IN THE HIGH COURT OF JUSTICE **KB-2024-BHM-000107**

KING'S BENCH DIVISION

BETWEEN:

THE UNIVERSITY OF NOTTINGHAM

Claimant

-and-

(1) MX JOEL BUTTERWORTH
(ALSO KNOWN AS RIVER BUTTERWORTH (THEY/THEM))

(5) NON STUDENTS/STAFF: PERSONS UNKNOWN, BEING PERSONS IN AN ENCAMPMENT OCCUPATION OF LAND ON THE JUBILEE CAMPUS AT THE UNIVERSITY OF NOTTINGHAM WHO ARE NOT CURRENTLY STUDENTS, STAFF OR EMPLOYEES OF THE CLAIMANT

(6) STUDENTS/STAFF: PERSONS UNKNOWN, BEING PERSONS IN AN ENCAMPMENT OCCUPATION OF LAND ON THE JUBILEE CAMPUS AT THE UNIVERSITY OF NOTTINGHAM WITHOUT THE CLAIMANT'S LICENCE OR CONSENT WHO ARE CURRENTLY STUDENTS, STAFF OR EMPLOYEES OF THE CLAIMANT

Defendants

JOINT BUNDLE OF STATUTORY MATERIALS AND AUTHORITIES

FOR THE HEARING ON FRIDAY 5 JULY 2024

NO	DOCUMENT	PAGE
A	**DOMESTIC LEGISLATION**	
1	Education (No. 2) Act 1986, section 43	4 – 7
2	Human Rights Act 1998, sections 1 - 6	8 – 14
3	Higher Education and Research Act 2017, sections 1 - 12	15 - 22
4	Section A1 of the Higher Education and Research Act 2017 (as inserted by the Higher Education (Freedom of Speech) Act 2023) [not in force]	23 – 26

B	DOMESTIC CASELAW	
5	*McPhail v Persons Unknown* [1973] Ch 447	27 – 42
6	*University of Essex v Djemal* [1980] 1 WLR 1301	43 – 47
7	*Wandsworth LBC v Winder* [1984] UKHL 2	48 – 97
8	*Director of Public Prosecutions v Jones* [1991] 1 AC 240	98 – 152
9	*R v University of Nottingham, ex parte K* [1997] 1 WL 1105891	153 – 158
10	*Evans v The University of Cambridge* [2002] EWHC 1382	159 – 167
11	*ED&F Man Liquid v Patel* [2003] EWCA Civ 472	168 – 184
12	*Aston Cantlow v Wallbank* [2004] 1 AC 546	185 – 242
13	*R (on the application of Beer (t/a Hammer Trout Farm) v Hampshire Farmers Market Ltd* [2004] 1 WLR 233	243 – 260
14	*YL v Birmingham City Council* [2008] 1 AC 95	261 – 318
15	*R (Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23	319 – 334
16	*The Chancellor, Master & Scholars of the University of Cambridge* [2009] EWHC 1382	335 – 354
17	*R (Weaver) v London and Quadrant Housing Trust* [2009] HLR 40	356 – 404
18	*Secretary of State for the Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11 [2009] 1 WLR 2780	405 – 432
19	*School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977	433 – 443
20	*Hall v Mayor of London* [2010] EWCA (Civ) 817; [2011] 1 W.L.R. 504	444 – 467
21	*City of London Corporation v Samede* [2012] PTSR 1624	468 – 486
22	*Duke v University of Salford* [2013] EWHC 196	487 – 492
23	*University of Sussex v Persons Unknown* [2013] EWHC 862	493 – 499
24	*University of Birmingham v Persons Unknown* [2015] EWHC 544	500 – 502
25	*R (Ben-Dor) v University of Southampton* [2015] EWHC 2206	503 – 520
26	*Ineos Upstream v Persons Unknown* [2017] EWHC 2945	521 – 567
27	*Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100	568 – 578

28	*Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29	579 – 599
29	*Director of Public Prosecutions v Ziegler & Ors* [2021] UKSC 23 [2022] AC 408	600 – 652
30	*Global 100 Ltd v Lavela* [2021] EWCA Civ 1835; [2022] 1 W.L.R. 1046	653 – 673
31	*Director of Public Prosecutions v Cuciurean* [2022] QB 888	674 – 702
32	*Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215	703 – 720
33	*Piepenbrock v London School of Economics and Political Science* [2022] EWHC 2421	721 – 794
34	*AG Ref (No 1 of 2022)* [2022] EWCA Crim 1259; [2023] K.B. 37	795 – 838
35	*University of Manchester and Others v Persons Unknown* (unreported) 20 March 2023	839 – 844
36	*Hicks v DPP* [2023] EWHC 1089 (Admin)	845 – 857
37	*Wolverhampton City Council v London Gypsies and Travellers* [2024] 2 WLR 45	858 – 927
C	**ECHR MATERIALS AND CASELAW**	
38	European Convention on Human Rights, Articles 10, 11 and A1P1	928 – 936
39	*Appleby v UK* (2003) 37 EHRR 38	937 – 952
40	*Murat Vural v Turkey* (App. no. 9540/07, 21 October 2014)	953 – 983
41	*Frumkin v Russia* (App. no. 74568/12, 5 January 2016)	984 – 1056
42	*Lashmankin and Others v Russia* (App. no. 57818/09, 7 February 2017)	1057 – 1205
43	*Maria Alekhina and Others v. Russia* (App. no. 38004/12, 17 July 2018)	1206 – 1291

Education (No. 2) Act 1986

1986 CHAPTER 61

PART IV

MISCELLANEOUS

43 Freedom of speech in universities, polytechnics and colleges.

(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.

(2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—

(a) the beliefs or views of that individual or of any member of that body; or

(b) the policy or objectives of that body.

(3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out—

(a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation—

(i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and

(ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and

(b) the conduct required of such persons in connection with any such meeting or activity;

and dealing with such other matters as the governing body consider appropriate.

(4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of

***Changes to legislation:** Education (No. 2) Act 1986, Section 43 is up to date with all changes known to be in force on or before 24 June 2024. 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*

the code of practice for that establishment, issued under subsection (3) above, are complied with.

[[F1](4A) The establishments in England to which this section applies are—

(a) any registered higher education provider;

(b) any establishment of higher or further education which is maintained by a local authority;

(c) any institution within the further education sector.**]**

(5) The establishments **[**[F2] in Wales**]** to which this section applies are—

(a) any university;

[[F3](aa) any institution other than a university within the higher education sector**]**

[[F4](b) any establishment of higher or further education which is maintained by a **[**[F5]local authority**]**;**]**

[[F6](ba) any institution within the further education sector**]**

[F7](c) . . . .

(6) In this section—

"governing body" **[**[F8]—

((a)) in relation to a registered higher education provider, has the meaning given by section 85(1) of the Higher Education and Research Act 2017;

((b)) in relation to a university in Wales,**]** means the executive governing body which has responsibility for the management and administration of its revenue and property and the conduct of its affairs (that is to say the body commonly called the council of the university);

[[F9]"registered higher education provider" has the meaning given by section 3(10) of the Higher Education and Research Act 2017;**]**

"university" includes a university college and any college, or institution in the nature of a college, in a university.

[[F10](6A) For the purposes of this section—

(a) an establishment is taken to be in England if its activities are carried on, or principally carried on, in England;

(b) an establishment is taken to be in Wales if its activities are carried on, or principally carried on, in Wales.**]**

(7) Where any establishment—

(a) falls within subsection **[**[F11](4A)(b) or**]** (5)(b) above; or

[F12](b) . . . .

the **[**[F5]local authority**][**[F13]. . .**]** shall, for the purposes of this section, be taken to be concerned in its government.

(8) Where a students' union occupies premises which are not premises of the establishment in connection with which the union is constituted, any reference in this section to the premises of the establishment shall be taken to include a reference to the premises occupied by the students' union.

Textual Amendments

F1 S. 43(4A) inserted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(2)**; S.I. 2018/1226, reg. 4(p)

F2 Words in s. 43(5) inserted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(3)**; S.I. 2018/1226, reg. 4(p)

F3 S. 43(5)(aa) substituted (1.4.1993) (for s. 43(5)(aa) which was inserted by Education Reform Act 1988 (c. 40, SIF 41:1), ss. 231(7), 235(6), 237(1), **Sch. 12 para. 100(2)**) by Further and Higher Education Act 1992 (c. 13), s. 93(1), **Sch. 8** para. Pt. I 22(a)(i); S.I. 1992/831, art. 2, **Sch. 3**

F4 S. 43(5)(b) substituted by Education Reform Act 1988 (c. 40, SIF 41:1), ss. 231(7), 235(6), 237(1), **Sch. 12 para. 100(3)**

F5 Words in Act substituted (5.5.2010) by The Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010 (S.I. 2010/1158), **Sch. 2 para. 3**

F6 S. 43(5)(ba) inserted (1.4.1993) by Further and Higher Education Act 1992 (c. 13), s. 93, **Sch. 8 Pt. I para. 22(a)(ii)**; S.I. 1992/831, art. 2, **Sch.3**

F7 S. 43(5)(c) repealed (1.4.1993) by Further and Higher Education Act 1992 (c. 13), s. 93, Sch. 8 Pt. I para. 22(a)(iii), **Sch. 9**; S.I. 1992/831, art. 2, **Sch. 3A**ppendix

F8 Words in s. 43(6) substituted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(4)**; S.I. 2018/1226, reg. 4(p)

F9 Words in s. 43(6) inserted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(5)**; S.I. 2018/1226, reg. 4(p)

F10 S. 43(6A) inserted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(6)**; S.I. 2018/1226, reg. 4(p)

F11 Words in s. 43(7)(a) inserted (1.8.2019) by Higher Education and Research Act 2017 (c. 29), s. 124(5), **Sch. 11 para. 5(7)**; S.I. 2018/1226, reg. 4(p)

F12 S. 43(7)(b) repealed (1.4.1993) by Further and Higher Education Act 1992 (c. 13), s. 93, Sch. 8 Pt. I, para. 22(b), **Sch. 9**; S.I. 1992/831, art. 2, **Sch. 3A**ppendix

F13 Words in s. 43(7) repealed (1.4.1993) by Further and Higher Education Act 1992 (c. 13), s. 93, Sch. 8 Pt. I para. 22(b), **Sch.9**; S.I. 1992/831, art. 2, **Sch. 3A**ppendix

Modifications etc. (not altering text)

C1 S. 43 modified (W.) (1.9.2013) by The Operation of the Local Curriculum (Wales) Regulations 2013 (S.I. 2013/1793), regs. 1(1), **3(a)**

Changes to legislation:
Education (No. 2) Act 1986, Section 43 is up to date with all changes known to be in force on or before 24 June 2024. 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. 43(4A)(a) omitted by 2023 c. 16 Sch. para. 18(a)
- s. 43(5)(aa) substituted by 2022 asc 1 Sch. 4 para. 3(2)(a)
- s. 43(6) words omitted by 2023 c. 16 Sch. para. 18(b)(i)
- s. 43(6) words omitted by 2023 c. 16 Sch. para. 18(b)(ii)

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):

- s. 43(6)(b) substituted by 2022 asc 1 Sch. 4 para. 3(2)(b)

Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes. [9th November 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent Information

E1 For the extent of this Act outside the U.K., see s. 22(6)(7)

Modifications etc. (not altering text)

C1 Act: certain functions of the Secretary of State transferred to the Lord Chancellor (26.11.2001) by S.I. 2001/3500, arts. 3, 4, **Sch. 1 para. 5**

C2 Act (except ss. 5, 10, 18, 19 and Sch. 4): functions of the Lord Chancellor transferred to the Secretary of State, and all property, rights and liabilities to which the Lord Chancellor is entitled or subject to in connection with any such function transferred to the Secretary of State for Constitutional Affairs (19.8.2003) by S.I. 2003/1887, art. 4, **Sch. 1**

C3 Act modified (30.1.2020) by Direct Payments to Farmers (Legislative Continuity) Act 2020 (c. 2), **ss. 2(8)**, 9(3)

C4 Act modified (31.12.2020) by European Union (Withdrawal) Act 2018 (c. 16), s. 25(4), **Sch. 8 para. 30** (with s. 19, Sch. 8 para. 37); S.I. 2020/1622, reg. 3(n)

Introduction

1 The Convention Rights.

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

Changes to legislation: Human Rights Act 1998 is up to date with all changes known to be in force on or before 24 June 2024. 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

(a) Articles 2 to 12 and 14 of the Convention,
(b) Articles 1 to 3 of the First Protocol, and
(c) **[**[F1]Article 1 of the Thirteenth Protocol**]**,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The **[**[F2]Secretary of State**]** may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—
(a) which the United Kingdom has ratified; or
(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

Textual Amendments

F1 Words in s. 1(1)(c) substituted (22.6.2004) by The Human Rights Act 1998 (Amendment) Order 2004 (S. I. 2004/1574), **art. 2(1)**

F2 Words in s. 1 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—
(a) by [F3]. . . **[**[F4]the Lord Chancellor or**]** the Secretary of State, in relation to any proceedings outside Scotland;
(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, 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.

Textual Amendments

F3 Words in s. 2(3)(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)**

F4 Words in s. 2(3)(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)

C5 S. 2 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))

C6 S. 2(3)(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)

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)

C7 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))

4 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

Changes to legislation: *Human Rights Act 1998 is up to date with all changes known to be in force on or before 24 June 2024. 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*

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means—

[[F5](a) the Supreme Court;**]**

(b) the Judicial Committee of the Privy Council;

(c) the **[**[F6]Court Martial Appeal Court**]** ;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

[[F7](f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the **[**[F8]Chancellor of the High Court**]** or a puisne judge of the High Court.**]**

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Textual Amendments

F5 S. 4(5)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(2)**; S.I. 2009/1604, **art. 2(d)**

F6 Words in s. 4(5)(c) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16 para. 156**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F7 S. 4(5)(f) inserted (1.10.2007) by Mental Capacity Act 2005 (c. 9), ss. 67(1), 68(1)-(3), **Sch. 6 para. 43** (with ss. 27, 28, 29, 62); S.I. 2007/1897, **art. 2(1)(c)(d)**

F8 Words in s. 4(5)(f) substituted (1.10.2013) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 14 para. 5(5)**; S.I. 2013/2200, art. 3(g)

5 Right of Crown to intervene.

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the [F9Supreme Court] against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

"criminal proceedings" includes all proceedings before the [F10Court Martial Appeal Court]; and

"leave" means leave granted by the court making the declaration of incompatibility or by the [F11Supreme Court]

Textual Amendments

F9 Words in s. 5(4) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

F10 Words in s. 5(5) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16 para. 157**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F11 Words in s. 5(5) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

Modifications etc. (not altering text)

C8 S. 5(2) functions made exercisable concurrently or jointly with the Welsh Ministers by 2006 c. 32, Sch. 3A para. 1 (as inserted (1.4.2018) by Wales Act 2017 (c. 4), s. 71(4), **Sch. 4 para. 1** (with Sch. 7 paras. 1, 6); S.I. 2017/1179, reg. 3(p))

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.

F12(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.

Changes to legislation: *Human Rights Act 1998 is up to date with all changes known to be in force on or before 24 June 2024. 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) "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

F12 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)**

Modifications etc. (not altering text)

C9 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)
C10 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))
C11 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)
C12 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)**
C13 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)

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.

(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 [F13]. . . [[F14]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

F13 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)**

F14 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)

C10 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))

C14 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**

C15 S. 7: referred to (11.3.2005) by Prevention of Terrorism Act 2005 (c. 2), **s. 11(2)**

C16 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)

Higher Education and Research Act 2017

2017 CHAPTER 29

PART 1

THE OFFICE FOR STUDENTS

Establishment of the Office for Students

1 The Office for Students

(1) A body corporate called the Office for Students is established.

(2) In this Act that body is referred to as "the OfS".

(3) Schedule 1 contains further provision about the OfS.

2 General duties

(1) In performing its functions, the OfS must have regard to—

(a) the need to protect the institutional autonomy of English higher education providers,

(b) the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,

(c) the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,

(d) the need to promote value for money in the provision of higher education by English higher education providers,

(e) the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,

(f) the need to use the OfS's resources in an efficient, effective and economic way, and

(g) so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—

(i) transparent, accountable, proportionate and consistent, and

(ii) targeted only at cases in which action is needed.

(2) The reference in subsection (1)(b) to choice in the provision of higher education by English higher education providers includes choice amongst a diverse range of—

(a) types of provider,

(b) higher education courses, and

(c) means by which they are provided (for example, full-time or part-time study, distance learning or accelerated courses).

(3) In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.

(4) In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.

(5) The guidance may, in particular, be framed by reference to particular courses of study but, whether or not the guidance is framed in that way, it must not relate to—

(a) particular parts of courses of study,

(b) the content of such courses,

(c) the manner in which they are taught, supervised or assessed,

(d) the criteria for the selection, appointment or dismissal of academic staff, or how they are applied, or

(e) the criteria for the admission of students, or how they are applied.

(6) Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study.

(7) Guidance given by the Secretary of State to the OfS which relates to English higher education providers must apply to such providers generally or to a description of such providers.

(8) In this Part, "the institutional autonomy of English higher education providers" means—

(a) the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,

(b) the freedom of English higher education providers—

(i) to determine the content of particular courses and the manner in which they are taught, supervised and assessed,

(ii) to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and

(iii) to determine the criteria for the admission of students and apply those criteria in particular cases, and

(c) the freedom within the law of academic staff at English higher education providers—

(i) to question and test received wisdom, and

(ii) to put forward new ideas and controversial or unpopular opinions,

without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.

The register of English higher education providers

3 The register

(1) The OfS must establish and maintain a register of English higher education providers (referred to in this Part as "the register").

(2) The register may be divided by the OfS into different parts representing such different categories of registration as the OfS may determine.

(3) The OfS must register an institution in the register (or, where it has been divided into parts, in a particular part of the register) if—

(a) its governing body applies for it to be registered in the register (or in that part),

(b) it is, or intends to become, an English higher education provider,

(c) it satisfies the initial registration conditions applicable to it in respect of the registration sought (see section 5), and

(d) the application complies with any requirements imposed under subsection (5).

(4) The OfS may not otherwise register an institution in the register.

(5) The OfS may determine—

(a) the form of an application for registration in the register (or in a particular part of the register),

(b) the information to be contained in it or provided with it, and

(c) the manner in which an application is to be submitted.

(6) The Secretary of State may by regulations make provision about the information which must be contained in an institution's entry in the register.

(7) Once registered, an institution's ongoing registration is subject to satisfying—

(a) the general ongoing registration conditions applicable to it at the time of its registration and as they may be later revised (see section 5), and

(b) the specific ongoing registration conditions (if any) imposed on it at the time of its registration and as they may be later varied (see section 6).

(8) References in this Part to the ongoing registration conditions of an institution are to the conditions mentioned in subsection (7)(a) and (b).

(9) The OfS must make the information contained in the register, and the information previously contained in it, publicly available by such means as it considers appropriate.

(10) In this Part—

(a) a "registered higher education provider" means an institution which is registered in the register, and

(b) references to "registration" are to be read accordingly.

4 Registration procedure

(1) Before refusing an application to register an institution, the OfS must notify the governing body of the institution of its intention to do so.

(2) The notice must—
   (a) specify the OfS's reasons for proposing to refuse to register the institution,
   (b) specify the period during which the governing body of the institution may make representations about the proposal ("the specified period"), and
   (c) specify the way in which those representations may be made.

(3) The specified period must not be less than 28 days beginning with the date on which the notice is received.

(4) The OfS must have regard to any representations made by the governing body of the institution during the specified period in deciding whether to register it in the register.

(5) Having decided whether or not to register the institution, the OfS must notify the governing body of the institution of its decision.

(6) Where the decision is to register the institution, the notice must—
   (a) specify the date of entry in the register, and
   (b) specify the ongoing registration conditions of the institution at that time.

(7) Where the decision is to refuse to register the institution, the notice must contain information as to the grounds for the refusal.

Registration conditions

5 The initial and general ongoing registration conditions

(1) The OfS must determine and publish—
   (a) the initial registration conditions, and
   (b) the general ongoing registration conditions.

(2) Different conditions may be determined—
   (a) for different descriptions of provider;
   (b) for registration in different parts of the register.

(3) The OfS may revise the conditions.

(4) If the OfS revises the conditions, it must publish them as revised.

(5) Before determining or revising the conditions, the OfS must, if it appears to it appropriate to do so, consult bodies representing the interests of English higher education providers which appear to the OfS to be concerned.

(6) The OfS may, at the time of an institution's registration or later, decide that a particular general ongoing registration condition is not applicable to it.

(7) Where the decision is made after the institution's registration, the OfS must notify the governing body of the institution of its decision.

6 The specific ongoing registration conditions

(1) The OfS may, at the time of an institution's registration or later, impose such conditions on its registration as the OfS may determine ("the specific ongoing registration conditions").

(2) The OfS may at any time vary or remove a specific ongoing registration condition.

(3) Before—

(a) varying or removing a specific ongoing registration condition on an institution's registration, or

(b) imposing a new specific ongoing registration condition on its registration,

the OfS must notify the governing body of the institution of its intention to do so.

(4) The notice must—

(a) specify the OfS's reasons for proposing to take the step in question,

(b) specify the period during which the governing body of the institution may make representations about the proposal ("the specified period"), and

(c) specify the way in which those representations may be made.

(5) The specified period must not be less than 28 days beginning with the date on which the notice is received.

(6) The OfS must have regard to any representations made by the governing body of the institution during the specified period in deciding whether to take the step in question.

(7) Having decided whether or not to take the step in question, the OfS must notify the governing body of the institution of its decision.

(8) If the OfS decides to vary or remove a specific ongoing registration condition or impose a new specific ongoing registration condition, the notice must—

(a) specify the condition (as varied), the condition being removed or the new condition (as the case may be), and

(b) specify the date when the variation, removal or imposition takes effect.

(9) For the purposes of this section, a specific ongoing registration condition is "new" if it is imposed otherwise than at the time of the institution's registration.

7 Proportionate conditions

(1) The OfS must ensure that the initial registration conditions applicable to an institution and its ongoing registration conditions are proportionate to the OfS's assessment of the regulatory risk posed by the institution.

(2) "Regulatory risk" means the risk of the institution, when it is registered, failing to comply with regulation by the OfS.

(3) In light of its duty under subsection (1), the OfS must keep the initial registration conditions applicable to an institution and its ongoing registration conditions under review.

Mandatory registration conditions

8 Mandatory ongoing registration conditions for all providers

(1) The OfS must ensure that the ongoing registration conditions of each registered higher education provider include—

(a) a condition that requires the governing body of the provider to notify the OfS of any change of which it becomes aware which affects the accuracy of the information contained in the provider's entry in the register,

(b) a condition that requires the governing body of the provider to provide the OfS, or a person nominated by the OfS, with such information for the purposes of the performance of the OfS's functions as the OfS may require it to provide, and

(c) a condition that requires the governing body of the provider to provide a designated body with such information for the purposes of the performance of its duties under sections 64(1) and 65(1) (compiling, making available and publishing higher education information) as the designated body may require it to provide.

(2) In subsection (1)(c), "designated body" means a body for the time being designated under Schedule 6.

9 Mandatory transparency condition for certain providers

(1) The OfS must ensure that the ongoing registration conditions of each registered higher education provider of a prescribed description include a transparency condition.

(2) A transparency condition is a condition that requires the governing body of a registered higher education provider to provide to the OfS, and publish, such information as the OfS requests in relation to one or more of the following—

(a) the number of applications for admission on to higher education courses that the provider has received;

(b) the number of offers made by the provider in relation to those applications;

(c) the number of those offers that were accepted;

(d) the number of students who accepted those offers that completed their course with the provider;

(e) the number of students who attained a particular degree or other academic award, or a particular level of such an award, on completion of their course with the provider.

(3) The information which the OfS may request in relation to the numbers mentioned in subsection (2) includes those numbers by reference to one or more of the following—

(a) the gender of the individuals to which they relate;

(b) their ethnicity;

(c) their socio-economic background.

(4) "Prescribed" means prescribed by regulations made by the Secretary of State for the purposes of this section.

10 Mandatory fee limit condition for certain providers

(1) The OfS must ensure that the ongoing registration conditions of each registered higher education provider of a prescribed description include a fee limit condition.

(2) In this Part, "a fee limit condition" means a condition that requires the governing body of the provider to secure that regulated course fees do not exceed the fee limit.

(3) "Regulated course fees" are fees payable to the provider by a qualifying person—

(a) in connection with his or her undertaking a qualifying course, and

(b) in respect of an academic year applicable to that course which begins at the same time as, or while, the provider is registered in the register.

(4) A "qualifying person" means a person who—

(a) is not an international student, and

(b) is within a prescribed description of persons.

(5) An "international student" means a person who is not within any description of persons prescribed under section 1 of the Education (Fees and Awards) Act 1983 (charging of higher fees in case of students without prescribed connection with the UK) for the purposes of subsection (1) or (2) of that section.

(6) A "qualifying course" means a higher education course of a prescribed description.

(7) The power to prescribe descriptions of higher education course under subsection (6) may not be exercised in such a way as to discriminate—

(a) in relation to courses of initial teacher training, between different courses on the basis of the subjects in which such training is given, and

(b) in relation to other courses, between different courses at the same or a comparable level on the basis of the areas of study or research to which they relate.

(8) The OfS has no power, apart from this section, to limit the fees payable to an English higher education provider.

(9) In this section—

"higher education course" does not include any postgraduate course other than a course of initial teacher training;

"prescribed" means prescribed by regulations made by the Secretary of State for the purposes of this section.

(10) Schedule 2 contains provision about determining "the fee limit"; see section 85(2) for the meaning of "fees".

11 Duty to publish a list regarding the fee limit condition

(1) The OfS must publish in each year a list of—

(a) the registered higher education providers who have a fee limit condition as an ongoing registration condition, and

(b) the fee limits as determined under Schedule 2 in relation to each of those providers for fees in connection with each qualifying course provided by the provider in respect of each relevant academic year.

(2) A "relevant academic year", in relation to a qualifying course, is an academic year which is applicable to the course and which is due to start in the calendar year after the calendar year in which the list is published.

(3) The OfS must send a copy of each published list to the Secretary of State who must lay it before Parliament.

(4) The Secretary of State may by regulations prescribe the date by which a list under this section must be published by the OfS.

12 Mandatory access and participation plan condition for certain institutions

(1) This section applies where—

(a) a fee limit condition will be or is one of the ongoing registration conditions of an institution, and

(b) the governing body of the institution requests the imposition of an access and participation plan condition in order to access the higher fee limits available in respect of the fee limit condition for institutions who have such a plan.

(2) An access and participation plan condition—

(a) may be an initial registration condition that is applicable to the institution, and

(b) must be one of its ongoing registration conditions.

(3) In this Part, "an access and participation plan condition", in relation to an institution, means a condition requiring that—

(a) there is an access and participation plan in relation to the institution which—

(i) has been approved by the OfS under section 29 (power to approve an access and participation plan), and

(ii) is in force, and

(b) the governing body of the institution complies with the general provisions of that plan (within the meaning of section 32).

(4) A governing body of an institution is not to be regarded as having failed to comply with the requirement mentioned in subsection (3)(b) by reason of its failure to comply with a general provision of the plan if it shows that it has taken all reasonable steps to comply with the provision.

Other registration conditions

13 Other initial and ongoing registration conditions

(1) The initial or ongoing registration conditions may, in particular, include—

(a) a condition relating to the quality of, or the standards applied to, the higher education provided by the provider (including requiring the quality to be of a particular level or particular standards to be applied);

(b) a public interest governance condition (see section 14);

(c) a condition relating to the provider having a student protection plan which has the OfS's approval (including requiring the provider to have such a plan and to publish it);

(d) a condition requiring the payment of a fee charged under section 70(1) (initial fee and annual fee for ongoing registration);

(e) a condition requiring the payment of a fee charged under section 28 or 67 (fees charged by designated bodies) or section 71(1) (other fees charged by the OfS);

(f) a condition requiring the governing body of the provider to take such steps as the OfS considers appropriate for facilitating cooperation between the provider and one or more electoral registration officers in England for the purpose of enabling the electoral registration of students who are on higher education courses provided by the provider.

Higher Education (Freedom of Speech) Act 2023

2023 CHAPTER 16

An Act to make provision in relation to freedom of speech and academic freedom in higher education institutions and in students' unions; and for connected purposes. [11th May 2023]

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PROSPECTIVE

Duties to protect freedom of speech

1 Duties of registered higher education providers

In the Higher Education and Research Act 2017, before Part 1 insert—

"PART A1

PROTECTION OF FREEDOM OF SPEECH

Duties of registered higher education providers

A1 Duty to take steps to secure freedom of speech

(1) The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech,

Status: *This version of this Act contains provisions that are prospective.*
Changes to legislation: *Higher Education (Freedom of Speech) Act 2023 is up to date with all changes known to be in force on or before 22 May 2024. 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*

are reasonably practicable for it to take in order to achieve the objective in subsection (2).

(2) That objective is securing freedom of speech within the law for—
(a) staff of the provider,
(b) members of the provider,
(c) students of the provider, and
(d) visiting speakers.

(3) The objective in subsection (2) includes securing that—
(a) the use of any premises of the provider is not denied to any individual or body on grounds specified in subsection (4), and
(b) the terms on which such premises are provided are not to any extent based on such grounds.

(4) The grounds referred to in subsection (3)(a) and (b) are—
(a) in relation to an individual, their ideas or opinions;
(b) in relation to a body, its policy or objectives or the ideas or opinions of any of its members.

(5) The objective in subsection (2), so far as relating to academic staff, includes securing their academic freedom.

(6) In this Part, "academic freedom", in relation to academic staff at a registered higher education provider, means their freedom within the law—
(a) to question and test received wisdom, and
(b) to put forward new ideas and controversial or unpopular opinions,

without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).

(7) Those ways are—
(a) loss of their jobs or privileges at the provider;
(b) the likelihood of their securing promotion or different jobs at the provider being reduced.

(8) The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (9).

(9) That objective is securing that, where a person applies to become a member of academic staff of the provider, the person is not adversely affected in relation to the application because they have exercised their freedom within the law to do the things referred to in subsection (6)(a) and (b).

(10) In order to achieve the objective in subsection (2), the governing body of a registered higher education provider must secure that, apart from in exceptional circumstances, use of its premises by any individual or body is not on terms that require the individual or body to bear some or all of the costs of security relating to their use of the premises.

(11) In order to achieve the objective in subsection (2), the governing body of a registered higher education provider must secure that the provider does not enter into a non-disclosure agreement with a person referred to in that

***Status:** This version of this Act contains provisions that are prospective.*
***Changes to legislation:** Higher Education (Freedom of Speech) Act 2023 is up to date with all changes known to be in force on or before 22 May 2024. 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*

subsection in relation to a relevant complaint made to the provider by the person (and if such a non-disclosure agreement is entered into it is void).

(12) In subsection (11)—

"non-disclosure agreement" means an agreement which purports to any extent to preclude the person from—

(a) publishing information about the relevant complaint, or

(b) disclosing information about the relevant complaint to any one or more other persons;

"relevant complaint" means a complaint relating to misconduct or alleged misconduct by any person;

"misconduct" means—

(a) sexual abuse, sexual harassment or sexual misconduct, and

(b) bullying or harassment not falling within paragraph (a).

(13) In this Part—

references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form);

"the Convention" has the meaning given by section 21(1) of the Human Rights Act 1998;

"member", in relation to a registered higher education provider, does not include a person who is a member of the provider solely because of having been a student of the provider;

"registered higher education provider" and "governing body", in relation to such a provider, have the same meanings as in Part 1 of this Act.

A2 Code of practice

(1) The governing body of a registered higher education provider must, with a view to facilitating the discharge of the duties in section A1(1) and (10), maintain a code of practice setting out the matters referred to in subsection (2).

(2) Those matters are—

(a) the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech,

(b) the procedures to be followed by staff and students of the provider and any students' union for students at the provider in connection with the organisation of—

(i) meetings which are to be held on the provider's premises and which fall within any class of meeting specified in the code, and

(ii) other activities which are to take place on those premises and which fall within any class of activity so specified,

(c) the conduct required of such persons in connection with any such meeting or activity, and

(d) the criteria to be used by the provider in making decisions about whether to allow the use of premises and on what terms (which

Status: *This version of this Act contains provisions that are prospective.*
Changes to legislation: *Higher Education (Freedom of Speech) Act 2023 is up to date with all changes known to be in force on or before 22 May 2024. 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*

must include its criteria for determining whether there are exceptional circumstances for the purposes of section A1(10)).

(3) The code of practice may deal with such other matters as the governing body considers appropriate.

(4) The governing body of a registered higher education provider must take the steps that are reasonably practicable for it to take (including where appropriate the initiation of disciplinary measures) in order to secure compliance with its code of practice.

(5) The governing body of a registered higher education provider must, at least once a year, bring—

(a) the provisions of section A1, and

(b) its code of practice under this section,

to the attention of all of its students.

A3 Duty to promote the importance of freedom of speech and academic freedom

The governing body of a registered higher education provider must promote the importance of—

(a) freedom of speech within the law, and

(b) academic freedom for academic staff of registered higher education providers and their constituent institutions,

in the provision of higher education."

Commencement Information

I1 S. 1 not in force at Royal Assent, see **s. 13(3)**

2 Duties of constituent institutions

After section A3 of the Higher Education and Research Act 2017 (inserted by section 1) insert—

"Duties of constituent institutions

A4 Duties of constituent institutions

(1) Sections A1 to A3 apply in relation to the governing body of a constituent institution of a registered higher education provider as they apply in relation to the governing body of the provider.

(2) Accordingly, in the application of those sections by virtue of subsection (1), references to "the provider" are to be read as references to the constituent institution.

(3) The duties of the governing body of a constituent institution of a registered higher education provider under sections A1 to A3 do not affect the

A Tax Acts by which child allowance should be determined"; and that the inspector was correct in disallowing the taxpayer's claim to the child allowance in the absence of evidence in support of his claims. I have every sympathy with the general commissioners in being faced with these problems of statutory construction without the aid of professional legal argument in support of the taxpayer's claim; and I should make it clear that much of the reasoning by which I have reached my conclusion in the B taxpayer's favour was not put forward by the taxpayer. Nevertheless, I do not see any effective answer to that reasoning, and in my judgment the decision of the general commissioners was wrong. The appeal must therefore be allowed.

Appeal allowed with costs.

C Solicitor: *Solicitor of Inland Revenue.*

[COURT OF APPEAL]

D

McPHAIL *v.* PERSONS, NAMES UNKNOWN

[1973 M. No. 1683]

BRISTOL CORPORATION *v.* ROSS AND ANOTHER

E [1973 B. No. 2111]

1973 May 17, 18; 24 Lord Denning M.R., Orr and Lawton L.JJ.

Practice—Chancery Division—Possession of land—Order for possession—Whether power to suspend order—R.S.C., Ord. 113

In two claims for possession under R.S.C., Ord. 113,[1] F squatters had broken into empty houses and started to live in them without any authority from the respective owners who in both cases obtained orders that they "do recover possession."

On appeals by the squatters, who sought stays of execution:—

Held, dismissing the appeals, that since the squatters had entered and remained in the houses as trespassers the court had no discretion to suspend the orders for possession (post, G pp. 456E–F, 458E–F, 460F, 462A–B).

Department of the Environment v. *James* [1972] 1 W.L.R. 1279 approved.

In re Wykeham Terrace, Brighton, Sussex, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch. 204 considered.

[1] R.S.C., Ord. 113, r. 1: "Where a person claims possession of land which he H alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order."

Per curiam. The squatters were guilty of both a criminal offence and a civil wrong and in such circumstances the courts of common law never suspended an order for possession and the courts of equity never intervened to aid a wrongdoer (post, pp. 456E–F, 457D, H, 460F, H—461A, 462B).

Per Lord Denning M.R. and Orr L.J. When a judgment for possession is obtained under the R.S.C., Ord. 113, procedure, there is no provision for giving any time (post, pp. 458E–F, 460F). The position is different when a tenant holds over after his tenancy has expired or a servant's exclusive occupation is terminated or a mortgagee seeks to obtain possession of a dwelling-house (post, pp. 458H, 460B, F).

Orders of Phillips J. and Foster J. affirmed.

The following cases are referred to in the judgments:

Aglionby v. *Cohen* [1955] 1 Q.B. 558; [1955] 2 W.L.R. 730; [1955] 1 All E.R. 785.
Air Ministry v. *Harris* [1951] 2 All E.R. 862, C.A.
Anonymous (1670) 1 Vent. 89.
Browne v. *Dawson* (1840) 12 Ad. & El. 624.
Chester-le-Street Rural District Council v. *Carr*, October 30, 1952, C.A.; Bar Library Transcript No. 414; [1952] C.P.L. 790.
Department of the Environment v. *James* [1972] 1 W.L.R. 1279; [1972] 3 All E.R. 629.
Gledhill v. *Hunter* (1880) 14 Ch.D. 492.
Grafton v. *Griffin* (1830) 1 Russ. & M. 336.
Harris v. *Austen* (1615) 1 Rolle 210.
Hemmings v. *Stoke Poges Golf Club* [1920] 1 K.B. 720, C.A.
Hillary v. *Gay* (1833) 6 C. & P. 284.
Jones v. *Savery* [1951] 1 All E.R. 820, C.A.
Lacy v. *Berry* (1659) 2 Sid. 155.
Leicester Permanent Building Society v. *Shearley* [1951] Ch. 90; [1950] 2 All E.R. 738.
Manchester Corporation v. *Connolly* [1970] Ch. 420; [1970] 2 W.L.R. 746; [1970] 1 All E.R. 961, C.A.
Minet v. *Johnson* (1890) 6 T.L.R. 417, C.A.
Newton v. *Harland* (1840) 1 Man. & G. 644.
Reg. v. *Child* (1846) 2 Cox C.C. 102.
Reg. v. *Mountford* [1972] 1 Q.B. 28; [1971] 2 W.L.R. 1106; [1971] 2 All E.R. 81, C.A.
Rex v. *Bathurst* (1755) Say. 225.
Rex v. *Dorny* (1700) 1 Salk. 260.
Sheffield Corporation v. *Luxford* [1929] 2 K.B. 180, D.C.
Southwark London Borough Council v. *Williams* [1971] Ch. 734; [1971] 2 W.L.R. 467; [1971] 2 All E.R. 175, C.A.
Stone (J. & F.) Lighting and Radio Ltd. v. *Levitt* [1947] A.C. 209; [1946] 2 All E.R. 653, H.L.(E.).
Wykeham Terrace, Brighton, Sussex, In re, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch. 204; [1970] 3 W.L.R. 649.

The following additional cases were cited in argument:

Cousins v. *Smith* (1806) 13 Ves.Jun. 164.
Four-Maids Ltd. v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317; [1957] 2 W.L.R. 931; [1957] 2 All E.R. 35.

A *Kelly* v. *White* [1920] W.N. 220, D.C.
Moore v. *Lambeth County Court Registrar* [1969] 1 W.L.R. 141; [1969] 1 All E.R. 782, C.A.
National Provincial Bank Ltd. v. *Hastings Car Mart Ltd.* [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.).
T. C. Trustees Ltd. v. *J. S. Darwen (Successors) Ltd.* [1969] 2 Q.B. 295: [1969] 2 W.L.R. 81; [1969] 1 All E.R. 271, C.A.
B *Upjohn* v. *Macfarlane* [1922] 2 Ch. 256, C.A.

APPEALS from Phillips J. and Foster J.

On an originating summons by the plaintiff, Donald Douglas McPhail, against " persons whose names are not known," in the matter of 4 Thornhill Square, Islington, London, Phillips J. on April 25, 1973, ordered that the plaintiff " do recover possession " of the premises. On May 1, 1973, the C Court of Appeal ordered that Sheila Smith, Elaine Hardman, Linda Levin, John Forsyth and Mark Hill be joined as defendants to the action and that execution of the order of Phillips J. be stayed until the hearing of their appeal.

On an originating summons by the plaintiffs, Bristol City Corporation, against the defendants, Jennifer Rosemary Ross and Angela Tapp, in the D matter of 23 Normanby Road, Easton, Bristol, Foster J. on April 18, 1973, ordered that the plaintiffs " do recover possession " of the premises.

In both cases the defendants appealed on the grounds that the judge was wrong in law in holding that he had no jurisdiction to grant a stay of execution; the decision of Goulding J. in *Department of the Environment* v. *James* [1972] 1 W.L.R. 1279 was wrong in law and the judge erred in following it, and in all the circumstances of the case it would be just and E equitable to grant a stay of execution. The appeals were heard together.

The facts are stated in the judgment of Lord Denning M.R.

J. C. Harper for the defendants Sheila Smith, Elaine Hardman and Mark Hill in the first appeal and for the defendants in the second appeal. *Department of the Environment* v. *James* [1972] 1 W.L.R. 1279 has been treated as binding by county court judges. Many similar cases go to the county F court and judges there usually try to give 28 days' stay.

Before 1873, in an action for ejectment where an order for possession was made a postponement of execution could be obtained. The issue is whether either at common law or in equity the court has a discretion to grant a stay of execution. The question might arise in all cases where the Rent Acts do not apply and an order for possession is made, e.g., the case G of a deserted wife or mistress.

There are four possible orders which could be made: (1) an absolute order for possession to take effect at once; (2) an absolute order with the date of possession postponed for a period; (3) a suspended order for possession; (4) an order that if specified conditions were not complied with a possession order would be made.

Historically the Court of Chancery did have power before 1875 to defer H ejectment by injunction. There are a number of cases in the 20th century that assume that there is the power to postpone execution of possession in the case of the trespasser. Anything that could be done by Chancery before 1875 can be done by the courts now.

Gilbert's History and Practice of Chancery (1758), pp. 195–196 says: A

> " 8. There are other injunctions which are never denied, as in an ejectment, where the party agrees to give judgment in ejectment to prevent trial, to give a release of errors, and to consent not to bring a writ of errors; and to this it is sometimes added, to deliver possession, as the court upon hearing shall direct. This forwards the defendant at law, and he could have no more, if he were to proceed to trial." B

That proposition was repeated in a number of books. *Harrison, Chancery Practice* ("The Accomplished Practiser in the High Court of Chancery"), 7th ed. (1790), vol. II, p. 247, says

> " Injunctions are granted in Ejectment Causes. This species of injunction is never denied where the party agrees to give judgment in ejectment, to prevent trial, to give a release of errors . . , and to this C it is sometimes added, to deliver possession as the court upon hearing shall direct. . . ."

See also *Bacon's Abridgement,* 6th ed. (1807), vol. III, p. 654 and 7th ed. (1832), vol. IV, p. 432. In *Harrison, Bacon* and in *Comyns' Digest* [see 5th ed. (1822), vol. 2, pp. 417–418] it is stated categorically that D an injunction can be granted at any stage even after judgment but not after execution, save to " stay the money in the hands of the sheriff " [*Comyns,* p. 418]. The power was exercised as of right. There was no distinction drawn between the possession of a person originally lawfully on the premises and that of a person who was there as a trespasser.

As to the effect of judgment for possession in ejectment and time for delivery up of possession, see *Halsbury's Laws of England,* 3rd ed., vol. 32 E (1960), pp. 376, 377. In *Kelly* v. *White* [1920] W.N. 220, 221, Salter and Roche JJ. held that the county court had the same inherent discretion to stay execution of its judgments as the High Court, but the discretion had to be exercised judicially and not to create a new tenancy of indefinite duration. In *Upjohn* v. *Macfarlane* [1922] 2 Ch. 256 Astbury J. at p. 265 considered *Kelly* v. *White* [1920] W.N. 220 and exercised his discretion F under section 5 of the Rent Restrictions Act 1920 to refuse an order for possession: on appeal to the Court of Appeal a consent order for possession was made. In *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180 it was recognised that the words " may order that possession . . . be granted " in section 138 of the County Courts Act 1888 contemplated a postponement of the day on which possession was to be ordered and the appeals were remitted to the county court judge " to make an order for possession, G postponing the operation of it " if he thought fit for such period as he thought right bearing in mind the views expressed. [Reference was made to sections 48 of the County Court Act 1959 and to *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [1947] A.C. 209, 216.]

There are three important cases. In *Jones* v. *Savery* [1951] 1 All E.R. 820 it was on the assumption that the county court judge had a H discretion to allow a reasonable time before the execution of an order for possession that a postponement of three months was reduced to one month in the circumstances of the case. *Jones* v. *Savery* was considered in *Air Ministry* v. *Harris* [1951] 2 All E.R. 862 where the landlords were held to

A be entitled to a warrant and a stay of execution on an order for possession was removed. The judgments of both Somervell and Denning L.JJ. proceeded upon the basis that there was a discretion " to keep a landlord out of possession " which had to be exercised within reasonable bounds.

In *Chester-le-Street Rural District Council* v. *Carr* (unreported), October 30, 1952, Bar Library Transcript No. 414 (see [1952] C.P.L. 790) where " proceedings were taken against persons without any legal right to posses-

B sion " the defendant had been given four months' suspension of the order of possession and the strong Court of Appeal dismissed the plaintiffs' appeal. In *Moore* v. *Lambeth County Court Registrar* [1969] 1 W.L.R. 141 the Court of Appeal held that the county court judge had no power after making an order for possession to suspend possession further: see *per* Edmund Davies L.J. at p. 144. In *National Provincial Bank Ltd.*

C v. *Hastings Car Mart Ltd.* [1965] A.C. 1175, 28 days was allowed. The discretion to suspend the order for possession exists; how it is exercised is another matter.

R.S.C., Ord. 3, r. 5 (1), gives the court power to extend the time within which a person is required " by any judgment, order or direction, to do any act in any proceedings." As to the form of judgment for possession, see R.S.C., Ord. 42, r. 1 (1) (2), and *The Supreme Court Practice* 1973.

D vol. 1, p. 613 and vol. 2, p. 23. R.S.C., Ord. 45, r. 6 (2), provides that where, as here, an order " requiring a person to do an act does not specify a time within which the act is to be done," the court has power " subsequently to make an order requiring the act to be done within such time after service " of the order, " or such other time, as may be specified therein." In the county court, by the County Court Rules 1936, Ord. 24,

E r. 11, " Every judgment or order requiring any person to do an act other than the payment of money or costs, shall state the time within which the act is to be done."

The defendants Linda Levin and John Forsyth in the first appeal appeared in person and made no submissions.

Anthony Lincoln Q.C. and *Stephen Nathan* for the plaintiff in the first appeal. Entry to a fully furnished first floor flat at no. 4 Thornhill

F Square was forced. The plaintiff does use the flat and so does his aunt.

There is a distinction so far as orders for possession of land are concerned between the county court and the High Court. The cases cited for the defendants in support of the suggested discretion to grant a stay were cases on appeal from the county court to the Court of Appeal. If there were the suggested discretion it would defeat the whole purpose of R.S.C.,

G Ord. 113 which provides a new procedure for the recovery of possession of land which is in wrongful possession by trespassers.

Goulding J. consulted his brethren before he gave his judgment in *Department of the Environment* v. *James* [1972] 1 W.L.R. 1279, 1280 and knew of no case " in which the question of the court's power to delay recovery of possession " had " been argued or decided." There is no inherent jurisdiction to stay a writ of fi. fa. Parliament has given the

H county court specific statutory powers to be merciful.

The defendants rely upon the alleged power of courts of equity to grant an injunction to restrain the enforcement of an owner's right to possession, but they are wrongdoers and can show no equity. R.S.C., Ord.

113, like the corresponding procedure in the county court under the County Court Rules, Ord. 26, Pt. 1, is intended to provide a swift form of R.S.C., Ord. 14, procedure. It provides a mandatory form of order for possession (R.S.C., Pt. 2, Appendix A, form no. 42A).

Jones v. *Savery* [1951] 1 All E.R. 820 says nothing about an inherent power to stay execution. Singleton L.J. at pp. 821–822 assumed that Ord. 24, r. 11, of the County Court Rules 1936 gave power to postpone for a short period the operation of an order for possession. In *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180 an express power to postpone had been given by section 138 of the County Courts Act 1888: see the argument at p. 181. *Kelly* v. *White* [1920] W.N. 220 was a case under section 1 (3) of the Increase of Rent, etc., Act 1915 of a tenant holding over when rent was in arrears and he had been given notice to quit: it is no authority on the point at issue here.

The High Court has power in limited circumstances to stay execution on a debt but only on grounds that are relevant to a stay and not to matters of defence in law or relief in equity: see *T.C. Trustees Ltd.* v. *J. S. Darwen (Successors) Ltd.* [1969] 2 Q.B. 295. Reliance is put on what Winn L.J. said at pp. 302–303 as to the effect of section 41 of the Judicature Act 1925 and the writ of fi. fa. being issued as of right.

There is no inherent jurisdiction to stay execution on a writ of possession. *Chester-le-Street Rural District Council* v. *Carr* (unreported), October 30, 1952 ([1952] C.P.L. 790) was an appeal from the county court where the Court of Appeal had not before it the judge's reasons for making his order and it cannot be regarded as an authority to the contrary. There is no mention in the *Final Report of the Committee on Supreme Court Practice and Procedure,* Cmd. 8878 ("the Evershed Report") of any such inherent jurisdiction. Section 36 (2) of the Administration of Justice Act 1970 gives the court express power to suspend the order for possession in the case of a mortgagee seeking possession of a dwelling house: so there is no inherent jurisdiction.

R.S.C., Ord. 113, provides a new summary procedure for obtaining an order for possession against squatters and there is no jurisdiction to permit delay.

Before 1873 Chancery could intervene by common injunction to restrain the obtaining, or the execution, of an order of possession at common law. There is a clear distinction between the position of trespassers, tortiously on another's property, and that of those whose possession was originally lawful. Hardship was not a ground for equitable relief. There is no reference in *Daniell's Chancery Practice,* 8th ed. (1914) to any inherent jurisdiction to stay proceedings.

An Act of 1731, 4 Geo. 2, c. 28, "for the more effectual preventing frauds committed by tenants . . . ," cut down the circumstances under which an injunction could be obtained in equity, "lessees filing bill in equity not to have an injunction against proceedings at law, etc." The Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), sections 103 and 108 dealt with a defendant confessing the action and error and bail in error in ejectment respectively. By section 111 a lessee proceeding in equity was not to have an injunction or relief without payment of rent and costs.

A In *Cousins* v. *Smith* (1806) 13 Ves.Jun. 164, Lord Erskine L.C. at p. 167 said that it was well known " that frequently after a verdict at law a bill for an injunction is filed merely for delay," that " No instance is cited of an injunction granted pending a demurrer " and that " the injunction ought not to have been issued." *Grafton* v. *Griffin* (1830) 1 Russ. & M. 336 shows that where " the plaintiff has by tortious means got into possession of property . . . the court will not stay legal proceedings B against him for the recovery of possession."

The Common Law Procedure Act 1852, section 212, and the Act of 1854 (17 & 18 Vict. c. 125), section 93, allow a stay of proceedings in specified circumstances. By section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 every matter of equity on which an injunction against the prosecution of a cause or proceeding " might formerly have been obtained . . . may be relied on by way of defence. . . ." If the defendants C had an equity it should have been raised in the action.

Under R.S.C., Ord. 45, r. 3 (2), the leave of the court is necessary before a writ of possession to enforce a judgment or order for possession of land is issued: see *The Supreme Court Practice*, 1973, vol. 1, pp. 678, 680. But under R.S.C., Ord. 113, r. 7 (1), notwithstanding Ord. 45, r. 3, a writ of possession to enforce an order for possession under that rule may D be issued without leave of the court. It was clearly the object of R.S.C., Ord. 113, to provide the procedure to obtain possession as soon as possible. [Reference was made to the County Court Rules 1936, Ord. 25, r. 72, and Ord. 26].

The only inherent jurisdiction on which the court can stay executions of judgments is where equity would have granted a common injunction and where there is a forceful entry there is no such jurisdiction. The E defendants have no equity and so there is no jurisdiction to grant a stay. What Gilbert C.B. said in *History and Practice of Chancery*, pp. 195–196, matches up with these submissions: it does not extend to a trespasser. The court has an inherent jurisdiction to stay proceedings which are an abuse of the process of the court. [Reference was made to *Cole on Ejectment* (1857), pp. 373 et seq.]

F It is not suggested that R.S.C., Ord. 113, is ultra vires. It created a summary procedure under which there is no express or implied power to stay judgments. Alternatively, on the wider question relating to all non-Rent Act possession cases, persons who have committed forceful entry have no equity and no question of an inherent jurisdiction to stay can apply to them. A tenant holding over could complain to equity on a number of specified grounds, i.e., that he had not had a fair trial, and G Chancery would give him a bill of discovery or a common injunction which was in effect a stay. The injunction was only granted to a person who could enter the doors of equity.

J. A. R. Finlay Q.C. for the plaintiffs in the second appeal. The plaintiffs are a local authority under a duty with regard to housing.

Two distinctions must be made: (1) between an order for possession H and a writ of possession; (2) between a stay of execution and a stay of proceedings. The passage in *Gilbert's History and Practice of Chancery*, pp. 195–196, relates to stay of proceedings.

R.S.C., Ord. 47 (R.S.C. 1965), r. 1, comes from the former Ord. 42, r. 19,

introduced by R.S.C. (No. 3) 1956 as amended by R.S.C. (Rev.) 1962 following the recommendation of the Evershed Report (Cmd. 8878). For the earlier forms of order before October 1, 1966, see *The Annual Practice 1963*, pp. 1141, 2344, 2345. For the forms of judgment, see R.S.C., Ord. 42, r. 1, and *The Supreme Court Practice 1973*, vol. 2, p. 23. A

Before October 1, 1966, there were two forms of order in an action for possession of land: (1) that the plaintiff "do recover possession"; (2) that the defendant do "deliver" possession to the plaintiff. The first was the traditional common law order stating no time for recovery of possession and requiring leave to be obtained ex parte before it could be enforced by writ of possession. The second operated in personam and derived from orders made by Chancery. It could and frequently did state a time for delivery of possession. It could be enforced by writ of possession and filing the appropriate affidavit. The fact that, in cases where the latter form of order was appropriate, possession could be postponed to the time stated does not imply that an order in the other form, that the plaintiff "do recover possession," can postpone possession. The claim for possession of mortgaged property does not afford any general guidance because the mortgagor always had his equity of redemption until he was foreclosed. The order on foreclosure is an order for possession forthwith; but because of the equity of redemption a mortgagee's order for possession, not made on foreclosure absolute, may be in terms which postpone possession. That does not imply a general inherent jurisdiction to postpone possession where the plaintiff claims possession as of legal right. B C D

Where the appropriate order is as here, under R.S.C., Ord. 113, r. 7, that the plaintiff "do recover possession" (see Form No. 66A in *The Supreme Court Practice*, vol. 2, p. 31) there is no jurisdiction to postpone the right to possession. E

Harper in reply. The plaintiffs made no reference to R.S.C., Ord. 113, r. 8. [Reference was made to the closing words of Goulding J. in *Department of the Environment* v. *James* [1972] 1 W.L.R. 1279, 1281.] It is unhistorical to say that equitable principles were codified before 1873, particularly with regard to injunctions, which were very easily obtained in Chancery, and so such statutes as 4 Geo. 2, c. 28 were passed. F

In *Moore* v. *Lambeth County Court Registrar* [1969] 1 W.L.R. 141, Edmund Davies L.J. at p. 144 referred to "the power of a judge in the *first* instance" to suspend the operation of an order for possession but that he could not do it twice. The Rules of the Supreme Court cannot increase or decrease legal rights. *Grafton* v. *Griffin*, 1 Russ. & M. 336 is quite irrelevant. *Cousins* v. *Smith*, 13 Ves.Jun. 164 is a very special case and is difficult to understand. G

If there is no discretion to suspend an order for possession, it is strange that it is not mentioned in *The Rent Acts, R. E. Megarry*, 10th ed. (1967), vol. 1, p. 249, where the group of cases including *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180 and *Chester-le-Street Rural District Council* v. *Carr* (unreported), October 30, 1952, which was a squatter case, are cited and it is said that where the Rent Acts do not apply "an order for possession may provide that it shall not take effect for some stated period. . . ." H

Until *Department of the Environment* v. *James* [1972] 1 W.L.R.

A 1279 it was always assumed that there was a discretion to suspend an order for possession. The practice among county court judges differs.

There was power in 1873 by virtue of an injunction in equity to effect a stay. No common law authority before 1873 is known. Since 1875 there has been nothing that has taken away that power to grant an injunction. R.S.C., Ord. 113, like the other rules, is entirely procedural and does not alter the substantive law. No time is specified in any order. [Reference B was made to *The Supreme Court Practice*, vol. 1, p. 613 and the County Court Rules 1936, Ord. 24, r. 11.]

Mortgages are a very special and not a parallel case: see *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317. Experienced counsel in the *Chester-le-Street* case (see [1952] C.P.L. 790) did not take the point that the judge had no discretion. The court should hesitate C before overruling that decision. The jurisdiction to stay execution exists, although the question of the exercise of the discretion may be another matter.

Lincoln Q.C. The defendants here did not submit to judgment.

Harper. The plaintiffs' title was not contested.

Cur. adv. vult.

D

May 24. The following judgments were read.

LORD DENNING M.R.

1. *Introduction*

Mr. McPhail is the owner of a leasehold house, no. 4, Thornhill E Square, Islington. There was some furniture in it, but otherwise it seems to have been unoccupied. On Friday, April 13, 1973, the premises were left locked and secured. On Sunday, April 15, 1973, some persons, then unknown, made entry. They got in by the front door and put a new lock on. On Monday, April 16, 1973, Mr. McPhail went with a detective inspector, and asked them their names. They did not give them. So F he took proceedings for possession under R.S.C., Ord. 113. These were served on them some time on Thursday, April 19 for hearing on April 25. They then gave their names. They said they believed that the house had been empty for at least two years, and, as they had nowhere to live, they decided to make their home there. On April 25, Phillips J. made an order that Mr. McPhail do recover possession.

Bristol Corporation own a house, no. 23, Normanby Road, Easton, G Bristol. About March 16, 1973, two women and five children entered it and started to live there. As soon as the officers of the corporation heard of it, they went to the house. They found a notice on the window, which read:

> "This property has been occupied by squatters, and we intend to stay here. If you try to evict us with force, we will prosecute you and H you must deal with us through the courts."

The corporation took steps under R.S.C., Ord. 113, to obtain possession. They served a summons on the two women on April 13, 1973. It came

before Foster J. on April 18, 1973. He made an order that the plaintiffs do recover possession of the house. A

In both cases the squatters appeal to the courts. They admit that they have no defence in law, but they ask the court to give them time. They only asked for four weeks, or so. Can the court give it to them? The case raises this question: when the owner of the house asks for an order for possession, is the judge bound to make an order which is enforceable forthwith or can he suspend it for a while? B

2. *The law as to squatters*

What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, C doing nothing. But this plea is of no avail in law. As we said in *Southwark London Borough Council* v. *Williams* [1971] Ch. 734, 744:

> "If homelessness were once admitted as a defence to trespass, no one's house could be safe. . . . So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that D their distress will be relieved by the charitable and the good."

(i) *The remedy of self-help*

Now I would say this at once about squatters. The owner is not obliged to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. This is not a E course to be recommended because of the disturbance which might follow. But the legality of it is beyond question. The squatters were themselves guilty of the offence of forcible entry contrary to the Statute of 1381 (4 Ric. 2, stat. 1, c. 7). When they broke in, they entered "with strong hand" which the statute forbids. They were not only guilty of a criminal offence. They were guilty of a civil wrong. They F were trespassers when they entered, and they continued to be trespassers so long as they remained there. The owner never acquiesced in their presence there. So the trespassers never gained possession. The owner, being entitled to possession, was entitled forcibly to turn them out: see *Browne* v. *Dawson* (1840) 12 Ad. & El. 624. As Sir Frederick Pollock put it in his book on Torts: G

> "A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner": see *Pollock on Torts*, 15th ed. (1951), p. 292.

Even though the owner himself should use force, then so long as he uses H no more force than is reasonably necessary, he is not himself liable either criminally or civilly. He is not liable criminally (1) because it was said in the old times that none of the statutes of forcible entry apply to

A the expulsion by the owner of a tenant at will (see *Anonymous* (1670) 1 Vent. 89; *Rex* v. *Dorny* (1700) 1 Salk 260; *Rex* v. *Bathurst* (1755) Say. 225); but, even if this is no longer true, (2) in any case the statutes only apply to the expulsion of one who is in possession: see *Reg.* v. *Child* (1846) 2 Cox C.C. 102. They do not apply to the expulsion of a trespasser who has no possession. The owner was not civilly liable because the owner is entitled to turn out a trespasser using force, no B more than is reasonably necessary: see *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720.

(ii) *The remedy by action*

Although the law thus enables the owner to take the remedy into his own hand, that is not a course to be encouraged. In a civilised C society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary. The courts of common law have done this for centuries. The owner is entitled to go to the court and obtain an order that the owner "do recover" the land, and to issue a writ of possession immediately. That was the practice in the old action of ejectment which is well described by Sir William Blackstone in his *Commentaries*, 8th ed. (1778), vol. III, pp. 200–205 D and Appendix No. II; and by Maitland in his *Equity* (1909), pp. 352–354. So far as I can discover, the courts of common law never suspended the order for possession. Once the order was made, the owner could straightaway get a writ of possession for the sheriff to cause the owner to be put into possession. Sometimes the owner, although he got an order, might not wish to get the sheriff to turn out the trespassers, E because the sheriff was known to charge extortionate fees. In that case the owner was entitled to take possession at once by his own hand: see *Harris* v. *Austen* (1615) 1 Rolle 210, 213, *per* Coke C.J., *Lacy* v. *Berry* (1659) 2 Sid. 155, 156 and *Aglionby* v. *Cohen* [1955] 1 Q.B. 558.

Seeing that the owner could take possession at once without the help of the courts, it is plain that, when he does come to the courts, he should not be in any worse position. The courts should give him possession at F once, else he would be tempted to do it himself. So the courts of common law never suspended the order for possession.

It was suggested by Mr. Harper that, although the courts of common law never suspended the order for possession, nevertheless, the courts of equity might do so: because they had power to issue an injunction to restrain the owner from proceeding with his action at law or with G the enforcement of his order. In support of his argument, Mr. Harper cited a passage from *Gilbert's History and Practice of Chancery* (1758) pp. 195–196, which was repeated afterwards in *Harrison, Chancery Practice,* 7th ed. (1790), vol. 11, p. 247 and *Bacon's Abridgement,* 6th ed. (1807), vol. III, p. 654; 7th ed. (1832), vol. IV, p. 432. But the passage is obscurely worded. And I am satisfied that a court of equity would never H intervene in aid of a wrongdoer. In *Grafton* v. *Griffin* (1830) 1 Russ. & M. 336, where some claimants had wrongfully turned a widow out of a house and got possession of it, Lord Lyndhurst L.C. said, at p. 337: "This court will not interfere to support a possession so acquired."

By the Supreme Court of Judicature Act 1875 [38 & 39 Vict. c. 77], the old action of ejectment was replaced by an action for the recovery of land: but the practice remained the same, although the machinery was different: see *Gledhill* v. *Hunter* (1880) 14 Ch.D. 492, 498–500. The judgment was, as before, that the plaintiff "do recover" possession. No time was mentioned. No date was given. The plaintiff could at once issue a writ of possession which was executed against the premises themselves. The sheriff's officers turned out everyone who was there. If there was some one else there, in addition to the defendant, he too would be turned out unless he applied to come in and defend: see *Minet* v. *Johnson* (1890) 6 T.L.R. 417 and *Leicester Permanent Building Society* v. *Shearley* [1951] Ch. 90.

(iii) *The remedy by summons*

So the matter rested until some difficulties were discovered recently. When some squatters entered on vacant land belonging to the Manchester Corporation, this court granted an injunction against them, but held that it could not make an order for recovery of possession except in a final judgment: see *Manchester Corporation* v. *Connolly* [1970] Ch. 420. And when some squatters occupied houses in Brighton, Stamp J. held that no proceedings could be taken for recovery of possession unless they were named as defendants: see *In re Wykeham Terrace, Brighton, Sussex, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch. 204. The result was that if the squatters did not give their names, or if one squatter followed another in quick succession, no order for possession could be made. I must confess that I doubt the correctness of that decision. But it does not matter. The position was soon put right by new rules of court. R.S.C., Ord. 113, of the High Court and Ord. 26 in the county court are quite clear. A summons can be issued for possession against squatters even though they cannot be identified by name and even though, as one squatter goes, another comes in. Judgment can be obtained summarily. It is an order that the plaintiffs "do recover" possession. That order can be enforced by a writ of possession immediately. It is an authority under which any one who is squatting on the premises can be turned out at once. There is no provision for giving any time. The court cannot give any time. It must, at the behest of the owner, make an order for recovery of possession. It is then for the owner to give such time as he thinks right to the squatters. They must make their appeal to his goodwill and consideration, and not to the courts. I think that the judgment of Goulding J. in *Department of the Environment* v. *James* [1972] 1 W.L.R. 1279 was correct.

3. *The position of tenants*

I must point out, however, that I have referred so far only to squatters who enter without any colour of title at all. It is different with a tenant who holds over after his term has come to an end or after he has been given notice to quit. His possession was lawful in its inception. Even after the tenancy is determined, he still has possession. If he remains in possession and in occupation, there is high authority for saying that

the owner is not entitled to take the law into his own hands and remove the tenant by force. He should go to the court and get an order for possession. Otherwise he is guilty of a criminal offence contrary to the statute of forcible entry: see what was said in *Hillary* v. *Gay* (1833) 6 C. & P. 284, *per* Lord Lyndhurst C.B., *Newton* v. *Harland* (1840) 1 Man. & G. 644. He may not be liable to a civil action for damages: see *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720. But, nevertheless, his conduct is unlawful and should not be countenanced by the courts of law. Any doubt on this score is nowadays removed by section 32 (1) of the Rent Act 1965, which says that where a tenancy has come to an end but the occupier continues to reside in the premises, it is not lawful for the owner to recover possession otherwise than by proceedings in the court.

Seeing that in the case of a tenancy the owner is not entitled to regain possession himself by his own self-help, and that he is bound to come to the court to recover possession, it follows that the courts are able to fix a date on which possession shall be recovered. At any rate, the House of Lords has proceeded on that assumption (see *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [1947] A.C. 209, 216); and Parliament has done likewise. Thus in section 138 of the County Courts Act 1888, Parliament said that at the end of a tenancy the judge may order possession to be given "either forthwith or on or before such day as the judge shall think fit to name; . . ." That section was repealed by the County Courts Act 1934 and replaced by a simple provision in section 48 that "A county court shall have jurisdiction to hear and determine any action for the recovery of land . . ." But the Act of 1934 was a consolidating Act. It did not alter the previous law. It certainly did not take away the power given by section 138 of the Act of 1888. It proceeded on the assumption that at the end of a tenancy a court has power to fix a date on or before which possession should be given. All the textbook writers, without exception, say that the county court has this power. Likewise in the Protection from Eviction Act 1964, Parliament in section 2 (1) said that when the court made an order for possession by the owner against the occupier:

> ". . . the court may suspend the execution of the order for such period, not exceeding 12 months from the date of the order, as the court thinks reasonable."

That section was repealed by the Rent Act 1965 [section 52 and Schedule 7, Part 1], but Parliament cannot thereby have intended to take away the power of the court at the end of a tenancy to suspend the execution of its order. It simply left intact its previous power.

If the county court has the power at the end of the tenancy to fix a date, then the High Court must have the like power. The County Courts Acts have always provided for the transfer of actions from the county court to the High Court, and vice versa, as for instance sections 49 and 50 of the County Courts Act 1959. It cannot be that, on such a transfer, the High Court has less power than the county court.

In my opinion, therefore, when a tenancy has come to an end, the landlord is not entitled to take possession except by an order of the court: and, on making the order, the court has power to fix a date for possession.

How then is this power to be exercised? It is a matter for the discretion of the court. But, in the ordinary way, where the defendant has no statutory right to remain, the usual order is from four to six weeks: see *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180 (four weeks); *Jones* v. *Savery* [1951] 1 All E.R. 820 (one month); *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [1947] A.C. 209, 216 (six weeks). A

Thus far I have spoken of tenants whose tenancy has come to an end. The same applies to a servant who is given exclusive occupation during his employment. If it comes to an end, he cannot be turned out except by order of the court: see section 32 (1) of the Rent Act 1965; and on making such an order the court has power to fix a date for possession to be recovered. B

Likewise in the case of a mortgagee who seeks possession of a dwelling-house. The court has power by statute (Administration of Justice Act 1970, s. 36 (2)) to suspend the order. This goes to show that, apart from statute, the court would have no such power. C

4. *Conclusion*

It follows from what I have said that *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180; *Jones* v. *Savery* [1951] 1 All E.R. 820; and *Air Ministry* v. *Harris* [1951] 1 All E.R. 862, were rightly decided. But I am afraid that *Chester-le-Street Rural District Council* v. *Carr*, October 30, 1952; Bar Library Transcript No. 414 may have been wrongly decided. The point was not raised or considered. D

My conclusion is that, when the owner of a house comes to the court and asks for an order to recover possession against squatters, the court must give him the order he asks. It has no discretion to suspend the order. But, whilst this is the law, I trust that owners will act with consideration and kindness in the enforcing of it—remembering the plight which the homeless are in. E

ORR L.J. I agree with the judgment delivered by Lord Denning M.R., and would only add that, like him, I cannot regard the decision of this court in *Chester-le-Street Rural District Council* v. *Carr* as any authority to the contrary. There is nothing to suggest that the question with which we are here concerned was ever raised in the case, and if it had been, I have no doubt that there would have been both a fuller judgment and a fuller report of the case. F

I too would dismiss these appeals.

G

LAWTON L.J. All these defendants are homeless. They have sought to solve their problems by occupying empty houses belonging to the plaintiffs and squatting in them. Phillips J. in one case and Foster J. in the other have made orders the effect of which is to enable the plaintiffs to recover possession forthwith. The defendants have appealed to this court for a stay of execution. They have not sought to challenge the findings that they were squatters; they have asked for time to find other accommodation. Has the court any jurisdiction to give them time? In my judgment the answer is "No." H

A Putting the problem in these stark terms, and answering it as I have, is but another example of the difficulties and unpleasantness of administering the law as it is without fear or favour to any man. Were I a cadi dispensing justice under a palm tree I might have been able to solve the problems which arise in this case. I might have ordered the plaintiff, Mr. McPhail, to forgo the profits which he seeks to make by converting 4 Thornhill Square, Islington, into flats and the Bristol Corporation to postpone B the demolition of 23 Normandy Road for the purpose of extending the playing fields of a school.

Cadis do not sit in this court. The problem has had to be solved by the application of principle; and in my judgment the solution is to be found in first principles, even though those principles have been encrusted, and partly hidden, by the legal dust of centuries.

C The beginning is to be found in the Middle Ages. The King, as the fountain of justice, had the duty of doing right by all men. The litigant who sought justice had to show that a wrong had been done to him. If he did show this, the king issued a writ to ensure that the wrong complained of was remedied. The equitable jurisdiction of our courts, as all lawyers know, evolved in order to enable the Crown to do justice in those cases in which writs issued under the common law produced only the D appearance of justice. But he who sought equity had to show that the common law proceedings were impinging upon some right or interest which he had.

Over the centuries these concepts of justice became the body of law which was administered by the Court of Chancery until 1873 and which is now administered by this court under the provisions of the Supreme Court of Judicature Act 1925. The law has become complex; but the E fundamentals of that law have not changed.

In my judgment Mr. Harper's erudite argument must be tested against these fundamentals. His researches have established that the Court of Chancery would grant a common injunction in an ejectment. Since common injunctions have been abolished, the same result is obtained nowadays by an order staying proceedings or execution. But on what F basis did the Court of Chancery issue common injunctions in ejectment actions? It could only have been on the basis that the plaintiff in the action for an injunction alleged that he had some equitable right or interest which required protection from the oppression of the common law action. What equitable right or interest has a trespasser? Those who became trespassers by holding over after the expiration of a tenancy or a licence may have been able to conjure up some equitable interest or right. G The 17th and 18th century practitioners showed considerable skill in the invention of legal fictions to establish jurisdiction; and even today in landlord and tenant litigation the lawyer representing the tenant who has had notice to quit can often find a point which will ensure for his client an extension of time. But what equitable right or interest could be conjured up for a squatter, still less for one who had effected a forcible entry? H Most squatters go into possession by, or as a result of, forcible entry. Forcible entry has been a crime since the Forcible Entry Act 1381. In 1391 justices were empowered by statute (15 Ric. 2, c. 2) to arrest those who made forcible entries and put them in gaol. The Forcible Entry

Act 1429 made provision for justices to reinstate those who had been kept out of their land by force. These powers were extended by the Forcible Entry Act 1623. All these statutes are still in force: see *Reg.* v. *Mountford* [1972] 1 Q.B. 28. Lord Lyndhurst L.C. refused to find any equitable interest in one who had effected a forcible entry. "This court" he said, "will not interfere to support a possession so acquired": see *Grafton* v. *Griffin*, 1 Russ. & M. 336, 337.

It follows, in my judgment, that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the court to stay execution in such cases.

I would dismiss the appeal.

Appeals dismissed.
Orders for possession.
No orders as to costs.

Solicitors: *Islington Community Law Centre; H. E. G. Hodge; Lewison & Co.; Blyth, Dutton, Robins, Hay.*

A. H. B.

END OF VOLUME AND OF CHANCERY SERIES FOR 1973

A business. There were no adequate findings as to whose evidence the judge preferred or generally as to the actual use over the appropriate period. I agree with the order proposed.

STEPHENSON L.J. I agree with both judgments which have been delivered and have nothing to add except my appreciation of the help received by the court from both counsel in reaching an unfortunate but, B in my judgment, necessary conclusion.

Appeal allowed with costs, save for defendants' costs of amendment to notice of appeal.
Case remitted for hearing by Judge Willcock.
C
Defendants to amend defence to plead any variations relied on.
Plaintiff to give full particulars of business use of land from 1974 *to* 1976, *and produce relevant farm books.*
D
Costs below reserved to judge.

Solicitors: *Jeremy Wood, Yeovil; Porter, Mangnall & Co., Yeovil.*

[Reported by MISS HENRIETTA STEINBERG, Barrister-at-Law]

E

[COURT OF APPEAL]

F

* UNIVERSITY OF ESSEX *v.* DJEMAL AND OTHERS

[1980 E. No. 552]

1980 March 14 — Buckley, Shaw and Brightman L.JJ.

G *Practice—Possession of land—Order for possession—Students occupying part of university premises—Summary proceedings for possession of land—Whether order for possession to be limited to area occupied by students—R.S.C., Ord.* 113, *rr.* 1, 2

Students at the plaintiff university occupied part of the university premises and, on February 27, 1980, the university obtained an order for possession which was executed on H March 5. Students then went into occupation of another part of the premises and, by an originating summons issued in accordance with the provisions of R.S.C., Ord. 113, the university sought an order for possession of the whole of their premises against the defendants, seven named students and persons unknown. The students vacated the area before the hearing of the summons but threatened further similar action. Walton J. made an order for possession limited to that part of the premises which the students had occupied. The university appealed.

A On the question whether the jurisdiction of the court to make a possession order was limited under the provisions of R.S.C., Ord. 113 to the area that was occupied in adverse possession to the owner's rights:—

Held, allowing the appeal, that R.S.C., Ord. 113 was a procedural order which did not affect the extent or nature of the court's jurisdiction to grant orders for the possession of land; that the jurisdiction of the court extended to the right of a legal owner to the possession of the whole of his property B uninterfered with by unauthorised persons in adverse possession, but the extent of any order for possession granted depended on the circumstances and, in the present case, since the defendants threatened further adverse possession, an order would be granted, extending to the whole of the university premises, enforceable against the defendants or any person who might be in adverse possession.

Order of Walton J. varied. C

No cases are referred to in the judgments.

The following case was cited in argument:

Evans v. *Roe* (1820) 4 Moo. C.P. 469.

APPEAL from Walton J. D

By summons of March 3, 1980, the University of Essex sought an order for possession for the whole of the premises against seven defendants, Amber Djemal, Sheila Margaret Jones, James M. Knights, Michael Mullan, Efstathios Nicolaides, Paul Gareth Rickard, Raymond Horne and persons unknown, who were in adverse possession of part of the premises. E

On March 11, 1980, Walton J. granted an order for possession of that part of the premises which had been occupied by a body of students, but refused to make an order in the wide terms sought by the university on the grounds that he had jurisdiction under R.S.C., Ord. 113 to make an order extending only to the parts of the premises identified as being in the possession of the defendants. F

By notice of appeal of March 14, 1980, the university appealed on the ground that the judge erred in law in holding that he had no jurisdiction under R.S.C., Ord. 113 to make an order for possession of premises more extensive than those identified as currently in the occupation of the defendants.

The facts are stated in the judgment of Buckley L.J. G

Hugh Laddie and *Martin Howe* for the University.

The defendants in person, through Sheila Margaret Jones.

BUCKLEY L.J. This is an appeal from an order made by Walton J. on March 11, 1980; it was an order for possession of part of the premises of the University of Essex, which had been adversely occupied by a body H of students by way of protest about certain matters as to which they considered they had grievances; the judge declined to make the order in as wide terms as the university sought.

The order which was asked for was an order for possession of "the premises at the University of Essex;" that is to say, an order extending to the whole of the university premises. The judge was only prepared to make the order in respect of that part of those premises which was

A actually in the occupation of the protesting students. This appeal is brought to this court upon the ground that the judge was in error in holding that he had no jurisdiction under R.S.C., Ord. 113 to make an order for possession of premises more extensive than those identified as currently in the occupation of the students.

The defendants to the proceedings are seven named undergraduates B of the university and persons unknown, because the university authorities were only able to identify seven of the protesting students, whose number, I gather, was considerably larger than seven; in fact it was perhaps a fluctuating body of students.

The students first went into occupation of part of the administrative offices of the university on February 27, 1980; on February 29, 1980, a possession order was obtained in respect of that part of the university C premises, which was executed on March 5. So the university then recovered possession of that part of their property.

On that same day, March 5, the students occupied another area of what is called Level 6 of part of the university buildings. They were served with a written notice requesting them to leave that area and notifying them that if they failed to do so by 9 o'clock on March 6, the D university would take legal proceedings. They did not vacate that area by the time laid down in that notice, and the originating summons which instituted these proceedings was issued by the university on March 7 against the seven named defendants and other persons unknown.

The matter came before Walton J. first on March 10. At 3 o'clock on that morning, or at about that time, the students had vacated the E area of the university buildings which they had occupied on the second occasion, March 5, so that when the matter came before the court they had already given up adverse possession of that part of the university buildings. But they left behind them a document which is headed "occupation statement," in which they said that the Student Union had been in indefinite occupation for the last ten days and so far the university had made no concessions at all. They then made reference to the matters F about which they thought they had grievances, and at the end of the document they say:

> "If the finance committee fails to agree to these demands then we shall recommend further direct action . . . on Wednesday. Since we have restored possession of the occupied area to the university there will be no need for them to proceed with the action in High Court G this morning."

Not surprisingly, faced with that threat of further action, the university went on with the legal proceedings.

The judge did not hear the case on March 10; he heard it on the following day and he then made an order for possession which was restricted to that part of the university premises which had been occupied H by the students on March 5. It is from that order that the present appeal is brought.

From what we have been told—we have not seen any note of his reasons—the judge seems to have reached his conclusion upon the ground that by implication the jurisdiction under R.S.C., Ord. 113 is restricted to making a possession order limited to the particular area which can be said in the circumstances of the case to be occupied by a person or persons without the licence or consent of the owner. Mr. Laddie, appear-

ing for the university, has contended that Order 113 is an Order which relates to procedural matters only; that it was an Order which was designed to meet the difficulty which arose out of the need for owners of property from time to time to seek to obtain possession against defendants whose identity they could not discover, or the identity of some of whom they could not discover. The Order permits proceedings to be commenced by originating summons and enables the proceedings to be entertained by the court notwithstanding that the identity of the persons in adverse possession cannot be ascertained.

I think that that submission by Mr. Laddie is a justified one. Note 113/1—8/1, *The Supreme Court Practice* (1979), says:

> "This Order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to overcome the apparent shortcomings of the present procedural law in two respects, namely, (*a*) by providing the procedure for claiming possession of land where not every wrongful occupier can reasonably be identified, the Order overcomes the question whether an order for possession of land can be made and enforced in ex parte proceedings in which no person is named as a defendant . . . or only in proceedings in which at least one person is named as the defendant."

I think the Order is in fact an Order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgment the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend upon the circumstances of the particular case.

In the present case there was, when the matter was before the judge, a threat to take what is described as "further direct action," which presumably meant similar action to the action which had already been taken, action which might be taken in respect of any part of the university property. In those circumstances it would, in my judgment, have been open to the judge to have made an order extending to the whole of the university property, or he might have made an order extending to particular parts, such as the administrative offices, of the university property. In my judgment he was in error in thinking that he was bound, by the terms of R.S.C., Ord. 113, to restrict his order to that particular part of the university property of which the students were then in actual adverse possession. For these reasons, in my judgment, this appeal is one which succeeds.

We have, however, been told by Miss Jones, one of the defendants, who has attended in this court this morning and has spoken as the spokesman of the protesting student body, that the students have decided not to continue this course of so-called direct action because they realise, I think very sensibly, that it is not a policy which will advance their cause in

A relation to the matters about which they want to negotiate with the university. If that is the position, the order which I would make, and which I think it was open to the judge to have made when the matter was before him, namely, a possession order extending to the whole property of the university and enforceable against the defendants or any other person who might be in unauthorised adverse possession of any part of B the university property, will not in fact incommode the students in any way because, through Miss Jones, they disavow any intention to pursue that policy in the future.

I would allow this appeal and make an order in the wide terms that I have indicated.

C SHAW L.J. I agree. It seems to me also that on its true construction R.S.C., Ord. 113 relates to procedure only and not to the form of redress which the court has jurisdiction to afford in appropriate cases.

The title to the site and building of the University of Essex is vested in the university, which has been incorporated for some years by Royal Charter. Its right of possession seems to me to be indivisible. If it is violated by adverse occupation of any part of the premises, that violation D affects the right of possession of the whole of the premises. It follows that those circumstances would in general justify an order in the terms prayed in the originating summons, namely, ". . . that they do recover possession of the premises at the University of Essex, Wivenhoe Park, Colchester in the County of Essex," without any geographic limitation.

I agree, however, that there may be cases where there is no danger of E actual violation of many, or a succession of, parts of the premises. The order might then be limited in appropriate terms. I do not think that this is such a case.

I would therefore allow the appeal and make an order in the terms proposed by Buckley L.J.

F BRIGHTMAN L.J. For the reasons that have been given by Buckley L.J., I agree that the appeal should be allowed.

Appeal allowed.
Defendants to pay £50 costs.
Order of Walton J. varied.

G Solicitors: *Douglas-Mann & Co.*

L. G. S.

H

A [HOUSE OF LORDS]

WANDSWORTH LONDON BOROUGH COUNCIL APPELLANTS

AND

WINDER . . . . RESPONDENT

B 1984 March 14, 15, 16; 29 Ackner, Robert Goff and Parker L.JJ.

1984 Oct. 30, 31; Nov. 1; 29 Lord Fraser of Tullybelton, Lord Scarman, Lord Keith of Kinkel, Lord Roskill and Lord Brandon of Oakbrook

C *Judicial Review—Public authority—Housing authority—Resolution to increase rents—Tenant refusing to pay increase—Authority's action for possession—Defence raising validity of resolution—Whether defence to be struck out as abuse of process of court—Whether judicial review appropriate remedy—R.S.C., Ord. 53*

D The defendant occupied a flat let by the council on a secure weekly tenancy. By two resolutions in 1981 and 1982, the council, pursuant to their powers under the Housing Act 1957, resolved to increase rents and served the defendant with two notices of increase of rent. On both occasions the defendant considered the increases excessive and refused to pay the increase while continuing to pay his original rent. The council brought proceedings in the county court claiming arrears of rent and possession of the flat. By his defence, the defendant contended that he was not liable to pay the arrears because the resolutions and notices of increase were ultra vires and void and E counterclaimed a declaration that each notice of increase was ultra vires and void. The council applied to strike out the defence and counterclaim as an abuse of the process of the court. The registrar refused the application but the judge allowed the council's appeal holding that it was an abuse of process and contrary to public policy to challenge the conduct of a public authority other than by application for judicial review under R.S.C., Ord. 53, whether the challenge was F brought by initiating an action or by a defence. On appeal by the defendant, the Court of Appeal (by a majority) allowed the appeal.

On appeal by the council:—

Held, dismissing the appeal, that it was a paramount principle that the private citizen's recourse to the courts for the determination of his rights was not to be excluded except by G clear words and that there was nothing in the language of R.S.C., Ord. 53 which could be taken as abolishing a citizen's right to challenge the decision of a local authority in the course of defending an action of the present nature, nor did section 31 of the Supreme Court Act 1981 which referred only to an "application" for judicial review have the effect of limiting a defendant's rights sub silentio (post, pp. 509G—510B, C–F).

Dictum of Viscount Simonds in *Pyx Granite Co. Ltd. v.* H *Ministry of Housing and Local Government* [1960] A.C. 260, 286, H.L.(E.) applied.

O'Reilly v. Mackman [1983] 2 A.C. 237, H.L.(E.) and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, H.L.(E.) distinguished.

Per curiam. It would be a very strange use of language to describe the defendant's behaviour in relation to the proceedings brought against him as an abuse or misuse of the process of the court, for he did not select the procedure to be adopted and was merely seeking to defend the present proceedings brought against him on the ground that he was not liable for the whole sum claimed. Moreover, he put forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour (post, p. 509E–F).

A

B

Decision of the Court of Appeal post, p. 465E; [1984] 3 W.L.R. 563; [1984] 3 All E.R. 83 affirmed.

The following cases are referred to in the opinion of Lord Fraser of Tullybelton:

C

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 233; [1947] 2 All E.R. 680, C.A.
Cannock Chase District Council v. Kelly [1978] 1 W.L.R. 1; [1978] 1 All E.R. 152, C.A.
Cocks v. Thanet District Council [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 3 All E.R. 1135, H.L.(E.)
Luby v. Newcastle-under-Lyme Corporation [1964] 2 Q.B. 64; [1964] 2 W.L.R. 475; [1964] 1 All E.R. 84

D

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
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.)
Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)

E

The following additional cases were cited in argument in the House of Lords:

An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board [1984] 2 C.M.L.R. 584, C.A.
Anisminic 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.).

F

Aries Tanker Corporation v. Total Transport Ltd. [1971] 1 W.L.R. 185; [1977] 1 All E.R. 398, H.L.(E.)
Barlow, In re (1861) 30 L.J.Q.B. 271
Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, C.A. and H.L.(E.)
Coventry v. Wilson [1939] 1 All E.R. 429, C.A.
Customs and Excise Commissioners v. Cure & Deeley Ltd. [1962] 1 Q.B. 340; [1961] 3 W.L.R. 798; [1961] 3 All E.R. 641

G

Davy v. Spelthorne Borough Council [1984] A.C. 262; [1983] 3 W.L.R. 742; [1983] 3 All E.R. 278, H.L.(E.)
Dyson v. Attorney-General [1911] 1 K.B. 410, C.A.
Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)
Henriksens Rederi A/S v. T.H.Z. Rolimpex [1974] Q.B. 233; [1973] 3 W.L.R. 556; [1973] 3 All E.R. 589, C.A.

H

Hogg v. Scott [1947] K.B. 759; [1947] 1 All E.R. 788
Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.)

A

Mohammed-Holgate v. Duke [1984] A.C. 437; [1984] 2 W.L.R. 660; [1984] 1 All E.R. 1054, H.L.(E.)
Nwakobi v. Nzekwu [1964] 1 W.L.R. 1019, P.C.
Reg. v. Bracknell Justices, Ex parte Griffiths [1976] A.C. 314; [1975] 3 W.L.R. 140; [1975] 2 All E.R. 881, H.L.(E.)
Reg. v. Bromley London Borough Council, Ex parte Lambeth London Borough Council, The Times, 16 June 1984, Hodgson J.

B

Reg. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd. [1966] 1 Q.B. 380; [1965] 3 W.L.R. 426; [1965] 2 All E.R. 836, C.A.
Reg. v. Patents Appeal Tribunal, Ex parte Beecham Group Ltd. [1974] A.C. 646; [1974] 2 W.L.R. 79; [1974] 1 All E.R. 333, H.L.(E.)
Reg. v. Jenner [1983] 1 W.L.R. 873; [1983] 2 All E.R. 46, C.A.
Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, H.L.(E.)

C

Reg. v. Wells Street Justices, Ex parte Collett [1981] R.T.R. 272, D.C.
South West Water Authority v. Rumble's [1984] 1 W.L.R. 800; [1984] 2 All E.R. 240, C.A.
Universe Tankships Inc. of Monrovia v. International Transport Workers Federation [1983] 1 A.C. 366; [1982] 2 W.L.R. 803; [1982] I.C.R. 262; [1982] 2 All E.R. 67, H.L.(E.)

D

The following cases are referred to in the judgments of the Court of Appeal:

Backhouse v. Lambeth London Borough Council (1972) 116 S.J. 802
Cocks v. Thanet District Council [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 3 All E.R. 1135, H.L.(E.)
Davy v. Spelthorne Borough Council [1984] A.C. 262; [1983] 3 W.L.R. 742; [1983] 3 All E.R. 278, H.L.(E.)

E

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 604; [1982] 3 All E.R. 680, C.A.; [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
Practice Note (Court of Appeal: New Procedure) [1982] 1 W.L.R. 1312; [1982] 3 All E.R. 376, 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.)

F

Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Universe Tankships Inc. of Monrovia v. International Transport Workers Federation [1983] 1 A.C. 366; [1982] 2 W.L.R. 803; [1982] I.C.R. 262; [1982] 2 All E.R. 67, H.L.(E.)
Vine v. National Dock Labour Board [1957] A.C. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939, H.L.(E.)

G

The following additional cases were cited in argument in the Court of Appeal:

Agricultural, Horticultural and Forestry Industry Training Board v. Kent [1970] 2 Q.B. 19; [1970] 2 W.L.R. 426; [1970] 1 All E.R. 304, C.A.
Anisminic 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.)

H

Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, C.A. and H.L.(E.)
Cannock Chase District Council v. Kelly [1978] 1 W.L.R. 1; [1978] 1 All E.R. 152, C.A.

Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, H.L.(E.)
Customs and Excise Commissioners v. Cure & Deeley Ltd. [1962] 1 Q.B. 340; [1961] 3 W.L.R. 798; [1961] 3 All E.R. 641
Dunlop v. Woollahra Municipal Council [1982] A.C. 158; [1981] 2 W.L.R. 693; [1981] 1 All E.R. 1202, P.C.
Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] A.C. 130; [1983] 3 W.L.R. 143; [1983] 2 All E.R. 770, H.L.(E.)
Greater London Council v. Connolly [1970] 2 Q.B. 100; [1970] 2 W.L.R. 658; [1970] 1 All E.R. 870, C.A.
Henriksens Rederi A/S v. T. H. Z. Rolimpex [1974] Q.B. 233; [1973] 3 W.L.R. 556; [1973] 3 All E.R. 589, C.A.
Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd. [1974] A.C. 689; [1973] 3 W.L.R. 421; [1973] 3 All E.R. 195, H.L.(E.)
Musson v Emile [1964] 1 W.L.R. 337; [1964] 1 All E.R. 315
Paul (R. & W.) Ltd. v. Wheat Commission [1937] A.C. 139; [1936] 2 All E.R. 1243, H.L.(E.)
Reg. v. Jenner [1983] 1 W.L.R. 873; [1983] 2 All E.R. 46, C.A.
Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)
South of Scotland Electricity Board v. British Oxygen Co. Ltd. [1959] 1 W.L.R. 587; [1959] 2 All E.R. 225, H.L.(Sc.)
Thames Water Authority v. Elmbridge Borough Council [1983] Q.B. 570; [1983] 2 W.L.R. 743; [1983] 1 All E.R. 836, C.A.

APPEAL from Judge White sitting at Wandsworth County Court.

Wandsworth London Borough Council claimed possession of a council flat, 25, Wheatley House, Tangley Grove, London S.W.15, on the ground that the defendant, Paul Winder, who was the secure tenant of those premises, had failed to pay the rent lawfully due. The defendant filed a defence and counterclaim alleging that the council's decision to make certain rent increases were ultra vires (see paragraphs 5 and 6, post, pp. 466D—467B). The council applied to strike out the defence and counterclaim on the ground, inter alia, that it was an abuse of the process of the court. On 2 March 1983 the registrar refused the application but on the council's appeal, Judge White, on 15 November 1983, ordered, inter alia, that paragraphs 5 and 6 of the defence and the whole of the counterclaim be struck out as an abuse of the process of the court.

By an amended notice of appeal, the defendant appealed on the grounds, inter alia, that (1) the judge had erred and misdirected himself as to the law in holding that the decisions of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 had any effect in restricting rights of defence and that they could and should be applied to prevent a defendant pursuing a defence available to him which showed a basis in law why the council's claim should not succeed, such as a defence that a sum sued for was not lawfully or properly due; (2) the judge misdirected himself in law in failing to hold that the defendant by paragraphs 5 and 6 of his defence was relying upon private law rights and that his right to rely upon them against a public authority whether by way of a defence or

A counterclaim or by action was not in any way affected by the decisions in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286; (3) the decision of the judge was wrong in that it imposed by way of the control of the court over its own procedures a special period of limitation to protect public authorities when the legislature had by section 1 of the Law Reform (Limitation of Actions) Act 1954 removed such a special period and made the ordinary B limitation periods apply to proceedings against public authorities; (4) the judge should have held that any public law element in the defendant's defences and/or the declaration sought by the defendant's counterclaim to be collateral to a private dispute and therefore appropriate to be pursued in an ordinary action consistently with R.S.C., Ord. 53 and the speeches in the House of Lords; (5) the challenge to the council's C increase in the defendant's rent raised was one to the decision itself and not to the process by which it was arrived at and was accordingly not a matter which could be canvassed in proceedings for judicial review.

The facts are stated in the judgments.

John Matthew Bowyer for the defendant.
Geoffrey Stephenson for the council.

D

Cur. adv. vult.

March 29. The following judgments were read.

ACKNER L.J. Some years ago (we do not know the precise date and E it is of no consequence) Wandsworth London Borough Council, the respondents to this appeal, let one of their council flats, 25, Wheatley House, Tangley Grove, S.W.15, on a weekly tenancy to Mr. Winder, the defendant. The rent as at 1980 was £12·06 per week, although whether this was the original rent we again do not know. The figures may indicate this to be unlikely. This tenancy was granted by the council F pursuant to their powers to provide housing accommodation under Part V of the Housing Act 1957. It is provided by section 113(1A) (as added by the Housing Rents and Subsidies Act 1975, section 1(2)) that a local authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, as circumstances may require. In pursuance of this statutory obligation, the council in 1981 resolved to increase the rents of the accommodation which they provided, G and on 2 March 1981 served the defendant with a notice of increase of rent purporting to increase his rent to £16·56 with effect from 6 April 1981. The defendant objected to that increase because he considered it excessive and continued to pay the original rent. Arrears accumulated, but no action was taken for the time being by the council, although correspondence did pass.

H The following year there was a further resolution by the council and a further notice of increase of rent, dated 1 March 1982, was served on the defendant purporting to increase his rent to £18·53 as from 5 April 1982. Again he refused to pay the increase. A notice seeking possession was eventually served on him on 21 May 1982, followed by a claim in

the Wandsworth County Court filed on 16 August 1982 claiming possession. The defendant being a secure tenant, the claim was made under ground 1 of Schedule 4 to the Housing Act 1980, namely, that the defendant had failed to pay the rent lawfully due. The arrears claimed amounted to nearly £700.

A

Initially no defence was filed and the claim came on for hearing before Judge Coplestone-Boughey on 20 October 1982. The defendant was then represented and an adjournment was sought in order that he might contend "that the rent exceeds the limit in the Housing Finance Act." The defendant had brought to court the money which was alleged to be owing to the council. The adjournment sought was granted, conditional upon payment of the moneys into court, and directions were given as to the filing of a defence. The defence, together with a counterclaim for a declaration, was filed on 11 January 1983. We are concerned, as was the registrar and the judge, with paragraphs 5 and 6 of the defence, since, although the figures are challenged, that issue is essentially one of mathematics and well capable of being resolved by the parties.

B

C

The defence

D

The precise nature of the defence is of first importance, and I accordingly quote paragraphs 5 and 6:

"5. By a notice of increase of rent dated March 1981 the plaintiffs purported to increase the weekly net rent payable to them by the defendant in respect of his said dwelling house from £12·06 to £16·56 with effect from 6 April 1981. By a further notice of increase of rent dated 1 March 1982 the plaintiffs purported further to increase the said rent from £16·56 to £18·53 with effect from 5 April 1982.

E

"6. The plaintiffs' decision to make each of the said increases was ultra vires and void and each of the said notices was likewise ultra vires and void in that in breach of section 111 of the Housing Act 1957 the resulting rents were not reasonable charges for the defendant's tenancy or for his occupation of the said dwelling house and the plaintiffs in exercising their discretion to determine the amount of the rent failed lawfully to exercise the same so as to arrive at a charge which was reasonable.

F

"Particulars of breach of section 111 and failure lawfully to exercise discretion

G

"(i) As to each of the said increases the plaintiffs failed in considering how the financial burden of the provision of council housing should be distributed between its ratepayers and its tenants to take into account (alternatively to take sufficient account of) the relative means of their ratepayers as a group and their tenants as a group.

H

"(ii) As to the first notice effective from 6 April 1981 the £4·50 increase and the decision to make that increase such increase was a substantially higher increase than the said rent from the said date than a private landlord could have then made in respect of a

A regulated tenancy of the said dwelling house by a notice given on or about 2 March 1981 in that it effected an increase to a rent higher than a rent officer would have registered as the fair rent and or an increase which would have had to have been phased under the provisions of section 55 of and Schedule 8 to the Rent Act 1977 as amended. The amount and pace of the increase was thus in excess of what Parliament considered appropriate for such premises.

B "(iii) As to the second notice and the decision to make the increase it purports to make, they were misconceived because they were based upon the purported earlier increase by the first notice which was itself for the reasons set out above ultra vires and void."

The defendant added a counterclaim in which he repeated his defence and claimed a declaration that the notices of increase of rent were ultra C vires and void and of no effect.

The application to strike out

When the council received the defence and counterclaim they applied to have them struck out on the ground that they were an abuse of the process of the court. In making this application they relied essentially on D the recent decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237. It is convenient at this stage to quote a short passage from the speech of Lord Diplock, who gave the only speech and which was concurred in by all the other members of the Appellate Committee, at p. 285:

"Now that those disadvantages to applicants have been removed E and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was F entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

The counter-submission made by Mr. Bowyer on behalf of the defendant, was that the *O'Reilly* decision only dealt with the *initiation* of proceedings and the rule of public policy which it declared does not G apply to a defendant wishing to raise *a defence* involving a matter of public law. The registrar accepted Mr. Bowyer's submission, but Judge White held that there was no distinction to be drawn between the raising of an issue of public law by way of a claim or by way of a defence, and accordingly there was no significance in the fact that the *O'Reilly* case was concerned with the commencement rather than the defence of H proceedings. He therefore rejected Mr. Bowyer's submission; hence this appeal.

The defendant's challenge

The defendant's contract of tenancy clearly gave him certain private

law rights against the council. Mr. Bowyer submits that by his defence he is setting up private law rights. I do not agree. He is not contending that the council are limited to charging him the original contractual rent. He is not claiming that they have no power to increase that rent. On the contrary, he accepts that the council have the statutory right to increase his rent. His client's complaint is that the council have exceeded their statutory powers in resolving to increase his rent by so great a sum. It is the quantum of the increase to which he objects and not the right and obligation to make an increase. Although the defence alleges a breach of section 111 of the Housing Act 1957, the true basis of the defence is that circumstances did not reasonably require the rent to be increased to the extent to which the council resolved: see section 113(1A). This is the only foundation of the defendant's contention that the notices of increase of rent were ultra vires and therefore void and of no effect. This is the defendant's answer, both to the claim for the arrears of rent and to the claim for possession. He has put forward no other defence. Of course the judge has a residual discretion as to whether or not to make an order for possession, given that the council establish that the defendant has failed to pay rent lawfully due: see section 34(3)(*a*) of the Housing Act 1980. No point has been raised as to this. The defendant is accordingly not setting up any private law right. The reference in paragraph 1 of the defence to his tenancy is an introductory averment which gives rise to no issue or contest in this case. He is attacking the two resolutions by the council to increase the rents. These resolutions were resolutions of a statutory body, pursuant to their statutory powers and duties, applicable to the rents of all or a particular category of council tenants, and affected the rights and liabilities of their ratepayers. The defendant is thus clearly challenging a decision made by a public body, performing its public functions in a field of public law. That is the limit of his challenge.

If I am wrong and the defendant is setting up some private law right, this cannot affect the reality of the situation—that the essence of the dispute is the validity of the notices. The result is then that the direct issue of public law arises merely at one remove and this is of no significance: see *Cocks v. Thanet District Council* [1983] 2 A.C. 286 referred to later, where the private law right set up was a right claimed under statute and the *O'Reilly* rule [1983] 2 A.C. 237 was nevertheless applied.

Mr. Bowyer rightly conceded in the court below that had the defendant sought to make his challenge by way of claim rather than by way of defence and had he done so by way of a claim in an ordinary action, the court would have struck the claim out as an abuse of its process, applying the principle laid down in *O'Reilly's* case.

Does the principle of public policy declared in O'Reilly's case apply where the challenge is made by way of defence and not by the initiation of proceedings?

In order to consider the breadth of the public policy declared in *O'Reilly's* case, I think it is helpful, before considering in more detail

A the speech of Lord Diplock, to see how that case was dealt with in the Court of Appeal. I was a member of that Court of Appeal, and, whilst in agreement with Lord Denning M.R., that the only proper method of attacking a decision of a board of visitors was by certiorari, I was not prepared to go further and hold that declarations against public authorities when exercising their public law functions can only be obtained by application for judicial review under R.S.C., Ord. 53. I B accepted that by reason of the radical procedural reforms in the supervisory jurisdiction of the court and the safeguards against abuse built into Order 53, where the conduct of a public authority was to be challenged, then as a general rule it was more appropriate that it be done by a process of judicial review and not by way of action. I expressed the view which Mr. Bowyer thought relevant to quote to us C [1983] 2 A.C. 237, 264–265:

> "If Parliament had desired that by reason of the reforms contained in R.S.C., Ord. 53 the remedy by way of judicial review should exclude the pre-existing remedy by way of an action for declaratory relief to control the exercise of administrative power, it could have simply so provided in the recent Supreme Court Act 1981. It would, D however, have been somewhat of a surprise if it had done so, in view of the contrary recommendation made in 1976 by the Law Commission, who were responsible for the production of the new R.S.C., Ord. 53."

I went on to quote section 31 of the Supreme Court Act 1981 and concluded that I could not construe that section as providing that E declarations against public authorities when exercising their public law functions can only be obtained by application for judicial review under R.S.C., Ord. 53. O'Connor L.J., at p. 267, was also not prepared to accede to the submission, "that judicial review is the only way in which decisions of administrative tribunals can be challenged." Lord Denning M.R. took the contrary view. He said, at p. 256:

> F "Now that judicial review is available to give every kind of remedy, I think it should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty."

If the view of Lord Denning M.R. is correct, then there is no G justification for differentiating between a challenge by way of the initiation of an action, as opposed to a challenge by a defence. Both are covered by the principle. The question then arises: does Lord Diplock's speech and the two subsequent decisions of the House of Lords (*Cocks v. Thanet District Council* [1983] 2 A.C. 286 and *Davy v. Spelthorne Borough Council* [1984] A.C. 262) expressly or by necessary implication decide that a challenge by way of defence to a claim by a public H authority to enforce its decision in a field of public law amounts to an abuse of the process of the court?

The following factors appear to me to suggest an affirmative answer to the question.

1. The decision in the *O'Reilly* case [1983] 2 A.C. 237 makes it clear that O'Connor L.J. and I should have gone further than we did. The speech of Lord Diplock does not suggest that Lord Denning M.R. went too far.

2. In commenting on the fact that neither R.S.C., Ord. 53 nor section 31 of the Supreme Court Act 1981 expressly provide that the procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for the infringement of rights that are entitled to protection under public law, Lord Diplock observed, at pp. 284H–285A:

> "There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process *whatever might be the form taken by that abuse.*" (Emphasis added).

3. The public policy requirement declared by Lord Diplock (to which I made reference in my first quotation from his speech earlier in this judgment) is surely, when expressed in positive terms, that "a person seeking to establish that a decision of a public authority infringes rights to which he was entitled to protection under public law must proceed by an application for an order for judicial review under Order 53." If this is a correct statement of the principle, there is no warrant for distinguishing between the methods adopted to establish the infringement.

4. In *Cocks v. Thanet District Council* [1983] 2 A.C. 286 the House of Lords applied the *O'Reilly* principle to a case where the plaintiff claimed a declaration that the council owed, and was in breach of its duty to house him permanently, under the Housing (Homeless Persons) Act 1977. Lord Bridge of Harwich posed the question (which he subsequently answered in the affirmative) in this way, at p. 294:

> "Does the same general rule apply, where the decision of the public authority which the litigant wishes to overturn is not one alleged to infringe any existing right . . .?"

This does not suggest that the principle does not apply to all forms of challenge to the decision.

5. In *Davy v. Spelthorne Borough Council* [1984] A.C. 262, the plaintiff claimed damages against the defendants alleging that he had refrained from appealing against an enforcement notice as a result of negligent advice given to him by the defendants. The House of Lords held that this claim was an ordinary action in tort which did not raise any issue of public law as a live issue, and accordingly it did not apply the *O'Reilly* principle. In his speech Lord Fraser of Tullybelton, with whose speech Lord Roskill, Lord Brandon and Lord Brightman agreed, used this expression, at p. 274: "In the present case, on the other hand, the respondent does not impugn or wish to overturn the enforcement notice." Again, these words seem of general application.

6. The justification for the public policy, as declared in the *O'Reilly* decision, was based upon the following propositions. (a):

A "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision:" see [1983] 2 A.C. 237, 280–281.

B (b) The new Order 53 has drastically ameliorated the position of applicants for judicial review, removing the previous disadvantages. Order 53 contained procedural restrictions imposed in the public interest to protect public authorities "against groundless, unmeritorious or tardy harassment . . ." (p. 284D).

These considerations apply irrespective of the manner in which the C challenge is made, be it by initiating an action, or by raising a defence. As Mr. Geoffrey Stephenson pointed out in his able address, if the distinction is a valid one, and if public policy does not make it an abuse of the process of the court to raise the challenge by way of defence, then why should not an applicant who has failed to get leave to apply for judicial review because of the tardiness of his application, not then wait to be sued and then raise the challenge by way of defence? As he D aptly points out, if the defendant's contention is correct, then presumably Mr. Cocks, having failed to obtain leave to bring proceedings under Order 53 for a declaration that the council owed him a duty to house him permanently, could have remained in his temporary accommodation and defended the subsequent possession proceedings by raising the very challenge for which he failed to get his leave to raise under Order 53. E To accept that the above conduct would not be an abuse of the process of the court would be to nullify the very decision of the House of Lords in the *O'Reilly* case.

As against the above considerations, Mr. Bowyer relies strongly on the following observations made by Lord Wilberforce in *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 271–277:

F "The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression 'public law' can be used to deny a subject a right of action in the court of his choice it must be related to a positive G prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.

H "The relevant statute to the present case is the Supreme Court Act 1981, section 31, and the relevant statutory rules those contained in R.S.C., Ord. 53 dating from 1977. These lay down the conditions under the procedure by which the courts can be asked to review the actions or omissions of (inter alia) statutory bodies, persons acting

under statute, and inferior courts. Before a proceeding at common law can be said to be an abuse of process, it must, at least, be shown (1) that the claim in question *could* be brought by way of judicial review (2) that it *should* be brought by way of judicial review.

"*O'Reilly v. Mackman* [1983] 2 A.C. 237 illustrates this in the clearest manner, and goes no distance towards supporting the appellants' case in this appeal. It was not contested there that the appellants, seeking directly to attack the board's decisions, would have had a remedy by way of judicial review (p. 274C): indeed, as I understand the case, they would not have had a remedy in private law at all. The only question, which my noble and learned friend, Lord Diplock was able to put in a single sentence (pp. 274H–275A), was whether it was an abuse of process to apply for declarations by using the procedure laid down in proceedings begun by writ or originating summons instead of using the procedure laid down by R.S.C., Ord. 53. It was decided that it would be such an abuse of process. The statements of law laid down in the single opinion must be related to that issue, the foundation of which was that the claims in question could have been brought by way of judicial review. Even when this requirement was satisfied, Lord Diplock was careful to make it clear that he was stating no universal rule that such claims could only be brought by this procedure: see pp. 284H-285A. And he expressly stated that though there should be a general rule of public policy against permitting a person seeking to establish that a decision of a public authority infringed rights as to which he was entitled to protection under public law to proceed by way of ordinary action, there might be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, and in other instances on a case to case basis. (The contemporaneous case of *Cocks v. Thanet District Council* [1983] 2 A.C. 286 may be regarded as one where a direct issue of public law arose at one remove.)

"It is indeed plain enough that issues which could be characterised as issues of 'public law' may arise in a number of contexts besides those where an attack upon, or review of, actions or omissions of public bodies is involved—cases, for example, where the invalidity of such action is set up by way of defence, or where the validity of such action arises collaterally in actions against third parties. The Law Commission in its recommendations of 1971 suggested that the procedure of judicial review should cover such cases, but this suggestion was not accepted and the reforms of 1977–1981 were of a more limited character. So we must judge a contention of 'abuse of process' according to normal principle."

He later said, at p. 278:

"Order 53 does not state that the procedure which it authorised was the only procedure which could be followed in cases where it applied. (In this it followed the recommendation of the Law

A Commission.) So prima facie the rule applies that the plaintiff may choose the court and the procedure which suits him best."

Having regard to the view which I ventured to express in the Court of Appeal in *O'Reilly's* case, I must confess that I was tempted by these observations to adopt a strongly restrictive approach to the *O'Reilly* decision, but I am satisfied that I must resist so doing. Lord Roskill, B Lord Brandon and Lord Brightman expressly adopted the reasons of Lord Fraser of Tullybelton, who expressed no reservations as to the *O'Reilly* principle for dismissing the appeal and not those of Lord Wilberforce. To my mind, to confine the rule of public policy to challenges made by way of an ordinary action and to exclude those challenges made by defence is to strike at the very basis of the public policy rule itself, and inevitably create wholly unacceptable anomalies. C That this rule of public policy may on occasions have the effect that persons will lose their entitlement hitherto enjoyed of impugning a public authority's decision because of the time restraints incorporated in the judicial review procedure, was fully recognised by Lord Diplock in his speech [1983] 2 A.C. 237, 283F:

"Failing such challenge within the applicable time limit, public D policy, expressed in the maxim omnia praesumuntur rite esse acta, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision."

Of course the court retains a general discretion to grant leave notwithstanding that the application is out of time. That those same time restraints should have similar effect where the challenge is made by E defence, seems to me to be inevitable.

Finally, I should add that I see no substance in Mr. Bowyer's complaint that to apply the *O'Reilly* public policy rule would give rise to multiplicity of proceedings. If the proper course is to apply under Order 53, there should be no need for the initiation of an action by the local authority and thus the necessity for the entry of a defence. However, in F the unusual situation where a defence has to be entered, the action is then simply stayed pending the outcome of the judicial review. If they fail, then there is no defence to the claim; if they succeed then the claim fails and the only issue that may arise is if, unlike this case, there is a counterclaim to recover money already paid.

In my judgment, the principle of public policy, as decided in the *O'Reilly* case, constrains me to decide that the challenge by the G defendant of the council's decision to increase his rent by the entry of a defence to the claim, is an abuse of the process of the court. The judge was accordingly right to strike out both the defence and counterclaim, and stay the action to give the defendant the opportunity to apply for leave to apply for judicial review. The defendant has made such an application and it has been refused. I accordingly would dismiss this H appeal.

ROBERT GOFF L.J. The judge ordered that paragraphs 5 and 6 of the defendant's defence and the whole of his counterclaim be struck out as an abuse of the process of the court, though, as I understand it, at the

same time he ordered that the council's action be stayed to enable the defendant to apply under R.S.C., Ord. 53 for leave to apply for judicial review of the council's increases in rent referred to in the counterclaim. The central passage in the judge's careful judgment reads:

> "I have come to the conclusion that in the interests of a consistent public policy the general rule should be applied in the circumstances of this case. If it is an abuse of the procedure of the court to avoid the safeguards of Order 53 by challenging a public law decision by claim in an ordinary action it must equally be an abuse to seek to make a similar challenge by way of defence or counterclaim to such an action provided that the court procedure can provide the defendant with an opportunity to raise the issue in an appropriate way by a stay of the claim against him. To hold otherwise would be to allow a coach and horses through the policy which the constraints of Order 53 are designed to promote. Further, the resulting position would be unacceptably anomalous. A tenant who wanted to challenge a rent increase decision of the plaintiffs but sat back and waited to be sued would be at an advantage over a tenant who, acting timeously, challenged by way of Order 53. The challenge of both tenants and the public law issue before the courts would be the same but the former would avoid the procedural safeguards that would confront the latter. It would bring the procedures of the court into disrepute."

This passage reveals (as do other passages in the judgment) that the judge was being invited to draw a distinction between claims and defences and to hold that, whereas a claim in which a public law decision is challenged must be made by way of an application for judicial review, nevertheless a defence which raises such a challenge does not require any such application to be made. The same argument was advanced before this court (among others) by Mr. Bowyer for the defendant. For me, however, the solution to the problem in the present case does not lie in drawing any such distinction; indeed, I suspect that emphasis upon that distinction in argument before him may have diverted the attention of the judge from the central issue in the case.

In the present case the council are claiming possession of a council flat which has been occupied by the defendant under a secure weekly tenancy. They are claiming possession on the ground of non-payment of rent, which falls within ground 1 of Schedule 4 to the Housing Act 1980. They are also claiming arrears of rent in the sum of £696·03. The defendant's case, as revealed in his defence and counterclaim, is that he is not in arrears with his rent, and so the council are not entitled to possession. At the heart of the dispute lies the defendant's challenge to the vires of the decisions by the council authorising two notices of increase of rent dated, respectively, 2 March 1981 and 1 March 1982, by which the council purported to increase the defendant's weekly rent, first, from £12·06 to £16·56, and then from £16·56 to £18·53. The defendant's case is therefore that he has never been under any obligation to pay more than the previously established rent of £12·03 per week.

A Two observations can be made about the issues in the case. The first is that the central issue in the case relates to the validity of decisions made by a public authority; and that the validity of those decisions affects not only the defendant but many, if not most, of those who live in the Borough of Wandsworth, either in their capacity as ratepayers or in their capacity as tenants of the council. The second is that a decision on the issue in the case will affect the defendant's private law rights, B both with regard to his occupation of the council flat and with regard to his liability to pay rent. These two matters lie at the heart of the arguments in the case. The argument of the council has been that public policy requires any challenge to a decision of a public authority, such as the council's decisions to increase rents of council houses and flats in the borough, to be made by application for judicial review; and indeed that C the House of Lords so decided in *O'Reilly v. Mackman* [1983] 2 A.C. 237. It makes no difference, submitted Mr. Stephenson for the council, that the action has been launched not by the defendant but by the council, and that a decision in the action may affect the defendant's private law rights, for the public interest in good administration is so strong that every challenge to a decision of a public authority must be made within the confines of the procedure established by Order 53, D including (subject to the court's power to extend the time) the requirement that an application for judicial review must be made within three months from the date when grounds for the application first arose: see Ord. 53, r. 4(1). At the bottom of the defendant's submissions, however, lies the argument that his private law rights cannot be affected by the procedural changes brought into effect by Order 53, even though E those changes have now been given the blessing of Parliament by section 31 of the Supreme Court Act 1981.

In considering how to resolve this conflict between public interest and private right, I turn first for guidance to the decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237. Now it is plain that that case was not concerned with private law rights. The four plaintiffs in the case (the appellants before the House of Lords) were inmates in F Hull Prison; they brought actions alleging that the board of visitors had acted in breach of the prison rules and of the rules of natural justice, and they claimed a declaration that a disciplinary award by the board of forfeiture of remission of sentence in respect of each of the plaintiffs was therefore null and void. It was however conceded that no claim would lie against members of the board for damages at the suit of the plaintiffs; indeed, Lord Diplock stressed, at p. 275, that an award of forfeiture of G remission did not infringe any right derived from private law, remission being not a matter of right but of indulgence. So the case was decided on the basis that the plaintiffs' sole remedy was to challenge the validity of the board's decision. It follows that the council cannot find authority for their argument in the ratio decidendi of *O'Reilly v. Mackman*. It is necessary therefore to examine the principle underlying the decision in H that case with some care, to ascertain whether it extends, or should be extended, to give authority to the council's argument.

In his speech (with which the other members of the Appellate Committee agreed) Lord Diplock stated the question for the House to be as follows [1983] 2 A.C. 237, 274–275:

"Put in a single sentence the question for your Lordships is: whether in 1980 after R.S.C., Ord. 53 in its new form, adopted in 1977, had come into operation it was an abuse of the process of the court to apply for such declarations [i.e., declarations of nullity] by using the procedure laid down in the Rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Ord. 53 for an application for judicial review of the awards of forfeiture of remission of sentence made against them by the board which the appellants are seeking to impugn?"

A

B

In so stating the question, Lord Diplock focused upon the fact that the alleged abuse of process in the case lay in the plaintiffs' action in invoking the procedure of issuing a writ or (in one case) an originating summons claiming declaratory relief. He therefore proceeded immediately to point out, not only that such relief is discretionary, but also that there was no question of the plaintiffs' private law rights being affected by the award which the plaintiffs sought to impugn. Furthermore, having reviewed the development of public law in this country and the emergence of the new procedure for judicial review in the present Order 53, Lord Diplock summarised the effect of Order 53, at pp. 283–284:

C

"So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ."

D

E

He then drew attention to the fact that the plaintiffs, by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Order 53, had been able to evade:

F

"those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision making public authorities by Order 53:" see p. 284.

G

His conclusion was that, following the removal of disadvantages (particularly in relation to discovery) which were manifestly unfair to applicants under the procedure relating to applications for prerogative orders, the general rule should be, at p. 285:

"Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a

H

A general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

B He then recognised that there might be exceptions to this general rule at p. 285:

"particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons."

C

It is right to observe that in his statement of the general rule Lord Diplock referred to the fact that remedies for infringements of rights under private law can be obtained upon an application for judicial review, if such infringements should also be involved. But the House of Lords did not in *O'Reilly v. Mackman* address itself to the question whether a citizen's right to invoke the ordinary procedure of the courts D to enforce, or to invoke the protection of, his private law rights should in any way be affected by the principle enunciated in that case. Indeed, in relation to certain earlier cases in which the House of Lords expressly approved actions by declarations of nullity as alternative to applications for certiorari to quash, Lord Diplock referred to the fact that those cases were concerned with private law rights: see his reference, at E p. 281, to *Vine v. National Dock Labour Board* [1957] A.C. 488, *Ridge v. Baldwin* [1964] A.C. 40 and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260.

It is true that in the case which the House of Lords decided on the same day, immediately after *O'Reilly v. Mackman* [1983] 2 A.C. 237, viz. *Cocks v. Thanet District Council* [1983] 2 A.C. 286, the House of Lords applied the principle in *O'Reilly v. Mackman* in circumstances F where private law rights of the plaintiff were relevant, though in a very limited sense. In that case the plaintiff (the respondent before the House of Lords) claimed a declaration that the defendant council was in breach of its duties under the Housing (Homeless Persons) Act 1977 in failing to provide both temporary and permanent accommodation, and he also claimed a mandatory injunction and damages. The House of Lords held G that such proceeding constituted an abuse of the process of the court, because the plaintiff should have proceeded by way of an application for judicial review. Lord Bridge of Harwich (with whose speech the remainder of the Appellate Committee agreed) analysed the functions of housing committees under the Act. He concluded his analysis, at pp. 292–293:

H "Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a

> liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty."

Then, after reviewing certain earlier authorities, he quoted the general rule stated by Lord Diplock in *O'Reilly v. Mackman* and posed the following question, at p. 294:

> "Does the same general rule apply, where the decision of the public authority which the litigant wishes to overturn is not one alleged to infringe any existing right but a decision which, being adverse to him, prevents him establishing a necessary condition precedent to the statutory private law right which he seeks to enforce?"

He concluded that the general rule should apply in such a case. He said:

> "The safeguards built into the Order 53 procedure which protect from harassment public authorities on whom Parliament has imposed a duty to make public law decisions and the inherent advantages of that procedure over proceedings begun by writ or originating summons for the purposes of investigating whether such decisions are open to challenge are of no less importance in relation to this type of decision than to the type of decision your Lordships have just been considering in *O'Reilly v. Mackman.*"

Now it is to be observed that, although Lord Bridge of Harwich founded his conclusion upon the need for such safeguards in cases of the kind which he described, he so formulated his question as to limit it to cases where the relevant decision was not one alleged to infringe any existing right of the litigant. The decision with which *Cocks v. Thanet District Council* was concerned did not affect private law rights; it was a decision which, taking the form it did, had the result that there did not come into existence certain private law rights which would have come into existence had the decision been different.

That is not the present case now before this court. Here the defendant is relying upon his pre-existing private law rights arising from his occupation of his council flat and from the previously established rent. His challenge to the decisions of the council is not a challenge to decisions which gave rise to those rights: he says, rather, that his pre-existing rights continue unaffected by the decisions which he challenges, which he contends were ultra vires and so void. So the ratio decidendi of the decision of the House of Lords in *Cocks v. Thanet District Council* provides no authority for the council's argument in the present case.

Nor, in my judgment, does the decision of the House of Lords in *Davy v. Spelthorne Borough Council* [1984] A.C. 262 provide any such authority. In that case the plaintiff (the respondent before the House of Lords), upon whom an enforcement notice had been served by the defendant council, issued a writ claiming an injunction restraining the defendants from implementing the notice, damages for negligence arising from negligent advice alleged to have been given to him by officers of the defendants, and an order that the notice be set aside. The defendants applied to have the writ and statement of claim struck out as an abuse

A of the process of the court. The Court of Appeal ordered that the first and third of the plaintiff's claims be struck out on the principle in *O'Reilly v. Mackman* [1983] 2 A.C. 237 but declined to strike out the claim for damages for negligence. The defendants appealed to the House of Lords against the refusal of the Court of Appeal to strike out that claim; but the House affirmed their decision. The leading speech was delivered by Lord Fraser of Tullybelton. It appears from his speech B (with which three of their Lordships agreed) that he, like the Court of Appeal, did not regard the plaintiff's claim in negligence as giving rise to a challenge to the enforcement notice. In the Court of Appeal Fox L.J. said, in a passage quoted by Lord Fraser of Tullybelton [1984] A.C. 262, 273:

> "'The claim, in my opinion, is concerned with the alleged C infringement of the plaintiff's rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim, so far as negligence is concerned.'"

With that opinion Lord Fraser of Tullybelton expressly agreed. He further said, at p. 274:

> D "In the present case . . . the respondent does not inpugn or wish to overturn the enforcement notice. His whole case on negligence depends on the fact that he has lost his chance to impugn it."

It followed that, since the enforcement notice must therefore stand, the interest in good administration which underlay the principle in *O'Reilly v. Mackman* was not affected. I infer that, in those circumstances, Lord E Fraser of Tullybelton considered that it did not matter that, for the purposes of proving that he had suffered damage by reason of the alleged negligence, the plaintiff would be seeking to establish that the enforcement notice was invalid. It follows that the decision in the case provides no basis for the council's argument in the present case.

There is, however, one passage in the speech of Lord Fraser of F Tullybelton to which I wish to refer. He said, at p. 274:

> "A further consideration is that if the claim based on negligence, which is the only one of the original three claims now surviving, were to be struck out, the blow to the respondent's chances of recovering damages might well be mortal. The court has no power to order the proceedings for damages to continue as if they had G been made under Order 53. The converse power under Ord. 53, r. 9 operates in one direction only—see *O'Reilly v. Mackman*, at p. 284A–B. So, if the present appeal were to succeed, the respondent's only chance of bringing his claim for damages before the court would be by obtaining leave to start proceedings for judicial review (now long out of time) and then by relying on Ord. 53, r. 7 to attach a claim for damages to his claim for judicial review. That H would be an awkward and uncertain process to which the respondent ought not to be subjected unless it is required by statute: see *Pyx Granite Co. Ltd. v. Minister of Housing and Local Government* [1960] A.C. 260, 286, *per* Viscount Simonds. In my view it is not."

I read this passage in Lord Fraser of Tullybelton's speech as expressing the opinion that the principle in *O'Reilly v. Mackman* should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or by way of defence.

For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court. But in any event I am satisfied that it cannot be right that his so proceeding should be held to amount to an abuse of process if the effect would be that his power to enforce his private law rights, or to rely upon them by way of defence, either would or might be adversely affected. I am unable to read Order 53 or section 31 of the Supreme Court Act 1981 as intended in any way to curtail a citizen's private law rights. Furthermore, as I read Lord Diplock's speech in *O'Reilly v. Mackman*, it was concerned with the abuse which arises where a person fails to employ a procedure for challenging public law decisions which has become, since 1977, free of disadvantages which were manifestly unfair to applicants. If, however, the council's argument in the present case were accepted, litigants could be required to employ a procedure which was manifestly unfair to them in that it would deprive them of the benefit of rights which were theirs by law. Take the case of a council house tenant who is required to pay rent following a notice of increase of rent which he wishes to challenge. If he does not pay the increased rent, he may risk the loss of his right to occupy the house. If he therefore feels compelled to pay the increased rent, he may thereafter wish to recover the increase in an action for money had and received. How is he to recover it? There is no power to award restitution on an application for judicial review. Then again, he may consult a solicitor; and he may be advised that the council has acted beyond its powers, and that he is not bound to pay the increase. So he does not do so, tendering only the previously established rent. He does not commence proceedings at that stage, perhaps because he does not wish to be involved in litigation if he can possibly avoid it. Some time later, long after the expiry of the three-month period specified in Ord. 53, r. 4(1), the council commences proceedings for possession. Is he to be deprived of a defence in those proceedings because it is too late to apply for judicial review? The council's decision to increase the rent may indeed be ultra vires and void. Is the council nevertheless free to enforce against its existing tenants claims for increased rent founded upon its void decision, and indeed claims for possession founded upon failure to pay the increased rent, simply because nobody has applied for judicial review within the requisite period of three months?

To me, these questions admit of only one answer. Indeed, so far as concerns delay in initiating proceedings for the enforcement of private law rights, the policy of the law is contained in the Limitation Act 1980

A (and other analogous statutory provisions) and in the equitable doctrine of laches. The argument of the council, if accepted, would result in the imposition in certain cases of a far more drastic period of limitation for the enforcement of private law rights than Parliament has yet envisaged; and, furthermore, would extend that period of limitation to defences, so enabling public authorities to enforce against citizens non-existing "rights" purporting to arise under decisions which are ultra vires and B effectively divesting such citizens of rights which are theirs by law. I cannot believe that the House of Lords intended the principle in *O'Reilly v. Mackman* [1983] 2 A.C. 237 to extend so far.

I do not see that the solution to the problem in the present case lies in the mere fact that here the challenge to the public law decision is made by way of defence. In my judgment the crucial question is whether C in his defence the defendant is (as a defendant usually will be) relying upon his private law rights. I will illustrate the point by contrasting the facts of the present case with those of a hypothetical case.

Let it be supposed that, in a case under the Housing (Homeless Persons) Act 1977, a housing authority provides temporary accommodation for a person, but, having subsequently concluded that that person became homeless intentionally, declines to provide him with permanent D accommodation. He refuses to leave the temporary accommodation and the authority seeks possession. The defence is that the decision not to provide permanent accommodation is ultra vires and void. Such a case would surely fall within the principle of *O'Reilly v. Mackman* [1983] 2 A.C. 237. The decision in *Cocks v. Thanet District Council* [1983] 2 A.C. 286 could not be distinguished simply because the challenge to the E vires of the authority's decision arose by way of defence. The crucial distinction between such a hypothetical case and the present case is, in my judgment, that the defence in the present case is founded upon the defendant's existing private law rights, whereas the defence in the hypothetical case would not be so founded. In the hypothetical case the riposte of the authority would simply be that, having regard to the authority's decision that the defendant became homeless intentionally, F he had no right to permanent accommodation and so no right to remain in the accommodation provided temporarily. But, in the present case, the defendant's case is that he has a secure tenancy and that, since the two notices of increase of rent are (as he says) ineffective, being derived from decisions of the council which are ultra vires and void, his private law rights in respect of rent are those which existed before the notices of G increased rent were served. On that basis there is no ground for depriving him of the benefit of his secure tenancy. He is therefore invoking the protection of his existing private law rights. Furthermore, it is plain that to require him (as the judge has done) to proceed by way of judicial review would not merely adversely affect the private law rights upon which he seeks to rely but effectively divest him of them, because the time has long since passed when he was free to make any such H application.

I fully appreciate that public authorities may be exposed to great inconvenience if they are unable to invoke the principle of *O'Reilly v. Mackman* [1983] 2 A.C. 237 in a case such as the present. But such

inconvenience may arise in many cases where a citizen successfully challenges action by a public authority affecting his private law rights under a decision by the public authority which proves to have been made ultra vires. The successful challenge by the citizen may be a source of great embarrassment for the public authority, as it contemplates all the earlier occasions upon which it has given effect to the ultra vires decision and the possibly immense cost to ratepayers of putting the matter right. Sometimes indeed, as experience has shown, it may even be necessary to legislate in order to extricate the public authority from its difficulties. But it does not in my judgment follow that there is an abuse of process by the citizen in invoking the assistance of the ordinary courts, by action or by defence, in order to enforce, or to claim the protection of, his private law rights. If it is thought that any limit should be placed upon citizens proceeding in this way, in the interests of good administration, then this is, in my judgment, a matter for Parliament.

For these reasons, I would allow the appeal.

PARKER L.J. By plaint dated 16 August 1982, the council commenced proceedings in the Wandsworth County Court against the defendant for possession of premises known as 25, Wheatley House. The claim for possession was based on ground 1 of Schedule 4 to the Housing Act 1980, which reads, so far as material: "Any rent lawfully due from the tenant has not been paid . . ." Combined with the claim for possession was a claim for rent allegedly lawfully due but unpaid.

The premises had been let to the defendant on a secure weekly tenancy from some date prior to March 1981 at which time the rent being charged was £12·06 per week. It is not disputed that such rent was lawfully being charged and was being duly paid by the defendant. On 2 March 1981, however, the council gave notice of increase of rent, stating that with effect from 6 April 1981 the rent would be £16·56 per week, an increase of a little more than 37 per cent. The defendant considered this increase unjustifiable, notified the council to this effect and refused to pay it. A further notice of increase dated 1 March 1982 stating that the rent would be increased to £18·53 from 5 April 1982 was given by the council. This increase also the defendant refused to pay. He continued, however, at all times to pay both the old rent of £12·06 per week and, as I understand it, an 8 per cent. increase which he considered was reasonable.

The arrears claimed by the council by their plaint is, effectively, the difference between the old rent of £12·06 plus the 8 per cent. supplement and the rents successively effected, or purported to be effected, by the two notices of increase.

The defendant (after first filing an inadequate "home-made" defence) filed a defence and counterclaim dated 11 January 1983.

[His Lordship read paragraph 6 of the defence, and continued:] The defence was repeated in the counterclaim, which claimed initially only a declaration that the two notices of increase were ultra vires void and of no effect. Subsequently, by amendment, a further and alternative declaration was sought—that the rent payable under the tenancy was £12·06 per week. The counterclaim adds nothing, save prayers for the

A formal relief which would be available in the event that the defence succeeded.

The response of the council to this pleading was an application to the county court dated 2 March 1983 to strike out the defence and counterclaim on the ground that it disclosed no reasonable defence or counterclaim or was scandalous, frivolous or vexatious or might embarrass or delay the fair trial of the action or was otherwise an abuse of the B process of the court.

The application does not reveal it, but the real, and indeed sole, basis of the application was that, if the defendant wished to challenge the validity of the notices of increase or the decisions on which they were based, as he plainly did, it was an abuse of process to do so otherwise than by application for judicial review in the High Court C under R.S.C., Ord. 53. The application was dismissed by the registrar, but on appeal to the judge an order was made on 15 November 1983 (1) staying the action, and (2) striking our paragraphs 5 and 6 of the defence and the whole of the counterclaim. The stay was to enable the defendant to apply for judicial review. This he has since done without success. This is hardly surprising, for the time for applying has long since expired.

D Both the registrar and the judge delivered fully reasoned judgments which have been of considerable assistance.

At the time of the hearings, both before the judge and the registrar, the decisions of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 had been reported, although at that time only in the Weekly Law Reports, E and the council's application was based squarely on these two cases, as is their argument on this appeal, which is brought by leave of the judge. Put in its simplest form, their contention is that the defendant's defence falls within the general rule enunciated in *O'Reilly v. Mackman*; that there is nothing special about the circumstances of this case to warrant a departure from that general rule; and, accordingly, that it is an abuse of the process of the court to challenge or impugn the council's decisions or F the notices of increase otherwise than by way of judicial review.

The defendant, on the other hand, contends (again put in abbreviated form) that there is nothing in section 31 of the Supreme Court Act 1981 or R.S.C., Ord. 53, which underlie the two decisions in the House of Lords, or in those decisions themselves to make it an abuse of process to set up any legal defence available to him even if that defence involves G challenging or impugning a decision, proceedings to challenge which in the High Court could only be initiated by way of an application for judicial review.

It is common ground that prior to the service of the first notice the defendant's position was that he had a right to remain in possession of the premises on paying rent therefor at the rate of £12·06 per week, and that that right has continued thereafter unless the rents specified in the H two notices were rents which the council were lawfully entitled to charge. It is further common ground that, certainly until 1977 when R.S.C., Ord. 53 was introduced and probably also until 1981, there was nothing whatever to prevent the defendant from challenging the notices

and the decisions upon which they were based by way of defence to an action by the council, whether in the county court or in the High Court. Finally, it is common ground that, if the rents specified in the notices were unlawful but the defendant had nevertheless paid them for a time, he would, until 1981, have been entitled to recover the overpayments as money had and received in an ordinary action in the High Court or county court, subject, so far as time is concerned, only to the relevant limitation period.

If the council's argument is correct, it would appear that, by way of provisions which were essentially procedural, a person's substantive rights under the law have been vitally affected. He can in such a case as the present only defend himself by way of separate proceedings in the High Court, and such proceedings, even if commenced within the time limited by Order 53, can only be brought by leave. If he, through no fault of his own, is out of time, he will additionally require the exercise of the court's discretion to obtain leave to apply out of time. Finally, he will require a further exercise of discretion in his favour, for the grant of the relief itself is discretionary.

If, on the other hand, he seeks to recover money to which at law he has a good claim, he will, if the council are right, again have to obtain the exercise of the court's discretion before he can proceed, and he will not be able in proceedings for judicial review to recover the overpayments, for, although it is possible to make a claim for damages on an application for judicial review, there is no provision in the Act or under the rules for making a claim for money had and received in such proceedings.

Such results appear somewhat startling, the more so when it is established law that the rights of the individual at common law cannot be taken away by legislation, save only by express words or necessary implication: see, e.g., *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* [1983] 1 A.C. 366.

It is unnecessary to examine the provisions of section 31 itself, or indeed Order 53, for it is not, and could not, be suggested that either by express words or by necessary implication they bar a litigant from proceeding by action for a declaration, much less from challenging a decision by way of defence. I therefore proceed at once to consider the authorities.

O'Reilly v. Mackman [1983] 2 A.C. 237

There are four preliminary points to be noted. (1) Lord Diplock expressed the question before the House in these terms, at pp. 274–275:

> "whether . . . it was an abuse of the process of the court to apply for such declarations by using the procedure laid down in the Rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Order 53 for an application for judicial review . . ."

The case was thus concerned solely with initiation of proceedings in the High Court where alternative procedures were available and not at all with proceedings in the county court or the raising of challenges by way

A of defence. Such matters are, moreover, not dealt with by the Supreme Court Act or Order 53. (2) The application was one seeking relief which, by whatever procedure it was initiated, was discretionary only (p. 275B–C). (3) None of the plaintiffs had any remedy in private law (p. 275E). (4) The remedy of the plaintiffs lay wholly in the field of public law which would only protect them from unfair treatment in the decision-making process (p. 275E).

B Having set out the foregoing matters, Lord Diplock dealt in detail with the development of the field of public law in comparatively recent times: the removal by Order 53 of the disadvantages which had previously faced applicants for orders of certiorari, prohibition and mandamus, and the addition of new remedies on applications thereunder for judicial review. He then observed that it was conceded that the fact C the applicants had, by proceeding by way of action for a declaration, been enabled to evade those protections against groundless, unmeritorious or tardy harassment that were afforded by Order 53 was a proper matter for a judge to consider when deciding whether to grant a declaration, but that it was contended that this could only be done at the conclusion of the trial. Having done so, he went on, at p. 284:

D "So to delay the judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections: viz., the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law."

E Notwithstanding this he says, at pp. 284–285:

"There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form F taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law."

G The public policy is thus a policy which is recognised as not being one of universal application. Further, the abuse of process under consideration was where an applicant was seeking a remedy against infringement of rights which were entitled to protection only in public law. This is repeated when Lord Diplock sets out the general rule in these terms, at p. 285:

H "it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to

proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

Finally, by way of illustration of possible exceptions to the general rule, he continues:

> "My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis—a process that your Lordships will be continuing in the next case in which judgment is to be delivered today [*Cocks v. Thanet District Council* [1983] 2 A.C. 286]."

Both the general rule itself and the exceptions to it relate to cases where the plaintiff, who is challenging a public law decision, does so by initiating proceedings in the High Court and selects for such purpose action by writ or originating summons for a declaration rather than the alternative by way of application for judicial review. They have no direct application to cases where the challenge comes by way of defence to an action on the part of the authority concerned which has chosen to sue the defendant either in the county court or the High Court. Nevertheless, the evasion of the Order 53 safeguards could clearly occur just as easily in such cases. There might well be cases in which, were the matter so raised, it would still be possible to say, as did Lord Diplock in *O'Reilly v. Mackman*, at p. 285, "They are blatant attempts to avoid the protections . . . for which Order 53 provides." To reach such a conclusion would, however, not be easy where the defendant had promptly informed the authority that he regarded the decision as invalid, where he had rested on an existing private law right which would, if his assertion was made good, defeat the claim made against him and where it could not be said that the defence as such was frivolous or vexatious.

To take an extreme case, in *Backhouse v. Lambeth London Borough Council* (1972) 116 S.J. 802, the council had passed a resolution to raise the rent of one council house which stood at £30·84 per month by £18,000 per week. The chairman of the council tenants brought an action for a declaration that the resolution was invalid and, not surprisingly, succeeded. If, however, the tenant had simply refused to pay and been sued by the council, I cannot suppose that it would be regarded as an abuse of process for the tenant to raise by way of defence that he was not liable as the rent was unreasonable and therefore unlawful, even if it had taken the council a year or more to summon the courage to sue him.

Before considering this further, however, it is necessary to refer to the decisions following *O'Reilly* in order to examine how the law has since developed.

A *Cocks v. Thanet District Council [1983] 2 A.C. 286*

In that case the plaintiff had commenced proceedings in the county court claiming a declaration that the defendants were under a duty to house him permanently under the Housing (Homeless Persons) Act 1977, and were in breach of that duty. The plaintiff further claimed a mandatory injunction and damages. The action was removed to the B High Court for determination of a preliminary issue whether the plaintiff was entitled to proceed with his claim in the county court or must proceed by way of application for judicial review under Order 53.

The plaintiff was there asserting a private right, but that right depended for its existence upon the authority first considering and then answering three questions. If, but only if, they were satisfied that the first two of such questions should be answered in the affirmative and the C third in the negative would there be an obligation to provide permanent accommodation (p. 291A–D and p. 293B). Lord Bridge of Harwich said, at p. 294:

> "Does the same general rule apply, where the decision of the public authority which the litigant wishes to overturn is not one alleged to infringe any existing right but a decision which, being adverse to D him, prevents him establishing a necessary condition precedent to the statutory private law right which he seeked to enforce? Any relevant decision of a housing authority under the Act of 1977 which an applicant for accommodation wants to challenge will be of that character. I have no doubt that the same general rule should apply to such a case."

E It is to be observed that in that case the *existence* of the private right depended upon a public law right decision in the plaintiff's favour first being made, whereas in the present case the defendant had an existing private law right which required for its *alteration* either a contractual variation of rent or a valid public law decision followed by the necessarily prescribed steps to implement it. Lord Bridge of Harwich concluded his F speech, at pp. 295–296:

> "As Lord Diplock has observed in *O'Reilly v. Mackman* [1983] 2 A.C. 237, the validity of a public law decision may come into question collaterally in an ordinary action. In such a case the issue would have to be decided by the High Court or the county court trying the action, as the case might be."

G Unfortunately, neither Lord Diplock nor Lord Bridge of Harwich said what they meant to be covered by the words "a collateral issue," although Lord Diplock envisages such an issue arising in the case of an action for infringement of a private right. Assuming that Lord Bridge was using the phrase "collateral issue" in the same sense as Lord Diplock, both were plainly considering cases where the challenger to the H public law decision was the plaintiff in an action. The position of the defendant was not considered at all. It is however to be observed that the public policy is apparently not one which will prevent a challenge being removed from the safeguards where the challenge arises as a collateral issue, albeit as it seems to me such a challenge made after the

passage of time might have just as disastrous results as a direct challenge by way of action for a declaration. A

I can find nothing in *O'Reilly v. Mackman* or *Cocks'* case which compels me to the conclusion that it is or could be an abuse of the process of the court to rely on a defence which, if established, would be a complete answer to the claim.

There remains one further decision of the House of Lords which it is necessary to consider in some detail before proceeding to examine whether the present state of the law is such that it is an abuse of process to raise such a defence. That case is *Davy v. Spelthorne Borough Council* [1984] A.C. 262. There the plaintiff had been served by the defendants with an enforcement notice in respect of the use of his premises. Legislation provided for an appeal against an enforcement notice to the Secretary of State and also provided that the validity of an enforcement notice should not, except by way of such appeal, be questioned in any proceedings whatever on any of the grounds upon which an appeal might be brought. The plaintiff had not appealed and the time for doing so had expired. In this situation he issued a writ against the defendants alleging that he had refrained from appealing as a result of negligent advice given by the defendants. He claimed (1) an injunction ordering the defendants not to implement the notice; (2) damages for negligence and (3) an order that the notice be set aside. B C D

On an application to strike out the action as an abuse of process the defendants failed before Sir Robert Megarry V.-C. but on appeal the Court of Appeal ordered the first and third claims to be struck out. The defendants appealed to the House of Lords seeking to have the second claim struck out also. There was no cross-appeal. The question before the House of Lords was therefore whether a claim against the defendants in negligence should be struck out. The negligence concerned was tortious only and thus an essential part of the cause of action was proof of damage. This the plaintiff could in theory establish without going into the validity of the enforcement notice, for, given that the duty of care and its breach were established, the plaintiff had been deprived of his opportunity to appeal. In practice, however, he would be concerned to establish the invalidity of the notice, for only by so doing could he prove substantial damage. E F

The defendants' appeal was out on two grounds, one of which was that the plaintiff was, by his action, questioning the validity of the notice and that this was prohibited by statute. The second ground was based on *O'Reilly v. Mackman* and it is only with that part of the decision which deals with that ground that I am presently concerned. G

The defendants' second contention was expressed by Lord Fraser of Tullybelton in the following terms, at p. 272:

> "that, when the respondent alleges that he had a good defence to the enforcement notice, he is asserting a right to which he is entitled to protection under public law, and one which therefore he cannot be permitted to defend by way of an ordinary action." H

The references to "defence" and "defending" cannot be taken to be of any significance, for the plaintiffs' assertion was that he could successfully

A have appealed and he was seeking as plaintiff to establish this in an ordinary action.

Lord Fraser of Tullybelton (with whose conclusion and reasoning Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman agreed) expressed his conclusion with regard to the above contention shortly as follows, at p. 273:

B "Although the argument was presented most persuasively, it is in my view not well founded. The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue. I cannot improve upon the words of Fox L.J. in the Court of Appeal when he said (1983) 81 L.G.R. 580, 596: 'I do not think that the negligence claim is concerned with "the C infringement of rights to which [the plaintiff] was entitled to protection under public law" to use Lord Diplock's words in *O'Reilly v. Mackman* [1983] 2 A.C. 237, 285. The claim, in my opinion, is concerned with the alleged infringement of the plaintiff's rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim, so far as D negligence is concerned.' It follows that in my opinion they do not fall within the scope of the general rule laid down in *O'Reilly v. Mackman*."

The reference to an absence of any issue of public law as a live issue was clearly to the fact that it was of the essence of the plaintiff's case as it remained after the Court of Appeal decision that he could no longer impugn the enforcement notice. The issue as to the *original* validity of E the enforcement notice was, however, a very live issue, for, if the plaintiff was not permitted to challenge it in the action, his claim for damages would, even if it could theoretically survive, be minimal. As Lord Fraser of Tullybelton said, at p. 274:

"So, if the present appeal were to succeed, the respondent's only chance of bringing his claim for damages before the court would be F by obtaining leave to start proceedings for judicial review (now long out of time) and then by relying on Ord. 53, r. 7 to attach a claim for damages to his claim for judicial review. That would be an awkward and uncertain process to which the respondent ought not to be subjected unless it is required by statute: see *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, G 286, *per* Viscount Simonds. In my view it is not."

The same considerations apply here. The defendant, having had his defence struck out, had as his only means of resisting the claim to possession and rent the obtaining of leave to start proceedings for judicial review (long out of time). Having sought and been refused leave, he will, if this appeal is dismissed, be left with no defence, even if H the rents sought to be imposed upon him are unreasonable and thus ultra vires. The authority will thereby be enabled to recover rent not lawfully due and to evict the tenant for not paying such rent.

The passage in Lord Fraser of Tullybelton's speech principally relied upon by the council is, at p. 274:

"It is quite clear from the speech of Lord Bridge of Harwich, with which all the other members of the House agreed, that the plaintiff was asserting a present right to impugn or overturn the decision—see p. 294D: 'the decision of the public authority *which the litigant wishes to overturn.*' (Emphasis added.) In the present case, on the other hand, the respondent does not impugn or wish to overturn the enforcement notice. His whole case on negligence depends on the fact that he has lost his chance to impugn it."

It is contended that in the present case the defendant is asserting a present right to impugn or overturn the notices of increase and the resolutions on which they are based, and that it makes no difference that he is doing so by way of defence. Indeed it is further contended that, if the defendant had, for example, not appreciated that the rent was unreasonable and ultra vires and had paid it for a considerable time, any claim to recover the overpayments as money had and received could only be raised after proceeding by way of Order 53 and obtaining first leave and then a favourable decision. In either case this would, in my view, to quote Lord Fraser again, "be an awkward and uncertain process to which the respondent ought not to be subjected unless it is required by statute: . . . In my view it is not." I add that the fact that it is not required by statute is expressly decided by the House in *O'Reilly v. Mackman.*

Lord Wilberforce, whilst agreeing with the conclusion of the other four members of the Appellate Committee, expressed his reasons in terms to which they refrained from expressing agreement. They did not however express disagreement. Had they expressed agreement, the present case would present no difficulty at all, for Lord Wilberforce said, at p. 277:

"It is indeed plain enough that issues which could be characterised as issues of 'public law' may arise in a number of contexts besides those where an attack upon, or review of, actions or omissions of public bodies is involved—cases, for example, where the invalidity of such action is set up by way of defence. . ."

I respectfully agree. There is no doubt that in the present case the defendant is impugning the resolutions and the notices, but he is doing so by way of defence. The statute does not require him, as a condition precedent to raising such a defence, himself to initiate proceedings by way of Order 53, and, in the absence of express House of Lords authority binding me so to do, I am unable to conclude that it is an abuse of the process of the court in which he has been sued not to do so. There is clearly no such binding authority.

I would add that I also respectfully agree with Lord Wilberforce's comments upon the need to proceed with caution when using the newly imported expressions "private law" and "public law." Failure to so do may result in the courts turning section 31 of the Supreme Court Act and Order 53 (which, whilst affording safeguards to the public authorities from harassment by tardy and unmeritorious challenges, were intended to remove the disadvantages to the public inherent in previous procedure)

A into instruments for depriving the public of rights of which they can only be deprived by statute.

Many questions arise for consideration. If, for example, public law is concerned only with the decision making process, then it embraces only a part of the field covered by Order 53. Applications thereunder, whether for orders for certiorari, mandamus, prohibition or declaration, may be made on the simple ground that the notice, decision, bye-law
B etc. was, as a matter of construction of a statute, outwith the powers of the authority concerned or was invalid because the correct procedure had not been followed. These have nothing to do with the decision making process. Is it to be said that such matters can only be raised, whether by initiation or defence, only by way of Order 53, and, if so, why? Suppose, for example, an authority, in pursuance of some notice
C or bye-law long since made, enter upon a person's property and remove his chattels and there is a sound argument that the notice is bad for non-compliance with statutory procedures or the bye-law ultra vires the relevant statute. Is it to be held an abuse of process to sue for trespass or conversion without first proceeding, or trying to proceed, under Order 53? Or suppose that an authority seeks to levy a rate which, on the true construction of its statute, it has no power to levy and the
D subject simply refuses to pay. Suppose further that, after protracted correspondence, the authority sue him for arrears. Can he not simply defend himself by setting up the construction of the statute?

I cannot think that the House of Lords intended bars to action or defence in such cases to flow from any of their three decisions, and in my view they did not do so. Thus far the House of Lords has gone so
E far only as to say that, in general, where a plaintiff is setting up either the infringement of a right which exists, if at all, only in public law, or an alleged private right, a condition precedent to the existence of which is the overturning by an attack on the decision-making process of a decision of an authority which infringes no private right, it is an abuse of process to do so otherwise than by application under Order 53. It may be that other cases will occur, but in my judgment this is not one of
F them.

In conclusion I would only say this. If I am wrong and *O'Reilly v. Mackman* [1983] 2 A.C. 237 should extend to some cases where the challenge is by way of defence, this is not in my view such a case. The defendant made his challenge promptly, made it clear that his reason for so doing was that he considered the rent demanded to be unreasonable
G and paid what he considered to be reasonable. In view of the size of the increase in relation to the rate of inflation, it is not surprising that he should have done so. Under section 111 of the Housing Act 1957 the local authority are empowered to make such "reasonable charges . . . as they may determine"—not such charges as they consider reasonable. It is true that by section 113(1A), which was added later by amendment, the authority is obliged from time to time to review rents and make such
H changes, either of rents generally or of particular rents, as circumstances may require, but I do not regard this as extending the power in section 113 so as to enable the authority to charge rents which are in fact unreasonable.

It is not suggested that the defendant has not an arguable case that the rents are unreasonable. He was in my view well entitled to sit back and leave it to the authority to sue him if they thought fit. He was under no obligation to initiate proceedings against them. However wide the general rule is, I cannot regard it as an abuse of process to raise his challenge in this case by way of defence. He has of course in that defence attacked not only the rent itself but the decision-making process and it is plain that, had he desired himself to initiate such a challenge, his proper course would have been to do so under Order 53, but this makes no difference. I would allow this appeal and set aside the order of the judge, with the result that the defence and counterclaim would be restored and the action would proceed.

I am fully conscious that the conclusion which I have reached may produce just those embarrassing results which the public policy enunciated by Lord Diplock is designed to avoid. Public policy has, however, been described as an unruly horse. A public policy which had the results contended for and interfered with the rights of the subject to defend himself when sued by any defence open to him or to bring an action for private law relief, save in the one case exemplified in *Cocks v. Thanet District Council* [1983] 2 A.C. 286, would in my view be more than unruly: it would have bolted and both outrun the legislature and overturned long-standing principles laid down by the House of Lords.

ACKNER L.J. Before we leave this appeal, we, that is all three of us, would like to repeat the point that we made at the outset of the hearing. But for judicial intervention, this appeal would have been heard by a two-judge court. Robert Goff L.J. and I took the initiative, having read the papers a few days before the appeal was due to be heard, to ask that a third judge be added to the court. We did so because we considered that the appeal clearly raised matters of general importance of some complexity and was one upon which there could well be a difference of judicial opinion: there already had been in the courts below. Sir John Donaldson M.R. has pointed out in the practice note on the new procedure in the Court of Appeal, *Practice Note (Court of Appeal: New Procedure)* [1982] 1 W.L.R. 1312, 1318 that, where an appeal falls within the jurisdiction of a two-judge court but raises issues of such complexity or general importance that a three-judge court is desirable, the parties should apply to the registrar for a special listing before a three-judge court, an application which of course needs to be made with discretion. It appears that the entitlement to make such an application is being overlooked by the Bar. It was, for example, only a few weeks ago that, on the initiative of Purchas L.J. and myself, a third judge (coincidentally Parker L.J.) was again added to the court to hear a commercial interlocutory appeal of considerable complication, involving continental and American companies, concurrent proceedings here and in New York with very large sums at stake.

It is to be hoped that in the future counsel at an early stage, preferably when settling a notice of appeal, will give special consideration to this question and, where appropriate, make the necessary application. We of course do not intend by these observations to encourage

A applications which do not come within the practice direction. However, it should not be left to the judiciary to take the initiative—not only because we do not always have an opportunity to read the papers sufficiently well in advance of the hearing to be able to add in time a third judge, but also because the complexities and/or the importance of the appeal, while well known to counsel, may not be apparent on a first reading of the papers.

B

Appeal allowed with costs.
Leave to appeal.

Solicitors: Wandsworth Legal Resources Project; Solicitor, Wandsworth Borough Council.

C

[Reported by Y. H. TAN, Barrister-at-Law]

D

APPEAL from the Court of Appeal.

This was an appeal by the appellants, the Mayor and Burgesses of

E the London Borough of Wandsworth, from the judgment dated 29 March 1984 of the Court of Appeal (Robert Goff and Parker L.JJ., Ackner L.J. dissenting) allowing an appeal by the respondent, Paul Winder, from an order dated 15 November 1983, of Judge White sitting at Wandsworth County Court by which he struck out paragraphs 5 and 6 of the respondent's defence and the whole of his counterclaim as being an abuse of the process of the court.

F

On 16 August 1982 the appellants brought proceedings against the respondent claiming possession of the council property let to him and arrears of rent relying on ground 1 of Schedule 4 to the Housing Act 190 (rent due not paid). By paragraphs 5 and 6 of his defence the respondent contended that the resolutions of the appellants increasing council rents made on 10 February 1981 and 9 February 1982 are ultra

G vires and void. By counterclaim he sought declarations to the effect that accordingly the notices of increase were void and of no effect.

The facts are stated in the opinion of Lord Fraser of Tullybelton.

Anthony Scrivener Q.C. and *Geoffrey Stephenson* for the appellants. The raising of the issue that the notices of increase in rent were void and of no effect, by way of defence and counterclaim in the action, is an

H abuse of the process of the court, since it should and could have been raised by way of judicial review under R.S.C., Ord. 53. The issue in this appeal is whether the principles in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and in *Cocks v. Thanet District Council* [1983] 2 A.C. 286 apply to

the defence and counterclaim. In effect, the respondent, who has made a broad attack against the appellant's contentions, has raised the issue whether the ambit of the principle laid down in *O'Reilly v. Mackman* [1983] 2 A.C. 237, should be narrowed.

The relevant legislation is at two levels. There is the Housing Act 1957, which, inter alia, provides a statutory duty on the local authority to review rents. Secondly, the Housing Act 1980, which governs the relationship between a local authority and a landlord and tenant.

It is necessary to consider the special position of local authorities. A local authority, being a body governed entirely by statute, is subject to the ultra vires rule. Because it is in receipt and is a custodian of public funds, it owes a fiduciary duty to its ratepayers. Further, it is a democratically elected body, and therefore answerable to the ballot box for its decisions; and accordingly its policies may be reflected in many of the decisions it makes.

There are a number of decisions which are made by public bodies which affect members of the public over which the latter have no public rights at all, for example, the charge made per unit for the supply of gas and electricity. The only right is contractual. But an unusual feature in the development of public law in England has been that members of the public who have a sufficient interest may attack a decision made by a public body which affects them by utilising the procedure of judicial review. This operates within the principle adumbrated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. There can be protection of members of the public both in public law and in private law.

Section 111(1) and (2) of the Housing Act 1957 provides for the general management, regulation and control of local authority housing. Section 113(4) imposes a duty on the local authority to review the rent from time to time of its houses. In *Luby v. Newcastle-under-Lyme Corporation* [1964] 2 Q.B. 64, 70–71, Diplock L.J. held that the expression in section 111(1), "reasonable charges" for the occupation of council houses meant "reasonable" in the *Wednesbury* sense [1948] 1 K.B. 223.

The Housing Act 1980 introduced a new term into the law relating to council tenants, namely, "secure tenant." In some ways the provisions relating thereto mirror the protection given to the private tenant under the Rent Restriction Acts. For the relevant provisions of the Housing Act 1980: see sections 33, 34(1), (2), (3), 35, 36, 37, 38, 39, 40(1)–(8), 41(1), (2), 43, 44(1), 47, 48, Schedule IV. In these provisions it is section 28 which defines a "secure tenancy." Section 40 is also of critical importance; for unlike the agreement between a private landlord and tenant, Parliament has here set out a complete statutory code in respect of a council tenancy. The terms are important, for it gives the landlord overriding rights over and above the contract: see, for example, section 40(4), section 41(1), (2). Section 43 relates to another important aspect of the code. Since the Housing Act 1980 sets up a special statutory code, the question arises where does the tenant's protection lie? As to section 40, Parliament has provided for a variation of the terms of the tenancy. Under this provision, a local authority can vary its rent simply by giving

A the requisite notice under the Act to the tenant. This is quite different from a contract of tenancy in the private sector, where such a variation can only be done where the contract between landlord and tenant so provides. It is true that section 40(3) provides for agreement between the parties for changes in rent. But section 40(4) enables the local authority to alter rent outside the terms of the contract, without agreement. This is to enable it to meet the requirements of section 111
B and section 113 of the Housing Act 1957.

If a local authority increases the rent pursuant to section 40(4) of the Act of 1980, the only way it can be challenged by the tenant is by way of judicial review. This is an additional protection given to the secure tenant by the courts; for without the remedy of judicial review, the secure tenant under the Act of 1980 would have no redress at all in
C respect of an increase of rent under section 40(4).

Luby v. Newcastle-under-Lyme Corporation [1964] 2 Q.B. 64, is a useful authority. It indicates clearly that the tenant's attack in this field must be on *Wednesbury* principles [1948] 1 K.B. 223. It shows that a local authority, being a public body, has to take into consideration its public duties and strike a balance between its duty to the ratepayers and its duties towards its council tenants. Further, it shows that the tenant's
D remedy is by way of judicial review.

In the present case, the respondent tenant is not content to allege that his increase in rent is unreasonable, but he also contends that the whole resolution of the local authority relating to review of rents is ultra vires and void.

In summary, the local authority has a statutory duty to provide
E accommodation. It has a statutory power under section 111 of the Housing Act 1957 to manage properties provided for that purpose, including the right to make reasonable charges for accommodation. In addition, it has a duty to review rents under section 113(4). In exercising that power and duty, it will consider the interests of ratepayers, tenants, its policies and other social considerations. The decision that the local authority makes relating to rents affects all tenants. The local authority
F has a very wide discretion. It follows that the only attack that can be made on this decision is on *Wednesbury* based principles [1948] 1 K.B. 223. The Housing Act 1980 enables a local authority to increase rent unilaterally. That is in the contemplation of an entire code. The only protection that a tenant will have is to attack the resolution relating to such increase of rent itself. If the remedy depends on *Wednesbury*
G principles, it follows that the court in reaching its decision has to exercise its discretion.

In *O'Reilly v. Mackman* [1983] 2 A.C. 237, 275c, the relief sought was discretionary only. It will be seen from Lord Diplock's speech that it was the courts which enlarged the powers to protect the citizen by way of the prerogative writs, later orders. Parliament did not intervene until the passing of the Tribunals and Inquiries Act 1971 which repealed the
H Tribunals and Inquiries Act 1958. Before 1977, the subject could go either by way of judicial review or by way of declaratory relief. Both are discretionary remedies. The choice was the citizen's. But since in going by way of judicial review the court's decision against a public body

might affect a great number of persons, it is right and proper that such a remedy should be applied for expeditiously, as R.S.C., Ord. 53 provides. In *O'Reilly v. Mackman* [1983] 2 A.C. 237, 285, Lord Diplock refers to rights protected by public law. In the present case, the only right that the secure tenant has relating to an increase of rent is that contained in section 40(4) of the Housing Act 1980, and this is in the realm of public law, and so any remedy is by way of judicial review.

Compare the approach of Lord Bridge of Harwich in *Cocks v. Thanet District Council* [1983] 2 A.C. 286 with the circumstances of the present case where, as in that case, the local authority as a housing authority is charged with a public law function. The situation adverted to by Lord Bridge [1983] 2 A.C. 286, 292H, applies to the present case. As to his observations at p. 293A, the present case is less strong, because the present respondent has no private law right to complain of an increase in rent. He has no remedy in private law. As to p. 294F, the facts there stated are present here to a far greater extent. A grant of declaratory relief would affect a large number of persons, namely, all other council tenants in the Borough of Wandsworth. A tenant who cannot pay his rent is not without relief. He can apply to the Social Services for assistance in this regard.

Davy v. Spelthorne Borough Council [1984] A.C. 262 was a very different case from the present, for it was in the realm of private law, whilst a decision made under section 111 of the Housing Act 1957 is in the realm of public law. For a discussion of the expressions "private law" and "public law" see the speech of Lord Wilberforce [1984] A.C. 262, 276–278. Lord Wilberforce approaches the question of the difference between these two concepts as one of a difference of remedies. This is correct. If it is necessary to consider the difference between the two as a question of substantive law, then for a decision to come within the realm of "public law" it must satisfy the following three tests: (i) the decision must be made by a public body; (ii) the public body must be exercising a statutory duty of statutory power conferred upon it or be purporting so to do; (iii) the decision can only be queried by a review process.

The local authority has a statutory right to vary a council tenant's rent unilaterally and outside the contract: section 40(4) of the Housing Act 1980. The tenant has no private law remedy to challenge the variation. The tenant has a public law remedy, by challenging *the decision* of the local authority to vary, made pursuant to the power in section 111 of the Housing Act 1957, and pursuant to the duty imposed by section 113 of the Act of 1957. Since the tenant is challenging a public law function, he only has "review" remedies: see *Cocks v. Thanet District Council* [1983] 2 A.C. 286, 292F–H. If the decision of the local authority is set aside in the present case it will have serious repercussions on the local authority, ratepayers and others, and third parties will be affected. In performing this public law function, "speedy certainty" is required, and the local authority should be protected from "harassment" on public policy grounds. If these public policy grounds exist, they apply equally where the challenge to the decision is raised by way of defence and/or counterclaim, and the court's powers to prevent abuse are not limited in this event. The tenant in these circumstances has an effective

A remedy by way of judicial review to challenge the decision. The only "impediments" are the need for leave and the requirement to commence proceedings within three months, unless time is enlarged. These "impediments" must be weighed against the factors outlined in the summary above when deciding as a matter of discretion whether it would be an abuse of process to allow him to use another procedure. B Taking all the above factors into consideration, it is the appellants' contention that paragraphs 5 and 6 of the defence and counterclaim should be struck out as a matter of discretion, as being an abuse of the process of the court, because (a) the respondent was challenging a public law decision with extensive repercussions in public law; (b) he had applied for leave to apply for judicial review out of time, and his application has been dismissed; (c) he could have applied timeously for C judicial review, and there was no reason why he could not have so applied.

For the relevant history relating to proceedings such as the present against public authorities, see the Limitation Act 1623 (21 Ja. 1, c.16); the Public Authorities Protection Act 1893 (56 & 57 Vict. c.61); rule 21 of the Crown Office Rules 1906; *Roberts v. Metropolitan Borough of* D *Battersea* [1914] 110 L.T. 566; section 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938; section 21 of the Limitation Act 1939; the Law Reform (Limitation of Actions) Act 1954 and *Wade, Administrative Law* (1982) 5th ed., p. 677. [Reference was also made to *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529.]

John M. Bowyer and *Andrew Lydiard* for the respondent. These E proceedings arise from an application to strike out and such applications only succeed in plain and obvious cases. This appeal has been presented on reliance and analysis of the Housing Act 1980, along with the Housing Act 1957. The argument based on section 40 of the Housing Act 1980 was not a matter raised in the Court of Appeal, nor is it raised in the appellants' printed case.

The argument for the respondent falls under three main heads: F (1) The House is invited to reconsider its decisions in *O'Reilly v. Mackman* [1983] 2 A.C. 237, and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, under the *Practice Direction* [1966] 1 W.L.R. 1084. (2) The respondent's right to ask for a declaration is, in the circumstances, a right in private law, and therefore *O'Reilly v. Mackman* [1983] 2 A.C. 237, is distinguishable. (3) *O'Reilly v. Mackman* is also distinguishable G on the grounds that the respondent raises the point by way of defence.

(1) The basis upon which the House is invited to reconsider the very recent decisions in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, is that in reaching them and formulating the principle of public policy there adopted, the House was not, so far as the respondent's advisers have been able to ascertain, H invited to consider the policy of the legislature with regard to proceedings against public authorities as expressed in the Law Reform (Limitation of Actions) Act 1954 and continued by the Limitation Act 1980, namely, to assimilate them (with exceptions not presently material) to proceedings against parties other than public authorities. It will be seen from Mr.

Stephen Sedley's argument in *O'Reilly v. Mackman* [1983] 2 A.C. 237, 271H–272A, that the provisions of the Act of 1954 were not directly before the House.

Section 1 of the Act of 1954 repeals section 21 of the Limitation Act 1939, which laid down a statutory time limit of one year for actions for any act done in pursuance, or execution, or intended execution of any public duty or authority. Section 21 applied to actions for declarations of nullity of decisions affecting the rights of citizens: *Coventry v. Wilson* [1939] 1 All E.R. 429, 451A–452A, 453G–H, and *Hogg v. Scott* [1947] K.B. 759, 767. By the repeal of section 21, Parliament evinced its intentions, and proceedings in respect of acts done in intended execution of any public duty or authority, including actions for declarations of nullity, should not be subject to special periods of limitation. Discrimination in favour of public authorities was ended: see *Wade, Administrative Law,* 5th ed., p. 677. Parliament's intention was that delay in commencing proceedings against public authorities should be dealt with according to any statutory limitation period applicable to the cause of action or, when there is no such statutory period, according to applicable common law principles.

No statutory period of limitation applied or applies now for actions for declarations against parties other than public authorities. But there were and are settled principles on which a declaration might be refused in discretion by reason of undue delay in commencing proceedings. Section 36(2) of the Limitation Act 1980 expressly left intact the court's equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise (including laches). The declaration may not be an equitable remedy, but it is a discretionary remedy. The principles are similar to the equitable jurisdiction including laches. The intention evinced by Parliament in the Act of 1954 was that these principles should govern actions for declarations against public authorities, including actions for declarations of nullity of decisions affecting the rights of citizens such as those sought in *Coventry v. Wilson* [1939] 1 All E.R. 429 and *Hogg v. Scott* [1947] K.B. 759.

The effect of the decisions in *O'Reilly v. Mackman* [1983] 2 A.C. 237, and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 is not, strictly speaking, to impose any limitation period, but merely to require the proceedings to establish that a public authority infringed rights entitled to protection in public law must normally be begun by judicial review proceedings pursuant to application for leave made within the short period of three months after the impugned decision—unless discretionary extension of time is obtained.

As to laches, a remedy by way of a declaration is a statutory remedy, and one to which the court will apply broad equitable principles and to which the doctrine of laches applies: see *Nwakobi v. Nzekwu* [1964] 1 W.L.R. 1019, 1022, 1024 and *Grunwick Processing Labatories Ltd. v. Advisory, Conciliation and Arbitration Service* [1978] A.C. 655, 695D, *per* Lord Diplock. If there is a matter of consequence to the public authority, then that is an incentive to get the public authority to the court at the earliest possible moment: see *Ealing London Borough v. Race Relations Board* [1972] A.C. 342.

A Where Parliament by statute has given a clear indication of what public policy is to be in a particular sphere of the law (as it has as stated previously in relation to time limits for proceedings against public authorities), the courts will not develop public policy in that field in a manner which diverges from that indication, even though the legislation setting out the public policy has no direction application to the problem before the court: *Universe Tankships Inc. of Monrovia v. International* B *Transport Workers Federation* [1983] 1 A.C. 366, 384D–388G, 391E–F, 397B–C, 401D–G; *Birkett v. James* [1978] A.C. 297, 320C–321A, 325G, 328F–329A, 332B–F, 334A–C, 336E. The public policy enunciated in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, does, by the resulting short time period for commencement of proceedings against public authorities, develop the C law in a manner inconsistent with the policy indicated by Parliament in the Limitation of Actions legislation referred to previously (see the judgment of Robert Goff L.J., ante pp. 480H—481B).

(2) The development of the law as to judicial review in recent cases (including *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, accepting both as rightly decided) has had no effect upon the citizen's opportunity to assert private rights, D and that is not what the respondent's defence and counterclaim does. The majority of the Court of Appeal decided these matters in his favour. Ackner L.J., dissenting, held that the defence and counterclaim set up no private rights or, alternatively, if it did, the issue of public law arose at one remove and this was of no significance.

In *O'Reilly v. Mackman* [1983] 2 A.C. 237, this House enunciated a E general rule that it was contrary to public policy to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action (p. 285E). As formulated in that case, the rule does not prevent a person from seeking to establish that a decision of a public authority has infringed or threatens to infringe rights derived from private law. *O'Reilly v. Mackman* [1983] 2 A.C. 237 was not such F a case (p. 275E), and there is no authority for extending the general rule to such a case.

It makes no difference that in such a case the validity of the decision of a public authority may be brought into question. It was expressly recognised in *Cocks v. Thanet District Council* [1983] 2 A.C. 286, 295H–296A, that the validity of a public law decision may come into question G collaterally in an ordinary action, and in such a case would have to be determined by the court of trial. There are many examples of this occurring: (a) If a public authority makes an unlawful demand for money, the citizen can defend any action brought, on the ground that the demand was unlawful. It is well recognised that such a defence to a claim by a public authority which is challenged as unlawful raises a public law issue of the validity of the alleged public law basis of the H claim collaterally: see *De Smith, Judicial Review of Administrative Action,* 4th ed. (1980), p. 22; *Wade, Administrative Law,* 5th ed., p. 296, 4th ed. (1977), p. 283, and the cases there cited, and more recently, *South West Water Authority v. Rumble's* [1984] 1 W.L.R. 800, and *An*

Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board [1984] 2 C.M.L.R. 584. Alternative courses available to the citizen are to seek a declaration that the demand is unlawful and ultra vires or, if he or she has paid, bring an action for money had and received. In each of these three alternatives (defence of unlawful demand, seeking a declaration to the same effect, and action for money had and received), the citizen is relying upon his rights in private law as is made plain by the analysis of the decision in *Dyson v. Attorney-General* [1911] 1 K.B. 410 adopted in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, 483G–H, 494E, 496D, 499G–500C, 501H–502C. (b) In an action for false imprisonment against the police officer who relies by way of defence on a statutory power of arrest, the court of trial must determine whether he has acted in the scope of the executive discretion conferred upon him. In doing so, the court applies *Wednesbury* principles [1948] 1 K.B. 223, which are applicable not only in proceedings for judicial review, but also for the purpose of founding a cause of action at common law for damages for false imprisonment: see *Mohammed-Holgate v. Duke* [1984] A.C. 437.

The foundation of the decisions in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 is the certainty principle in the field of public law. It would be unfortunate if the House in the present case were to use the word "collaterally" in a different sense than its use in those two cases. See the comment in *Wade, Administrative Law,* 5th ed., p. 574, on the judgment of the Court of Appeal in *O'Reilly v. Mackman* [1983] 2 A.C. 237.

[LORD FRASER OF TULLYBELTON said that there was no need to develop the argument on the second point further. Their Lordships now desired to hear the argument relating to the respondent's third point.]

(3) *O'Reilly v. Mackman* [1983] 2 A.C. 237 is distinguishable because the respondent raises the issue of ultra vires by way of defence. There are four submissions: (i) there is a well-recognised defence of ultra vires to a public authority claim; (ii) section 31 of the Supreme Court Act 1980, R.S.C., Ord. 53, *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, either singularly or collectively, have not changed the position in relation to that well-known principle; (iii) the decisions in *O'Reilly* and *Cocks* should not include, and indeed cannot be extended to, such a defence; (iv) striking out such a defence so that judicial review can or should take place is unacceptable for various reasons.

(i) The validity in law of the defence raised by the respondent's defence and counterclaim (if he establishes the pleaded facts) was recognised in the judgment of the county court judge and has never been in issue in the appellants' application to strike out that pleading (see also the judgment of Parker L.J. in the Court of Appeal). The right to resist a claim by a public authority by a defence that it is acting ultra vires or unlawfully in making the claim is very well established by a line of authority, much of it growing from *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, 171B–G, 195B, 196B, 206D–E, 207H–208A, 214E–F, 215A–D, and including, in the Privy Council, *Attorney-General v. Ryan* [1980] A.C. 718, 729H–730D, 731H–732D and

A *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, 172C–E. Recent cases in the Court of Appeal in which such defences have succeeded in defeating money claims by public authorities include *Agricultural, Horticultural and Forestry Industry Training Board v. Kent* [1970] 2 Q.B. 19 and *South West Water Authority v. Rumble's* [1984] 1 W.L.R. 800. See also *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1.

(ii) Section 31 of the Supreme Court Act 1981 and R.S.C., Ord. 53, B deal only with the initiation of proceedings and neither explicitly nor implicitly with rights of defence (or even of set off and counterclaim). In this respect, they can be contrasted with the provisions of section 28 of the Limitation Act 1939 (now repealed) and section 35 of the Limitation Act 1980. The radical revision of R.S.C., Ord. 53, in 1977–1981 made no change in substantive law: *Reg. v. Inland Revenue Commissioners,* C *Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, 631A, 644H–645A, 647G–648D, 664E. There was a deliberate decision not to extend judicial review to cases where the invalidity of administrative action was set up by way of defence: see *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 276E–G, 277F–G, *per* Lord Wilberforce. It is a change of substance to remove a right to a defence and substitute an opportunity to take proceedings. Thus before D the reforms in 1977 the tenant in *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1 had a *right* to his defence. If the appellants are correct on this issue, then the tenant has lost the right. At the best he has an opportunity to persuade a judge of the Queen's Bench Division of the High Court to allow him to bring proceedings by way of judicial review.

E The principles as to abuse of process formulated and applied in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 turned entirely upon the provisions of section 31 and R.S.C., Ord. 53: see [1983] 2 A.C. 237, 280D–285E, and [1983] 2 A.C. 286, 294E, 295C–F. The procedural analysis which is the basis of the *O'Reilly* decision (applied in *Cocks*) and its formulation of policy does not apply to defences: [1983] 2 A.C. 237, 280B–285E. It is F emphasised that section 31(1) of the Supreme Court Act 1981 does not apply to defences by its express terms. R.S.C., Ord. 53, rule 1, is in identical language.

(iii) On the "should not" aspect of this point, the respondent draws attention to the possible delay and uncertainty being overcome by the doctrine of laches and the availability to the public authority itself of an G ordinary action for the declaration that the passing of the resolutions in question was not ultra vires. If the appellants' contentions succeed, the effect will be to extinguish retrospectively, as rights, rights of defence invocable without specific limit of time and to substitute for them discretionary remedies recourse to which is subject to short and rigorous time limits. That is a result which could only be accomplished by clear words in the statute or rule relied upon: *Pyx Granite Co. Ltd. v.* H *Ministry of Housing and Local Government* [1960] A.C. 260, 286, 290–91, 304; *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 274H, 279C–D; *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, *per* Lord Reid; and *Reg. v. Bracknell Justices, Ex parte*

Griffiths [1976] A.C. 314, 331, *per* Lord Edmund-Davies. The respondent also supports the proposition that the doctrine of *O'Reilly v. Mackman* [1983] 2 A.C. 237 cannot be extended to a defence of the present nature. If the appellants are correct, there will be a category of legal right which cannot be asserted by way of defence, but only established first in another jurisdiction.

(iv) The course adopted by the county court judge and urged by the appellants, namely, staying county court proceedings so that the defence that the appellants' demand is unlawful can be explored in judicial review proceedings if the respondent obtained leave to bring such proceedings, is (a) inconsistent with the provisions of and/or the public policy expressed in section 74 of the County Courts Act 1959, and of section 49 of the Supreme Court Act 1981, and (b) would subject the respondent to an awkward and uncertain process to which he ought not to be subjected unless that is required by statute: *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 274G–H, 276F–G, and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286, 290–91, 304.

Finally, in the alternative to the submission that section 31 of the Supreme Court Act 1981, R.S.C., Ord. 53, and *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286 have no effect on rights of defence, the respondent submits that they have no such effect where the defence raised is a "true defence" or "pure defence" in the sense in which those expressions are used in *Henriksens Rederi A/S v. T.H.Z. Rolimpex* [1974] Q.B. 233, 245G–249A, 251D–252F, 260C–261C. Such a defence can, as the judgments in that case showed, be relied upon even where there is an express statutory provision that no action shall be brought in respect of it. The defence raised by the respondents' pleading in this action is such a true or pure defence, being wholly intrinsic to the claim made in the action.

In summary, a secure tenant has rights and liabilities in private law according to the terms of his secure tenancy. His rights include the right to occupy the demised premises. His liabilities include a liability to pay rent. The rent may be varied unilaterally by the landlord by a valid, intra vires, notice of variation pursuant to the statutory power conferred by section 40(4) of the Housing Act 1980. It is ultra vires the council to make unreasonable charges for a secure tenancy (section 111 of the Housing Act 1957). A purported notice of increase purporting to increase the rent to an unreasonable level is ultra vires the council. It is therefore void and a nullity. Such a notice of increase is not a valid notice of increase within section 40(4). It is incapable of affecting the tenant's rights or liabilities under his secure tenancy. His pre-existing liability to pay rent at the level in force before service of the notice is unaffected. If the council sues to recover an unreasonable rent and/or for possession relying on alleged arrears, the tenant is entitled by way of defence to deny any indebtedness. In so doing the tenant is not relying on rights protected only in public law; he is asserting and defending his private law rights. In order to determine what are the private law rights and liabilities of the tenant the county court must determine the public law issue whether the notices of increase are valid. The challenge to the

A validity of the notices is therefore a collateral (public law) issue in an ordinary action concerning the (private law) rights and liabilities of landlord and tenant. The general rule requiring such challenges to be made under R.S.C., Ord. 53, does not apply. The tenant could equally well commence an action for or counterclaim for a declaration that his private law rights and liabilities are unaffected by the purported notice of increase.

B *Lydiard* following. (1) In the present case, if the defence is successful on the merits, then there is no question of the court exercising its discretion. The respondent must win as of right: see *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 2 C.M.L.R. 584, 588, para. 13, 589, para. 15. The position of a defendant cannot be worse than that of a plaintiff. (2) R.S.C., Ord. 53, is not C suitable in the circumstances of the present case because the defence raised substantial issues of fact which cannot conveniently be determined in judicial review proceedings: *Reg. v. Jenner* [1983] 1 W.L.R. 873, 877. (3) As to the justice of R.S.C., Ord. 53, being applied to the present case, there is a peculiar injustice in relation to a poor litigant, such as the respondent who has to rely on legal aid. The risk to an impecunious litigant is that the legal aid committee might conclude that the sum D involved is too small to justify the grant of legal aid, on the ground that a private litigant would not bring proceedings for so small a sum.

Scrivener Q.C. in reply.

[LORD FRASER OF TULLYBELTON said that their Lordships did not wish to hear the appellants on the respondent's first submission.]

It is not disputed that *O'Reilly v. Mackman* [1983] 2 A.C. 237, E cannot interfere with private law rights. Accordingly, it must first be ascertained whether the present claim involves a private or public law remedy. For this purpose it is necessary to consider the pleadings. The defence discloses that it is the decision of a local authority which is being attacked. The registrar will then know that it can only be a review-type approach. It is apparent that it will not be open to the public authority to plead limitation in this case, for the Limitation Acts F do not apply in this type of case. The defendant has to set up here a specific defence of ultra vires and the onus is on him to prove that defence.

In the present case, the attack is on the decision of a public authority. In *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1, the attack was on the notice to quit served on the tenant. That is a G considerable difference. The *Cannock Chase* case was rightly decided, for it was not concerned with a public law attack. In the present case, it is an attack on a public law claim albeit it affects the respondent's rights in private law; for it is a claim for an increase in rent.

Assuming this is an action for a declaration, the local authority could not plead the Limitation Act. The respondent, if going for judicial review, which again is a discretionary remedy, is subject to the three H month period and the necessity to obtain leave. It follows that if the respondent is right, by bringing an action for a declaration a defendant could sidestep the provisions of section 31 of the Supreme Court Act 1981 and judicial review would become a dead letter against public

authorities. It is for this reason that the House should consider *O'Reilly v. Mackman* [1983] 2 A.C. 237 in this connection. The object of section 31(6) was not to assist applicants, but to prevent the harassment of public authorities. [Reference was made to *Reg. v. Bromley London Borough Council, Ex parte Lambeth London Borough Council, The Times,* 16 June 1984, Hodgson J.]

A section 31(2) type of declaration is the correct type of declaration to be sought in relation to public law rights. It cannot be right that if judicial review by way of a declaration is refused against a public authority, that an applicant can then commence fresh proceedings by way of an action for a declaration in the Chancery Division. The appellants are not attempting to take away the respondent's rights, but they do state that his right to proceed against a public authority is governed by the decision of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237. If the above submission be correct, can it be right for a defendant to sit back and do nothing? On a point of procedure, *Halsbury's Laws of England,* 4th ed., vol. 36 (1981), para. 30, n. 2 shows that the plea of "never indebted" was abolished in 1889. See also *Odgers, Pleading and Practice,* 19th ed. (1966), p. 83.

If the defendant founds his defence on the invalidity of specific resolutions of the local authority, he must aver them. The onus is on the defendant. In *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1, 7E, 10D, the local authority called no evidence. As to the limits of a declaration, *Wade, Administrative Law,* 5th ed., p. 529 is adopted.

A defence such as the present does not suffice against the claim of a public authority because it still leaves the resolution of the public authority intact. But it does not avail the defendant to put in a counterclaim, for the decision of the local authority is not confined to him, but includes all other council tenants.

In conclusion, there is a presumption of regularity in relation to the decisions and resolutions and acts of a public body: *O'Reilly v. Mackman* [1983] 2 A.C. 237, 285A. Further, the purpose of section 31 of the Supreme Court Act 1981 is to maintain the good administration of public law. [Reference was also made to *Wade, Administrative Law,* 5th ed., pp. 304–306, 308–310.]

Their Lordships took time for consideration.

29 November. LORD FRASER OF TULLYBELTON. My Lords, the question in this appeal is whether it is an abuse of process for an individual, who claims that his existing rights under a contract have been infringed by a decision of a public authority, to challenge the decision in defence to an action at the instance of the public authority for payment, instead of by judicial review under R.S.C., Ord. 53. The appeal is a sequel to the decisions of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286.

Immediately before 6 April 1981, the respondent was, and had been for some time, the tenant of a flat at Tangley Grove in Wandsworth on a weekly tenancy at a weekly rent of £12·06. He had a secure tenancy in the sense of section 28 of the Housing Act 1980. The landlords were the

A London Borough of Wandsworth, the appellants. On 2 March 1981, the appellants gave notice to the respondent under section 40(1) and (4) of the Act of 1980 that with effect from 6 April 1981, the rent would be increased to £16·56 per week. The respondent regarded the increase as unreasonable and he so informed the appellants. He refused to pay the increased rent; instead he paid the old rent of £12·06 and an increase of 8 per cent. which he regarded as reasonable. The following year in B March, the appellants gave notice of a further increase in the rent to £18·53 with effect from 5 April 1982. The respondent again refused to pay the increased rent and paid only such rent as he considered reasonable.

On 16 August 1982, the appellants took proceedings against the respondent in Wandsworth County Court claiming arrears of rent, and C also claiming possession of the premises on the ground that the rent lawfully due had not been paid. Non-payment of rent is ground 1 for recovery of possession under Schedule 4 to the Act of 1980. The respondent defended the action on the ground that the appellants' decisions to make the increases, and the increases themselves were ultra vires and void as being unreasonable. He also counterclaimed for a declaration that the notices of increase of rent were ultra vires and void D and of no effect, and for a declaration that the rent payable under his tenancy was £12·06 per week.

The action has caused a considerable divergence of judicial opinion so far. The appellants applied to strike out the paragraphs of the defence and counterclaim which asserted that the decisions and notices were void. Mr. Registrar Price dismissed the application to strike out. E Judge White allowed the appellants' appeal against the registrar's order, and stayed the proceedings to allow the respondent to apply for leave to apply for judicial review out of time. The respondent did apply for such leave but his application was refused. He then appealed to the Court of Appeal and that court, by a majority (Robert Goff and Parker L.JJ., Ackner L.J. dissenting) allowed his appeal against the order of Judge White.

F Until 6 April 1981, the respondent had a contractual right to occupy the flat, provided he paid the rent of £12·06 and complied with the other terms of the tenancy. That was an ordinary private law right under a contract. But by section 40 of the Act of 1980, the appellants were entitled to vary the terms of the tenancy unilaterally by a notice of variation, subject to certain conditions not here material. In addition to G complying with the express statutory conditions, the appellants when they exercised their power under section 40(4) were also bound to act reasonably in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. That is made clear beyond doubt by the Housing Act 1957, section 111(1), which provides as follows:

H "The general management, regulation and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make *such reasonable charges* for the tenancy or occupation of the houses as they may determine." (Emphasis added.)

In *Luby v. Newcastle-under-Lyme Corporation* [1964] 2 Q.B. 64, 72, Diplock L.J. (as my noble and learned friend then was) referring to this provision, said:

> " 'Reasonable' in the context in which it appears in section 111(1) of the Housing Act 1957, is in my view to be construed as the converse of 'unreasonable' in the sense in which it is used by Lord Greene M.R. [in the *Wednesbury Corporation* case [1948] 1 K.B. 223, 229] . . . The court's control over the exercise by a local authority of a discretion conferred upon it by Parliament is limited to ensuring that the local authority had acted within the powers conferred. It is not for the court to substitute its own view of what is a desirable policy in relation to the subject matter of the discretion so conferred. It is only if it is exercised in a manner which no reasonable man could consider justifiable that the court is entitled to interfere."

The respondent seeks to show in the course of his defence in these proceedings that the appellants' decisions to increase the rent were such as no reasonable man could consider justifiable. But your Lordships are not concerned in this appeal to decide whether that contention is right or wrong. The only issue at this stage is whether the respondent is entitled to put forward the contention as a defence in the present proceedings. The appellants say that he is not because the only procedure by which their decision could have been challenged was by judicial review under R.S.C., Ord. 53. The respondent was refused leave to apply for judicial review out of time and (say the appellants) he has lost the opportunity to challenge the decisions. The appellants rely on the decisions of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286. The respondent accepts that judicial review would have been an appropriate procedure for the purpose, but he maintains that it is not the only procedure open to him, and that he was entitled to wait until he was sued by the appellants and then to defend the proceedings, as he has done.

In order to deal with these contentions, it is necessary to consider what was decided by the House in those two cases. The question raised in *O'Reilly* [1983] 2 A.C. 237 was the same as that in the present case, although of course, the circumstances were different. In *O'Reilly* Lord Diplock said, at p. 274:

> "All that is at issue in the instant appeal is the procedure by which such relief ought to be sought. Put in a single sentence the question for your Lordships is: whether in 1980 after R.S.C., Ord. 53 in its new form, adopted in 1977, had come into operation it was an abuse of the process of the court to apply for such declarations [sc. that a decision of a public authority was void] by using the procedure laid down in the Rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Ord. 53 for an application for judicial review . . ."

In that case four prisoners in Hull prison had started proceedings, in three cases by writ and in one case by originating summons, each

A seeking to establish that a disciplinary award of forfeiture of remission of sentence made by the Board of Visitors of Hull Prison was void because the board had failed to observe the rules of natural justice. This House held that the proceedings were an abuse of the process of the court, and that the only proper remedy open to the prisoners was by way of judicial review under Ord. 53. There are two important differences between the facts in *O'Reilly* and those in the present case. B First, the plaintiffs in *O'Reilly* had not suffered any infringement of their rights in private law; their complaint was that they had been ordered to forfeit part of their remission of sentence but they had no right in private law to such a remission, which was granted only as a matter of indulgence. Consequently, even if the board of visitors had acted contrary to the rules of natural justice when making the award, the C members of the board would not have been liable in damages to the prisoners. In the present case what the respondent complains of is the infringement of a contractual right in private law. Secondly, in *O'Reilly* the prisoners had initiated the proceedings, and Lord Diplock, throughout in his speech, treated the question only as one affecting a claim for infringing a right of the plaintiff while in the present case the respondent is the defendant. The decision on *O'Reilly* is therefore not D directly in point in the present case, but the appellants rely particularly on a passage in a speech of Lord Diplock, with whose speech the other members of the Appellate Committee agreed, at p. 285:

> "Now that those disadvantages to applicants [for judicial review] have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for E judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to F proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> "My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, G or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis—a process that your Lordships will be continuing in the next case in which judgment is to be delivered today [*Cocks v. Thanet District Council* [1983] 2 A.C. 286]."

H

The last paragraph in that quotation shows that Lord Diplock was careful to emphasise that the general rule which he had stated in the previous paragraph might well be subject to exceptions. The question

for your Lordships is whether the instant appeal is an exception to the general rule. It might be possible to treat this case as falling within one of the exceptions suggested by Lord Diplock, if the question of the invalidity of the appellants' decision had arisen as a collateral issue in a claim by the respondent (as defendant) for infringement of his right arising under private law to continue to occupy the flat. But I do not consider that the question of invalidity is truly collateral to the issue between the parties. Although it is not mentioned in the appellants' statement of claim, it is the whole basis of the respondent's defence and it is the central issue which has to be decided. The case does not therefore fall within any of the exceptions specifically suggested in *O'Reilly v. Mackman* [1983] 2 A.C. 237.

Immediately after the decision in *O'Reilly,* the House applied the general rule in the case of *Cocks* [1983] 2 A.C. 286. The proceedings in *O'Reilly* had begun before the Supreme Court Act 1981 (especially section 31) was passed. The proceedings in *Cocks* were begun after that Act was passed, but for the present purpose nothing turns on that distinction. *Cocks* was an action by a homeless person claiming that the local housing authority had a duty to provide permanent accommodation for him. The council resolved that the plaintiff had become homeless "intentionally" in the sense of the Housing (Homeless Persons) Act 1977. Consequently the plaintiff had no right in private law to be provided with permanent housing accommodation by the authority. The plaintiff raised an action in the county court claiming, inter alia, a declaration that the council were in breach of their duty to him in not having provided him with permanent accommodation. In order to proceed in his action he had to show as a condition precedent that the council's decision was invalid. This House held that the plaintiff was not entitled to impugn the council's decision in public law otherwise than by judicial review, notwithstanding that the effect of the decision was to prevent him from "establishing a necessary condition precedent to the statutory private law right which he [was seeking] to enforce": see *per* my noble and learned friend, Lord Bridge of Harwich, at p. 294E. The essential difference between that case and the present is that the impugned decision of the local authority did not deprive the plaintiff of a pre-existing private law right; it prevented him from establishing a new private law right. There is also the same distinction as in *O'Reilly* [1983] 2 A.C. 237, namely, that the party complaining of the decision was the plaintiff.

Although neither *O'Reilly* nor *Cocks* [1983] 2 A.C. 286 is an authority which directly applies to the facts of the instant appeal, it is said on behalf of the appellants that the principle underlying those decisions applies here, and that, if the respondent is successful, he will be evading that principle. My Lords, I cannot agree. The principle underlying those decisions, as Lord Diplock explained in *O'Reilly* [1983] 2 A.C. 237, 284, is that there is a "need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law." The main argument urged on behalf of the appellants was that this is a typical case where there is a need for

A speedy certainty in the public interest. I accept, of course, that the decision in this appeal will indirectly affect many third parties including many of the appellants' tenants, and perhaps most if not all of their ratepayers because if the appellants' impugned decisions are held to be invalid, the basis of their financial administration since 1981 will be upset. That would be highly inconvenient from the point of view of the appellants, and of their ratepayers, and it would be a great advantage to B them if persons such as the respondent who seek to challenge their decision were limited to doing so by procedure under Order 53. Such procedure is speedy and avoids prolonged uncertainty about the validity of decisions. An intending applicant for judicial review under Order 53 has to obtain leave to apply, so that unmeritorious applications can be dismissed in limine and an application must normally be made within a C limited period of three months after the decision which has impugned, unless the court allows an extension of time in any particular case. Procedure under Order 53 also affords protection to public authorities in other ways, which are explained in *O'Reilly* and which I need not elaborate here. It may well be that such protection to public authorities tends to promote good administration. But there may be other ways of obtaining speedy decisions; for example in some cases it may be possible D for a public authority itself to initiate proceedings for judicial review. In any event, the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims.

It would in my opinion be a very strange use of language to describe E the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, F whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example *Cannock Chase District Council v. Kelly* [1978] 1 G W.L.R. 1, which was decided in July 1977, a few months before Order 53 came into force (as it did in December 1977). I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in *Reg. v. Inland Revenue Commissioners, Ex parte Federation of Self Employed* H *and Small Businesses Ltd.* [1982] A.C. 617, 647G "The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not—indeed, cannot—either extend or diminish the substantive law. Its function is limited to ensuring 'ubi jus, ibi remedium.'" Lord

Wilberforce spoke to the same effect at p. 631A. Nor, in my opinion, did section 31 of the Supreme Court Act 1981 which refers only to "an application" for judicial review have the effect of limiting the rights of a defendant sub silentio. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows:

> "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 to be excluded except by clear words."

The argument of the appellants in the present case would be directly in conflict with that observation.

If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities, where the defence rests on a challenge to a decision by the public authority, then it is for Parliament to change the law.

I would dismiss the appeal.

LORD SCARMAN. My Lords, I agree with the speech delivered by my noble and learned friend, Lord Fraser of Tullybelton. For the reasons he gives I would dismiss the appeal.

LORD KEITH OF KINKEL. My Lords, I agree with the speech of my noble and learned friend Lord Fraser of Tullybelton, which I have had the opportunity of reading in draft, and for the reasons he gives I too would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Solicitor, Wandsworth London Borough Council; Wandsworth Legal Resource Project Ltd.

J. A. G.

A B C D E F G H

reason that I was in favour of allowing the appeal and granting the injunction in the terms proposed. A

Appeal allowed with costs.
Injunction granted.

Solicitors: Lovell White Durrant; Stephenson Harwood. B

[Reported by SHIRANIKHA HERBERT, Barrister]

C

[HOUSE OF LORDS]

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

D

AND

JONES (MARGARET) AND ANOTHER . . . . . APPELLANTS

1998 Oct. 20, 21; Lord Irvine of Lairg L.C., Lord Slynn of Hadley,
1999 March 4 Lord Hope of Craighead, Lord Clyde and Lord Hutton

E

Crime—Public order—Trespassory assembly—Order in force prohibiting trespassory assemblies—Peaceful, non-obstructive assembly on highway—Extent of public's rights of access to highway—Whether assembly trespassory—Public Order Act 1986 (c. 64), ss. 14A, 14B(2) (as inserted by Criminal Justice and Public Order Act 1994 (c. 33), s. 70)

F

The defendants took part in a peaceful, non-obstructive assembly on a highway in respect of which there was in force an order under section 14A of the Public Order Act 1986,[1] as inserted by section 70 of the Criminal Justice and Public Order Act 1994, prohibiting the holding of trespassory assemblies. They were convicted before justices of taking part in a trespassory assembly knowing it to be prohibited, contrary to section 14B(2) of the Act of 1986, as inserted. On appeal, the Crown Court held that there was no case for them to answer on the basis that the holding of a peaceful, non-obstructive assembly was part of the public's limited rights of access to the highway and so was not prohibited by the order. The Divisional Court allowed an appeal by the Director of Public Prosecutions. G

On appeal by the defendants:—

Held, allowing the appeal (Lord Slynn of Hadley and Lord Hope of Craighead dissenting), that (*per* Lord Irvine of Lairg L.C.) the public highway was a public place that the public H

[1] Public Order Act 1986, s. 14A, as inserted: see post, p. 252A–E.
S. 14B(2), as inserted: see post, p. 252E.

might enjoy for any reasonable purpose, provided that the activity in question did not amount to a public or private nuisance and did not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway; that (*per* Lord Clyde) a peaceful assembly for a reasonable period that did not unreasonably obstruct the highway was not necessarily unlawful, nor did it necessarily constitute a trespassory assembly within sections 14A and 14B(2) of the Act of 1986, the matter being essentially one to be judged in the light of the particular facts; that (*per* Lord Hutton) the right of public assembly could, in certain circumstances, be exercised on the highway provided that it caused no obstruction to persons passing along the highway and that the tribunal of fact found that it had been a reasonable user; and that, in the circumstances, the Crown Court had been entitled to allow the defendants' appeals (post, pp. 254G–255A, F–G, 257D–G, 279C–F, 281B–F, G–H, 288D–E, 291A–B, 292H–293B, 294A).

Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A. and *Hickman v. Maisey* [1900] 1 Q.B. 752, C.A. considered.

Decision of the Divisional Court of the Queen's Bench Division [1998] Q.B. 563; [1997] 2 W.L.R. 578; [1997] 2 All E.R. 119 reversed.

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

Aldred v. Miller, 1924 J.C. 117
Atholl (Duke of) v. Torrie (1850) 12 D. 691; (1852) 1 Macq. 65, H.L.(Sc.)
Attorney-General v. Antrobus [1905] 2 Ch. 188
Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)
C. (A Minor) v. Director of Public Prosecutions [1996] A.C. 1; [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43, H.L.(E.)
Committee for the Commonwealth of Canada v. Canada (1991) 77 D.L.R. (4th) 385
Derbyshire County Council v. Times Newspapers Ltd. [1992] Q.B. 770; [1992] 3 W.L.R. 28; [1992] 3 All E.R. 65, C.A.
Ellenborough Park, In re [1956] Ch. 131; [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667, C.A.
Fielden v. Cox (1906) 22 T.L.R. 411
Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A.
Hickman v. Maisey [1900] 1 Q.B. 752, C.A.
Hirst v. Chief Constable of West Yorkshire (1986) 85 Cr.App.R. 143, D.C.
Hubbard v. Pitt [1976] Q.B. 142; [1975] 3 W.L.R. 201; [1975] 3 All E.R. 1, C.A.
Lewis, Ex parte (1888) 21 Q.B.D. 191, D.C.
Liddle v. Yorkshire (North Riding) County Council [1934] 2 K.B. 101, C.A.
Llandudno Urban District Council v. Woods [1899] 2 Ch. 705
Lowdens v. Keaveney [1903] 2 I.R. 82
M'Ara v. Magistrates of Edinburgh, 1913 S.C. 1059
Macpherson v. Scottish Rights of Way and Recreation Society Ltd. (1888) 13 App.Cas. 744, H.L.(Sc.)
Mann v. Brodie (1885) 10 App.Cas. 378, H.L.(Sc.)
Nagy v. Weston [1965] 1 W.L.R. 280; [1965] 1 All E.R. 78, D.C.
Randall v. Tarrant [1955] 1 W.L.R. 255; [1955] 1 All E.R. 600, C.A.
Reg. v. Graham (1888) 16 Cox C.C. 420
Reg. v. Pratt (1855) 4 E. & B. 860
Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 S.C.(H.L.) 30, H.L.(Sc.)

The following additional cases were cited in argument: A

Anderson v. United Kingdom [1998] E.H.R.L.R. 218
Burden v. Rigler [1911] 1 K.B. 337, D.C.
Chappell v. United Kingdom (1987) 10 E.H.R.R. 510
Christians against Racism and Fascism v. United Kingdom (1980) 21 D. & R. 138
Cooper v. Metropolitan Police Commissioner (1985) 82 Cr.App.R. 238, D.C.
De Morgan v. Metropolitan Board of Works (1880) 5 Q.B.D. 155, D.C. B
Dovaston v. Payne (1795) 2 H.Bl. 527
Ferguson (L.L.) Ltd. v. O'Gorman [1937] I.R. 620
Greek Case, The (1969) 12 Yearbook of the European Convention on Human Rights
Homer v. Cadman (1886) 16 Cox C.C. 51, D.C.
Plattform "Ärzte für das Leben" v. Austria (1988) 13 E.H.R.R. 204
Rassemblement jurassien v. Switzerland (1979) 17 D. & R. 93 C
Reg. v. Clark (No. 2) [1964] 2 Q.B. 315; [1963] 3 W.L.R. 1067; [1963] 3 All E.R. 884, C.C.A.
Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245
Wheeler v. Leicester City Council [1985] A.C. 1054; [1985] 2 All E.R. 151, C.A.

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

This was an appeal by the defendants, Margaret Jones and Richard D Lloyd, by leave of the House of Lords (Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde) given on 14 January 1988 from the judgment of the Divisional Court of the Queen's Bench Division (McCowan L.J. and Collins J.) on 23 January 1997 allowing an appeal by the Director of Public Prosecutions by case stated from the decision of the Crown Court at Salisbury (Judge MacLaren Webster Q.C. and justices). E The Crown Court on 4 January 1996 had allowed appeals by the defendants against their convictions by Salisbury justices on 3 October 1995 of offences of trespassory assembly contrary to section 14B(2) of the Public Order Act 1986, as inserted by section 70 of the Criminal Justice and Public Order Act 1994.

The point of law of general public importance certified by the Divisional Court was: "Where there is in force an order made under F section 14A(2) [of the Act of 1986, as inserted], and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's right of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

The facts are stated in their Lordships' opinions. G

Edward Fitzgerald Q.C., *Keir Starmer* and *Anthony Hudson* for the defendants. The public's right of access in the context of the criminal offence of trespassory assembly is not exceeded if the use of the highway is a reasonable use of the highway. A peaceful, non-obstructive assembly is a reasonable use of the highway.

H The definition of "limited" in section 14A(9) of the Act of 1986 is merely illustrative of the type of circumstances in which the public's right of access to land is not absolute. It does not restrict or cut down the public's pre-existing common law right of access. The extent of the public's

A right of access is therefore left untouched by section 14A and is found in the common law. That limited right is not necessarily exceeded by a peaceful, non-obstructive assembly. It is to be inferred from the wording of section 14A(1)(*a*), including the reference to "conduct," that an assembly can be held on the public highway that does not of itself exceed the limits of the public's right of access to the highway. Parliament intended courts to consider the conduct of the assembly and whether its conduct was B reasonable. If the law were otherwise, much reasonable conduct would amount to a trespass and therefore would be made unlawful by an order under section 14A. It is both inappropriate and contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) for the freedom to carry out such activities to be dependent on the forbearance of the relevant authorities. It is C inappropriate for such a fundamental civil liberty to be subject to potentially arbitrary enforcement.

The early trespass cases (*Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 and *Hickman v. Maisey* [1900] 1 Q.B. 752) established that the public's right of access extended beyond that of the right to pass and repass and recognised that the breadth of that right would be subject to further D extensions as society developed. The more recent obstruction cases, applying the test in a modern setting and in the context of a criminal offence, show that the test includes consideration of whether the use in question is a "reasonable user" of the highway. Lord Esher M.R.'s formulation of the public's right of access in *Harrison v. Duke of Rutland*, at pp. 146–147 necessarily requires a consideration of what is "reasonable" and necessarily recognises that the answer will change as society does. His E judgment is to be preferred to those of Lopes and Kay L.JJ. as the authoritative statement of the law in 1893, since it was the leading judgment and was cited with approval in *Hickman v. Maisey.* The "reasonable extensions" recognised as necessary by the Court of Appeal in *Hickman v. Maisey* in 1900 are found in the subsequent cases on obstruction. *Burden v. Rigler* [1911] 1 K.B. 337 demonstrates that in F determining whether a public meeting held on a highway is unlawful it is necessary to look at the circumstances of the assembly. McCowan L.J. and Collins J. erred in relying upon *Ex parte Lewis* (1888) 21 Q.B.D. 191 in support of their conclusion that no right of peaceful, non-obstructive assembly on the highway exists in English law. *Ex parte Lewis* is of little assistance because (a) the ratio of the decision concerned the jurisdiction G of the Divisional Court to review the decisions of magistrates to refuse to issue summonses; (b) the comments about the public's right of access were obiter; (c) those comments were essentially concerned with the right on the part of the public to occupy Trafalgar Square for the purposes of holding public meetings; (d) Trafalgar Square was completely regulated by Act of Parliament; and (e) any other comments about the public's right of access to the highway are ambiguous and/or not inconsistent with a development H of that right, as demonstrated by *Harrison v. Duke of Rutland* and *Hickman v. Maisey. Reg. v. Graham* (1888) 16 Cox.C.C. 420 fails to take account of the concept of reasonable user. [Reference was also made to Review of Public Order Law (1985) (Cmnd. 9510).]

The test of "reasonable user" applied in the obstruction cases is of particular relevance as, like the offence of trespassory assembly, it involves the adoption and application of the civil test of the public's right of access in relation to a criminal offence. To the extent that the definition of the public's right of access found in the obstruction cases differs from the civil law test of trespass, the former is the applicable test when considering the criminal offence of trespassory assembly. The obstruction cases, e.g., *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143, establish that a person whose use of a highway is reasonable has a lawful excuse even if he is a demonstrator. The right to demonstrate peacefully on the public highway has received judicial recognition in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175, 177D–G, 178E–H; *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 151–152 and Lord Scarman's statement in his report on The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38, para. 6. Concepts based on the protection of private rights of ownership must be modified when dealing with a publicly owned highway, the public ownership of which engages the state's duty to protect and foster the right to peaceful demonstration. [Reference was made to *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 393–394; *Lowdens v. Keaveney* [1903] 2 I.R. 82, 86–87, 89–91; *Cooper v. Metropolitan Police Commissioner* (1985) 82 Cr.App.R. 238, 242 and section 137 of the Highways Act of 1980.

Rights, although not "positive" in the sense that they are enshrined in statute, nonetheless exist in the sense that under English law it is recognised that citizens are entitled to act unless their conduct is restricted by law: see *Wheeler v. Leicester City Council* [1985] A.C. 1054, 1065C and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 178. Individuals have freedom, and therefore a right, to engage in activity on the highway so long as it does not constitute a civil wrong or a criminal offence in other words, so long as it does not transgress that which is reasonable and usual. Collins J. [1998] Q.B. 563, 571 erred in rejecting the approach of the Crown Court on the ground that the public's right of access, "must mean a right given by law." It is a misconceived approach in the context of English law, to look for a positive right of freedom of assembly. It is necessary to start from the premise that the public has right of access, including potentially to assemble, except to the extent that that right is restricted by law. The law restricts the right of access to the extent that it does not amount to passage or repassage and reasonable and usual user. If, in a particular set of circumstances, an assembly constitutes reasonable and usual usage, the public has a right to so assemble. The magistrates will take account of that is usual. Collins J.'s analysis at pp. 571–572, that "a right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it" is, in the present context, also misconceived. The public does have a right of access to public highways. The argument is over the extent of that right. The public's right of access is a right to engage in activity on the highway that is reasonable and usual. If such activity is neither a trespass nor a criminal offence it cannot be stopped unless and until the limits of reasonableness are exceeded. [Reference was made to articles 10 and 11 of

A the European Convention for the Protection of Human Rights and Fundmental Freedoms (1953) (Cmd. 8969).] The judgment of the Divisional Court creates a fundamental divergence between English laws and the Convention. The highway should be regarded as a public place or open space where all activities may reasonably go on. The test of reasonableness will be the same in all cases, but the fact that the land in question is private rather than public property may be a factor to be taken into B account. [Reference was made to *Dicey, Introduction to the Study of the Law of the Constitution,* 10th ed. (1965), pp. 270–272 and *Aldred. v. Miller,* 1924 J.C. 117, 120.]

Collins J. erred in distinguishing *Hirst v. Chief Constable of West Yorkshire* as he did, at p. 573D: see the commentary of Professor Sir John Smith on the decision of the Divisional Court [1997] Crim.L.R. 599, 600. C Moreover, the judgment of Glidewell L.J. in *Hirst v. Chief Constable of West Yorkshire,* at p. 150, makes it clear that lawful excuse is not limited as suggested by Collins J. "in terms of offending" in the context of the criminal offence of obstruction. The effect of the Divisional Court's judgment is to create an unfortunate dichotomy whereby peaceful non-obstructive assembly is deemed a reasonable user of the highway and therefore lawful when obstruction charges are preferred but unreasonable D user of the highway and therefore unlawful when trespassory assembly charges are preferred.

Starmer following. The European Convention for the Protection of Human Rights and Fundamental Freedoms is relevant in two respects: (a) as an aid to statutory interpretation; (b) as a yardstick against which to resolve any uncertainty in the common law or to guide its development: E see *Derbyshire County Council v. Times Newspaper Ltd.* [1992] Q.B. 770.

The obligation on a contracting party to the Convention under article 1 to "secure" to its citizens the right to freedom of peaceful assembly under article 11 and to provide an "effective remedy" in cases of arguable violation (article 13) requires domestic law to recognise a "right" to peaceful assembly; a mere practice of tolerance or non-interference (even if established on the facts) is not enough, being ineffective and F illusory. The analysis of article 11(1) by Collins J. is wrong. The wording of article 11 suggests a positive right of peaceful assembly and limits restrictions on that right: see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93. In keeping with the constant jurisprudence of the European Court of Justice and the Commission of Human Rights, any restrictions on the right of peaceful assembly should be narrowly construed. An G unfettered discretion on the part of a local authority or private landlord to restrict the public's right of peaceful assembly is wholly inconsistent with the requirements of article 11(2). For the proper approach to restrictions such as those under article 11(2), see *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245. An unfettered discretion to restrict the public's right of peaceful assembly is not prescribed by law because the circumstances in which it can be exercised are arbitrary, nor will any H restriction necessarily pursue a legitimate aim, and the pre-conditions of necessity will not be met. [Reference was made to *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283 and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.]

The wording of article 11 has to be read with article 1 (the obligation to secure Convention rights) and article 13 (the obligation to provide an effective remedy for arguable violations). For proper approach to article 13, see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 209–210, paras. 25, 28–34. If the Director of Public Prosecutions were right in his assertion that the right of peaceful assembly under article 11 is "secured" in the United Kingdom through tolerance or non-interference, article 11 read in conjunction with article 13 would be rendered meaningless. The narrow view advocated by him is wholly inconsistent with the approach of the European Court of Human Rights to positive obligations arising under article 11. This approach is consistent with the "principle of effectiveness" developed by the court and the Commission. The conclusion should be that section 14A of the Act of 1986 and/or the common law of civil trespass to the highway can be reconciled with the Convention only if the right to peaceful assembly is recognised wthin the public's right of access to the highway. If this is right, recourse to article 11(2) is unnecessary. [Reference was made to The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights, pp. 170–171, paras. 392–394.]

The right to peaceful assembly under article 11 of the Convention includes a right to assemble on the highway: *Rassemblement jurassien v. Switzerland*, p. 17 D. & R. 93, pp. 118–119, para. 3, *Plattform* and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.

Unless the order in issue in this case is construed narrowly so as to exclude the assembly in issue, it cannot be justified as "necessary in a democratic society" under article 11(2) of the Convention: *Christians against Racism and Fascism v. United Kingdom* (1980) 21 D. & R. 138, 149–150. No issue under article 11(1) arose there because (i) the effect of an order under section 3(3) of the Public Order Act 1936, now section 13(1) of the Act of 1986, was to ban *all* public processions, with one or two exceptions, not just those taking place in prohibited circumstances, and (ii) a right to process has always been recognised. The pre-conditions to making an order under section 3(3) of the Act of 1936 were much stricter than those under section 14A of the Act of 1986. The House of Lords should draw on the Commission's comments about the narrow circumspection of the order in question and, by analogy, construe the order in question in these proceedings so as to ring-fence and thereby preserve the applicants' right of peaceful assembly under article 11 of the Convention. The principle of proportionality derived from paragraph (2) of articles 10 and 11 requires section 14A of the Act of 1986 to be construed so as to ensure, if possible, that an order made under that section does not infringe the rights guaranteed under paragraph (1) of articles 10 and 11.

Chappell v. United Kingdom (1987) 10 E.H.R.R. 510 does not advance the issue for determination. It concerned rights of access to Stonehenge itself and was not dealing with article 11 rights on the highway.

The "margin of appreciation," being a principle of international law applicable on the international plane, is irrelevant to the determination of the present issues: see *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights* (1995) pp. 12–15. In any event, as *Christians*

A *against Racism and Fascism v. United Kingdom* shows, the Strasbourg bodies apply a fairly strict test even when the margin of appreciation is in play.

Victor Temple Q.C. and *Michael Butt* for the Director of Public Prosecutions. The question whether an assembly on the highway is a trespassory assembly is to be determined only by reference to the common law relating to rights of access to the highway and the principles of B trespass. This is a consequence of the clear language of section 14A(9) of the Act of 1986. It is clear from the definition of "limited" in section 14A(9) that, where the land in question is a highway or road, to which there is only a limited right of access for the public, use of the land in excess of the right is intended to fall within the "prohibited circumstances" of section 14A(5)(*b*). It is also clear that the draftsman has C singled out highways as being the starting-point of any test, so that all that one has to do is to look at the public right of access to the highway. Since the authorities are all one way in showing that this is limited to passing and trepassing for the purposes of legitimate travel and purposes incidental thereto, section 14A(9) is not opening the floodgates to general use of the highway. [Reference was also made to section 328 and 329 of the Highways Act 1980.]

D The limits of the public's rights of access to the highway have been established by a very long line of clear and settled authority: see *Halsbury's Laws of England,* 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110; *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146–147, 152, 154, 155–156; *Dovaston v. Payne* (1795) 2 H.Bl. 527; *Reg. v. Pratt* (1855) 4 E. & B. 860; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705; *Hickman v.* E *Maisey* [1900] 1 Q.B. 752; *Fielden v. Cox* (1906) 22 T.L.R. 411 and *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101. Any extension to the right to pass and repass must always be consistent with the paramount principle that the right of the public is that of passage.

If the applicants are correct and the public's right of access is based on reasonableness, that would, being contrary to a long line of authority, constitute a fundamental and radical extension to the common law, which F is not a matter for the judiciary: see *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1.

Use of the highway for purposes other than passing and repassing, etc., is prima facie trespass. In particular, there is no right to use the highway for static meetings, assemblies, protests or demonstrations, peaceful or otherwise. Such activities, while commonly taking place on the highway G without hindrance or objection, are nevertheless acts of trespass if they are not licensed or permitted. The Salvation Army holding a service on the highway do, strictly speaking, commit a trespassory offence. The order in this case was made for good reason, anticipating trouble. Where no order is made, as would be the case with the Salvation Army, charitable collections, tourists and so on, the fact that there is, strictly speaking, an offence does not in practice give rise to problems, tolerance and common H sense inevitably prevailing. However, it is still necessary to have the power to remove even prima facie peaceful groups, because otherwise the position could arise where the first 20 were joined by another 20, and so on, and they became violent or, in the case of Stonehenge, make an excursion over

the perimeter fence. [Reference was made to *Dovaston v. Payne*, 2 H.Bl. 527, 530; *Reg. v. Pratt*, 4 E.&B. 860, 868–869; *Harrison v. Duke of Rutland*, [1893] 1 Q.B. 142, 152–153; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, 709; *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756, 757–758 and *Fielden v. Cox*.]

A

Certain activities incidental to passage and repassage on the public highway may be considered necessary, usual and reasonable for the purpose of exercising the right. Such activities will not be trespass if they do not go further than use of the highway *as a highway* and are not inconsistent with the paramount idea that the right of the public is a right of passage: see *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146, 147, 156; *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, 757–758 and *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259–260. An activity which is "lawful" in itself is not prevented thereby from being a trespass on the highway: see *Reg. v. Pratt*, 4 E.&B. 860 and *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146. There is no authority for the proposition that a static assembly, meeting or demonstration on the public highway is to be considered a use incidental to the right of passage and repassage. Such use is wholly inconsistent with the dedication of a public highway, and must therefore prima facie be a trespass on the highway: see *De Morgan v. Metropolitan Board of Works* (1880) 5 Q.B.D. 155, 157; *Homer v. Cadman* (1886) 16 Cox C.C. 51, 54; *Ex parte, Lewis* (1888) 21 Q.B.D. 191, 197 and *Reg. v. Graham* (1888) 16 Cox C.C. 420 and compare *L. L. Ferguson Ltd. v. O'Gorman* [1937] I.R. 620, 644, 648. Attempts to demonstrate the existence of a common law right to hold assemblies on the highway (see the argument advanced in *Burden v. Rigler* [1911] 1 K.B. 337) are misconceived. In that case a political meeting held on the highway in the course of an election was at least tacitly licensed by the urban authority and could not therefore have been a trespass against it. No evidence of obstruction or nuisance had been called. The justices were held to have been wrong in finding that all meetings on the highway were unlawful for the purposes of the Public Meeting Act 1908, but it is plain that the judgment of Lord Alverstone C.J. was concerned with the question of the statute and the matter of obstruction. It has nothing to say about trespass and does not establish any general principle that the only meetings on a highway that are unlawful are those that cause a material obstruction.

B

C

D

E

F

In principle, where a highway vests in the highway authority by virtue of section 263 of the Act of 1980, there appears to be nothing to prevent it from seeking and obtaining relief for acts of trespass on it. Indeed, both at common law and now by statute it has not only the right but the duty to remove obstruction interfering with free passage along the highway and assert and protect the rights of the public to the use and enjoyment of it: see section 130 of the Act of 1980. In practice, however, throughout the 20th century acts amounting to civil trespass on the highway have been dealt with by way of the criminal offence of obstruction under successive Highway Acts, or by way of prosecutions for public nuisance. For the first time (apart from the offence of burglary), section 14A of the Act of 1986 brings consideration of the civil wrong of trespass into the criminal domain.

G

H

A Nothing in the obstruction and nuisance cases, or other authority, suggests that the defence of "reasonable use" is relevant where trespass is the issue, as in the context of trespassory assembly. The fact that the defendant is or may be a civil trespasser is immaterial in deciding the lawfulness or otherwise of his activity for the purposes of the criminal offence of obstruction: *Lowdens v. Keaveney* [1903] 2 I.R. 82 and *Nagy v. Weston* [1965] 1 W.L.R. 280. Essentially the same test is to be applied in B cases of public nuisance: see *Reg. v. Clark (No. 2)* [1964] 2 Q.B. 315. These cases establish a defence that excuses liability for specific criminal offences. They do not establish rights that did not exist before. They neither establish nor propose that activities on the highway that may be reasonable in the context of obstruction and nuisance cannot thereby be trespass. "Lawful excuse" in a crimnal case is not the same as a positive right in C civil law: There is no suggestion in *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 or *any* of the obstruction cases that the concept of "reasonable use" has been borrowed from the civil law of trespass, still less does section 137 of the Act of 1980 deem any particular activity to be a reasonable or unreasonable use of the highway. "Reasonable user" has never been a defence to a civil accusation of trespass. It follows that there is nothing inconsistent in an activity being "reasonable" for the D purposes of section 137 and yet remaining a civil wrong in trespass for the purpose of founding an offence under section 14B of the Act of 1986. In such circumstances, the court is saying no more than that it shall not attract a criminal sanction. Further, to say that the public's *rights* of access to the highway are now determined simply by what is reasonable and usual is an unjustified extension of the principle in the obstruction and nuisance E cases and ignores the clear line of authority in the trespass cases. If an activity is to avoid being a trespass on the highway, it must be incidental to the right of passage and repassage and must not trangress the usual and reasonable mode of using the highway *as a highway*, or otherwise have the consent of the owner of the surface. The concept of trespass on highways has laid dormant for most of the century. That concept, firmly established in the common law, is now the foundation of section 14A of F the Act of 1986. There can be no warrant for grafting on to it the body of case law that has grown up around obstruction and nuisance.

Recourse to the European Convention to assist in interpretation is neither necessary nor permissible where, as here, English law is settled and unambiguous. It is neither uncertain, nor developing, nor incomplete. Nor is the United Kingdom yet in the position where the courts must resolve G conflicts between the Convention and national law: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 812E. Any discussion about rights in English law must take into account the difference between countries whose written constitutions *confer* clearly defined rights on citizens, and countries such as the United Kingdom without written constitutions where rights are only really definable in terms of the extent to which they are restricted or abrogated. Rights such as freedom of H peaceful assembly are "secured" in the United Kingdom for the purposes of article 1 of the Convention through toleration, or non-interference. No general assessment as to whether such rights are secured in accordance with article 1 can be made without reference to tradition and practical

experience. Freedom of assembly inevitably raises a number of problems, especially where public meetings are involved. These pose threats to public order through the disruption of communications, the prospect of confrontation with the police and the danger of violence with rivals, the latter claiming their own freedom to demonstrate. The European Commission of Human Rights and the European Court of Human Rights have confirmed that in these particular circumstances there are positive duties on a state to protect those exercising their right of freedom of peaceful assembly from violent disturbance by counter-demonstrators.: see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 210, para. 32. In none of the cases brought against the United Kingdom under article 11 has it been argued that the relevant freedoms do not exist in the United Kingdom, and the only questions have been whether there has been a restriction on the freedoms and, if so, whether it has been justified under article 11(2). Each case has been decided against the complaint on the basis either that there has been no interference with the freedoms or that, if there has, it was justified under article 11(2) (the so-called state's "margin of appreciation"): *Chappell v. United Kingdom*, 10 E.H.R.R. 510 and *Anderson v. United Kingdom* [1998] 2 E.H.R.L.R. 218.

In England, the state and the courts recognise and give practical effect to a "right" of peaceful assembly. Peaceful, non-obstructive demonstrations on the highway are in fact permitted. In 1985 the Government declined to extend to static assemblies the power to ban that was provided in respect of processions and marches: see Review of Public Order Law (1985) (Cmnd. 9510), p. 2, para. 1.7, p. 31–32, para. 5.3. In 1994, however, the Criminal Justice and Public Order Act 1994 provided a limited such power by the insertion of section 14A into the Act of 1986. The power provided in section 14A to prohibit trespassory assemblies represents an encroachment, albeit limited, on the right to freedom of assembly. This right has never been absolute and has always been subject to the requirement of good order. By 1994, however, events had largely overtaken the 1985 decision. These included various attempts to defy the exclusion of the public from the Stones at Stonehenge and led to successive annual outbreaks of violence and disorder: see *Chappell v. United Kingdom* and section 19 of the Ancient Monuments and Archaeological Areas Act 1979, as amended by section 33 of and Schedule 4, paragraph 45 to The National Heritage Act 1983.

In any event, such interference with the freedom of peaceful assembly as is caused by a section 14A(2) order is justified under article 11(2) of the Convention. The conditions required to be met before an order under section 14A(1) will issue are entirely compatible with article 11(2): see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93, 120. [Reference was also made to section 14A(6) of the Act of 1986.]

It is to be observed that, while English law recognises and gives effect to a *right* of peaceful assembly as such, there is no legal *right* to exercise that freedom on the public highway, although commonly that is where assemblies/demonstrations/protests do in fact take place without objection or hindrance.

A *Fitzgerald Q.C.* in reply. As to "judicial legislation," the concept of reasonable user is nothing new but is simply rationalising the law and two conflicting lines of authority. There is no reason why the common law cannot develop it; indeed, Parliament has expressly left the development of these matters to the courts.

There must be some objective evidence to justify an inference that persons may behave unreasonably. If the assembly is not peaceful and non-B obstructive and there is evidence that the persons involved are a group of conspirators, that right render the user unreasonable.

Article 11(1) of the Convention guarantees a right of peaceful assembly on the highway. That right can only be restricted in pursuit of a legitimate aim under article 11(2), e.g, for the prevention of disorder or crime, and where restriction is "necessary," i.e., is proportionate to the legitimate aim C pursued. If the public's rights of access to a highway include all such uses as are reasonable but not inconsistent with the rights of others to passage, e.g., peaceful assembly, article 11 is complied with in full. If they exclude a right of peaceful assembly, article 11 is not complied with. There is no content to the right given by article 11(1) if the argument for the Director of Public Prosecutions is correct.

D Their Lordships took time for consideration.

4 March 1998. LORD IRVINE OF LAIRG L.C. My Lords, this appeal raises an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of E peaceful assembly on the public highway?

On 1 June 1995 at about 6.40 p.m. Police Inspector Mackie counted 21 people on the roadside verge of the southern side of the A344, adjacent to the perimeter fence of the monument at Stonehenge. Some were bearing banners with the legends, "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." He concluded that they F constituted a "trespassory assembly" and told them so. When asked to move off, many did, but some, including the defendants, Mr. Lloyd and Dr. Jones, were determined to remain and put their rights to the test. They were arrested for taking part in a "trespassory assembly" and convicted by the Salisbury justices on 3 October 1995. Their appeals to the Salisbury Crown Court, however, succeeded. The court held that neither of the defendants, nor any member of their group, was "being destructive, violent, G disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

About an hour before, a different group of people had scaled the fence of the monument and entered it. They had been successfully escorted away by police officers without any violence or arrests; but there were no grounds for apprehension that any of the group of which Mr. Lloyd and Dr. Jones were members proposed an incursion into the area of the H monument.

An appeal by way of case stated to the Divisional Court [1998] Q.B. 563 followed. It was assumed for the purposes of that appeal (*per* McCowan L.J., at p. 568C) that (a) the grass verge constituted part of the

public highway; and (b) the group was peaceful, did not create an obstruction and did not constitute or cause a public nuisance.

A

The defendants had been charged with "trespassory assembly" under section 14B(2) of the Public Order Act 1986 (as inserted by section 70 of the Criminal Justice and Public Order Act 1994). Section 14A(1) (as inserted) of the Act of 1986 permits a chief officer of police to apply, in certain circumstances, to the local council for an order prohibiting for a specified period "trespassory assemblies" within a specified area. An order of that kind may be obtained only in respect of land "to which the public has no right of access or only a limited right of access;" had been obtained in this case; and covered the area in which the defendants, with others, had assembled.

B

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in prohibited circumstances, that is to say, without the permission of the occupier of the land or *so as to exceed* the limits of any permission of his or *the limits of the public's right of access.*" (Emphasis added.)

C

D

Section 14A(5) thus indicates that a "trespassory assembly" must be "trespassory" in the sense that it must involve the commission of the tort of trespass by those taking part, either by entering land to which they have no right of access, or by exceeding a limited right of access to land.

Section 14A(9) provides, inter alia:

> "In this section ... 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) . . ."

E

The offence with which the defendants were charged is set out in section 14B(2): "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The Divisional Court reinstated the defendants' convictions. It held that a peaceful assembly on the public highway exceeds the limits of the public's right of access (within the meaning of section 14A(5)). The "particular purpose" mentioned in the definition of "limited" in section 14A(9) was held not to include the use of the highway for peaceful assembly.

F

The central issue in the case thus turns on two interrelated questions: (i) what are the "limits" of the public's right of access to the public highway at common law? and (ii) what is the "particular purpose" for which the public has a right to use the public highway?

G

The basis of the Divisional Court's decision

The reasoning underlying the Divisional Court's judgments is not altogether clear. McCowan L.J. stated, at p. 570:

H

> "counsel for the defendants ... argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to

A have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public."

In my judgment that reasoning is circular. There is no suggestion in B the Act of 1986 that the making of any order under section 14A(1) *in itself* defines the limits on the public's right of access to the highway. Rather, the conditions under which it is appropriate to make an order, and the conditions for the breach of such an order, are defined by reference to the *existing* limits upon the public's right of access. In other words, section 14A presupposes limited rights of access; it does not purport to impose such limits.

C Collins J. concluded, at pp. 571–572, that, at common law, an assembly on the highway, however peaceable, exceeds the limits of the public's right of access. This is the conclusion which lies at the heart of the Divisional Court's decision.

In addition, Collins J. rejected the defendants' argument that article 11(1) of the European Convention for the Protection of Human D Rights and Fundamental Freedoms (1953) (Cmd. 8969) requires that there is a *right* of assembly on the public highway (albeit a right which may be subject to restrictions under article 11(2)), as opposed merely to a toleration of assemblies. Collins J. concluded, at p. 574, that the common law conforms with the Convention right of assembly because "The reality is that peaceful and non-obstructive assemblies on the highway are normally permitted."

E Thus in broad terms the basis of the Divisional Court's decision is the proposition that the public's right of access to the public highway is limited to the right to pass and repass, and to do anything incidental or ancillary to that right. Peaceful assembly is not incidental to the right to pass and repass. Thus peaceful assembly exceeds the limits of the public's right of access and so is conduct which fulfils the actus reus of the offence of F "trespassory assembly."

The position at common law

The Divisional Court's decision is founded principally on three authorities. In *Ex parte Lewis* (1888) 21 Q.B.D. 191 the Divisional Court held obiter that there was no public right to occupy Trafalgar Square for the purpose of holding public meetings. However, Wills J., giving the G judgment of the court, had in mind, at p. 197, an assembly "to the detriment of others having equal rights ... in its nature irreconcilable with the right of free passage ..." Such an assembly would probably also amount to a public nuisance, and, today, involve the commission of the offence of obstruction of the public highway contrary to section 137(1) of the Highways Act 1980. Such an assembly would probably also amount to H unreasonable user of the highway. It by no means follows that this same reasoning should apply to a peaceful assembly which causes no obstruction nor any public nuisance.

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the plaintiff had used the public highway, which crossed the defendant's land, for the sole and

deliberate purpose of disrupting grouse-shooting upon the defendant's land, and was forcibly restrained by the defendant's servants from doing so. The plaintiff sued the defendant for assault; and the defendant pleaded justification on the basis that the plaintiff had been trespassing upon the highway. Lord Esher M.R. held, at p. 146:

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, *or for any reasonable or usual mode of using the highway as a highway,* I think he was a trespasser." (Emphasis added.)

Plainly Lord Esher M.R. contemplated that there may be "reasonable or usual" uses of the highway beyond passing and repassing. He continued, at pp. 146–147:

> "Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

Lopes L.J., by contrast, stated the law in more rigid terms, at p. 154:

> "if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil ..."

Similarly, Kay L.J. stated, at p. 158:

> "the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

The rigid approach of Lopes and Kay L.JJ. would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.

The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a

trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway.

The third authority relied upon by the Divisional Court is the decision of the Court of Appeal in *Hickman v. Maisey* [1900] 1 Q.B. 752. In that case, the defendant, a racing tout, had used a public highway crossing the plaintiff's property for the purpose of observing racehorses being trained on the plaintiff's land. A. L. Smith L.J. expressly followed the approach of Lord Esher M.R. in *Harrison v. Duke of Rutland.* Applying that reasoning, he accepted, at p. 756, that a man resting at the side of the road, or taking a sketch from the highway, would not be a trespasser. The defendant's activities, however, fell outside "an ordinary and reasonable user of the highway" and so amounted to a trespass. Collins L.J. similarly approved Lord Esher M.R.'s approach, noting, at pp. 757–758, that:

> "in modern times a reasonable extension has been given to the use of the highway as such ... The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

Romer L.J. was to similar effect, at p. 759.

I do not, therefore, accept that, to be lawful, activities on the highway must fall within a rubric "incidental or ancillary to" the exercise of the right of passage. The meaning of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland*, at pp. 146–147, is clear: it is not that a person may use the highway only for passage and repassage and acts incidental or ancillary thereto; it is that any "reasonable and usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's right of passage. I understand Collins L.J.'s acceptance in *Hickman v. Maisey,* at pp. 757–758, of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* in that sense.

To commence from a premise, that the right of passage is the only right which members of the public are entitled to exercise on a highway, is circular: the very question in this appeal is whether the public's right is confined to the right of passage. I conclude that the judgments of Lord Esher M.R. and Collins L.J. are authority for the proposition that the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage.

Nor can I attribute any hard core of meaning to a test which would limit lawful use of the highway to what is incidental or ancillary to the right of passage. In truth very little activity could accurately be described as "ancillary" to passing along the highway: perhaps stopping to tie one's shoe lace, consulting a street-map, or pausing to catch one's breath. But I do not think that such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book, would qualify. These

examples illustrate that to limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The law should not make unlawful what is commonplace and well accepted. A

Nor do I accept that the broader modern test which I favour materially realigns the interests of the general public and landowners. It is no more than an exposition of the test Lord Esher M.R. proposed in 1892. It would not permit unreasonable use of the highway, nor use which was obstructive. It would not, therefore, afford carte blanche to squatters or other uninvited visitors. Their activities would almost certainly be unreasonable or obstructive or both. Moreover the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance. B C

Nor do I accept that the "reasonable user" test is tantamount to the assertion of a right to remain, which right can be acquired by express grant, but not by user or dedication. That recognition, however, is in no way inconsistent with the "reasonable user" test. If the right to use the highway extends to reasonable user not inconsistent with the public's right of passage, then the law does recognise (and has at least since Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 recognised) that the right to use the highway, goes beyond the minimal right to pass and repass. That user may in fact extend, to a limited extent, to roaming about on the highway, or remaining on the highway. But that is not of the essence of the right. That is no more than the scope which the right might in certain circumstances have, but always depending on the facts of the particular case. On a narrow footpath, for example, the right to use the highway would be highly unlikely to extend to a right to remain, since that would almost inevitably be inconsistent with the public's primary right to pass and repass. D E

A highway may be created either by way of the common law doctrine of dedication and acceptance, or by some statutory provision. Dedication presupposes an intention by the owner of the soil to dedicate the right of passage to the public. Whilst the intention may be expressed, it is more often to be inferred; but the requirement of an inference of an intention to dedicate does not, in my judgment, advance the question of the extent of the public's right of user of the highway. The dedication is for the public's use of the land as a highway and the question remains: what is the proper extent of the public's use of the highway? Given that intention to dedicate is usually inferred, it would be a legal fiction to assert that actual intention was confined to the right to pass and repass and activities incidental or ancillary to that right. There is no room in the judgment of Collins L.J. in *Hickman v. Maisey* [1900] 1 Q.B. 752, 757–758 for the fiction of an immutable, subjective original intention. Neither highway users nor the courts are in any position to ascertain what the landowner's original intentions may have been, years or even centuries after the event. In many cases, where the intention to dedicate is merely inferred from the fact of user as of right, there will not even have been a subjective intention. Nor would it be sensible to hold that the extent of the public's right of user F G H

A should differ from highway to highway, as necessarily it would if actual subjective intention were the test. It is time to recognise that the so-called intention of the landowner is no more than a legal fiction imputed to the landowner by the court.

It would have been possible for the common law to have imposed tight constraints on the public's right of user of the highway in one of two ways. First, it could have held that the right was no wider than the bare B minimum required for the use of the highway as such: a test of necessity. Or, secondly, it could have been held that the right was static, so that a user which could not have been in contemplation as reasonable and usual at the time of dedication could never become a lawful user in changing social circumstances. I have already demonstrated that the former has been rejected. Nor could the latter be sustained. I doubt whether, when a C highway was first dedicated in, say, the early 19th century, a landowner would have contemplated the traversal at very high speed of the land dedicated by vehicles powered by internal combustion engines. The fact is that the common law permits vehicles to be driven at high speed on the highway because that is a reasonable user in modern conditions: it would be a fiction to attribute that to an actual intention at the time of dedication.

D I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.

E Since the law confers this public right, I deprecate any attempt artificially to restrict its scope. It must be for the magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass. In particular, there can be no principled basis for limiting the scope of the right by reference to the subjective intentions of the persons assembling. Once the right to assemble within F the limitations I have defined is accepted, it is self-evident that it cannot be excluded by an intention to exercise it. Provided an assembly is reasonable and non-obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature. To draw a distinction on the basis of anterior intention is in substance to G reintroduce an incidentality requirement. For the reasons I have given, that requirement, properly applied, would make unlawful commonplace activities which are well accepted. Equally, to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and degree for the court of trial.

H Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the subsoil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined

are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways.

Finally, I regard the conclusion at which I have arrived as desirable, because it promotes the harmonious development of two separate but related chapters in the common law. It is neither desirable in theory nor acceptable in practice for commonplace activities on the public highway not to count as breaches of the criminal law of wilful obstruction of the highway, yet to count as trespasses (even if intrinsically unlikely to be acted against in the civil law), and therefore form the basis for a finding of trespassory assembly for the purposes of the Act of 1986. A system of law sanctioning these discordant outcomes would not command respect.

Wilful obstruction of the highway

By section 137 of the Act of 1980: "(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence ..." The relevant case law was extensively considered by the Divisional Court in *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143.

The appeal was by animal rights supporters, who had been demonstrating against the use of animal fur both outside and in the doorway of a furrier's shop. They handed out leaflets, held banners and attracted groups of passers-by who blocked the street. The issue whether they were guilty of the statutory offence was held (*per* Glidewell L.J., at pp. 150–151) to turn on three questions: (i) was there an obstruction (with "any stopping on the highway," unless de minimis, counting as an obstruction)? (ii) was the obstruction deliberate? and (iii) was the obstruction without lawful excuse?

The latter question, if the obstruction was not unlawful in itself (as in the case of unlawful picketing), was "to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway." Glidewell L.J. instanced, at p. 150:

> "what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? ... It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates . . ."

In so holding Glidewell L.J. applied the reasoning of the Divisional Court in *Nagy v. Weston* [1965] 1 W.L.R. 280, where the activity in question, the sale of hot dogs in the street, "could not ... be said to be incidental to the right to pass and repass along the street." The question was one of fact: "whether the activity was or was not reasonable."

I find it satisfactory that there is a symmetry in the law between the

A activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway.

Article 11 of the European Convention

If, contrary to my judgment, the common law of trespass is not as clear as I have held it to be, then at least it is uncertain and developing, so B that regard should be had to the Convention for the Protection of Human Rights and Fundamental Freedoms in resolving the uncertainty and in determining how it should develop: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, *per* Balcombe L.J., at p. 812B–C, and Butler-Sloss L.J., at p. 830A–B; and see *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283, *per* Lord Goff of Chieveley. Article 11 confers a "right to freedom of peaceful assembly" C and then entitles the state to impose restrictions on that right. The effect of the Divisional Court's decision in this case would be that any peaceful assembly on the public highway, no matter how minor or harmless, would involve the commission of the tort of trespass.

Its conclusion is that all peaceful assemblies on the highway are tortious, whilst seeking to justify that state of affairs by observing that D peaceful assemblies are in practice usually tolerated. In my judgment it is none to the point that restrictions on the exercise of the right of freedom of assembly may under article 11 be justified where necessary for the protection of the rights and freedoms of others. If the Divisional Court were correct, and an assembly on the public highway always trespassory, then there is not even a prima facie right to assembly on the public highway in our law. Unless the common law recognises that assembly on E the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied. Of course the right may be subject to restrictions (for example, the requirements that user of the highway for purposes of assembly must be reasonable and non-obstructive, and must not contravene the criminal law of wilful obstruction of the highway). But in my judgment our law will not comply with the Convention unless its *starting-point* is F that assembly on the highway will not necessarily be unlawful. I reject an approach which entails that such an assembly will always be tortious and therefore unlawful. The fact that the letter of the law may not in practice always be invoked is irrelevant: mere toleration does not secure a fundamental right. Thus, if necessary, I would invoke article 11 to clarify or develop the common law in the terms which I have held it to be; but for the reasons I have given I do not find it necessary to do so. I would G therefore allow the appeal.

LORD SLYNN OF HADLEY. My Lords, in section 14A of the Public Order Act 1986 (inserted by section 70 of the Criminal Justice and Public Order Act 1994) Parliament gave a new power of control to local councils and to the police to deal with assemblies of 20 or more persons on land H to which the public had a limited right of access or no right of access.

A chief officer of police who reasonably believes that such an assembly is intended to be held and that it is likely to be held without the permission of the occupier of the land, or to conduct itself in such a way as to exceed the public's limited right of access, and to cause significant damage to land

or buildings of historical or archaeological importance, may apply to the council of the district for an order "prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified:" section 14A(1). It is thus necessary to show that the land is such that the public has no or only a limited right of access, and

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to *use for a particular purpose (as in the case of a highway or road)*:" section 14A(9) (emphasis added).

With the consent of the Secretary of State the council may then make an order prohibiting such assemblies for a period not exceeding four days and in respect of an area not exceeding five miles from a specified centre. When such an order is made: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence:" section 14B(2) (as inserted).

This new offence is thus subject to important conditions being satisfied before prosecutions can be brought—the reasonable belief of the chief officer of police as to the matters specified, the consent of the Secretary of State and the decision of the council to make such an order, but it is plain that Parliament in 1994 was intending to give additional powers to councils and to the police to disperse trespassory assemblies over and above any other remedies (often slower and less effective) which might be available where people trespassed, committed nuisance or were violent.

On 22 May 1995 Salisbury District Council made an order prohibiting the holding of trespassory assemblies within a four-mile radius of Stonehenge for a period from 29 May to 1 June 1995 inclusive.

It is agreed that on 1 June 1995 a group of people were on the grass verge of the A344 road. The group was not fixed or static; people came and went. At about 6.45 p.m. the present defendants were on the verge in a group said by the police to have numbered 21 persons. A police inspector formed the view that this group constituted a prohibited trespassory assembly and they were told to move on. Some apparently did. The two defendants refused and were subsequently charged with the offence under section 14B(2) of the Act. They were convicted by the Salisbury justices but on appeal the Crown Court ruled that there was no case to answer and allowed the appeal.

The Crown Court found that the group, including the defendants, were not "destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway." The court further concluded that the group's use of the highway was a "reasonable user" and that the conduct of the defendants and the group as a whole did not exceed the public's right of access to the highway.

The Divisional Court on appeal allowed the appeal and ruled that a peaceful assembly of 20 or more persons on the highway which does not obstruct the highway is still a trespassory assembly for the purposes of section 14B(2). The sole question on the appeal to your Lordships is thus whether the public has the right of access to the highway in order to assemble there when it does not at the time obstruct the highway and when those present are not violent and are not threatening a breach of the peace.

A It cannot, of course, be said that the public has no right of access to the highway; it is not suggested that the public's right of access is absolute. The question is what are the limits to the right (not, it should be noted, the practice) of the public to use or be on the highway. For this purpose it is not necessary to distinguish between "highway" and "road" since the definition of "limited" includes both, though no issue has been raised that the place where the defendants were was not a highway. I assume that it B was and that as such the public had some right of access to it.

It is necessary to remember when considering this case that both at common law and by the Highways Act 1980 the public have an analogous right of way over bridleways and footpaths. It is not, however, necessary in this case to consider the case of a private road or other place where the permission of the occupier is needed and where additional factors may C need to be taken into account, but the arguments here have implications in principle for both.

It is hardly surprising that the public's rights of access to and use of the highway have been considered on previous occasions by the courts though in different contexts. As I see it the essential feature of the public's right was explained in the judgment of Lopes L.J., with whom in substance Kay L.J. agreed, in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142. D Lopes L.J. said, at p. 152: "The interest of the public in a highway consists solely in the right of passage . . ." He quotes, at p. 153, Crompton J. in *Reg. v. Pratt* (1855) 4 E. & B. 860, 868–869 who said:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

E

Lopes L.J. added: "I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public." He said, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that F in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil G as he had previously to any easement being acquired by the public."

Thus the core right is to pass and to repass although I do not think that Lopes L.J. would have said that uses incidental to passing and repassing—stopping to adjust a bridle or to repair a carriage wheel—would have constituted a trespass. Lord Esher M.R. was more specific. He said, at p. 146:

H

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser."

He added, at pp. 146–147, that if the language of Erle J. and Crompton J. were construed too largely the effect might be to interfere

> "with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

It does not seem to me that his words "any reasonable or usual mode of using the highway as a highway" or "a reasonable and usual mode of using a highway *as such*" (emphasis added) were intended to include acts done by people who were not in the ordinary sense of the term "passing and repassing along the highway." This is how A. L. Smith L.J. appears to have read Lord Esher M.R. in his judgment in *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756. He then said: "I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a *slight* extension of the rule as previously stated ..." (Emphasis added.) He accepted that for a man to stop to rest or to take a sketch in the highway would not be considered an act of trespass but he continued:

> ". . . I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

Collins L.J. said, at pp. 757–758:

> "The question must in the last resort be whether what the defendant did after he got upon the highway comes within the ordinary and reasonable use of the highway *as a highway*, that is, for the purpose for which it is dedicated to the public. Now primarily the purpose for which the highway is dedicated is that of passage, as is shown by the case of *Dovaston v. Payne* (1795) 2 H.Bl. 527; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage." (Emphasis added.)

A It seems to me that Collins L.J. is saying no more than that developments which were incidental to the right of passage might be accepted as falling within the public's right of limited access to the highway.

That ruling as to the law had already been reflected in two cases involving specifically the holding of public meetings in Trafalgar Square. Thus in *Reg. v. Graham* (1888) 16 Cox C.C. 420, 429–430 Charles J., rejecting the claim that there was a right of public meeting in Trafalgar B Square or any other thoroughfare, said:

> "So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them for the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and C repassing ..."

Similarly, in *Ex parte Lewis,* 21 Q.B.D. 191, 197, Wills J. said that a public right of passage is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

D It was reflected subsequently in *Randall v. Tarrant* [1955] 1 W.L.R. 255 where Sir Raymond Evershed M.R. said, at p. 259:

> "The rights of members of the public to use the highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time E to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

and in *Clerk & Lindsell on Torts,* 17th ed. (1995), p. 861, para. 17-41:

> F "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The right of assembly, of demonstration, is of great importance but in G English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored.

These cases, in limiting or linking rights of user by the public of the highway to passage or repassage, in themselves exclude a right to stay on the highway other than for purposes connected with such passage, but they are to be read with cases of wider application which reject the possibility of a right of staying on or wandering over land being acquired by user or H prescription. See, for example, *Attorney-General v. Antrobus* [1905] 2 Ch. 188, where a claim of a right for the public to visit Stonehenge acquired by user was rejected, and in *In re Ellenborough Park* [1956] Ch. 131 where a claim that the public had acquired a right to wander in a pleasure park

was asserted. In the latter case, Sir Raymond Evershed M.R. said, at p. 184: A

"There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription." B

On existing authority, I consider that the law is clear. The right is restricted to passage and reasonable incidental uses associated with passage.

It seemed to be suggested or at least implicit in argument that demonstrations and assemblies are a new development of the late 20th century and cannot have been in the mind of judges when they defined the law in the 19th century and even as late as Sir Raymond Evershed M.R.'s C judgment to which I have referred. This is plainly wrong as the two Trafalgar Square cases (and 19th century descriptions of contemporary conditions) show, even though the extent, nature, size and object of such demonstrations and assemblies have changed. I am willing to assume that more people are now more conscious of the importance of assembly and demonstration than they were in previous centuries, but I do not see that this in itself is enough to justify changing the nature and scope of the D public's right to use the highway. That it cannot in itself justify as of right assemblies or demonstrations on private land is obvious. The defendants' argument in effect involves giving to members of the public the right to wander over or to stay on land for such a period and in such numbers as they choose so long as they are peaceable, not obstructive, and not committing a nuisance. It is a contention which goes far beyond anything E which can be described as incidental or ancillary to the use of a highway as such for the purposes of passage; nor does such an extensive use in my view constitute a reasonable, normal or usual use of the highway as a highway. If the defendants' claim is right, it seems to me to follow that other uses of the highway than assembly would be permitted—squatting, putting up a tent, selling and buying food or drinks—so long as they did not amount to an obstruction or a nuisance. To get over the fence from F adjoining land (as could have happened here) and to sit or stand on the highway, including the verge, in order to demonstrate does not seem to me to be a normal or usual use of the highway as such and has nothing to do with passing and repassing.

The fact that the purpose of the demonstration or assembly is one which most or many people would approve does not change what is G otherwise a trespass into a legal right. Nor does the fact that an assembly is peaceful or unlikely to result in violence, or that it is not causing an obstruction at the particular time when the police intervene, in itself change what is otherwise a trespass into a legal right of access.

It is objected that very often people on the highway singly or in groups take part in activities which go beyond passage and repassage and are not H stopped. That is no doubt so, but reasonable tolerance does not create a new right to use the highway and indeed may make it unnecessary to create such a right which in its wider definition goes far beyond what is justified or needed. It may well be in the situation with which your

A Lordships are concerned that, but for section 14 of the Act of 1986, nothing would have been done to a peaceful non-obstructive group like the one in which the defendants took part. But Parliament in 1994 has enabled action to be taken over and above existing remedies to deal with trespass on the highway, or on land for entry on which the landowner's permission is required, to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do B so. I do not consider that disapproval of this near statutory power justifies a change in the law by the courts as to the public's rights over the highway, which is what at times seemed to be one of the bases of the defendants' arguments.

Reference was made to cases such as *Lowdens v. Keaveney* [1903] 2 I.R. 82; *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 (under C section 137(1) of the Act of 1980); *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hubbard v. Pitt* [1976] Q.B. 142, which concern wilful obstruction of the passage along a highway without reasonable excuse. That is a different question from the one raised in the present case and I do not consider that the passages relied on from those judgments directly assist in answering it.

Reference was also made to the European Convention for the Protection D of Human Rights and Fundamental Freedoms, not, of course, as in itself governing the legal position in the United Kingdom, but as indicating what our law should now be. It is desirable to look at the Convention for guidance even at the present time, but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is: see *per* Butler-Sloss L.J. in *Derbyshire County* E *Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830. In any event, I am not satisfied that the existing law on highways is necessarily in conflict with article 11 of the Convention providing for a right of assembly, or of article 10 relating to freedom of expression. Both provide for exceptions to the rights created. I accept that it is arguable that a restriction on assembly even on the highway may interfere with the right of assembly in some situations, as the decisions of the European Court of Human Rights, which F have been referred to, show, but I am not satisfied that there was here such a violation either by the law relating to access to the highway as it stands, or in its application to the facts of this case, which should compel us to change the law as I believe it to be.

It follows in my view that the Crown Court deciding essentially that what happened was a reasonable use of the highway erred in law and that G the Divisional Court was right in the result to reverse their decision. The justices who heard the case through were entitled to find that there had been a trespassory assembly.

The question certified in essence asks whether the lack of obstruction prevents an assembly of 20 or more persons on the highway from being a trespassory assembly. I would answer that in the negative. Put in the way in which the question is framed, i.e. whether such an assembly where there H is no obstruction does exceed the public right of access to the highway so as to constitute a trespassory assembly contrary to section 14A of the Act of 1986, I would answer in the affirmative.

I would accordingly dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, the point which is at issue in this appeal arises out of an incident which took place on 1 June 1995 on the grass verge of the A344 road beside the perimeter fence of the monument at Stonehenge. It relates to the extent of the use which members of the public are entitled to make of a highway in the exercise of the public's right of access to it. The question is whether members of the public who join together to form a peaceful, non-obstructive assembly upon the highway, their purpose being not to pass along the road but to remain in the place where they have gathered for such time as they choose to remain there, are acting in such a way as to exceed their public right of access to the highway.

On 22 May 1995 Salisbury District Council made an order under section 14A(2) of the Public Order Act 1986, as inserted by the Criminal Justice and Public Order Act 1994, prohibiting the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining Stonehenge from 2359 hours on Sunday, 28 May 1995 until 2359 hours on Thursday, 1 June 1995. At about 6.40 p.m. on 1 June 1995 the defendants had gathered with others on the grass verge of the perimeter fence to the west of the Heelstone. They were spread out along the verge, which was about five feet wide, over a distance of about 10 to 15 yards. The conduct of the group was entirely peaceful. No obstruction was being caused to anybody who wished to use the highway. No member of the group was on the roadway, and nobody was abusive, offensive or violent to the police or anybody else in any way. There had been some movement, as people joined the group and others left it during the afternoon and those who were on the verge moved around. But the group was in the nature of an assembly, not a procession. Its members were not pausing for conversation, rest or refreshment while passing along the highway. They had taken up a position upon it in a place where they proposed to stay for the time being. It can be assumed that they did so because they believed they had a right to be there.

A police officer who was at the scene formed the view, after counting its members, that this was an assembly of 20 or more persons and that it was a trespassory assembly which had been prohibited by the order made under section 14A. He informed those present of the terms of the order and at about 6.45 p.m. he instructed them to move on. Most of those who were present complied with this instruction. But the defendants refused to do so, and just after 7 p.m. they were arrested on the ground that they were committing an offence under section 14B of the Act by taking part in an assembly which they knew was prohibited by an order under section 14A. They were tried before the Salisbury magistrates and convicted of an offence under section 14B(2). They appealed against their convictions to the Salisbury Crown Court, which allowed their appeals on the ground that the group's user of the highway was a reasonable one which did not exceed the public's right of access. This decision was reversed when the case came before a Divisional Court of the Queen's Bench Division [1998] Q.B. 563 on the ground that the public's right of access to the highway was limited to a right of passage and that an assembly, although peaceful and non-obstructive, could not be said to be on the highway in the exercise of that right. McCowan L.J. rejected, at p. 570, the suggestion that the

A holding of an assembly of 21 persons was incidental to the right of passage and repassage. Collins L.J. said, at p. 571H, that the holding of a meeting, demonstration or vigil on the highway, however peaceable, has nothing to do with the right of passage.

The case has obvious implications for the relationship between the criminal law and the right of peaceful assembly under article 11 of the European Convention for the Protection of Human Rights and B Fundamental Freedoms, as it arises out of a prosecution brought under the Act of 1986. But the problem which it has raised seems to me to depend for its answer upon an application of the principles which are to be found in the law of real property and landownership. This is because of the words which section 70 of the Act of 1994 has used to define what it describes as a trespassory assembly. Section 14A(5), which it has inserted C into Part II of the Act of 1986, states:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the D limits of any permission of his or the limits of the public's right of access."

"Assembly" for this purpose means an assembly of 20 or more persons, and "land" means land in the open air: see subsection (9). The word "limited" is defined by subsection (9) in these terms:

> "'limited,' in relation to a right of access by the public to land, means E that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

This section may be contrasted with section 14 of the Act of 1986 which deals with the imposition of conditions on public assemblies. Section 16 defines "public assembly" as "an assembly of 20 or more F persons in a public place which is wholly or partly open to the air." It defines "public place" for this purpose as meaning any highway and any place to which the public or any section of it has access, on payment or otherwise, as of right or by virtue of express or implied permission. The technique which section 14 uses to enable the police to control assemblies of this kind is that of enabling the police to impose conditions on the place where it may be held, its numbers and its duration. A person who G knowingly fails to comply with any of these conditions commits an offence. The assumption is that, so long as the conditions are complied with, a public assembly in a public place is lawful and that the police have no power to require its members to disperse.

The technique which section 14A uses is entirely different. It brings into the arena of the criminal law the rights, if any, which the public have as against the occupier of the land in private law. It does so by enabling H the police to take action against those taking part in an assembly if the occupier of the land would be entitled to treat the assembly as trespassing on his land. But the police may exercise their powers independently of the occupier, whose knowledge of or consent to the action which they are

taking is not required. It is sufficient that an order under section 14A is in force for the time being and that the assembly is within the area to which it applies. A

In this situation it is necessary first to identify the extent of the public's right of access to a highway before looking more broadly at the human rights issues which this case has raised. Mr. Fitzgerald for the defendants accepted that the public's right of access was a limited one, and he did not suggest that there was any relevant distinction in this regard between a "road" and a "highway." The definition of "limited" in section 14A(9) uses both expressions. At common law the expression "highway" includes all ways to which the public have access, from footpaths and bridleways to carriageways. It may therefore be said to include a "road," and in particular a road such as the A344 the solum of which is vested in the statutory highway authority. B C

The most important point to note about these expressions is their generality. The certified question refers to "*the public* highway" (emphasis added). The use of the definite article and the addition of the adjective "public" suggest that a distinction can be drawn between those highways which are public and those which are not. But section 14A(9) refers simply to "a highway." In doing so it follows the wording used in other statutes to which I shall refer later. It also follows the common law, which uses the word "highway" to describe a place to which the public have access in order to exercise the public right. All highways are in that sense "public." The only distinction which might relevantly be drawn is that the land over which a highway passes is not always vested in a public authority. But it has not been suggested that the right of access is different according to the public or private character of the landowner. The conclusions which I would draw from this are that the addition of the word "public" is tautologous, and that anything which we may say about the limits of the public right of access to a highway must be taken, in law, to apply to each and every highway. D E

The next point is that no question arises in this case as to the limits of any permission given by the occupier. But it is worth noting that section 14A(5), by treating an assembly which exceeds the limits of such permission as a trespassory assembly, is relying for its application on a matter which the law would normally be content to leave to the discretion of the occupier. The same may also be said of cases where the assembly is held on land to which the public have a right of access which is limited. The law would normally be content to leave it to the occupier to intervene if any members of the public were acting in a way which exceeded the limits of the public right. Although the right to complain that there is a trespass has been taken out of the hands of the occupier and placed at the disposal of the police by section 14A, the extent of these limits must nevertheless be found in the relationship in private law between the public and the occupier. F G

It may be convenient to begin an examination of this subject with some general statements. A highway is a way over which there is a public right of way. A public right of way is similar to but not in all respects the same as an easement of way. The right is exercisable by anyone whether he owns land or not, whereas an easement is a right exercisable by the owner of H

A land for the time being by virtue of his estate in the land of which he is the dominant proprietor. There are other differences. But a public right of way closely resembles an easement of way in regard to the nature of the user from which its creation may be inferred and the nature of the use which may be made of it. *Halsbury's Laws of England*, 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110, states that it is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far B as the public's presence is attributable to a reasonable and proper use of it as such. In the same volume, p. 9, para. 1, it is stated that a highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. In *Megarry & Wade, The Law of Real Property*, 5th ed. (1984), p. 844 it is stated:

C "The land over which a public right of way exists is known as a highway; and although most highways have been made up into roads, and most easements of way exist over footpaths, the presence or absence of a made road has nothing to do with the distinction. There may be a highway over a footpath, while a well made road may be subject only to an easement of way, or may exist only for the D landowner's benefit and be subject to no easement at all."

In *Clerk & Lindsell on Torts*, 17th ed., p. 861, para. 17-41 the current state of the law as to the question of use is summarised in these terms:

"The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of E the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The law of Scotland, which is relevant to this case as section 14A applies also to Scotland (section 42(2)), is the same on the question as to the use which may be made of the public right. In *Rankine, The Law of F Land-ownership in Scotland*, 4th ed. (1909), p. 325 it is stated that the definition of a highway in English law as "a right of passage in general to all the King's subjects" applies also to Scotland. At p. 327 it is observed that "the public right of passage, called a highway" is regarded as a limitation or restriction on the landowner's use of his property. In *Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd.*, 1976 S.C.(H.L.) 30, 125 Lord Wilberforce said: "A public right of way on highways is G established by use over the land of a proprietor . . ."

But it is worth nothing that there are some important differences between the law of Scotland and the law of England as to the constitution of the right. I think that it is right to mention this, because Scots law does not regard the assertion that actual intention is confined to the right to pass and repass and to activities incidental or ancillary to that right as a legal fiction. This is regarded in Scotland as a matter of fact which requires H to be established by the evidence. The differences between the laws of the two countries on this matter were discussed in *Mann v. Brodie* (1885) 10 App.Cas. 378. Lord Blackburn observed, at p. 385, that any reference to the law of England in that case, which was to be governed by the law

of Scotland, was apt to mislead unless the difference of the law of the two countries was borne in mind. He pointed out, at p. 386, that, although in both countries a right of public way may be acquired by prescription, it was in England never practically necessary to rely on prescription to establish a public way. It was enough that there was evidence on which those who had to find the fact might find that there was a dedication by the owner whoever he was. Lord Watson said, at pp. 390–391, that the constitution of such a right according to the law of Scotland does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. There are many examples in the Scottish authorities of cases where the parties have joined issue on the question whether the evidence of user was sufficient to establish this fact: e.g. *Duke of Atholl v. Torrie* (1850) 12 D. 328, affirmed (1852) 1 Macq. 65; *Macpherson v. Scottish Rights of Way and Recreation Society Ltd.* (1888) 13 App.Cas. 744. As *Rankine*, pp. 329–330, puts it: "The books are rich in illustrations of this matter, for no actions have been more obstinately fought out than cases of right of way."

The statutes which make provision as regards highways in England and Wales and as regards roads in Scotland follow the approach of the common law as to the nature of the public right of access. Section 328(1) of the Highways Act 1980 provides that in that Act, except where the context otherwise requires, "highway" means the whole or part of a highway other than a ferry or waterway. Section 329(1) defines "bridleway," "carriageway," "footpath" and "footway" respectively as meaning a way over which the public have a right of way on horseback, for the passage of vehicles or on foot only, as the case may be. As the term "highway" is not itself defined, it is necessary to apply the common law meaning of the word as a way over which members of the public have a right to pass and repass. Section 151(1) of the Roads (Scotland) Act 1984 is more explicit on this point. It defines "road" as meaning any way over which there is a public right of passage by whatever means. From this it follows that it is not possible to draw any relevant distinction as regards the nature of the public right of access between a highway which passes over land which is in private ownership and a highway which is vested in the statutory highway or roads authority.

It seems that at one time the extent of the right of passage was stated more narrowly than appears from the current textbooks. In *Ex parte Lewis*, 21 Q.B.D. 191 it was held that there was no right in the public to occupy Trafalgar Square for the purpose of holding public meetings there. Wills J. said, at p. 197:

> "The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.' A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."

A In *Reg. v. Graham,* 16 Cox C.C. 420, 429–430 Charles J. addressed the jury in these terms:

> "I have anxiously considered the observations of Mr. Asquith" —counsel for the defendant Graham—"and I can find no warrant for telling you that there is a right of public meeting either in Trafalgar Square or any other public thoroughfare. So far as I know the law of B England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and repassing; and, if you come to regard Trafalgar Square as a place of public resort simply, it seems to C me it would be very analogous to the case of public thoroughfares ..."

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 152 Lopes L.J. said that the interest of the public in a highway consisted solely in the right of passage. He went on to say, at p. 154:

> "The conclusion which I draw from the authorities is that, if a D person uses the soil of a highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil E as he had previously to any easement being acquired by the public."

Kay L.J., at p. 158, was to the same effect. He said that the right of the public upon a highway is that of passing and repassing over the land the soil of which may be owned by a private person, and that using the land for any other purpose lawful or unlawful was a trespass.

F I note in passing that he also made the point that, for trespass, the purpose need not be unlawful in itself, it being enough that it should be a user of the soil for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it. These observations seem to me to be directly in point in the present case. On this approach it would not matter in the least whether the assembly was or was not a G peaceful one or whether or not it was causing an obstruction to anyone. The motives or behaviour of those who constitute the assembly are irrelevant to the question whether there is a trespass. The mere fact that it was a use of the soil for a purpose other than that of passing or repassing along the highway would be enough to make it a trespassory assembly.

But the strict approach indicated by the earlier authorities was departed from by Lord Esher M.R. in the same case. He observed, at p. 146, that, H if the proposition that the use of the highway for any purpose, lawful or unlawful, other than that of passing or repassing was a trespass were to be construed too largely, the effect might be to interfere with the universal usage as regards highways in a way which would derogate from the

reasonable exercise of the rights of the public. He went on to give this explanation, at pp. 146–147: A

> "Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway *as such*. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." (Emphasis added.) B

In *Hickman v. Maisey* [1900] 1 Q.B. 752, 755 A. L. Smith L.J. said that he agreed with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, although he thought that it was a slight extension of the rule as previously stated which showed that the right of the public was merely to pass and repass along the highway. He gave, at p. 756, as examples of acts which no reasonable person would regard as trespassing, that of a man who sat down by the road for a time to rest himself or who took a sketch from the highway—of which the modern equivalent might be the tourist who pauses to take a photograph. But it is important to notice that the distinction which he drew was between acts which were an ordinary and reasonable use of the highway as such, which were permissible, and acts which were not within that description, which were not. Collins L.J. put the matter in this way, at pp. 757–758: C D

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. This is in effect what Lord Esher M.R. said in *Harrison v. Duke of Rutland*." E F

While therefore Lord Esher M.R. may be said to have extended the previous statements of the law, the extension which he was willing to accept did not depart from the essential principle. The test of what is ordinary and reasonable is not to be applied in the abstract, as one may legitimately do in order to discover whether the activity is in itself lawful. It has to be applied in the context of the exercise of the right of passage, which is the only right which members of the public are entitled to exercise when "using the highway *as a highway*" (emphasis added): see his words at p. 146. So the question remains whether what is being done is an ordinary and reasonable thing for a person to do while using the highway as such in the exercise of that right. G

Some of the cases indicate a disinclination on the part of the judges to favour resort to the courts for a remedy in cases where the trespass was so trivial or technical that no reasonable person would have objected to it: *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, where the H

A objection was to a clergyman holding services and delivering addresses on the seashore; *Fielden v. Cox* (1906) 22 T.L.R. 411, where the defendants had set up appliances on the highway for the purpose of catching moths. But the fact that some activities on the highway are or ought to be tolerated does not mean that they are being done there in the exercise of the public's right of access to it. It is the extent of the right of access, not the question whether the activity in question ought to be tolerated, which B is in issue in the present case. For the purposes of section 14A(5) the question is not whether the assembly is of a kind which a reasonable occupier of the land would tolerate, but whether it exceeds the limits of any permission of his or the limits of the public's right of access.

We were referred to a number of later authorities, but these seem to me to be illustrations of the application of the law as settled by these C previous cases and not to indicate that the law is in need of any further extension or relaxation as to the test to be applied. For example, in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. said:

> "The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is D legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

These observations are consistent with the opinion which the Lord President (Lord Dunedin) expressed in *M'Ara v. Magistrates of Edinburgh*, E 1913 S.C. 1059. The question in that case was whether the magistrates were entitled to issue a proclamation ordering that "persons shall not assemble or congregate or hold meetings" in certain streets of the city unless they had been licensed to do so. It was held that they had no power to do so either under the Act of 1606, c. 17, for staying unlawful conventions or at common law. As the Lord President explained, at F pp. 1074–1075, they had power by means of the police to move the people on if they were causing an obstruction or their conduct was such as to be likely to amount to a breach of the peace. What they could not do without statutory authority was to create an offence and impose penalties. (It should be noted that the Lord President was referring here to the magistrates not as judges—not as a tribunal of fact of that kind—but as members of the town council, with the power at common law by means of G the police—and by proclamation, if necessary—of moving on people who were causing an obstruction. The Lord President said, as to the limits of the public right of access, at p. 1073:

> "As regards the common law, I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, H and there is no such thing as a right in the public to hold meetings as such in the streets."

He went on to say that, although the streets are for passage and that passage is paramount to everything else, this does not necessarily mean

that anyone is doing an illegal act if he is not at the moment passing along—the whole question being one of degree. As for the right of free speech, he said that it undoubtedly exists but that: "the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised." I think therefore that the law as stated by Lord Esher M.R. in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 can be taken to be the law as it must be applied between members of the public who seek to exercise the public's right of way on a highway and the occupier of the land which has been dedicated to that right. The question is one of degree. But the principle which must be applied is that the highway is for passage, and such other uses as may be made of it as of right must be capable of being recognised as a reasonable and usual mode of using the highway as such.

This brings me to the wider questions which were raised in the course of the argument. Mr. Fitzgerald's submission was that the assembly in this case was a reasonable use of the highway because it was an entirely peaceful one and because it was not obstructing anybody. His argument was that this was a reasonable use of the highway, not because it was incidental or accessory to the activity of passing and repassing along it, but because as a purpose and end in itself it was reasonable. He said that the test which had been stated by Lord Esher M.R. was capable of development to bring it into line with what society in the late 20th century would consider to be reasonable. In order to strike a fair balance between the rights to freedom of expression and of assembly and the rights of those who wished to pass and repass on the highway, an assembly which was causing an obstruction could not be considered to be reasonable. But an assembly which was not obstructive and was otherwise lawful was a reasonable and usual use of the highway simply because the activity was in itself a reasonable one. So it should not be regarded as a trespassory assembly within the meaning of section 14A.

I do not think that this broad argument can be reconciled with Lord Esher M.R.'s statement of the law or with principle. In my opinion the distinction between the use of a highway for passage and its use as a place of assembly as an end in itself is a fundamental one, although the question is ultimately one of fact. The purpose of those who are said to have formed an assembly may be to remain in the place where they have gathered for a short time only before continuing to pass along the road, in which case it may be inferred that they are making reasonable use of the highway as a highway. Or it may be that their purpose to remain there indefinitely, in which case the only inference which can be drawn is that they are using the highway as a place of assembly. This point that the right is to pass or repass, not to remain, is perhaps best illustrated by using the language which Farwell J. adopted in *Attorney-General v. Antrobus* [1905] 2 Ch. 188 when he was asking himself whether the public could acquire by user the right to visit a public monument.

In that case also, as it happens, Stonehenge was the subject of the controversy—although in rather different circumstances, as the monument was then in private ownership. The owner of the land had enclosed the monument by fencing on the view that this was necessary for its protection. The Attorney-General wished to remove the fencing in order to keep the

A place open so that the public could visit it. The action failed, because there could be no public right of way to the monument acquired by mere user or by the fact that the public had been in the habit of visiting it. Farwell J. said, at p. 198, that the jus spatiandi—the right to walk about or to promenade—was not known to our law as a possible subject matter of prescription. He said, at p. 206, that the public had no jus spatiandi or manendi—the right to stay or remain—within the circle. In *In re* B *Ellenborough Park* [1956] Ch. 131, in which it was held that the jus spatiandi, in regard to a right to use a pleasure park, could be acquired by grant as an easement, Sir Raymond Evershed M.R. observed, at p. 163, that Farwell J.'s rejection of it may have been derived in part from its similar rejection by the law of Rome, and that there was no other judicial authority for adopting the Roman view in this respect into English law. C But as to the matter of public right he went on to say, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

D Although the use of these Latin words may seem out of date in present circumstances, they serve nevertheless as a valuable reminder of the place which the right to assemble must occupy in the context of the law relating to real property. Easements and public rights to land which are acquired by user or by dedication are limited rights, as against the occupier or owner of the land which is affected by them. They are granted or acquired E for a particular purpose only, and they are not to be confused with the use of the land for other purposes. Thus a right of way or passage is entirely different from a right to walk about or a right to remain in one place. The law recognises that a right of way or passage may be acquired by user or by dedication. But it takes a different view of the right to walk about or to remain in one place. These are not rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at F all they can be acquired only by express grant. So they cannot be included among the rights of access which the public can enjoy as of right without the consent of the landowner.

The assembly which was said by the police to have formed on this occasion was undoubtedly a peaceful and non-obstructive one and, as it was on the grass verge of a road which was vested in the statutory highway G authority, it may reasonably be said to have been doing no harm to anybody. But the consequences of accepting that anyone who was behaving in this way was exercising the public's right of access to the highway—was doing so as of right and not by mere tolerance—would have implications far beyond the facts of this case. It would affect the position of every private owner of land throughout the country over which there is a public right of way, irrespective of whether this is a made-up road or a footpath H or bridleway. The right of assembly which Mr. Fitzgerald was seeking to establish was what would be described in the terms of property law as a right to remain. I wish to stress that the purpose for which the defendants were seeking to remain where they had gathered is not material in this

context. Any member of the public may use a highway for passage in the exercise of the public right whatever his reason may be for doing so. In the same way, if such a thing as a public right to assemble and remain in one place on the highway were to be recognised, the purpose of those who wished to exercise it would be immaterial. If it was an unlawful purpose it could be stopped on that ground. But if it was lawful there would be nothing to prevent those who wished to exercise it from remaining where they were for however long they wished, whatever their number and whatever their purpose might be in doing so.

A

B

It is not difficult to see that to admit a right in the public in whatever numbers to remain indefinitely in one place on a highway for the purpose of exercising the freedom of the right to assemble could give rise to substantial problems for landowners in their attempts to deal with the activities of demonstrators, squatters and other uninvited visitors. It would amount to a considerable extension of the rights of the public as against those of both public and private landowners which would be difficult for the courts to control by reference to any relevant principle. The margin between what is and what is not a nuisance is an imprecise one, as to which he who wishes to put a stop to it may be in difficulty in obtaining an immediate remedy. The test of reasonable use of the highway as such is consistent with the rule that the public's right of way is essentially a right of passage. It is also consistent with the law as to the kind of user which must be shown in order to show that a public right of way has been constituted over the land of the proprietor. The proposition that the public are entitled to do anything on the highway which amounts in itself to a reasonable user may seem at first sight to be an attractive one. But it seems to me to be tantamount to saying that members of the public are entitled to assemble, occupy and remain anywhere upon a highway in whatever numbers as long as they wish for any reasonable purpose so long as they do not obstruct it. I do not think that there is any basis in the authorities for such a fundamental rearrangement of the respective rights of the public and of those of public and private landowners.

C

D

E

Mr. Fitzgerald said that, whatever the difficulties might be in regard to the holding of assemblies on footpaths and bridleways over the property of private landowners, there was no good reason why the same view should be applied to highways which were vested in the statutory highway authority. He said that, as highways which are used as roads by the public are now almost all in public ownership and as section 14A had brought the whole issue of trespass into the realm of public law, there should now be a coherent system of public law to deal with assembly cases. His argument was that the approach which the criminal law had taken in obstruction cases showed that the concept of reasonable user was capable of providing the required symmetry.

F

G

I do not need to go into a detailed analysis of the obstruction cases. We were referred to *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, in which the question was considered in the context of the offence which is created by section 137(1) of the Act of 1980 where a person without lawful authority or reasonable excuse in any way wilfully obstructs the free passage along a highway. In that context it is necessary to consider whether what was done was in itself reasonable, striking a

H

A balance between the right to free speech and to demonstrate on the one hand and the need for peace and good order on the other: *per* Otton L.J., at p. 151.

Mr. Fitzgerald said that the common law was capable of development within the concept of reasonable user in order to rationalise what he accepted were two conflicting lines of authority. But I do not think that section 14A requires us to attempt such an exercise. On the contrary, the B intention of Parliament as disclosed by the language of that section was to rely upon the existing state of the law relating to trespass as between members of the public and the occupiers of land to which members of the public have no right of access or only a limited right of access. Like it or not, this approach makes the lack of symmetry of which Mr. Fitzgerald complains inevitable. The private law upon which section 14A depends for C its application is concerned to regulate the rights of the owners and occupiers of land in regard to the use of their land by the public. Public law, which is concerned with the relationship between the state and its citizens, depends upon entirely different concepts. Furthermore it is a striking feature of the present case that the question whether the law relating to the public's right of access should be rationalised in order to give the public greater freedom in the exercise of that right is being D discussed in a case to which no landowner is a party. It seems to me to be contrary to elementary concepts of justice that the rights of landowners as against the public in relation to access to their land should be diminished by a decision of your Lordships' House when nobody who is in a position to defend their interest has yet been heard.

We were invited to have regard to the European Convention for the E Protection of Human Rights and Fundamental Freedoms both as an aid to statutory interpretation and as a yardstick against which to resolve any uncertainty in the common law or to guide its development. I do not think that there is any need to have resort to the Convention as an aid to statutory interpretation, as there is no ambiguity in the statutory provisions which are relevant to this case. Nor do I think that there is any uncertainty as to the test which must be applied under the common law relating to the F use which the public may make of a highway in the exercise of the public's right of access. In *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283G, Lord Goff of Chieveley said that he conceived it to be his duty, when he was free to do so, to interpret the law in accordance with the obligations of the Crown under the treaty. Adopting this approach, in *Derbyshire County Council v. Times Newspapers Ltd.* G [1992] Q.B. 770, 830B–C Butler-Sloss L.J. said that, where there was an ambiguity in the law or the law was otherwise unclear or so far undeclared by an appellate court, the English court was not only entitled but obliged to consider the implications of the Convention. For the defendants it was contended that the law is unclear because the inconsistency between the private law relating to trespass and the criminal law relating to obstruction in public places had still to be reconciled. For the reasons which I have H already given I do not accept that there is such an inconsistency.

In any event it seems to me that there are clear indications in the Convention that restrictions on the exercise of fundamental rights and freedoms such as the freedom of assembly under article 11(1) of the

Convention may be justified where this is necessary for the protection of the rights and freedoms of others. This is stated in terms in article 11(2). Article 1 of the First Protocol states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The precise effect of these provisions in regard to the right of a landowner to exclude trespassers from his property was not explored in the course of the hearing before us. But I do not think that it would be right to regard the Convention as providing unqualified support to the argument that the public's right of access should be enlarged so as to enable the public to exercise what article 11(1) of the Convention describes as "the right to freedom of peaceful assembly" wherever there is a public right of access to a highway. Such an enlargement would be bound to result in loss of the protection of the owners of land which the existing state of the law gives to them. In that sense and to that extent it could be said that they were being deprived of their right to the quiet enjoyment of their possessions contrary to article 1 of the First Protocol.

It seems to me therefore that what I can best describe as the horizontal effect of the defendants' argument as to the Convention in regard to the private rights of landowners gives rise to questions of considerable difficulty. I am not persuaded that the balance which is struck in private law between the rights of the public and those of landowners is in need of adjustment in order to enable members of the public to exercise their freedom of assembly. In practice members of the public are allowed to assemble in public places as they wish without objection or hindrance so long as they do not obstruct others and are peaceful. As Lord Goff of Chieveley said in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283F, everybody is free to do anything in this country, subject only to the provisions of the law. The law of trespass exists to protect the interests of landowners where such assemblies exceed the limits which they are willing to tolerate. Such provisions as exist in public law, as in the case of section 14A, may be justified on the ground that they have been carefully drafted having regard to the need to protect the public from arbitrary action on the part of the police while at the same time enabling the police to intervene to prevent disorder or crime. I do not think that the Convention requires us to attempt to reform the private law relating to trespass on which section 14A relies in order to mitigate the effects of its application to trespassory assemblies which are held in breach of an order obtained under that section.

For these reasons I would answer the certified question in the affirmative and dismiss the appeal.

LORD CLYDE. My Lords, the defendants were convicted of having taken part in an assembly which they knew was prohibited under section 14 of the Public Order Act 1986. The question is whether the assembly was a prohibited one. Section 14A(5) explains what is meant by a prohibited, or a "trespassory," assembly. The relevant words for the purposes of the present case are that the assembly "(*a*) is held on land to which the public has ... only a limited right of access, and (*b*) takes place in the prohibited circumstances ..."

A There is no doubt but that the assembly in the present case took place on a highway and that a highway is land to which the public had a limited right of access. So one has next to consider the prohibited circumstances. Those circumstances are defined in section 14A(5)(*b*). The critical qualification here claimed is that the assembly so took place "as to exceed ... the limits of the public's right of access." So the question comes to be B what is the extent of the public's right of access. That is a quite general question which will apply universally, whether an individual member of the public or a group of people is involved. It will also be applicable to any other kind of public road, subject to any particular limitations which may restrict the use of such a road, whenever or however imposed.

The Act gives a little further explanation. Section 14A(9) defines "limited" in relation to a right of access by the public to land as meaning C that "their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions." So one has to consider what was the particular purpose for which Parliament considered the use of a highway was restricted.

The fundamental purpose for which roads have always been accepted to be used is the purpose of travel, that is to say, passing and repassing D along it. But it has also been recognised that the use comprises more than the mere movement of persons or vehicles along the highway. The right to use a highway includes the doing of certain other things subsidiary to the user for passage. It is within the scope of the right that the traveller may stop for a while at some point along the way. If he wishes to refresh himself, or if there is some particular object which he wishes to view from E that point, or if there is some particular association with the place which he wishes to keep alive, his presence on the road for that purpose is within the scope of the acceptable user of the road. The view was expressed by A. L. Smith L.J., in *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, that if a man took a sketch from the highway no reasonable person would treat that as an act of trespass. So, as it seems to me, the particular purpose for F which a highway may be used within the scope of the public's right of access includes a variety of activities, whether or not involving movement, which are consistent with what people reasonably and customarily do on a highway. In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146 Lord Esher M.R. defined trespass in terms of a person being on the highway "not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway . . ." But G what is reasonable or usual may develop and change from one period of history to another. That was recognised by Collins L.J. where in *Hickman v. Maisey* he said, at pp. 757–758:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged H notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

On the other hand the purpose for which the road is used must be for ordinary and lawful uses of a roadway and not for some ulterior purpose for which the road was not intended to be used. Thus in *Hickman v. Maisey* it was held to be a trespass for someone to use the road as a vantage point for observing the performance of racehorses undergoing trial. To use the language of Collins L.J., that was a use of the highway "in a manner which is altogether outside the purpose for which it was dedicated ..." So also in the earlier case of *Harrison v. Duke of Rutland* it was held to be a trespass for a person to use the road for the purpose of disrupting the adjoining landowner's enjoyment of his sporting rights.

But it must immediately be noticed that the public's right is fenced with limitations affecting both the extent and the nature of the user. So far as the extent is concerned the user may not extend beyond the physical limits of the highway. That may often include the verges. It may also include a lay-by. Moreover, the law does not recognise any jus spatiendi which would entitle a member of the public simply to wander about the road, far less beyond its limits, at will. Further, the public have no jus manendi on a highway, so that any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there.

So far as the manner of the exercise of the right is concerned, any use of the highway must not be so conducted as to interfere unreasonably with the lawful use by other members of the public for passage along it. The fundamental element in the right is the use of the highway for undisturbed travel. Certain forms of behaviour may of course constitute criminal actings in themselves, such as a breach of the peace. But the necessity also is that travel by the public should not be obstructed. The use of the highway for passage is reflected in all the limitations, whether on extent, purpose or manner. While the right to use the highway comprises activities within those limits, those activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with that use even if they are not strictly ancillary to it. As was pointed out in *M'Ara v. Magistrates of Edinburgh*, 1913 S.C. 1059 and in *Aldred v. Miller*, 1924 J.C. 117 the use of a public street for free unrestricted passage is the most important of all the public uses to which public streets are legally dedicated. No issue regarding the nature of the user arises in the present case. It appears that everyone was behaving with courtesy and civility and restraint. Moreover there was no obstruction at all to any traffic.

In the generality there is no doubt but that there is a public right of assembly. But there are restrictions on the exercise of that right in the public interest. There are limitations at common law and there are express limitations laid down in article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. I would not be prepared to affirm as a matter of generality that there is a right of assembly at any place on a highway at any time and in any event I am not persuaded that the present case has to be decided by reference to public rights of assembly. If a group of people stand in the street to sing hymns or Christmas carols they are in my view using the street within the legitimate scope of the public right of access to it, provided of course that they do so for a

A reasonable period and without any unreasonable obstruction to traffic. If there are shops in the street and people gather to stand and view a shop window, or form a queue to enter the shop, that is within the normal and reasonable use which is matter of public right. A road may properly be used for the purposes of a procession. It would still be a perfectly proper use of the road if the procession was intended to serve some particular purpose, such as commemorating some particular event or achievement. B And if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so. All such activities seem to me to be subsidiary to the use for passage. So I have no difficulty in holding that in principle a gathering of people at the side of a highway within the limits of the restraints which I have noted may be within the scope of the public's right of access to the highway.

C In my view the argument for the defendants, and indeed the reasoning of the Crown Court, went further than it needed to go in suggesting that any reasonable use of the highway, provided that it was peaceful and not obstructive, was lawful, and so a matter of public right. Such an approach opens a door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a D highway as a highway. I do not consider that by using the language which it used Parliament intended to include some distinct right in addition to the right to use the road for the purpose of passage.

I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the E exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it F may come to exceed the right to use the highway.

The only point which has caused me some hesitation in the circumstances of the present case is the evident determination by the two defendants to remain where they were. That does seem to look as if they were intending to go beyond their right and to stay longer than would constitute a reasonable period. But I find it far from clear that there was G an assembly of 20 or more persons who were so determined and in light of the fluidity in the composition of the grouping and in the consistency of its component individuals I consider that the Crown Court reached the correct conclusion.

I do not find it possible to return any general answer to the certified question. The matter is essentially one to be judged in light of the particular facts of the case. But I am prepared to hold that a peaceful H assembly which does not obstruct the highway does not necessarily constitute a trespassory assembly so as to constitute the circumstances for an offence where an order under section 14A(2) is in force. I would allow the appeal.

LORD HUTTON. My Lords, on 1 June 1995 a number of people were present in the vicinity of Stonehenge. There were tourists and sightseers, and there were also a number of people who were present because it was the tenth anniversary of a disturbance known as "the Battle of the Beanfield" when the police had had to eject persons who had tried to enter the site of Stonehenge.

About 6.45 p.m. on 1 June the two defendants together with about 19 other persons, constituting a group of more than 20 persons, were on the grass verge between the perimeter fence of Stonehenge and the metal surface of the roadway of the A344. Some of the group were carrying banners with the words "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." The grass verge was about 4 feet 6 inches to 5 feet wide and the group, which was not static but fluid, was moving around on the verge and was spread out over 10 to 15 yards. It is not in dispute that the grass verge is to be considered as part of the public highway.

In 1994 Parliament amended the Public Order Act 1986 by section 70 of the Criminal Justice and Public Order Act 1994 which inserted section 14A and section 14B after section 14. The effect of section 14A in relation to the circumstances of the present case can be broadly stated as follows: where a chief officer of police reasonably believes that an assembly of 20 or more persons is intended to be held in any district at a place on land to which the public has only a limited right of access, and that the assembly is likely to conduct itself in such a way as to exceed the limits of the public's right of access and may result in serious disruption to the life of the community or in significant damage to a monument of historical, architectural, archaeological or scientific importance on the land, he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or in part of it. On receiving such an application a council in England, with the consent of the Secretary of State, may make such an order.

On 22 May 1995 Salisbury District Council made an order pursuant to section 14A that the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining the monument at Stonehenge were prohibited for four days commencing at 23.59 hours on 28 May 1995 and terminating at 23.59 hours on 1 June 1995.

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

Section 14A(9) provides:

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

A Section 14B(2) provides: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The two defendants were charged with an offence under section 14B(2). They were tried before the Salisbury justices and on 3 October 1995 they were each convicted of that offence. They appealed against their convictions to the Salisbury Crown Court and their appeals were heard by Judge B MacLaren Webster Q.C. and two justices on 3 and 4 January 1996. At the close of the prosecution case the defendants submitted that there was no case to answer and the Crown Court accepted this submission and allowed the appeals in a fully reasoned judgment setting out its findings and conclusions. The Director of Public Prosecutions appealed by case stated to a Divisional Court of the Queen's Bench Division, constituted by C McCowan L.J. and Collins J., which allowed the Director's appeal and ordered that the case be remitted to the Salisbury Crown Court to be reheard by a differently constituted bench.

In its judgment the Crown Court set out its findings of fact. These included:

> "At no time was either appellant or, for that matter any other person D in the group of people in the area extending 10 to 15 yards westward from the Heelstone abusive, obstructive or in any way offensive or violent to the police or anyone else. None of those to whom Inspector Mackie addressed himself was in the roadway—the A344 itself, they were not obstructing the freedom of movement of others on the verge nor were they causing a public nuisance ... I pause to remind us that we have found that the assembly of 20 or more people was merely E that. It was a presence. It was not, let alone any member of it, let alone either of the appellants, other than present. Neither as a group nor as individuals were any of those 20, and in particular, of course, the defendants (whom it must always be remembered we have to consider individually as distinct both from the group and each other) being destructive, violent, disorderly, threatening a breach of the peace F or, on the evidence, doing anything other than reasonably using the highway."

Therefore the issue which arose for determination before the Crown Court and the Divisional Court was whether the entirely peaceful assembly which did not obstruct passage along the highway constituted a trespassory assembly because it was taking place "so as to exceed the limits of ... the G public's right of access" to the highway, the A344.

The conclusion of the Crown Court was stated as:

> "we find that everything that was done by the appellants was done peaceably and in good order. Although Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142 was dealing with an interlocutory injunction and Otton J. in *Hirst v. Chief Constable of West Yorkshire*, H 85 Cr.App.R. 143 with obstruction (which, let it be recalled, did not occur in the instant case), we too are of the view that the passage cited from Lord Denning, at pp. 178–179, is, to adopt and adapt the words of Otton J., at p. 152, of importance when considering whether appellants (behaving as we find, on the evidence thus far, these

appellants to have been behaving), have committed a criminal offence of knowingly taking part in a *prohibited* assembly. What the order prohibited was a trespassory assembly. We accept Mr. Butt's contention [for the prosecution] that a trespassory assembly is one where the public's right of access to land has been exceeded. We do not in the light of our conclusion on that aspect have to consider whether the appellants knew they were taking part in a prohibited assembly. Their user of the highway was a reasonable user. Accordingly, for the reasons we have sought to explain we have unanimously reached the conclusion that the evidence is not such that properly directed we could properly convict of that offence. Accordingly there is no case for the appellants to answer and their appeals must be allowed."

In the case stated to the Divisional Court two questions were stated for its opinion:

"(i) Where there is in force an order under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A? (ii) In order to prove an offence under section 14B(2), is it necessary for the prosecution to prove that each of the 20 or more persons present is exceeding the limits of the public's right of access or merely that 20 or more persons were present and that some of them were exceeding the limits of the public's right of access?"

The Divisional Court answered the first question in the affirmative. In his judgment in the Divisional Court [1998] Q.B. 563, 570 McCowan L.J. stated:

"In the present case counsel for the defendants, Mr. Starmer, argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public. I would accordingly answer the first question posed by the Crown Court for this court in the affirmative. Counsel for the defendants also argued before us that a right to passage and repassage must include anything incidental thereto. I would accept that, but it leaves the question of what is incidental to passage or repassage. Passing the time of day with an acquaintance whom one happens to meet on the highway might well qualify, but I would reject the suggestion that the holding of an assembly of 21 persons possibly could, any more than I would accept counsel's suggestion, by way of analogy, that a photographer on a public highway adjacent to the Queen's land taking photographs from the highway of members of the Royal Family on that land would only be doing something which was incidental to his right of passage or repassage on that highway."

A Collins J. stated, at pp. 571–572:

> "The holding of a meeting, a demonstration or a vigil on the highway, however peaceable, has nothing to do with the right of passage. Such activities may, if they do not cause an obstruction, be tolerated, but there is no legal right to pursue them. A right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it."

B

He said, at p. 573:

> "The existence of a lawful excuse for doing something does not necessarily establish a legal right to do it. In the context of the criminal offence of obstruction, lawful excuse is naturally seen in terms of offending and not in terms of civil trespass."

C

It was agreed before the Divisional Court that the second question should be answered in the negative, in the sense that the prosecution need prove no more than that the assembly consisted of 20 or more persons and that the particular person accused was taking part in that assembly knowing it to be prohibited by an order under section 14A.

The point of law of general public importance stated for the opinion D of this House is the same as that contained in the first question stated for the opinion of the Divisional Court:

> "Where there is in force an order made under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

E

My Lords, I consider that in the light of the well known authorities cited to the House the present state of the law is correctly stated in the following passage in *Halsbury's Laws of England,* 4th ed. reissue, vol. 21, pp. 77–78, para. 110:

F

> "The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for those purposes and not with a legitimate object, and as against the owner of the soil he is to be treated as a trespasser."

G

However I consider that there are indications in the authorities that the public's right to use the highway may be extended and that the important issue before your Lordships' House is whether that right should be extended so that the public has a right in some circumstances to hold a peaceful assembly on the public highway provided that it does not obstruct the use of the highway.

H

To consider this issue I must first turn to the principal authorities which establish the principle stated in *Halsbury's Laws of England.* In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 it was held that the plaintiff was a trespasser when, on the occasion of a grouse drive upon a moor

owned by the Duke of Rutland, the plaintiff went upon a highway which crossed it, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the guns. Lopes L.J. stated, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

In his judgment, having considered the authorities, Kay L.J. stated, at p. 158:

> "According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it."

In *Hickman v. Maisey* [1900] 1 Q.B. 752 the defendant, who published information as to the performances of racehorses in training, walked backwards and forwards on a portion of the highway over the plaintiff's land about 15 yards in length for a period of about an hour and a half, watching and taking notes of the trials of racehorses on the plaintiff's land. The Court of Appeal following the decision in *Harrison v. Duke of Rutland* upheld a verdict that the defendant was a trespasser.

In *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, 125–127 Slesser L.J. stated the right of the public to use the highway in the terms employed by Lopes L.J. in *Harrison v. Duke of Rutland*, at p. 154, and in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. stated:

> "it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

Therefore, as I have stated, the issue which arises in the present appeal is whether the right of the public to use the highway, as stated by Lopes L.J. in *Harrison v. Duke of Rutland*, should be extended and should include the right to hold a peaceful public assembly on a highway, such as the A344, which causes no obstruction to persons passing along the highway and which the Crown Court found to be a reasonable user of the highway.

A In my opinion your Lordships' House should so hold for three main reason which are as follows. First, the common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern and I consider that the common law should now recognise that this right, which is one of the fundamental rights of citizens in a democracy, is unduly restricted unless it can be exercised in some circumstances on the public highway. Secondly, the law as to trespass on B the highway should be in conformity with the law relating to proceedings for wilful obstruction of the highway under section 137 of the Highways Act 1980 that a peaceful assembly on the highway may be a reasonable use of the highway. Thirdly, there is a recognition in the authorities that it may be appropriate that the public's right to use the highway should be extended, in the words of Collins L.J. in *Hickman v. Maisey*, at p. 758:

C "in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

I now turn to state these reasons more fully.

D *The common law right of public assembly is unduly restricted unless it can be exercised in some circumstances on the public highway*

In *Hubbard v. Pitt* [1976] Q.B. 142, 178–179 Lord Denning M.R. stated:

"Finally, the real grievance of the plaintiffs is about the placards and leaflets. To restrain these by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in E *Bonnard v. Perryman* [1891] 2 Ch. 269, and repeatedly applied ever since. That case spoke of the right of free speech. Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often F the only means by which grievances can be brought to the knowledge of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of Common Council of London affirmed 'the G undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.' Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited: see *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308. I stress the need for peace and good H order. Only too often violence may break out: and then it should be firmly handled and severely punished. But so long as good order is maintained, the right to demonstrate must be preserved. In his recent inquiry on the Red Lion Square disorders, Scarman L.J. was asked to

> recommend that 'a positive right to demonstrate should be enacted.' He said that it was unnecessary: 'The right, of course, exists, subject only to limits required by the need for good order and the passage of traffic:' The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38. In the recent report on Contempt of Court (1974) (Cmnd. 5794), the committee considered the campaign of the 'Sunday Times' about thalidomide and said that the issues were 'a legitimate matter for public comment:' p. 28, line 7. It recognised that it was important to maintain the 'freedom of protest on issues of public concern:' p. 100, line 5. It is time for the courts to recognise this too. They should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right of free speech; provided that everything is done peaceably and in good order."

A B C

In *Hubbard v. Pitt* the issue before the Court of Appeal was whether the judge in the High Court was right to grant an interlocutory injunction. Lord Denning M.R. dissented on this issue from the other members of the court, Stamp and Orr L.JJ., but they did not express an opinion on the right of public assembly.

In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 151–152 Otton J. cited the above passage from the judgment of Lord Denning M.R. in *Hubbard v. Pitt* and said:

D

> "The courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other."

If, as in my opinion it does, the common law recognises the right of public assembly, I consider that the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens, because otherwise the value of the right is greatly diminished. The principles of law in Canada governing the right of public assembly are different to those in England, in part because the Canadian Charter of Rights and Freedoms gives an express right of freedom of expression, but I consider that the reasoning in the following passage in the judgment of Lamer C.J.C. in the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 394 should also apply to the common law right of public assembly:

E F

> "the freedom of expression cannot be exercised in a vacuum ... it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression."

G

Conformity between the law of trespass to the highway and the law relating to wilful obstruction of the highway

H

Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence ..."

A In *Hirst v. Chief Constable of West Yorkshire* the defendants were members of a group of animal rights' supporters which stood on the public street in the vicinity of a furrier's shop offering leaflets to pedestrians and holding banners. They were charged with an offence contrary to section 137(1). They were convicted by the justices and their appeals to the Crown Court were dismissed. They then appealed by case stated to the Divisional Court. Both in the Crown Court and in the Divisional Court B the submission of the prosecutor was, 85 Cr.App.R. 143, 146:

"that unless the presence of the defendants upon the highway was for the purpose of its lawful use (i.e. passing and repassing over and along it) or some purpose incidental to that lawful use then their presence on the highway constituted an obstruction. [The prosecutor] further contended that the question of 'reasonableness' did not fall to C be decided if the court was satisfied that the presence of the defendants upon the highway was not for the purpose of its lawful use or some purpose incidental to it."

The Crown Court stated its conclusion as follows:

"We considered ourselves bound by the decision in *Waite v. Taylor* (1985) 149 J.P. 551. We found that to stand in the highway offering D and distributing leaflets or holding a banner was not incidental to its lawful user, and accordingly that each of the defendants had wilfully obstructed the highway contrary to section 137 of the Highways Act 1980. We therefore dismissed the appeals."

The Divisional Court allowed the appeals and quashed the convictions. In his judgment Glidewell L.J., at pp. 147–148, cited the judgment of Lord E Parker C.J. in *Nagy v. Weston* [1965] 1 W.L.R. 280, 284 in which Lord Parker C.J. said:

"It is undoubtedly true—[counsel for the defendant] is quite right—that there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a F question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

Glidewell L.J. also cited the judgment of Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175 where a group of persons picketed the G plaintiffs' offices by standing on the public footpath in front of the premises holding placards and distributing leaflets and Lord Denning M.R., after quoting the passage from the judgment of Lord Parker C.J. in *Nagy v. Weston* which Glidewell L.J. quoted, continued:

"In the present case the police evidently thought there was no breach of this law. The presence of these half a dozen people on Saturday H morning for three hours was not an unreasonable use of the highway. They did not interfere with the free passage of people to and fro. Of course, if there had been any fear of a breach of the peace, the police could have interfered: see *Duncan v. Jones* [1936] 1 K.B. 218. *But there was nothing of that kind.*"

Glidewell L.J. then stated, at p. 150:

> "In *Nagy v. Weston* itself, the activity being carried on, that is to say the sale of hot dogs in the street, could not in my view be said to be incidental to the right to pass and repass along the street. Clearly, the Divisional Court took the view that it was open to the magistrates to consider, as a question of fact, whether the activity was or was not reasonable. On the facts the magistrates had concluded that it was unreasonable (an unreasonable obstruction) but if they had concluded that it was reasonable then it is equally clear that in the view of the Divisional Court the offence would not have been made out. That is the way Tudor Evans J. approached the matter in the recent decision of *Cooper v. Metropolitan Police Commissioner* (1986) 82 Cr.App.R. 238, 242 and I respectfully agree with him. As counsel pointed out to us in argument, if that is not right, there are a variety of activities which quite commonly go on in the street which may well be the subject of prosecution under section 137. For instance, what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? In my judgment that is a question that arises. It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates, in my view ... Some activities which commonly go on in the street are covered by statute, for instance, the holding of markets or street trading, and thus they are lawful activities because they are lawfully permitted within the meaning of the section. That is lawful authority. But many are not and the question thus is (to follow Lord Parker's dictum): have the prosecution proved in such cases that the defendant was obstructing the highway without lawful excuse? That question is to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway."

In his judgment Otton J. referred to the balance between the right to demonstrate and the need for peace and good order and stated, at p. 152:

> "On the analysis of the law, given by Glidewell L.J. and his suggested approach with which I totally agree, I consider this balance would be properly struck and that the 'freedom of protest on issues of public concern' would be given the recognition it deserves."

The importance of this decision, which in my opinion was correct, was that, in deciding whether there was a lawful excuse for a technical obstruction of the highway, the Divisional Court rejected the test applied by the Crown Court, which was that a use of the highway which was not incidental to passing along it could not give rise to a lawful excuse, and applied the test whether the use of the highway (even though not incidental to passage) was reasonable or not.

A In my opinion the law would be left in an unsatisfactory state if your Lordships' House held that in this case the peaceful assembly on the highway, which caused no actual obstruction to persons passing along the highway, constituted a criminal trespass under section 14B of the Act of 1986 because the assembly was not incidental to passage along the highway, whilst the law recognised, as held in *Hirst v. Chief Constable of West Yorkshire*, that such an assembly may be a reasonable use of the B highway and in consequence there is a lawful excuse under section 137 of the Act of 1980 in respect of a charge of wilfully obstructing the free passage along a highway.

The extension of the public's right to use the highway

In the judgments in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the C words of Crompton J. in *Reg. v. Pratt*, 4 E. & B. 860, 868–869 were quoted:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

D In *Pratt's* case Erle J., at pp. 867–868, made a similar statement. But in *Harrison v. Duke of Rutland* Lord Esher M.R. stated the principle in less restrictive terms, at pp. 146–147:

> "Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. E But I must observe that I think that, if the language of Erle J., and of Crompton J., in *Reg. v. Pratt*, were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but F pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he G will be a trespasser."

In their judgments in *Hickman v. Maisey* [1900] 1 Q.B. 752 A. L. Smith and Collins L.JJ. accepted that the right of the public to pass and repass on the highway was subject to some degree of extension. A. L. Smith L.J. stated, at pp. 755–756:

> H "Many authorities, of which the well known case of *Dovaston v. Payne*, 2 H.Bl. 527 is one, show that prima facie the right of the public is merely to pass and repass along the highway; but I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a slight extension of the rule as previously stated, namely,

> that, though highways are dedicated prima facie for the purpose of passage, 'things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such;' and, 'if a person on a highway does not transgress such reasonable and usual mode of using it,' he will not be a trespasser; but, if he does 'acts other than the reasonable and ordinary user of a highway as such' he will be a trespasser. For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, to take a case suggested during the argument, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass. But I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

And Collins L.J. stated, at pp. 757–758:

> "Now primarily the purpose for which a highway is dedicated is that of passage, as is shown by *Dovaston v. Payne*; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

It can be contended that these passages in the judgments of Lord Esher M.R. and A. L. Smith and Collins L.JJ. only contemplate an extension of the rights of the public provided that the highway is used "as such," and that the extended use must be connected with using the highway for passing and repassing. But I consider that the passages are open to a broader construction and that they do not exclude a reasonable use of the highway beyond passing and repassing, provided always that the use is not inconsistent with the paramount purpose of a highway, which is for the use of the public to pass and repass. Therefore for your Lordships' House to uphold the defendants' argument would not constitute a reversal of a well established principle but rather would be an extension of the law in a way foreshadowed by earlier judgments. In *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1 this House was considering whether a long established rule of the criminal law should be set aside and I consider that the approach stated by Lord Lowry, at p. 28B–D, is not applicable to the present case.

Therefore, for the reasons which I have given, I am of opinion that the holding of a public assembly on a highway can constitute a reasonable

A user of the highway and accordingly will not constitute a trespass and I would allow the appeal. But I desire to emphasise that my opinion that this appeal should be allowed is based on the finding of the Crown Court that the assembly in which the defendants took part on this particular highway, the A344, at this particular time, constituted a reasonable use of the highway. I would not hold that a peaceful and non-obstructive public assembly on a highway is always a reasonable user and is therefore not a B trespass.

It is for the tribunal of fact to decide whether the user was reasonable. In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 150 Glidewell L.J. makes it clear that a reasonable activity in the street may become unreasonable by reason of the space occupied or the duration of time for which it goes on, "but it is a matter on the facts for the C magistrates, in my view."

If members of the public took part in an assembly on a highway but the highway was, for example, a small, quiet country road or was a bridleway or a footpath, and the assembly interfered with the landowner's enjoyment of the land across which the highway ran or which it bordered, I think it would be open to the justices to hold that, notwithstanding the importance of the democratic right to hold a public assembly, nevertheless D in the particular circumstances of the case the assembly was an unreasonable user of the highway and therefore constituted a trespass.

In conclusion I refer to one further matter. In setting out the facts the judgment of the Crown Court states:

> "At 5.45 p.m. [Inspector Mackie] and other officers saw a sizeable group (he said by that he meant one he estimated at about 20 people) E scale the fence of the monument and enter it. The officers also saw that group escorted out again either by police or security officers without any arrests or violence."

And:

> "Of course the basis of Inspector Mackie's undisputedly reasonable and sensibly intended intervention was to prevent any such thing as F an incursion into the monument such as had occurred an hour earlier in which there was no evidence that the appellants were involved."

I thought for a time in the course of the argument that the decision of the Crown Court might be erroneous because it appears that Inspector Mackie thought that the assembly of which the defendants were a part was about to commit an act of trespass by entering the monument, as had G happened an hour earlier. I consider that there is an argument of some force that a reasonable user of the highway by an assembly may become an unreasonable user so that the non-trespassory assembly becomes a trespassory assembly if it appears that members of the assembly are about to commit unlawful acts. However, this point did not arise in the questions stated for the opinion of the Divisional Court and was not argued before the Divisional Court, and the point does not arise on the question stated H for the opinion of your Lordships' House. Therefore it would not be right to decide the appeal on this point. Accordingly I express no concluded opinion on the point or on the circumstances in which a non-trespassory assembly may become a trespassory assembly.

For the reasons which I have given I would allow the appeal and would answer the certified question before your Lordships' House as follows. "No, if the tribunal of fact finds that the assembly was a reasonable user of the highway." A

Appeal allowed. Order of Crown Court restored.
Costs of first appellant to be paid out of central funds in accordance with section 16 of the Prosecution of Offences Act 1985. B

Solicitors: Philip Leach, Legal Department, Liberty; Douglas & Partners, Bristol; Crown Prosecution Service, London Branch 2, Central Casework. C

M. G.

D

[PRIVY COUNCIL]

GILBERT AHNEE AND OTHERS . . . . . . APPELLANTS

AND E

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

[APPEAL FROM THE SUPREME COURT OF MAURITIUS]

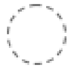
1999 Jan. 25, 26; March 17

Lord Steyn, Lord Jauncey of Tullichettle, Lord Hoffmann, Sir Iain Glidewell and Sir Andrew Leggatt F

Mauritius—Supreme Court—Jurisdiction—Contempt of court—Newspaper article publicly scandalising court—Whether power to commit for contempt of court—Whether power contravening individual's constitutional rights—Whether constitutional meaning of "law" including common law—Ingredients of offence of scandalising court—Courts Ordinance 1945 (No. 5 of 1945), s. 15—Constitution of Mauritius (Laws of Mauritius, 1981 rev., vol. 1, p. 9), ss. 5(1), 10(1)(4), 12(1)(2)(b), 76(1)[1]—Courts Act (Laws of Mauritius, 1996 rev., vol. 2), s. 15[2] G

[1] Constitution of Mauritius 1968, s. 5(1): see post, p. 301D.
S. 10: "(1) Where any person is charged with a criminal offence . . . the case shall be afforded a fair hearing . . . (4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . ." H
S. 12(1)(2): see post, p. 301E–F.
S. 76(1): see post, p. 301G.
[2] Courts Act, s. 15: see post, p. 301B–C.
S. 15, as amended: see post, p. 302B–C.

Regina v University of Nottingham

 No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
28 July 1997

FC3 97/5675/D

Court of Appeal (Civil Division)

1997 WL 1105891

Before Lord Justice Simon Brown Lord Justice Henry Lord Justice Auld

Monday, 28th July 1997

Application for Leave to Move for Judicial Review

Representation

The Applicant appeared in person.
Miss J McNeill (instructed by Messrs Lawford & Co , Richmond) appeared on behalf of the Respondent.

Judgment

Lord Justice Simon Brown:

My Lord, Lord Justice Auld, will give the first judgment.

Lord Justice Auld:

Mrs Subha Ktorides renews an application for leave to challenge by way of judicial review a decision of the University of Nottingham that she has failed part of a one year postgraduate teacher training course. The course, which she began in September 1994, would have resulted, if all had gone well for her, in the award of the postgraduate certificate of education in the summer of 1995.

The course included periods of practical teaching experience in schools with which the University had made arrangements for the purpose. They have been called “partnership schools”. The school or schools with which a student teacher undertook teaching practice contributed to the University's assessment of his or her performance in determining success or failure in the course. Inevitably, the schools' chief contribution concerned the student's performance in the classroom during the periods of teaching practice. The University has a full and detailed document called “A Partnership”, describing the course, its objects and its system in great detail. The members of the partnership, so described, are the University, the schools with which it has arrangements for placements for teaching practice and the student teachers themselves. The document provides in a section headed “Roles and Responsibilities”, the content and organisation of the course. As to assessment of the student's performance, it provides in paragraph 19 that:

© 2024 Thomson Reuters.

> “Partner Schools are responsible for providing the specific context in which students are supported in practising and developing professional skills and qualities.”

It continues:

> “They will have a leading responsibility for the school-based training of students to teach their specialist subjects and develop their understanding of how pupils learn training students to manage classes and assess pupils supervising students in relation to school-based elements of the course assessing student competences in subject application and classroom skills.”

There is then a note to that paragraph which reads:

> “The word ‘leading’ is not meant to imply total responsibility. School of Education method tutors will also be involved in the training aspects listed. The input of both will be important, and will vary during the course.”

In the preceding paragraph, paragraph 18, there is a reference to the involvement of the schools in ensuring that student competencies are assessed and in the awarding of the qualifications to successful students as part of that partnership.

During the academic year the applicant undertook teaching practice at three schools. The first appears to have gone reasonably well, but she experienced difficulties in the second and, to a lesser extent, in the third. She made a number of complaints about one of the schools, mainly of racism and discriminatory behaviour, and about the University and other staff involved in her training, mainly that they gave her inadequate support.

The University Examination Board determined in July 1995 that she had failed the teaching practice element of the course and thus had not qualified for the certificate of education.

At the applicant's request the University agreed to extend or defer the completion of her course into the autumn of 1995 to enable her to undertake a further period of teaching practice at a fourth school. So far as the applicant and the school are concerned, that period of practice seems to have been satisfactory, but the University, through her tutors and others who observed and otherwise appraised her performance, took a different view. In November 1995 the University informed her that she had failed and that the Board of the Faculty of Education had recommended that her course be terminated.

© 2024 Thomson Reuters.

It added that that recommendation would be automatically confirmed unless she requested a hearing by a body called the Board of Undergraduate Studies.

The applicant sought a hearing, making eight specific complaints about the University's treatment of her. These included allegations of improper conduct by her tutor and an external examiner and of failure by the examiners to consider all relevant matters and to consult fully with the placement school when making their assessment.

On 12th January 1996 the University's Undergraduate's Studies Committee, chaired by Professor D J Birch of the Law School, conducted an oral inquiry into the applicant's complaints. I should note the limited powers of that body. It could not substitute a pass for a fail decision, save in limited circumstances, but it could determine whether or not to confirm the decision to terminate the course and, in the latter event, whether the student should be allowed to re-sit some or all of the course constituents.

The Committee concluded that two of the applicant's complaints had some foundation, namely that the examiners had failed to discuss sufficiently with the placement school her performance in teaching practice, and thus had failed to take some relevant considerations into account in reaching their decision. However, the Committee expressed a belief that the examiners would still have failed the applicant if they had followed the procedures properly in those respects. Nevertheless, it considered that her course should not be automatically terminated, as had been indicated by the University, and that she should be offered the opportunity of a further period of teaching practice and assessment.

By letter of 15th January 1996, three days later, the University communicated that decision to the applicant, stating that it would contact her in due course to make arrangements. It appears that there was some discussion between Professor Birch and the applicant after the Committee had sat, in which, according to the applicant, Professor Birch had suggested that more than just two of her criticisms had been regarded as having some foundation and that the University might consider the funding of a “resit” by the applicant of her course at some other university. However, the decision communicated to the applicant in the letter of 15th January 1996 was simply that she should be allowed to “re-sit” her course at the University.

The University wrote again a week later, on 22nd January 1996, to the applicant, inviting her to indicate whether she wished to undertake further teaching practice and reassessment and offering to arrange it. The applicant did not reply to that letter. It does appear, however, from what she has told us this morning that there was some other correspondence passing between her and the University over the next few months in which she pressed the University to change its mind and find that she had passed, or, alternatively, to fund a re-sit of the teaching practice part of the course at another university.

The next indication of the applicant's intention in relation to the University's offer that she could re-sit the teaching practice part of its course came in the form of a solicitor's letter over three months later, of 3rd May 1996. It notified the University of her intention to seek judicial review of the decision of 12th January 1996 upholding the decision of the examiners that she had failed the course.

There was, it seems, further correspondence in which the University expressed its continuing willingness to allow the applicant to retake the teaching practice part of the course and in which the applicant's solicitors indicated her unwillingness to do so. As a result, the University, by a letter of 17th June 1996, informed the applicant's solicitors that it had recorded that

© 2024 Thomson Reuters.

she had failed her course and had not accepted its offer to permit her to repeat the practical teaching part of it. It should be noted that it did not terminate her course or her entitlement to redo the teaching part of it.

The applicant has not sought to invoke the visitatorial jurisdiction provided by the University. She has made no approach to the Visitor to challenge the treatment of her complaints by the Committee in January 1996. This application for leave to move for judicial review, which is in respect of the decision of 12th January 1996, was not made until August 1996, that is to say over six months after the event.

The applicant has appeared in person this morning to support her application, and we have also had the benefit of a full written application for leave in amended form and a skeleton argument provided by her former counsel.

The first matter, putting aside the merits with which the applicant has to deal, is whether this court has jurisdiction to deal with her complaint or whether it is properly a matter for the exclusive jurisdiction, in the first instance, of the University Visitor. The well-established rule is that the domestic affairs of a university, including the decisions of its examiners, are matters for resolution by the university, subject to review, in the first instance, by its visitor, and not for this court.

The leading authority for that well-established principle, which appears in a number of others, is Thomas v University of Bradford [1987] 1 AC 795 . It is for the visitor to determine complaints of this sort where the dispute relates to the correct interpretation and fair administration of the domestic law of a university through its statutes and ordinances and other instruments by which it guides its conduct.

The applicant maintains that in the circumstances of this case the Visitor does not have that jurisdiction. She submits that the court should accept jurisdiction for three main reasons. The first is that there is, she maintains, a statutory intrusion into the University's role in the provision of teacher training and certification of teachers by virtue of the provisions of the Education Teachers Regulations 1993 and a supporting ministerial circular enabling the minister to withdraw accreditation of an institution for such training and certification if the institution does not abide by the procedures indicated by the minister as being appropriate for it.

Second, the applicant maintains that the statutory scheme as interpreted by the University in the Partnership Document, to which I have referred, envisages an involvement of others (the placement schools) in the organisation of courses and in the assessment of student performance. Indeed, she maintains, as the document itself indicates, there are three parties involved — the University, the schools and the student teacher herself — in the assessment process. Accordingly, she maintains that the decision is not solely that of the University and review of it is not a matter for its exclusive visitatorial jurisdiction.

Third, the applicant maintains, through the arguments submitted by her former counsel in the written skeleton argument, that recent authorities indicate that the courts may intervene where there has been unfairness by a university in allowing non-academic considerations to intrude on an academic evaluation or where the decision-making is procedurally improper.

As to the first of those contentions, that of statutory intrusion or underpinning, I agree with Popplewell J that the accreditation of the University for the conduct of such a course pursuant to the 1993 regulations and its preparation of a working document in accordance with Government guidance are not sufficient to remove the exclusive jurisdiction of the University Visitor, subject, of course, to the ultimate supervision of this court. It is not sufficient to enable this court to intrude in the University's decision-making process in connection with its own affairs, in particular its assessment of its students. Neither the regulations

© 2024 Thomson Reuters.

nor the ministerial circular, to which I have referred, arguably qualifies the University's exclusive role through its visitor in that respect.

As to the sharing of responsibilities for the teacher training part of the course (described in paragraphs 18 and 19 of the Partnership Document), it does not, in my view, remove from the University the final responsibility of the University's examiners, as provided in paragraph 53 of the Document, which reads:

> “The final decision on student assessment is made by the Board of Examiners, which will if necessary take into account the differences between schools in awarding a pass. Assessment is on a pass/fail basis only.”

Whether the final assessment in this case stands, as I have said, is a matter for the exclusive jurisdiction of the University Visitor, to the extent that he can properly intervene.

As to the suggestion of recent erosion of the visitatorial jurisdiction in such matters, there is, as I read the authorities, no basis for it. The exclusive visitatorial jurisdiction, certainly over academic decisions and the proper application of university procedures in reaching them, is alive and well. In my view, there is no arguable basis, certainly in the circumstances of this case, for the assumption by the courts of an overlapping review before the visitor has exercised his jurisdiction.

On the ground of jurisdiction alone I would therefore refuse this application.

There is, in any event, the matter of the applicant's delay in seeking relief by way of judicial review. The decision under challenge is that of the University Committee of 12th January 1996 upholding the decision of the University's examiners that the applicant had failed her course. As I have said, a further six months went by before she made this application. She has sought to explain that delay by reference to her attempts after January 1996 to persuade the University to finance her completion of the teaching part of the course at another institution. However, as Popplewell J observed in refusing leave, a clear and firm decision was made and communicated to the applicant in January 1996 that she had failed but that she could retake the teaching practice part of her course at the University if she wished. She took well over three months before communicating, via her solicitor's letter of 3rd May 1996, that it was a reversal of the decision of failure or nothing that she would accept, and then a further three months or so before she made this application.

Whilst it may be that the applicant harboured hopes that she could persuade the University to fund the continuance of her course at another institution, and indeed that another institution would accept her and accept the qualifications that she would take with her from Nottingham, that can in no way justify the delay that occurred here in seeking to challenge the decision of January 1996.

In my view, the application, more than double the outside period permitted for such an application, was far too late, and there is no satisfactory reason shown for the failure to make it promptly and within the time. For that reason also I would refuse this application.

© 2024 Thomson Reuters.

Lord Justice Henry:

I agree.

LORD JUSTICE SIMON BROWN: Nobody who has listened to the applicant plead her own cause before the court today could fail to be struck by the depth of the resentment she so evidently feels about the way the University of Nottingham has treated her in recent times. Clearly she should be able to have her grievance fully heard and, if it were to prove well-founded on the facts, to have it remedied. The sole question before us today, however, is by what body should it be heard, and, more particularly, is she entitled to have it adjudicated on within the scope of an application for judicial review?

I have to say that there seems to me no room whatever for doubt on this central and fundamental question. All aspects of the applicant's complaint here make it, in my judgment, *par excellence* a complaint which can, and therefore can only properly, be heard by the university's visitor. The assessment of a student's competence and the decision whether or not to award a particular academic qualification, here a postgraduate certificate in education, is pre-eminently a question to be decided within the regime established by the university's own rules and regulations. True, partner schools here were to have a leading responsibility for assessing the important practical aspect of the student's teaching skills. True too, the Department of Education is interested, no doubt vitally interested, in the proper administration of this aspect of educational training, but, as my Lord has explained and as the Judge below held, these considerations do not begin to take this case out of the long-established principle that the visitor has not only jurisdiction, but indeed exclusive jurisdiction, in cases of this kind.

That view is sufficient to dispose of this application, and that indeed is the ground upon which I, for my part, would reject this application for leave. That is not, however, to say that I disagree with what my Lord has said also on the issue of delay; it is only that delay, as it seems to me, is here an altogether less clear, compelling and indeed decisive basis for refusing leave. One might have been prepared to exercise discretion to overcome the applicant's difficulty resulting from her delay. There is no discretion to override the visitor's exclusive jurisdiction in cases of this kind. The application must, accordingly, be dismissed.

ORDER: Application dismissed.

Crown copyright

Case No: CO/4285/00 + C0/4472/01, Neutral Citation Number: [2002] EWHC 1382 (Admin)
IN THE HIGH COURT OF JUSTICE
IN THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 5th July, 2002

B e f o r e:

THE HONOURABLE MR JUSTICE SCOTT BAKER

– – – – – – –

DR GILLIAN ROSEMARY EVANS

Claimant

– v –

THE UNIVERSITY OF CAMBRIDGE

Defendant

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

DR GILLIAN ROSEMARY EVANS IN PERSON
MR GERARD CLARKE (instructed by CLIFFORD CHANCE) for the DEFENDANT

– – – – – – – –

J U D G M E N T
As Approved by the Court

Crown Copyright ©

1. Dr Evans is a lecturer in history at Cambridge University. She has a long running dispute with the University about her failure to obtain promotion. She complains about various aspects of the promotion system and believes that she should have been promoted to professor.

2. There are before the court two sets of proceedings. In the first, CO/4285/2000, she challenges the General Board's Promotions Committee's decision of 17 October 2000 and the General Board's decision of 25 October 2000 not to recommend her for promotion as well as the Appeals Committee's decision of 11 December 2000 to reject her appeal against the General Board's decision. In the second, CO/4472/2001, she challenges the General Board's decision of 10 October 2001 not to propose the creation for her of a personal professorship. The proceedings were stayed pending further consideration of Dr Evans for promotion. Also, the University has tried to resolve Dr Evans grievances internally but has been unable to do so. At one stage Sir Brian Neill became involved as a mediator.

3. When the matters became before Burton J. on paper he gave various directions including one for an oral hearing on notice. The case came before me on 9 May 2002. After hearing argument for most of the day I granted permission but limited to the issue of whether or not the challenged decisions are amenable to judicial review. It seemed to me that this issue lies at the heart of the case and if resolved against Dr Evans would dispose of the case. I gave her the opportunity to lodge any further submission on this issue in writing by 20 May 2002 and gave the Defendant the opportunity of replying in writing on any points of law. Both parties have availed themselves of these opportunities. I further directed that the grant or otherwise of permission on any of the other issues should await the outcome of my decision.

4. Oxford and Cambridge Universities derive their powers from the Oxford and Cambridge Act 1923. They have statutory power to make their own statutes subject to the approval of the Privy Council, and also their own ordinances. They are different from other universities. They have no visitor.

5. A similar application was made by Dr Evans in 1998. She sought leave to bring proceedings for judicial review of a decision of the Promotions Appeals Committee on 2 March 1998, claiming she had been the subject of a miscarriage of justice on a number of grounds. Turner J, in refusing permission (see CO/×./1998 unreported) pointed out that there had for a considerable period been a running dispute between Dr Evans and the University on the basis that she felt her qualifications entitled her to serious consideration for promotion to the position of professor. She had brought proceedings in the employment tribunal and the county court. Turner J. dealt with the various substantive complaints deciding that none of them had any merit before concluding:

> "Quite apart from the specific grounds put forward by the applicant, which themselves lack intrinsic merit, generally, the applicant has failed to satisfy me there is in her application to challenge the decision of the Appeals Committee, any sufficient element of public law to justify the grant of leave. The essence of the dispute between the applicant and the University lies in its role as an employer and her position as an employee. That relationship is governed by the ordinary rules of the law of contract. If and to the extent that the applicant wishes to claim that her employer has acted unfairly towards her, that is capable of resolution as a breach of her private law rights. The mere fact that certain aspects of the government of the University do fall within the field of public law if, by way of example, its decisions have been reached by ignoring well known public law principles, then public law can be successfully invoked. But that is a long way from anything from which the applicant seeks to ventilate in regard to her own promotion and the activities of the Appeals Committee."

The Promotions Process

6. As I understand the process it is as follows. First, candidates are assessed by faculties under published criteria; next, the Promotions Committee of the General Board sits in sub–committees to deal with groups of disciplines. Each candidate is evaluated with two or three sentences of reasons. The third stage is for the whole

of the General Board's Promotions Committee to come together. It tries to achieve consistency across the disciplines. This meeting takes a day and in the present case some 129 candidates were assessed against seven criteria. Finally the General Board ratifies the Committee's decision and there is a right of appeal to the Appeals Committee. Dr Evans makes various points about the fairness of the procedure, absence of reasons and so forth but it is unnecessary to go into these at this juncture.

7. The Second challenge complains that the University's General Board did not propose the creation for her of a personal professorship. Here again numerous grounds are advanced including reasons, unlawful delegation of powers by the General Board, breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, failure to divulge who considered her application for promotion, breach of legitimate expectation and breach of statutory duty under the Data Protection Act 1998. Again, at this stage I need go into no further detail.

8. Dr Evan's case is that she is not just a discontented employee of the University (although in my view she is certainly that). She goes much further claiming that what the University has been doing is unlawful. She has been campaigning for many years for a complete overhaul and reform of the promotion process, which in her view is out of date and not geared to ensuring that the best qualified candidates are promoted. For example, she says there is no indication how the General Board could satisfy itself from the materials put to it. It should be able to see what it is approving and why rather then merely acting as a rubber stamp. Candidates are given nothing to show how to do better or why they have failed; and they should be.

9. Dr Evans points to the fact that she is an officer holder within the University, a university lecturer in the Faculty of History. She draws attention to the continuity of the office and to the fact she cannot be dismissed. The promotion procedures are ordinances of the University.

10. The demarcation between public law disputes which the Administrative Court will entertain and private law disputes which it will not is not always capable of precise definition. The question to be asked in the present case is whether the decision–makers were exercising public law or private law functions. In this regard the prime focus is not so much on the status and nature of the body making the decision as on the particular function that it is exercising. Where that function relates to employment, cases that have came before the courts have usually fallen on the private law side of the line for the no doubt obvious reason that there are other remedies of a statutory or contractual nature.

11. The indisputable fact is that Dr Evans is an employee of the University. She has a contract of employment with the University, one that incorporates the University's own rules made through ordinances. If the University is in breach of contract through failing to comply with its own rules her remedy is to claim breach of contract. She also has rights giving access to an employment tribunal.

12. Dr Evans, as I have said, makes much of being an officer holder, claiming that this fact gives rise to the availability of public law remedies. But, as Mr Clarke for the University points out, there is a distinction between being an office holder within the University and holding a public office. In this case being an office holder within the University means no more than being an employee within the University.

13. If the University's submission is wrong then the consequences would be to open up judicial review to every disgruntled academic employee at Oxford and Cambridge universities. I cannot believe that to be right. Dr Evans has to attach any claim for judicial review to an impeachable public law decision. In looking at the decision to see what function the decision–makers in this case were performing, the answer seems to me to be clear that they were ones of an employment nature rather than public ones.

14. Dr Evan's second complaint that the General Board did not propose the creation for her of a personal professorship seems to me to emphasise the personal character of this dispute. She is not claiming appointment to an established chair, rather that one should be created for her. I do not regard this as significantly different from an employee in a business who complains that he has not been promoted to a post that should have been tailor made for him.

The Authorities

15. I turn therefore to look and see how the observations of Turner J. in 1998 accord with authority. There is some dispute as to the extent, if any to which the public/private law point was argued before him. In R v Panel on Take–Overs and Mergers ex parte Datafin PLC [1987] 1QB 815 the Court of Appeal had to consider whether decisions of the Take–Over Panel were amenable to judicial review. It concluded that they were. If there is a public duty the court will police it. Lord Donaldson M.R said at 835G:

> "No one could have been in the least surprised if the panel had been initiated and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take–over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide."

The Court looked closely at the underlying circumstances of what the Take– Over panel was doing. This was of much greater relevance than the source of its power.

16. R v Secretary of State for the Home Department ex parte Benwell [1985] 1QB 554 was a case where a prison officer obtained judicial review of a decision to dismiss him for a breach of the code of discipline for prison officers. But he had entered the prison service as a person holding the office of constable and not under a contract of employment. Accordingly, he had no private law rights that could be enforced in civil proceedings. In the course of his judgment Hodgson J cited with apparent approval Purchas L.J in R v East Berkshire Health Authority ex parte Walsh [1985] QB 152, 176B:

> "There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter parties whether by action in the High Court or in the appropriate statutory tribunal, whilst the latter are subject to the supervisory powers of the court under R.S.C. Ord 53."

Walsh was distinguishable because the disciplinary procedures in that case were incorporated into the contract of service which deprived the procedures and compliance with them of any possible public law character. So in the present case promotion is something to be determined according to Dr Evan's terms of service.

17. University Council of The Vidyodaya University of Ceylon v Linus Silva [1965] 1W.L.R 77 was a Privy Council decision. The University had summarily terminated the Vice–Chancellor's appointment without him being informed of the nature of the allegations against him or being afforded an opportunity of being heard in his own defence. It was held that he was not shown to be in any special position other than a servant of the University and that where there was an ordinary contractual relationship of master and servant the latter could not obtain an order of certiorari if the master had terminated the contract. Lord Morris of Borth–y–Guest said at 90 C:

> "The circumstances that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18(e) are other than ordinary contracts of master and servant."

18. That decision was referred to by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1W.L.R 1578 where the House of Lords decided by three to two that teachers in Scotland had in general a right to be heard before they were dismissed. He said at 1596F:

"On the other hand, there are some cases where the distinction has been lost sight of, and where the mere allocation of the label - master and servant - has been thought decisive against an administrative law remedy.

One such, which I refer to because it may be thought to have some relevance here is Vidyodaya University Council v Silva [1965] 1W.L.R. 77, concerned with a university professor, who was dismissed without a hearing. He succeeded before the Supreme Court of Ceylon in obtaining an order for certiorari to quash the decision of the University, but that judgment was set aside by the Privy Council on the ground that the relation was that of master and servant to which the remedy of certiorari had no application. It would not be necessary or appropriate to disagree with the procedural or even the factual basis on which this decision rests, but I must confess that I could not follow it in this country in so far as it involves a denial of any remedy of administrative law to analogous employments. Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law."

19. Dr Evans cited McLaren v The Home Office [1990] I.R.L.R. 338 where the Court of Appeal held that the first instance judge had wrongly taken the view that the relationship between a prison officer and the Home Office was a matter of public law rather than private law and that any claim had to be raised by way of an application for judicial review. Woolf L.J, as he then was, said at paragraph 38 that in resolving the issue whether the prison officer was required to bring his claim by way of judicial review the following principles had to be borne in mind:

"1. In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceeding for damages, a declaration or an injunction (except in relation to the Crown) in the High Court or the County Court in the ordinary way. The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employees. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power for, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other imitations but whatever rights the employees has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so××..

2. There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariable will have if the employer is the Crown and it is not domestic or wholly informal its proceedings and determination can be an appropriate subject for judicial review××.

3. In addition if an employee of the Crown or other public body is adversely affected by a decision of general application by his employer, but he contends that that decision is flawed on what I loosely describe as *Wednesbury* grounds, he can be entitled to challenge that decision by a way of judicial review××..

4. There can be situations where although there are disciplinary procedures which are applicable they are of a purely domestic nature and therefore, albeit that their

> decisions might affect the public, the process of judicial review will not be available××."

It is to be noted that in *McLaren's* case the employment dispute was regarded as a private law matter despite the fact that the claimant prison officer worked in a public institution.

20. Dr Evans also relied on Clark v University of Lincolnshire and Humberside (C.A. unreported 19 April 2000). The examiners had failed an examination for plagiarism. The Court of Appeal declined to strike out the claimant's claim for breach of contract merely because an application for judicial review would have been more applicable. *Clark* , however, was not concerned with an employment situation but with the failure of an examination paper, a function that plainly in my judgment crosses the public law boundary.

21. R v The British Broadcasting Corporation ex parte Lavelle [1983] 1W.L.R 23 is a decision that illustrates the caution of the courts in permitting what are really employment issues to embark into the public law field. That case was incidentally one of the decisions cited by Woolf L.J. in *McLaren* as an example of his fourth principle. An employee of the BBC was refused judicial review of the decision to dismiss her. Woolf J (as he then was) said at 39B:

> "××.it seems to me that while the court must have jurisdiction to intervene to prevent a serious injustice occurring it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely a notional danger that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene."

22. The final authority to which it is necessary for me to refer is The Queen on the application of Galligan v The Chancellor, Masters and Scholars of the University of Oxford (unreported 22 November 1991). In that case it was conceded that the dispute was amenable to judicial review and so the question was never in issue. The decision under review was very different from those in the present case and, as I said at paragraph 52 of the judgment, the court should be very slow to intervene in a matter arising out of an employment dispute and involving the management of the University.

23. In my judgment the principle to be derived from the authorities and to be applied in a case such as the present is that the court has to look closely at the functions of the body whose decision is being questioned and if they are of a private or employment rather than a public nature there will ordinarily be no basis for the Administrative Court to entertain the dispute. The fact that the University has public functions and that its powers derive from statute will, in the circumstances, be neither here nor there. It is true that many employment cases turn on issues of dismissal whilst here the issue is promotion. But this is still, in my judgment essentially an employment or contractual dispute. The fact that Dr Evans is employed by Cambridge University rather than any other employer such as a school or a business does not make this a public law dispute. There is a useful analogy in the case of R (Heather) v Leonard Cheshire Foundation [2002] E.W.C.A Civ 366 where the background elements of regulations and funding did not make the foundation a public authority for the purposes of the Human Rights 1998.

24. I cannot leave this case without expressing admiration for the research and erudition of Dr Evans in the preparation of her argument both written and oral. Furthermore, she has presented her argument with skill and moderation. In the end, however, I have come to the conclusion as did Turner J. 1998 that her case is in truth a private law dispute and not amenable to the jurisdiction of the Administrative Court. The University has given an undertaking that it will not argue in any breach of contract claim that its promotion procedures are not contractual, but I do not wish to say anything to encourage Dr Evans to prolong her dispute with the University by taking yet further proceedings. That, however, is entirely a matter for her. In the result, this claim for judicial review fails and it is unnecessary for me to go into any of the other matters raised at the application for permission.

_ _ _ _ _ _ _ _ _ _ _ _ _

MR JUSTICE SCOTT BAKER: For the reasons given in the judgment that has been handed down the judicial review fails.

MR CLARKE: My Lord, as my Lord can see Dr Evans is not here this morning, and it does not appear that she intends to be present; she sent an email to somebody at the university about an hour ago from which, unless she sent it from a lap−top, it appears that she is in Cambridge this morning. So she is not going to come.

MR JUSTICE SCOTT BAKER: Yes.

MR CLARKE: My Lord, I invite the court to order that Dr Evans pay the costs of both applications, which have been dismissed now on a substantive basis. I do not invite my Lord to assess those costs, not least because Dr Evans is not here to make any submissions about that, but I would invite the court to accept the principle, ordinary principle, that this has now been a substantive judicial review upon which Dr Evans has failed at the public law threshold.

MR JUSTICE SCOTT BAKER: Yes.

MR CLARK: My Lord, even if you had only been dealing with it on permission, and if my Lord had refused permission, I would say it is one of those cases where an oral hearing with both parties represented, it was appropriate for the respondent to have its costs. But we have gone beyond that stage now and we are now, I would submit, in the ordinary position where the unsuccessful party should pay the costs.

Now, in fact, it may well be that the party would be able to come to some agreement about the amount of costs hereafter and it will not need to go to a full assessment, but in the absence of Dr Evans here to make any observations about that, I simply invite my Lord to make the order in principle, and the assessment can follow on for a detailed assessment in the usual way?

MR JUSTICE SCOTT BAKER: Yes. I am just wondering whether it might be desirable to say that the order should not be drawn up for seven days in order to give her an opportunity to make any further representations that she wants to on costs?

MR CLARKE: I do not anticipate that there would be a problem, my Lord. My only observation, I suppose, would be that she has known of the judgment since it was issued in draft the day before yesterday. She has known what the result was going to be this morning.

MR JUSTICE SCOTT BAKER: She has, I think, written something saying that she did not want to pay the costs.

MR CLARKE: We have not seen anything ourselves from Dr Evans.

MR JUSTICE SCOTT BAKER: Well there is a request for leave to appeal. What she says is this, this has been faxed through: "The Court of Appeal found against the university in the applicant's application for leave to appeal over costs in October 1999. The judgment was critical of the university's extravagance in running up costs beyond what was

reasonable and proportionate. The judge will have noticed that two senior solicitors from Clifford Chance were present throughout the day's hearing on 9th May. If the respondent appears to seek costs at the handing down of the judgment, the applicant asks for a hearing to be set and for reasonable time to obtain the advice of a costs draughtsman so that she may be in a position to put forward properly–founded arguments about the size of the university's bill."

MR CLARKE: My Lord, what appears to me from that is that Dr Evans does not invite the court not to make any order for costs, but she might simply take issue as to the quantum. In those circumstances, my Lord, I would suggest that the appropriate order is an order for costs to be assessed, and that should not be made subject to any further period of challenge. But that, of course, Dr Evans would have every opportunity on the assessment to make all appropriate points.

The Court of Appeal matter she was referring to, my Lord, was simply a county court case where a costs order was made favourably to the university, and all that happened there was that Dr Evans obtained leave to appeal in respect of the costs order. The matter did not go any further because it was resolved by agreement between the parties.

But, my Lord, in the circumstances Dr Evans has effectively signalled to the court her intention to argue on quantum.

MR JUSTICE SCOTT BAKER: That seems pretty clear and she is not, I think, taking issue, according to this document, with the principle.

MR CLARKE: Yes, and I would suggest that, my Lord, rather than saying that this order should be left open or not drawn for any period of time, my Lord should make the order. The order then goes–– obviously the costs then go for assessment. If the parties cannot agree the matter then the costs judge will have to deal with it and, of course, Dr Evans can take such advice on costs as it is appropriate and make such submissions as she wishes.

MR JUSTICE SCOTT BAKER: Yes, very well, I shall make an order for costs and direct that there is to be a detailed assessment.

MR CLARKE:: My Lord, I am grateful.

MR JUSTICE SCOTT BAKER: Now, as far as her request for permission to appeal, what she says is this: "In view of the immense importance to academic staff at universities of this question of access to public law remedies and its considerable significance as a public interest issue, the applicant seeks permission to appeal. The applicant takes the opportunity to mention that at the time of sending this, on the morning of 5th July, she has received no notice from the respondent that it intends to be present in court for the handing down of the judgment to seek costs. She has had no schedule of the respondent's costs in this matter at any time. She repeats her request to be allowed a hearing if the respondent seeks an award of costs."

MR CLARKE: Well it seems we are going back on to that ground, my Lord, but I would suggest that really does not alter the position as to costs, that is a leave to appeal matter. I would simply say that what my Lord has done is really decided this case as applying well–established principles as to the public/private law divide insofar as it concerns employment disputes, and my Lord has averted to a number of leading cases on that. Although it might be thought to be of importance to Dr Evans, it is not really a case of pressing public interest or general public interest, in my submission. Nor is it a case which establishes any new legal frontier. My Lord has, as I indicated, applied the well–established to principles to the facts of this case and it is not a matter upon which leave to appeal should be granted, certainly not by this court. If Dr Evans wishes to take it further, then perhaps she will try the Court of Appeal.

MR JUSTICE SCOTT BAKER: I am going to refuse permission to appeal. It seems to me that there has already been far too much litigation in relation to this matter and I am not prepared to do anything to encourage it.

As far as the costs are concerned, again, it appears from these two documents that the issue is as to quantum. In the circumstances the order will be made as I indicated.

MR CLARKE: I am most grateful, my Lord.

____

Case No: A3/2002/1450, Neutral Citation Number: [2003] EWCA Civ 472
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(HHJ DEAN QC SITTING AS A JUDGE OF THE HIGH COURT)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 4th April, 2003

B e f o r e:

LORD JUSTICE PETER GIBSON,
LORD JUSTICE POTTER

– – – – – – –

ED&F MAN LIQUID PRODUCTS LTD

Appellant

– v –

PATEL & ANR

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr RobertThomas (instructed by Clyde & Co) for the appellant
Mr Simon Bryan (instructed by Mills & Co) for the respondent

J U D G M E N T
As Approved by the Court

Crown Copyright ©

Lord Justice Potter:

1. This is an appeal from a judgment of His Honour Judge Dean QC sitting as a judge of the High Court by which he rejected the application of the first defendant to set aside a judgment obtained against him in default of acknowledgment of service. The action had been brought against the first defendant and the second defendant, as partners trading in industrial alcohol under the name of "Quickstop Group" and, as such, liable to pay for two shipments of alcohol the subject of the claim. Judgment had also been signed against the second defendant who applied with the first defendant to set it aside. The second defendant was successful. Each defendant faced the burden placed upon him by CPR Part 13.3(1)(a), namely to demonstrate that he had "a real prospect of successfully defending the claim". The judge held that the second defendant had a real prospect of success on the basis of his assertion that he was not a partner in, but merely employed by, the Quickstop Group. However, so far as the first defendant was concerned, the judge dealt with the matter upon the merits as they appeared from the evidence before him and held that, in the light of a series of unqualified admissions of the claimants' debt over a prolonged period prior to judgment, there was no real prospect of a successful defence.

2. Before the judge, as on this appeal, there was debate over the precise meaning or emphasis of the test to be applied to the defendant's prospects of success under CPR 13.3.(1)(a); in particular (1) whether it is the same as under CPR Part 24 which uses similar terminology in respect of the criterion for summary judgment against a defendant, namely that he has "no real prospect of successfully defending the claim or issue" (see CPR 24.2(a)(ii)) or (2) whether (if different) the court should adopt the approach set out in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221, a decision under the equivalent rule of the former Rules of the Supreme Court, as adopted and applied with reference to CPR 13.3.(1) by Moore–Bick J in *International Finance Corporation Utexafrica S.p.r.l.* (2001) CLC 1361.

3. In the *Saudi Eagle* , when comparing the test to be met by a defendant under R.S.C. Order 14 ("an arguable case"), with the standard laid down in *Evans v Bartram* (H.L.) [1937] AC 473 in respect of a defendant seeking to set aside a regular judgment signed in default, the Court of Appeal (per Sir Roger Ormrod) said:

> "× *Evans v Bartram* × clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. ×
>
> Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."

4. Later, having considered the facts of the case, the court concluded:

"In the circumstances we do not think that the defendants have shown that they have a defence which has any reasonable prospect of success."

5. In the *Utexafrica* case, Moore–Bick J applied the *Saudi Eagle* approach to CPR 13.3.(1) in the following passage of his judgment at p.1363:

> "The application is made under 13.3.1 of Civil Procedure Rules which gives the court the power to set aside the default judgment if the defendant has a real prospect of successfully defending the claim. Mr Howard drew my attention to the commentary in paragraph 13.3.1 of Civil Procedure and the decision of the Court of Appeal in the *Saudi Eagle* in which the court held that in order to set aside a default judgment under Order 13 of the Rules of the Supreme Court the defendant had to show that he had a realistic prospect of defeating the claim. It was said in that case that merely arguing a defence was not sufficient. It had to be a defence which had a real prospect of success which carried some degree of conviction. Mr Popplewell, on the other hand, submitted that unless the defence was one which could be said to have no realistic prospect of success, it must follow that the tests in 13.3.1(a) are satisfied. However logical the proposition may be on its face, it is not one I am able to accept. The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless, whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable. That is clearly the sense in which the expression was used in the *Saudi Eagle* and, in my view, it is also the sense in which it is used in Rule 13.3.1(a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside. In my view, therefore, Mr Howard is right in saying the expression "realistic prospect of success" in this context means a case which carries a real conviction."

6. It is perhaps worth mentioning in relation to that passage, that the phrase used by the court in the *Saudi Eagle* was "any *reasonable* prospect of success" and that, in making its observation that the defence advanced "must carry some degree of conviction" it was seeking to convey the nuance to be attached to "a *real* prospect of success" as propounded in *Evans v Bartram* [1937] AC 473. It nowhere made use of the word "realistic" as the passage in Moore–Bick J's judgment might suggest. However, in this context, I regard use of the words "real" and "realistic" as interchangeable so far as nuance of meaning is concerned.

7. What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase "real prospect of successfully defending the claim" for the purposes of both CPR 13.3.(1) and 24.2 and, subject to the question of burden of proof, may be taken to have contemplated a similar test under each rule. It was stated by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92j that:

> "The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success × they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

8. I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the *Saudi Eagle* that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14. Furthermore, both CPR 13.3(1) and 24.2 have provisions whereby, for the purposes of doing justice between the parties, the court can order that judgment be set aside under 13.3.1(b) if it appears to the court that there is some other good reason to do so, and, under 24.2(b) that summary judgment be withheld on the ground that there is some compelling reason why the case or issue should be disposed of at trial.

9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2.

10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini−trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and *Three Rivers DC v Bank of England (No.3)* [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].

11. I would only add that, where there is a claim or judgment for monies due and issues of fact are raised by a defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent that, with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgements into account as an indication of the likely substance of the issues raised and the ultimate success of the defence belatedly advanced.

12. In the instant case, the judge held that, if there was a difference to be detected in the approach set out in the *Saudi Eagle* and that defined in *Swain v Hillman* it was

unnecessary to resolve it because, upon either approach, the first defendant had no real prospect of success in the light of admissions made prior to judgment.

13. The state of the evidence and the nature of the issues before the judge were as follows.

14. The claim was for a principal sum of US $283,860.00, the balance of the price of two deliveries, one of ethyl alcohol and the other of grain alcohol, made to the defendants by the claimants in the course of March to May 1997. The first delivery was alleged to have been made pursuant to an oral contract made on the telephone between the first defendant and Mr Macaire of the claimants on 9 February 1997 and the second between the first defendant and Mr Duriez on behalf of the claimants on 6 March 1997 as evidenced by subsequent invoices. The price under the ethyl alcohol contract (no.1696.01) was US$681,408 payable on delivery DDU Chimkent, Kazakhstan. The price for the grain alcohol was US$61,360 payable on delivery DDU Alma Ata, Kazakhstan. Each delivery was the subject of a detailed invoice dated 4 March 1997 and 10 March 1997 respectively. Each stated: "Price: US$130.00 per Hectolitre at volume" and "Payment: Cash on Delivery" and provided that the funds would be remitted by telegraphic transfer to the claimant's New York bank under advice to the claimants in London. They were thus on their face outright sales with payment due from the defendant following delivery.

15. It was common ground between the parties that, following their first commercial contacts in 1994, they had entered into an agreement dated 26 October1995 but signed by the first defendant on 15 November 1995 entitled "J V Agreement between Quickstop Group and ED&F Man Alcohol for the sale of ethyl alcohol, 96% in Uzbekistan". That agreement provided that the parties would have a 50% participation in the joint venture and all profits would be shared equally after deduction of all costs relating to the operations of the joint venture. The contracts of sale and spot sales into the Uzbekistan market were to be procured by Quickstop with payment made locally to Quickstop in US$. The title of the product shipped to Tashkent would remain with the claimants until passed to a buyer under the relevant terms and conditions of sale. The claimants would deliver the alcohol to Quickstop's bonded warehouse under All Risks cover to be provided by the claimants till such delivery, with Quickstop providing All Risks insurance cover thereafter until delivery to the local buyer. Quickstop would keep a running account of transactions, supplying the claimants with regular trading statements by way of account. Under the heading ‘Share of the Profit and Loss' it was provided that:

> "Both parties shall declare all related costs of the Joint Venture. Upon sale of the Product and receipt of payment by [the first defendant], a profit shall be calculated. [The first defendant] shall pay [the claimants] for all of [the claimants'] expenses plus 50% of the profit.
>
> Payment to be made by telegraphic transfer to bank account of Man"

16. The evidence before the judge may be summarised in this way. The application was originally made supported by the first witness statement of Mr Preston the defendants' solicitor on the basis of the defendants' instructions. He spoke to, and exhibited documents in relation to, a total of six shipments of alcohol which he stated were all made under the terms of the joint venture agreement. These showed commercial invoices for various shipments by the claimants to the defendants which were on the face of them similarly

outright sales at a price in US$ per litre at volume but with provision for "Payment: Prompt". Mr Preston stated that Quickstop usually managed to increase the prices of those sales to about US$1.60 per litre, sometimes obtaining less and sometimes more from the on–sales. On that basis it was agreed between the parties that US$1.60 should be treated as the average on–sale price and by agreement the claimants consistently invoiced Quickstop thereafter for US$1.30 per litre, representing their costs and share of the profits. It was said that, because the market in Central Asia was volatile and Quickstop's on–sales were often in the form of barter for other commodities which Quickstop would then sell to realise cash, the payments made to the claimants to reimburse them for their costs and share of the profits, were often greatly delayed.

17. Mr Preston stated that the invoices the subject of the claim were the seventh and eighth shipments under the joint venture arrangements. It was stated that Quickstop subsequently sold most of the alcohol shipped, transferring a total of US$458,908 to the claimants on receipt of the proceeds of their on–sales. However it was said the market deteriorated badly and several buyers cancelled leaving several hundred thousand litres unsold in Quickstop's warehouses. A series of problems concerning customs laws and licences in Uzbekistan followed, including certain confiscations with the result that no payments had ever been received in respect of various of the on–sales negotiated and a substantial quantity of the alcohol was in warehouses in Uzbekistan where it remained the legal property of the claimants or had been destroyed by persons unknown to the Quickstop group.

18. It was asserted that in those circumstances, under the provisions of the joint venture agreement, the terms of which were never altered, title to the alcohol in the warehouses had never passed to Quickstop, the obligation to pay the claimants never arose and thus nothing was due to the claimants under the invoices. It was stated that the invoices sent to Quickstop were not documents with contractual force or effect. They merely evidenced the joint venture relationship under the agreement being "mainly issued for the benefit of customs authorities, who required contracts to be registered with them before allowing the goods to pass". Mr Preston referred to a fax dated 27 March 2002 from the claimants' solicitors in which, in response to the request to vacate the judgment, they refused to do so in reliance inter alia upon the fact that the defendants had repeatedly admitted that the outstanding purchase price was due without any suggestion of reliance on the joint venture agreement. In this respect Mr Preston stated that the first defendant recalled being contacted by a representative of the claimant whom he believed to be Mr Orbart and that, in the course of a conversation, the latter had explained that, for accounts purposes, the claimants required a schedule of payments in order to prove the debt. He went on:

> "Mr Mahesh Patel explained that the goods had not been sold so no money was due to the Claimants. The representative acknowledged this point but advised that he needed something from Quickstop Group to acknowledge that money may be forthcoming in the future. It was certainly not Mahesh Patel's intention that monies were in fact due at the time."

19. In response to Mr Preston's witness statement, the claimant's solicitor Mr Smith provided a statement, similarly stated to be made on the basis of instructions and the documents provided to him. He stated as follows so far as the joint venture agreement was concerned:

> "From the very first supply the Agreement was never properly implemented. The Claimants were never given any information

regarding Quickstop's sales or profits. Instead, a price was agreed to replace the Claimants' share of the joint venture profits. Then after a few shipments Quickstop began to ask the Claimants to quote a fixed price. The price which the Claimants thereafter charged Quickstop [i.e. the $1.30 appearing on the invoices] was not their cost of acquiring the alcohol plus delivering it but was an entirely separate figure including the Claimants' profit margin. As part of this further agreement it was agreed that no payment by Quickstop was conditional upon their receipt of funds from their purchasers."

20. In connection with the defendants' assertion that the terms of the joint venture continued to apply and, in particular, govern the terms of the relevant shipments, Mr Smith pointed out, at length and in detail various reasons why it was plain on Mr Preston's account, that the joint venture agreement did not continue to govern the relations of the parties. There was no provision in it for payment by Quickstop to the claimants on delivery of the goods supplied, simply a provision for accounting by Quickstop and calculation of the profit against a declaration of expenses by both parties with payment to the claimants of the claimants' expenses plus 50% of the profit. None of these procedures had been followed. Instead, as both sides accepted, there had been an agreement for prompt payment by the defendant of a sum of US$1.30 per litre to include any profit to the claimants. This was against a background where Quickstop did not, as provided for in the joint venture agreement, receive payment locally in US$ but entered into a variety of on–sale transactions including barter in respect of which no accounts were ever produced to the claimants and the profit was left with Quickstop who merely paid the invoice price of the relevant deliveries to the claimant. However, the principal matter relied on by Mr Smith was a series of unqualified after–the–event admissions made by the defendants as to the balance due under the relevant contracts. Because, despite the factual issues before him, the judge relied upon this series of admissions as his ground for refusal of the defendants' application, I propose to set them out at length.

21. On 8 January 1998, a year after the relevant deliveries, the claimants wrote to the first defendant asking him to advise when he would be "sending cash against the outstanding amounts". When no reply was received, a chasing fax was sent on 26 January and again on 11 February 1998 asking "when we may expect settlement of the outstanding sums due". The letter reminded the first defendant of an earlier promise made to Mr Wyper of the claimants in Tashkent that there would be full settlement by the end of December 1997. On 12 March 1998, Mr Orbart, the claimants' financial controller, wrote referring to a conversation between the first defendant and Mr Tuite proposing a repayment schedule in relation to the outstanding debt of US$508,804. It called for payment of $150,000 on 20 March 1998, $200,000 on 20 April 1998 and $158,804 on 20 May 1998. By letter of 17 March the second defendant responded as 'Financial Controller' of Quickstop, stating that Quickstop proposed to pay its outstanding debt in the stages requested save that the dates for payment would be the 30th rather than the 20th of the month. On 23 March 1998 Mr Tuite faxed that the schedule was acceptable and emphasised the importance of ensuring that the first and subsequent tranches were executed without problems.

22. On 30 March 1998 a letter was written by the claimants to the defendants stating:

"Our auditors require confirmation of the net balance with you as at 31st March 1998. Please could you state the balance as at 31st March

1998 in the space below and return it directly to the auditors, Price Waterhouse."

The balance was specified at that date as US$458,804. The defendants duly acknowledged receipt and sent such clarification.

23. On 16 April 1998 the claimants again wrote to the defendants:

> "With regard to the above noted debt, we are still awaiting debt of US$100,000 as per repayment schedule agreed in your letter of 17 March 1998. We have yet to receive the response to our letter of 6 March. We therefore request that you regularise your account by 22 April 1998 and ensure that the agreed repayment schedule is adhered to."

The letter added that if the schedule was not adhered to in the future the debt would be passed to the legal department for recovery.

24. On 8 May 1998 the defendants replied:

> "Further to our telephone conversation today about the outstanding payment, we have been informed by our office in Tashkent that due to a small problem at the central bank they are unable to transfer any funds. They hope to resolve this problem in a few days. As soon as these funds are transferred to our UK bank, we will be able to transfer US$100,000 to your account."

25. Although US$100,000 was then paid, the payment schedule was not adhered to and a further chasing letter on 6 October 1998 having been ignored, the claimants wrote a formal letter on 8 January 1999 referring to a telephone call concerning the outstanding debt and pointing out that the defendants had committed themselves to a repayment schedule that had been submitted to the claimants' auditors. It stated that, in conversations before Christmas, the defendants had undertaken to remit a tranche of cash and discuss a new payment schedule but nothing had been received. The letter insisted on proposals for repayment backed by a guarantee from a financial institution such as a bank by 15 January 1999 and in the absence of such a proposal the matter would be passed to lawyers.

26. On 15 January 1999 the defendants replied by letter headed "Re Outstanding Debt". They proposed a repayment schedule, namely US$50,000 to be paid by the end of business on 22 January with subsequent payments of similar amount until the debt had been paid in full. Thereafter two payments each of US$25,000 (and not $50,000 as proposed) were made on 2 and 14 February 1999 and a third such payment on 14 May 1999.

27. On 8 June 1999 the claimants wrote referring to an indication from the first defendant in a recent meeting with Mr Tuite that the outstanding debt of US$283,860 'would be settled in three to four months' and an undertaking to transfer $28,000 by mid–June. The claimants' letter proposed a schedule for repayment of the balance over a four month period. No reply, nor any payment was received.

28. After further sporadic correspondence, the claimants' letter dated 7 February 2001 addressed to both defendants, stated the writer's understanding that the first defendant had agreed at a meeting with a representative of Man Sugar to whom the first defendant had proposed some sugar business in the near future,

> " × to make a payment by Friday 16 February of US$50,000 on account of the balance owed to Man Alcohols of US$283,860."

The letter asked for confirmation by return fax and an arrangement to make payment by bank transfer to the claimants' New York bank. It proposed a discussion the following week to arrange "to settle the remaining indebtedness". No payment was received and the meeting did not take place.

29. In response to the statement of Mr Smith, the first defendant himself supplied a witness statement on 8 June 2002 largely confirming the earlier contents of Mr Preston's affidavit. In particular he said at paragraph 5 that, while he had never taken legal advice on the meaning of the joint venture agreement until 2002, his understanding was that a joint venture meant that he and the claimants were sharing in the risks and the profits of the business and that "We only got paid once we had received the proceeds of sale, and I understood that we would only have to pay the Claimants after that".

30. He explained the arrangements which had in fact been followed:

> "I agreed to basically offer them an upfront split on the profit. It was simply more convenient for us to use this average price of US$1.30 for the joint venture and it meant that I didn't have to trace the alcohol sales through a variety of other transactions to try and calculate the complete profit after the event. This way the Claimants passed a lot of their market risks to me and I would bear the loss if I could only sell the alcohol for say US$1.50 per litre."

31. He said that, if he had been buying the alcohol, he would simply have accepted a lower "straight sale price" for the alcohol and taken the extra profit himself. He said that, since the claimant seemed happy to perform the administrative tasks of the joint venture by keeping the running accounts and trading statements, he was happy for them to do so. He said that, so far as he was concerned, the agreement set out the general terms on which the claimants were prepared to do business with Quickstop but it was not a manual on how the business would be run and he believed there was flexibility in how things were to be run, the agreement simply setting out the principles. In response to Mr Smith's detailed comments on (i) the inadequacy of any documents produced to show that any of the confiscation measures of the Uzbekistan authorities or the alcohol involved related to the shipments of alcohol in question, (ii) the absence of any evidence that Quickstop had not in fact received payment for those shipments and (iii) the fact that, in the midst of its alleged problems in 1998 and 1999, Quickstop continued to make a number of (albeit insufficient) payments to the claimants, the first defendant stated:

> "I am currently reviewing all my files and documents from this period to try and establish exactly what happened to the quantities of alcohol that were confiscated/destroyed in 1997/98. So far I have only had about two months to collect this information and it will take

> some time. These events happened some 4 years ago and many of my employees in Tashkent have left since then. I had assumed that the Claimants would accept their responsibility under the Agreement, but that is obviously not the case now."

32. Finally, the first defendant sought to deal with the admissions made in the letters to which I have referred in the following way. He said that, in early 1998, as the claimants' financial year end approached, he had received a telephone call from Mr Tuite explaining that the claimants needed something on paper from the defendants. The first defendant understood that the claimants were having problems with their auditors and, in order to oblige, he instructed the second defendant to send the claimants a payment schedule which was the fax of 17 March 1998. He said it was never his intention to make any admission of liability to the claimants and that he "just wanted to stop them hassling us". However, he failed to advert to, or explain why, in response to the claimants' later threats to place the matter in the hands of their lawyers, he made the unqualified proposals for payment contained in Quickstop's letters dated 8 May 1998 and 15 January 1999 or failed to reply to any of the later letters recording admissions made by him.

33. The second defendant also made a witness statement in which he stated that he was employed by Quickstop as Financial Controller and was not a partner of the first defendant who controlled the day to day business of Quickstop, including that with the claimants. He (the second defendant) was not aware of how the day to day business was run and had no operational involvement with Quickstop's operations in Central Asia. He was not aware of the terms of the joint venture agreement. However, he spoke to the letter of 17 March 1998 which he had written on the instructions of the first defendant who told him that he had been telephoned earlier by the claimants and told that they were approaching the end of their financial year and needed something to help satisfy the auditors. He said that when he wrote the letter it was not his intention to acknowledge a legally enforceable debt. He later received the letter of 30 March 1998 which asked for him to write to the auditors. He said:

> "We were happy to co–operate with the Claimants because we still had on–going contracts for the supply of sugar in early 1998 and we did not want to jeopardise that business."

34. In relation to the payments made following the letter of 8 January 1999 threatening legal proceedings, he said:

> "I believe that Jitendra Patel simply wanted to make a goodwill gesture to the Claimants and finish the matter."

35. The judge gave an oral judgment immediately following argument. Bearing in mind the detail of the argument he had received on the many documents before him which were presented with the relevant witness statements in a piecemeal rather than a comprehensive manner, I consider that, contrary to the submissions of Mr Thomas for the first defendant, the judgment shows a clear grasp of the effect of those documents. The judge rightly summed up the position of the claimants as being that the joint venture agreement was never properly implemented and that it had subsequently ceased to be implemented altogether, being superseded by a number of sales without reference to an account to be taken in accordance with the joint venture agreement. He also observed that that appeared to be the effect of the defendants' own evidence.

36. The judge was critical of the state of the claimant's evidence, on the grounds that Mr Smith's statement that a price was agreed to replace the joint venture profits and that it had been agreed that payment by the defendants was no longer conditional upon their finding purchasers was lacking in particularity, there being no indication of when or with whom the agreement was made or whether it was oral or in writing. He said that if the case had turned simply on the validity of that statement he could well see that there should be liberty to set aside the judgment. However, the judge also observed that the effect of the first defendant's evidence was to indicate that the fundamental accounting procedures contemplated by the joint venture agreement had been abandoned and superseded by a straight identified sale price which appeared to have no relevance to the success or otherwise of the ability of Quickstop to sell the goods. He said that, in those circumstances, he could not accept the submission for the defendants that it had to be assumed that the term of the agreement which stated that no payments were to be made until receipts had been obtained by the defendants from the local sales must still remain in force. As the judge said:

> "It is one thing to say that the parties are going to share profits and losses upon the basis of credit and on–sales; it is quite a different thing to say that there is going to be a straight sale at a price and, in effect, the seller will simply have to await payment upon the disposal in an uncertain market. It seems to me that once you have abandoned the profit sharing and the accounting provisions which go with it, the basis of the agreement has gone."

37. The judge referred to certain other correspondence (see further below) which showed that very shortly before the invoice changed to US$1.30 per litre, the claimants were using language in letters dated 11 and 16 January which appeared to affirm the continued existence of the joint venture agreement. Also to a letter dated 9 April 1997, some time after the shipments in issue when the claimants wrote to a company in Tajikistan, which was not a designated territory in the joint venture agreement, referring them to "our partner the Quickstop Group" as the medium for any discussion about a business enquiry. However, he weighed against those statements what he described as the mass of later material "which indicates that not only did the defendants admit that they were liable for the actual sums claimed in the particulars of claim, but furthermore they paid off part of the sum due, admitted that they were liable for the balance and stated that they would seek to pay this off by instalments".

38. The judge regarded the reference by the defendants to the request received to acknowledge their outstanding debt for the purposes of the claimants' auditors as wholly inadequate to explain their responses and admissions in relation to correspondence pressing for payment quite independently of the auditors' request. In particular the judge referred to the response of 8 May 1998 and 15 January 1999 in which, in response to letters threatening legal action the debt was acknowledged and funds promised (see paragraphs 24–26 above). He observed that further monies were actually paid following the acknowledgment of 15 January 1999 and stated:

> "Throughout the whole of that correspondence in 1998 and 1999, going through to December 2000, there is not the least suggestion that (a) the money was not due, (b) it was subject to the Joint Venture, (c) there was any suggestion of a denial of liability ×
>
> × in my judgment this defence is fanciful, almost certainly dishonest and has no chance of success whatsoever.

> I do not believe that any businessman who had written those letters, made those admissions and made those payments would genuinely believe that the debt was not due.
>
> It was said that the defendants wished to keep a good relationship with Man and therefore made admissions of liability and part payment pursuant to those admissions of liability, simply in the course of good relations. I regard that suggestion as risible. Mr Patel is a man in his 40s, he has been in business for some 20 years and I cannot believe that any businessman would have made those admissions and those payments if he did not genuinely accept liability. No suggestion of any defence was made until this application in witness statements to support an application and to set aside the judgment in default.
>
> So far as the first defendant is concerned, in the exercise of my discretion, I think it would be a gross injustice to the claimants to set aside this judgment and I refuse to do so."

39. Having been refused permission to appeal on paper, the first defendant made a successful oral application to Rix LJ for permission to appeal. Permission was granted on the basis of concern expressed by Rix LJ over three particular aspects of the evidence before the judge, the second and third of which might have involved misunderstandings on the part of the judge or, at any rate, were points which he failed properly to address when giving his judgment.

40. The points were as follows:

    i) The fact that the claimants' case that there had been a change from what was accepted originally to have been a joint venture arrangement to a position where, by agreement, the parties dealt on a straight sale basis was stated in general terms, and in an unparticularised form, unsupported by first–hand evidence from an employee of the claimants, in which respect the claimants had been criticised by the judge. This was said by Mr Thomas for the first defendant to be of particular significance because

    ii) in relation to the first invoice between the parties which showed the price of US$1.30 per litre, i.e. the invoice dated 20 February 1996, it appeared that there was earlier correspondence demonstrating that the price agreed was agreed in the context of a live joint venture arrangement;

    iii) the judge appeared to have made an error when dealing with the defence case in relation to the acknowledgment of indebtedness contained in the letter of 17 March 1998.

41. Rix LJ also expressed concern:

iv) that the judge may have assumed that because the invoices passing between the parties named a specific price, that in itself indicated that they had reached a straight sale arrangement at the same time abandoning the scheme for profit sharing under the joint venture agreement; and

v) that despite the grave difficulties in the way of the defendants' case, the judge may have erred in treating the application as a mini–trial in the course of which he had been prepared to find dishonesty, without the defendants having had the opportunity of presenting their evidence at trial.

42. On this appeal, Mr Thomas has adopted and addressed us at length upon those concerns.

43. On careful examination of the position I do not consider that, in giving judgment, the judge was subject to any significant error or misunderstanding concerning the matters raised. In relation to concern (i), the judge made clear that on the basis of the assertions of the claimants as to the contractual arrangements alone, he would not have found as he did. His judgment was based not upon the positive evidence of the claimants as to an express agreement that the joint venture arrangements would cease to operate, but upon (a) the incompatibility of everything which appeared to have happened between the parties from an early stage with continuation of the arrangements under that agreement, when combined with (b) the unequivocal and continued acknowledgement of the debt and proposals for payment from 1998 onwards when, over a period of two years, the first defendant was pressed to settle the debt.

44. The judge plainly found, as in my view he was entitled to find, that it simply was not credible that such acknowledgements would have been made (two in the face of threatened legal proceedings) without any suggestion that payment was not due under whatever contractual arrangements existed between the parties. According to the first defendant he had always understood that under the joint venture agreement he had no obligation to make payment until he had himself received payment. He therefore had no need for legal advice to take that point or to reserve his position in correspondence. The only inference which could practically arise from the terms of the correspondence was either that he accepted that payment was due under altered arrangements, or that his assertions that he had never been paid for the particular alcohol concerned were insincere.

45. In relation to concern (ii), the judge did not overlook, nor is there any reason to suppose he misunderstood, the force of the point that in relation to the first invoice in which the US$1.30 price appeared the letters of 11 and 16 January 1996 were indicative that the price was reached on the basis that the joint venture arrangement, but two months old, was in force. The letter of 11 January stated:

> "As per our telecon of yesterday please be advised that we have arranged for a further 10 containers to be shipped to Tashkent for the JV, to depart Hamburg with Bruhn Transport next Friday 19 Jan 96.

46. It also made clear that at that time the "pro forma invoice" would be priced at US$0.99 per litre. The letter of 16 January 1996 referred to another 15 containers being available and stated:

"Our costs on these I'm afraid has gone up to $1.08 per litre so please see if you can get a better price."

47. It is by no means clear that these containers were the same as those the subject of the invoice of 20 February 1996. However, even if they were, that transaction was over a year before the shipments in issue. The broad question was whether, the price of US $1.30 per litre, which it was the first defendant's own case was a price agreed on the basis of a fixed amount to include the claimants' loss of profit was, in February 1996 or subsequently, agreed to be treated as a sale price payable to the claimants in accordance with the terms of the invoice or whether the arrangements for payment and profit sharing under the joint venture agreement continued to regulate the parties' relationship. It is not correct, as submitted by Mr Thomas in his skeleton argument that, despite having his attention drawn to the significance of the letters of 11 and 16 January 1996 the judge completely failed to address them in his judgment. Having referred to the invoice of 20 February 1996, which Mr Bryan for the claimants had identified as the latest date at which the joint venture arrangements must have existed, the judge said that Mr Thomas had asserted for the defendants that prior thereto the claimants were using language which appeared to affirm the continued existence of the agreement and that in this respect he relied upon "a number of documents". He then referred in terms to the letter of 11 January as supporting this argument. It is true that he did not go on specifically to mention the letter of 16 January but in the light of his reference to "documents" there is no reason to think that he did not have it in mind. He picked in particular upon the letter of 11 January because it referred in terms to "the JV". The judge then went on to refer to a letter following that invoice written by representatives of the claimants to possible third party customers in the local area which stated that

"Our business in central Asia is handled in Tashkent by our partner the Quickstop Group."

48. Thus, the judge acknowledged a "grey area" existing around this time. However, he came to the conclusion that he did, namely that by the time of the invoices sued upon, the joint venture arrangement had been abandoned, for two interrelated reasons. He regarded the evidence of Mr Patel that he decided to offer the claimants "an upfront split on the profit based on an average price of US$1.30" with any profit over that figure being retained by the first defendant, together with his later admissions of debt at a time when, on his own evidence, he was meeting difficulties with his on–sales, as demonstrating that:

" × at some point the fundamental accounting procedures contemplated by the Joint Venture Agreement had been abandoned and superseded by a straight identified sale price which had no relevance to the success or otherwise of the ability of the defendants to sell the goods."

49. The judge went on to make the observation I have already quoted at paragraph 36 above. In my view it was a realistic observation rather than one based on any misunderstanding.

50. Concern (iii) is based on Mr Thomas' assertion that the judge misunderstood or misconstrued the evidence of the defendants when he described as "misguided if not misleading" their explanation that the acknowledgement of debt was made simply to accommodate the claimants by demonstrating to their auditors that the claimants had a

number of unchallenged trade debts. The judge appeared to base his comment upon the fact that the letter written by the claimants requiring such confirmation was written on 30 March 1998 i.e. it post–dated the letter of 17 March 1998 in which Mr Patel had made his acknowledgement and proposed a schedule of repayment. Mr Thomas rightly points out however that it was the assertion of the defendants that the claimants had telephoned the first defendant *prior* to the letter of 17 March to say that they needed something to help satisfy their auditors. On that basis, and because the claimants put in no witness statement in rejoinder which contradicted that sequence of events, it does indeed appear that the judge was in error at that point. However, it is a point which is of minimal significance in the overall picture. There was also before the judge a report by Mr Wyper of the claimants on a trip made by him to Uzbekistan in November 1997 which made clear that, well before any question arose in relation to the audited accounts, the first defendant was admitting the sum due, even in the knowledge of his difficulties in Uzbekistan. The relevant part of the report read:

> "He received me with goodwill and told me about his operations there. He has many business interests of which importing ethanol is only a small part and owns two bonded facilities. He talked of the difficulties of conducting business in Uzbekistan but mentioned that he has regularly challenged government decrees - and won! As far as our business is concerned, he said that the money he owes us will be paid by Christmas. He is planning a partial transfer at the end of this month. As for the future, Mr Patel claimed that he wants no more contact with ED&F Man as we are 'not serious'."

Furthermore, after the acknowledgement in March, there were, as I have already made clear, a number of separate admissions and payments made quite independently of any question of assistance with the auditors.

51. As to concern (iv), I have already made clear that I do not consider there is any reason to suppose the judge assumed that the naming of a specific price *per se* meant that the profit sharing arrangement had been abandoned in favour of a straight sale price. He treated it, *together* with (a) the subsequent conduct of the parties' business, (b) the absence of any profit accounting as provided in the joint venture agreement, and (c) the clear admissions made, as an indication to that effect. I consider he was correct to do so.

52. Mr Thomas has powerfully submitted that, in deciding as he did, the judge in effect conducted a mini–trial of the issues in a manner impermissible on an application to set aside judgment under CPR 13.3(1)(a). He says there were plainly issues of fact as to whether and, if so, when the provisions of the joint venture agreement were abandoned and, in particular, the provision that Quickstop should not be liable to make any payment to the claimants unless or until payment was received by Quickstop. He further submits that, the judge was wrong to reject the explanation of the first defendant for the series of admissions made that the debt was due.

53. I would accept, as the judge accepted, that without the written admissions that would plainly be correct. However, in a case where, with knowledge of the material facts, clear admissions in writing are unambiguously made by a sophisticated businessman who has ample opportunity to advance his defence prior to judgment signed, a judge is in my view entitled to look at a case "in the round", in the sense that, if satisfied of the genuineness of

the admissions, issues of fact which might otherwise require to be resolved at trial may fall away. Here, the broad issue was clear. By the time of the shipments sued upon, were the parties dealing upon the basis of a straight sale by the claimants at an invoiced price covering their costs and profit, or subject to joint venture arrangements under which they carried the risk of non–payment by Quickstop's ultimate buyer? The series of written admissions, if informed and genuine, were a clear indication that the former was the case. In that respect, I consider that the judge was entitled to reject as devoid of substance or conviction such explanation as was advanced for the making of those admissions and in my view he was entitled to conclude that the first defendant lacked any real prospect of successfully defending the claim.

54. As to the final concern expressed by Rix LJ, Mr Thomas submits that, whether or not the judge was right to regard the evidence as insufficient to satisfy the test under CPR 13.3(1)(a), there is reason for this court to set aside the judgment against the first defendant under 13.3(1)(b) because of the judge's observation not only that the defence was fanciful and had no chance of success but that it was "almost certainly dishonest". Mr Thomas submits that (1) the observation cast a slur upon the first defendant's name and reputation which was unnecessary to the judge's finding and which the first defendant should have an opportunity to contest; (2) the second defendant having obtained leave to defend, if a trial proceeds in relation to him, he may himself be prejudiced by reason of the judge's aspersions upon the advancement of a defence to which he was a party and would himself be entitled fully to litigate.

55. It does seem to me unfortunate that the judge felt constrained to make the observation he did as to the likelihood that the defence was dishonest, in a situation where refusal to set aside the judgment inevitably meant that the first defendant would be deprived of the opportunity to give evidence or cross–examine in relation to the circumstances surrounding the admissions made. The observation was unnecessary and collateral to the judge's decision. However, it was not a finding of fraud or dishonesty in relation to any of the transactions in question. It simply went to the bona fides of the first defendant's denial that he had genuinely acknowledged the debt. Were there reason to suppose that the matter will indeed proceed to trial against the second defendant, then there might have been some ‘other good reason' for setting judgment aside against the first defendant on terms that the entire sum claimed be paid into court. However, we have been informed by Mr Bryan that, assuming the appeal is dismissed, the claimants have no intention of pursuing the second defendant to trial. In those circumstances, I do not consider there is good reason to set aside the judgment under CPR 13.3 (1)(b).

56. I would dismiss this appeal.

Lord Justice Peter Gibson:

57. I agree. Potter LJ has set out the reasons for dismissing the appeal so comprehensively that there is nothing which I would wish to add.

Order: Appeal dismissed; costs to be paid by the 1st defendant, such costs agreed between the parties in the sum of £15,000.

(Order does not form part of the approved judgment)

House of Lords

Aston Cantlow and Wilmcote with Billesley Parochial Church Council *v* Wallbank and another

[2003] UKHL 37

2003 March 3, 4, 5; June 26 — Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Ecclesiastical law — Lay rector — Repairs to chancel — Obligation at common law to repair chancel — Parochial church council's statutory power to recover cost of repairs from lay rector — Whether infringing lay rector's Convention right to peaceful enjoyment of possessions — Whether unlawful discrimination in enjoyment of Convention right — Whether parochial church council "public authority" — Whether entitled to enforce liability against lay rector — Chancel Repairs Act 1932 (22 Geo 5, c 20), ss 1, 2 — Human Rights Act 1998 (c 42), s 6, Sch 1, Pt I, art 14, Pt II, art 1

The defendants were the freehold owners of former rectorial land and consequently, as lay rectors or lay impropriators, they were liable at common law to repair the chancel of their parish church. In September 1994 the plaintiff, the parochial church council, served the first defendant with a notice under section 2(1) of the Chancel Repairs Act 1932[1] calling upon her to repair the chancel. She disputed the liability, and the plaintiff subsequently brought proceedings against the defendants, pursuant to section 2(2) of the 1932 Act, to recover the cost of chancel repairs. On a preliminary issue the judge held that the defendants were liable for the cost of the repairs. The Court of Appeal allowed the defendants' appeal and held that the plaintiff could not recover the cost of chancel repairs from the defendants on the grounds that a parochial church council was a public authority for the purposes of section 6 of the Human Rights Act 1998[2] since it had powers unavailable to private individuals to determine how others should act, that therefore it could not act in a manner which was incompatible with the defendants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the defendants' liability to defray the cost of chancel repairs was an indiscriminate form of taxation and amounted to an infringement of their right to peaceful enjoyment of

[1] Chancel Repairs Act 1932, s 2: "(1) Where a chancel is in need of repair, the responsible authority may serve upon any person, who appears to them to be liable to repair the chancel, a notice in the prescribed form . . . stating in general terms the grounds on which that person is alleged to be liable as aforesaid, and the extent of the disrepair, and calling upon him to put the chancel in proper repair. (2) At any time after the expiration of a period of one month from the date when the notice to repair was served, the responsible authority may, if the chancel has not been put in proper repair, bring proceedings against the person on whom the notice was served to recover the sum required to put the chancel in proper repair . . ."

[2] Human Rights Act 1998, s 6: "(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 a 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 . . . (b) any person certain of whose functions are functions of a public nature . . . (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."

Sch 1, Pt I, art 14: "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."

Sch 1, Pt II, art 1: see post, para 66.

A their possessions guaranteed by article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to article 14.

On appeal by the plaintiff—

Held, allowing the appeal, (1) that a "public authority" for the purposes of section 6 of the 1998 Act could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public B nature; that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches; that the functions of parochial church councils were primarily concerned with pastoral and administrative matters within the parish and were not wholly of a C public nature, and therefore they were not core public authorities under section 6(1); that (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a parochial church council in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing a function of a public nature, which rendered it a hybrid public authority under section 6(3)(b); that the defendants' chancel repair liability was a private law liability arising out of the D ownership of land, and the enforcement of that liability by the plaintiffs was an act of a private nature and therefore excluded by section 6(5) from coming within the ambit of section 6(3)(b); that (per Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry) in seeking to enforce the defendants' chancel repair liability the plaintiff was acting under primary legislation, namely section 2 of the 1932 Act, and was consequently within the exception in section 6(2)(b) of the 1998 Act; that therefore, there were no grounds E upon which the plaintiff could be regarded as a public authority within section 6 of the 1998 Act; and that, accordingly, it had no obligation to act compatibly with Convention rights (post, paras 7, 9, 12–14, 16, 17, 19, 58–64, 86–89, 93, 129, 137, 153, 154, 156–166, 169–173).

(2) That (per Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote) a person's right to peaceful enjoyment of his possessions did not extend to the grant of relief from liabilities incurred under the civil law; that the F defendants had acquired the rectorial property with full knowledge of the potential liability for chancel repair that the acquisition would carry with it; that it was a burden which ran with rectorial land and was similar to any other burden which ran with the land; and that the defendants were not therefore being discriminated against as compared with other owners of rectorial land, nor were they being subjected to an arbitrary form of taxation or being interfered with in the peaceful enjoyment of their possessions contrary to article 14 of, and article 1 of the First Protocol to, the G Convention (post paras 71–75, 91, 92, 133–136).

Decision of the Court of Appeal [2001] EWCA Civ 713; [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393 reversed.

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

Ayuntamiento de Mula v Spain Reports of Judgments and Decisions 2001-I, p 531
Barnes, In re; Simpson v Barnes (Note) [1930] 2 Ch 80
H *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585; [1955] 3 WLR 154; [1955] 2 All ER 607
Doughty v Rolls-Royce plc [1992] 1 CMLR 1045, CA
Ely (Bishop of) v Gibbons (1833) 4 Hagg Ecc 156
European Coal and Steel Community v Acciaierie e ferriere Busseni SpA (Case C-221/88) [1990] ECR I-495, ECJ

Foster v British Gas plc (Case C-188/89) [1991] 1 QB 405; [1991] 2 WLR 258; [1990] 3 All ER 897; [1990] ECR I-3313, ECJ; [1991] 2 AC 306; [1991] 2 WLR 1075; [1991] 2 All ER 705, HL(E) A
General Assembly of the Free Church of Scotland v Lord Overtoun [1904] AC 515, HL(Sc)
Gilbert v Corpn of Trinity House (1886) 17 QBD 795, DC
Hautanemi v Sweden (1996) 22 EHRR CD 155
Holy Monasteries v Greece (1994) 20 EHRR 1 B
Hong Kong Polytechnic University v Next Magazine Publishing Ltd [1996] 2 HKLR 260
James v United Kingdom (1986) 8 EHRR 123
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1986] ECR 1651, ECJ
Marckx v Belgium (1979) 2 EHRR 330
Marshall v Graham [1907] 2 KB 112, DC C
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R v Benjafield [2002] UKHL 2; [2003] 1 AC 1099; [2002] 2 WLR 235; [2002] 1 All ER 815, HL(E)
R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann [1992] 1 WLR 1036; [1993] 2 All ER 249
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E) D
Representative Body of the Church in Wales v Tithe Redemption Commission [1944] AC 228, HL(E)
Rothenthurm Commune v Switzerland (1988) 59 DR 251
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wainwright v Home Office [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405, CA E
Walwyn v Awberry (1677) 2 Mod 254
Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, CA
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

Håkansson and Sturesson v Sweden (1990) 13 EHRR 1
Hentrich v France (1994) 18 EHRR 440 F
Kjeldsen v Denmark (1976) 1 EHRR 711
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001 4 All ER 604, CA
R v Bolsover District Council, Ex p Pepper [2001] LGR 43
R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA
R (Molinaro) v Kensington and Chelsea Royal London Borough Council [2001] EWHC Admin 896; [2002] LGR 336 G
Sunday Times v United Kingdom (1979) 2 EHRR 245
Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617; [2002] 4 All ER 1136, CA

APPEAL from the Court of Appeal

By leave of the House of Lords granted on 11 February 2002 (Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett) the plaintiff, the Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire, appealed from a decision of the Court of Appeal (Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ) on 17 May 2001 allowing an appeal by the defendants, Gail Wallbank and Andrew H

A David Wallbank, from a decision of Ferris J who on 28 March 2000 ruled on a preliminary issue that by virtue of being freehold owners of Glebe Farm, Aston Cantlow, the defendants were lay rectors of the church of St John the Baptist, Aston Cantlow, and were therefore personally liable for the repair of the chancel of the church as set out in a notice served by the plaintiff on the first defendant on 12 September 1994, to recover the sum of £95,260·84, the estimated cost of the repair.

B The facts are stated in the opinions of their Lordships.

Charles George QC and *Mark Hill* for the plaintiff. The lay rector's duty to repair the chancel is the corollary of his right to receive the tithes of the parish. It is the quid pro quo for the grant to him or his predecessor by the Crown, usually at the time of the Reformation, of the tithes, with or without C glebe land. Where, as in the present case, land has been allotted to him under an inclosure award in lieu of his right to the tithes, the duty to repair becomes the corollary of the right to the land so allotted. The fact that the tithe has ceased to be payable is irrelevant. [Reference was made to *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228.]

The Court of Appeal's decision constituted a windfall for the defendants D in that it let them off their liability and led to their unjust enrichment. That was not the intention of the Human Rights Act 1998.

The parochial church council ("PCC") was not a core public authority for the purpose of section 6 of the 1998 Act. Core authorities are those bodies, whether national or local, through which the state performs its function of administering and protecting its citizens. All the acts of a core E authority must be compatible with Convention rights. If the PCC is a core authority it will never be possible for it to bring a complaint under the Act because it cannot be a victim. [Reference was made to *Rothenthurm Commune v Switzerland* (1988) 59 DR 251; *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531; *Hautanemi v Sweden* (1996) 22 EHRR CD 155 and *Holy Monasteries v Greece* (1994) 20 EHRR 1.]

F The mere fact that the Church of England is the established church cannot be enough to make a PCC a core public authority. The Church of England is not a department of state and it has no juridical personality. Its ecclesiastical courts are the only parts of the Church of England which are core authorities.

Unlike other public authorities a PCC receives no public funding. The G majority of the funding for the Church comes from its worshipping communities. The members of the PCC are volunteers and there is no provision for payment of attendance allowances to which members of public authorities are normally entitled. The functions of the PCC are essentially private, pastoral and spiritual and include co-operation with the minister in promoting the pastoral, evangelistic, social and ecumenical mission of the Church. Its functions clearly show that a PCC is not a core H public authority.

Section 6 of the 1998 Act draws a distinction between core public authorities and hybrid authorities whose acts must be compatible with Convention rights unless the nature of the act is private. The dividing line between hybrid public authorities and bodies which are not public

authorities at all is a fine one. [Reference was made to *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *R v Bolsover District Council, Ex p Pepper* [2001] LGR 43 and *R (Molinaro) v Kensington and Chelsea London Borough Council* [2002] LGR 336.] A

Although there are occasions when church representatives stand in the place of the state in the exercise of public functions such as marriage, education, care of churchyards and the issue of burial certificates, a PCC's functions relate exclusively to pastoral matters. The functions and powers of PCCs when properly analysed fall short of what is required to constitute all PCCs as hybrid authorities if they have no churchyards and the benefit of chancel repair liability. It is improbable that Parliament intended that some PCCs but not others should be hybrid public authorities. There is no indication that Parliament intended that PCCs should be public authorities at all. B C

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings by the PCC against a lay impropriator for recovery of the costs of chancel repairs is a private act for the purposes of section 6(5) of the 1998 Act. The primary duty of the lay rector is to maintain the chancel in repair. That is not a function of a public nature within the meaning of section 6(3)(b) of the 1998 Act. One of the functions of the PCC is the maintenance of the fabric of the parish church. That is not a function of a public nature within the meaning of section 6(3)(b) and in exercising it the PCC is not acting as a public authority. D

Where the lay rector has not effected the necessary chancel repairs himself the PCC may effect them and recover the costs of doing so by the statutory procedure introduced by the Chancel Repairs Act 1932. In recovering the cost by that procedure the PCC is enforcing a private law obligation which rests on the owner of rectorial land. The liability to repair the chancel runs with the land and is enforceable against the owner for the time being of the land personally. The PCC's act in serving a repair notice was a private act whereby it was performing the private function of having the church repaired. The fact that liability attaches to the ownership of particular land and is unrelated to church membership confirms that enforcement is a private act. E F

There was no interference with the defendants' property under article 1 of the First Protocol to the Convention The defendants came knowingly into ownership of land which they knew was subject to a certain liability, namely, the liability to repair the chancel of the parish church. In using a mechanism that was open to it to enforce that liability the PCC was not imposing a tax as the Court of Appeal concluded. It is necessary to look at the particular case and not at the generality of the situation. [Reference was made to *James v United Kingdom* (1986) 8 EHRR 123; *Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245.] G

A landowner who has an obligation cannot, when called upon to honour the obligation, rely upon the prohibition of discrimination in article 14 of the Convention. [Reference was made to *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.] The defendants' land already had a burden and the defendants never had unencumbered land when they became lay rectors. The relevant class of comparator would not be landowners H

A generally but other landowners subject to incumbrances including chancel repair liabilities. In such a case there would be no discrimination or different treatment of the defendants from the chosen comparator. There was no discrimination which related to a personal characteristic and the fact of being a lay rector is not such a characteristic. [Reference was made to *Kjeldsen v Denmark* (1976) 1 EHRR 711.]

B Even if the PCC was a public authority for the purposes of the 1998 Act, section 6(1) of the 1998 Act does not apply because the PCC was acting under the compulsion of primary legislation. As a result of the provisions of the 1932 Act the PCC could not have acted differently and is entitled to rely on section 6(2)(a) and/or (b) of the 1998 Act.

Proceedings under the 1932 Act are not discretionary and there are two requirements: to serve a notice of repair and, in default, to sue for the new C statutory debt. A PCC is a charity. It has a duty and not a discretion to bring in outstanding funds. It has no power to waive debts. If the PCC did not follow the procedures set out in the 1932 Act it would be in breach of its statutory duty, and its members would be in breach of their duties as charity trustees and liable to be held to account by the Charity Commissioners.

D *Michael Beloff QC* and *Ian Partridge* for the defendants. The PCC is a core public authority for the purposes of section 6(1) of the 1998 Act. A public authority is not defined in the Act but is left to the courts to define. "Public" in its ordinary and natural meaning is the antithesis of private. It is to be assumed at least that the legislature wished to impose domestic law obligations upon certain bodies so that if those bodies complied with their E obligations the United Kingdom would not be liable to suit before the European Court of Human Rights. [Reference was made to *Foster v British Gas plc* [1991] 1 QB 405; [1991] 2 AC 306.]

Consideration of whether or not a PCC is a public authority requires consideration of its nature, the source of its existence, powers and duties and the nature of the functions which it carries out. The approach adopted by the Court of Appeal was correct.

F The Church of England, as the church by law established, is a public authority. It enjoys a unique position and is regulated by Acts of Parliament. The sovereign appoints its bishops and deans. Archbishops and certain bishops sit ex officio in the House of Lords. The Church of England's status as the established church distinguishes it from other religious bodies. The public have rights in regard to the Church of England in matters such as G baptism, marriage and burial.

The PCC is an integral part of the Church of England. It is the administrative organ of the parish, which is the basic building block of the church. The PCC is a body corporate with perpetual succession and in effect created by statute. It has powers outside those concerning purely religious matters and beyond those which result from the normal rules applicable between individuals, including statutory power to enforce the chancel repair H liability. When the PCC exercises its functions in promoting the mission of the established church, it is acting in the public interest and is performing a public function. The PCC is therefore part of the fabric of the state and satisfies the public authority test. *Hautanemi v Sweden* 22 EHRR CD 155 and *Holy Monasteries v Greece* 20 EHRR 1 are not decisions which assist

the plaintiff and the latter case suggests that an established church is a public authority.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings against a lay impropriator, pursuant to the 1932 Act, for the recovery of the cost of chancel repairs is not a "private" act for the purposes of section 6(5) of the 1998 Act. There is no element of mutuality or mutual governance between impropriator and the church in relation to modern repair liability. The enforcement is a function of the PCC supported by statute. The relationship between the plaintiff and defendants arises independently of the volition of either of them. There is a public interest in the repair of historic churches and enforcement of the liability is thus a public function.

The rule of common law which established the liability of the defendants to repair applies to individuals whether or not they are members of the church. It lacks any juridical basis and is wholly capricious. The liability is enforced by a body established by the state by statute, and empowered by the state by statute to enforce the liability. Such an act of enforcement is a public act.

The PCC's action in serving a notice under the 1932 Act on the defendants was unlawful under the 1998 Act by reason of article 1 of the First Protocol to the Convention, read either alone or in conjunction with article 14.

The word "possessions" in article 1 of the First Protocol is to be broadly construed and includes money, which is the possession the defendants have been deprived of. The assumption inherent in Article 1 is that the payment of taxes or other contributions is a deprivation of possessions. Therefore the defendants have been deprived of the peaceful enjoyment of their possessions.

Although it is proper and in the public interest to repair ancient churches, the burden of chancel repairs falls disproportionately on the defendants. It is objectionable that liability can be imposed on those, inter alias, who are not churchgoers, who are not Christians and who do not live in the parish. The chancel repair liability is personal and unlimited and can easily be disproportionate to the value of the land. Therefore the enforcement of the liability to defray the cost of chancel repairs is an unlawful interference with the defendants' personal property rights. [Reference was made to *Håkansson and Sturesson v Sweden* 13 EHRR 1 and *Hentrich v France* (1994) 18 EHRR 440.)

The enforcement of the liability also amounts to discrimination in the enjoyment of a Convention right under article 14. The appropriate class of comparator is that of landowners in England at large or in the parish, and there is no objective or reasonable justification for treating the defendants differently. [Reference was made to *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417.]

There was no compulsion of primary legislation which obliged the PCC to act as it did so as to bring it within section 6(2) of the 1998 Act. The liability of the lay rector exists only at common law. The 1932 Act imposes no duty to serve notice or commence proceedings against the defendants or anyone who appears to be liable to repair the chancel.

George QC replied.

A Their Lordships took time for consideration.

26 June. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, I have had the advantage of reading in draft the speeches of all your Lordships. I too would allow this appeal. On some of the issues your Lordships have expressed different views. I shall state my own views without repeating the facts.

B 2 This case concerns one of the more arcane and unsatisfactory areas of property law: the liability of a lay rector, or lay impropriator, for the repair of the chancel of a church. The very language is redolent of a society long disappeared. The anachronistic, even capricious, nature of this ancient liability was recognised some years ago by the Law Commission in its report on Property Law: Liability for Chancel Repairs (1985) Law Com No 152.
C The commission said "this relic of the past" is "no longer acceptable". The commission recommended its phased abolition.

3 In these proceedings Mr and Mrs Wallbank admitted that, apart from the Human Rights Act 1998, they have no defence to the claim made against them by the Parochial Church Council of the parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire. The House was not asked to consider whether *Wickhambrook Parochial Church Council v Croxford*
D [1935] 2 KB 417 was correctly decided.

4 At first sight the Human Rights Act 1998 might seem to have nothing to do with the present case. The events giving rise to the litigation occurred, and the decision of Ferris J was given, before the Act came into force. But the decision of the Court of Appeal [2002] Ch 51 was based on the provisions of the Human Rights Act, and this decision has wide
E financial implications for the Church of England, going far beyond the outcome of this particular case. The decision affects numerous parochial church councils and perhaps as many as one third of all parish churches. The Church of England needs to know whether, as the Court of Appeal held, it is unlawful now for a parochial church council to enforce a lay rector's obligation to meet the cost of chancel repairs. Accordingly, in order to obtain the decision of the House on this point, the plaintiff
F parochial church council conceded that the Human Rights Act 1998 applies in this case. This concession having been made by the plaintiff, no argument was addressed to your Lordships' House on the question of law thus conceded. I express no view on this question.

5 Assuming the Human Rights Act 1998 is applicable in this case, the overall question is whether the plaintiff's prosecution of proceedings against
G Mr and Mrs Wallbank is rendered unlawful by section 6 of the Act as an act by a public authority which is incompatible with a Convention right. In answering this question the initial step is to consider whether the plaintiff is "a public authority".

6 The expression "public authority" is not defined in the Act, nor is it a recognised term of art in English law, that is, an expression with a specific recognised meaning. The word "public" is a term of uncertain import, used
H with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893 (56 & 57 Vict c 61)), public nuisance, public house, public school, public company. So in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in

A doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg.

B 7 Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act 1998 a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local C authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476.

D 8 A further, general point should be noted. One consequence of being a "core" public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of a Convention rights. A core public authority seems inherently incapable of satisfying the E Convention description of a victim: "any person, *non-governmental organisation* or group of individuals" (article 34, with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act 1998, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular F body is a core public authority. In itself this feature throws some light on how the expression "public authority" should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.

9 In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the G manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law H Society. Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase "public authority" any person whose functions include "functions of a public nature". This extension of the expression "public authority" does not apply to a person if the nature of the act in question is "private".

A 10 Again, the statute does not amplify what the expression "public" and its counterpart "private" mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description "public", essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

B 11 Unlike a core public authority, a "hybrid" public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the C expression "public function" in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

12 What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental D functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

13 Turning to the facts in the present case, I do not think parochial E church councils are "core" public authorities. Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative F powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.

14 As to parochial church councils, their constitution and functions lend no support to the view that they should be characterised as G governmental organisations or, more precisely, in the language of the statute, public authorities. Parochial church councils are established as corporate bodies under a church measure, now the Parochial Church Councils (Powers) Measure 1956. For historical reasons this unique form of legislation, having the same force as a statute, is the way the Church of England governs its affairs. But the essential role of a parochial church council is to provide a formal means, prescribed by the Church of England, H whereby ex officio and elected members of the local church promote the mission of the Church and discharge financial responsibilities in respect of their own parish church, including responsibilities regarding maintenance of the fabric of the building. This smacks of a church body engaged in self-governance and promotion of its affairs. This is far removed from the type

of body whose acts engage the responsibility of the state under the European Convention.

15 The contrary conclusion, that the church authorities in general and parochial church councils in particular are "core" public authorities, would mean these bodies are not capable of being victims within the meaning of the Human Rights Act 1998. Accordingly they are not able to complain of infringements of Convention rights. That would be an extraordinary conclusion. The Human Rights Act goes out of its way, in section 13, to single out for express mention the exercise by religious organisations of the Convention right of freedom of thought, conscience and religion. One would expect that these and other Convention rights would be enjoyed by the Church of England as much as other religious bodies.

16 I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function. The impugned act is enforcement of Mr and Mrs Wallbank's liability, as lay rectors, for the repair of the chancel of the church of St John the Baptist at Aston Cantlow. As I see it, the only respect in which there is any "public" involvement is that parishioners have certain rights to attend church services and in respect of marriage and burial services. To that extent the state of repair of the church building may be said to affect rights of the public. But I do not think this suffices to characterise actions taken by the parochial church council for the repair of the church as "public". If a parochial church council enters into a contract with a builder for the repair of the chancel arch, that could be hardly be described as a public act. Likewise when a parochial church council enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly "public" about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit.

17 For these reasons this appeal succeeds. A parochial church council is not a core public authority, nor does it become such by virtue of section 6(3)(b) when enforcing a lay rector's liability for chancel repairs. Accordingly the Human Rights Act 1998 affords lay rectors no relief from their liabilities. This conclusion should not be allowed to detract from the force of the recommendations, already mentioned, of the Law Commission. The need for reform has not lessened with the passage of time.

18 On this footing the other issues raised in this case do not call for decision. I prefer to express no view on the application of article 1 of the First Protocol to the Convention or, more specifically, on the compatibility of the Chancel Repairs Act 1932 with Mr and Mrs Wallbank's Convention right under that article. The latter was not the subject of discrete argument.

19 I add only that even if section 6(1) is applicable in this type of case, and even if the provisions of the 1932 Act are incompatible with Mr and Mrs Wallbank's Convention rights under article 1 of the First Protocol, even so the plaintiff council would not be acting unlawfully in enforcing Mr and Mrs Wallbank's liability as lay rectors. Like sections 3(2)

A and 4(6), section 6(2) of the Human Rights Act 1998 is concerned to preserve the primacy, and legitimacy, of primary legislation. This is one of the basic principles of the Human Rights Act. As noted in *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 72, a public authority is not obliged to neutralise primary legislation by treating it as a dead letter. If a statutory provision cannot be rendered B Convention compliant by application of section 3(1), it remains lawful for a public authority, despite the incompatibility, to act so as to "give effect to" that provision: section 6(2)(b). Here, section 2 of the Chancel Repairs Act 1932 provides that if the defendant would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court, the court shall give judgment for the cost of putting the chancel in repair. When a parochial church council acts pursuant to that provision it is acting within C the scope of the exception set out in section 6(2)(b).

LORD HOPE OF CRAIGHEAD

20 My Lords, the village of Aston Cantlow lies about three miles to the north west of Stratford-upon-Avon. It has a long history. The parish church, St John the Baptist, stands on an ancient Saxon site. Two images of its exterior can be seen on the website Pictorial Images of Warwickshire, D www.genuki.org.uk/big/eng/WAR/images. It is the church where Shakespeare's mother, Mary Arden, who lived at Wilmcote within the parish, married John Shakespeare. The earliest part of the present structure is the chancel which has been there since the late 13th century. It was built in the decorated style and contains a fine example of the use of flowing tracery: *Pevsner & Wedgewood, The Buildings of England: Warwickshire* (1965), E pp 19, 75. As time went on the condition of the structure began to deteriorate, and it is now in need of repair. It has been in that state since at least 1990.

21 In January 1995, when this action began, it was estimated that the cost of the repairs to the chancel was £95,260·84. By that date the Parochial Church Council ("the PCC") had served a notice under the Chancel Repairs Act 1932 in the prescribed form on Mrs Wallbank in her capacity as lay F rector calling upon her to repair the chancel. She disputed liability, so the PCC brought proceedings against her under section 2(2) of the Act. When the notice was served on 12 September 1994 it was thought that Mrs Wallbank was the sole freehold owner of Glebe Farm. In fact, as a result of her conveyance of the farm into their joint names in 1990, she is its joint owner together with Mr Wallbank. So a further notice was served on G 23 January 1996 on both Mr and Mrs Wallbank and an application was made for Mr Wallbank to be joined as a defendant in the proceedings. Several years have gone by. The dispute between the parties has still not been resolved. The cost of the repairs must now greatly exceed the amount of the original estimate.

22 On 17 February 2000 Ferris J heard argument on the question whether the liability of the lay rector to repair the chancel or otherwise to H meet the cost of the repairs was unenforceable by reason of the Human Rights Act 1998 or otherwise. He had been asked to determine this question as a preliminary issue. On 28 March 2000 he answered the question in the negative. At the end of his judgment he observed that it had been posed in terms which would only be appropriate if the Act was already in force. The

only provisions which were in force then were sections 18, 20 and 21(5): section 22(2). By the time of the hearing in the Court of Appeal on 19 March 2001 the position had changed. The remaining provisions of the Act were brought into force on 2 October 2000: the Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000/1851). Mr and Mrs Wallbank were allowed to amend their notice of appeal so that the issues which they wished to raise could be properly pleaded. On 17 May 2001, the Court of Appeal [2002] Ch 51 held that the PCC was a public authority for the purposes of section 6 of the Act. The court also held that the PCC's action in serving the notice on Mr and Mrs Wallbank was unlawful by reason of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, read either alone or with article 14 of the Convention.

23 The circumstances in which Mr and Mrs Wallbank are said to be liable for the cost of the repair have been helpfully described by my noble and learned friend, Lord Scott of Foscote. I gratefully adopt what he has said about them. It is clear from his account that the liability of the lay impropriator to pay the cost of repairing the chancel has been part of ecclesiastical law for many centuries. As Wynn-Parry J explained in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, it rests on the maxim, which has long been recognised, that he who has the profits of the benefice should bear the burden. But the questions about the scope and effect of the Human Rights Act 1998 which your Lordships have been asked to decide in this appeal, and on which I wish to concentrate, are of current interest and very considerable public importance. They raise issues whose significance extends far beyond the boundaries of the parish of Aston Cantlow.

24 The principal human rights issues which arise are (a) whether Mr and Mrs Wallbank can rely upon an alleged violation of their Convention rights as a ground of appeal when both the act complained of and the decision which went against them at first instance took place before 2 October 2000 ("the retrospectivity issue"), (b) whether the PCC is a public authority for the purposes of section 6(1) of the Act ("the public authority issue") and (c) whether the act of the PCC in serving the notice under the Chancel Repairs Act 1932 on Mr and Mrs Wallbank was incompatible with their rights under article 1 of the First Protocol read either alone or in conjunction with article 14 of the Convention ("the incompatibility issue").

The retrospectivity issue

25 When the case came before the Court of Appeal the PCC conceded that it was open to Mr and Mrs Wallbank to raise the question whether its act in serving the notice was unlawful under section 6(1) of the Human Rights Act 1998 by virtue of sections 7(1)(b) and 22(4) of the Act, notwithstanding that service of the notice predated the coming into force of those sections. The Court of Appeal accepted this concession, which they considered it to have been rightly made: [2002] Ch 51, 56, para 7. Those were, of course, early days in the life of the Act. *R v Lambert* [2002] 2 AC 545, *R v Kansal (No 2)* [2002] 2 AC 69 and *R v Benjafield* [2003] 1 AC 1099 had yet to come before your Lordships' House. In the light of what was said in those cases about the issue of retrospectivity the PCC gave notice in the Statement of Facts and Issues of its intention to apply for leave to dispute the

A issue in the course of the hearing of this appeal. But in the PCC's written case it is stated that this contention is no longer being pursued. In the result, although the parties were told at the outset of the hearing that it should not be assumed that the House would necessarily proceed on the basis of this concession, the issue was not the subject of argument.

26 I have, nevertheless, given some thought to the question whether it would be appropriate to examine the issue whether the service of the notice B was incompatible with Mr and Mrs Wallbank's Convention rights. The question whether, and if so in what circumstances, effect should be given to the Human Rights Act 1998 where relevant events occurred before it came into force is far from easy. So I should like to take a moment or two to explain why I have come to the conclusion that the concession was properly made and that in this case Mr and Mrs Wallbank are entitled to claim in C these proceedings that the PCC has acted in a way that is made unlawful by section 6(1) of the Act.

27 As Lord Woolf CJ observed in *Wainwright v Home Office* [2002] QB 1334, 1344G para 22, there has been considerable uncertainty as to whether the Human Rights Act 1998 can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position which we have reached so far can, I think, be summarised in D this way.

28 The only provision in the Act which gives retrospective effect to any of its provisions is section 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities: see sections 6 to 9. It has been said that its effect is to enable the Act to be used defensively against public authorities with retrospective effect but not offensively: see E the annotations to the Act by the late Peter Duffy QC in *Current Law Statutes*, vol 3 (1998). Section 22(4) states that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place, but that otherwise subsection (1)(b) does not apply to an act taking place before the coming into force of section 7. Section 7(1)(b) enables a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) to rely on his Convention F rights in proceedings brought by or at the instigation of the public authority. Section 6(2)(a) provides that section 6(1) does not apply if as a result of one or more provisions of primary legislation the authority could not have acted differently.

29 It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to make by primary G legislation and were made according to the meaning which was to be given to the legislation at that time are not affected by section 22(4): see *R v Kansal (No 2)* [2002] 2 AC 69, 112, para 84; *Wainwright v Home Office* [2002] QB 1334, 1346–1347, paras 29–36. Section 3(2) states that the obligation in section 3(1) to interpret legislation in a way that is compatible with Convention rights applies to primary and secondary legislation whenever enacted. But the interpretative obligation in section 3(1) cannot be applied H to invalidate a decision which was good at the time when it was made by changing retrospectively the meaning which the court or tribunal previously gave to that legislation. The same view has been taken where the claim relates to acts of public authorities other than courts or tribunals. Here too it has been held that the Act cannot be relied upon retrospectively by

introducing a right of privacy to make unlawful conduct which was lawful at the time when it took place: *Wainwright v Home Office* [2002] QB 1334, 1347G–H, para 40.

30 In this case the act which section 6(1) is said to have made unlawful is the enforcement by the PCC of the liability for the cost of the repairs to the chancel. It is the enforcement of that liability that is said to be an unlawful interference with the personal property rights of Mr and Mrs Wallbank contrary to article 1 of the First Protocol. Service by the PCC of the notice on Mr and Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1932 took place in September 1994, well before the coming into effect of the Human Rights Act 1998. But the service of the notice under that subsection was just the first step in the taking of proceedings under the 1932 Act to enforce the liability to repair. If, as has happened here, the chancel is not put in proper repair within a period of one month from the date when the notice to repair was served proceedings must be taken by the responsible authority to recover the sum required to put the chancel in proper repair by means of an order of the court: section 2(2). The final step in the process is the giving by the court of judgment for the responsible authority for such sum as appears to it to represent the cost of putting the chancel in proper repair: section 2(3). The arguments before Ferris J and in the Court of Appeal arose out a direction that there should be trial of preliminary issues. The question which is before your Lordships relates to one of those issues. The proceedings are, in that sense, still at the preliminary stage. The stage of giving judgment under section 2(3) has not yet been reached.

31 If the only act of the PCC which was in issue in this case had been the service of the notice on Mr and Mrs Wallbank it would have difficult, in the light of what was decided in *R v Lambert* [2002] 2 AC 545 and *R v Kansal (No 2)* [2002] 2 AC 69, to say that that act, which was lawful at the time when the notice was served and was still lawful when the preliminary issue was decided by Ferris J at first instance, had become unlawful following the coming into effect of the Human Rights Act 1998. But the proceedings to give effect to that notice are still on foot. In this situation there is, in my opinion, no issue of retrospectivity. Mr and Mrs Wallbank do not need to rely on section 22(4). It is sufficient for their purpose to say that they wish to rely on their Convention right in the proceedings which the PCC are still taking against them with a view to having the notice enforced. This is something that they are entitled to do under section 7(1)(b).

32 It should be emphasised that the situation which I have outlined avoids the problems which were discussed in *R v Lambert* and *R v Kansal (No 2)* about extending section 22(4) to appeals. We are, of course, dealing in this case with an appeal against the decision of a court or tribunal: see section 7(6)(a). But the fact is that the appeal relates to a preliminary issue only. This means that the court has yet to reach the stage in these proceedings when effect can be given to the notice which the PCC have served. That still lies in the future. Section 7(6)(a) states that the expression "legal proceedings" in section 7(1)(b) includes "proceedings brought by or at the instigation of a public authority." The preliminary issue has been examined as part of these proceedings.

33 The question whether the proceedings of which an examination of the preliminary issue forms part are "legal proceedings" as so defined brings

A me to the next issue, which is whether the PCC is a public authority for the purposes of section 6(1) of the Act.

The public authority issue

(a) Introduction

34 Section 6(1) provides that it is unlawful for a public authority to act B in a way which is incompatible with a Convention right. The expression "public authority" is not fully defined anywhere in the Human Rights Act 1998. What the Act does instead is to address itself to some particular issues. In all other respects the expression has been left to bear its ordinary meaning according to the context in which it is used. Section 6(3) provides:

> "In this section 'public authority' includes—(a) a court or tribunal, and C (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."

Section 6(5) provides: "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."

D 35 It is clear from these provisions that, for the purposes of this Act, public authorities fall into two distinct types or categories. Courts and tribunals, which are expressly included in the definition, can perhaps be said to constitute a third category but they can be left on one side for present purposes. The first category comprises those persons or bodies which are obviously public or "standard" public authorities: *Clayton & Tomlinson*, E *The Law of Human Rights* (2000), vol 1, para 5.08. They were referred to in the course of the argument as "core" public authorities. It appears to have been thought that no further description was needed as they obviously have the character of public authorities. In the Notes on Clauses which are quoted in *Clayton & Tomlinson*, para 5.06, it was explained that the legislation proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. In other F words, they are public authorities through and through. So section 6(5) does not apply to them. The second category comprises persons or bodies some of whose functions are of a public nature. They are described in *Clayton & Tomlinson* as "functional" public authorities and were referred to in the argument as "hybrid" public authorities. Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the G acts which they perform which are of a private nature.

36 Skilfully drawn though these provisions are, they leave a great deal of open ground. There is room for doubt and for argument. It has been left to the courts to resolve these issues when they arise. It is plain that the Court of Appeal were being invited to enter into largely uncharted territory. As a result of their efforts we are better equipped as we set out on the same journey. We have the benefit of their decision and of the criticisms that have H been made of it. We must now see where all this leads us. First, it is necessary to examine what they did.

37 The Court of Appeal declined, rightly in my opinion, to look to Hansard for assistance: [2002] Ch 51, 61D, para 29. They rejected the argument that there was an ambiguity which brought this case within the

scope of the limited exception which was described in *Pepper v Hart* [1993] AC 593. It is true that various attempts were made by ministers in both Houses to explain their approach to the application of the Bill to what it described as public authorities. That was understandable, as some concern was expressed about the implications of this aspect of the legislation. But it is not the ministers' words, uttered as they were on behalf of the executive, that must be referred to in order to understand what Parliament intended. It is the words used by Parliament that must be examined in order to understand and apply the legislation that it has enacted.

38 The Court of Appeal were invited to hold that the test of what is a public authority for the purposes of section 6 was function-based. They rejected this proposition too. As Sir Andrew Morritt V-C delivering the judgment of the court pointed out, this may well be determinative as regards the "hybrid" class of public authorities as defined by section 6(3)(b). But it does not follow that it governs the principal category of "core" public authorities: [2002] Ch 51, 62B, para 33. In the following paragraph he said that for this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or hybrid class of public authority. He noted that the authorities on judicial review, as they now stand, draw a conceptual line between functions of public governance and functions of mutual governance. He said that there was no surviving element of mutuality or mutual governance as between the impropriator and the Church in the lay rector's modern liability for chancel repairs.

39 Sir Andrew Morritt V-C set out the conclusions of the Court of Appeal on the public authority issue, at p 63, para 35:

> "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

40 The Court of Appeal, in reaching the conclusion that the PCC is a "core" public authority, appears to have proceeded in this way: (1) the PCC is an authority because it possesses powers which private individuals do not possess to enforce the lay rector's liability; and (2) it is public because it is created and empowered by law, it forms part of the Church of England as the established church and its functions include the enforcement of the liability on persons who need not be members of the church. By a similar process of reasoning the Court of Appeal concluded that the PCC is in any event a person some of whose functions, including chancel repairs, are functions of a public nature. In their view the fact that the PCC has the power and duty to enforce the obligation on persons with whom it has no other relationship

A showed that it has the character of a public authority, or at least that it is performing a function of a public nature when it is enforcing this liability: see also para 36.

41 This approach has the obvious merit of concentrating on the words of the statute. The words "public" and "authority" in section 6(1), "functions of a public nature" in section 6(3)(b) and "private" in section 6(5) are, of course, important. The word "public" suggests that there some B persons which may be described as authorities that are nevertheless private and not public. The word "authority" suggests that the person has regulatory or coercive powers given to it by statute or by the common law. The combination of these two words in the single unqualified phrase "public authority" suggests that it is the nature of the person itself, not the functions which it may perform, that is determinative. Section 6(1) does not C distinguish between public and private functions. It assumes that everything that a "core" public authority does is a public function. It applies to everything that a person does in that capacity. This suggests that some care needs to be taken to limit this category to cases where it is clear that this over-arching treatment is appropriate. The phrase "functions of a public nature" in section 6(3), on the other hand, does not make that assumption. It requires a distinction to be drawn between functions which are public and D those which are private. It has a much wider reach, and it is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a "hybrid" public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.

E **42** The absence of a more precise definition of the expression "public authority" for the purposes of section 6(1) of the Human Rights Act 1998 may be contrasted with the way that expression is used in the devolution legislation for Scotland and Northern Ireland. Sections 88–90 of the Scotland Act 1998 deal with what that Act calls "cross-border public authorities". "Scottish public authorities" are dealt with in Part III of Schedule 5. Definitions of these expressions are provided in section 88(5), F which requires "cross-border authorities" to be specified by Order in Council and in section 126(1) which states that "Scottish public authority" means any public body, public office or holder of such an office whose functions are exercisable only in or as regards Scotland. A list of public bodies was appended to the White Paper, Scotland's Parliament (1997) (Cm 3658): see also the note to section 88 of the 1998 Act in *Current Law* G *Statutes*. It included three nationalised industries, a group of tribunals, three statutory water authorities, health bodies and a large number of miscellaneous executive and advisory bodies. Sections 75 and 76 of the Northern Ireland Act 1998 impose a duty on public authorities to promote equality of opportunity and prohibit discrimination in the carrying out of their functions. The expression "public authority" for the purposes of each of these sections is defined in a way that appears to leave no room for doubt H as to which departments, corporations or other bodies are included: see sections 75(3), 76(7).

43 The Court of Appeal did not explore the significance of the distinction which is drawn in section 6 between "core" and "hybrid" public authorities. In their view the PCC, for the same reasons, fell into either

category: p 63D–E, para 35. But the width that can be given to the "hybrid" category suggests that the purpose of the legislation would not be impeded if the scope to be given to the concept of a "core" public authority were to be narrowed considerably from that indicated by the Court of Appeal.

44 There is one vital step that is missing from the Court of Appeal's analysis. It is not mentioned expressly in the Human Rights Act 1998, but it is crucial to a proper understanding of the balance which sections 6 to 9 of the Act seek to strike between the position of public authorities on the one hand and private persons on the other. The purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. It is the obligation of states which have ratified the Convention to secure to everyone within their jurisdiction the rights and freedoms which it protects: *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 49. The source of this obligation is article 13. It was omitted from the articles mentioned in section 1(1) which defines the meaning of the expression "the Convention rights", as the purpose of sections 6 to 9 was to fulfil the obligation which it sets out. But it provides the background against which one must examine the scheme which these sections provide.

45 The principle upon which the scheme proceeds is that actions by public authorities are unlawful if they are in breach of Convention rights: section 6(1). Effect is given to that principle in section 7. It enables anyone who is a victim of an act made unlawful by section 6(1) to obtain a remedy. The extent to which the scheme derives its inspiration from the Convention is revealed by the definition of the word "victim" which is set out in section 7(7). It provides:

> "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."

Article 34 of the Convention is in these terms:

> "The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

46 The reference to non-governmental organisations in article 34 provides an important guide as to the nature of those persons who, for the purposes of section 6(1) of the Act and the remedial scheme which flows from it, are to be taken to be public authorities. Non-governmental organisations have the right of individual application to the European Court of Human Rights as victims if their Convention rights have been violated. If the scheme to give effect to article 13 is to be followed through, they must be entitled to obtain a remedy for a violation of their Convention rights under section 7 in respect of acts made unlawful by section 6.

47 The test as to whether a person or body is or is not a "core" public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental

A organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of article 34 ought not to be regarded as a "core" public authority for the purposes of section 6. That would deprive it of the rights enjoyed by the victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1). B Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476, 491–493 has observed that this would have serious implications. It would undermine the protections against state control which are the hallmarks of a liberal democracy.

48 In *Rothenthurm Commune v Switzerland* (1988) 59 DR 251 the Commission held that local government organisations such as the applicant C commune which exercise public functions are clearly "governmental organisations" as opposed to "non-governmental organisations" within the meaning of article 25 (now article 34) of the Convention, with the result that the commune which was complaining that proceedings for the expropriation of land for a military training area were in breach of their rights under article 6(1) could not bring an application under that article. In D *Ayuntamiento de Mula v Spain*, Reports of Judgments and Decisions 2000-I, p 53 the European Court held that under the settled case law of the Convention institutions local government organisations are public law bodies which perform official duties assigned to them by the Constitution and by substantive law and are therefore quite clearly governmental organisations. It added this comment:

E "In that connection, the court reiterates that in international law the expression 'governmental organisations' cannot be held to refer only to the Government or the central organs of the State. When powers are distributed along decentralised lines, it refers to any national authority which exercises public functions."

49 The phrase "public functions" in this context is thus clearly linked to F the functions and powers, whether centralised or distributed, of government. This point was developed more fully in *Holy Monasteries v Greece* (1995) 20 EHRR 1. The Government of Greece argued that the applicant monasteries, which were challenging legislation which provided for the transfer of a large part of the monastic property to the Greek state, were not non-governmental organisations within the meaning of article 25 (now 34) of the Convention. It was pointed out that the G monasteries were hierarchically integrated into the organic structure of the Greek Orthodox Church, that legal personality was attributed to the Church and its constituent parts in public law and that the Church and its institutions, which played a direct and active part in public administration, took administrative decisions whose lawfulness was subject to judicial review by the Supreme Administrative court like those of any other public H authority. Rejecting this argument, the court said in para 49:

"Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially

ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the State—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery."

50 The phrase "governmental organisations established for public administration purposes" in the third sentence of the passage which I have quoted from the *Holy Monasteries* case is significant. It indicates that test of whether a person or body is a "non-governmental organisations" within the meaning of article 34 of the Convention is whether it was established with a view to public administration as part of the process of government. That too was the approach which was taken by the Commission in *Hautanemi v Sweden* (1996) 22 EHRR CD 156. At the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law in the domestic legal order. It was held nevertheless that the applicant parish was a victim within the meaning of what was then article 25, on the ground that the Church and its member parishes could not be considered to have been exercising governmental powers and the parish was a non-governmental organisation.

51 It can be seen from what was said in these cases that the Convention institutions have developed their own jurisprudence as to the meaning which is to be given to the expression "non-governmental organisation" in article 34. We must take that jurisprudence into account in determining any question which has arisen in connection with a Convention right: Human Rights Act 1998, section 2(1).

52 The Court of Appeal left this jurisprudence out of account. They looked instead for guidance to cases about the amenability of bodies to judicial review, although they recognised that they were not necessarily determinative: p 62D–E, para 34. But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, "Chancel repairs and the Human Rights Act" [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of "core" public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the "hybrid" class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a "function of a public nature" within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention.

A 53 At first sight there is a close link between the question whether a person is a non-governmental organisation for the purposes of article 34 and the question whether a person is a public authority against which the doctrine of the direct effect of directives operates under Community law: see article 249 EC. Both concepts lie at the heart of the obligations of the State under international law. Individual applications for a violation of Convention rights may be received under article 34 from "any person, B non-governmental organisation or group of individuals". Direct effect exists only against the member state concerned "and other public authorities": *European Coal and Steel Community v Acciaierie e ferriere Busseni SpA* (Case C-221/88) [1990] ECR I-495, para 23; *Brent*, *Directives: Rights and Remedies in English and Community Law* (2001), para 15.11.

C 54 The types of organisations and bodies against whom the provisions of a directive could be relied on were discussed in *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405. The court noted in para 18 that it had been held in a series of cases that provisions of a directive could be relied on against organisations and bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals. Reference was D made to a number of its decisions to illustrate this point. Its conclusions were set out in para 20:

> "It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the E normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

55 This is a broad definition of the concept by which such bodies have come to be referred to as "emanations of the State": e g *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, F 154, para 56. It has been described as a starting point: *Doughty v Rolls-Royce plc* [1992] 1 CMLR 1045, 1058, per Mustill LJ. As *Brent*, para 15.11, note 101, points out, the phrase "emanation of the State" is an English legal concept derived from *Gilbert v Corpn of Trinity House* (1886) 17 QBD 795 which was later criticised by the courts as inappropriate and undefined. Whatever its value may be in the context of Community law, however, it G would be neither safe nor helpful to use this concept as a shorthand way of describing the test that must be applied to determine whether a person or body is a non-governmental organisation for the purposes of article 34 of the Convention. There is no right of individual application to the European Court of Justice in EC law. The phrase "non-governmental organisation" has an autonomous meaning in Convention law.

H *(b) Is the PCC a public authority?*

56 The general functions and powers of parochial church councils in the Church of England are set out in the Parochial Church Councils (Powers) Measure 1956. That was a measure passed by the National Assembly of the Church of England under the powers which were conferred on the National

Assembly by the Church of England Assembly (Powers) Act 1919. The National Assembly was renamed and reconstituted as the General Synod of the Church of England by the Synodical Government Measure 1969. Section 7 of the 1969 Measure provides that the rules contained in Schedule 3, which may be cited as the Church Representation Rules, are to have effect for the purpose of providing for the constitution and proceedings of diocesan and deanery synods and making further provision for the synodical government of the church. Part II of the Church Representation Rules provides for the holding of annual parochial church meetings at which parochial representatives of the laity to the parochial church council and the deanery synod are to take place. Rule 14 sets out the membership of the parochial church council. It includes the clergy, churchwardens, any persons on the roll of the parish who are members of any deanery or diocesan synod or the General Synod, elected representatives of the laity and co-opted members.

57 Section 2(1) of the Parochial Church Councils (Powers) Measure 1956 provides that it shall be the duty of the minister, as defined in rule 44(1) of the Church Representation Rules, and the parochial church council to consult together on matters of general concern and importance to the parish. Section 2(2) states that the functions of parochial church councils shall include, among other things, co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical and the consideration and discussion of matters concerning the Church of England or any other matters of religious or public interest other than the declaration of the doctrine of the Church on any question. Among the powers, duties and liabilities vested in parochial church councils by section 4 are those relating to the financial affairs of the church and the care, maintenance and preservation of its fabric. Section 2 of the Chancel Repairs Act 1932 provides that, where a chancel is in need of repair, proceedings to enforce the liability to repair are to be taken by the responsible authority. Section 4(1) of the Act provides that the expression "responsible authority" in relation to a chancel means the parochial church council of the parish in which the chancel is situate.

58 There is no doubt that parochial church councils are an essential part of the administration, on the authority of the General Synod, of the affairs of the Church of England. The parish itself has been described as the basic building block of the Church and the PCC as the central forum for decision-making and discussion in relation to parish affairs: *Hill*, *Ecclesiastical Law*, 2nd ed (2001), pp 48 and 74, paras 3.11 and 3.74. It is constituted by section 3 of the Parochial Church Councils (Powers) Measure 1956 as a body corporate. It has statutory powers which it may exercise under section 2 of the Chancel Repairs Act 1932 against any person who appears to it to be liable to repair the chancel, irrespective of whether that person is resident in the parish and is a member of the Church of England. In that context, perhaps, it may be said in a very loose sense to be a public rather than a private body.

59 But none of these characteristics indicate that it is a governmental organisation, as that phrase is understood in the context of article 34 of the Convention. It plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants

A from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual. The statutory powers which it has been given by the Chancel Repairs Act 1932 are not exercisable against the public generally or any class or group of persons which forms part of it. The purpose of that Act, as its long title indicates, was to abolish proceedings in ecclesiastical courts for enforcing the liability to repair. The only person against whom the liability B may be enforced is the person who, in that obscure phrase, "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court on the date when the notice was served": see section 2(3); *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 429, per Lord Hanworth MR.

C 60 Then there is the fact that the PCC is part of the Church of England. The Court of Appeal said that it exemplifies the special status of the church of which it forms part: [2002] Ch 51, 61, para 32. The fact that it forms part of the church by law established showed, it was said, that the PCC is a public authority: p 63, para 35. The implication of these observations is that other bodies such as diocesan and deanery synods and the General Synod itself fall into the same category. In my opinion however the legal framework of the D Church of England as a church by law established does not lead to this conclusion.

61 The Church of England as a whole has no legal status or personality. There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibden*, *Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state E has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said:

> "A Church which is established is not thereby made a department of the state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered F under certain legal conditions, certain civil sanctions."

The Church of England is identified with the state in other ways, the monarch being head of each: see *Doe*, *The Legal Framework of the Church of England* (1996), p 9. It has regulatory functions within its own sphere, but it cannot be said to be part of government. The state has not surrendered or delegated any of its functions or powers to the Church. None of the G functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility: see *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036, 1042A, per Simon Brown J. The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the H powers or functions of government.

62 The decisions of the Strasbourg Court in *Holy Monasteries v Greece* 20 EHRR 1 and *Hautanemi v Sweden* 22 EHRR CD 156 support this approach. It is also worth noting that, while the two main churches in Germany (Roman Catholic and Lutheran) have public legal personality and are public authorities bound by the provisions of article 19(4) of the German

Constitution (Grundgesetz) or Basic Law which guarantees recourse to the court should any person's basic rights be violated by public authority, they are in general considered to be "non-governmental organisations" within the meaning of article 34 of the Convention. As such, they are entitled to avail themselves of, for example, the right to protection of property under article 1 of the First Protocol: *Frowein and Peukert*, *Kommentar zur Europäishen Menschenrechtskonvention*, 2nd ed (1996), art 25, para 16. *Maunz and Dürig*, *Kommentar zum Grundgesetz* (looseleaf), art 33, para 38 explain the position in this way:

> "Keine hoheitsrechtlichen Befugnisse nehmen die Amtsträger der Kirchen wahr, soweit sie nicht kraft staatlicher Ermächtigung (etwa in Kirchensteurangelegenheiten) tätig werden; die Kirchen sind, auch soweit sie öffentlich-rechtlichen Status haben, nicht Bestandteile der staatlichen Organisation."

[Church officeholders do not exercise sovereign power so long as they are not acting by virtue of state empowerment (for example, in matters concerning church taxes); the churches do not, even though they have public law status, form an integral part of the organisation of the state.] This reflects the view of the German Constitutional Court in its 1965 decision (BVerwGE 18, 385) that measures taken by a church relating to purely internal matters which do not reach out into the sphere of the state do not constitute acts of sovereign power. The churches are not, as we would put it, "core" public authorities although they may be regarded as "hybrid" public authorities for certain purposes.

63 For these reasons I would hold that the PCC is not a "core" public authority. As for the question whether it is a "hybrid" public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of the Human Rights Act 1998 provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.

64 It is true, as Wynn-Parry J observed in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, that the burden is imposed for the benefit of the parishioners. It may be said that, as the church is a historic building which is open to the public, it is in the public interest that these repairs should be carried out. It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is, as the Court of Appeal observed, at p 63B, para 34, no surviving element of mutuality or mutual governance between the church and the impropriator. But none of these factors leads to the conclusion that the PCC's act in seeking to enforce the lay rector's liability on behalf of the parishioners is a public rather than a private act. The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State. I would

A hold that section 6(5) applies, and that in relation to this act the PCC is not for the purposes of section 6(1) a public authority.

The incompatibility issue

65 This issue does not arise if, as I would hold, the PCC is not for present purposes a public authority. But I should like to offer these brief B comments on it, as I do not agree with the Court of Appeal's finding that Mr and Mrs Wallbank's right to peaceful enjoyment of their possessions under article 1 of the First Protocol, read either alone or with article 14 of the Convention, has been violated: [2002] Ch 51, paras 38–46.

66 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of C his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions D or penalties."

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms which the Convention sets forth.

67 Article 1 of the First Protocol contains three distinct rules: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *James v United Kingdom* (1986) 8 EHRR 123, para 37. The first rule is set out in the E first sentence, which is of a general nature and enunciates the principle of the peaceful enjoyment of property. It then deals with two forms of interference with a person's possessions by the state: deprivation of possessions which it subjects to certain conditions, and control of the use of property in accordance with the general interest. In each case a balance must be struck between the rights of the individual and the public interest to determine F whether the interference was justified. These rules are not unconnected as, before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable. As it was put in *James*, para 37, the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They should be construed in the light of the general principle enunciated in G the first rule.

68 The Court of Appeal appear to have overlooked this guidance. They did not address the question whether Mr and Mrs Wallbank were being deprived of their possessions according to the second rule, and they did not deal with the question whether there was an interference with the first rule. They held that the liability to defray the cost of chancel repairs was levy upon the personal funds of Mr and Mrs Wallbank, that this was a form of H taxation within the third rule in the second paragraph of article 1, and that it was arbitrary and disproportionate. They rejected the PCC's argument the source of the liability was their ownership of Glebe Farm. They held that there was in this case an outside intervention by the general law which made ownership of the land a fiscal liability: para 40.

69 Ferris J said in his judgment that, if the law relating to chancel repairs was as understood it to be (which he described as "the supposed rule"), it did not involve a deprivation of possessions. As he put it, at para 23:

"The argument for Mr and Mrs Wallbank seems to assume that the starting point is that they are to be regarded as the owners of Glebe Farm free from incumbrances or other burdensome incidents attached to the ownership of the land. But this is not in fact correct if the supposed rule represents the law. The liability to repair the chancel is, on that basis, one of the incidents of ownership of that part of Glebe Farm which consists of land allotted under the inclosure award in lieu of tithe or other rectorial property. It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

He said that the case was quite different from that in which there was some kind of outside intervention in the form of taxation, compulsory purchase or control over the way in which the property can be used.

70 I prefer Ferris J's analysis to that of the Court of Appeal. The principle which we must follow was described in *James v United Kingdom* 8 EHRR 123, para 36. We must confine our attention, as far as possible, to the concrete case which is before us. It must not be directed to the impact of the law relating the enforcement of the chancel repair liability in the abstract, but to its impact as it affects Mr and Mrs Wallbank.

71 How then does the liability arise? It cannot be considered in isolation from the obligation that gives rise to it. That is the obligation which rests on the owner of rectorial land, not as a result any outside intervention with the possession of the land by the state but as a matter of private law. The conveyance of Glebe Farm to Mrs Wallbank's parents in 1970 described the land as subject to the liability for the repair of the chancel mentioned in previous conveyances. Their deeds of gift to Mrs Wallbank in 1974 and 1986 also referred to the chancel repair liability. This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value. She could have divested herself of it at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank. It is not, as the Court of Appeal said (para 40), an outside intervention by way of a form of taxation.

72 I recognise that Mr and Mrs Wallbank may well need to draw on their personal funds to discharge the liability. But they are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of article 1 of the First Protocol. The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges. I do not think that in this case the right which article 1 of the First

A Protocol guarantees, read alone or in conjunction with article 14 of the Convention, is being violated.

Conclusion

73 The law relating to the liability for chancel repairs is open to criticism on various grounds. The liability has been described by the Law B Commission as anachronistic and capricious in its application and as highly anomalous: Liability for Chancel Repairs (1985) (Law Com No 152), para 3.1; Land Registration for the Twenty-first Century (1998) (Law Com No 254; Cm 407), para 5.37. The existence of the liability can be difficult to discover, as most lay rectories have become fragmented over the years as a result of the division and separate disposals of land: Transfer of Land, Liability for Chancel Repairs (1983) (Law Commission Working paper C No 86), para 2.29. The fact that it is a several liability may operate unfairly in cases where there is more than one lay rector and the person who is found liable is unable to recover a contribution from others who ought to have been found liable.

74 On the other hand it was noted in the 1983 Law Commission Working Paper that there were some 5,200 chancels for which there is a D chancel repair liability. Not all of these cases involve individual landowners. About 800 are the liability of the Church Commissioners, 200 the liability of cathedrals and 200 the liability of educational foundations. Charitable donations may provide relief in some cases, while in others grants may be available from English Heritage. But there is no other source of private funding that can be relied upon, and there is no right of access to public E funds. Unsatisfactory though the system may appear to be, there is no obvious alternative. Ferris J recognised, in para 18 of his judgment, that the law relating to chancel repairs is capable of operating arbitrarily, harshly and unfairly. But he did not find any basis for declaring the law to be otherwise than it appeared to be on the authorities.

75 It is not open to us to resolve these problems judicially. All one can say is that the Human Rights Act 1998 does not provide a vehicle for doing F so. I would allow the appeal and restore the order and determination made by Ferris J.

LORD HOBHOUSE OF WOODBOROUGH

76 My Lords, it is admitted by the defendants that, apart from the Human Rights Act 1998, they are, as the joint owners of Glebe Farm, Aston G Cantlow, and have been at all material times personally responsible for the repair of the chancel of the church of St John the Baptist Aston Cantlow and that, they having failed to repair the chancel, the Parochial Church Council ("PCC") is entitled to a judgment against them under section 2(3) of the Chancel Repairs Act 1932 for such sum as represents the cost of putting the chancel into a proper state of repair. This is because the defendants, Mr and Mrs Wallbank, being liable to repair the chancel, would, but for the H 1932 Act, have been liable to be admonished to repair the chancel by an ecclesiastical court. The obligation of the defendants is the obligation to repair. Under the 1932 Act the remedy of an order that the obligation be performed is no longer to be available and the monetary remedy is provided in lieu but the character of the obligation was left unchanged.

77 The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land. The 15th and 16th century origins of this are helpfully explained in the opinion of my noble and learned friend, Lord Scott of Foscote. In the present case the obligation arose not from the receipt of tithes but as a result of an enclosure award of 1743 made under the private Act of Parliament of 1742 (15 Geo 2, c 42). It is a personal obligation but only exists so long as the person in question is the owner of the land. Thus he acquires it by a voluntary act—the acquisition of the title to the land of which the obligation is an incident. He can divest himself of the obligation by a further voluntary act—the disposal of the land or, under section 52 of the Ecclesiastical Dilapidations Measure 1923, by redemption. At all the times material to this case, the obligation was categorised by section 70 of the Land Registration Act 1925 as an overriding interest. The person or persons who are under such an obligation are described, using the historical terminology, as the "lay rectors" or the "lay impropriators".

78 In fact the defendants knew that ownership of the land was believed to carry with it the obligation. It was referred to in all the title deeds and, in at least one conveyance, an express indemnity had been taken by the vendor. In other cases some special consideration might arise from the fact that the relevant landowner had acquired the title to the land without any notice of the existence, or possible existence, of the obligation. But that is not this case and it need not be discussed further.

79 The only defence now raised by the defendants to the claim of the PCC under the 1932 Act is based upon the Human Rights Act 1998 and/or the Convention. The 1998 Act had not come into force at the time when the defendants failed to carry out the relevant repairs, nor when the PCC served the notice required by section 2(1) of the 1932 Act, nor at the time when Ferris J tried the case and gave judgment for the PCC. He was formally trying two preliminary issues ordered by Master Bragge but, when he decided the human rights issue against the defendants, the defendants, having abandoned their case on the other issue, admitted that they had no defence to the claim except as to quantum. He accordingly made a declaration of liability, ordered an inquiry as to quantum and ordered the defendants to pay to the claimants the sum found due on the inquiry. The question of quantum arose under section 2(3) of the 1932 Act: "[the] court . . . shall give judgment . . . for such sum as appears to the court to represent the cost of putting the chancel in proper repair". The points which the defendants were taking on quantum were pleaded in paragraph 1 of the outline defence. The judgment of Ferris J was in English procedural law a final judgment. The defendants appealed to the Court of Appeal. By the time that the defendants' appeal was heard, the 1998 Act had however come into force.

80 This timetable raises again the question of the extent to which the Act has a retrospective effect, a question on which the Court of Appeal did not express an opinion since no point was taken in that regard by the PCC. Your Lordships were not satisfied that this was necessarily correct; however it was clearly convenient and in the interest of both of the parties that the House should first hear the parties' arguments upon the points which the Court of Appeal did decide. I stress that the House have not heard any argument upon the question of the extent, if at all, to which the Act has

A retrospective effect. It is not appropriate that any view should be expressed on it in the present case. Anything said will not be authoritative. The retrospectivity point will arise for decision in other unrelated appeals and will then fall to be decided after full argument and due consideration. It is in any event not correct to approach that question on the basis that the judgment of Ferris J was undeterminative or merely interlocutory. In English procedural law, it was a final judgment which, unless reversed on appeal, B determined the parties' rights and liabilities, subject only to quantum. I will accordingly proceed on the basis of assuming that the Human Rights Act 1998 applies to this case in accordance with the provisions of sections 22(4), 7(1)(b) and 6.

81 The structure of the defendants' argument under the Human Rights Act 1998 is that they have to establish three propositions. If they fail on any C one of these, their defence fails. They are: (a) that the PCC is a public authority, the sections 6(1), (3) and (5) point, and (b) that there has been a breach of article 1 of the First Protocol, the article 1 and article 14 point, and (c) that the exclusion in section 6(2) does not apply. Before Ferris J only point (b) arose and he decided it in favour of the claimants. In the Court of Appeal all three points were decided in favour of the defendants.

82 These were the questions of law raised on this appeal. They are D questions which are of relevance not only to the present case but to many other cases or potential cases concerning the enforcement under the 1932 Act of the obligation to repair chancels. Other cases may, on their facts, raise special considerations not found in this case and, similarly, legal questions not dependent upon the Human Rights Act 1998 may arise. Your Lordships' decision on this appeal does not touch upon any of them. But E I must expressly disassociate myself from any suggestion that there is a cap upon the monetary liability under section 2(3) of the 1932 Act or that any such point is presently open to the defendants upon the inquiry ordered by Ferris J as discussed in the opinion of my noble and learned friend, Lord Scott of Foscote, which I have had the privilege of reading in draft after I had prepared this opinion, together with his questioning of the correctness of the decision in *Wickhambrook Parochial Church Council v Croxford* [1935] F 2 KB 417. The question was neither raised nor argued. There are contentious points which will arise if it ever is. Does the cap apply where the express words of the 1932 Act are applicable? How does it apply to successive or continuing and cumulative breaches of the obligation to repair? Does the cap apply where the liability is not attributable to the ownership of a tithe rentcharge but simply to the ownership of land? If so, G how does one assess what the cap should be? It is by no means clear that any of these questions should be answered in a way that could assist the defendants. But they have not been argued and I will say no more about them.

Is the PCC a public authority?

83 Historically parochial church councils did not exist. They were H introduced by the Parochial Church Councils (Powers) Measure 1921 as a body at parish level which would better enable the lay members of the congregation to be represented. It was agreed that at the material times the powers and functions of PCCs were defined by the Parochial Church Council (Powers) Measure 1956. Section 2 (as amended) provided:

"*General Functions of Council*

"(1) It shall be the duty of the minister and the [PCC] to consult together on matters of general concern and importance to the parish.

"(2) The functions of [PCCs] shall include—(a) cooperation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod.

"(3) In the exercise of its functions the [PCC] shall take into consideration any expression of opinion by any parochial church meeting."

Section 3 provided that the PCC was to be a body corporate with perpetual succession. Section 4 made provision for the PCC as successor to certain other bodies to have the relevant powers of those bodies:

"(1) . . . the council of every parish shall have . . . (ii) the like powers duties and liabilities as, immediately before [1 July 1921], the churchwardens of such parish had with respect to—(a) The financial affairs of the church including the collection and administration of all moneys raised for church purposes and the keeping of accounts in relation to such affairs and moneys; (b) The care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments thereof; (c) The care and maintenance of any churchyard (open or closed) and the power of giving a certificate under the provisions of section 18 of the Burial Act 1855 with the like powers as, immediately before [1 July 1921] were possessed by the churchwardens to recover the cost of maintaining a closed churchyard . . ."

Of these powers, the most relevant to the present case are those in section 4(1)(ii)(b) but it is important to note that these are only those powers and duties which the churchwardens had and that the churchwardens did not have a duty to repair the fabric but only a duty to report its disrepair. As stated by Richard Burn Ch in his work *Burn on Ecclesiastical Law*, 9th ed (1842), edited by Robert Phillimore, vol 1, p 357,

"And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate and fall into decay; and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentation thereof at the next visitation."

It was no doubt following this logic that the PCC were given the power (and correlative duty) in 1932 to bring the action to obtain a remedy for the failure of a lay rector to repair the chancel. (The changes later introduced by section 39 of the Endowments and Glebe Measure 1976 relating to incumbents of a benefice are not relevant to this case.)

A **84** The PCC is thus the creature of a statutory provision by what was then the National Assembly of the Church of England. It has only those functions, duties and powers which have been conferred on it by that or other legislation. It is part of the structure known as the Church of England but the Church of England is not itself a legal entity. The legal entities are the various office-holders and various distinct bodies set up within that structure.

B **85** The Human Rights Act 1998 and section 6 do not contain any complete or general definition of the term "a public authority". Section 6 does however contain a secondary definition in subsections (3)(b) and (5) as including, in respect of acts which are not of a private nature, persons (or bodies) certain of whose functions are functions of a public nature. This secondary category has been described as "hybrid" public authorities. It C requires a two-fold assessment, first of the body's functions, and secondly of the particular act in question. The body must be one of which at least some, but not all, of its functions are of a public nature. This leaves what by inference from subsection (3)(b) is the primary category, i e, a person or body *all* of whose functions are of a public nature. This category has conveniently been called by the commentators a "core" public authority. For this D category, there is no second requirement; the section potentially applies to everything that they do regardless of whether it is an act of a private or public nature.

86 Is a PCC a "core" public authority? The answer I would give to this question is that it is clearly not. Its functions, as identified above from the relevant statutory provisions, clearly include matters which are concerned only with the pastoral and organisational concerns of the diocese and the E congregation of believers in the parish. It acts in the sectional not the public interest. The most that can be said is that it is a creature of a church measure having the force of a statute—but that is not suggested to be conclusive—and that some aspects of the Church of England which is the "established church" are of wider general interest and not of importance to the congregation alone. Thus the priest ministering in the parish may have F responsibilities that are certainly not public, such as the supervision of the liturgies used or advising about doctrine, but may have other responsibilities which are of a public nature, such as a responsibility for marriages and burials and the keeping of registers. But the PCC itself does not have such public responsibilities nor are its functions public; it is essentially a domestic religious body. The fact that the Church of England is the established church of England may mean that various bodies within G that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions. Even the monasteries of the established church in Greece, which has strong legal links with the state, such as the presence of representatives of the state on its governing body and direct financial links with the state, has been held not to be an emanation of the state for the purposes of the Convention: *Holy Monasteries v Greece* 20 EHRR 1.

H **87** The Court of Appeal reached a different conclusion. I do not find their reasoning satisfactory. Neither parliamentary material nor references to the law of judicial review assist on this question. The relevant underlying principles are to be found in human rights law not in Community law nor in the administrative law of England and Wales. The Strasbourg jurisprudence

has already been deployed in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it. The relevant concept is the opposition of the "victim" and a "governmental body". The former can make a complaint; the latter can only be the object of a complaint. The difference between them is that the latter has a governmental character and discharges governmental functions. If there is a need to find additional assistance in construing section 6 of the Act, this is where it is to be found. The structure of the Act also supports the same conclusion. It is through section 7 and its reference to victims in section 7(1) and (7) that one gets from section 22(4) to section 6(1). Section 7 is drafted having regard to the Strasbourg jurisprudence; it would be inconsistent to construe section 6 in a manner opposed to that jurisprudence. The Court of Appeal's approach cannot be supported.

88 In my opinion it has not been established that PCCs in general nor this PCC in particular perform any function of a public or governmental nature. If it is to be said that they do, I am unaware what specifically it can be said is that function. The Court of Appeal (in paragraph 34) said that the recovery of money under section 2 of the 1932 Act was the function which made the PCC a public authority. This is to be contrasted with the statement in paragraph 37 that the "power and, no doubt duty" to do so is a "common law" power. The nature of the person's functions are not to be confused with the nature of the act complained of, as section 6 makes clear. But in neither case are they governmental in nature nor is the body itself inherently governmental. It follows that in my opinion the PCC was neither a "core" nor a "hybrid" public authority. On that basis the defence of Mr and Mrs Wallbank must fail.

89 But, if I am wrong, and the PCC was a "hybrid" public authority, the further question arises under section 6(5): Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable by the PCC as a civil debt by virtue of the 1932 Act. The 1932 did not alter the preexisting law as to the obligations of lay impropriators. It is simply remedial (as the Court of Appeal recognised in paragraph 37). Its purpose is to enable repairs to be done which the lay rector ought to have, but has not, himself carried out. It is argued that it is akin to a power of taxation. Whether or not it was once true in the 16th century that such a power existed, it was certainly not true in the 20th century. Whatever the former obligations of lay impropriators may once have been, by the 18th century they were or had been converted into civil obligations. In the present case this occurred in 1743 as a result of an enclosure award made under a private Act of Parliament of 1742 entitled An Act for Dividing and Inclosing, Setting out and Allotting, certain Common Fields and Inclosures within the Manor and Parish of Aston Cantlow, in the County of Warwick (15 Geo 2, c 42). In return for financial and proprietorial advantages then conferred upon them, the impropriators accepted the obligation to repair the chancel as and when the need arose. That is the private law obligation which is being enforced in the present action using the remedy provided in the 1932 Act.

90 The 1932 Act is irrelevant unless and until the lay impropriator fails to perform his obligation to repair the chancel, a failure which may have occurred on a single occasion or may, as in the present case, have been a continuing and cumulative failure over a long period of time. The

A responsibility for repairing the chancel was since 1743 an incident of the ownership of certain particular parcels of land. When Mr and Mrs Wallbank acquired the title to that land they assumed that responsibility to repair and the consequent liability in default if they should fail to discharge it. This was not a responsibility and liability which they shared with the public in general; it was something which they had personally assumed voluntarily by a voluntary act of acquisition which at the time they apparently thought was B advantageous to them. From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature. Again, this conclusion is adverse to the Wallbanks' defence.

Has there been a breach of article 1 (and article 14)?

C **91** Article 14 (discrimination) is not a freestanding provision but has to be read in conjunction with the recognition of the rights conferred by other articles. Therefore the material article is article 1 of the First Protocol which endorses the entitlement to the peaceful enjoyment of a person's possessions and prohibits depriving a person of his possessions, subject to certain qualifications. The word "possessions" has been considered by the D European Court of Human Rights, in particular in the cases of *Marckx v Belgium* (1979) 2 EHRR 330 and *Sporrong and Lönnroth v Sweden* 5 EHRR 35. It applies to all forms of property and is the equivalent of "assets". But what is clear is that it does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their E possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability. Nor do they have a Convention right to be relieved from the consequences of a bargain made, albeit some 200 years earlier, by their predecessors in title. They do not make any complaint under article 6 or complain about the fairness of these legal proceedings. They cannot complain that they are F being discriminated against. The only reason why they are being sued is because they are the parties liable. This defence also fails. The submission that there should be a declaration of incompatibility likewise fails.

92 For the sake of completeness, it was clear that at all material times both they and their predecessors in title knew of the responsibility to repair or at least that it was asserted that they would be responsible if they acquired G the title to the relevant land, an assertion which they have now admitted to be correct subject only to the Human Rights Act 1998. Further, they originally ran a case of waiver by the PCC which they have now accepted was rightly rejected. If they had had a legal defence it would have been recognised by the court and the action would have been dismissed. Their financial liability under the 1932 Act is not arbitrary. It arises from their failure to perform a civil private law obligation which they had voluntarily assumed.

H

The section 6(2) point

93 This point would only arise if I was wrong on all the preceding points. One therefore has to assume that the PCC is a public authority and the demand for payment is not of a private nature. In such circumstances,

subsection (2) creates an exception to the application of subsection (1). The words of exception relevant to this case are "the authority was acting so as to give effect to or enforce" provisions of primary legislation. The primary legislation is the 1932 Act. Incontrovertibly the PCC were seeking to give effect to and enforce provisions of that Act. On the above-stated assumption, the PCC's act in suing the Wallbanks comes squarely within the exception. Paragraph (b) of the subsection is to be contrasted with paragraph (a) which is manifestly intended to cover cases where the public authority did not have any alternative but to act as it did (i e it was compelled to do so). Paragraph (b), on the other hand, covers situations where the public authority was empowered by legislation to act as it did and the intention of the legislation, whilst leaving open a measure of discretion, was that it should use the power provided. For some unstated reason, the Court of Appeal treated only paragraph (a) as being relevant and this accounts for their mistaken decision on this point.

Conclusion

94 It follows that, far from making out all three of the necessary constituents in their defence, the defendants have made out none. Their defence accordingly fails and the appeal must be allowed. There is no need to consider the retrospectivity question.

LORD SCOTT OF FOSCOTE

Introduction

95 My Lords, the respondents, Mr and Mrs Wallbank, are the freehold owners of Glebe Farm, Aston Cantlow in Warwickshire. Glebe Farm, which consists of a farmhouse and about 179 acres of land, includes five fields amounting to just over 52 acres known, or formerly known, as Clanacre. The Clanacre fields, it is contended, were and remain rectorial property thereby constituting its owners for the time being lay rectors and subjecting them to the liability of paying for all and any necessary repairs to the chancel of St John the Baptist church, the parish church of Aston Cantlow.

96 The appellants, the parochial church council of Aston Cantlow are responsible for supervising the care, maintenance, preservation and insurance of the fabric of the church (see section 4(1)(ii)(b) of the Parochial Church Councils (Powers) Measure 1956) and have served notices on Mr and Mrs Wallbank requiring them to put the chancel in proper repair. The notices were served on 12 September 1994 and 23 January 1996 pursuant to section 2 of the Chancel Repairs Act 1932. The cost of the necessary repairs is put in the notices at £95,260-odd. Mr and Mrs Wallbank dispute their liability. This litigation has resulted.

The law on chancel repairs

97 A description, even a brief one, of the law on chancel repairs must, if it is to be comprehensible, start with mediaeval times when every parish had its parish priest, the "rector". The rector had, by virtue of his office, a number of valuable proprietary rights which, collectively, constituted his "rectory". These rights included the profits of glebe land and tithes, usually one-tenth of the produce of land in the parish. Responsibility for the repair

A of the parish church was, absent some special custom to the contrary (see *Bishop of Ely v Gibbons* (1833) 4 Hagg Ecc 156), shared between the rector and the parishioners. The parishioners were responsible for repairing the part of the church where they sat, the western end of the church. The rector was responsible for repairing the chancel, the eastern end of the church. The rector's glebe land and tithes, the "rectory", provided both for his maintenance and a fund from which he could pay for chancel repairs.

B 98 The right of appointment to a rectory, the advowson, was an item of property transferable by conveyance and often in the hands of a lay person, typically the landowner who had built and endowed the church or his successors. But the appointee had to be a spiritual rector and, on appointment, would become entitled to the rectorial rights and subject to the chancel repair liability.

C 99 In the 300 years or so prior to the dissolution of the monasteries under Henry VIII a great number of advowsons were acquired by monasteries. A monastery, having acquired an advowson, would almost invariably appoint itself the rector and thereby appropriate to itself the valuable rectorial rights, the rectory. It would, of course, be a spiritual rector. The parish would, however, need a parish priest. So the monastery would appoint a deputy, a vicar, to fulfil that role, usually allocating to the D vicar some part of the rectorial tithes or glebe. It seems, interestingly, never to have been suggested that the vicar, by virtue of the allocation to him of some part of the rectory thereby became liable for chancel repairs. Vicarial tithes or vicarial glebe did not carry that liability which remained with the rector.

100 On the dissolution of the monasteries under Henry VIII the E property of religious houses, including their advowsons and the rectories they had appropriated, were compulsorily sold, impropriated, to lay institutions, such as Oxford and Cambridge colleges, and individuals. The lay institutions and individuals who acquired the rectories became lay rectors, or lay impropriators (the terms are synonymous) and, as such, subject to the chancel repair liability. The lay rector may have, and usually had, also acquired the advowson and thereby become the patron and F entitled to appoint the vicar of the parish. A vicar, thus appointed, was no longer a deputy but held office in his own right. The obligation to repair the chancel lay on the lay rector in that capacity and not as owner of the advowson.

101 The proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes. These rights could be alienated G and divided up. Many rectorial tithes were extinguished under Inclosure Awards made pursuant to Inclosure Acts. Under these Awards plots forming part of the common lands to be enclosed were allotted to lay rectors in lieu of their rectorial tithes. It is generally assumed that the allotted lands then took the place of the tithes as the lay rector's rectorial property (see para 2.11 of the Law Commission's Working Paper No 86 Transfer of land. Liability for Chancel Repairs (1983).

H 102 Tithes, other than those extinguished under Inclosure Awards, were converted into tithe rentcharges under the Tithe Act 1836 (6 & 7 Will 4, c 71). Tithe rentcharges, unlike their predecessor tithes, were charged on the land in respect of which the tithe had been payable and attracted the same chancel repair liability as had been attracted by the predecessor tithes—see

section 71 of the 1836 Act which subjected the rentcharges to "the same liabilities and incidents as the like estate in the tithes commuted". Over the next 100 years various further statutory changes were made until, finally, the Tithe Act 1936 abolished tithe rentcharges and replaced them with tithe redemption annuities. The annuities were payable to the Government and the owners of the rentcharges received Government stock in compensation for the extinction of their rights.

103 Section 31 of the 1936 Act and Schedule 7 to the Act dealt specifically with chancel repairs. As to liability for chancel repair arising from the ownership of tithe rentcharges (evidently on the footing that the tithe rentcharge had taken the place of the tithes as rectorial property) a part of the Government stock to be issued in respect of that rentcharge was to go to the diocesan authority to provide for the cost of future repairs to the chancel and the cost of insuring against damage by fire (section 31(2)). Subsections (3) and (4) of section 31 merit mention. They provided, in conjunction with section 21 of the 1936 Act and section 1 of the Tithe Act 1839 (2 & 3 Vict c 62), that where the tithe rentcharge and the land on which it was charged were in the same ownership, the rentcharge would be treated as abolished by merger but the land would be subject to the chancel repair liability "to the extent of the value of . . . the rentcharge" (section 1 of the 1839 Act). The chancel repair liability of the lay rector became thereby limited to the value of the rectorial property, the rentcharge, from which his office of lay rector was derived.

104 It is clear that a lay rectorship and liability for chancel repair could attach to a person who had become owner of a part only of the rectorial property. That that is so is implicit in the decision of this House in *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, the "Welsh Commissioners" case. The issue, which arose out of the disestablishment in 1914 of the Welsh Church, was whether tithe rentcharges which, until abolished by the 1936 Act, had become temporally vested in the Commissioner of Church Temporalties in Wales (the Welsh Commissioners) pending their transfer to the University of Wales under provisions in the Welsh Churches Acts 1914 and 1919 had, while so vested, subjected the Welsh Commissioners to chancel repair liability. If the answer was "Yes", Government stock needed to be issued to the appropriate Welsh authority pursuant to the Tithe Act 1936. Their Lordships held that the Welsh Commissioners, so long as they held the tithe rentcharges, were lay impropriators and accordingly under a chancel repair liability. The issue, which applied to a number of parishes in Wales, was examined by reference to a particular parish, Llantwit Major in Glamorgan. Tithe rentcharges valued at £481 7s 11d, representing rectorial property of the parish, were held by the Dean and Chapter of Gloucester. Other tithe rentcharges, valued at £64 4s 2d and also representing rectorial property of the parish were held by a limited company, Plymouth Estates Ltd. Viscount Simon LC said, at p 239, that "Plymouth Estates Ltd . . . plainly and admittedly remain liable for chancel repair". He described the obligation of a rector to repair the chancel as "an obligation imposed by common law": p 240 and see also Lord Wright, at p 247. Lord Porter expressed himself to the same effect. He said, at p 249, "Prima facie, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at anytime it is held

A subject to the liability to repair" and at p 250 that "impropriation exists where the property is in lay hands . . ."

105 But although it must now be regarded as settled law that an individual who becomes the owner of rectorial property of a parish becomes liable for chancel repair, there remain subsidiary issues which, in my opinion, are not settled. For example, the extent of the liability is not settled. Is the liability limited to the value of the rectorial profits the B ownership of which has attracted the office of lay rector and the consequent chancel repair liability or is it unlimited in amount? I have already referred to the effect of section 31(3) and (4) of the Tithe Act 1936 whereby, by reference to section 21 of the 1936 Act and section 1 of the Tithe Act 1839, the chancel repair liability of a lay rector attributable to his ownership of a tithe rentcharge which had merged in the land on which it C was charged was limited to the value of the rentcharge. In *Walwyn v Awberry* (1677) 2 Mod 254 a lay rector brought an action for trespass because the local bishop had sequestered his tithes on account of his failure to obey an admonition to repair the chancel of the parish church. The issue was whether sequestration was an available remedy. It was held that it was not. Atkins J, at p 258 who disagreed on the sequestration point, said that "it was agreed by all, that an impropriator is chargeable with the repairs of D the chancel; but the charge was not personal but in regard of the profits of the impropriation . . ." This suggests that the liability is limited to the amount of the profits. A similar suggestion appears in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May 1930 (Cmd 3571). The chancel repair liability was described in para 4(a) as "an obligation imposed by the Common Law of E England, which annexes to the ownership of the rectory the duty of the rector to maintain the chancel of the church *out of the profits of the rectory*." (Emphasis added.) As to the position where the rectorial property has passed to several owners, the paragraph said "every several owner is, *to the extent of the profits derived by him from his piece of the property*, under the duty of maintaining the chancel." (Emphasis added.)

F 106 In *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, however, the Court of Appeal decided otherwise. The defendants were lay rectors of the parish of Wickhambrook by virtue of ownership of rentcharge of £39 11s 9d per year, a subdivided part of a tithe rentcharge of £120 per year. The cost of the necessary chancel repairs was estimated to be £123 12s 6d. It was this sum that the PCC sought to recover from the defendants. It was proved at trial that the total sum actually received by the G defendants from their ownership of the rentcharge was £50-odd. The trial judge, relying on passages in *Phillimore's Ecclesiastical Law* 2nd ed (1895), held that it was necessary to prove that the impropriator had received tithes or other profits belonging to the rectory sufficient to cover the cost of repair (p 423) and, accordingly, that the PCC's claim failed. He was reversed on appeal. Lord Hanworth MR after examining various reports of *Walwyn v Awberry* expressed the view that the case was an unsatisfactory authority on H which to found a limitation of a lay rector's chancel repair liability (p 437) and concluded that "the liability of a lay impropriator is personal, and is not limited to the amount of the receipts from the tithe". But he held that the defendants had a right of contribution from other owners of parts of the tithe rentcharge. Romer LJ agreed with Lord Hanworth MR, as too did

Eve J who added that "the result . . . does not appear to me to be reasonable or just". A

107 In the "Welsh Commissioners" case [1944] AC 228, 239, Viscount Simon LC, having referred to the chancel repair liability of Plymouth Estates Ltd, said that "It is not necessary for the purposes of the present appeal to discuss the difficult question of the extent of their possible responsibility, or whether *Wickhambrook Parochial Church Council v Croxford* was rightly decided." B

108 Counsel before your Lordships have not argued whether the *Wickhambrook* case was or was not rightly decided. But if Mr and Mrs Wallbank are liable as lay rectors, the question whether their liability should be limited to the profits they have received from the rectorial property may be open to them. The point is certainly still open in this House. C

109 A further point of law that cannot, in my opinion, yet be regarded as settled is whether each and every alienation by a lay rector of impropriatorial assets of the rectory necessarily makes the alienee a co lay rector and liable for chancel repairs. The point arose in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 594 where Wynn-Parry J held that the liability to repair the chancel "is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property". and that "If there is more than one owner, each is severally liable". For reasons which will appear, this is not a point which can have any bearing on the present case but, none the less, the conclusion to which the judge came may be open to question. Is it really the case that on every disposition of any part of former rectorial property, no matter how small and no matter what may be the intentions of the parties, express or implied, regarding the assumption by the transferee of chancel repair liabilities, the transferee becomes willy-nilly by dint of inflexible legal principle a lay impropriator liable to chancel repairs? I doubt it. D E

The conveyancing history of Clanacre

110 At the time of the Inclosure Act 1742 and the Award of 1743, under which the common lands of Aston Cantlow were enclosed, Lord Brooke was the lay impropriator of the rectory of the parish church of Aston Cantlow. A recital to the Act so states. It appears from another recital to the Act that Lord Brooke was the owner of tithes and it appears from the terms of the Award that the impropriated property included glebe land. F

111 Under the Award Lord Brooke was allotted Clanacre. It was described as "one plot lying in Aston Cantlow . . . called Clanacre combining (containing) . . . 52 acres two roods and 21 perches". Details of its boundaries were given so that there could be no doubt as to the identity of what had been allotted. G

112 It is unclear from the extract of the Award contained in the papers before your Lordships on account of what rectorial rights Clanacre was allotted. It may have been allotted on account of Lord Brooke's tithes or it may have been allotted on account of glebe comprised in the common lands that were being enclosed. But it is not in dispute that one way or another Clanacre became, by substitution, rectorial property. Certainly all Lord Brooke's tithes over the common lands were extinguished by the Act and the Award. H

A

113 At some time between 1743 and 1875 Lord Brooke, or his successors, sold Clanacre together with the rest of what later became Glebe Farm. Whether the sale was of all Lord Brooke's impropriated property or of only part of it is not apparent from the papers in evidence in the case.

114 The first readable conveyance dealing with Clanacre is a conveyance of 21 October 1918 under which the vendor, Thomas Wood, conveyed to two purchasers, both with the surname Terry, Glebe Farm and its 179 odd acres including the 52-odd Clanacre acres. The habendum to the Conveyance says that the purchasers were to hold the land "in fee simple in equal shares as tenants in common subject primarily and in priority to the other hereditaments charged therewith to the repairs of the Chancel of Aston Church". The "subject to" provision indicates the strong likelihood that the vendor, Thomas Wood, who must have been a lay impropriator, was selling part of the rectorial property but retaining other parts. It seems to me unlikely, given the content of this provision, that Mr and Mrs Wallbank could succeed in claiming from Thomas Wood or his successors a contribution towards any chancel repairing liability that rests on them by virtue of their ownership of Clanacre.

115 In 1970 Mr and Mrs Coulton, Mrs Wallbank's parents, purchased Glebe Farm and the 179 acres from Herbert Terry & Sons Ltd, no doubt the successors of the 1918 Terry purchasers. Clause 2 of the Conveyance to the Coultons said that the property was conveyed "subject to the liability for the repair of the Chancel of Aston Church . . . so far as the same affects the property hereby conveyed and is still subsisting and capable of being enforced". And under two deeds of gift dated respectively 21 March 1974 and 1 May 1986 Glebe Farm and the bulk of the 179 acres, including all the Clanacre fields, were conveyed to Mrs Wallbank by her parents. Mrs Wallbank later placed the property in the joint names of herself and her husband.

116 It is plain from this conveyancing history that Mr and Mrs Wallbank acquired Glebe Farm, including Clanacre, with the knowledge that ownership might carry with it a liability to pay for repairs to the chancel of the parish church.

The Chancel Repairs Act 1932

117 The Chancel Repairs Act 1932 was passed in consequence of the inadequacies of enforcement procedure revealed by litigation between Hauxton PCC and a Mr Stevens. Pre 1932 the enforcement of chancel repair liability was primarily a matter for ecclesiastical courts. Proceedings for the issue of an admonition requiring the alleged lay rector to carry out the repairs had to be issued in the consistory court. It had been established by dicta in, if not by the ratio of, *Walwyn v Awberry* 2 Mod 254 that ordinary civil law enforcement procedures were not available. If the consistory court issued the admonition and it was not obeyed, the next step would be either a decree of excommunication or a transfer of the proceedings to the High Court in order for proceedings for committal for contempt of court to be brought, or both. The unfortunate Mr Stevens, having unsuccessfully disputed his liability, ignored the admonition issued by the consistory court. He ended up in prison for contempt under a committal order made in the King's Bench Division. He obtained his release only on undertaking to carry out the requisite repairs.

118 Such a disproportionate remedy was obviously unsatisfactory and section 2 of the 1932 Act authorised PCCs to serve notices to repair on individuals alleged to be liable for chancel repairs. If such a notice is not complied with, the PCC can commence proceedings in the ordinary courts to recover the sum required to put the chancel in proper repair. The court, if satisfied that the defendant would, but for the 1932 Act, "have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court", can give judgment against the defendant for the sum representing the cost of the necessary repairs. The judgment would be enforceable like any other money judgment. Hence the notices served by the PCC on Mr and Mrs Wallbank and the litigation that followed Mr and Mrs Wallbank's denial of liability.

The litigation

119 The pleadings in the case confirmed that there was a dispute as to Mr and Mrs Wallbank's liability to bear the cost of the chancel repairs. On 29 September 1999 the case came before Master Bragge on what I take to have been a summons for directions. On this summons Master Bragge directed that two preliminary issues be tried. Each related to contentions by Mr and Mrs Wallbank as to why they were not liable. One of these contentions was abandoned at trial. The other is the issue that has found its way to your Lordships' House. But before reciting its terms it is important to notice an important concession made by Mr Wallbank, who appeared in person, and on the basis of which the master directed the trial of the preliminary issues. The concession is recorded in the order in the following terms:

> "And upon the second defendant on his own behalf and on that of the first defendant stating that he agreed and accepted that the defendants (and each of them) as the joint freeholders of Glebe Farm Aston Cantlow Warwickshire are and at all material times have been the lay rector and are personally liable for the repair of the chancel of the church of St John the Baptist Aston Cantlow Warwickshire ('the church') if and to the extent that the liability is enforceable and/or exists by reason of the preliminary issues particularised below."

This concession very greatly reduced the number of issues relating to chancel repair liability that Mr and Mrs Wallbank could raise.

120 The preliminary issue that was, and is, persisted in was subsequently amended and in its amended form is as follows:

> "Whether having regard to the provisions of the European Convention on Human Rights, a co-rector is liable to repair the chancel of the church or otherwise to meet the costs of the said repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law."

121 The preliminary issue was tried before Ferris J. It was tried after the Human Rights Act 1998 had been passed but before 2 October 2000, the date on which the Act was to come into effect. In paragraph 9 of his judgment Ferris J described the argument addressed to him by counsel for Mr and Mrs Wallbank as having two main elements, namely,

A "(i) that English law is not yet settled in deciding that a lay rector is liable for chancel repairs, at any rate where the rectorial property owned by that lay rector consists of part only of a larger parcel of land allotted under an inclosure award in lieu of tithes or other rectorial property; and (ii) that it should be decided that such a lay rector is not liable because to hold to the contrary would involve a contravention of one or more of the rights declared by the Convention."

B **122** I find some difficulty in reconciling the first argument with Mr Wallbank's concession as recited in Master Bragge's order. That, perhaps, does not matter because Ferris J, following *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 and *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585 held that it was settled law that an C individual who had come into ownership of part only of the rectorial property became liable to the full burden of the chancel repair liability. In the Court of Appeal [2002] Ch 51, 58, para 15, Sir Andrew Morritt V-C, relying on the same authorities, agreed and held, in addition, that the liability "is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost of necessary repairs". This was what had been held in the *Wickhambrook* case, a case by which the Court of Appeal in the D present case was bound. This is not a point which has been argued before your Lordships in the present appeal nor, in my opinion, is it a point which arises under the preliminary issue. It is a point that may re-emerge if the quantum of the cost of repairs for which the Wallbanks are liable has to be litigated. For the present I want to say no more about it than Viscount Simon LC said in the "Welsh Commissioners" case, namely, that it is a E difficult question and that whether the *Wickhambrook* case was rightly decided is open to debate at least in this House.

123 As to the *Chivers & Sons Ltd v Air Ministry* point (see paragraph 16 of Sir Andrew Morritt V-C's judgment) it cannot avail the Wallbanks. The 1918 Conveyance plainly intended to make the Terrys, the transferees, co-rectors. Otherwise there would have been no mention of the chancel repair liability.

F **124** As to the second argument for the Wallbanks to which Ferris J referred, the argument based on the 1998 Act, the judge held that there was no breach of article 1 of the First Protocol. The Wallbanks' liability to repair the chancel was an incident of their ownership of the Clanacre fields and the enforcement of that liability by those entitled to enforce it could not be regarded as a deprivation of their possessions. Their G possessions, he pointed out, were always liable to such enforcement. Ferris J, therefore, answered in the negative the question posed in the preliminary issue.

125 The Court of Appeal disagreed with Ferris J on the 1998 Act point. They held, first, that the PCC was a core "public authority" within the meaning of that expression in section 6 of the Act. Section 6(1) provides that "It is unlawful for a public authority to act in a way which is incompatible H with a Convention right." They held, alternatively, that the PCC's function in enforcing against the Wallbanks their chancel repair liability was a function "of a public nature". Section 6(3)(b) provides that the expression "public authority" includes "any person certain of whose functions are functions of a public nature" and section 6(5) says that "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".

126 Having reached conclusions under which the PCC's attempts to enforce the chancel repair liability against the Wallbanks were acts of a public authority for section 6 purposes, the question was whether the enforcement was incompatible with a Convention right. The Court of Appeal first addressed itself to article 1 of the First Protocol and held that the liability to defray the cost of chancel repairs was "inescapably" a form of taxation. The reasoning was that "a private individual who has no necessary connection with the church [was being] required by law to pay money to a public authority for its upkeep": para 40. The Court of Appeal identified in Strasbourg jurisprudence a requirement that "the legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose" (paragraph 44), held that the liability for chancel repair was a tax which operated entirely arbitrarily "first because the land to which it attaches, now shorn of any connection with the rectory, does not differ relevantly from any other freehold land, and secondly because the liability may arise at any time and be . . . in almost any amount" (para 45), and held that the "tax" accordingly violated article 1 of the First Protocol.

127 The Court of Appeal held, also, that the way in which the chancel repair liability operated discriminated, impermissibly and in breach of article 14, between the Wallbanks, who were subject to the liability, and other landowners in the parish who were not.

128 The following issues therefore arise for decision on this appeal. (1) Is the PCC a "core" public authority for the purposes of section 6 of the 1998 Act? (2) If the PCC is not a core public authority, is its function in enforcing chancel repair liability a function "of a public nature"? (3) If the PCC's enforcement of chancel repair liability is a function of a public nature, does the enforcement infringe article 1 of the First Protocol to the Convention? (4) Or does it infringe article 14 of the Convention?

Is the PCC a core public authority?

129 I have had the advantage of reading in advance the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry. Each has concluded that a PCC is not a core public authority. I am in complete agreement with their reasons for coming to that conclusion and cannot usefully add to them. I, too, would hold that a PCC is not a core public authority.

Is the enforcement of chancel repair liability a function of a public nature?

130 On this issue my noble and learned friends have come to the conclusion that the nature of enforcement of chancel repair liability is private. I have found this a difficult question but at the end have come to the opposite conclusion. I agree with Lord Hope that the answer to the question, whether an authority, not being a "core" public authority, is, when exercising a particular function, exercising a function of a public nature, must depend upon the facts of the particular case (paragraph 63 of his opinion). The important facts and matters relevant to the question in the present case seem to me, in no particular order of importance, to be the

A following. (1) The parish church is a church of the Church of England, a church by law established. (2) It is a church to which the Anglican public are entitled to have recourse, regardless of whether they are practising members of the church, for marriage, for baptism of their children, for weddings, for funerals and burial, and perhaps for other purposes as well. (3) Members of other denominations, or even other religions, are, if parishioners, entitled to burial in the parish churchyard. (4) The church is, therefore, a public B building. It is not a private building from which the public can lawfully be excluded at the whim of the owner. (5) The PCC is corporate and its functions are charitable. Its members have the status of charity trustees. Charitable trusts are public trusts, not private ones. (6) A decision by a PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole. It is not taken in pursuit of any private C interests. If it were so taken, it would I think be impeachable by judicial review.

131 Lord Hope has said that the liability of the lay rector to repair the chancel arises as a matter of private law from the ownership of glebe land: paragraph 71 of his opinion. I would respectfully question whether the adjective "private" is apt. In the *Welsh Commissioners* case [1944] AC 228 Sir Walter Monckton KC for the appellants in his submissions to their D Lordships commented on the fact that the Welsh Churches Act 1914 had made no express provision for a tribunal to take the place of the consistory court in enforcing chancel repair and put to their Lordships that "Perhaps the Attorney General might have dealt with the matter as a public right": p 234. There was no recorded dissent and I respectfully suggest that Sir Walter's comment was soundly based. The liability of a lay rector is a E personal liability arising from his ownership of impropriated property and is imposed by common law (see Viscount Simon LC, at p 240). But obligations imposed by common law are not necessarily private law obligations. Whether they are so or not must depend on those to whom they are owed. The chancel repair obligations are not owed to private individuals. Private individuals cannot release them. Section 52 of the Ecclesiastical Dilapidations Measure 1923 provided a procedure whereby lay rectors F liable for chancel repairs could compound their liability and thereby obtain a release from it. The procedure required there to be consultation with the PCC of the parish, the obtaining of approval from the Diocesan Dilapidations Board and payment of the requisite sum to the Diocesan Authority. The sum paid becomes trust money (see subsection (5)). These provisions have an unmistakable public law flavour to them. The chancel G repair obligations resting on a lay rector are not, in my opinion, private law obligations.

132 In my opinion, therefore, the question posed under this issue should be answered in the affirmative. It follows, if that is right, that in enforcing chancel repair liability, a PCC must not act in a manner incompatible with a Convention right. Is enforcement of chancel repair liability against Mr and Mrs Wallbank an infringement of their rights under article 1 of the H First Protocol?

133 The terms of article 1 have been set out by Lord Hope in paragraph 66 of his opinion. I need not repeat that exercise. The question is whether the enforcement of the chancel repair liability constitutes a deprivation of the lay rector's possessions. The Court of Appeal prayed in

aid the analogy of taxation in order to justify the proposition that the relevant deprivation was of the Wallbanks' funds. It was their personal funds of which they were to be deprived, not Glebe Farm. For my part, although I disagree with the categorisation of the liability as a form of taxation (see paragraph 40 of the Court of Appeal's judgment) I would accept the analysis. The enforcement of the liability is indeed an attack on the Wallbanks' personal funds but it does not on that account infringe article 1 any more than a claim to enforce any other pecuniary liability does so. It is here, perhaps, that the taxation analogy does become relevant. Taxation is a levy imposed by a state, or perhaps by some core public authority authorized by the state to impose the levy, either on the public generally or on some identified section of the public. In *Black's Law Dictionary*, 6th ed (1990), "tax" is described as "a charge by the government", as a pecuniary burden laid upon individuals or property to support the government, and [being] a payment exacted by legislative authority" and whose "essential characteristics . . . are that it is not a voluntary payment or donation but an enforced contribution, exacted pursuant to legislative authority". It may be that the obligation imposed on parishioners by the common law to pay tithes to the rector of the parish could, although not imposed by government or by the legislature, reasonably be regarded as an obligation to pay a tax. But the obligation of the recipient of the tithes to repair the chancel of the parish church could not, in my opinion, be so described. When tithe rentcharge took the place of tithes, the obligation to pay the tithe rentcharge might similarly have been regarded as an obligation of a taxation character. But the obligation to repair the chancel of the church resting on the recipient of the tithe rentcharge could not be so described. It remained a quid pro quo for the receipt of the tithe rentcharge. The substitution under an Inclosure Award of land for tithes could no more have changed the nature of the obligation to repair the church chancel than the substitution of tithe rentcharge for tithes could have done. The taxation analogy drawn by the Court of Appeal is, in my respectful opinion, misplaced.

134 The chancel repair liability satisfies, in my opinion, the requirements of the article 1 exception: it is a liability created by the common law, it operates in the narrow public interest of the parishioners in the parish concerned and in the general public interest in the maintenance of churches. It is created by common law and is subject to the incidents attached to it by common law. And in the case of Mr and Mrs Wallbank they acquired the rectorial property and became lay rectors with full knowledge of the potential liability for chancel repair that that acquisition would carry with it. I can see no infringement of (or incompatibility with) article 1 produced by the actions of the PCC in enforcing that liability.

135 Nor, in my opinion, do Mr and Mrs Wallbank have any case of infringement of article 14. The comparators for article 14 purposes cannot possibly be persons who are not lay rectors. A person who is sued for £1,000 that he owes is not discriminated against for article 14 purposes because people who do not owe £1,000 are not similarly sued. A person who builds in breach of planning permission and has proceedings taken against him by the local planning authority is not discriminated against for article 14 purposes because a person who builds and has obtained planning permission is not sued. The comparators are not apt. The apt comparator in

A the present case would be a co-lay rector who was liable for chancel repairs to the Aston Cantlow church but on whom no 1932 Act notice had been served. There is no case here of article 14 discrimination.

136 For these reasons I would allow the appeal and restore the declaration and order made by Ferris J.

137 A final point before your Lordships was whether, if the PCC's enforcement of the chancel repair liability had constituted an infringement B of Mr and Mrs Wallbank's Convention rights, the PCC could have relied on section 6(2)(a) or (b) of the 1998 Act. As to (a), it was contended that, as a result of section 2 of the 1932 Act, the PCC could not have done otherwise than enforce the chancel repair liability. In my opinion, this contention could not be sustained. Section 2 confers a power. It does not impose a mandatory duty. The PCC could have decided not to enforce the repairing C obligation. They could have so decided for a number of different reasons which, in particular factual situations, might have had weight. They might, for example, have recommended the deconsecration of the church and its sale for conversion into a dwelling. They might have taken into account excessive hardship to Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge. Section 2 is not, in my D opinion, a provision of primary legislation capable of engaging section 6(2)(a) of the 1998 Act. As to (b), it is not section 2 of the 1932 Act that produces the alleged incompatibility with Convention rights. Section 2 merely provides enforcement machinery for the obligation created by the common law. If section 2 had never been enacted the allegedly Convention infringing obligation to pay for chancel repairs would still have been present. None the less, if the imposition by the common law of the E obligation constitutes an infringement of Convention rights so, too, the use of section 2 for the purpose of enforcement would constitute an infringement. So I respectfully agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough, that the PCC would be entitled to rely on section 6(2)(b).

LORD RODGER OF EARLSFERRY

F 138 My Lords, in 1986 Mrs Gail Wallbank became the owner of the freehold of Glebe Farm near the village of Aston Cantlow in Warwickshire. Four years later she conveyed the property into the joint names of herself and her husband. As owners of Glebe Farm Mr and Mrs Wallbank are the lay rectors or impropriators of the parish church and, as such, potentially liable to pay the cost of repairs to the chancel. By 1990 the chancel was in G disrepair. At that time the Parochial Church Council ("the PCC") did not know about the conveyance into joint names and accordingly it simply asked Mrs Wallbank to pay for the repairs. She disputed the liability. In 1994 the PCC, as the responsible authority, served notice on Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1936, calling on her to repair the chancel. When she still refused to do so, the PCC began these proceedings under section 2(2) of the 1936 Act to recover over £95,000, the estimated H cost of the repairs. Subsequently, the PCC joined Mr Wallbank as a defendant.

139 My noble and learned friend, Lord Scott of Foscote, has described the origins and development of the liability for chancel repairs as well as the way in which that liability attaches to the owners of Glebe Farm. The law as

it applies today can scarcely be regarded as satisfactory and may well cause real hardship to lay rectors who are called on to pay the cost of repairs to the chancel. Not surprisingly, the Law Commission have made proposals for the abolition of the liability over a period of time: Liability for Chancel Repairs (Law Com No 152, (1985)). Not altogether surprisingly either, Parliament has not yet acted on those proposals since abolition without compensation would cause significant financial harm to many ancient parish churches throughout England. This case highlights both aspects of the problem.

140 Mr and Mrs Wallbank do not now dispute that, absent the Human Rights Act 1998, they would be liable to pay the reasonable cost of the necessary repairs to the chancel. They defend the proceedings, however, on the basis that the PCC is a "public authority" which has acted unlawfully in terms of section 6(1) of the 1998 Act by requiring them to pay the sum in question and so interfering with their peaceful enjoyment of their possessions in contravention of article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.

141 The demand for payment was made and the action begun long before the 1998 Act was even thought of. And indeed Ferris J heard argument and delivered judgment at first instance some months before the Act came into force. By the time of the hearing in the Court of Appeal the 1998 Act was in force and the PCC conceded that, by virtue of sections 7(1)(b) and 22(4), Mr and Mrs Wallbank were entitled to rely on their Convention right. In their judgment delivered by Sir Andrew Morritt V-C, the Court of Appeal accepted the concession: [2002] Ch 51, 56, para 7. In its written case in this House the PCC indicated an intention to withdraw the concession. When the appeal opened, however, Mr George indicated that he did not intend to argue the point. This may have been, in part at least, because the Church authorities are anxious to have the substantial issue resolved. In these circumstances the House heard no argument on what the cases show to be a difficult area of the law. I therefore prefer to express no view on the point.

142 Differing from the decision of Ferris J, the Court of Appeal disposed of the case by holding that the liability of Mr and Mrs Wallbank, as lay rectors, to meet the cost of the chancel repairs was unenforceable by reason of the 1998 Act. In that way the Court of Appeal lifted the burden from lay rectors like Mr and Mrs Wallbank, albeit at the expense of PCCs like the one at Aston Cantlow. The question for the House is whether the Court of Appeal were right to take this momentous step on the basis of the 1998 Act.

143 In reaching their conclusion the Court of Appeal held that the PCC was indeed a "public authority" in terms of section 6 of the 1998 Act. While a number of other issues were argued in the hearing of the appeal to your Lordships' House, none of them arises unless the PCC is indeed to be regarded as a public authority for this purpose.

144 Section 6 provides, inter alia:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
> "(3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."
> "(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."

A The use of the word "includes" in subsection (3) shows that there are public authorities other than persons only certain of whose functions are of a public nature. So there must be persons who are public authorities because all their functions are of a public nature. These are sometimes referred to as "core" public authorities, as opposed to "hybrid" authorities, only certain of whose functions are public and some of whose acts may be private in nature. In view of my overall conclusion on the appeal I have not found it necessary on B this occasion to explore the significance of the distinction between the two kinds of public authorities.

145 In deciding that the PCC was to be regarded as a public authority, the Court of Appeal first noted that in the area of judicial review the cases at present draw a conceptual line between functions of public governance and functions of mutual governance. But the Court of Appeal could detect no C surviving element of mutuality or mutual governance as between the impropriator and the church in the modern liability for chancel repairs: the relationship in which the function arose was created by a rule of law and a state of fact which were independent of the volition of either of them: [2002] Ch 51, 62–63, para 34. In the hearing before the House Mr George did not argue the contrary. The Court of Appeal continued, at p 63, para 35:

D "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the E enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

F The Court of Appeal's main conclusion therefore was that the PCC was a core public authority. Alternatively, it was a hybrid authority, some of whose functions were public—among them enforcing the impropriators' obligation to pay for chancel repairs.

146 There is no doubt that, in terms of section 2(1) of the Chancel Repairs Act 1932, the PCC is an authority—more precisely, "the responsible G authority". For present purposes, however, the question is whether the PCC should be regarded as a public authority in terms of section 6. Parliament has chosen to use a composite phrase "public authority". There are therefore distinct dangers in interpreting it by breaking it down and examining the two components separately. Be that as it may, the Court of Appeal considered each of the two elements in turn.

H 147 They first held that the PCC was an "authority" for purposes of section 6 because it had powers which private individuals do not possess to determine how others should act—the relevant example being its power to serve a notice to repair which has statutory force. That is a somewhat imprecise criterion for identifying an authority, however. When a police officer arrests an offender, his act is that of a public "authority" irrespective

of whether or not the arrest is one that a private citizen could have effected. Moreover Parliament can, if it wishes, invest private individuals with quite remarkable powers over their fellow citizens. For instance, section 391 of the Burgh Police (Scotland) Act 1892 (55 & 56 Vict c 55), now repealed, provided:

> "It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding twenty shillings."

A paterfamilias standing in evening dress at the entrance to his New Town residence could address an order to an organ-grinder to depart from the vicinity, or his butler could issue it from the top of the area steps. In either event, the organ-grinder would commit an offence under the section if he continued to play in the street. But if, instead, they had summoned a constable who had issued the same instruction with exactly the same effect, he would unquestionably have been an "authority"—and indeed a "public authority". The existence or non-existence of the equivalent statutory power in the householder and his servant would not be germane to the constable's status. So the fact that no individual possesses the power to issue a statutory repair notice with specific effects on the lay rector cannot in itself be sufficient to show that the PCC is to be regarded as an authority for the purposes of section 6.

148 The Court of Appeal drew attention to three features which they thought pointed to the PCC being a "public" authority for purposes of section 6: the PCC is created and empowered by law; it forms part of the church by law established and its functions include the enforcement through the courts of a common law liability to maintain the chancel resting upon persons who need not be members of the Church.

149 It is necessary to look a little more closely at the Court of Appeal's observation that the PCC "is created and empowered by law". The origins of PCCs can be traced back to the movement that began in the 19th century for greater self-government and better representation of the laity in the Church of England. Part of the problem was that, while the Convocations of Canterbury and York could pass canons which were binding on the clergy, any wider legislation had to be by Act of Parliament and Parliament passed only relatively few of the Acts for which the Church asked. In 1916 a special committee set up to look into the question recommended the formation of a Church Council with power to legislate on ecclesiastical matters. Eventually, after further work by another committee, the necessary scheme was approved by the Convocations of Canterbury and York. Both Convocations adopted identical addresses which were presented to King George V on 10 May 1919. The text is to be found in the Acts of the Upper and Lower Houses, Convocation of Canterbury, 6 May 1919, Upper House, *Official Year Book of the Church of England 1920*, p 193. Attached to the addresses was an appendix (*Official Year Book of the Church of England 1921*, p 16) setting out the constitution of what was now called the National Assembly of the Church of England. Paragraph 17 of the constitution provided that, before entering on any

A other legislative business, the Assembly should make further provision for the self-government of the Church by passing through the Assembly two measures, the second being to confer "upon the Parochial Church Councils constituted under the Schedule to this Constitution such powers as the Assembly may determine."

150 The necessary machinery for giving Assembly measures legal effect was created later that year when Parliament passed the Church of England B Assembly (Powers) Act 1919. Under section 4, measures passed by the Assembly and submitted to the Ecclesiastical Committee of Parliament would, on being approved and receiving the Royal Assent, have the force and effect of an Act of Parliament. In accordance with that procedure, the National Assembly proceeded to pass the Parochial Church Councils (Powers) Measure 1921. The Preamble duly records that the measure was C passed to fulfil a requirement of the constitution of the National Assembly to

> "make further provision for the self-government of the Church by passing through the Assembly Measures inter alia for conferring on the Parochial Church Councils constituted under the Schedule to such Constitution such powers as the Assembly may determine."

D

151 As the Preamble shows, just like the National Assembly itself, the PCCs were actually constituted when the scheme, comprising the constitution of the National Assembly and the schedule of rules for the representation of the laity, was approved by the Convocations of Canterbury and York. The function of the 1921 Measure was, accordingly, E not to constitute or "create" the PCCs but to confer powers on them. The same division survives today. The rules for the representation of the laity, including those relating to PCCs, are to be found in Schedule 3 to the Synodical Government Measure 1969, while the powers of PCCs are now in the Parochial Church Council (Powers) Measure 1956. Like section 3 of the 1921 Measure, section 3 of the 1956 Measure provides for the PCC to be a body corporate. Section 2 of the 1921 Measure made it "the primary duty of F the council in every parish to co-operate with the incumbent in the initiation and development of Church work both within the parish and outside", while section 2 of the 1956 Measure, which was inserted by section 6 of the 1969 Measure, confers rather more elaborate general functions on the council. I come back to that section shortly.

152 On closer examination, therefore, the process by which the PCCs G were constituted and received their powers is really very different from the way in which a public body such as the Equal Opportunities Commission is created and given its powers by statute. In a case of that kind, the fact that the body owes both its existence and its powers to statute may well indicate that it has been called into existence to carry out some function that relates to the government of the country in a broad sense. By contrast, the PCCs were not constituted by statute but by the Church. They then became bodies H corporate and received their powers not by virtue of an Act of Parliament but by virtue of an Assembly Measure, having the force and effect of an Act of Parliament. These factors suggest that, in reality, PCCs were constituted by the Church to carry out functions to be determined by the National Assembly, later the General Synod, of the Church.

153 The Court of Appeal pointed next to the PCC being part of the Church by law established. In his submissions on behalf of Mr and Mrs Wallbank Mr Beloff embellished this argument. The Church of England—with Her Majesty the Queen at its head, with bishops appointed by the Queen on the recommendation of the Prime Minister, with the legislation of General Synod receiving the Royal Assent and having the force and effect of an Act of Parliament and with the civil power being available to enforce the judgments of its courts—was so woven into the fabric of the state that it should be regarded as a core public authority for purposes of section 6. Then, since "the parish is the basic building block of the church" (*Hill*, *Ecclesiastical Law*, 2nd ed, p 74), the PCC too should be regarded as a core public authority—whatever might be its precise functions in terms of section 2 of the 1956 Measure.

154 I would reject that argument. In this case the House is not concerned with any theological doctrine of establishment such as gave rise to one of the issues in *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515. Mr Beloff's argument centred, rather, on the general position of the Church of England in English law. The juridical nature of the Church is, notoriously, somewhat amorphous. The Church has been described as "an organised operative institution" or as "the quasi corporate institution which carries on the religious work" of the Church of England: *In re Barnes; Simpson v Barnes (Note)* [1930] 2 Ch 80, 81. Whether or not such an institution itself could ever count as a public authority in terms of section 6, I see no basis upon which a body within the Church, which would not otherwise be regarded as a public authority, could be impliedly invested with that character simply by reason of being part of the wider institution.

155 On the other hand, the 1956 Measure passed by the National Assembly of the Church casts light on the nature of the functions of a PCC. Under section 2(1) its duty is to consult with the minister on matters of general concern and importance to the parish. By section 2(2) the PCC's general functions include:

> "(a) co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and the deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod."

In addition to these general functions, by virtue of section 4 the PCC is given powers, duties and liabilities which formerly vested in the churchwardens. These focus very much on the parish church and its affairs. In particular, under section 4(1)(b) the PCC has powers, duties and liabilities with respect to the care, maintenance, preservation and insurance of the fabric of the church and of its goods and ornaments. By section 7(ii) the PCC has power

A to levy and collect a voluntary church rate for any purpose connected with the affairs of the parish church.

156 The key to the role of the PCC lies in the first of its general functions: co-operation with the minister in promoting in the parish the whole mission of the Church. Its other more particular functions are to be seen as ways of carrying out this general function. The mission of the Church is a *religious* mission, distinct from the secular mission of B government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position C but they do not mean that it is a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore LJ. In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom. The PCC exists to carry forward the Church's mission at the local level.

157 Against that background the adjective "private" is not perhaps the one that springs most readily to mind to describe the functions of a PCC in D the Church of England either generally or as compared, for instance, with those of a church council in the Methodist Church. It might therefore be tempting to conclude that the PCC's functions must be "public" and that the PCC must itself be a "public" authority for the purposes of the 1998 Act. At this point it becomes necessary to look more closely at the meaning of the composite expression "public authority" in section 6. This in turn takes one E back behind the Act to the Convention itself.

158 The "High Contracting Parties" to the Convention were "the governments signatory" to the Convention, more particularly "the governments of European countries" having certain common characteristics. In the fourth recital to the Convention they reaffirmed their profound belief in those rights and freedoms which are the foundation of justice and peace in the world and which are best maintained by a common F understanding and observance of the human rights upon which they depend. The governments gave concrete expression to the beliefs and aspirations recorded in the recitals by undertaking in article 1 to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the Convention. It can reasonably be inferred from the terms of the recitals and article 1 that the freedoms, and the rights on which they depend, relate to the G powers and responsibilities of the governments which are parties to the Convention.

159 That inference is confirmed by article 34 which provides that the European Court of Human Rights ("the European Court")

> "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a H violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

I respectfully agree with the Court of Appeal [2002] Ch 51, 62, para 33, that, taken together, articles 1 and 34 assume the existence of a state which stands

distinct from persons, groups and non-governmental organisations. I would go further: the reference in article 1 to the rights and freedoms defined in section 1 of the Convention only makes sense if the state in question is exercising a range of functions which are, in a broad sense, governmental—and to which the rights and freedoms in section 1 can therefore relate. Long ago, the functions of government were usually confined to defending the realm and keeping the peace. Nowadays, in addition, they commonly cover such matters as education, health and the environment. The exact range of governmental power will vary, of course, from state to state, depending on the history of the particular state and the political philosophy of its government. Similarly, the distribution of governmental power will depend on the constitutional arrangements of the individual states. In some, the central government will retain most functions, in others power will be shared on some kind of federal system, while, in most at least, some functions will be allotted to local or community bodies. Irrespective of these and other possible permutations, under article 1 of the Convention the states parties are responsible for securing that all bodies exercising governmental power within their jurisdiction respect the relevant rights and freedoms. This approach underlies the admissibility decision of the Fourth Chamber of the European Court in *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531.

160 The obligation under article 1 has bound the United Kingdom ever since the Convention came into force. Since 1966 individuals have been able to bring proceedings in Strasbourg to ensure that the United Kingdom complies with that obligation. Prima facie, therefore, when Parliament enacted the 1998 Act "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights", the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for "a public authority" to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.

161 Mr Beloff accepted, of course, that, in order to achieve the government's declared aim of bringing rights home, in the legislation which it placed before Parliament the term "public authority" must have been intended to include all bodies that carry out a function of government that would engage the responsibility of the United Kingdom in Strasbourg. But, he said, that was simply a minimum. The government and, more particularly, Parliament could well have intended to go further and to include other public bodies, even though their acts would not engage the international responsibility of the United Kingdom. It would therefore be wrong to limit the scope of "public authority" in section 6 to bodies exercising a governmental function of the state, however loosely defined. Mr Beloff could not point to any authoritative statement showing that Parliament had intended the 1998 Act to have this wider effect. But he argued that, if Parliament had meant to limit the legislation to bodies carrying out a function of government, the natural thing would have been

A to use some such term as "a governmental authority" or "a governmental organisation"—which would mirror the term "non-governmental organisation" to be found in article 34 of the Convention. That was how the draftsman of the Act had proceeded in section 7(7) when he provided that a person was to be a "victim" of an unlawful act for the purposes of the section only if he would have been a victim for the purposes of article 34 in proceedings before the European Court in respect of that act. B Not only had the draftsman not adopted a similar approach in section 6(1): when an attempt had been made to amend the Bill so as to align the domestic test with the test adopted by the European Court in interpreting the Convention, the government had opposed it and the amendment had failed.

162 I see no proper basis for referring to Hansard as an aid to C construing the term "public authority" in section 6. But it appears that, in advancing this particular argument, Mr Beloff had in mind the amendments moved by Mr Edward Leigh MP and discussed by the Home Secretary during the Commons committee stage of the Bill: Hansard (HC Debates), 7 June 1998, cols 400, 418–425 and 432–433. Since the Convention is concerned with the obligations of the governments of the states parties, it D does not define the domestic bodies whose acts engage the liability of those governments. Moreover, the jurisprudence of the Strasbourg court on the point is not extensive. A definition of the relevant public bodies in the 1998 Act by reference to the approach of the Strasbourg court would therefore not have been particularly workable. Keith J made much the same point in relation to the Hong Kong Bill of Rights in *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1996] 2 HKLR 260, 264B–F. E According to the Home Secretary, because of these problems and in an attempt to replicate the situation under the Convention, the government chose the term "public authority" to indicate that the body concerned was to be sufficiently public to engage the responsibility of the United Kingdom. If—contrary to my view—the House could properly derive assistance from the fate of these amendments, it would lie in the confirmation that, in F promoting the Bill, the government intended to give people rights in domestic law against the same bodies as would engage the liability of the United Kingdom before the Strasbourg court.

163 In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the G Strasbourg organs. It so happens that there are two cases from Strasbourg dealing with the position of churches in this regard. They suggest that, in general, church authorities should not be treated as public authorities in this sense.

164 The first case is *Holy Monasteries v Greece* 20 EHRR 1. On the basis of various provisions of the Convention, including article 1 of the First Protocol, the applicant monasteries challenged a Greek statute which H changed the rules of administration of their patrimony and provided for the transfer of a large part of their estate to the Greek state. The links between the Greek Orthodox Church and the Greek state were particularly close. In Greek law the Holy Monasteries were public law entities that could be founded, merged or dissolved by means of a decree of the President of

Greece. Another public law entity, under the supervision of the ministry of education and religious affairs, was responsible for managing the property belonging to the monasteries. In these circumstances the Greek Government stated, as a preliminary objection to the Holy Monasteries' application, that they were not a non-governmental organisation which could make an application as a victim in terms of article 25(1) (now article 34) of the Convention. Repelling that objection, the European Court held, at p 41, para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the state—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration and furtherance of spiritual life and the internal administration of each monastery. The monasteries come under the spiritual supervision of the local archbishop, not under the supervision of the state, and they are accordingly entities distinct from the state, of which they are completely independent. The applicant monasteries are therefore to be regarded as non-governmental organisations within the meaning of article 25 of the Convention."

While the positions of the Holy Monasteries and of a PCC are scarcely comparable, the judgment of the European Court is important for its reasoning that the nature of the objectives of the monasteries was not such that they could be classed with "governmental organisations established for public administration purposes". The court also attached importance to the fact that the monasteries came under the spiritual supervision of the local archbishop rather than under the supervision of the state, as an indication that they were entities distinct from the state.

165 In *Hautanemi v Sweden* 22 EHRR CD 156 the applicants were members of a parish of the Church of Sweden who complained of a violation of article 9 of the Convention because the Assembly of the Church of Sweden had prohibited the use of the liturgy of the Finnish Evangelical-Lutheran Church in their parish. Under reference to the judgment in the *Holy Monasteries* case, the Commission recalled article 25(1) (now article 34) of the Convention and observed, at p 155, that

> "at the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law. Since these religious bodies cannot be considered to have been exercising governmental powers, the Church of Sweden and notably the applicant parish can nevertheless be regarded as 'non-governmental organisations' within the meaning of article 25(1)."

A Having held that, as members of the parish, the applicants could be regarded as victims in terms of article 25(1), the Commission added, at p 156:

> "The Commission has just found that, for the purposes of article 25 of the Convention, the Church of Sweden and its member parishes are to be regarded as 'non-governmental organisations'. It follows that the respondent state cannot be held responsible for the alleged violation of B the applicants' freedom of religion resulting from the decision of the Church Assembly . . . There has thus been no State interference with that freedom."

166 In the light of these decisions what matters is that the PCC's general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not C in any sense under the supervision of the state: under section 9 of the 1956 Measure it is the bishop who has certain powers in relation to the PCC's activities. In these circumstances the fact that the PCC is constituted as a body corporate under the 1956 Measure is irrelevant. For these reasons, in respectful disagreement with the Court of Appeal, I consider that the PCC is not a core public authority for purposes of section 6 of the Act.

167 This conclusion finds further support in the treatment of certain D churches in relation to article 19(4) of the German Constitution or Grundgesetz. That article provides that, if any person's rights are infringed by "public power" ("öffentliche Gewalt"), recourse to the courts is open to him. The history of relations between Church and State in Germany is, of course, very different from the history of that relationship in any part of the United Kingdom. In Germany it has culminated in a E declaration that there is to be no State Church (article 137(1) of the Weimar Constitution incorporated by article 140 of the Constitution). This important difference must not be overlooked. Nevertheless, as permitted by article 137, certain churches are constituted as public law corporations. In general, domestic public law entities are regarded as exercising public power in terms of article 19(4), whereas natural persons and private law associations are not. Despite this, because of their F particular (religious) mission which does not derive from the state, the churches that are public law corporations are treated differently from other public law corporations that are organically integrated into the state. "Church power is indeed public, but not state power" ("ist kirchliche Gewalt zwar öffentliche, aber nicht staatliche Gewalt"): BVerwGE 18, 385, 386–387; BVerwGE 25, 226, 228–229. So, in relation to these G churches, the Administrative Court interprets the phrase "public power" in article 19(4) as being equivalent to "state power". Since within their own sphere the churches do not exercise state power, even if they exercise public power, the article 19(4) guarantee does not apply. Despite the rather different context, this interpretation of "public power" tends to confirm the interpretation of "public authority" in section 6 which I prefer. Moreover, due allowance having been made for the particular position of H the Church of England, the reasoning of the Administrative Court also tends to confirm that the mere fact that section 3 of the 1956 Measure makes every PCC a body corporate does not carry with it any necessary implication that the PCC should, on that account alone, be regarded as a public authority for the purposes of section 6.

168 Of course, if the churches in Germany go outside their own unique sphere and undertake state functions, for example, in running schools, the constitutional guarantee in article 19(4) applies to them: BVerwGE 18, 385, 387–388; BVerwGE 25, 226, 229. In much the same way, for example, a Church of England body which was entrusted, as part of its responsibilities, with running a school or other educational establishment might find that it had stepped over into the sphere of governmental functions and was, in that respect, to be regarded as a public authority for purposes of section 6(1).

169 The Court of Appeal did indeed consider that, even if they were wrong in holding that PCCs are core public authorities, a PCC should be regarded as a public authority when enforcing the common law obligation of lay rectors, who need not be members of the Church, to maintain the chancel of the parish church. Mr Beloff reinforced this argument by pointing both to the duty of the minister under the relevant canons to hold certain services in the parish church and to the widespread belief, whether particularly well-founded or not, that any resident of a parish was entitled to be married in the church. These were indications of the public role of the parish church and, accordingly, of the public nature of the PCC's function in relation to the maintenance of the fabric of the church so that the minister could perform those public duties there. Enforcing the lay rectors' obligation was part of that public function.

170 For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties—conducting a marriage service in the church—the minister himself may act as a public authority.

171 Moreover, the fact that, as part of its responsibilities in relation to the maintenance of the church fabric, the PCC may have to enforce a common law obligation against a lay rector who happens not to be a member of the Church can hardly transform the PCC into a public authority. Indeed, the very term "lay rector" is a reminder that the common law obligation which the PCC is enforcing is the last remnant of a set of more complex rights and liabilities that were ecclesiastical in origin. As Ferris J held, at para 23 of his judgment, today the liability to repair the chancel can be regarded as one of the incidents of ownership of rectorial property:

> "It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the

A owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

I respectfully agree. There is nothing in the nature of the obligation itself, or in the means or purpose of its enforcement, that would lead to the conclusion that the PCC of Aston Cantlow is exercising a governmental function, however broadly defined, when it enforces the lay rectors' B obligation to pay for chancel repairs. Therefore, even when it is enforcing that obligation, the PCC is not to be regarded as a public authority for the purposes of section 6 of the 1998 Act.

172 I should add that I agree with the observations of my noble and learned friend, Lord Nicholls of Birkenhead, in the final paragraph of his speech.

C 173 For these reasons I would allow the appeal and make the order proposed by Lord Scott of Foscote.

Appeal allowed.
Defendants to pay plaintiff's costs before Ferris J and the Court of Appeal.
D *No order as to costs in the House of Lords.*

Solicitors: Winckworth Sherwood for Rotherham & Co, Coventry; Eddowes Perry & Osbourne, Sutton Coldfield.

S H

E

F

G

H

A

Court of Appeal

*Regina (Beer (trading as Hammer Trout Farm)) *v* Hampshire Farmers' Markets Ltd

[2003] EWCA Civ 1056

B

2003 June 19
July 21

Dyson, Longmore LJJ and Sir Martin Nourse

Market — Right to trade — Termination of licence — Local authority setting up company limited by guarantee to operate farmers' markets on non-profit basis — Company refusing to renew trader's licence — Whether decision amenable to judicial review — Whether company "public authority" — Human Rights Act 1998 (c 42), s 6(3)

C

The county council established farmers' markets in 1999 acting under powers pursuant to the Local Government and Housing Act 1989[1]. Those who wished to apply to participate in the programme were invited to apply to the farmers' market manager who was employed by the council. The claimant was accepted as a stallholder from the outset. In 2001 the council decided to hand over the running of the markets to the stallholders, and it set up a company limited by guarantee to take over the markets. The company's registered address was initially at the council's offices, and in January 2002 it started operating the markets. The council continued to provide some finance and facilities such as the use of a computer at its offices. The company secretary was an employee of the council who became the company's business development manager and one of its directors, the other directors being stallholders. The claimant applied to participate in the 2002 market programme, but the company rejected his application and refused to grant him a licence. On the claimant's claim for judicial review in which the council appeared as an interested party, the judge quashed the company's refusal to grant a licence holding that the company was acting as a "public authority" within the meaning of section 6 of the Human Rights Act 1998[2] and its decision was susceptible to judicial review. On appeal by the council, with leave, it was common ground that the tests for identifying a functional public authority within the meaning of the 1998 Act and for amenability to judicial review were for practical purposes the same.

D

E

F

On the council's appeal—

Held, dismissing the appeal, that, unless the source of the power of a decision-maker originating from statute or prerogative clearly provided the answer, the question whether a decision was amenable to judicial review required careful consideration of the nature of the power and function to be exercised to see whether the decision had a sufficient public element, flavour or character to bring it within the purview of public law; that, although the farmers' markets were neither statutory nor charter markets, their essential feature was that they were held on publicly owned land to which the public had a right of access; that the company was set up by the council using its statutory powers and it stepped into the council's shoes, performing the same functions as the council had previously performed; that, from the date of the company's incorporation until the time when it started operating the markets, and to some extent thereafter, the council assisted the company by providing facilities and finance; that the company was not simply a private company established to run markets for profit, but was established to take over on a non-profit basis the running of markets previously operated by the council in the exercise of its statutory powers

G

H

[1] Local Government and Housing Act 1989, s 33: see post, para 2.
[2] Human Rights Act 1998, s 6(3): "In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."

in what was considered to be the public interest; and that, accordingly, the company's decision to refuse the claimant's application for a licence was amenable to judicial review and it was acting as a public authority within the meaning of section 6(3)(b) of the Human Rights Act 1998 (post, paras 16, 27–30, 33–45, 48). A

R v Barnsley Metropolitan Borough Council, Ex p Hook [1976] 1 WLR 1052, CA followed.

R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815, CA, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, CA, *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, CA and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 WLR 283, HL(E) considered. B

Decision of Field J [2002] EWHC 2559 (Admin) affirmed.

The following cases are referred to in the judgments:

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E) C

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA

R v Barnsley Metropolitan Borough Council, Ex p Hook [1976] 1 WLR 1052; [1976] 3 All ER 452, CA

R v Basildon District Council, Ex p Brown (1981) 79 LGR 655, CA

R v Birmingham City Council, Ex p Dredger (1993) 91 LGR 532 D

R v Durham City Council, Ex p Robinson The Times, 31 January 1992

R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564, CA

R v Servite Houses, Ex p Goldsmith [2001] LGR 55

R v Wear Valley District Council, Ex p Binks [1985] 2 All ER 699

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA E

The following additional cases were cited in argument:

CIN Properties Ltd v Rawlins [1995] 2 EGLR 130, CA

R v Association of British Travel Agents, Ex p Sunspell Ltd (t/a Superlative Travel) [2001] ACD 88

R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan [1993] 1 WLR 909; [1993] 2 All ER 853, CA F

R v London Metal Exchange Ltd, Ex p Albatros Warehousing BV (unreported) 31 March 2000, Richards J

R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57; [2003] ICR 599, CA

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

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1984] 3 All ER 935, HL(E)

Holy Monasteries v Greece (1994) 20 EHRR 1

Marcic v Thames Water Utilities Ltd [2002] QB 929; [2002] 2 WLR 932; [2001] 3 All ER 698

R v Insurance Ombudsman Bureau, Ex p Aegon Life Assurance Ltd [1994] CLC 88, DC H

R (Royden) v Wirral Metropolitan Borough Council [2002] EWHC 2484 (Admin); [2003] 2 GR 290

Tre Traktörer AB v Sweden (1989) 13 EHRR 309

Wandsworth London Borough Council v A [2000] 1 WLR 1246, CA

A **APPEAL** from Field J

By a judicial review claim form the claimant, Graham John Beer trading as Hammer Trout Farm, sought an order quashing the decision of Hampshire Farmers' Markets Ltd ("HFML") on 14 November 2001 rejecting his application to attend the 2002 programme of farmers' markets and claiming damages. Hampshire County Council was joined as an interested party. On 25 November 2002 Field J quashed HFML's decision, B declaring that in excluding the applicant from its markets HFML was acting as a public authority within section 6 of the Human Rights Act 1998, and directing that the applicant's claim for damages be separately determined. The judge granted the council leave to appeal.

By a notice of appeal dated 19 December 2002 the council appealed on the grounds (1) that, in deciding that the company's decision not to grant the C applicant a licence to hold a stall at markets operated by the company was amenable to judicial review, the judge took into account the following irrelevant matters (a) the historical involvement of the council in establishing and running the markets, (b) the fact that the council might itself have been susceptible to judicial review; (c) the fact that the public had certain limited rights to attend markets to buy and sell goods; alternatively, in so far as those matters were taken into account by the judge, he failed to accord them D sufficient or any weight; and (2) the judge left out of account the following relevant matters (a) the status of the company as a private limited company, (b) the absence of any identifiable function being carried out by the council, (c) the absence of any statutory underpinning for the company or enmeshing into any system of governmental control.

The facts are stated in the judgment of Dyson LJ.

E

Gillian Carrington for the council.

James Maurici for the claimant.

The company did not appear and was not represented.

Cur adv vult

F 21 July. The following judgments were handed down.

DYSON LJ

1 This appeal raises the question of whether the decision of a private company limited by guarantee, Hampshire Farmers' Markets Ltd ("HFML"), is susceptible to judicial review, and whether this company is a "public authority" within the meaning of section 6 of the Human Rights Act G 1998. The decision was made on 14 November 2001 to reject an application by Mr Beer to be allowed to participate in the 2002 farmers' markets programme organised by HFML. In addition to seeking to have this decision quashed Mr Beer claims damages under the 1998 Act. By a decision dated 25 November 2002 Field J held that the decision was susceptible to judicial review and quashed it. He also held that HFML was acting as a public authority within the meaning of section 6 of the 1998 Act when it H excluded Mr Beer from its markets. He adjourned Mr Beer's claim for damages. He gave permission to appeal to this court on the grounds that the questions raise issues of general importance to local authorities who transfer functions to companies. Hampshire County Council have been joined in these proceedings as an interested party. The appeal has been brought by the

council. HFML decided not to appeal since it is a company of limited resources, and was unwilling to expose itself to the uncertainties of litigation.

2 Mr Beer is a producer of trout at Liphook in Hampshire and trades under the name "Hammer Trout Farm". In 1999 the council began to organise farmers' markets using the name Hampshire Farmers' Markets. This was at a time when the farming economy was suffering a severe downturn. The council ran three pilot markets in Winchester. These were established pursuant to section 33 of the Local Government and Housing Act 1989 (subsequently repealed). Section 33(1) empowered a local authority to take such steps "as they may from time to time consider appropriate for promoting the economic development of their area". Section 33(2) provided that the steps taken could include—

> "participation in and the encouragement of, and provision of financial and other assistance for—(a) the setting up or expansion of any commercial, industrial or public undertaking—(i) which is to be or is situated in the authority's area; or (ii) the setting up or expansion of which appears likely to increase the opportunities for employment of persons living in that area . . ."

Corresponding provisions are now to be found in section 2 of the Local Government Act 2000.

3 Following the success of these pilot schemes, in 2000 the council organised a programme of 32 farmers' markets. These were run for part of the year only and were held at weekends and on bank holidays. In September 2000 the council announced a programme of 60 farmers' markets for 2001, again to be held at weekends and on bank holidays. Those who wished to participate in the programme were invited to apply to the farmers' market manager, Ms Tessa Driscoll, who was an employee of the council. Participants had to satisfy three criteria: (a) all produce to be sold had to be grown, raised, baked or caught in Hampshire or within ten miles of the border; (b) the stallholders had to grow and produce the produce themselves; and (c) no brought-in produce was allowed to be sold.

4 Mr Beer was accepted by the council into the farmers' market programme from the outset. About 60 stallholders (including Mr Beer) wanted to have farmers' markets not only at weekends and on bank holidays as organised by the council, but also on weekdays. In September 2000 these stallholders set up the Southern Farmers' Market Association ("SFMA") to organise weekday markets to run alongside the council's markets. Mr Beer was elected chairman of SFMA.

5 Having established Hampshire Farmers' Markets, the council decided to hand over the running of the markets to the stallholders themselves. The farmers and producers were told that the council would cease to run the markets in December 2001, but that the council would help them to set up a limited company to take over the markets. HFML was incorporated on 29 December 2000. Its registered office was at the council's offices at the Castle in Winchester. HFML was set up with the assistance of the council which included the provision of advice and help with the documentation by its legal department. In October 2001 HFML's registered address was changed to that of its accountants. HFML started operating in January 2002. The company secretary at the time of incorporation was Mrs Frances

A Stokes, a council employee, who became HFML's business development manager and one of its seven directors. The remaining directors were stallholders. Ms Tessa Driscoll was seconded from the council to HFML until April 2002. Since then she has been employed directly by HFML. The council provided further support to HFML by allowing it to use a desk and computer in one of the rooms in the council's main building in B Winchester.

6 In 2001 the council issued application forms to be completed by stallholders who wanted to participate in the 2002 programme of farmers' markets. The criteria and market regulations were in identical terms to those that had previously been issued by the council. Mr Beer applied for a licence to participate in the markets. By its letter dated 14 November 2001 the company refused his application. The judge held that this decision was C taken in breach of the rules of natural justice. Since there is no appeal from that part of his decision, I do not propose to explore the reasons for the rejection of Mr Beer's application.

Amenability of HFML to judicial review

7 The judge reviewed a number of the leading authorities at paragraphs D 14 to 26 of his judgment. The reasons he gave for concluding that the decision by HFML to exclude Mr Beer from its markets was amenable to judicial review were as follows:

> "27. In my judgment, the decision to exclude Mr Beer from the 2002 farmers' markets programme by HFML involved a public element which renders the decision amenable to judicial review. The facts before me are E quite different from those in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55 and *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. It is true that HFML is a private body, and that there is no statutory underpinning to its role and functions; nor are its functions woven into a system of governmental control. However, it is a not-for-profit organisation engaged in promoting the public interest by F facilitating access to trading outlets much needed by Hampshire's farmers and producers. In substance it acquired from the council the assets and goodwill of the Hampshire farmers' markets business, and it did so free of charge. It did not and does not own the sites on which the markets are conducted. These are public sites owned by local councils whose permission for the use of the sites for the markets had been granted free of G charge to the council, a situation which in November 2001 was highly likely to continue as, in fact, it has done in 2002. The goodwill acquired by HFML included both the reputation established by Hampshire Farmers' Markets with the public who attended the various markets, and a ready-made body of stallholders. The company plainly had in November 2001, and has today, a privileged position over potential rival organisers of weekend and bank holiday farmers' markets held at the sites H operated by the council. It follows that to this extent Hampshire farmers and producers were and are dependent on HFML for access to the markets it organises. Thus, the exclusion of a producer from those markets was bound potentially to be damaging, particularly if, like Mr Beer, he had been a stallholder when the council ran the markets and

had thereby come to depend on those markets for a significant part of his livelihood.

"28. In my opinion HFML were and are engaged in running what in substance are public markets to which the public, both buyers and sellers (especially sellers who have been stallholders from the outset) have a common law right of access. This right to access is not unqualified. It is subject to a power in HFML to regulate and organise, but the exercise of that power is a public function, and it is reviewable by the courts.

"29. I asked Ms Carrington whether she accepted that decisions by the council when it ran the markets to grant or terminate licences had been amenable to judicial review. With respect to her, she had difficulty in avoiding an affirmative answer to this question. In my view, on the basis of the market cases to which I have referred, such decisions by the council were plainly reviewable, and not only because the council was a public authority exercising a statutory power. Does the fact that the organisation of the markets has been transferred to HFML in the manner I have described change the situation? In my opinion not. The company has stepped straight into the shoes of the council. The rights of the public to attend the markets, including in particular the right of an applicant stallholder who has been a stallholder from the outset, and who satisfies the prescribed criteria and is willing to pay the prescribed fees, were not extinguished when the undertaking was transferred to HFML. Accordingly, I hold that the decision of the HFML board of 14 November 2001 to exclude Mr Beer from its markets is amenable to judicial review."

Summary of the parties' submissions

8 On behalf of the council Ms Carrington submitted that there are two principal factors which militate against the decision being amenable to judicial review. The first is the absence of any public function being performed by HFML: its function is no more public than that performed by the owner of a shopping mall, or the organiser of a car boot sale or a supermarket. It is true that a sector of the public, namely market traders, will be affected by the decisions of the company. But impact on a section of the public is not sufficient to render those decisions amenable to judicial review. The relationship between Mr Beer and HFML was entirely consensual in character.

9 The second is the judge's finding that HFML is a private body with no statutory underpinning of its role and functions, and that its functions are not woven into a system of governmental control. It is true that the council was exercising statutory functions when it established HFML. But the function of promoting economic development in an area is not delegable and was not delegated to HFML. There was no statutory underpinning of the role and functions of HFML, which simply operates markets as does any other market operator. No control is exercised by the council over the company. At the material time Mrs Stokes was but one of seven directors (there are now nine), and she has never had a controlling vote on the board. The low level assistance given by the council to the company is not enough to lead to the conclusion that the functions of the company are woven into a system of governmental control.

10 On behalf of Mr Beer Mr Maurici advanced two main arguments. First, he submitted that the fact that HFML were operating a market to

A which the public had access on public land was, of itself, sufficient to render the decision amenable to judicial review. He relied on a number of cases in support of the proposition that bodies which take decisions in relation to market licences are exercising a public function. I shall refer to these as "the market cases". They are: *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052, *R v Basildon District Council, Ex p Brown* (1981) 79 LGR 655, *R v Wear Valley District Council, Ex p Binks* [1985] B 2 All ER 699, *R v Durham City Council, Ex p Robinson* The Times, 31 January 1992 and *R v Birmingham City Council, Ex p Dredger* (1993) 91 LGR 532. Mr Maurici submitted that these authorities show that disputes that arise on the termination or non-renewal of a licence to trade at a market to which the public has access are not purely private or contractual matters: they have a public element.

C 11 His second principal argument was that there were in any event a number of features of the relationship between HFML and the council which demonstrate that, in making the impugned decision, HFML was exercising a public function. I shall refer to some of these features later.

The authorities

D 12 I shall deal with the market cases separately. It is clear from the authorities that there is no simple litmus test of amenability to judicial review. The relevant principles tend to be stated in rather elusive terms. There was a time when courts placed much emphasis on the *source*, rather than the *nature,* of the power being exercised by the body making the impugned decision. If the power derived from statute or the prerogative, E then it was a public body and the decision was amenable to public law challenges. If the source was contractual, then public law had no part to play. The importance of the seminal decision in *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815 was its recognition of the fact that the issue of amenability to judicial review often requires an examination of the nature of the power as well as its source. Lloyd LJ said, at p 847, that, where the source of the power did not clearly provide the answer, then the F nature of the power fell to be examined:

> "If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context G is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other."

13 Lloyd LJ did not explain what he meant by "public law functions". But Sir John Donaldson MR said, at p 838:

H
> "In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the

jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction." A

14 This test of a "public element which can take many forms" is expressed in very general terms, and of itself provides no real guidance. A similar formulation of the general test has been propounded in two recent decisions of this court as to the meaning of "public authority" in section 6 of the Human Rights Act 1998 to which I shall refer in more detail shortly. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 69, para 65 Lord Woolf CJ said that what could make an act, "which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act". In *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, 946, para 35 Lord Woolf CJ referred to the lack of "evidence of there being a public flavour to the functions [of the body]". The issue in the *Donoghue* and *Heather* cases was whether the bodies whose decisions were the subject of challenge were public authorities within the meaning of section 6 of the 1998 Act. As Lord Woolf CJ pointed out in the judgment of the court in the *Donoghue* case [2002] QB 48, 69, para 65(i), section 6 "is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review". No doubt for this reason it was common ground in oral argument before us that (i) the tests for a functional public authority within the meaning of section 6(3)(b) of the 1998 Act and for amenability to judicial review are, for practical purposes, the same and (ii) the observations in both the *Donoghue* and *Heather* cases are equally relevant to the application of both tests. B C D

15 Since the completion of the oral argument, however, the House of Lords has decided the appeal in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 WLR 283. We have had the benefit of further written submissions from counsel as to the effect of this decision on the appeal in the present case. The issue in the *Aston Cantlow* case was whether the decision of the church council to enforce a lay rector's obligation to meet the cost of chancel repairs was a private act or the discharge of a function of a public nature within the meaning of section 6(3)(b) of the 1998 Act. Certain observations were made as to the relationship between the public functions test in section 6(3)(b) and the test for amenability to judicial review, and I shall come to these later when I consider whether HFML acted as a public authority when it decided to exclude Mr Beer from the farmers' market programme. In my judgment, there is nothing in the speeches in the *Aston Cantlow* case which suggests that what was said in the *Donoghue* and *Heather* cases is not a useful guide to amenability to judicial review. Moreover, and unsurprisingly, their Lordships said nothing about the important market cases to which I refer at paragraphs 20–22 below. E F G

16 It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say H

A question-begging. But it provides the framework for the investigation that has to be conducted. There is a growing body of case law in which the question of amenability to judicial review has been considered. From these cases it is possible to identify a number of features which point towards the presence or absence of the requisite public law element. I do not propose to examine many of these authorities. Leaving aside the market cases, it seems to me that it is sufficient to refer to the two recent decisions which I have
B already mentioned.

17 The first is *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48. The issue in that case was whether a housing association was a public authority performing public functions for the purposes of section 6 of the 1998 Act. The housing association had obtained a possession order evicting the claimant from her
C home. She contended that the association was a public authority exercising a public function, and that her eviction violated her rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Woolf CJ said, at pp 69–70, para 65 of the judgment of the court:

> "In coming to our conclusion as to whether Poplar is a public authority
> D within the Human Rights Act 1998 meaning of that term, we regard it of particular importance in this case that:
>
> "(i) While section 6 of the Human Rights Act 1998 requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflects the
> E approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal (the judgment of Lloyd LJ) in *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815.
>
> "(ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties.
>
> "(iii) The act of providing accommodation to rent is not, without
> F more, a public function for the purposes of section 6 of the Human Rights Act 1998. Furthermore, that is true irrespective of the section of society for whom the accommodation is provided.
>
> "(iv) The fact that a body is a charity or is conducted not for profit means that it is likely to be motivated in performing its activities by what it perceives to be the public interest. However, this does not point to the
> G body being a public authority. In addition, even if such a body performs functions, that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purpose of sections 6(3)(b) and 6(5).
>
> "(v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help
> H to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body

does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private. A

"(vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant. B

"(vii) The defendant, at the time of the transfer, was a sitting tenant of Poplar and it was intended that she would be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets." C

18 He said, at p 70, para 66 that there is no clear demarcation line between public and private bodies and functions. "In a borderline case, such as this, the decision is very much one of fact and degree." It is necessary to take account of all the circumstances. The conclusion of the court was that "the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions". D

19 The second recent decision is *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. In that case the claimants were persons to whom the local authority owed a statutory duty to provide accommodation. It made arrangements for that accommodation to be provided at public expense by the Leonard Cheshire Foundation ("LCF"), a charitable foundation. LCF decided to close the home where the claimants had been living for many years. They applied for judicial review of the decision. The first issue was whether, in deciding to close the home, LCF was acting as a public authority exercising functions of a "public nature" within the meaning of section 6(3)(b) of the 1998 Act. Giving the judgment of the court Lord Woolf CJ said, at p 946, para 35: E

"The matters already referred to can, however, be put aside. In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private. Here we found *R v HM Treasury, Ex p University of Cambridge* (Case C-380/98) [2000] 1 WLR 2514, 2523, 2534–2535, relied on by Mr Henderson, an interesting illustration in relation to European Union legislation in different terms to section 6. F G H

A (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the [National Assistance Act 1948] provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that Mr Gordon B can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon article 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on article 8, but, if the situation is otherwise, article 8 cannot change the appropriate classification of the function. On the approach adopted in *Poplar Housing and Regeneration Community Association* C *Ltd v Donoghue* [2002] QB 48, it can be said that LCF is clearly not performing any public function. Stanley Burnton J's conclusion as to this was correct."

The market cases

20 It is sufficient to refer to two of the market cases relied on by D Mr Maurici. The first is the well-known case of *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. The applicant applied to have quashed the decision of the council to exclude him from trading in the market and to revoke his right to have a stall. His application succeeded on the grounds that the decision had been taken in breach of the rules of natural justice. Ms Carrington submitted that this case (and indeed all the market E cases relied on by Mr Maurici: see paragraph 10 above) is distinguishable on the grounds that the decision was made by a local authority. Moreover, she pointed out that the market in the *Hook* case had been the subject of grant by royal charter and later a private Act. But I agree with Mr Maurici that neither of these factors was relied upon by the Court of Appeal as the reason for quashing the decision on the grounds of breach of natural justice. Lord F Denning MR said that the right of a stallholder to have access to the market was conferred by common law, and could only be taken away for just cause and then only in accordance with the principles of natural justice. He said, at p 1057D: "I do not mind whether the marketholder is exercising a judicial or an administrative function." It is clear that it was irrelevant that the marketholder was a local authority and that the market was authorised by royal charter and statute. What was relevant was that the stallholder had G the right at common law to come to a place to which the public had the right of access to sell his goods. The judgment of Scarman LJ was to similar effect. He emphasised the common law right in the public to go to market to buy and sell, subject to the statutory regulation of the exercise of that right by the local authority. He said, at p 1060:

H "Although, therefore, there is a contractual element in this case, there is also an element of public law, viz, the enjoyment of rights conferred upon the subject by the common law. I think, therefore, upon analysis, it is clear that the Barnsley Corporation in its conduct of this market is a body having legal authority to determine questions affecting the rights of subjects."

There is no suggestion here that Scarman LJ attributed any relevance to the identity of the marketholder (the local authority) or the nature of the market (other than the fact that it was one to which the public had a right of access at common law).

21 The second decision is *R v Wear Valley District Council, Ex p Binks* [1985] 2 All ER 699. Here too the marketholder was the local authority. The applicant was a street trader who operated a hot food takeaway caravan from a market place. She had no written licence, and operated under what was described as an informal arrangement with the local authority. Her right to station the caravan in the market place was terminated without notice. Her application to quash the decision on the grounds that it had been made in breach of the rules of natural justice succeeded before Taylor J. He rejected the submission that decisions such as the *Hook* case [1976] 1 WLR 1052 were to be distinguished because the principles enunciated in them were only to be applied where there is a statutory market or something akin to a statutory market. In so doing he relied on a passage in the judgment of Templeman LJ in *R v Basildon District Council, Ex p Brown* (1981) 79 LGR 655, 667 to the effect that the status of the market was not relevant to the crucial question whether the stallholder's licence had been validly terminated. The exercise of the powers (in that case by the local authority) must be governed by the same principles whether in relation to a statutory market or an unofficial market managed by the local authority in the interests of the local community.

22 Having rejected this submission Taylor J continued [1985] 2 All ER 699, 703:

> "Moreover, in the present case the market place at Crook is conceded to be a place to which the public has right of resort at all times. It is not a highway, but it is nevertheless a place to which the public has a right of access and on which the council have a discretion whether to allow street traders or not. During the day, the market place is in fact used for a market. When it is not being so used between prescribed hours it is used as a public car park for which no charge is made. It therefore seems to me that the local authority in granting or revoking licences to street traders to operate in the market place are in exactly the same situation as that envisaged in the *Basildon* case by all three members of the Court of Appeal. It seems to me that there is a public law element in the decisions of the council with regard to whom they license and whom they do not license to trade in the market place."

Public authority

Summary of the parties' submissions

23 It was common ground that HFML is not a "core" public authority. It is a "hybrid" authority. It follows that the relevant question is whether the decision to exclude Mr Beer was a private act or the exercise of a public function. Both counsel rely on substantially the same factors in relation to this question as form the basis of their submissions on the amenability issue. In short Ms Carrington submitted that the act of HFML that Mr Beer seeks to challenge was not "governmental" in nature, but was of a private character. The assistance given by the council to HFML and the current use of public land are minor indicia which are insufficient to imbue what would

A otherwise be a private decision with a public stamp. Mr Maurici submitted that the guidance given by their Lordships in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 WLR 283 in relation to hybrid authorities is not significantly different from that given in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, and that for all the reasons given in relation to the amenability issue B the impugned decision was made in the exercise of a public function.

The Aston Cantlow decision

24 Much of the discussion in the speeches in the *Aston Cantlow* case [2003] 3 WLR 283 is on the question whether the parish council was a "core" public authority. The only general guidance on hybrid authorities C and what is a public function for the purposes of section 6(3) of the 1998 Act is to be found in the speech of Lord Nicholls of Birkenhead, who said, at p 288:

> "11. Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public D authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the E ability themselves to rely on Convention rights when necessary.
>
> "12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is F publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

25 Lord Hope of Craighead considered, at pp 296 and 303, paras 41 and 63 that the question of public function was fact-sensitive and did not admit of an answer in the abstract, an approach with which Lord Scott of Foscote agreed, at p 321, para 130. It is perhaps somewhat surprising that G there is no reference to the *Donoghue* case [2002] QB 48 or the *Heather* case [2002] 2 All ER 936 in the *Aston Cantlow* case. Ms Carrington submitted that these decisions have been "superseded" by the *Aston Cantlow* case. If by "superseded" she means that the two earlier decisions are to be taken as having been overruled, then I do not agree. As I have said, apart from what Lord Nicholls said, at p 288, paras 11 and 12, the *Aston Cantlow* case H contains no guidance as to what amounts to the exercise by a hybrid public authority of functions of a public nature. Provided that it is borne in mind that regard should be had to any relevant Strasbourg jurisprudence, then the passages which I have quoted from the judgments in the two earlier cases will continue to be a source of valuable guidance. Indeed, para 12 of Lord Nicholls's speech is redolent of the flavour of that guidance.

Conclusion

A

26 I can now state my reasons for concluding that Field J was right to decide that the decision of HFML which is challenged in these proceedings is amenable to judicial review, and that in making that decision HFML was acting as a public authority.

27 I should start by explaining why, in my judgment, if the decision is amenable to judicial review, it was by the same token made by HFML acting as a public authority. I accept that it is possible to conclude that a decision by a public authority is not amenable to judicial review and vice versa. This point was made very clearly by Lord Hope in the *Aston Cantlow* case [2003] 3 WLR 283, 299–300, para 52:

B

> "But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, 'Chancel repairs and the Human Rights Act' [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of 'core' public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the 'hybrid' class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a 'function of a public nature' within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg court as to those bodies which engage the responsibility of the state for the purposes of the Convention."

C

D

E

28 Thus the domestic case law on amenability to judicial review can be "very helpful". But reliance on domestic cases must be tempered by, and sometimes yield to, relevant Strasbourg jurisprudence. This jurisprudence is especially likely to be helpful in determining whether a body is a core public authority. It is likely to be less helpful in relation to the fact-sensitive question of whether in an individual case a hybrid body is exercising a public function.

F

29 In the present case Ms Carrington has shown us no Strasbourg authority which points the way. Nor has she advanced any reasons peculiar to the public authority issue in support of the submission that, even if HFML's decision is amenable to judicial review, nevertheless it was not made by HFML in the exercise of a public function. In my judgment, she was right not to do so. On the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other.

G

30 It is important to record the concession by Ms Carrington (in my view rightly made) that, if the decision to refuse Mr Beer's application had been made by the council before the incorporation of HFML, it would have been amenable to judicial review. The reason given by Ms Carrington for her concession was not that the decision would have denied a person access to a public market; rather it was that the decision would have been made by a public body, namely a local authority. In my judgment, the correct reason for the concession is more than the mere fact that the decision would have

H

A been made by a public body. Not all decisions by local authorities are amenable to judicial review or involve the exercise of public functions. The reason why I consider that the concession was correctly made is that the power being exercised by the council would have had that public element or flavour to which I have earlier referred. In this regard the fact that the power was being exercised in order to control the right of access to a public market is a most important feature.

B 31 I return to the decision that was actually made by HFML. It is clear from the market cases that decisions affecting the right of access to certain types of market may have a sufficient public element to be amenable to judicial review. There is a distinction between (a) an unofficial market in respect of which there are no public rights of access and (b) a statutory market in respect of which public rights do exist. A good example of the C former is a car boot sale held on a person's private land. The paradigm example of the latter is a statutory or charter market held on land dedicated to public use and to which the public has a right of access. Where do the markets held by HFML come within the spectrum of markets? It is true that HFML did not start to operate the markets until January 2002, a few weeks after the decision of 14 November 2001. But neither party has suggested that the situation that obtained at the time of the decision was not likely to D continue once HFML took over the running of the markets, or that it has not done so. The rather exiguous evidence as to the nature of these markets is not directed specifically at the time of the decision. But the brief summary that follows of the present position is the best evidence of the situation that existed at that time.

32 The markets are held on town centre sites. None of the sites is E owned by the council but they are all owned by other local authorities. Mrs Stokes says that the markets operated "on town centre sites in close association with the relevant local authorities". She does not explain exactly what she means by "close association with the relevant authorities". But she must mean that HFML and the local authorities who own the sites co-operate in the organising of the markets. The evidence also discloses that at Winchester the market stalls occupy a pedestrianised area and most of the F adjacent public car park. The pedestrianised area is used during the week by a conventional market.

33 In my view, it is clear from this evidence that these markets cannot be assimilated to the category of unofficial markets to which the public have no right of access. They are much closer to the second category to which I have referred, even though they are neither statutory nor charter markets. Their G essential feature is that they are markets held on publicly owned land to which the public have access.

34 What flows from this? There is much to be said for accepting the submission of Mr Maurici that, for this reason alone, the decision of 14 November 2001 is amenable to judicial review and that in making that decision HFML was exercising public functions and acting as a public authority. The decisions in *R v Barnsley Metropolitan Borough Council,* H *Ex p Hook* [1976] 1 WLR 1052 and *R v Wear Valley District Council, Ex p Binks* [1985] 2 All ER 699 show that the identity of the marketholder is not decisive, nor is the source of the power to hold the market. What is critical is whether the market is one to which the public has the right of access. It is this feature which led Scarman LJ in the *Hook* case to speak of

the existence of "an element of public law" which opened the door to the remedy of certiorari for breach of natural justice. It was the same feature which led Taylor J in the *Binks* case to speak of a "public law element". It is significant that "public element" was the phrase used by Sir John Donaldson MR in *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815 to describe one of the essential elements of amenability to judicial review.

35 But I do not base my conclusion that there was a sufficient public element in HFML's decision of 14 November 2001 solely on the fact that it involved the denial to Mr Beer of access to a public market. I have already referred to Ms Carrington's concession that, if the decision had been taken by the council before HFML had been incorporated, it would have been amenable to judicial review. This concession brings into sharp focus the need to examine the relationship between the council and HFML. I accept the submission of Mr Maurici that there are several features of that relationship which strengthen Mr Beer's case that the decision is amenable to judicial review.

36 First, HFML owes its existence to the council. The company was set up by the council using its statutory powers. It was the council's economic development office which employed and paid for the services of Charles Morrison of Business Link Wessex to assist in the setting up of the company (it was bought "off the shelf"). The council's in-house legal practice undertook the necessary legal work. In the *Donoghue* case [2002] QB 48 it was a relevant feature which pointed towards there being a sufficient public element that the housing association was *created* by the local authority. By contrast, in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, Moses J regarded the fact that Servite was a "private body which does not owe its existence to Wandsworth" as a factor militating against its function being within the scope of public law.

37 Secondly, HFML stepped into the shoes of the council. The phrase "standing in the shoes" of a public body derives from the *Heather* case [2002] 2 All ER 936, 946, para 35(ii). There is also a reflection of it in Lord Nicholls's speech in the *Aston Cantlow* case [2003] 3 WLR 283, 288, para 12 ("or is taking the place of central government or local authorities"). The phrase is not a term of art. But it is clear what it means. It connotes the idea of A performing the same functions as had previously been performed by B, to the same end and in substantially the same way. It was an important feature of the decision in the *Heather* case that LCF was not performing the statutory functions previously performed by the local authority under section 21 of the National Assistance Act 1948. It was merely providing accommodation to the claimants. In the present case the council announced the 2002 programme of farmers' markets in 2001 before HFML started operating. They asked that applications for the 2002 programme be sent to themselves. After 2002 HFML took over the running of the markets, and ran them (as was always envisaged) in the same way as the council had previously run them. It is relevant that the three criteria for admission of farmers to the markets were the same as those promulgated by the council when the scheme was first established. These criteria were devised in what was perceived to be the public interest of promoting the interests of the local farming community. Ms Carrington drew attention to the fact that the main objects clause of HFML's memorandum of association was drafted in wide

A terms, so that it would be open to the company lawfully to change the criteria for admission to the markets, and operate them differently from the way they were previously operated, and indeed not operate markets at all. In theory this is true. Anything might happen in the future. But these proceedings are concerned with the lawfulness of the decision of 14 November 2001. At that time, in so far as HFML was doing anything at all, it had stepped into the shoes of the council in relation to these markets.

B **38** Thirdly, from the date of incorporation of HFML until the time when the company started operating the markets, and to some extent thereafter, the council assisted the company in a number of respects. For several months after incorporation the company's registered office was in the council's offices. The company has at all times been provided with a desk and computer in one room in the council's main building in Winchester. It C has not yet operated from anywhere else. The council agreed to make a discretionary grant to HFML to assist in the development of the markets. Two council personnel have provided important assistance to HFML, and continue to do so. Mrs Stokes is employed by the company as business development manager and is one of its directors. She played an influential role in setting up the company. She chaired the steering group that was established for that purpose. Ms Driscoll, the company's market manager, D was employed by the council until April 2002 when her employment was transferred to HFML. In November 2001 she was seconded to the company.

39 In my view, the combined effect of these three features (or groups of features) is sufficient to justify the conclusion that the decision of 14 November is amenable to judicial review. I regard the first two features as being of particular significance. To these must be added the fact that the E decision was one which affected a person's right of access to a public market.

40 What is Ms Carrington able to put into the scales as a counterweight to these points? She relied strongly on the fact that this is not a case involving the privatisation of the business of government, or the assimilation of HFML's role into a system of statutory control or regulation. It is true that HFML is not performing a function of statutory control or regulation on behalf of the council. The judge agreed that there is no statutory F underpinning of the company's role and its functions, and that those functions are not woven into a system of governmental control. In some cases the absence of such features may point decisively against amenability to judicial review. But it is necessary to have regard to all the relevant factors. In this case I do not consider that the absence of statutory underpinning and the lack of interweaving into a system of governmental G control is a matter of great weight. HFML was not simply another private company that was established to run markets for profit. It was established by a local authority to take over on a non-profit basis the running of the markets that the authority had previously been running in the exercise of its statutory powers in what it considered to be the public interest.

41 Ms Carrington also relied on the fact that the relationship between Mr Beer and HFML is consensual in character. The answer to this point was H provided by Scarman LJ as long ago as 1976 in *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. There is a consensual element in the case. But for the reasons that he gave, and for the additional reasons that I have sought to give in this judgment, there was also a public element too. This is a far cry from the paradigm case discussed in *R v Panel*

on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815 where, as in the case, for example, of a private arbitration, the sole source of power is a consensual submission to jurisdiction. A

42 There are some cases which may properly be described as close to the borderline. Lord Woolf CJ said that the *Donoghue* case [2002] QB 48 was such a case. But, in my view, that is not so here. It seems to me that the factors to which I have referred clearly compel the conclusion that the decision of 14 November 2001 is amenable to judicial review, and that in making that decision HFML was acting as a public authority within the meaning of section 6 of the 1998 Act. For these reasons I would dismiss this appeal. B

LONGMORE LJ

43 I agree with the judgment of Dyson LJ. For myself, I consider that the decision of the judge was correct for each of the two reasons identified by Dyson LJ, each reason being sufficient in itself to justify his decision. C

44 First, the market cases show that if a trader is denied the right to sell his goods in a place to which the public normally has access, that decision is a decision of public law and is amenable to judicial review. I do not think we could decide otherwise without overruling *R v Wear Valley District Council, Ex p Binks* [1985] 2 All ER 699. So far from overruling it, we should approve that decision and declare that it is good law. D

45 Secondly, the relationship between the council and HFML is such that, for that reason also, the decision of HFML to exclude Mr Beer is amenable to judicial review. I agree with the considerations set out in paras 28–30 of Dyson LJ's judgment and regard them as also justifying Field J's decision. E

46 Naturally, the combination of the two reasons makes the judge's decision that much more secure but, in my view, either reason alone would have been sufficient.

47 I would also like to record my agreement with para 25 of Dyson LJ's judgment in which he says that the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 WLR 283 has not overruled *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 or *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; these cases continue to give authoritative guidance on amenability to judicial review. F

SIR MARTIN NOURSE

48 I agree that this appeal should be dismissed for the reasons given by Dyson LJ. G

Appeal dismissed.

Solicitors: Solicitor, Hampshire County Council; Thring Townsend, Bath.

Reported by EDWINA EPSTEIN, Barrister H

A

House of Lords

YL *v* Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)

[2007] UKHL 27

B

2007 April 30, May 1, 2; June 20

Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond, Lord Mance and Lord Neuberger of Abbotsbury

Human rights — Public authority — Functions of public nature — Local authority under duty to arrange accommodation for claimant — Local authority placing claimant in private care home — Private care home giving claimant notice to leave — Declaration sought by claimant that removal from home contrary to Convention rights — Whether private care home exercising "functions of a public nature" in providing care and accommodation — National Assistance Act 1948 (11 & 12 Geo 6, c 29) (as amended by Local Government Act 1972 (c 70), s 195(6), Sch 23, para 2(1), Children Act 1989 (c 41), s 108(5), Sch 13, para 11(1), National Health Service and Community Care Act 1990 (c 19), s 42(1) and Community Care (Residential Accommodation) Act 1992 (c 49), s 1(1)), ss 21, 26 — Human Rights Act 1998 (c 42), s 6(1)(3)(b)

C D

The claimant was an 84-year-old suffering from Alzheimer's disease and in respect of whom the first defendant council had a duty under section 21 of the National Assistance Act 1948[1] to make arrangements for providing residential accommodation. Pursuant to its powers under section 26 of the 1948 Act, the council contracted with the second defendant company, an independent provider of health and social care services, for the claimant to be placed in one of its care homes, which accommodated both privately funded residents and those whose fees were paid by the council in full or in part. The claimant's fees were paid by the council, save for a small top-up fee paid by her relatives. The company subsequently sought to terminate the contract for her care and remove her from the home. The claimant, by her litigation friend the Official Solicitor, commenced proceedings in the Family Division of the High Court under CPR Pt 8 seeking, inter alia, declarations that it would not be in the claimant's best interests to be moved out of the home and that the company, in providing accommodation and care for the claimant, was exercising public functions within section 6(3)(b) of the Human Rights Act 1998[2] and would breach her rights under articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, contrary to section 6(1) of the 1998 Act, were it to move her out of the home. The judge held as a preliminary issue that the company was not exercising a public function within the ambit of section 6(3)(b) and the Court of Appeal upheld that decision.

E F G

[1] National Assistance Act 1948, s 21, as amended: "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing— (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them . . ."

S 26, as substituted: "(1) . . . arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) . . . of that section, and (b) the arrangements are for the provision of such accommodation in those premises."

H

[2] Human Rights Act 1998, s 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right . . . (3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."

On the claimant's appeal—

Held, dismissing the appeal (Lord Bingham of Cornhill and Baroness Hale of Richmond dissenting), that a distinction was to be made between the function of a local authority in making arrangements pursuant to section 21 of the 1948 Act for those in need of care and accommodation who were unable to make such arrangements for themselves and that of a private company in providing such care and accommodation under contract with the authority, on a commercial basis rather than by subsidy from public funds, in order for the authority to fulfil its section 21 duty; that the actual provision of such care and accommodation by the private company, as opposed to its regulation and supervision pursuant to statutory rules, was not an inherently public function and fell outside the ambit of section 6(3)(b); that it followed that a resident of a private care home placed there pursuant to sections 21 and 26 of the 1948 Act, though retaining public law rights as against the authority which had arranged the accommodation, did not have Convention rights as against the care home; and that, accordingly, the decision of the judge on the preliminary issue that the second defendant, in providing care and accommodation for the claimant, was not exercising a public function for the purposes of section 6(3)(b) would stand (post, paras 26–27, 29, 33, 35, 105, 114–115, 118, 120, 123, 126, 134, 138, 148, 155, 160, 170).

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2004] 1 AC 546, HL(E) considered.

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48, CA doubted.

Decision of the Court of Appeal [2007] EWCA Civ 27; [2008] QB 1; [2007] 2 WLR 1097 affirmed.

The following cases are referred to in the opinions:

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2001] EWCA Civ 713; [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393, CA; [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)
Botta v Italy (1998) 26 EHRR 241
Costello-Roberts v United Kingdom (1993) 19 EHRR 112
HL v United Kingdom (2004) 40 EHRR 761
Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1; [1991] 2 WLR 372; [1991] 1 All ER 545, HL(E)
Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)
Marzari v Italy (1999) 28 EHRR CD 175
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA
R v Barnsley Metropolitan Borough Council, Ex p Hook [1976] 1 WLR 1052; [1976] 3 All ER 452, CA
R v Code of Practice Committee of the Britsh Pharmaceutical Industry, Ex p Professional Counselling Aids Ltd (1990) 3 Admin LR 697
R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA
R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564, CA
R v Servite Houses, Ex p Goldsmith [2001] LGR 55
R v Wandsworth London Borough Council, Ex p Beckwith [1996] 1 WLR 60; [1996] 1 All ER 129, HL(E)
R (A) v Partnerships in Care Ltd [2002] EWHC 529 (Admin); [2002] 1 WLR 2610
R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056; [2004] 1 WLR 233, CA

A *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin); [2003] LGR 423
R (Heather) v Leonard Cheshire Foundation [2001] EWHC Admin 429; 4 CCLR 211; [2002] EWCA Civ 366; [2002] 2 All ER 936, CA
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57; [2006] 1 AC 529; [2005] 3 WLR 837; [2006] 3 All ER 111, HL(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (West) v Lloyd's of London [2004] EWCA Civ 506; [2004] 3 All ER 251, CA
Storck v Germany (2005) 43 EHRR 96
Sychev v Ukraine (Application No 4773/02) (unreported) 11 October 2005, ECtHR
Van der Mussele v Belgium (1983) 6 EHRR 163
Woś v Poland (Application No 22860/02) (unreported) 1 March 2005, ECtHR
C *X and Y v The Netherlands* (1985) 8 EHRR 235
Z v United Kingdom (2001) 34 EHRR 97

The following additional cases were cited in argument:

A v A Health Authority [2002] EWHC 18 (Fam/Admin); [2002] Fam 213; [2002] 3 WLR 24
A v United Kingdom (1998) 27 EHRR 611
D *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005, ECtHR
Eldridge v British Columbia (Attorney General) [1997] 3 SCR 624
Feldbrugge v The Netherlands (1986) 8 EHRR 425
Mykhaylenky v Ukraine Reports of Judgments and Decisions 2004-XII, p 153
R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan [1993] 1 WLR 909; [1993] 2 All ER 853, CA
R v Muntham House School, Ex p R [2000] LGR 255
E *Szula v United Kingdom* (2007) 44 EHRR SE 237

APPEAL from the Court of Appeal

This was an appeal, by permission of the Court of Appeal, by the claimant, YL, by her litigation friend the Official Solicitor, from that part of the order of the Court of Appeal (Sir Anthony Clarke MR, Buxton and Dyson LJJ) dismissing her appeal against the order of Bennett J [2006] F EWHC 2681 (Fam) made in proceedings issued in the Family Division of the High Court under CPR Pt 8 against the first defendant, Birmingham City Council, and the second defendant, Southern Cross Healthcare Ltd ("the company"), the claimant's daughter, OL, and husband, VL, being named as third and fourth defendants, whereby on the claimant seeking, inter alia, declarations that (1) it would not be in the claimant's best interests to be G moved out of the company's care home, in which she had been placed pursuant to section 21 of the National Assistance Act 1948 by the council, (2) the company, in providing accommodation and care for the claimant at the home was exercising public functions within section 6(3)(b) of the Human Rights Act 1998, and (3) to move the claimant out of the home would be contrary to her rights under articles 2, 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and H unlawful, the judge had held as a preliminary issue that the company, in providing care and accommodation for the claimant, had not been exercising a public function within section 6(3)(b).

The facts are stated in the opinions of Baroness Hale of Richmond and Lord Mance.

A

David Pannick QC, Ian Wise and *Naina Patel* for the claimant. The claimant enjoys Convention rights under the Human Rights Act 1998 against the care home in which she has been placed by the council in compliance with its statutory duty to provide her with accommodation as a person in need of care and attention by reason of age, illness or disability.

B

In deciding that the claimant should receive such care and accommodation, and formulating a care plan for her, pursuant to section 21 of the National Assistance Act 1948 the council is performing "functions of a public nature" within section 6(3)(b) of the 1998 Act and acting as a public authority for the purpose of section 6 of the Act. In providing that accommodation and implementing the care plan the care home is also performing functions of a public nature and acting as a public authority. The decision in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 to contrary effect is wrong. Section 6(3)(b) focuses on function, not on the nature of the body providing it. Thus the status of the care home as a commercial enterprise is not in point. The function at issue is public in the classic, social welfare sense. The care is given in a statutory context: see Craig, "Contracting out, the Human Rights Act and the scope of judicial review" (2002) 118 LQR 551, 557.

C

D

One of the main functions of the 1998 Act was to implement the obligations of the United Kingdom under the Convention for the Protection of Human Rights and Fundamental Freedoms and section 6(3)(b) should, so far as possible, be construed consistently with that objective. Giving a wide scope to the term "public function" will further the statutory aim: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 9–12, 52, 87, 160.

E

Helen Mountfield for the OL and VL. Services are of a public nature where they are provided by the people as a whole in the form of legislation passed by a democratic legislature and funded, where necessary, by general taxation, regulated by legislation and available on the basis of publicly assessed need under arrangements which are made by, and on terms of which are negotiated by, a public authority acting on behalf of the people. The focus is on the function, not the nature of the body providing the services. The provision of care for old people on the basis of assessed need is a paradigm public function. The legal history of provision of accommodation for people who are in need of care and attention by reason of age shows that this has been regarded as a public function for at least 400 years.

F

G

Persons in the claimant's position are peculiarly vulnerable and unlikely to be able to enforce contractual rights or remedies. A "contractual" solution cannot provide proper protection of the rights of all affected persons. Nor are the continuing obligations of the core public authority sufficient to protect the rights of a care home resident or his or her family. Decisions affecting a resident's rights may also affect the latter's rights to respect for their private and family life under article 8 of the Convention, but the Care Standards Act 2000 does not impose any obligation upon a private care home to respect the private and family life of a member of a resident's family.

H

The accommodation in the same care home of those whose care was arranged by the state under section 21 and those who made their own

A private care arrangements does not render the provision of care for the former any less public. Different protective regimes may apply to the two cases.

Philip Sales QC and *Cecilia Ivimy* for the Secretary of State for Constitutional Affairs intervening. The phrase "functions of a public nature" is used in section 6(3)(b) in contradistinction to the concept of B functions and acts of a private nature: see section 6(5). It is necessary to assess whether public sphere features or private sphere features predominate in relation to the function in question. The interpretation of section 6(3)(b) should reflect the central purpose of the 1998 Act to give effect in domestic law to the rights and freedoms guaranteed by the United Kingdom under the Convention: see *Aston Cantlow and Wilmcote with Billesley Parochial* C *Church Council v Wallbank* [2004] 1 AC 546, para 44 and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, para 34. The court should follow the approach of the European Court of Human Rights in determining under article 6(1) of the Convention the question whether rights fall within the public or private sphere by reference to common understandings of the role of the state. The D assumption of responsibility for the care of the elderly and disabled by the state is an indicator that the service being provided is a public service: compare *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, para 34 and *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

The provision of accommodation and care to a resident by a care home pursuant to arrangements made with a local authority under section 26 of the 1948 Act is a public function because it is a publicly funded and E regulated service intended to discharge the local authority's obligations under domestic public law in a area which is recognised as involving a central function of the state and to discharge the United Kingdom's positive obligations under the Convention.

A contracting state is subject to express and implied positive obligations under the Convention to secure rights: see *Botta v Italy* (1998) 26 EHRR F 241; *Marzari v Italy* (1999) 28 EHRR CD 175; *Van der Mussele v Belgium* (1983) 6 EHRR 163; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112; *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005; *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005 and *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005. If a particular function has been identified by the European Court of G Human Rights as one which a state is under a positive obligation to carry out and that function is one which central or local government relies on a private provider to perform, that is a strong indicator that the function as exercised by the private provider is intended to be treated as a public function for the purposes of section 6(3)(b), in which case a claim may be brought directly against the private body. The provision of accommodation and care to those in need of it by reason of their physical health is such a function. By contrast, H the provision of accommodation and care by a care home to residents who have not been placed by a local authority but have made their own arrangements, the provision of accommodation for renting by private landlords which assists a local authority to discharge its duty towards homeless persons, and the provision of accommodation to children by foster

parents fall outside section 6(3)(b). These are more in the nature of activities of a private character than a public character. A

Michael Fordham QC, Jessica Simor and *Iain Steele* for Justice, Liberty and the British Institute of Human Rights intervening. Where a state governmental body entrusts the discharge of a function of a public nature to a private sector body the function remains a public function. "Function of a public nature" in section 6(3)(b) refers to a function which the state has determined should be undertaken in the general interest to achieve some public policy objective. Once such a function has been identified its nature cannot be altered by the fact that it is being discharged using private sector bodies. B

The position at domestic public law is relevant when applying the concept of "public authority" which Parliament chose for the purpose of bringing Convention rights home. Common law standards of administrative law (lawfulness, fairness and reasonableness) are applicable by reference to the function being exercised, not the status of the body or the source of its powers: see *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815. Private entities with a business or commercial ethos can be the subject of public law obligations in respect of public functions which they undertake: see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233. C D

Andrew Arden QC and *David Carter* for the council. Since the Poor Relief Act 1601 (43 Eliz 1, c 2) local authorities (or their predecessor bodies) have had the responsibility for the relief of destitution. At times this has involved the direct provision of services and facilities; at other times it has involved ensuring that an objective is achieved. The National Assistance Act 1948 in its original form imposed a duty on authorities to provide residential care for adults in need of care and attention, although they could discharge that duty through arrangements made with a voluntary organisation. As amended, the Act only requires an authority to make arrangements: see section 21(1). That function, in the sense of determining what is needed for the person and funding it, cannot be provided by the private sector and is a function of a public nature within section 6(3)(b). E F

Absent an express power to delegate or contract out, e g under section 70 of the Deregulation and Contracting Out Act 1994, local authorities cannot confer functions of a public nature on private care home providers. By contrast, some local authority functions involve the provision of services which are also provided by the private or voluntary sectors and which fall outside section 6(3)(b). G

Care of a person in need is a private act; to ensure the provision of care is a public function, but the execution of it is not. It is quite artificial to talk about actual care of the elderly being a public function—because actual care of the elderly is (and always has been) performed in many ways, e g by family, by paying for it, by charity. The public function is arranging for it. H

In determining whether a function is within section 6(3)(b) the test is not whether the ultimate source of income includes public funds. Even if a large part of the income of a care home comes from local authorities, that does not make the care home a "publicly funded" body. Nor is the test subjection to a

A regulatory regime. There is a wide range of private activity which is subject to regulatory regimes: see *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan* [1993] 1 WLR 909.

Regulation must be distinguished from control: regulation goes to how you do what you choose to do; control dictates what you do. There is no analogy between care services and the National Health Service, which is B clearly public. The latter is a state service, delegated to individual practitioners who make medical care decisions about an individual on behalf of the state. NHS doctors are not merely regulated as professionals; their activities are directly controlled in a number of respects.

Under Strasbourg jurisprudence, the United Kingdom's positive obligation is expressly limited to securing the provision of accommodation C and care. The state is not required to provide it. If a care home withdraws accommodation the obligation on the local authority is to arrange new accommodation. The United Kingdom Government would not be answerable at Strasbourg for the failure to require the private operator to continue the service.

There is no simple formula to govern every function. To take D responsibility for ensuring that provision is made for those dependent on public services and to fund that provision are public functions but to make that provision is essentially private. The "tipping point" between public and private is where the provision crosses over into an act being done for or to an individual. By analogy, an authority may undertake the public function of securing housing for a person but when it is taken up the tenant enters into a private law tenancy agreement.

E Residents of care homes are already protected by the regulatory framework provided by the Care Standards Act 2000 and the Care Homes Regulations 2001. Where a local authority has arranged accommodation for a person in a care home, the authority remains liable to that person for the discharge of its duties under section 21. The inability of the person to assert Convention rights against the care home does not amount to a F "protection gap". In the case of the proposed closure of a home, the care home could not be ordered to remain open whereas a local authority can be ordered to take action to keep it open under community care legislation. If an individual resident is threatened with eviction a publicly-placed resident is in no worse position than a private resident and, as in the instant case, the placing agreement between the care home, local authority and primary care trust will provide that the home may only give notice for a good reason the G validity of which can be tested in court. As to non-eviction issues, the resident has the protection of both the 2001 Regulations and the criminal law. The duty of the care home is to provide a system of good care. The duty of the local authority is to place a person where there is such a system.

Beverley Lang QC and *Ivan Hare* for the company. Section 6 of the Human Rights Act 1998 seeks to provide a domestic remedy for a breach of H the Convention where a remedy would be available in the European Court of Human Rights: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 33–34 and *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, para 29. The principal purpose of the Convention is to protect the rights of private

individuals from violations by the state, not private bodies: see article 34 of the Convention, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 46 and *Mykhaylenky v Ukraine* Reports of Judgments and Decisions 2004-XII, p 153, paras 41–44.

The section 6 distinction between "core" and "functional" bodies is a device to capture within the scope of section 6(1) all those bodies carrying out functions of government which would engage the responsibility of the United Kingdom in Strasbourg. Where the Convention does impose a positive obligation on the state to take action to protect Convention rights, the state may be required to regulate relations between private individuals. Typically, the obligation will be to provide adequate procedures, remedies and safeguards against infringements of rights under domestic civil and criminal law. However, in such cases the state is not directly liable for the actions of private individuals, nor does the Convention impose any liability on private individuals or treat them as bodies exercising public functions: see *X and Y v The Netherlands* (1985) 8 EHRR 235; *Z v United Kingdom* (2001) 34 EHRR 97; *Storck v Germany* (2005) 43 EHRR 96 and *A v United Kingdom* (1998) 27 EHRR 611. Thus a private school is not a public authority under section 6: see *Costello-Roberts v United Kingdom* 19 EHRR 112; *R v Muntham House School, Ex p R* [2000] LGR 255 and *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, paras 59–60.

In the present case the care home is a private company carrying out private commercial functions. The relationship between it and the local authority (and that between the care home and resident) is governed by private law contract, not by statute. Under domestic law it cannot be required to provide accommodation for the claimant even if a court concludes that it is in her best interests to reside in that particular home: see *A v A Health Authority* [2002] Fam 213, para 53. Nor is it amenable to judicial review, as it is not a public body: see *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55. The position of the care home is different from that of a privately run mental hospital or prison which is exercising coercive powers on behalf of the state: see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610, paras 17 and 25.

The only "public" feature is the status and function of the council in discharging its section 21 duty. Because of its continuing responsibility under section 21 the resident has a direct claim under the 1998 Act against the council for any breaches of article 8 of the Convention.

Rabinder Singh QC, David Wolfe and *Samantha Knights* for Help the Aged and the National Council on Ageing intervening by written submissions. When considering whether bodies fall within section 6(3)(b) of the 1998 Act the correct test is to focus on the character of the function in question, not the character of the person or organisation performing it. The Strasbourg jurisprudence is of limited assistance as the European court is primarily concerned with state obligations and liability rather than deciding whether liability falls on a body performing state functions in a domestic setting. There is nothing to prevent contracting states from making the Convention rights applicable to a wider range of bodies than would constitute the "state" as respondent in Strasbourg.

A Section 6(3)(b) should be interpreted so as to bring the residential care sector within its reach. The use of contracts between local authorities and care homes is not sufficient to secure compliance with the Convention. The residents for whose benefit the contract will be drawn up are unlikely to be able to participate in the negotiation process leading up to the contract and will not be sufficiently aware of their legal rights or be in a sufficiently strong bargaining position to ensure that those rights are adequately incorporated. B Standard form contracts may be made subject to exemptions or limitations, thus resulting in differing degrees of protection. Local authorities are not under any legal obligation to include Convention rights protection into contracts and, even if included, a third party may not be able to enforce it: see section 1(2) of the Contracts (Rights of Third Parties) Act 1999.

It is anomalous that persons detained by compulsory powers are C protected by the 1998 Act (see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 and *HL v United Kingdom* (2004) 40 EHRR 761) while older people in residential care homes are not. Older people are a group which is particularly vulnerable and in need of protection.

Robin Allen QC and *David Wolfe* for the Disability Rights Commission intervening by written submissions. Those residential care homes which D provide accommodation pursuant to arrangements with local authorities under section 26 of the National Assistance Act 1948 should be required to act compatibly with the Convention rights of their residents.

The Commission has a specific statutory role as regulator of the "disability equality duty" placed upon public authorities under the Disability Discrimination Act 1995, as amended by the Disability Discrimination Act 2005. Since the term "public authority" is used in the E 1995 Act, as amended, as a condition for that duty being engaged, an interpretation of that phrase in the 1998 Act which tied the ambit of the term to the state's obligations under the Convention would risk affecting the reach and effect of the disability equality duty. "Public authority" in the 1998 Act must therefore be construed as including obligations imposed by the Convention but not limited by them.

F

Pannick QC in reply. Vulnerable individuals are entitled to effective protection: see *Szula v United Kingdom* (2007) 44 EHRR SE 237 and *Marzari v Italy* (1999) 28 EHRR CD 175. The distinction drawn between a duty to provide and a duty to arrange is unsustainable. Parliament imposed on local authorities a duty to provide accommodation, whether it is done by themselves or through a private body. The fact that the matter being G regulated is of a personal nature is no reason for excluding the Convention; rather, this is the area where the application of Convention rights is often most intense.

Section 6(3)(b) is not confined to cases where there are no other remedies. Its purpose is to set general standards which all public authorities should adhere to whether or not there are any other remedies. In enacting section 6(3)(b) Parliament was primarily concerned about functions which H the state had decided should be performed in the public interest, with the state accepting responsibility (by legislation or some other public instrument such as a Direction) for ensuring that the function was performed, whatever the legal status of the person who performed the function, especially if the function was performed at public expense (even if subject to a means test),

and especially if the function was linked to Convention rights for which the state was answerable. A

The committee took time for consideration.

21 July. **LORD BINGHAM OF CORNHILL**

1 My Lords, the issue in this appeal is whether a care home (such as that run by Southern Cross Healthcare Ltd), when providing accommodation and care to a resident (such as Mrs YL, the appellant), pursuant to arrangements made with a local authority (such as Birmingham City Council) under sections 21 and 26 of the National Assistance Act 1948, is performing "functions of a public nature" for the purposes of section 6(3)(b) of the Human Rights Act 1998 and is thus in that respect a "public authority" obliged to act compatibly with Convention rights under section 6(1) of that Act. B C

2 For reasons more fully given by my noble and learned friend, Baroness Hale of Richmond, with whose opinion I wholly agree, I would answer that question in the affirmative. Despite the contrary opinions of my noble and learned friends, and of the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, I venture to think that the answer to the question is clear. For that reason, and because the issue is an important one, I give my reasons for reaching the conclusion I do. In doing so, I shall take as read, and will not repeat, Baroness Hale's survey of the facts, the legislation, the history and the authorities. D

3 Public authorities in the United Kingdom must not act incompatibly with a Convention right of anyone in the country. That is the effect of sections 6(1) and 1(1) of the Human Rights Act 1998. The same prohibition applies to any body which is not a public authority but certain of whose functions are of a public nature, save in respect of a particular act if the nature of that act is private. That is the effect of section 6(1) of the Act, read with section 6(3)(b), (5). Thus the question to be resolved is whether Southern Cross, as the owners and managers of the registered care home in which Mrs YL is resident, is in material respects exercising functions of a public nature not involving acts of a private nature. E F

4 Section 6 is a provision in a domestic statute, to be construed as such. Its meaning is not to be found in the Convention. The provision is found in a measure intended to give effective domestic protection to Convention rights as defined in and scheduled to the Act. It is accordingly appropriate to give a generously wide scope to the expression "public function" in section 6(3)(b), as Lord Nicholls of Birkenhead observed in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 11. G

5 As Lord Nicholls also observed in the same case, at para 12, there is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so. The draftsman was wise to express himself as he did, and leave it to the courts to decide on the facts of particular cases where the dividing line should be drawn. There are, however, some factors which are likely to be H

A relevant, as Lord Nicholls recognised in para 12 of his opinion in *Aston Cantlow*.

6 It will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function—public or private?—which is decisive under the section.

7 It is also relevant to consider the role and responsibility of the state in relation to the subject matter in question. In some fields the involvement of B the state is long-standing and governmental in a strict sense: one might instance defence or the running of prisons. In other fields, such as sport or the arts, the involvement of the state is more recent and more remote. It is relevant to consider the nature and extent of the public interest in the function in question.

8 It will be relevant to consider the nature and extent of any statutory C power or duty in relation to the function in question. This will throw light on the nature and extent of the state's concern and of the responsibility (if any) undertaken. Conversely, the absence of any statutory intervention will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation.

9 Also relevant will be the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function D in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it. This is an indicator of the state's concern that the function should be performed to an acceptable standard. It also indicates the state's recognition of the importance of the function, and of the harm which may be done if the function is improperly performed.

10 It will be relevant to consider whether the function in question is one E for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. The greater the state's involvement in making payment for the function in question, the greater (other things being equal) is its assumption of responsibility.

11 It will be relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's F Convention right. In some fields, such as sport, the risk of infringing a Convention right might appear to be small; in relation to certain of the arts, the potential impact of article 10, for instance, could obviously be greater.

12 Certain factors are in my opinion likely to be wholly or largely irrelevant to the decision whether a function is of a public nature. Thus it will not ordinarily matter whether the body in question is amenable to G judicial review. Section 6(3)(b) extends the definition of public authority to cover bodies which are not public authorities but certain of whose functions are of a public nature, and it is therefore likely to include bodies which are not amenable to judicial review. In considering whether private body A is carrying out a function of a public nature, it is not likely to be relevant that public body B is potentially liable for breach of an individual's Convention right. The effect of the Act may be that both A and B are liable. It will in my H opinion be irrelevant whether an act complained of as a breach of a Convention right is likely to be criminal or tortious: the most gross breaches of the Convention—the improper taking of life, inhumane treatment, unjustified deprivation of liberty—will ordinarily be both criminal and tortious.

13 It is necessary to stress that no summary of factors likely to be relevant or irrelevant can be comprehensive or exhaustive. The present question may arise in widely varying contexts and on widely varying facts. Other factors may then call for consideration.

14 The nature of the function with which this case is concerned is not in doubt. It is not the mere provision of residential accommodation but the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

15 Historically, the attitude of the state towards the poor, the elderly and the incapable has not been uniformly benign. But for the past 60 years or so it has been recognised as the ultimate responsibility of the state to ensure that those described in the last paragraph are accommodated and looked after through the agency of the state and at its expense if no other source of accommodation and care and no other source of funding is available. This is not a point which admits of much elaboration. That the British state has accepted a social welfare responsibility in this regard in the last resort can hardly be a matter of debate.

16 Sections 21 and 26 of the National Assistance Act 1948 confer statutory powers and impose a statutory duty. The duty is imposed on the relevant local authority. It may be discharged by arranging for the provision of residential care in a home run by itself, or by another local authority, or by a voluntary organisation (such as the Leonard Cheshire Foundation) or by a private provider such as Southern Cross. These are alternative means by which the responsibility of the state may be discharged. Counsel for the Birmingham City Council laid great emphasis on the fact that its duty under the Act is to arrange and not to provide. This is correct, but not in my view significant. The intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant. By one means or another the function of providing residential care is one which must be performed. For this reason also the detailed contractual arrangements between Birmingham, Southern Cross and Mrs YL and her daughter are a matter of little or no moment.

17 The provision of residential care is the subject of very detailed control by statute, regulation and official guidance, and criminal sanctions apply to many breaches of the prescribed standards. Little is left to chance, or the judgment of the particular provider.

18 Some of those for whom residential care is provided pursuant to sections 21 and 26 of the 1948 Act pay the full cost of the service they receive. A majority are subsidised to a greater or lesser extent out of public funds. No difference of legal principle depends on the group to which a particular resident, if accommodated and cared for pursuant to sections 21 and 26, belongs. The significant thing is that the state is willing to apply public funds to support those falling within sections 21 and 26 if, and to the extent that, they cannot pay for themselves, rather than leave them unaccommodated and uncared for. Those who need residential care but are able (through themselves or their families or other agents) to arrange it and pay for it fall into a different category, altogether outside sections 21 and 26. It is indicative of a function being public that the public are, if need be, bound to pay for it to be performed.

A 19 Those who qualify for residential care under sections 21 and 26 are, beyond argument, a very vulnerable section of the community. With children, mental patients and prisoners they are among the most vulnerable. Despite the intensive regulation to which care homes are subject, it is not unknown that senile and helpless residents of such homes are subjected to treatment which may threaten their survival, may amount to inhumane treatment, may deprive them unjustifiably of their liberty and may seriously B and unnecessarily infringe their personal autonomy and family relationships. These risks would have been well understood by Parliament when it passed the 1998 Act. If, as may be confidently asserted, Parliament intended the Act to offer substantial protection of the important values expressed in the articles of the Convention given domestic effect by the 1998 Act, it can scarcely have supposed that residents of privately run care homes, C placed in such homes pursuant to sections 21 and 26 of the 1948 Act, would be unprotected.

20 When the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind. The performance by private D body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace. It is, in my opinion, this case.

LORD SCOTT OF FOSCOTE

21 My Lords, the opinions on this appeal prepared by my noble and E learned friends, Baroness Hale of Richmond, Lord Mance and Lord Neuberger of Abbotsbury, which I have had the advantage of reading in draft, have described the facts that have given rise to this appeal and have lucidly explained the fairly complex statutory background applicable to the management of privately owned care homes and to the use of them made by local authorities pursuant to their statutory duties and responsibilities under the National Assistance Act 1948. I gratefully adopt, and hope not to repeat F unnecessarily, my noble and learned friends' exposition.

22 The issue which your Lordships must decide, as expressed in para 18 of the order of Ryder J of 12 September 2006, is whether the second respondent, Southern Cross Healthcare Ltd ("Southern Cross"), "in providing care and accommodation for YL [the appellant] is exercising a public function for the purposes of section 6(3)(b) of the Human Rights Act G 1998". Bennett J held, on 5 October 2006, that it was not. The Court of Appeal, on 30 January 2007, agreed [2008] QB 1. But these decisions are challenged before the House by YL, supported by the Secretary of State for Constitutional Affairs and by Justice, Liberty, the British Institute of Human Rights, Help the Aged and Age Concern England, each an independent body. It is convenient to refer, briefly, to the statutory and factual background to the formulation of this preliminary issue.

H 23 The Human Rights Act 1998 incorporated into our domestic law the rights referred to in a number of specified articles of the European Convention on Human Rights. Section 6(1) of the Act said that "it [was] unlawful for a public authority to act in a way which [was] incompatible with . . ." any of these rights. The section did not contain any

comprehensive definition of "public authority" but subsection (3)(b) said that a "public authority" included "any person certain of whose functions are functions of a public nature". However subsection (5) said that: "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." The effect of all this is that an act (or an omission) of a private person or company that is incompatible with a Convention right is not unlawful under the 1998 Act (it may, of course, be unlawful under ordinary domestic law) unless the person or company has at least some "functions of a public nature"; but even if that condition is satisfied the private person or company will not have any liability under the 1998 Act if the nature of the act complained of was private.

24 YL became a resident in one of Southern Cross' care homes on 3 January 2006. She became a resident under the terms of an agreement with Southern Cross signed on 20 February 2006. The agreement was signed on YL's behalf by her daughter. By a letter of 21 June 2006 Southern Cross gave the daughter 28 days' notice to terminate YL's right to remain in the care home. The agreement allowed Southern Cross to give four weeks' notice of termination but a contractual undertaking had been given by Southern Cross to Birmingham City Council ("the council") that notice of termination would be given "only for a good reason". There are unresolved issues as to whether Southern Cross did have "a good reason". YL contends that the notice given by Southern Cross was incompatible with her right under article 8 of the Convention to respect for her home and was unlawful under section 6(1) of the 1998 Act. Hence the preliminary issue directed by Ryder J to be tried.

25 The reason why I have referred to this statutory and factual background is that there are, in my opinion, two issues for your Lordships to consider; first, whether, for subsection (3)(b) purposes Southern Cross has functions of a "public nature", and, second, whether Southern Cross's act in serving notice to terminate its agreement with YL was an act the nature of which, for subsection (5) purposes, was "private".

26 My Lords, on both the issues to which I have referred I have reached the same conclusion for much the same reasons as my noble and learned friends, Lord Mance and Lord Neuberger. To express in summary terms my reason for so concluding, Southern Cross is a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses (subject, of course, to anti-discrimination legislation which affects everyone who offers a service to the public) and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.

27 A number of the features which have been relied on by YL and the intervenors seems to me to carry little weight. It is said, correctly, that most of the residents in the Southern Cross care homes, including YL, are placed there by local authorities pursuant to their statutory duty under section 21 of the 1948 Act and that their fees are, either wholly or partly, paid by the local authorities or, where special nursing is required, by health authorities. But the fees charged by Southern Cross and paid by local or health authorities

A are charged and paid for a service. There is no element whatever of subsidy from public funds. It is a misuse of language and misleading to describe Southern Cross as publicly funded. If an outside private contractor is engaged on ordinary commercial terms to provide the cleaning services, or the catering and cooking services, or any other essential services at a local authority owned care home, it seems to me absurd to suggest that the private contractor, in earning its commercial fee for its business services, is publicly B funded or is carrying on a function of a public nature. It is simply carrying on its private business with a customer who happens to be a public authority. The owner of a private care home taking local authority funded residents is in no different position. It is simply providing a service or services for which it charges a commercial fee.

28 The position might be different if the managers of privately owned C care homes enjoyed special statutory powers over residents entitling them to restrain them or to discipline them in some way or to confine them to their rooms or to the care home premises. The managers do, of course, have private law duties of care to all their residents and these duties of care may sometimes require, for the protection of a resident, or of fellow residents, from harm, the exercise of a degree of control over the resident that might in other circumstances be tortious. When the Mental Capacity Act 2005 comes D into force acts of that sort, in relation to persons who lack mental capacity, may attract a statutory defence to any civil action (see sections 5 and 6 of the Act). This, however, really does no more than place common law defences of self-defence or necessity on a statutory basis and does not, in my opinion, advance any argument about the "public nature" of the function being carried on by care homes.

E 29 An argument heavily relied on in support of the appeal has been a comparison of the management of a local authority care home with the management of a privately owned care home. There is no relevant difference, it is pointed out, between the activities of a local authority in managing its own care homes and those of the managers of privately owned care homes. The function of the local authority is unquestionably a function of a public nature, so how, at least in relation to residents the charges for F whom are being paid by the local authority, can the nature of the function of the managers of a privately owned care home be held to be different? So the argument goes. There are, in my opinion, very clear and fundamental differences. The local authority's activities are carried out pursuant to statutory duties and responsibilities imposed by public law. The costs of doing so are met by public funds, subject to the possibility of a means tested G recovery from the resident. In the case of a privately owned care home the manager's duties to its residents are, whether contractual or tortious, duties governed by private law. In relation to those residents who are publicly funded, the local and health authorities become liable to pay charges agreed under private law contracts and for the recovery of which the care home has private law remedies. The recovery by the local authority of a means tested contribution from the resident is a matter of public law but is no concern of H the care home.

30 As it seems to me, the argument based on the alleged similarity of the nature of the function carried on by a local authority in running its own care home and that of a private person running a privately owned care home proves too much. If every contracting out by a local authority of a function

that the local authority could, in exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes, where does this end? Is a contractor engaged by a local authority to provide lifeguard personnel at the municipal swimming pool a section 6(3)(b) public authority? If so, would a local authority employee engaged by the local authority as a lifeguard at the pool become a public authority? Could it be argued that his or her function was a function of a public nature? If Southern Cross is a section 6(3)(b) public authority, why does it not follow that each manager of each Southern Cross care home, and even each nurse or care worker at each care home would, by reason of his or her function at the care home, be a section 6(3)(b) public authority?

31 These examples illustrate, I think, that it cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those activities. A local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations. The nature of the function of privately owned care homes, such as those owned by Southern Cross, no different for section 6 purposes from that of ordinary privately owned schools or privately owned hospitals (nb some schools and hospitals may have special statutory powers over some pupils and patients e g reformatories in the olden days and mental hospitals these days), seems to me essentially different from that of local authority care homes.

32 It has been suggested that vulnerable elderly residents in care homes are in need of the extra protection that potential liability of private care home managers under section 6 of the 1998 Act would provide, and that section 6(3)(b) should be given a wide and generous construction accordingly. There is nothing, in my opinion, in this suggestion. It is common ground that it is a responsibility of government and, through government, of local authorities to establish a regulatory framework to provide legal remedies to those in care homes whose rights under the Convention might be breached by those in charge of them (see the cases cited by Lord Mance in paras 93 and 94 of his opinion). This regulatory framework is in place. A feature, or consequence, of it is that an obligation by Southern Cross to observe the Convention rights of residents is an express term of the agreement between the council and Southern Cross and is incorporated into the agreement between Southern Cross and YL. Any breach by Southern Cross of YL's Convention rights would give YL a cause of action for breach of contract under ordinary domestic law. No one has suggested that the contractual arrangements between the council and Southern Cross and between Southern Cross and YL are not typical. There is, in my opinion, no need to depart from the ordinary meaning of "functions of a public nature" in order to provide extra protection to YL and those like her. I would add that the ability of an inmate in a care home to challenge on article 8 grounds the efficacy of a notice to quit that was otherwise contractually effective would be subject to the same considerations that were explored and ruled upon by this House in *Kay v Lambeth London Borough Council* [2006] 2 AC 465.

A 33 For the reasons I have given I am unable to conclude that Southern Cross, in managing its care homes, is carrying on a function of a "public nature" for section 6(3)(b) purposes, whether the contractual charges are payable in respect of residents who are privately funded or are met out of public funds.

34 As to the act of Southern Cross that gave rise to this litigation, namely, the service of a notice terminating the agreement under which B YL was contractually entitled to remain in the care home, the notice was served in purported reliance on a contractual provision in a private law agreement. It affected no one but the parties to the agreement. I do not see how its nature could be thought to be anything other than private. In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 (referred to by Lord Mance in para 87 of his opinion) the C act, or acts, of the parochial church council ("PCC") held by the House to be private in nature were the steps taken to recover from private individuals the cost of repair to the chancel of the parish church. Lord Nicholls of Birkenhead accepted that to some extent the state of repair of the church building affected rights of the public but said that a contract by the PCC with a builder could hardly be regarded as a public act: para 16. Lord Hope of D Craighead, explaining why the nature of the acts of the PCC were private, said that the liability of the defendants, lay rectors, to repair the chancel arose as a matter of private law: para 63. He went on, at para 64: "The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt" Lord Hope's emphasis was on the private law nature of the obligations sought to be enforced by the PCC. So here, the notice served by Southern Cross, whether E rightly or wrongly served, falls, in my opinion, to be tested by reference to YL's rights and Southern Cross's obligations under the agreement between them; by reference, that is to say, to private law. It was, in my opinion, an act the nature of which, for section 6(5) purposes, was private.

35 For these reasons, supplemental to those of my noble and learned friends, Lord Mance and Lord Neuberger, with which I am in full F agreement, I would dismiss this appeal.

BARONESS HALE OF RICHMOND

36 My Lords, many services which used to be provided by agencies of the state are now provided, not by employees of central or local government, but by voluntary organisations or private enterprise under contract with central or local government. The issue before us is of great importance, both G to the many hundreds of thousands of clients of those services and to the organisations and businesses which provide them. To what extent, if at all, are they covered by the Human Rights Act 1998?

37 Under section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. "Public authority" is nowhere exhaustively defined, but by section 6(3)(b) it includes "any person certain of whose functions are functions of a public nature". H However, in relation to any particular act, section 6(5) provides that "a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". The broad shape of the section is clear. "Core" public authorities, which are wholly "public" in their nature, have to act compatibly with the Convention in everything they do. Other bodies, only

certain of whose functions are "of a public nature" have to act compatibly with the Convention, unless the nature of the particular act complained of is private. The law is easy to state but difficult to apply in individual cases such as this.

The facts

38 The appellant is an 84-year-old woman with Alzheimer's disease. She and her family have lived in the area governed by Birmingham City Council ("the council") for many years. Since January 2006 she has been living in a nursing home owned and run by the second respondent ("the company"), a limited company which provides approximately 29,000 care home beds in the United Kingdom. Of these approximately 80% are funded by local authorities. When these proceedings began, 60 of the 72 residents in the appellant's home, including the appellant, were funded by local authorities and 12 paid privately.

39 The company has a contract with the council ("the service provision contract"). Under this, the company undertakes to provide accommodation for the residents placed with them by the council in accordance with the terms of the agreement and of the council's care plan for each individual resident. In return, the council agrees to pay the "SSD price" for each "SSD resident" (SSD stands for Social Services Department). In addition to residential care, the company also undertakes to provide the appropriate level of nursing care assessed to be needed for each resident, and the local NHS primary care trust agrees to pay for this.

40 Among the many detailed provisions about the standards of service to be provided are two of particular relevance to this case. Under clause 24.7.2, the service provider may only give notice of termination of a placement "for a good reason". And under clause 55.1:

> "The service provider shall and shall ensure that its employees agents and officers shall at all times act in a way which is compatible with the Convention rights within the meaning of section 1 of the Human Rights Act 1998."

41 The recitals to the agreement refer to the statutory duty of the council "to make arrangements for providing residential accommodation for persons in need of care and attention which is not otherwise available to them pursuant to section 21 of the National Assistance Act 1948" (clause 4.1) and to the duty of the primary care trust "to assess and provide for the registered nursing care needs of the SSD residents who are resident at the care home, pursuant to the directions and guidance" of the Secretary of State: clause 4.3. I shall return to the statutory framework in due course.

42 For each SSD resident there is also a care home placement agreement, made between the council, the company and the resident (or someone acting on her behalf). This is expressly subject to and includes the specification and conditions of the current service provision contract between the council and the company. The company agrees to provide a service to the resident in accordance with that contract and with the individual resident's care plan. The resident agrees to pay direct to the council (unless directed otherwise) whatever sums the council has determined should be paid by the resident. The council undertakes to meet

A its obligations under the service provision contract, which expressly include arranging assessments and formal reviews of the resident's needs.

43 Coupled with the placement agreement there may also be a third party funding agreement. Under this a third party (usually a relative) agrees to pay a weekly "top up" amount "because the home chosen has a fee which is greater than the council would usually expect to pay". In this case, the appellant's daughter agreed to pay an extra £35 per week, on top of the B SSD price. The NHS contribution to the costs of nursing care was assessed at £129 per week.

44 In addition to the placement agreement, there is an agreement between the company, the council, the resident and the resident's receiver detailing, among other things, the specific accommodation and services to be provided and the payment arrangements. This agreement is to continue in C force until terminated by the death of the resident or by four weeks' notice in writing: clause 7.1. The company undertakes that it will "normally" only give notice if the fees are not promptly paid, the home is no longer able to meet the resident's needs, or the company "considers the circumstances or behaviour of the resident to be seriously detrimental to the home or the welfare of other residents": clause 7.2.

D **45** On 21 June 2006, the company wrote to the appellant's daughter stating that "in light of the continuing and irreconcilable breakdown in relationship between yourself and the home management and staff I am writing to formally give 28 days' written notice regarding your mother". This was prompted by concerns, which are disputed, about the appellant's husband's behaviour towards the appellant and her daughter's behaviour towards staff. When it became apparent that the company intended to serve E a formal notice to quit, the Official Solicitor launched proceedings on the appellant's behalf under the jurisdiction of the Family Division of the High Court to make declarations as to the best interests of people who are unable to take decisions for themselves.

46 Among the declarations sought was a declaration that the company, in providing accommodation and care for the appellant, was exercising public functions for the purpose of section 6 of the 1998 Act. F Ryder J ordered that this be tried as a preliminary issue. Both the High Court [2006] EWHC 2681 (Fam) and the Court of Appeal [2008] QB 1 decided this issue against the appellant, following the previous decision of the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. Recognising the importance of the point, which has attracted considerable academic comment, the Court of Appeal gave leave to appeal G to this House.

47 Happily, following the first hearing in the Family Division, the council agreed to fund supervised contact between the appellant, her daughter and husband. The company has since withdrawn the request to remove the appellant from the home. The parties are now in discussions about arrangements for unsupervised visits. This is welcome, because a H consultant in the psychiatry of old age has reported that the appellant would certainly deteriorate clinically if she had to transfer to an unfamiliar care setting. It is also likely that any new care setting would be further away from her family home, making visiting more difficult for her 83-year-old husband, who visits her every day. He therefore has an independent interest in his own human rights in these proceedings.

48 It is to be hoped, therefore, that the future of this appellant is now more secure. The issue remains of great importance for the many thousands of other "SSD residents" who are looked after in care homes run by private companies or voluntary organisations.

The statutory framework

49 The National Assistance Act 1948 was part of the package of measures which created the modern welfare state. It stood alongside the Children Act 1948, which is the origin of our modern child care services, the National Insurance Act 1946, which laid the foundations of the modern social security system, and the National Health Service Act 1946, which created the National Health Service. The Education Act 1944 had already led the way in the fight against what Sir William Beveridge had called the "five giants on the road of reconstruction"—Want, Disease, Ignorance, Squalor and Idleness: "Social Insurance and Allied Services" (1942) (Cmd 6404), para 8. The education and health services were universal, in the sense that they were available to all, and originally without any charge, irrespective of ability to pay. But people who could afford to do so remained, and still remain, free to make their own arrangements if they wish. The social services were more limited, in that it was expected that families would continue to look after their children and their elderly or disabled relatives. But the social services were there to provide a safety net for those whose families could not look after them and from the start people were expected to pay what they could afford for the accommodation with which they or their children were provided. Once again, of course, there was nothing to prevent those with the means to do so from making their own arrangements.

50 Section 21(1)(a) of the National Assistance Act 1948 originally required each local authority to provide "residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them". Accommodation could be provided either in homes owned and run by the authority, or by another local authority (section 21(4)), or by a voluntary organisation (section 26), but not by private persons. Residents were required to pay for their local authority accommodation according to their ability to pay: section 22. Where accommodation was arranged with a voluntary organisation, the local authority was liable to pay for it and could then recoup a means-tested contribution from the resident: section 26(2)(3). Schemes were later replaced with ministerial approval and directions (section 195(3) of the Local Government Act 1972) and the relevant words of section 21(1) amended to read " a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing . . .": section 195(6) of, and para 2(1) of Schedule 23 to, the 1972 Act. Ministerial directions required that provision be made for people ordinarily resident in the area: DHSS Local Authority Circular 13/74.

51 But supply was never able to match demand. Many older people were accommodated in private residential homes but paid for by the state, through the means tested benefits system rather than by local authorities. This was widely regarded as inefficient and expensive, because there was no professional assessment of whether the resident really needed this expensive

A form of care, rather than to be helped to remain in her own home, nor was there any systematic control of the cost: see Audit Commission, "Making a Reality of Community Care" (1986) and Griffiths, "Community Care: Agenda for Action: A Report to The Secretary of State for Social Services" (1988). The result was Part III of the National Health Service and Community Care Act 1990. Under this, each local authority must prepare and publish a strategic plan for the provision of community care services in B their area: section 46. They were instructed to develop a "mixed economy of care" making use of voluntary, not for profit and private providers whenever this was most cost-effective. They were to move away from the role of exclusive service provider and into the role of service arranger and procurer: Department of Health "Caring for People: Community Care in the Next Decade and Beyond" (1989) (Cm 849). To this end, section 26 C of the 1948 Act was amended to allow them to place residents with private providers as well as with voluntary organisations. The charging arrangements remained broadly the same, primary liability remaining with the local authority.

52 At the same time, local authorities were placed under a duty to carry out an assessment of the need for community care services of any person who might be in need of them (section 47(1)(a) of the 1990 Act) and then to D decide whether those needs called for the provision by them of any such services: section 47(1)(b). "Community care services" include arranging or providing accommodation under section 21(1) of the 1948 Act: section 46(3). If the person may also need health care under the National Health Service Act 1977, the local authority must invite the relevant health body to assist in the assessment. A large slice of the social security budget E was transferred to local authorities to enable them to meet these new responsibilities.

53 The appellant's case was a good example of how the system is supposed to work. She was first assessed as needing residential care in January 2005, but the family decided to continue looking after her at home with the help of social services. But eventually her health deteriorated to the extent that they could no longer do so. The local authority arranged the F placement with the care home provider and undertook to meet the charges under the tripartite contractual arrangements described above. The local authority has a continuing duty of assessment and remains responsible for the resident's welfare. The local NHS primary care trust assessed her health care needs, and found them to be in the high band, entitling her to a weekly contribution towards the nursing component in her care. This is paid direct G to the nursing home and will reduce the amount which the local authority would otherwise have to pay. The NHS contribution would also go to reduce the fees payable by a purely private resident for whom otherwise the contractual arrangements are quite different.

The Human Rights Act 1998

H 54 The purpose of the 1998 Act, as has so often been said, was to ensure that people whose rights under the European Convention on Human Rights had been violated would have an effective domestic remedy in the courts of this country, as required by article 13 of the Convention, and would not have to seek redress in the European Court of Human Rights in Strasbourg. In the Labour party's consultation paper "Bringing Rights Home: Labour's Plans

to Incorporate the European Convention on Human Rights into United Kingdom Law" (1996), by Jack Straw and Paul Boateng, it was said that: A

> "We take the view that the central purpose of the ECHR is to protect the individual against the misuse of power by the state. The Convention imposes obligations on states, not individuals, and it cannot be relied upon to bring a case against private persons. For this reason we consider that it should apply only to public authorities—government departments, B executive agencies, quangos, local authorities and other public services. An appropriate definition would be included in the new legislation and this might be framed in terms of bodies performing a public function. We would welcome views on this."

The Government's white paper "Rights Brought Home: The Human Rights Bill" (1997) (Cm 3782) explained the resulting clause in the Bill thus: C

> "The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of D activity which were previously within the public sector, such as privatised utilities." (Para 2.2.)

It is also worthwhile quoting the explanation given by the then Home Secretary, Mr Jack Straw, at the second reading of the Bill in the House of Commons (Hansard (HC Debates) 16 February 1998, col 773):

> E "Under the Convention, the Government are answerable in Strasbourg for any acts or omissions of the state about which an individual has a complaint under the Convention. The Government have a direct responsibility for core bodies, such as central government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge upon private individuals. The Bill had to have a definition of a public authority that went at least as wide F and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities."

55 Two points emerge clearly from these extracts. One is that it was envisaged that purely private bodies which were providing services which G had previously been provided by the state would be covered. The second is that the Government were anxious that any acts for which the United Kingdom might later be held responsible in Strasbourg would be covered by the domestic remedies. Hence the definition would go "at least as wide" as that.

56 Strasbourg case law shows that there are several bases upon which a H state may have to take responsibility for the acts of a private body. The state may have delegated or relied upon the private body to fulfil its own obligations under the Convention: as in *Van der Mussele v Belgium* (1983) 6 EHRR 163, in which the provision of legal aid was delegated to the Belgian bar which required young advocates to provide their services pro

A bono; or, perhaps, in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 where the fact that education is itself a Convention right was influential in engaging the state's responsibility for corporal punishment in private schools. The state may have delegated some other function which is clearly a function of the state to a private body: as in *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005, where the Polish Government delegated to a private body the task of allocating compensation received B from the German Government after World War II. The state may itself have assisted in the violation of Convention rights by a private body: as in *Storck v Germany* (2005) 43 EHRR 96, where the police had assisted in the illegal detention of a young woman in a private psychiatric hospital by taking her back when she ran away.

57 Above all, the state has positive obligations under many articles of C the Convention to take steps to prevent violations of an individual's human rights. These include taking general steps, such as enacting laws to punish and deter such violations: as in *X and Y v The Netherlands* (1985) 8 EHRR 235, where Dutch law did not afford an effective remedy to a mentally disabled girl who had been raped by a relative of the directress of the care home where she lived. They also include making effective use of the steps D which the law provides: as in *Z v United Kingdom* (2001) 34 EHRR 97, in which a local social services authority did not use its powers to protect children whom they knew to be at risk of serious abuse and neglect.

58 Positive obligations arise under each of the articles most likely to be invoked by residents in care homes. Article 3 may afford them protection against inhuman and degrading treatment. Article 8 may afford protection against intrusions into their privacy, restrictions on their contacts with E family and the outside world, and arbitrary removal from their home. Article 5 may afford protection against deprivation of liberty. Regrettably, examples abound in the literature (I hasten to add, none of it with reference to the company involved in this case) of care homes where acts which might well amount to breaches of articles 3 or 8 are commonplace but might not amount to the criminal offence of ill-treatment or neglect. The following F example is taken from Jenny Watson "Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission" (2002) (British Institute of Human Rights):

> "An agency worker told us about going into a residential care home for older people at breakfast time. She was instructed to get the residents up and onto their commode. She was then told to feed them breakfast. G When she started to get the residents off their commodes first she was stopped. The routine of the home was that residents ate their breakfast while sitting on the commode and the ordinary men and women who worked there had come to accept this as normal."

59 Happily, there is now evidence in the literature that invoking human rights values in support of residents has produced change. The following H example comes from Sonya Sceats "The Human Rights Act—Changing Lives" (2007) (British Institute of Human Rights):

> "A learning disabled man in a care home became very anxious about bathing after slipping in the bath and injuring himself. Afterwards, in order to reassure him and build his confidence once again, a carer, usually

female, would sit in the room with him as he bathed. His female carers felt uncomfortable with the arrangement . . . A discussion of the human rights principle of dignity had served as a 'trigger' for [one carer] and together with co-workers she was able to develop solutions that would both protect the man's dignity, whilst also providing him with the support he needed."

A

60 There is, of course, a difference between the negative obligation of the state to refrain from violating an individual's rights and the positive obligation of the state to protect an individual from the violations of others. But *Storck v Germany* 43 EHRR 96 is a good example of the willingness of the Strasbourg court to find several reasons for holding a state responsible for violations caused by private bodies. The most effective way for the United Kingdom to fulfil its positive obligation to protect individuals against violations of their rights is to give them a remedy against the violator.

B

C

Functions of a public nature

61 This is a domestic law concept which has no parallel in the Convention jurisprudence although the extracts quoted above give some indication of why it is in the Act. It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b). *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing.

D

62 The contrast is drawn in the Act between "public" functions and "private" acts. This cannot refer to whether or not the acts are performed in public or in private. There are many acts performed in public (such as singing in the street) which have nothing to do with public functions. And there are many acts performed in private which are nevertheless in the exercise of public functions (such as the care of prisoners or compulsory psychiatric patients). The contrast is between what is "public" in the sense of being done for or by or on behalf of the people as a whole and what is "private" in the sense of being done for one's own purposes.

E

F

63 Hence it is common ground that "functions of a public nature" include the exercise of the regulatory or coercive powers of the state. Thus, were a public authority to have power to delegate the task of regulating care homes to a private body, that regulation would be a function of a public nature. Again, it is common ground that privately run prisons perform functions of a public nature. In a similar category are private psychiatric hospitals when exercising their powers of compulsory detention under the Mental Health Act 1983: see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610, 2619. This is so, even though the power to detain rests with the hospital managers rather than with a state body by whom it has been delegated.

G

H

64 The respondents argue that the concept should go no further than this. The appellants, with the support of all the interveners including the Secretary of State for Constitutional Affairs, would go further. As Lord Nicholls of Birkenhead pointed out in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 555,

A para 10 "the phrase used in the Act is public function, not governmental function". He went on, in paras 11 and 12:

> "11. . . . Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when B necessary.
>
> "12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these function are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, C or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

65 Those factors tell heavily in favour of section 6(3)(b) applying to this case. While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public D expense if need be, and in the public interest.

66 One important factor is whether the state has assumed responsibility for seeing that this task is performed. In this case, there can be no doubt that the state has undertaken the responsibility of securing that the assessed community care needs of the people to whom section 21(1)(a) of the National Assistance Act 1948 applies are met. In the modern "mixed E economy of care", those needs may be met in a number of ways. But it is artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them, when the state has assumed responsibility for seeing that both are done.

67 Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people F who are unable to look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly. They must be provided with the specialist care, including the health care, that they need even if they are unable to arrange or pay for it themselves. No-one can doubt that providing health care can be a public function, even though it can also be provided purely privately. This home was providing health care by G arrangement with the National Health Service as well as social care by arrangement with the local social services authority. It cannot be doubted that the provision of health care was a public function.

68 Another important factor is public funding. Not everything for which the state pays is a public function. The supply of goods and ancillary services such as laundry to a care home may well not be a public function. But providing a service to individual members of the public at public expense H is different. These are people for whom the public have assumed responsibility. There may be other residents in the home for whom the public have not assumed responsibility. They may not have a remedy against the home under the Human Rights Act, although there may well be circumstances in which they would. But they will undoubtedly benefit from

the human rights values which must already infuse the home's practices as a result of clause 55.1 of the service provision contract.

69 Another factor is whether the function involves or may involve the use of statutory coercive powers. All in-patients receiving treatment for psychiatric disorder are potentially vulnerable to detention under section 5 of the Mental Health Act 1983. This means that their capacity for self-determination is diminished and their vulnerability to human rights abuses increased even before any compulsory powers are invoked. Currently, the Mental Capacity Act 2005 provides for the restraint of a person who lacks the capacity to decide for herself, but only in that person's best interests and if certain conditions are fulfilled: see sections 5(1), 6(1)–(4). It does not provide for the deprivation of liberty within the meaning of article 5(1) of the Convention, whether or not the defendant is a public authority: see section 6(5).

70 However, the unregulated deprivation of liberty which is frequently practised upon people who lack the capacity to decide for themselves under the common law doctrine of necessity has been held to contravene article 5 of the Convention: see *HL v United Kingdom* (2004) 40 EHRR 761. Given the approach of the Strasbourg court in *Storck v Germany* 43 EHRR 96, it is perhaps unlikely that the United Kingdom would be absolved from responsibility for deprivations of liberty taking place in private care homes. Hence provisions to safeguard incapacitated people who are deprived of their liberty will be inserted into the Mental Capacity Act 2005 by the Mental Health Bill currently going through Parliament. These will apply to residents in care homes as well as in hospital. The use or potential use of statutory coercive powers is a powerful consideration in favour of this being a public function.

71 Finally, then, there is the close connection between this service and the core values underlying the Convention rights and the undoubted risk that rights will be violated unless adequate steps are taken to protect them.

72 The fact that other people are free to make their own private arrangements does not prevent a function which is in fact performed for this person pursuant to statutory arrangements and at public expense from being a function of a public nature. People are free to provide their own transport rather than to use the publicly provided facilities. People are free to arrange their own health care rather than to use the National Health Service. Nor does the fact that people pay for or towards the service they receive necessarily prevent its provision being a function of a public nature. National Health Service dentistry is no less a function of a public nature because those patients who can afford to do so pay for it. I accept that not every function which is performed by a "core" public authority is necessarily a "function of a public nature"; but the fact that a function is or has been performed by a core public authority for the benefit of the public must, as Lord Nicholls pointed out in *Aston Cantlow* [2004] 1 AC 546, para 12, be a relevant consideration.

Conclusion

73 Taken together, these factors lead inexorably to the conclusion that the company, in providing accommodation, health and social care for the appellant, was performing a function of a public nature. This was a function performed for the appellant pursuant to statutory arrangements, at public

A expense and in the public interest. I have no doubt that Parliament intended that it be covered by section 6(3)(b). The Court of Appeal was wrong to reach a different conclusion on indistinguishable facts in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. Furthermore, an act in relation to the person for whom the public function is being put forward cannot be a "private" act for the purpose of section 6(5) (although other acts, B such as ordering supplies, may be). The company is therefore potentially liable to the appellant (as well as to the council) for any breaches of her Convention rights.

74 We have not been concerned with whether her rights have been or might be breached in this case. It is common ground that the company may seek to justify any invasions of her qualified rights. Whether "the rights . . . of others" for this purpose includes the rights of the company itself is a C question for another day. But it is also common ground that the company, being a "non-governmental organisation" for the purpose of article 34 of the Convention, may complain of violations of its own Convention rights, as pointed out by Lord Nicholls in *Aston Cantlow* [2004] 1 AC 546, para 11. Any court would have to strike a fair balance between the competing rights.

75 For these reasons, in amplification of those given by my noble and D learned friend, Lord Bingham of Cornhill, with which I agree, I would allow this appeal and make the declaration sought.

LORD MANCE

Introduction

76 My Lords, does a privately owned, profit-earning care home E providing care and accommodation for a publicly funded resident have "functions of a public nature", and is it therefore a public authority, under section 6(3)(b) of the Human Rights Act 1998? The second respondent, Southern Cross Healthcare Ltd ("Southern Cross") is such a care home. It has some 29,000 beds in the United Kingdom. About 80% of its residents benefit by full or partial local authority funding. The appellant, YL, is 84 years old and suffers from Alzheimer's Disease. She has lived in a F Southern Cross care home since 3 January 2006. Her residence is largely funded by the first respondent, Birmingham City Council ("the council"). It is covered by a "three way" placement agreement signed on 20 February 2006 by Southern Cross as "the provider [homeowner]", the council and the third respondent, OL (YL's daughter), acting on behalf of YL, as well as by a third party funding agreement between the council and OL. Under these G agreements Southern Cross receives a basic fee from the council and a top-up fee from OL. A further tripartite agreement dated 10 March 2006 records that Southern Cross's fee was £478 per week including the top up fee of £35 per week, and that each party [i e the council and YL/OL] "will only be liable for their own agreed proportion".

77 The council in arranging the placement acted pursuant to its duty under section 21 the National Assistance Act 1948. Because Southern H Cross's fee for residence in the care home chosen by or on behalf of YL was greater than the council would usually expect to pay, the council was only obliged to agree to the placement upon a third party (YL or, in this case, OL) agreeing to meet the top up fee: section 54 of the Health and Social Care Act 2001 and regulation 4 the National Assistance (Residential

Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001 (SI 2001/3441). In May 2006 the local primary care trust, South Birmingham NHS, authorised additional higher band nursing care, pursuant to its responsibility under section 3 of the National Health Service Act 1977, and section 49 of the Health and Social Care Act 2001, and an additional weekly figure (around £130) became payable on that account by South Birmingham NHS to Southern Cross. Although in the case of YL Southern Cross thus received fees under three heads from three sources, in the case of other residents and/or care homes fees for care and accommodation could be covered by a simple arrangement between the local authority and the care home. There were also resident in YL's and other care homes a number of "self-funders", that is residents who or whose relatives had arranged their own placement and met their fees themselves.

78 The issue of principle which the House must address is general and continuing, although the particular difficulties which led to this litigation have happily resolved themselves. They arose from allegations (strongly disputed) about the conduct of OL and YL's husband, VL, during visits, followed by a notice given by the care home to OL to have YL moved. In response YL invoked section 6(3)(b) of the 1998 Act and article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms against Southern Cross as well as the council. The potential relevance of the issue is not confined to article 8. If, under section 6(3)(b) of the Act, the Convention applies against Southern Cross, then in other circumstances (not suggested as applicable in this case) other articles of the Convention—such as some or all of articles 3 to 5 and 9 to 11—might apply. Further, if the Convention applies, then relatives such as YL's husband, VL, might in some circumstances be able directly to invoke the Convention (e g under article 8 in respect of the right to visit). However, the domestic case law in this field to date suggests that the main impact of the Convention, if applicable, would be in the area of closure of care homes or termination of residence for other reasons.

79 Whether the Convention applies under section 6(3)(b) does not depend upon whether other common law, statutory or contractual protection anyway exists. But on each side reference has been made to the extensive regulation of care homes, generally under statute and contractually in the case of this particular care home. Under the Care Standards Act 2000 and the Care Homes Regulations 2001 (SI 2001/3965), any care home must establish its fitness and obtain registration from the Commission for Social Care Inspection ("CSCI"). Its operations must comply with substantial and detailed regulations, backed by a procedure for complaints to the CSCI and in many cases by criminal sanctions. Under section 23 of the 2000 Act, the Secretary of State for Health is empowered to prepare and publish statements of national minimum standards. These are to be taken into account by the CSCI in relation to registration and in any proceedings for an offence under the regulations. The third edition of such national minimum standards "Care Homes for Older People" published in February 2003 extends to over 91 pages. Standard 13 requires service users to be able to have visitors of their choice in private at any reasonable time.

80 As to contract, the tripartite placement agreement incorporated (cf the opening paragraph of its introduction and clauses 1 and 2(5)) a set of

A general contractual conditions agreed between the council and Southern Cross. These restricted Southern Cross's right to give notice of termination to circumstances where it had "good reason" (clause 24.7.2). Southern Cross also undertook that its service to residents would comply with the national minimum standards published under section 23 (clause 6.2.1), and that its employees, agents and officers would "at all times act in a way which is compatible with the Convention rights within the meaning of section 1 of B the Human Rights Act 1998" (clause 55.1). That general tort and criminal law would also cover abuse of residents is evident. But, as stated, the issue for decision by the House does not depend upon the existence of protections other than the Convention.

Section 6(1)

C **81** Section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) includes in the concept of a public authority "(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature". But section 6(5) provides that: "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 D private". Thus, the section identifies two types of public authority—"core" public authorities who are to be so regarded in relation to all their functions and "hybrid" persons with functions both of a public and of a private nature who are only to be so regarded when the nature of their particular act under consideration is public rather than private.

The parties' submissions

E **82** The interpretation and application of section 6(3)(b) have been left by Parliament to the courts. A range of approaches to section 6(3)(b) was advocated before the House. Mr Andrew Arden for the council and Miss Beverly Lang for Southern Cross distinguish the council's public law functions in placing and funding YL in the care home from Southern Cross's private law activities under contract in running the care home. In contrast, F Mr David Pannick for YL and Miss Helen Mountfield for OL and VL describe Southern Cross as performing functions of the state, in the form here of the council. Thus, in reply, Mr Pannick suggested that Parliament was in section 6(3)(b):

> "primarily concerned about functions which the state has decided should be performed in the public interest, with the state accepting G responsibility (by legislation or some other public instrument such as a Direction) for ensuring that the function is performed, whatever the legal status of the person who performs the function, especially if the function is performed at public expense (even if subject to a means test), and especially if the function is linked to Convention rights for which the state is answerable."

H Mr Pannick invited the House to confine its attention to care homes. But some consideration of wider implications is necessary. On Mr Pannick's formulation, any contractor agreeing with a governmental authority to supply goods or services, the supply of which fulfils a responsibility incumbent on that authority in the public interest, will itself in that regard be

a public authority. Mr Pannick suggested that section 6(3)(b) would exclude "incidental" services undertaken by private contractors such as window cleaning, but it is not easy to see on what principle, at least if the cleaning was of premises let by the council to its tenants rather than of the council's offices.

83 Mr Philip Sales for the Secretary of State for Constitutional Affairs as intervener was, in contrast, concerned to look more widely. He advances a nuanced, "factor-based" test, with limitation of the application of section 6(3)(b) avowedly in mind. He submits that contracting out by a governmental authority of services involved in a particular function of that authority does not of itself make the contractor a public authority. Other factors have to be examined. In his submission Southern Cross was and is a public authority within section 6(3)(b) because its services discharge the local authority's duty, are publicly funded, are subject to detailed and intensive regulation and are not services which the beneficiaries of the services could provide for themselves, and there is an immediate and direct link between the services and Convention rights, such that state responsibility might be engaged by the manner of their performance.

84 In oral submissions Mr Sales added that, had Southern Cross had coercive powers (e g to detain), that would have been another pointer. In written submissions after the hearing, Mr Sales suggests that this last factor applies to this case in the light of section 22(5)(b) of the Care Standards Act 2000 and regulation 13(7)(8) of the Care Homes Regulations 2001, and will be reinforced when the Mental Capacity Act 2005 come into force. But in my view the former provisions do no more than reflect the common law doctrine of necessity, and anyway only operate in limited circumstances, while the 2005 Act, not yet in force, will apply (expressly) to all carers whether or not they are a public authority, and is neutral. None of these provisions assists analysis of the general activity of providing accommodation and care to care home residents.

85 Mr Sales also suggests, as a further factor, that the existence of an essentially private or personal element in a relationship between a service provider and the beneficiary (as with fostering) would point against any conclusion that the provider (e g a foster parent) was a public authority. But Mr Pannick responds that it is often where there are private relationships that the protection of the Convention is most needed, and Mr Fordham for Justice, Liberty and the British Institute of Human Rights as interveners positively asserts that foster parents are a public authority under section 6(3)(b). Another category which Mr Sales argues falls outside section 6(3)(b) is the private landlord, with whom or which a local authority makes arrangements for the provision of accommodation in discharge of its duties to the homeless under sections 188, 190, 200 or 204(4) of the Housing Act 1996. Mr Pannick would wish to leave that open, while Mr Fordham submits that private landlords generally should be seen as falling within section 6(3)(b), whenever the accommodation is paid for by public funding, even if only by housing benefit. In the event, I consider that it is unnecessary and unwise to follow Mr Sales and Mr Fordham into any definite analysis of these particular cases, the circumstances of which have not been examined at all closely before the House.

A *Guidance to the interpretation of section 6(3)(b)*

86 Section 6(3)(b) is a domestic law provision with no direct parallel in European human rights or domestic jurisprudence. Various guides to its interpretation have been suggested. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, para 65, Lord Woolf CJ considered that section 6 was "clearly inspired by the approach B developed by the courts in identifying the bodies and activities subject to judicial review". Several recent authorities (e g *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233) have indeed assimilated the tests.

87 However, it is clear from the House's decision in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC C 546 and *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 that, while authorities on judicial review can be helpful, section 6 has a different rationale, linked to the scope of state responsibility in Strasbourg. In the latter case, at para 29, my noble and learned friend, Lord Bingham of Cornhill, said of the Act's general aim that:

D "the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg."

In *Aston Cantlow* [2004] 1 AC 546, section 6 was specifically addressed. E My noble and learned friend, Lord Nicholls of Birkenhead said, at para 6:

"the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights."

F The rationale was further spelled out by my noble and learned friend, Lord Rodger of Earlsferry who said, at para 160:

"Prima facie . . . when Parliament enacted the 1998 Act . . . the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom G observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for 'a public authority' to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs."

H In para 163 Lord Rodger concluded that:

"In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government

which would engage the responsibility of the United Kingdom before the Strasbourg organs."

My noble and learned friends, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote, all, I understand, accepted this rationale, at paras 52, 87 and 129 respectively. Lord Hope observed that, although the domestic case law on judicial review might be helpful, it could not be determinative of what is a core or hybrid public authority and "must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the state for the purposes of the Convention".

88 Section 6(3)(b) merely elucidates section 6(1), to which Lord Nicholls and Lord Rodger referred in paras 6 and 160. Further, Lord Rodger's use of the phrase "either generally or on the relevant occasion" in para 163 makes explicit that the rationale applies as much to the identification of a person exercising a function of a public nature under section 6(3)(b) as it does to the identification of a core public authority.

89 A second point which emerges from *Aston Cantlow* is that, with the general purpose of section 6 thus identified, the rule in *Pepper v Hart* [1993] AC 593 provides no further assistance. In paras 161 to 162, Lord Rodger expressly rejected a submission that reference to Hansard was permissible as an aid to construing the term "public authority" in section 6 (adding only that, had it been, it would have confirmed his view). Lord Hope agreed, at para 37, that the Court of Appeal had (in rejecting a contrary submission based on *Pepper v Hart*: cf [2002] Ch 51, para 29) rightly declined to look at Hansard for assistance. Lord Scott, in agreeing, at para 129, with the reasons given by Lord Hope and Lord Rodger for concluding that the parish council of Aston Cantlow was not a core public authority, can, as I read his opinion, also be taken to have agreed with their rejection of Hansard, although disagreeing on the application of section 6(3)(b). No submission was made to the House to the effect that any of these statements was wrong, or that *Pepper v Hart* has any greater relevance on this appeal than in *Aston Cantlow*.

90 The House was shown two substantial, and informative, reports of the Joint Committee on Human Rights of the House of Lords and House of Commons on "The Meaning of Public Authority under the Human Rights Act" (the Seventh Report of Session 2003–04, HL 39 and HC 382, and the Ninth Report of Session 2006–07, HL 77 and HC 410). But, so far as these reports recite particular statements made during either House's consideration of the 1998 Act (which, on any issue relevant to this appeal, seem to have been very limited), such statements must be left on one side. So far as these reports proceed on the basis that Parliament had any particular intention, that is the issue which the House has to determine according to relevant principles of statutory construction.

91 Thirdly, Lord Nicholls at paras 7 to 12 in *Aston Cantlow* expressed more detailed views on the characteristics of those bodies or persons which might constitute either core or hybrid public authorities. At para 7, he said that "behind the instinctive classification" as "governmental", and as core public authorities, of organisations such as government departments, local authorities, the police and the armed forces lay "factors such as the possession of special powers, democratic accountability, public funding in

A whole or in part, an obligation to act only in the public interest, and a statutory constitution"; and he referred to an article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476, as valuable in this connection. At para 9 he explained section 6(3)(b) as addressing situations where in the interests of efficiency and economy or otherwise, functions of a governmental nature were discharged by non-governmental bodies, B sometimes as a result of privatisation, sometimes not. He gave as "obvious" examples the running of prisons by private organisations and the discharge of regulatory functions by organisations in the private sector such as the Law Society, or one might add the Bar Council. Further, while a core public authority was disabled from having any Convention rights (cf article 34), a hybrid authority was not so disabled in respect of any act of a private C nature, and:

> "Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary" (para 11).

D Finally, there was, in his view, "no single test of universal application" to decide whether a function was of a public nature, "given the diverse nature of governmental functions and the variety of means by which these functions are discharged today". However:

> "Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is E exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service" (para 12).

Lord Nicholls's view supports not only a broad application of section 6(3)(b) but also a factor-based approach such as Mr Sales in particular advocated. On the other hand, none of Lord Nicholls's specific examples is close to the present case.

F

State responsibility in the Strasbourg case law

92 In the light of the rationale of section 6 identified in *Aston Cantlow* [2004] 1 AC 546, it is logical to start by considering whether Strasbourg case law offers any clear guidance on the scope of state responsibility in the present field. In my opinion it lacks any case directly G in point. But two relevant principles appear. First, the state may in some circumstances be responsible for failure to take positive steps to regulate or control the activities of private persons where there will otherwise be a direct and immediate adverse impact on a person's Convention protected interests. Second, the state may in some circumstances remain responsible for the conduct of private law institutions to which it has delegated state powers. The case law does not always distinguish clearly between these H principles.

93 Examples of the first principle are *Botta v Italy* (1998) 26 EHRR 241 and *Marzari v Italy* (1999) 28 EHRR CD 175 (failure to protect an individual's right to respect for private life) and *Z v United Kingdom* (2001) 34 EHRR 97 (local authority's failure to protect children known to be

suffering ill-treatment). In *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, Sullivan J on the same principle held responsible a local authority which in breach of article 8 failed to act for over 20 months on assessments of need under section 47 of the National Health Service and Community Care Act 1990, which should have led it to arrange care and accommodation under section 21 of the National Assistance Act 1948, as amended.

94 *Storck v Germany* (2005) 43 EHRR 96 falls under the same principle. The Federal Republic was responsible in respect of the applicant's confinement in a private clinic in circumstances not authorised by a court or any other state entity, in view of (a) the lack at the time of any system for supervision by state authorities of the lawfulness and conditions of confinement of persons treated in such a clinic, and (b) the use of police force to return the applicant to the clinic after she had fled: paras 90 and 91. At one point (para 103), the European Court of Human Rights in *Storck* noted that the state could not "completely absolve itself from its responsibility" by delegating its obligations:

> "the state is under an obligation to secure to its citizens their right to physical integrity under article 8 of the Convention. For this purpose there are hospitals run by the state which co-exist with private hospitals. The state cannot completely absolve itself from its responsibility by delegating its obligations in this sphere to private bodies or individuals."

This was followed by a reference to *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 and the observation that "similarly, in the present case, the state remained under a duty to exercise supervision and control over private psychiatric institutions": para 103. It is clear that the basis of responsibility in *Storck* was not some general responsibility for every misdeed in the clinic, but responsibility under the first principle for the state's supervisory and policing failures.

95 *Costello-Roberts* itself is not an easy case to analyse. This is because the court held that there was in fact no breach of any Convention duty. The issue was whether the particular corporal punishment ("slippering") suffered by a pupil in a private school had infringed his Convention rights, and it was held that it was not of a severity to infringe either of articles 3 and 8. But the court started by considering the state's potential responsibility, in which regard the United Kingdom argued "the English legal system had adequately secured the rights guaranteed by articles 3 and 8 . . . by prohibiting the use of any corporal punishment which was not moderate or reasonable": para 26. The court concluded however, at para 28, that in

> "the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with article 3 or article 8 or both."

The basis was said to be the state's duty to secure to its children their right to education, including an appropriate school disciplinary system, which "cannot be said to be merely ancillary to the educational process", the co-existence of independent and state schools, in circumstances where the right to education is guaranteed equally to pupils in both, and the state's inability

to "absolve itself from responsibility by delegating its obligations to private bodies or individuals": para 27. While the Court in *Storck* treated the state in *Costello-Roberts* as responsible under the first principle, the actual reasoning in *Costello-Roberts* is open to the wider interpretation that the state may under the second principle have a non-delegable or vicarious responsibility for education, at least for such acts of a private school as may be said to be central to its educational role. In Professor David Feldman's *Civil Liberties and Human Rights in England*, 2nd ed (2002), p 97, he suggests that other aspects of a private school's activities, such as its contractual relations with parents, could fall outside its public functions. This might in turn suggest that termination of contractual relations would fall outside the Convention protections. It was along such lines that Buxton LJ [2008] QB 1 may have been thinking in the present case when he suggested that "a hybrid body may be directly impleaded in the protection of some Convention rights but not of others": para 78. But this was not a theme pursued by any side before the House.

96 Footnotes to the relevant passages in both *Costello-Roberts* and *Storck* refer to *Van der Mussele v Belgium* (1983) 6 EHRR 163. That case concerned a complaint by a pupil advocate that he was compelled to represent clients without fee. It was the Belgian State's obligation under article 6(3)(c) of the Convention to administer a system of free legal assistance in criminal matters. Belgian domestic legislation in turn obliged the Belgian Bar Association to provide such a system. As the European Court of Human Rights said, "legislation 'compels them to compel' members of the Bar to 'defend indigent persons' ". The court continued: "Such a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself": para 29. In the next sentence, the court pointed out that the domestic legislation expressly obliged pupil advocates to act in cases assigned under the free legal assistance scheme. In the event and since pupil advocates had chosen to enter the profession, the legislative scheme was held consistent with the Convention. The case was not so much one of potential responsibility for delegated acts, as one of potential responsibility for the state's own legislative scheme.

97 The second principle is that the state may in some circumstances remain responsible for the manner of performance of essentially state or governmental functions or powers which it has chosen to delegate to a private law institution. Examples are provided by *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005 and *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005. In *Woś* a minister in the Polish cabinet in 1991 established the Polish-German Reconciliation Foundation under the Foundations Act 1984, a statute enabling persons to establish private law foundations to carry out socially and economically useful goals complying with the basic interests of the Republic. The minister and his successor had as founder full control over appointments to the foundation's boards, over the amendment of its statute and its dissolution. The foundation's capital consisted of DEM 500m contributed by the Federal Republic of Germany under treaty with Poland, and the foundation's role was to use such moneys to compensate victims of Nazi persecution. As a result of further international negotiations culminating in 2000 in an agreed joint statement signed by inter alia the

Federal Republic and Poland, the foundation also acquired in 2001 the role of disbursing to Polish resident claimants further moneys contributed by the Federal Republic and German companies to a German Foundation established to compensate victims of slave and forced labour. The court held that "the specific circumstances of the present case give rise to the conclusion that the actions of the Foundation . . . in respect of both compensation schemes are capable of engaging the responsibility of the state" (para 74). It said that the state's choice of "a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of state responsibility ratione personae" (para 72) and that delegation to a body operating under private law of the Polish State's obligations arising out of international agreements could not "relieve the Polish state of the responsibilities it would have incurred had it chosen to discharge these obligations itself, as it could well have": para 73.

98 In *Sychev* the state had established a private law commission to which were delegated certain state powers relating to the execution of court judgments. The court did not find it necessary to discuss whether or not the commission was or was not in itself a state authority for the purposes of article 34, but said that: "It suffices to note that the body in question exercised certain state powers at least as regards the execution of court judgments": para 54. The distinction drawn may be seen as mirroring that between core and hybrid public authorities in English domestic law. The court went on to say that "the exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law": para 54. It also made points about the absence of any judicial or administrative control over the commission which could have invoked the first principle I have mentioned.

The relevance of European case law

99 The first principle does not assist to determine whether Southern Cross is a public authority under section 6. State and governmental bodies have an important role in regulating and supervising the activities of many private bodies and persons, including care homes. But it is not suggested that Southern Cross occupied any such regulatory or supervisory role. The second principle recognises that there may be certain essentially state or governmental functions, particularly involving the exercise of duties or powers, for the manner of exercise of which the state will remain liable, notwithstanding that it has delegated them to a private law body. It is necessary to consider whether the provision of care and accommodation in a private care home under an arrangement made with a local authority falls within this principle. The above analysis confirms that Strasbourg case law contains no case directly in point. In contrast with *Sychev*, a private care home does not acquire or exercise any obvious state power or duty. In contrast with both *Woś* and *Sychev*, it is not established and capitalised by the state for state purposes. The ambit and significance of the reasoning in *Costello-Roberts* is less clear, but the case concerns the very different field of education, where the court may, on one view, have considered that any activity bearing centrally on the provision of education was a non-delegable state function, whether it is provided by a state or under private contractual

A arrangements in a private school. The case does not indicate that the same can or should be said of the provision of care and accommodation.

The meaning of section 6(3)(b) in domestic law

100 Coming against this background to the interpretation of section 6(3)(b), the phrases "public authority" and "functions of a public B nature" are readily understandable and applicable in cases of what Lord Nicholls called "special powers" or functions of a "governmental" nature in *Aston Cantlow* [2004] 1 AC 546, paras 7 and 9. Thus, local authorities were granted power, by section 111(1) of the Local Government Act 1972, to do "any thing . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions", and in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 29F Lord Templeman C said that "the word 'functions' embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions".

101 On the other hand, as both *Aston Cantlow* and *R (West) v Lloyd's of London* [2004] 3 All ER 251 show, the mere possession of special powers conferred by Parliament does not by itself mean that a person has functions D of a public nature. Such powers may have been conferred for private, religious or purely commercial purposes. Conversely, there can be bodies without special statutory powers amenable to judicial review, as shown by *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815 and *R v Code of Practice Committee of the British Pharmaceutical Industry, Ex p Professional Counselling Aids Ltd* (1990) 3 Admin LR 697, cited by E Moses J in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 74B. In *Datafin*, the panel was as a matter of fact entrusted with an extensive and vital regulatory role in the public interest, and that was sufficient to make it susceptible to judicial review. In *Code of Practice Committee*, applying *Datafin*, judicial review was available in respect of the administration by a trade association of a code of practice which it had voluntarily developed in conjunction with the Department of Health, and which was obligatory for F members and followed in practice by non-members. I do not doubt that such bodies would in respect of their regulatory functions also constitute a public authority under section 6(3)(b). In *Datafin* Sir John Donaldson MR said [1987] QB 815, 826, 834, 835 that:

> "Lacking any authority de jure, it [the take-over panel] exercises G immense power de facto . . . the panel is a truly remarkable body, performing its function without visible means of legal support. But the operative word is 'visible', although perhaps I should have used the word 'direct'. Invisible or indirect support there is in abundance. Not only is a breach of the [City] code [on Take-overs and Mergers], so found by the panel, ipso facto an act of misconduct by a member of the Stock Exchange, and the same may be true of other bodies represented on the H panel, but the admission of shares to the Official List may be withheld in the event of such a breach . . . The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever

non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions."

102 The reasoning in *Datafin* has been welcomed for underlining the importance for the public of the role and de facto power exercised by the Take-over Panel, but regretted in so far as it retained as a supporting factor, in the passage at p 835, the imputed governmental source of the power: see Murray Hunt "Constitutionalism and the Contractualisation of Government in the United Kingdom" published in *The Province of Administrative Law* (ed Taggart) (1997), p 29. But it should be no surprise that the usual source of the "functions of a public nature" addressed by section 6(3)(b) is legislative or governmental, when section 6(3)(b) is intended to reflect in domestic law the scope of the state responsibility which the Convention addresses. The concept "governmental" or "of government" was found useful in *Aston Cantlow* [2004] 1 AC 546, paras 10, 49, 88 and 159 by Lord Nicholls, Lord Hope, Lord Hobhouse and Lord Rodger. The existence and source of any special powers or duties must on any view be a very relevant factor when considering whether state responsibility is engaged in Strasbourg or whether section 6(3)(b) applies domestically. On this point, I prefer Mr Sales's submissions, that it is necessary to look at the context in which and basis on which a contractor acts, to Mr Pannick's submission, that all that is appropriate is to look at what a contractor "does". There is, for example, a clear conceptual difference between the functions of a private firm engaged by a local authority to enforce the Road Traffic Regulation Act 1984, as amended, on a public road and the activities of the same firm engaged by a private land-owner or a local authority to enforce a private scheme or parking restrictions of which notice have been given on a private property or estate. Mr Pannick in his own submissions seeks to identify what Southern Cross does by reference to the duties which the council owes.

103 Typical state or governmental functions include powers conferred and duties imposed or undertaken in the general public interest. I shall not attempt to identify the full scope of the concept of "functions of a public nature", any more than Lord Nicholls did in *Aston Cantlow.* But some further consideration is appropriate of his suggested hallmarks of a public authority. As stated, these were, in the case of a core public authority and in addition to special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution. All these factors can readily be understood to throw light on the nature of a person's functions. When considering section 6(3)(b), Lord Nicholls suggested as factors, again in addition to statutory powers, the extent that a body is publicly funded or is "taking the place" of central government or local authorities or is providing a public service: [2004] 1 AC 546, para 12. These are more generally expressed factors, to which I address some further comments.

104 In the Court of Appeal Buxton LJ [2008] QB 1, para 72 considered it arguable that Southern Cross did indeed "stand in the shoes of the local authority as it discharges its public duties under section 21", but Mr Pannick in my view rightly did not endorse that approach. That powers or duties may in some circumstances be delegated to others is clear—witness the examples, given by Lord Nicholls, of privately run prisons and the regulation (at that time) of the solicitors' profession by the Law Society or

A the example of the private contractor entrusted with responsibility for enforcing the Road Traffic Regulation Act 1984. Section 101 of the Local Government Act 1972 enables a limited form of delegation, whereby arrangements may be made for the discharge of local authority functions by a committee or subcommittee or an officer of the authority or by any other local authority. More significantly, under section 70 of the Deregulation and B Contracting Out Act 1994, the Secretary of State may specify statutory functions which may be discharged by a person other than the authority primarily responsible for them. Section 72 provides that any acts or omissions of a person so authorised shall be treated for all purposes as done or omitted to be done by or in relation to the authority. Examples of such orders include the Contracting Out (Management Functions in relation to certain Community Homes) Order 1996 (SI 1996/586) and the Local C Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205). In such cases, while the acts or omissions are by statute attributed to the authority, there is a clear basis for regarding the authorised delegate as a person having functions of a public nature within section 6(3)(b). But no delegation of that sort exists in relation to the council's functions under section 21 of the 1948 Act.

D **105** Democratic accountability, an obligation to act only in the public interest and (in most cases today) a statutory constitution exclude the sectional or personally motivated interests of privately owned, profit-earning enterprises. Public funding and the provision of a public service are most easily understood in a similar sense. In a much looser sense, the self-interested endeavour of individuals usually works to the general benefit of society, as Adam Smith noted. But more than that is required under E section 6(3)(b). The difficulty is where to draw the line. Public funding takes various forms. The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangement with a company aiming to profit commercially thereby is potentially quite another. In every case, the ultimate focus must be upon the F nature of the functions being undertaken. The deployment in *Poplar Housing* [2002] QB 48, apparently as a decisive factor in favour of the application of section 6(3)(b), of the close historical and organisational assimilation of Poplar Housing with the local authority is in my view open to the objection that this did not bear on the function or role that Poplar Housing was performing.

106 Other domestic legislation adopts the concept of public authority, G in particular the Race Relations Act 1976 and the Freedom of Information Act 2000. The different contexts of these statutes mean that they offer very limited assistance in the construction of the Human Rights Act 1998. Their technique was to set out (differing) lists of bodies which were to be regarded as public authorities, either for all purposes or in respect of certain functions. The Race Relations Act thus lists various Royal Colleges (Anaesthetists, H General Practitioners, Nursing, Surgeons, etc), the Bank of England and the BBC, the General Council of the Bar and the Law Society each "in respect of its public functions", as well as a large number of other bodies generally. Neither Act includes in its list any private company or organisation offering services comparable to those rendered by Southern Cross, though that is, as stated, of little relevance in view of their different contexts. Of some interest

is however a power conferred on the Secretary of State by section 5 of the Freedom of Information Act to designate as a public authority for the purposes of the Act any person not listed who either "(a) appears . . . to exercise functions of a public nature, or (b) is providing under a contract made with a public authority any service whose provision is a function of that authority". The careful distinction between (a) and (b) highlights the point that a person with whom a public authority contracts for a service which it is the function of that authority to provide is not axiomatically exercising a function of a public nature. Under the Freedom of Information Act, there might be reason to extend the benefit of the Act to such a person. But section 6(3)(b) of the 1998 Act only extends the concept of a public authority to a person within (a).

Analysis of Southern Cross's role

107 In submitting that Southern Cross in providing care and accommodation has and is exercising functions of a public nature, Mr Pannick relies on the statutory framework which led to the council's involvement and to the placement of YL with Southern Cross. That consists primarily in the National Assistance Act 1948 as amended in (inter alia) 1972, 1990 and 1992. The Act as amended reads:

> "21 *Duty of local authorities to provide accommodation*
> "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing— (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them . . ."
> "(2A) In determining for the purposes of paragraph (a) or (aa) of subsection (1) of this section whether care and attention are otherwise available to a person, a local authority shall disregard so much of the person's resources as may be specified in, or determined in accordance with, regulations made by the Secretary of State for the purposes of this subsection . . ."
> "(4) Subject to the provisions of section 26 of this Act accommodation provided by a local authority in the exercise of their functions under this section shall be provided in premises managed by the authority or, to such extent as may be determined in accordance with the arrangements under this section, in such premises managed by another local authority as may be agreed between the two authorities and on such terms, including terms as to the reimbursement of expenditure incurred by the said other authority, as may be so agreed.
> "(5) References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections . . ."

108 Section 22 requires a local authority to recover from any person to whom accommodation is provided under section 21 a payment consisting of

A the full cost to the authority of providing such accommodation or such lower rate as the authority may assess that such person is able to pay. Section 26 provides:

"*26 Provision of accommodation in premises maintained by voluntary organisations*

"(1) Subject to subsections (1A) and (1C) below, arrangements under B section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) or (aa) of that section, and (b) the arrangements are for the provision of such accommodation in those premises.

"(1A) Arrangements must not be made by virtue of this section for the C provision of accommodation together with nursing or personal care for persons such as are mentioned in section 3(2) of the Care Standards Act 2000 (care homes) unless—(a) the accommodation is to be provided, under the arrangements, in a care home (within the meaning of that Act) which is managed by the organisation or person in question; and (b) that organisation or person is registered under Part II of that Act in respect of D the home."

109 Section 26(2)(3) requires arrangements made under section 26 to provide for payments by the local authority to the accommodation provider "at such rates as may be determined by or under the arrangements" and for the resident to refund the local authority either in full or according to his or her ability to pay. Section 26(3A) enables the local authority, the resident E and the service provider to agree instead for the resident to pay direct to the provider any share that he or she would otherwise have to refund to the local authority and for the local authority to be liable only to pay the balance to the provider.

110 Mr Pannick submits that the 1948 Act gives effect to a basic state or public responsibility to *provide* care and accommodation for those in need. In *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, F para 15, Lord Woolf CJ said:

"If the authority itself provides accommodation, it is performing a public function. It is also performing a public function if it makes arrangements for the accommodation to be provided by [The Leonard Cheshire Foundation ("LCF")]. However, if a body which is a charity, G like LCF, provides accommodation to those to whom the authority owes a duty under section 21 in accordance with an arrangement under section 26, it does not follow that the charity is performing a public function."

Taking as his premise Lord Woolf's first two sentences, Professor Paul Craig argues with force that the nature of a function does not alter if it is H contracted out, rather than performed in house ("Contracting Out, the Human Rights Act and the Scope of Judicial Review" (2002) 118 LQR 551). But Professor Dawn Oliver in the article in 2000 to which Lord Nicholls referred and in a later article in 2004 ("Functions of a Public Nature under the Human Rights Act" [2004] PL 329) pertinently observes that it is a fallacy to regard all functions and activities of a core public authority as

inherently public in nature. All such functions and activities are subject to the Convention, because the authority is a core public authority. It only becomes necessary to analyse their nature, if and when they are contracted out to a person who is not a core public authority. Some of them may then on analysis be private in nature. Reference to a core public authority performing a public function when providing care and accommodation is potentially confusing.

111 How then is the provision of care and accommodation to be regarded? The House was taken to the history and amendments of the 1948 Act and to the more remote background of the Poor Law abrogated by section 1 of that Act. Mr Pannick submits that the Act gave effect to an essential duty of the state to provide care and accommodation for the needy. As originally enacted, section 21 made it the duty of every local authority "to provide" residential accommodation for persons in need of care and attention not otherwise available to them. This function was under section 21(3) to be exercised in accordance with a scheme. The accommodation was under section 21(4) to be provided in premises managed by the local authority, or by another local authority on terms to be agreed between them. However, under section 21(5) references to accommodation provided were to be construed as references to accommodation provided in accordance with the five next sections, and section 26(1) stated that, notwithstanding anything in the foregoing provisions, a scheme under section 21 "may provide for the making by a local authority . . . of arrangements with a voluntary organisation managing any premises for the provision of accommodation in those premises".

112 In 1972, section 21 was amended to its present form, whereby a local authority's duty is expressed generally as being to "make arrangements for providing . . . accommodation" not otherwise available for those in need of care and attention. With effect from 1 April 1993, as a result of amendments made in 1990 and 1992, sections 21 and 26 enable arrangements to be made not merely with a voluntary organisation, but also "with any other person who is not a local authority". In 2000 section 26(1A) was further amended by section 116 of and paragraph 1(1)(3) of Schedule 4 to the Care Standards Act 2000 to require any such arrangements for care and accommodation to be with a care home registered under the 2000 Act. Mr Pannick points out that in its modern form the 1948 Act still retains headings suggesting a duty of provision on the local authority (most obviously, the heading to section 21: "Duty of local authorities to provide accommodation").

113 In response, Mr Arden submits that the appellants' propositions are supported neither by history nor by the amended form of the legislation. As a matter of history, he observes that the state's duty to address the needs of the poor "often took the form of cash payments": *Neville Harris*, *Social Security Law in Context* (2000), p 71. Further, attention should focus on the modern form of the 1948 Act, and this is deliberately phrased in terms of a duty on the local authority to make arrangements. That duty never passes to the care home, which does no more than provide care and accommodation under contract.

114 In my view it is appropriate to focus on the modern form of the 1948 Act. This is particularly so when contracting with a care home such as

A Southern Cross only became possible from 1 April 1993, when the legislation was amended to formulate the local authority's duty as being to arrange care and accommodation. Neither the concept nor the extent of a function of a public nature is immutable in either national or European law (cf also per Lord Rodger in *Aston Cantlow* [2004] 1 AC 546, para 159). The modern legislation distinguishes clearly between a local authority with a statutory duty to arrange care and accommodation and a private company B providing services with which the local authority contracts on a commercial basis in order to fulfil the local authority's duty to arrange care and accommodation. My noble and learned friend, Lord Hoffmann, summarised the effect of the modern form of legislation, aptly also for present purposes, in *R v Wandsworth London Borough Council, Ex p Beckwith* [1996] 1 WLR 60, 64:

C

> "The duty of the council under section 21 is to make 'arrangements' for providing residential accommodation for certain classes of people. Subsection (4) says that the accommodation must be managed by the local authority or by some other authority. But this is expressed to be subject to section 26, which says that 'arrangements under section 21 of this Act' (not, notice, '*the* arrangements *made* under section 21 of this D Act') may include arrangements with the private sector. The draftsman is therefore not saying that homes in the private sector may be included in the collective of homes which the council has to provide. He is saying that the *concept* of 'arrangements' which has been used to define the council's duty in section 21 is to include arrangements with the private sector. This produces an altogether different result: it extends the meaning of the concept by which the council's duty is defined. Any arrangements which E fall within the extended definition will satisfy the council's duty."

A rider that perhaps calls for mention is that it is not, and could not be, suggested that a local authority has no continuing duty in respect of the suitability of a placement, once made. As Moses J observed in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 66:

F

> "It remains under a duty to see that the applicants' needs are met and if necessary to re-assess them. It remains under an obligation to ensure that the arrangements which it has made continue to be sufficient to meet the needs of those qualified for such community care provision."

115 I do not regard the actual provision, as opposed to the arrangement, of care and accommodation for those unable to arrange it G themselves as an inherently governmental function. The duty on a local authority under section 21 constitutes a safety net, conditional upon care and attention being "not otherwise available". In practice, this means that, if a person assessed as in need of care and accommodation has more than £21,000 capital and can arrange care and accommodation or (for example through relatives) make arrangements for it, then the local authority will not be further involved. In contrast with the position relating to the National H Health Service, the default position is one in which the local authority is not involved. I can see no basis, and none was really suggested, on which a private care home could somehow be regarded as exercising functions of a public nature in providing care and accommodation for "self-funders", those who or whose relatives could fund and make their own arrangements. The

local authority's involvement is aimed at making arrangements (including funding) which put those in need in effectively the same position as those "self-funders" Once such arrangements are made, the actual provision of care and accommodation is a different matter, which, as the modern legislation recognises, does not need actually to be undertaken by the local authority and can take place in the private sector, as it does for those who or whose relatives are able to make arrangements including funding for themselves.

116 In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the state is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary. The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a function of a public nature. Some of the particular duties which it has been suggested would follow—a duty not to close the home without regard to the Convention right to a home of publicly funded residents, and perhaps even a duty to give priority to accepting such residents into the home—fit in my view uneasily with the ordinary private law freedom to carry on operations under agreed contractual terms, even accepting (as I would) that, if the Convention applied, a private care home would be able to invoke that freedom as a relevant factor under article 8(2).

117 A private care home company provides services for residents in its care homes, which do not—and should not—depend in their nature or quality on the person with whom it contracts to provide such services. Age Concern England in a memorandum dated January 2006 annexed to the Joint Committee of the House of Lords and House of Commons of March 2007 was aware of this, and observed that "it would also be inequitable if self-funders—who pay higher fees (often called the 'self-funders rate')—had less legal protection than residents whose lower fees are met by the local authority": para 3.5. Age Concern's only antidote was to recommend some form of legislation: paras 8.4 to 8.5. In my view, however, a submission which leads to such a distinction being drawn under section 6(3)(b) of the 1998 Act is inherently questionable. Care homes would be bound to be, and to make their staff, aware of the distinction between Human Rights Convention protected and other residents. If it came to an issue like closure of a wing of a home or relocation of some residents during works, there could be an incentive (it might be argued even a legal duty) to give priority to the wishes and demands of publicly funded residents. To distinguish between different residents in the same care home on the basis of their ability to make the relevant contractual arrangements necessary to gain entry to the home appears undesirable.

118 Some differences do of course exist between care home residents whose placement is arranged under section 21 and residents whose placement is privately arranged. Every resident, privately or publicly funded, must consent, either personally or through a representative, to being admitted to the particular care home. A privately funded resident has,

A subject to space and funds, a choice of care homes. A publicly funded resident also has the choice which care home to enter, at least if the necessary funds exist to meet any consequential top-up liability. All care home residents have common and criminal law rights not to be mistreated (including any claims that may, perhaps, exist for breach of statutory duty). But a privately placed resident will either be party to a contract with the care B home or be resident as a result of a contract covering his or her residence made by a representative or relative. In contrast, the only contract covering the publicly funded resident's placement may be between the local authority and the care home, although YL was through her representative party to the tripartite arrangements described at the start of this opinion. On the other hand, even if a publicly funded resident is not party to any contract with the care home, he or she will (unlike privately funded residents) have public law C rights, including the right to invoke the protection of the Human Rights Convention, as against the local authority. These will enable him or her effectively to place on the local authority the onus to take any steps open to it as against the care home to protect the resident's human rights.

119 In my view the differences mentioned do not either justify or require a different approach to the application to the care home of the D Convention as between privately and publicly funded residents in one and the same care home. Apart from any contractual arrangements, the care home should view and treat all such residents with equality. Their contractual arrangements differ, but not in any way which indicates that publicly funded residents need additional protection compared with privately funded residents. A publicly funded resident's Convention rights against the local authority may even mean that he or she is in some respects E already more amply protected than a privately funded resident. As to the direct application of the Convention as against a care home, it is less incongruous to distinguish between residents in privately owned, profit-earning care homes on the one hand and residents in a local authority owned and managed care home on the other hand, than it is to distinguish between publicly and privately funded residents in one and the same care home. F Residents in a local authority owned and managed care home have the protection of the Convention not because the function of providing care and accommodation for those in need is inherently public in nature, but simply because a local authority is a core public authority, all of whose activities are, whatever their nature, subject to the Convention under section 6(1) of the 1998 Act.

G **120** The House was referred to a number of previous domestic authorities. The decision which I would reach on this appeal fits within them. Before the 1998 Act came into force, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, the court granted judicial review of a health authority's decision to close one of its National Health Service nursing homes; and in an illuminating judgment in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, Moses J concluded that a private H care home company was not exercising a public function in relation to residents placed with it under contract with the local authority, in the absence of any statutory source or underpinning for its operations and although the nature of its activities was "a matter of public concern and interest". Moses J said, at p 81, this was

> "not to say that a fresh approach ought not to be adopted so that the court can meet the needs of the public faced with the increasing privatisation of what were hitherto public functions",

but that, if this was to be done, it would have to be in a higher court. For my part, however, his reasoning remains persuasive, and the essentially contractual source and nature of Southern Cross's activities differentiates them from any "function of a public nature", even though it is (as often in the private sector) a matter of public concern, interest and benefit that reputable, efficient and properly regulated providers of such services should exist.

121 In *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610, Keith J held that section 6(3)(b) covered the functions performed by a mental nursing home registered under the Registered Homes Act 1984 in which the claimant, who had a severe personality disorder, was compulsorily detained pursuant to section 3(1) of the Mental Health Act 1983. He distinguished the circumstances before him, admission by compulsion, from those in the then first instance decision of Stanley Burnton J in *R (Heather) v Leonard Cheshire Foundation* (2001) 4 CCLR 211, residence by choice—a fact which, Keith J [2002] 1 WLR 2610, para 25 thought that Stanley Burnton J "rightly considered as critical". I agree.

122 Finally, in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, the county council, which had previously run farmers' markets under statutory powers, set up a non-profit making company to run such markets on a contractual basis on publicly owned land to which the public had, and at common law had the right of, access for the sale of goods. The Court of Appeal held that, despite the lack of any statutory source or underpinning for the company's role, the company was both performing a function of a public nature under section 6(3)(b) and subject to judicial review. An important element in this decision was the common law right of access of the public to such markets, which was being regulated by the company in succession to the council: cf *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. There is in the present case no such right or feature in relation to Southern Cross. Publicly funded residents have public law rights against the local authority, but no common law right of access to or residence in any private care home, other than under a contractual arrangement with whomsoever made.

Conclusion

123 For these reasons I would hold that Southern Cross in providing care and accommodation for YL was not and is not exercising functions of a public nature within section 6(3)(b) of the Human Rights Act 1998. I would leave entirely open the position of those operating in the different areas of health and education services, but I agree with the reasoning and conclusions regarding privately owned care homes such as Southern Cross's contained in the opinions of Lord Scott of Foscote and Lord Neuberger of Abbotsbury which I have had the benefit of seeing in draft. If further protection or regulation is considered to be necessary in respect of privately owned care homes, in addition to that which is available under common law or statute and for which local authorities may contract as indicated in para 80 above, the means may already be available to achieve this under the Care Standards Act 2000. And, if additional protection is to be achieved by statutory means,

A it is no matter for regret that this should be done without distinguishing between residents in one and the same care home who on the one hand arrange and fund their own care and accommodation and others who on the other hand benefit from local authority assistance to arrange and fund such care and accommodation. I would accordingly dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

B

Introductory

124 My Lords, where a "person [is] by reason of age, illness [or] disability in need of care and attention which [would] not otherwise [be] available to [her]", the local authority "in whose area [she] is ordinarily resident" becomes liable, under sections 21(1)(a) and 24(1) of the National C Assistance Act 1948 as amended, to "make arrangements for providing . . . residential accommodation" for her. By virtue of section 21(5), "accommodation" in this context extends to such "board and other services, amenities and requisites" as she needs, and in this speech I shall refer to these services as "care and accommodation". Such care and accommodation can be provided by the local authority itself (sections 21(4), 22 and 23), by another local authority (section 24(4)), or by "a voluntary organisation D or . . . any other person [who] manages premises which provide for reward [such] accommodation": section 26(1).

125 The issue raised on this appeal is whether, in a case where a local authority performs its duty by arranging and paying for care and accommodation in a privately owned care home, the person concerned can claim that the proprietor of the care home is thereby someone "certain of E whose functions are functions of a public nature" within the meaning of section 6(3)(b) of the Human Rights Act 1998. The appeal arises from facts, and in a historical context, which are fully set out in the opinions of my noble and learned friends, Baroness Hale of Richmond and Lord Mance, which I have had the privilege of reading in draft.

126 I agree with the conclusion reached by Lord Mance, and with his reasons for reaching that conclusion. However, as the issue raised on this F appeal is of some importance, and as it has resulted in a sharp difference of opinion in this House, it seems appropriate to explain my thinking, although, in doing so, I do not intend to detract from my agreement with Lord Mance's reasoning.

127 If the provision of care and accommodation in circumstances such as those of the instant case is a function falling within subsection (3)(b) of G section 6 of the 1998 Act ("section 6"), then, by virtue of section 6(1), it would be "unlawful" for the proprietor of the care home "to act in a way which is incompatible with a Convention right" of that person. Thus, a resident of a privately owned care home, whose care and accommodation is paid for (in whole or in part), or even (possibly) whose care and accommodation has simply been arranged, by a local authority would have rights against the proprietor of the home ("the proprietor") in addition to H those that would lie under contract, common law or purely domestic legislation.

128 While the issue can be relatively easily and briefly expressed and explained, it is much harder to resolve with confidence, as is demonstrated by the sharp difference of opinion revealed in the four preceding opinions.

Any reasoned decision as to the meaning of section 6(3)(b) risks falling foul of circularity, preconception and arbitrariness. The centrally relevant words, "functions of a public nature", are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion. Further, given that the question of whether section 6(3)(b) applies may often turn on a combination of factors, the relative weight to be accorded to each factor in a particular case is inevitably a somewhat subjective decision.

129 In the light of section 6(3)(b), section 6(1) has been interpreted as applying to two types of public authority, namely "core" public authorities "whose nature is governmental in a broad sense", and "hybrid" (or "functional") public authorities, only some of whose functions are of a public nature — see the discussion in the speech of Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 7 to 9. Under section 6(5), an entity which would otherwise be a hybrid public authority is none the less not to be treated as such in relation to an act "the nature of [which] is private", but this exception does not apply to core public authorities.

130 Section 6 is, at least in some respects, not conspicuous for the clarity of its drafting. Thus, there was some debate before your Lordships as to whether there was a distinction between "acts" and "functions" in the section. In my view, both as a matter of ordinary language and on a fair reading of the section, there is a difference between "functions", the word used in section 6(3)(b), and "act[s]", the word used in section 6(2) and (5) and defined in section 6(6). The former has a more conceptual, and perhaps less specific, meaning than the latter. A number of different acts can be involved in the performance of a single function. So, if this appeal succeeds, a proprietor providing care and accommodation pursuant to section 26(1) of the 1948 Act would be performing a "function", which, while "of a public nature", would involve a multitude of acts, many of which would be private—e g contracting for the purchase of food or for the consumption of electricity.

131 Accordingly, a core public authority is bound by section 6(1) in relation to every one of its acts whatever the nature of the act concerned; there is therefore no need to distinguish between private and public acts or functions of a core public authority. On the other hand, a hybrid public authority is only bound by section 6(1) in relation to an act which (a) is not private in nature and (b) is pursuant to or in connection with a function which is public in nature.

132 Having made those preliminary points about section 6, I turn to the specific issue in the present case. In that connection, in the light of the arguments addressed to us, I propose to consider that issue in three stages. First, I shall discuss the individual specific factors which are said to bring the performance of a contract for the provision of care and accommodation between a proprietor and a resident, paid towards or arranged by a local authority pursuant to sections 21 to 26 of the 1948 Act, within the ambit of section 6(3)(b). Secondly, I shall address a policy argument based on those factors which involve "contracting-out", that is, the system whereby a core public authority, most commonly a local authority, contracts to pay a

A private company to carry out services which the authority is statutorily liable to provide. Thirdly and finally, I shall express my conclusion by considering these various factors together in the context of wider issues of principle.

A particulate analysis

B 133 It may be helpful to start by considering a simple case of a person who independently enters into a contract with a proprietor for the provision to her of care and accommodation in a privately owned care home. In such a case, I have some difficulty with the notion that the proprietor would be thereby performing a function within section 6(3)(b). Although Mr Pannick, for Mrs YL, did not concede this, Mr Sales, on behalf of the Secretary of State, did so. That concession was, in my view, at least on the face of it, C realistic and correct. In such a case, there would simply be a private law contract for the provision of care and accommodation. At any rate at first sight, it is hard to see why, in performing such a contract, the proprietor would be carrying out a function "of a public nature".

134 Reliance was placed on the fact that care homes are subject to detailed rules and supervision under the provisions of the Care Homes D Regulations 2001. That is not, in my opinion, a telling reason for saying that, in providing care and accommodation to a private person, the proprietor of a care home is carrying out a function of a public nature. There is no identity between the public interest in a particular service being provided properly and the service itself being a public service. As a matter of ordinary language and concepts, the mere fact that the public interest requires a service to be closely regulated and supervised pursuant to E statutory rules cannot mean that the provision of the service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous material would ipso facto be susceptible to being within the ambit of section 6(1).

135 It was also said that it is in the public interest that the old and infirm are cared for, and that there are charities which offer the sort of services F which care homes provide. In my opinion, that feature does something, but relatively little, to justify the view that section 6(3)(b) applies where care and accommodation are provided in a privately owned care home. The fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature. Nor does it follow as a matter of logic or policy. G Otherwise, the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities, would be caught by section 6(1). It is in the public interest that health, education, housing, indeed food, is available to everyone. That cannot mean that those who provide such commodities on a commercial basis (including private hospitals, private schools, private landlords, and food retailers and distributors) therefore fall within the scope of section 6(3)(b).

H 136 It was also suggested that the fact that it will almost always be the vulnerable who are provided with care and accommodation in care homes indicates that such provision falls within section 6(3)(b). This point was advanced partly on the basis that the Strasbourg court has indicated that such people are entitled to particular protection under the Convention: see

for example *Botta v Italy* (1998) 26 EHRR 241, para 32. I do not think that that point goes much further than the argument based on the quasi-charitable nature of, and the detailed regulations applicable to, the function. The fact that the vulnerable are entitled to particular protection ties in with the detailed regulatory regime which the government has imposed on those who run care homes, but it does not appear to me to go to the point in the present case.

137 The factors so far mentioned are not, I accept, irrelevant to the issue that has to be decided on this appeal, but I do not find them persuasive on their own. Accordingly, subject to wider policy considerations indicating otherwise, it appears to me that a straightforward arrangement whereby a proprietor of a care home agrees to provide care and accommodation for a person under a private contract would not engage section 6(3)(b).

138 The same conclusion must logically apply where the contract for the provision of care and accommodation in a privately owned care home is arranged and/or paid for by a third party, such as a relative of the person concerned. In other words, by entering into (whether pursuant to an arrangement with that person or a third party) and performing a contract for the provision of care and accommodation for a person "who by reason of age, illness [or] disability [is] in need of care and attention which is not otherwise available to [her]", a care home proprietor does not appear to me to be performing a "function" which is, at least intrinsically, "of a public nature", at least in the absence of telling reasons of policy or principle to the contrary.

139 As I see it, the basis for justifying a different conclusion in this case essentially rests on three further factors. First, the contract whereby Southern Cross Healthcare Ltd agreed to provide Mrs YL with care and accommodation was made as a result of Birmingham City Council carrying out its duty to arrange for care and accommodation for Mrs YL under section 21(1) of the 1948 Act under its "umbrella agreement" with Southern Cross. Secondly, the majority of the care home charges for Mrs YL's care and accommodation were paid to Southern Cross by Birmingham, pursuant to the same statutory duty. Thirdly, Birmingham itself could have provided Mrs YL with care and accommodation pursuant to the 1948 Act.

140 While the statutory involvement of Birmingham can fairly be said to give the function performed by Southern Cross in providing care and accommodation for Mrs YL a public connection, I do not consider that it can, at least on its own, convert that function into one "of a public nature" which engages section 6(3)(b). Birmingham's function in connection with the provision of the care and accommodation, according to its counsel, Mr Arden, fairly can be described as being of a public nature, but that is not really in point for two reasons.

141 First, at any rate in the context of section 6, it is meaningless, and therefore potentially misleading, to describe a function of a core public authority as being "of a public nature", as that concept (like that of "an act which is private") has relevance only to hybrid authorities. Secondly, even if Birmingham performed a function of a public nature by arranging the care and accommodation in accordance with its statutory duty, that would not mean, either as a matter of logic or policy, that the actual provision of the care and accommodation to Mrs YL by Southern Cross pursuant to a private law contract must thereby be converted from what would otherwise be a

A function of a private nature into one of a public nature. If the Ministry of Defence placed an order for military materiel with a private manufacturer, the Ministry could fairly be said, as a matter of ordinary language, to be carrying out a function of a public nature in placing the contract, but it would not follow, in my opinion, that the manufacturer would be carrying out a function of a public nature in performing the contract.

B **142** The fact that Southern Cross was paid by Birmingham for the provision in its care home of care and accommodation for Mrs YL does not appear to me to render such provision a "function of a public nature", at any rate on its own. It may well be that an activity of an entity which is not a core public authority is often unlikely to be a "function of a public nature" if it is not ultimately funded by a core public authority, but, again as a matter of logic and language, it cannot be a sufficient condition, in my view. C Otherwise, the activities of every employee and every supplier of a core public authority would be within section 6(1).

143 The existence of the umbrella agreement between Birmingham and Southern Cross does not, in my view, take matters further. It merely reflects the fact that Birmingham recognises that it will have to perform its statutory duty under section 21(1) of the 1948 Act to a number of persons, and that it D wishes to have the basis on which it gives effect to the "arrangements", which it has to make under section 21(1) of the 1948 Act, identified in advance.

144 The fact that Birmingham, as a core public authority, could have provided care and accommodation for Mrs YL in a care home which it ran itself seems to me to be a factor which assists the contention that Southern Cross is performing a function of a public nature, but only to a limited E extent. It is certainly not a sufficient condition: indeed, it appears to me to be more like a necessary condition. While it would be wrong to be didactic in this difficult area, I suspect that it would be a relatively rare case where a company could be performing a "function of a public nature" if it was carrying on an activity which could not be carried out by any core public authority. On the other hand, I would not accept that the mere fact that a F core public authority, even where it is the body funding the activity, could carry out the activity concerned must mean that the activity is such a function. Apart from anything else, there must scarcely be an activity which cannot be carried out by some core public authority.

The argument based on "contracting-out"

G **145** It is, I think, appropriate to consider in a little more detail the combined effect of two of the factors just discussed, namely the fact that Birmingham paid for the care and accommodation and the fact that Birmingham could have provided the care and accommodation itself. It was suggested that these two factors throw up a general point of principle, namely that section 6(3)(b) should apply to a case where a core public authority contracts-out one or more of its functions to a private company. H This was a concern which weighed heavily with the Joint Committee (of the House of Lords and the House of Commons) on Human Rights, as may be seen in two of their reports on "The Meaning of Public Authority under the Human Rights Act" (2003–04) HL 39, HC 382 and (2006–07) HL 77, HC 410.

A

146 There is undoubted force in the point that, if a person would have Convention rights if a service was provided by a core public authority, she should not lose them merely because the service is contracted-out by that authority to a private company. It is a point which has been made in a number of articles and reports. In para 41 of the first of the two reports, quoted in support of Mrs YL's case before your Lordships, the Joint Committee said that it would mean that the existence of Convention rights would be "dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body's administrative links with institutions of the state". However, it seems to me that there are several countervailing arguments, some of which apply to the present type of case, while others are of more general application.

B

147 First, this is not a case of contracting out a duty: under the 1948 Act, Birmingham does have a duty to arrange for the provision of care and accommodation for Mrs YL, but it has no duty to provide such care and accommodation itself. The 1948 Act requires a local authority to arrange and, where necessary, to pay towards or for, care and accommodation for a person falling within section 21(1)(a); however, the 1948 Act does no more than to permit a local authority to provide the care and accommodation through its own care homes (and your Lordships were told Birmingham did not have any homes capable of providing for Mrs YL's needs).

C

D

148 Secondly, where a company carries on a business providing services for individuals, it appears to me that there is a difference between (a) a core public authority supporting, or subsidising, the business generally (e g a care home all of whose expenses are met either as they arise or by a grant intended to cover all such expenses), and (b) such an authority funding services provided by the business to specific individuals (e g some or all of a care home's care and accommodation charges for a person who is not well off). I consider that it is easier in the former case to contend that the business as a whole is therefore a function "of a public nature", than it is in the latter case to contend that the services provided to the specific individuals constitute such a function. That is not so much because it seems unattractive to have two categories of resident in a single care home. It is more that section 6(3)(b) appears to me to be concerned primarily with "functions", or services, as such, rather than with the identity of the person who is paying for the provision of the services, or the reason for payment (although such factors are not, in my view, irrelevant). I agree in this connection with the views expressed by my noble and learned friend, Lord Scott of Foscote in para 27 of his opinion which I have had the benefit of seeing in draft.

E

F

G

149 Thirdly, Mrs YL continues to enjoy Convention rights in respect of the provision of care and accommodation provided under section 21 of the 1948 Act against Birmingham, even after the care and accommodation was provided to her. It is true that, at least in some circumstances, those rights could be of somewhat less value in practice than if they existed against the proprietor, but I am not persuaded that any such disadvantage would be likely to be significant, let alone substantial. Further, as the documentation in this case illustrates, the contractual terms which a local authority is often able to impose on a proprietor of a care home with whom it makes arrangements under the 1948 Act may well ensure that a person's rights

H

A against the proprietor are pretty similar in practice to those which would be enjoyed against the local authority.

150 Fourthly, much of the concern of those who consider that contractors under contracting-out arrangements should have a Convention liability co-extensive with that which the contracting-out authority would have, is based on the nature of the powers given to contractors under such arrangements. This is illustrated by the reference to "the type of power" in B the extract from paragraph 41 of the Joint Committee Report quoted above. In the present type of case, however, the proprietor of a care home is not given significant, if any, statutory powers, a point discussed in a little more detail below.

151 Fifthly, the arbitrariness identified in the same extract from the Joint Committee report, if this appeal fails, is at least equalled by the C arbitrariness, if this appeal succeeds, of the existence of Convention rights of a private care home resident depending on whether her care and accommodation is being paid for (or was arranged by) the local authority, as opposed to herself or her family. Quite apart from that, I agree on this aspect with what Lord Scott says in paras 29 and 30 of his opinion.

152 Sixthly and more generally, I consider that, in answer to the policy argument for allowing this appeal on the basis of contracting-out, there is a D policy argument for dismissing it on the same basis. It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting-out at least certain services previously performed by E local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators. I am in no position to decide on the relative strength of the two competing policy arguments: that is a matter for the legislature. However, the fact that there are competing arguments makes it hard to justify the courts resolving the instant issue by reference to policy.

153 Seventhly, it does not seem to me that, as a matter of ordinary F language, an activity is "a function of a public nature" merely because it is contracted-out, as opposed to its being provided directly, by a core public authority. If an activity were thereby automatically rendered such a function, it would mean that activities such as providing meals or cleaning and repairing buildings could be caught. Referring again to the Ministry of Defence contracting for the manufacture of military materiel, it seems to me G that the private manufacturer's activities would not be within section 6(3)(b) even though the Ministry could have manufactured the materiel in its own factory.

A wider perspective

154 The factors which I have so far considered to support the case for H saying that, by providing care and accommodation for Mrs YL pursuant to an agreement with Birmingham, Southern Cross was performing a "function which is public in nature" are, in summary form: (a) the existence and detailed nature of statutory regulation and control over care homes; (b) the provision of care and accommodation for the elderly and infirm is a beneficial public service; (c) the elderly and infirm are particularly vulnerable

members of society; (d) the care and accommodation was provided pursuant to the local authority's statutory duty to arrange its provision; (e) the cost of the care and accommodation is funded by the local authority pursuant to its statutory duty; (f) the local authority has power to run its own care homes to provide care and accommodation for the elderly and infirm; and (g) the contention that section 6(3)(b) should apply to a contracting-out case.

155 For the reasons so far given, I consider that each factor, at least if taken individually, would be insufficient to render the provision of care and accommodation by Southern Cross in its care home to Mrs YL a "function of a public nature". However, it must be right to consider the effect of the various factors together, and, indeed, in the broader policy context. There is no doubt that, if one takes the various factors which I have summarised together, rather than examining the effect of each one separately, Mrs YL's case looks significantly stronger, but I still do not find it very persuasive. Each factor has some force, but, for the reasons already given, not very much force, at least in my opinion. Without some other, more powerful, wider, or policy, consideration to support the contention that section 6(3)(b) applies, I do not consider that the combination of the factors so far discussed serves to establish that Southern Cross is performing a function "of a public nature" in providing care and accommodation to Mrs YL in its care home.

156 I turn to what may be characterised as wider, policy, considerations. In that connection, the House was referred to a number of decisions concerning judicial review. The issue as to the meaning of the words "functions of a public nature" in a statute concerned with incorporating the Convention into domestic law does not necessarily involve quite the same principles as the question of whether a decision of a particular body is susceptible to judicial review. However, particularly given that the meaning of section 6(3)(b) is ultimately an issue of domestic law, the similarity in the character of the two issues, and the overlap of factors which come into play on the two issues, satisfies me that such decisions are of real assistance. So far as the effect of the cases on the present issue is concerned, there is nothing which I can usefully add to Lord Mance's analysis and conclusion in paras 100 to 105 of his speech.

157 While the question of the effect of section 6(3)(b) is one of domestic law, it seems to me that the Strasbourg jurisprudence is also of help, especially in the light of what has been said in your Lordships' House about the purpose of the 1998 Act, and section 6 in particular. In para 34 of his speech in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, Lord Nicholls of Birkenhead said that the 1998 Act was "not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg", and in para 29 of his speech in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, my noble and learned friend, Lord Bingham of Cornhill said, to much the same effect, that the purpose of the 1998 Act "was not to enlarge the rights or remedies of those . . . whose Convention rights have been violated". These general observations are consistent with the views expressed by Lord Hope of Craighead and Lord Rodger of Earlsferry in relation to section 6(3)(b) at paras 45 to 51 and paras 158 and 159 respectively in *Aston Cantlow* [2004] 1 AC 546.

158 Indeed, the observations of this House in *Aston Cantlow* are in my opinion of more specific assistance to the resolution of the present appeal.

A Lord Hope and Lord Rodger said that the Strasbourg court jurisprudence on the effect of article 34 of the Convention (which restricts applications to the Strasbourg court to "any person, non-governmental organisation or group of individuals . . .") was relevant when considering whether an entity was a "core public authority".

159 Even more to the point, Lord Hope also said, at para 49, that " 'public functions' in this context is thus clearly linked to the functions and B powers, whether centralised or distributed, of government". In the following paragraph, he referred to article 34 as extending to "a person or body . . . established with a view to public administration as part of the process of government". Lord Rodger referred in paras 159, 160 and 163 to entities "exercising governmental power", "carrying out the functions of government" and having the "public function of government". This is very C much in line with the broader approach of Lord Nicholls: in para 10, while stressing that it was "no more than a useful guide", he said that in the light of "the repetition of the description 'public' " in section 6(3)(b), "essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature". To similar effect, Lord Hobhouse of Woodborough invoked the test of a function which is "governmental in nature" and of entities which are "inherently D governmental" in para 88.

160 With the assistance of this guidance, and looking at other policy issues, the following considerations (which, in some cases, have already been mentioned and, in other cases, overlap to some extent and are not ranked in order of importance), are in point: (a) the activities of Southern Cross in providing care and accommodation for Mrs YL would not be susceptible to E judicial review; (b) Mrs YL would not, I think, be treated by the Strasbourg court as having Convention rights against Southern Cross, and she retains her Convention rights against Birmingham; (c) Southern Cross's functions with regard to the provision of care and accommodation would not be regarded as "governmental" in nature, at least in the United Kingdom; (d) in relation to its business, a care home proprietor such as Southern Cross has no special statutory powers in relation to those it provides with care and F accommodation, or otherwise; (e) neither the care home nor any aspect of its operation, as opposed to the cost of the care and accommodation provided to Mrs YL and others in her situation, is funded by Birmingham; and (f) the rights and liabilities between Southern Cross and Mrs YL arise under a private law contract. When taken together, these considerations establish to my satisfaction that the provision of care and accommodation by Southern G Cross to Mrs YL, despite being arranged and paid for by Birmingham pursuant to its statutory duty under sections 21 to 26 of the 1948 Act, is not a function "of a public nature" within section 6(3)(b).

161 I have already explained that I agree with Lord Mance's analysis of what the position would be in relation to judicial review. The Strasbourg jurisprudence has also been admirably discussed in his speech, and it would be otiose for me to repeat his analysis. The decisions are not all entirely easy H to reconcile, but it appears to me that they support the arguments put forward by Ms Beverley Lang for Southern Cross. First, Southern Cross would be regarded as falling within article 34 in connection with the provision of care and accommodation to Mrs YL. Secondly, and more controversially, Southern Cross would not be susceptible to a claim in the

Strasbourg court at the suit of Mrs YL. In other words, to interpret section 6(3)(b) as giving Mrs YL Convention rights against Southern Cross would appear to involve extending her rights in a way inconsistent with the observations quoted above from *Quark* and *Denbigh*. Further, as already discussed, she has substantial Convention rights against Birmingham. A

162 Also of real significance, in my view, is the not unrelated point arising from the reference in the speeches in *Aston Cantlow* [2004] 1 AC 546 to the governmental character of the functions covered by section 6(3)(b). As Lord Rodger explained in para 159, "the exact range of governmental power will vary . . . from state to state". Providing care and accommodation in a care home would not, in my opinion, be seen in this country as being a function which was of a character which could be described as "governmental", in the normal sense of that word. The fact that local authorities are empowered to run care homes no more justifies a contrary conclusion than the fact that they enter into maintenance or cleaning contracts in respect of their buildings or run restaurants for their staff justifies the view that such activities are governmental functions. B C

163 It is true, as Lord Bingham points out, that the state has accepted responsibility for the past 60 years for ensuring that care is provided for the old and infirm who cannot support themselves. However, that does not mean that the actual provision of such care to an individual is a function of a public nature, or that it would be perceived as being a governmental function, at least in a privately owned care home, even if paid for, as in her particular case at least in part, by a core public authority. D

164 The state provides education and health to everyone, and indeed it is obliged by the Convention to provide education. However, that certainly does not mean that the provision of health or education services in a private school or hospital is a function of a public nature, and, at least as at present advised, that would apply, in my view, even where the costs of the recipient of the service happens to be paid for by a core public authority. Similarly, local authorities provide free or subsidised accommodation for those who need it, but that does not mean that a private landlord falls within section 6(3)(b), even if its tenants receive rent support (including direct payment to the landlord) from a local authority. There are state pensions for every retired worker, and public sector workers receive earnings-related pensions, but that does not mean that a private company managing those pension funds, or underwriting of the pensions, would thereby be exercising a function of a public nature. E F

165 As already mentioned, it seems to me much easier to invoke public funding to support the notion that service is a function of "a public nature" where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person. Section 6(3)(b) is primarily concerned with functions and what is entailed with them (e g statutory powers and duties) rather than to whom they are provided, or indeed who provides them. Thus, it appears to me to be far easier to argue that section 6(3)(b) is engaged in relation to the provision of free housing by an entity all of whose activities are wholly funded by a local authority, than it is in relation to the provision of housing by an independently funded entity to impecunious tenants whose rent is paid by the local authority. G H

A **166** In my judgment, it is of particular importance in relation to the issue which we have to decide that a proprietor of a care home is not given significant, or indeed (as far as I am aware) any, coercive or other statutory powers, over its residents, whether they are in the care home pursuant to an arrangement with a local authority or otherwise. If proprietors had such powers, that would be a powerful reason for justifying the conclusion that a function was "public in nature". Running a prison, discharging a statutory B regulatory regime (Lord Nicholls's examples in *Aston Cantlow* [2004] 1 AC 546, para 9), maintaining defence (as is mentioned by Lord Bingham) and providing police services, which are plainly functions falling within section 6(3)(b), carry with them such powers.

167 I accept that the fact that some statutory power is attached to a function may not always determine that the function is "of a public nature". C Indeed, if it were, *Aston Cantlow* [2004] 1 AC 546 may well have been differently decided: see also *R (West) v Lloyd's of London* [2004] 3 All ER 251. In *Aston Cantlow* [2004] 1 AC 546, para 147, Lord Rodger said the existence of a statutory power was not "sufficient" to bring the function within section 6(3)(b), and he characterised the existence of such a power as an "imprecise criterion for identifying [a public] authority". However, the D existence of a relatively wide-ranging and intrusive set of statutory powers in favour of the entity carrying out the function in question is a very powerful factor in favour of the function falling within section 6(3)(b). Indeed, it may well be determinative in many cases, because such powers are very powerfully indicative of a public institution or service. (For completeness, I should add that the source of the powers need not always be statutory: see, by analogy, *R v Panel on Take-overs and Mergers Ex p Datafin plc* [1987] E QB 815).

168 In para 63 of his speech in *Aston Cantlow* [2004] 1 AC 546, Lord Hope of Craighead approached the issue slightly differently. He held that section 6(3)(b) did not apply because "the liability [in question] arises as a matter of private law". Although he dissented in the answer on this aspect, Lord Scott appears, in para 131, to have thought this the right approach. F The liability of Southern Cross to provide Mrs YL with care and accommodation in the present case similarly "arises as a matter of private law". That is illustrated by the fact that Mrs YL was (or her relatives were) free to choose which care home she went into, and took advantage of that right by selecting a care home more expensive than Birmingham was prepare to pay for, and funding the difference. Indeed, although provided as a result of a core public authority carrying out its duty to arrange and pay towards G its cost, the services provided in this case are very much of a personal nature, as well as arising pursuant to a private law contract between Southern Cross and Mrs YL.

169 Mr Fordham, for the Interveners, Justice, Liberty and BIHR, made much of the point which I have already briefly mentioned, namely the alleged anomaly which would result if the question of whether a person H whose care home was paid for (or arranged by) the local authority would have Convention rights should depend on whether the care home was run by the local authority or a private entity. Even if that can be characterised as an anomaly, it is a point which seems to me to be of little relevance. It is inherent in the scheme of section 6 that any service provided by a core public authority is caught, whereas it is only if the service falls within

section 6(3)(b) that it is caught where the service is provided by anyone else. It would in my view, if anything, be rather more of an anomaly if inhabitants of a privately owned care home, who were funded in whole or in part by a local authority, had Convention rights, whereas other inhabitants, who paid for themselves but were in an otherwise identical situation, did not. In any event, the balancing exercise in the case of a resident who claimed her Convention rights were being infringed, would be different in a care home run by a local authority (who would have no Convention rights) from a care home with a private proprietor (who would be able to pray in aid his own Convention rights).

Conclusion

170 Accordingly, for the reasons given by Lord Mance, as well for those given by Lord Scott, and for the additional reasons I have set out, I am of the view that the provision of care and accommodation by Southern Cross to Mrs YL, even though it was arranged, and is being paid for, by Birmingham pursuant to sections 21 to 26 of the 1948 Act, does not constitute a "function of a public nature" within section 6(3)(b). Accordingly, I would dismiss this appeal.

171 Finally, it is right to add this. It may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors. That is a subject on which there are no doubt opposing views, and I am in no position to express an opinion. However, if the legislature considers such a course appropriate, then it would be right to spell it out in terms, and, in the process, to make it clear whether the rights should be enjoyed by all residents of such care homes, or only certain classes (e g those whose care and accommodation is wholly or partly funded by a local authority).

Appeal dismissed.

Solicitors: Irwin Mitchell, Sheffield; Legal and Democratic Services, Birmingham City Council, Birmingham; Lester Aldridge, Bournemouth; Bailey Wright & Co, Birmingham; Treasury Solicitor; Solicitor, Liberty; Solicitor, Help the Aged; Legal Officer, Disability Rights Commission.

C T B

Neutral Citation Number: [2009] EWCA Civ 23

Case No: C1/2008/0649

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
(LORD JUSTICE MAURICE KAY AND MR JUSTICE WALKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE WALL
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

Tabernacle	**Appellant**
- and -	
The Secretary of State for Defence	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr David Pievsky (instructed by Public Interest Lawyers) for the Appellant
Mr Gordon Nardell (instructed by **The Treasury Solicitor**) for the Secretary of State for Defence

Hearing dates : 26 November 2008

- -

Crown copyright©

Lord Justice Laws:

INTRODUCTION

1. This is an appeal, with permission granted by Waller LJ on 13th May 2008, against the decision of the Divisional Court (Maurice Kay LJ and Walker J) given on 6th March 2008 by which it dismissed the appellant's application for judicial review seeking to challenge the legality of paragraph 7(2)(f) of the Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 (the 2007 Byelaws).

2. The appellant is a long-time member of the Aldermaston Women's Peace Camp (the AWPC). The AWPC protest against nuclear weapons. They do so in the vicinity of the Atomic Weapons Establishment at Aldermaston (the AWE). They have camped on land at Aldermaston, most recently in an area owned by the respondent Secretary of State within what the 2007 Byelaws call "the Controlled Areas". Paragraph 7(2)(f) of the 2007 Byelaws prohibits camping in the Controlled Areas from which, therefore, it bans the AWPC. The question in the case is whether this prohibition violates the appellant's right of free expression guaranteed by Article 10 of the European Convention on Human Rights (the ECHR).

THE FACTS

3. What follows is an outline. It will be necessary to say a little more about some of the facts in the context of particular submissions advanced by counsel and the conclusions I will arrive at.

4. The camp has been going for some 23 years. The women assemble on the land for the second weekend of each month. They stay from Friday evening until Sunday morning. They hold vigils, meetings and demonstrations, and hand out leaflets. Their protest is and always has been entirely peaceful.

5. The land occupied by the AWE includes what are called the Protected Areas and the Controlled Areas. Public entry into the Protected Areas, where the actual Research Establishment is situated, is forbidden. However the public has free access to the Controlled Areas, and it is there, as I have indicated, that the AWPC foregathers each month. We were told that the Controlled Areas have been open to the public at least since 1986.

THE LEGISLATION

6. The 2007 Byelaws have been in force since 31st May 2007. Their *vires* is s.14(1) of the Military Lands Act 1992. S.14(2) is also material. The relevant provisions are:

> "(1) Where any land belonging to a Secretary of State or to a volunteer corps is for the time being appropriated by or with the consent of a Secretary of State for any military purpose, a Secretary of State may make byelaws for regulating the use of the land for the purposes to which it is appropriated, and for securing the public against danger arising from that use, with

power to prohibit all intrusion on the land and all obstruction of the use thereof …

(2) Where any such byelaws permit the public to use the land for any purpose when not used for the military purpose to which it is appropriated, those byelaws may also provide for the government of the land when so used by the public, and the preservation of order and good conduct thereon, and for the prevention of nuisances, obstructions, encampments, and encroachments thereon, and for the prevention of any injury to the same, or to anything growing or erected thereon, and for the prevention of anything interfering with the orderly use thereof by the public for the purpose permitted by the byelaws."

7. Paragraph 6 of the 2007 Byelaws allows the public to have access to the Controlled Areas. It provides:

> "Subject to the provisions of these byelaws, members of the public are permitted to use all parts of the Controlled Areas not specially enclosed or entry to which is not shown by signs or fences as being prohibited or restricted, for any lawful purpose at all times when the Controlled Areas are not being used for the military purpose for which they are appropriated."

Paragraph 7(2) of the 2007 Byelaws opens with the words "No person shall within the Controlled Areas …", and there then follow twenty prohibited acts, listed under (a)-(t). I should read paragraph 7(2)(f), (g) and (j):

> "(f) camp in tents, caravans, trees or otherwise;
>
> (g) attach any thing to, or place any thing over any wall, fence, structure or other surface;
>
> …
>
> (j) act in any way likely to cause annoyance, nuisance or injury to other persons …"

Contravention of any provision of Byelaw 7 is a criminal offence: see Byelaw 9.

8. ECHR Article 10 provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
>
> (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."

I should also set out Article 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 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 …"

THE ISSUE

9. The appellant sought originally to challenge the legality of paragraph 7(2)(f), (g) and (j). The Divisional Court, having granted permission to seek judicial review and proceeded to determine the substantive judicial review claim, upheld the challenge to paragraph 7(2)(g) but dismissed the balance of the application relating to 7(2)(f) and (j). We are no longer concerned with (j). The appeal relates only to (f).

10. As I have foreshadowed the appellant's primary case is that paragraph 7(2)(f) of the 2007 Byelaws constitutes an unlawful interference with her right – indeed the right of every member of the AWPC – of freedom of expression guaranteed by ECHR Article 10. It is also said there is a violation of Article 11. That, I think, is on the facts not so much to be regarded as an autonomous claim, but rather as underlining the mode of free expression relied on: a communal protest in a camp established for the purpose.

11. It is of course common ground, having regard to s.6 of the Human Rights Act 1998 which I need not read, that in framing paragraph 7(2)(f) of the 2007 Byelaws the Secretary of State was obliged to respect the Article 10 rights of persons potentially affected by the prohibition thereby enacted. It is clear that paragraph 7(2)(f) constitutes in practice an interference with the rights of the AWPC pursuant to Article 10(1). So much is also common ground. The ultimate question in the appeal, therefore, is whether this byelaw is nevertheless justified by any of the considerations in Article 10(2).

THE SECRETARY OF STATE'S CASE

12. Although the Secretary of State is respondent to the appeal it is convenient first to explain his case. He bears the burden of justifying the accepted interference with the Article 10 right. As a preliminary, there are some foothills to cross.

The Legal Setting

13. In deciding whether the interference is justified the court has to consider whether paragraph 7(2)(f) serves the achievement of a legitimate aim and, if it does,

constitutes a proportionate means of doing so. The requirement of proportionality is derived from the rubric "necessary in a democratic society" in Article 10(2). It is well established that this standard can only be satisfied if the impugned measure is required to fulfil what the European Court of Human Rights has described as a "pressing social need": see, amongst a welter of authority, *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

14. Moreover the weight of the Article 10(2) justification advanced by the State cannot – certainly in this case – be looked at in isolation. Whether paragraph 7(2)(f) imposes no more than a proportionate restriction of AWPC's free expression rights depends also on the particular nature and quality of the right's exercise with which the prohibition interferes. Here the Secretary of State's case has two specific aspects. First, Mr Nardell on his behalf submits that we should attach importance to the fact that the only source of the public's right (thus AWPC's right) to go on the Controlled Areas is to be found in the 2007 Byelaws themselves: paragraph 6, which I have set out. They are not, otherwise, public land at all. Mr Nardell says that all that has happened is that the Secretary of State has through the 2007 Byelaws granted the public a right to go on the Controlled Areas, but subject to conditions including that provided for by paragraph 7(2)(f). The State owes no positive obligation whatever to set aside any part of the property as a place for public protest. Moreover the Secretary of State has not previously admitted the public to the Controlled Areas for camping purposes, let alone political protest: the predecessor byelaws also prohibited camping. In all those circumstances, while as I have foreshadowed Mr Nardell accepts that paragraph 7(2)(f) constitutes an interference with AWPC's rights under Article 10, he says that the interference is weak.

15. The second aspect of the Secretary of State's case concerning the particular nature and quality of the Article 10 right's exercise (with which the paragraph 7(2)(f) prohibition interferes) is altogether broader. It consists in what Mr Nardell submits is an important distinction: between the so-called essence of the Article 10 right on the one hand, and the "manner and form" of its exercise on the other. Mr Nardell submits that paragraph 7(2)(f) only intrudes upon the latter, and this has, or should have, a significant bearing on the court's readiness to hold that paragraph 7(2)(f) is no more than a proportionate interference. Plainly there is not, nor could there be, any suggestion that the Secretary of State has sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. Mr Nardell submits that such a restriction goes at most to the manner and form of AWPC's exercise of the right of free expression; and not to the right's essence.

16. The distinction between a right's essence and the manner and form of its exercise has been recognised in the Strasbourg jurisprudence: *Ziliberberg v Moldova* (Application 61821/00), *Ashingdan v UK* (1985) 7 EHRR 528 (paragraph 57), and *F v Switzerland* (1987) 10 EHRR 411. Of particular interest in the context of this case is an authority referred to by Mr Nardell in response to the reply skeleton argument put in by Mr Pievsky for the appellant, namely *Rai, Allmond & "Negotiate Now" v UK* (1995) 19 EHRR CD93. Mr Nardell would submits that this case tends to show – and does so in the then highly charged context of protest and demonstration concerning Northern Ireland – that restrictions on the manner of the Article 10 right's exercise may very well be regarded as proportionate provided they betray no bias or arbitrariness and do

not amount to a blanket prohibition. *Rai, Allmond* concerned an application to hold a political rally in Trafalgar Square by an organisation favouring negotiations without pre-conditions in Northern Ireland. The police considered that there would be no danger to public order, but the application was turned down having regard to the policy of successive governments since 1972 to refuse permission for public demonstrations or meetings in Trafalgar Square on the Northern Ireland issue. After the IRA bombing in Aldershot which killed seven civilians, the Secretary of State had in 1972 stated that

> "... the Government had to decide whether it would be fitting to permit the use of the Square by any organisation that had declared its support for the perpetrators of violence of that kind and they had no hesitation in deciding that it would be an affront to the British people to do so. The Government having made the decision, it would be wrong to attempt to distinguish between different organisations..."

17. In Strasbourg the applicants submitted that their assembly was banned in Trafalgar Square because it was "controversial" and liable to shock or offend rather than for any reason of public safety. The Commission, which concluded that the applicants' complaint was manifestly ill-founded, held that the question whether the applicants' policy was merely "controversial" was within the government's margin of appreciation, and said this (CD98):

> "Having regard to the fact that the refusal of permission did not amount to a blanket prohibition on the holding of the applicants' rally but only prevented the use of a high profile location (other venues being available in central London)... the restriction in the present case may be regarded as proportionate and justified as necessary in a democratic society within the meaning of Article 11(2) of the Convention."

18. One might compare *Chorherr v Austria* (1993) 17 EHRR 358, in which persons displaying placards and distributing leaflets at a military ceremony were arrested and convicted of "causing a breach of the peace by conduct likely to cause annoyance". The court, holding there had been no violation of Article 10, stated:

> "31. ... [The] margin of appreciation extends in particular to the choice of the - reasonable and appropriate - means to be used by the authorities to ensure that lawful manifestations can take place peacefully...
>
> 32. … [W]hen he chose this event for his demonstration against the Austrian armed forces, Mr Chorherr must have realised that it might lead to a disturbance requiring measures of restraint, which in this instance, moreover, were not excessive. Finally, when the Constitutional Court approved these measures it expressly found that in the circumstances of the case they had been intended to prevent breaches of the peace and not to frustrate the expression of an opinion...

> 33. In the light of these findings, it cannot be said that the authorities overstepped the margin of appreciation which they enjoyed in order to determine whether the measures in issue were 'necessary in a democratic society' and in particular whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued."

19. Mr Nardell would submit that the learning shows not only that there is a real distinction between restrictions on the manner and form of a protest (or other utterance) and a prohibition of the protest altogether; it shows also that once the court is satisfied that the case is in the former territory and not the latter, it will be much readier to allow the State what may be a generous margin of appreciation to take restrictive measures for practical or prudential reasons. As Professor Barendt has said (*Freedom of Speech*, 2nd edn., p. 281):

> "[R]easonable time, manner, and place restrictions have been upheld, provided at any rate that they leave ample alternative channels for communication of the ideas an information."

One may compare the decision of the Divisional Court in *Blum v DPP & Orsv DPP* [2007] UKHRR 233 in which it was held that a requirement for prior authorisation of a demonstration would not generally be repugnant to ECHR Article 11.

20. On Mr Nardell's case the space given by the Strasbourg court to manner and form restrictions is, moreover, all of a piece with another dimension of the court's jurisprudence. This is the care taken in the authorities to avoid a position in which invocation of a Convention right might seem to, or might in fact, confer an immunity from the effects of ordinary State regulation for proper purposes. *Chapman v UK* (2001) 10 BHRC 48 (Application No 272385/95) is a good example. The applicant was a gypsy. The local authority refused planning permission for her mobile home to be stationed on a piece of land she had purchased, and served enforcement notices which were upheld at a public inquiry. Further applications for planning permission for a bungalow were refused, and the refusals again upheld at public inquiries. The court at Strasbourg held that the authority's decisions constituted an interference with the applicant's right to respect for her private life, family life and home pursuant to ECHR Article 8; but the interference had the legitimate aim of protecting the rights of others, the national authorities enjoyed a margin of appreciation as to how that should be achieved, and they had weighed in the balance the various competing interests. Accordingly the decisions arrived at were proportionate to the legitimate aim of preserving the environment. At paragraph 96 the court observed that

> "the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment..."

21. Mr Nardell submits that all these aspects of the case-law provide the setting for the Secretary of State's justification of the interference with the AWPC's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Their effect is that while the justification must be real and not fanciful, and of course serve a legitimate aim, it

must be judged by reference to a very broad margin of appreciation enjoyed by the Secretary of State.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

22. What then is the Secretary of State's justification for paragraph 7(2)(f)? It is offered in the witness statement of Mr Timothy Pinchen, who is employed by the Ministry of Defence dealing with estate management issues across various parts of the Defence Estate. The essence of his evidence is crisply summarised by Maurice Kay LJ giving the judgment of the Divisional Court:

> "23. … As a matter of policy, there is a general prohibition on unauthorised camping across the Defence Estate. It is only allowed with express permission. The reasons include operational and security concerns. Dealing specifically with Aldermaston, Mr Pinchen says that camping in the vicinity of the security fence is not appropriate for security reasons. If it were allowed, additional surveillance would be necessary. Camping can be used as a base, a cover or a distraction in relation to terrorist or similar activities. There are no publicly accessible sanitation facilities anywhere in the Controlled Areas. AWE have received numerous complaints about the AWPC and its occupants, ranging from the leaving of human excreta in the area to passing motorists beeping their horns … The claimant denies all allegations of antisocial behaviour and we are content to accept that, in general, the members of the AWPC do not behave badly. They have been camping there or thereabouts for many years and the prohibition on camping in the Byelaws has existed since at least 1986. We have previously explained why it has not been enforced over the years."

The reference to a previous explanation is to paragraph 5 of the Divisional Court's judgment:

> "It seems that the 1986 Byelaws were never used against the AWPC, probably because there was for a time some doubt as to whether the women were on land belonging to the Secretary of State and, more recently, because of apprehension about the impact of the Human Rights Act 1998."

23. I should notice some further specific points made by Mr Pinchen. At paragraph 48 of his statement he says that camping on the verges "is in dangerous proximity to high volume traffic... [and] provides a distraction to motorists". At paragraph 52 he refers to an area called "Bluebell Wood" which has been used for camping, but is also "regularly used by residents for recreational and access purposes as there is no footpath along the verge of the busy road. Last year there was an attack on the unauthorised camp by, it is believed, local residents."

24. In light of all these matters Mr Nardell would pray in aid a series of legitimate aims or purposes, among those listed in ECHR Article 10(2), which are promoted by

paragraph 7(2)(f): national security, public safety, the prevention of disorder or crime, and the protection of the rights of others. And given the broad margin of appreciation to be accorded to the Secretary of State for the reasons which (on Mr Nardell's case) I have explained, the court should not undercut the Secretary of State's deployment of paragraph 7(2)(f) as a proportionate measure supporting those aims.

25. Given all these considerations Mr Nardell submits that paragraph 7(2)(f) of the 2007 Byelaws constitutes no violation of the appellant's rights under ECHR Article 10; and if it does not, there is no free-standing case under Article 11.

THE APPELLANT'S CASE

The Legal Setting

26. Mr Pievsky for the appellant does not dispute, nor could he, that the Strasbourg court has accepted a distinction between manner and form on the one hand and the essence of a Convention right on the other. He also concedes that the prevention of public disorder may in appropriate cases justify such measures as a requirement of prior authorisation or even the prohibition of a protest; though he submits that the feared disorder must be imminent. He does not, however, accept that in principle the law allows a wider discretionary area of judgment in relation to the manner and form, as opposed to the essence, of a political protest. ("Discretionary area of judgment" is a better phrase than "margin of appreciation": as is well known the latter is a Strasbourg term of art reflecting the international court's distance from the facts and circumstances of decision-making in the States Parties.)

27. In any event, however, Mr Pievsky roundly submits that we are not in "manner and form" territory. His case is that the AWPC camp is not merely the setting or the context – the manner and form – of his client's protest: it is an inherent part of the protest itself. It has a symbolic effect. Attending a peace camp is a traditional and well-recognised form of political expression. There are many well-known instances. Waller LJ granting permission to appeal considered that "the byelaw as construed catches a form of peaceful protest used in many places..." It is undoubted that acts as well as words may constitute political expression: see for example *Vajna v Hungary* (Application 33629/06). In his reply skeleton argument Mr Pievsky puts it thus (paragraph 4):

> "Defacing a flag, deliberately using a seat on a bus supposedly reserved for citizens of a different race, in order to defy a racist law on segregation, going on a hunger strike, carrying out a silent vigil, and attending a peace camp are well-known ways in which political messages about fundamentally important political matters can be very powerfully expressed – albeit silently."

28. As for the contention that the appellant's ECHR rights are the less because (in light of paragraph 6 of the 2007 Byelaws) all that has happened is that the Secretary of State has granted public access to the Controlled Areas subject to conditions, this is, on Mr Pievsky's argument, a *non sequitur*. He submitted in terms that government property is held for the public good; the Secretary of State has no legitimate private axe to grind. I apprehend Mr Pievsky would say that once it is accepted that the appellant

enjoys Article 10 rights with the AWPC, the fact that the government landowner has granted access to the land means only that the AWPC is not a trespasser.

29. Mr Pievsky also submits that the Secretary of State has given no weight to the subject-matter of the AWPC protest: nuclear weapons. Where the acts or speech in question relate to "a debate on a matter of general concern and [constitute] political and militant expression … a high level of protection of the right to freedom of expression is required under Article 10": *Lindon and others v France* (2008) 46 EHRR 35.

30. In all these circumstances Mr Pievsky submits that the interference with his client's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws, far from being weak or insubstantial, goes to the right's core or essence; and the discretionary area of judgment which the domestic court should allow the Secretary of State (whatever the margin of appreciation which might be contemplated by the international tribunal) should be severely circumscribed. Paragraph 7(2)(f) could only be vindicated by a substantial objective justification, amounting to an undoubted pressing social need.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

31. Mr Pievsky has advanced arguments in reply to all of the points put forward by Mr Pinchen. As for concerns about security, it has not been suggested that the AWPC have ever proposed to enter the Protected Areas, and (as my Lord Wall LJ suggested in the course of argument) the perimeter fence is presumably patrolled in any event. Then there is a point about sanitation: the appellant has given evidence, which I do not think is contradicted, as to the availability of adequate sanitation facilities. Moreover the 2007 Byelaws include provisions relating to nuisance and waste and there has been no suggestion of any breach. Next there is Mr Pinchen's evidence of "numerous complaints about the AWPC and its occupants", some of them taking a particularly unpleasant form. The Divisional Court accepted that "in general, the members of the AWPC do not behave badly", and the evidence overall shows that their activities down the years have been consistently peaceful.

32. On this last aspect of the case, the reaction of other members of the public to the presence and the activities of the AWPC, Mr Pievsky understandably relies on the decision of the Divisional Court in *Redmond-Bate v DPP* [1999] EWHC Admin 732. That case concerned an episode in which one or more of three women, Christian fundamentalists, were preaching from the steps of Wakefield Cathedral. A crowd gathered. Some of the people in the crowd showed themselves hostile to the women. A police officer at the scene feared a breach of the peace. He asked the women to stop preaching. They refused. He arrested them for breach of the peace. One of the women was subsequently convicted of obstructing a police officer. Her appeal to the Crown Court was dismissed. She launched a further appeal, by way of case stated, to the High Court; and this appeal was successful. Sedley LJ (with whom Collins J agreed) said this:

> "18. ... The question for PC Tennant was whether there was a threat of violence and if so, from whom it was coming. If there was no real threat, no question of intervention for breach of the peace arose. If the appellant and her companions were (like the street preacher in *Wise v Dunning*) being

> so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Skeleton Army in *Beatty v Gilbanks*), then it was they and not the preachers who should be asked to desist and arrested if they would not."

33. In all these circumstances Mr Pievsky submits that the Secretary of State has not begun to demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need.

THE DECISION OF THE DIVISIONAL COURT

34. The Divisional Court's conclusions are expressed in paragraph 25:

> "The questions become: has the Secretary of State established that the prohibition on camping is necessary in a democratic society and that it satisfies a pressing social need by reference to the reasons set out in Articles 10(2) and 11(2). Has he accordingly established the proportionality of the prohibition …? In our judgment, the answer to both questions is in the affirmative. We attach some significance to the fact that the prohibition only limits freedom of association and of expression on the property of the Secretary of State. Importantly, a prohibition on camping only impacts on one form of association and expression. Mr Pievsky is eloquent on the significance of camping to his client and her colleagues but we see his point more in terms of poetry than of true principle. In our judgment, the evidence of Mr Pinchen and the matters to which we have referred enable the Secretary of State to justify the prohibition on camping."

CONCLUSIONS

The Legal Setting

35. In my judgment the supposed distinction between the essence of a protest and the manner and form of its exercise has to be treated with considerable care. In some cases it will be real, in others insubstantial. All depends on the particular facts; and it is worth remembering that the Strasbourg court has always been sensitive to factual nuance.

36. As I have said it is plain in this case that the Secretary of State has not sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. In that sense it may be said that paragraph 7(2)(f) of the 2007 Byelaws only goes to the manner and form of the exercise of the appellant's rights under ECHR Article 10. It is not on its face directed towards the suppression of free speech, on the part of the AWPC or anyone else. It merely prohibits camping, which

happens to be the mode or setting chosen by the AWPC for its protest. It happens also (Mr Pinchen, paragraph 37) that there is a general prohibition of unauthorised camping across the Defence estate.

37. But this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs. It takes little imagination to perceive, as I would hold, that that is the case here. As I have said, the AWPC has been established for something like 23 years. Some of those involved may have been steadfast participants the whole time. Others will have come and gone. But the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it. To them, and (it may fairly be assumed) to many who support them, and indeed to others who disapprove and oppose them, the "manner and form" *is* the protest itself.

38. In my judgment, therefore, the fact that the camp can be categorised as the mode not the essence of the protest carries little weight. And the fact that the Secretary of State is himself the source of the public's right to go on the Controlled Areas carries none. Mr Pievsky's submission that government property is held for the public good is obviously correct; indeed, nothing could be more elementary. The Secretary of State has, as I have said, no legitimate private axe to grind. It follows that the Secretary of State's grant of a general permission to go on the Controlled Areas would only have resonance if the case were like a private landowner's grant, whereby he reserved certain rights to himself. In such a case the reserved rights would of course limit the permission in the landowner's own legitimate interests. There is no analogy here.

39. In light of all these considerations I consider that if he is to show compliance with his obligations under the Human Rights Act the Secretary of State must demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need. The byelaw's interference with the appellant's rights is far from being weak or insubstantial. The Secretary of State does not enjoy so broad a margin of discretionary judgment as Mr Nardell submits.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

40. Against that background I turn to the Secretary of State's justifications for the interference with the appellant's Article 10 rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Mr Pinchen helpfully explains that the making of the 2007 Byelaws followed a Byelaws Review which began in 2004 as a rolling exercise. Various recent legal developments were considered, and the Review led to "a number of adjustments to the generic byelaws template" (Mr Pinchen, paragraph 20). There was correspondence with the AWPC in which the AWPC (and their lawyers) asserted Convention rights. At length the Byelaws were made.

41. In my judgment the Secretary of State's justifications are insubstantial. First of all, the fact that no steps were taken to put a stop to the camp over the 23 years of its existence to my mind speaks loud. I have already referred to the explanation offered for the fact that the 1986 Byelaws were never used against the AWPC: "there was for a time some doubt as to whether the women were on land belonging to the Secretary of State and, more recently, because of apprehension about the impact of the Human Rights Act 1998" (Divisional Court judgment, paragraph 5). I am afraid I think this

is extremely feeble. I acknowledge that the AWPC has occupied different locations over the years, and there seems even today to be a degree of uncertainty, if not confusion, as to where the boundaries of the Controlled Area have precisely lain. But if the Secretary of State in truth entertained substantial objections to the presence of the camp, he was surely able to deploy appropriate resources to ascertain the exact position and take legal steps to deal with it. And acting on expert advice he would, no less surely, have adopted a clear stance on the Human Rights Act, which has now been in force for eight years and more.

42. Mr Pievsky's responses to the individual justifications canvassed in Mr Pinchen's evidence are all generally persuasive. Paragraph 7(2)(f) was not framed in the face of high-profile public concerns, as in *Rai, Almond* (1995) 19 EHRR CD93; or threats of violent public disorder, as in *Chorherr v Austria* (1993) 17 EHRR 358; or defiance of the general law, as in *Chapman v UK* (2001) 10 BHRC 48. In my judgment the Secretary of State has viewed, or treated, the AWPC's presence at Aldermaston for all the world as if it were no more nor less than a nuisance. I accept he appears to have regarded it as more than that, and I certainly accept that Mr Pinchen's evidence accurately describes the Secretary of State's perception of the matter. But the individual points made – the security fence, traffic problems, lavatories, the bad behaviour of other members of the public – are, in objective terms, nuisance points.

43. Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope.

44. For all these reasons, in my judgment the effect of paragraph 7(2)(f) of the 2007 Byelaws is to violate the appellant's rights guaranteed by ECHR Articles 10 and 11. I would accordingly allow the appeal. If my Lords agree, we should hear argument as to the appropriate form of relief.

Lord Justice Wall :

45. I do agree. Since I have had the great advantage of reading in draft the judgment of my Lord, Laws LJ and since I find myself in complete agreement with it, I propose to add only a short judgment of my own; (1) because of what I see as the importance of the case; and (2) because we are differing from the Divisional Court on the critical issue.

46. I would like to make two short points. The first is that I was unimpressed, on the facts of this case, by the argument advanced on behalf of the Secretary of State in paragraph 6 of Mr. Pinchen's witness statement that the prohibition on camping was

merely a means of redirecting the protest, and not of extinguishing it. In Mr Pinchen's words: -

> The MOD recognises that members of the public may have strongly held opinions about military activity, not least about the development and manufacture of nuclear weapons…… It entirely respects the entitlement of individuals to express views and participate in protest activity about those matters. The MOD's aim in making and enforcing byelaws for Controlled "Areas is not to prevent people from participating in such activity, but to impose on all who wish to use the Controlled Areas the regulation considered necessary to enable the Ministry to offer public access in a way that is compatible with the operational requirements of the establishment".

47. In my judgment, this paragraph is vulnerable to attack on a number of fronts. I will identify only two. In the first place, it seems to me to give take no cognisance of the nature of the protest, as explained by the appellant in paragraph 7 of her second witness statement: -

> "I would like to emphasise how fundamental camping is to the AWPC's protests at Aldermaston. As AWPC's name suggests, its very nature is the camp. Without the camp AWPC simply would not exist……."

48. In the second place, there is absolutely no evidence that the presence of the AWPC over many years has been incompatible "with the operational requirements of the establishment". Had it been, Mr. Pinchen's statement would, no doubt have provided a great deal of detail. As it is, his statement, as I read it, is highly unspecific.

49. I therefore find myself in respectful disagreement with paragraph 25 of the judgment of the Divisional Court, which my Lord has set out and which I will not repeat. Whatever one's views of the AWPC (which are, as my Lord says, neither here nor there) the penultimate sentence of that paragraph strikes me as unduly dismissive, and in my judgment the evidence of Mr. Pinchen comes nowhere near demonstrating a "pressing social need". In this regard, I gratefully adopt and associate myself with my Lord's analysis of Mr. Pinchen's evidence which I cannot better and need not repeat.

50. My second point is that, in my judgment, this is a case about freedom of expression under ECHR Article 10, and freedom of association and assembly under Article 11. For the Secretary of State, Mr Nardell spent a considerable amount of time taking us through the decision of the ECtHR in *Chapman v UK* which my Lord discusses in paragraph. 20 of his judgment. *Chapman* is, of course, a case concerned with ECHR Article 8, and speaking for myself, I found wholly unpersuasive Mr. Nardell's argument that the margin of appreciation allowed in such a case could be translated to a case such as the present, involving as it does, Articles 10 and 11.

51. I have given these short reasons, which are I think entirely parasitic on my Lord's judgment, to explain how, in part at least, I reached the clear conclusion at the end of the argument that this appeal should succeed. It follows, of course, that I am extremely grateful to have the reasons for allowing the appeal so fully and clearly articulated by my Lord.

Lord Justice Stanley Burnton:

52. I agree both with the judgment of Laws LJ and that of Wall LJ.

Neutral Citation Number: [2009] EWHC 434 (Ch)

Case No: CH/2008/APP/0304

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2009

Before :

THE CHANCELLOR OF THE HIGH COURT

- -

Between :

The Chancellor, Masters & Scholars of the University of Cambridge	**Appellant**
- and -	
HM Revenue and Customs	**Respondent**

- -
- -

Mr Andrew Hitchmough & Mr James Rivett (instructed by Ernst & Young) for the Claimant
Mr Raymond Hill (instructed by the Solicitors Office) for the Defendant

Hearing dates: 26 / 27 February 2009

- -

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

…………………………….

THE CHANCELLOR OF THE HIGH COURT

The Chancellor:

Introduction

1. In November 2004 the University of Cambridge ("the University") went into occupation of a building it had newly constructed for the purposes of its faculty of education. The building is used by the University both for the provision of education at undergraduate and graduate level and for purposes of research. The University applied to Her Majesty's Revenue & Customs ["HMRC"] for the necessary consent to entitle it to issue a certificate to the supplier of electricity to the building requiring the supplier to charge VAT in respect of those supplies at the reduced rate of 5% allowed by s.29A of and Note 3 of Group 1 to Schedule 7A to the VAT Act 1994. Those provisions allow payment of the reduced rate of 5% in respect of supplies of electricity for:

> "use by a charity otherwise than in the course or furtherance of a business".

The University is a charity but, as it admits, its provision of higher education is a business activity.

2. The University seeks to avoid the likely consequence of that admission by relying on Article 13 EU Principal VAT Directive (2006/112/EC). That article is in the same terms as article 4(5) of the Sixth VAT Directive and provides:

> "Article 13
>
> 1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.
>
> 2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities."

3. The case for the University involves three propositions, namely:

> (1) the University is an "other bod[y] governed by public law";
> (2) the University engages in its activities or transactions "as [a] public authorit[y]";
> (3) the proper application of Article 13 requires that the engagement of the University in those activities and transactions is to be treated for VAT purposes as not carrying on an economic activity.

It is common ground that if Article 13 does apply in the manner for which the University contends then the use of electricity by the University in its new building is not "in the course or furtherance of a business" for the purposes of Note 3 of Group 1 to Schedule 7A to the VAT Act 1994.

4. These contentions were rejected by HMRC on 1st September 2005 and by the VAT and Duties Tribunal (Mr Edward Sadler and Miss Sheila Wong Chong) on the appeal of the University in a decision released on 12th March 2008. It is from that decision of the VAT and Duties Tribunal that the University now appeals pursuant to s.11 Tribunals and Enquiries Act 1992 on the ground that it is dissatisfied with it "in point of law".

The Facts

5. The Tribunal heard extensive evidence from Mr Kerry Sykes, the deputy director of finance of the University, and Mr Ian Lewis, the head of finance of Higher Education Funding Council for England ("HEFCE") as to the constitution and funding of the University. So far as material to the first two propositions set out in paragraph 3 above, the Tribunal summarised that evidence in paragraphs 49 to 63 of its decision. For immediate purposes the following broad summary will suffice.

6. The University was incorporated by Statute in 1571. It is currently regulated by the Universities of Oxford and Cambridge Act 1923 and the secondary and tertiary legislation made thereunder. That legislation provides a complete code for the powers, governance and administration of the University. In addition, as the Tribunal recorded in paragraph 54 of its decision:

> "...over the centuries an abundance of statutory and prescriptive rights have accreted to the [University], conferring special privileges or regulating aspects of its historic activities or assets and property rights."

7. The funding of the University is derived from a number of sources, including the Cambridge University Press, public examination and assessment services, research grants and contracts, endowment and investment income, student fees and government funding almost entirely through HEFCE. The latter represents

20% of the University's income from all sources (30% of the University Press and public examination fees are excluded). With regard to HEFCE funding the Tribunal recorded in paragraph 61:

> "...the greater part of the funding is a block grant for teaching based simply on the number of students, and under current policy no conditions are attached to such *per capita* funding beyond standard conditions such as accounting for the spending of the funds and submitting to quality assurance supervision if requested. The [University] has full liberty to allocate the block grant funding as it sees fit. The [University] may be funded for a specific purpose beyond the block grant in which case, of course, the funding must be applied for that purpose and the University must comply with any special conditions imposed by HEFCE relating to the relevant project or funding."

8. Whilst HEFCE funding is available to other universities on a similar basis their constitutions vary widely. The Tribunal recorded the evidence of Mr Lewis on that topic in paragraph 56 in these terms:

> "...universities other than Oxford and Cambridge may be established in a number of ways: those created before 1992 were established by Royal Charter granted through the Privy Council or, in the case of some universities, incorporated under the Companies Act as companies limited by guarantee. In the case of those created since 1992, which changed status from polytechnics under local authority control to universities, they derive their university status and degree-awarding powers under the Further and Higher Education Act 1992. The University of Buckingham is a private university (that is, not funded by the State), and is incorporated as a non-profit-making company with degree-awarding powers granted by the Privy Council."

9. As recorded by the Tribunal in paragraph 58 of its decision Mr Lewis described all English Universities as:

> "...legally independent bodies responsible for the governance, management and direction of their own affairs which are funded from a range of public and private sources. They are not regarded as part of the public sector in the way that, say, a maintained school or NHS hospital is so regarded - thus, for example, their accounts are not classified to the public sector for National Accounts purposes, and they are not subject to direction from the government except to the extent that they receive public

> funding and thereby render themselves subject to any conditions attaching to such funding."

The decision of the Tribunal

10. The Tribunal noted in paragraph 4 of its decision that if the University failed on the third proposition, to which I have referred in paragraph 3 above, its appeal would be dismissed but that for its appeal to succeed it must establish all the three propositions on which it relied. The Tribunal dealt with the third proposition first in paragraphs 34 to 46. It noted in paragraph 35 the University's concession that it was in fact carrying on an economic activity or business. It concluded in paragraph 45 that for the reasons expressed in the intervening paragraphs the University had not made out the convincing case required if it was to establish that Article 13 deemed it not to be carrying on a business when in fact it is.

11. The Tribunal recognised that this conclusion necessitated the dismissal of the University's appeal but, in case it was wrong, went on to consider whether the University was within the ambit of Article 13. The Tribunal noted that this required the University to satisfy the two conditions reflected in the first and second of the propositions set out in paragraph 3 above. It considered the first of those propositions in paragraphs 76 to 91. For reasons I will consider in detail later the Tribunal concluded that the University is not "a body governed by public law".

12. The Tribunal noted in paragraph 92 that if it was wrong in its conclusion on the first proposition then in order to succeed the University must show that in carrying out its activities it is acting as a public authority. It considered that issue in paragraphs 106 to 122. It concluded that even if the University is a body governed by public law it does not engage in its activities of providing higher education as a public authority.

13. Accordingly the University failed to establish any of the three propositions on which the success of its appeal depended. I propose to deal with them in the order in which I have set them out. That is the logical order and as the University must succeed on all of them if its appeal is to be allowed I see no reason to depart from it.

Is the University a body governed by public law for the purposes of Article 13?

14. I start with the detailed reasons given by the Tribunal for answering that question in the negative. The Tribunal's starting point was that:

> "....the relevant expression, "States, regional and local government and other bodies governed by public law" must

> be understood in its proper context, namely as Community law which must apply fairly, uniformly and sensibly across the range of Community states and the diverse entities and organisations which are to be found in those states and through which those states organise their affairs." [77]

15. The Tribunal then rejected a submission advanced by Counsel for the University to the effect that Community Law looks to the domestic law of the member state concerned to determine the conditions which a body must satisfy. The Tribunal considered that:

> "...even if Article 13 has effect so that a Member State determines whether or not, under its domestic law, there is a special legal regime under which the public law body is operating, it [does not] follow[s] that Article 13 requires the Member State to determine what is a body governed by public law by reference to its domestic law: the two issues are distinct, the one looking to the bodies which are within Article 13, and the other to the way those bodies carry out functions within the domestic law." [79]

16. The Tribunal then recorded a submission of counsel for HMRC to the effect that it was for the member state to identify "a body by its attributes or its conformity to a concept" derived from Community law so as to ensure consistent and uniform application in all member states "in compliance with the principle of fiscal neutrality". It described the case of **JP Morgan Fleming Claverhouse Investment Trust plc v HMRC** [2007] ECR I-5517 as a recent example of the application of that principle. The Tribunal accepted the submission of counsel for HMRC as

> "...self-evidently correct in applying a Community law provision such as Article 13 of the 2006 VAT Directive, as it ensures a uniformity of treatment within each Member State and across all Member States. It results in all bodies which have the same broad function and attributes (in this case, in the domestic context, English universities) having equal standing and treatment in relation to the application of Article 13..." [81]

17. The Tribunal noted in paragraphs 82 to 84 that such an approach also avoided difficulties arising from the fact that under English law some bodies are governed by public law and susceptible to judicial review in relation to only some of their activities and that in the case of universities only some are incorporated. In paragraph 85 the Tribunal considered what the relevant concept for identifying a body governed by public law is. In that context the Tribunal considered the

decisions of the European Court of Justice in **The European Commission v The Netherlands** [1987] ECR 1471; **Ayuntamiento de Sevilla v Recaudadores de Tributos de los Zonas primera y segunda** [1991] ECR I-4135; **European Commission v UK** [2000] ECR I-6355 and **CO.GE.P Srl v Ministero delle Finanze-Ufficio IVA di Milano** (2007) C-174/06. The Tribunal concluded:

> "We take from these cases the principle that, for Article 13 purposes, an entity, to be a body governed by public law, must be "part of the public administration", in the phrase used in the *Netherlands* case. It is not sufficient that it is carrying out by delegation a public function which could be, and sometimes is, carried out by the State itself. It is not sufficient that it is entrusted with powers and duties of a public nature in the performance of which it is amenable to judicial review in the English law context..... It is not sufficient that it is highly regulated by the State and operates within a comprehensive statutory regime. If it is a body which is inherently and by its nature not a creature or extension of the State it is not part of the public administration and is not a body governed by public law for these purposes." [86]

The Tribunal agreed with counsel for HMRC that this conclusion is consistent with the language of Article 13 itself, and the Explanatory Memorandum on the Sixth Directive issued by the European Commission.

18. In paragraphs 87 to 91 the Tribunal applied that test and concluded that the University is not part of the public administration and therefore not a body governed by public law for the purposes of Article 13. Its reasons were that the University is a legally independent and autonomous institution; it is self-governing and independent in its management of its affairs. The Tribunal did not consider that the receipt of public funds through HEFCE on conditions designed to ensure the implementation of certain government policies could result in the University being part of the public administration.

19. Counsel for the University contends that the Tribunal was wrong in both its reasoning and its conclusion. He submits that it is illogical to justify the conclusion that a body governed by public law is a concept of European law by reference to the principle of fiscal neutrality when Article 13 is itself a departure, and a deliberate departure, from that principle. He submits that the authorities relied on by the Tribunal, which he subjected to detailed analysis, do not justify its conclusion either. He contends that other authorities on which he relies support his case. I propose to consider first the principle of fiscal neutrality, its application to Article 13 and whether it necessitates a European concept of a body governed by public law.

20. The principle of fiscal neutrality precludes economic operators carrying out the same or similar transactions from being treated differently for the purposes of VAT. It is designed to eliminate the distortion which will arise if supplies of

goods or services in competition with each other are treated unequally for the purposes of VAT. It is a principle fundamental to the system of VAT imposed on member states and their nationals throughout the European Union by EU Principal VAT Directive (2006/112/EC) and, formerly, The Sixth VAT Directive. See generally **JPMorgan Fleming Claverhouse Investment Trust plc v HMRC** [2007] ECR I-5517, 5550 paras 45-47 and **HMRC v Isle of Wight Council** (2008) C-288/07 para 42.

21. Counsel for the University submits that any exemption from VAT is to that extent a departure from the principle of fiscal neutrality, as recognised by Rimer J in **HMRC v Isle of Wight Council** [2007] EWHC 219 (Ch) para 15. Further, he submits that, given the terms of Article 13(1) second sub-paragraph, there is no need, by reference to the principle of fiscal neutrality, to interpret the first sub-paragraph by reference to it because the necessary corrective is introduced by the second sub-paragraph. He submits that this effect was recognised by the European Court of Justice in **Fiorenzuola d'Arda District Tax Office v Commune di Carpaneto Piacentino** [1989] ECR 3323, 3275 paras 15 and 16 and **Fazenda Publica v Camara Municipal do Porto** [2000] ECR I-11435, 11470 para 16.

22. In my view this issue was authoritatively determined by the European Court of Justice in **HMRC v Isle of Wight Council** (2008) C-288/07. That case concerned the provision of off-street parking by local authorities. Historically local authorities had charged VAT on parking charges at the standard rate and accounted for it as output tax. Following the decision of the European Court of Justice in **Fazenda Publica v Camara Municipal do Porto** [2000] ECR I-11435 various local authorities reclaimed VAT so accounted for on the basis that Article 4(5) of the Sixth Directive, the predecessor of Article 13, applied so as to exempt the parking charges from VAT. These claims first came before Pumfrey J in 2004, see **Customs & Excise v Isle of Wight Council** [2005] STC 257, on the question whether the provisions of Article 4(5) second sub-paragraph had been incorporated into English law as well as the first sub-paragraph. He concluded that the second sub-paragraph was of direct effect and the matter was remitted to the VAT and Duties Tribunal.

23. The matter returned to the High Court, Rimer J, in 2007 in relation to the meaning of the phrase in Article 4(5) second sub-paragraph "would lead to significant distortions of competition". For the reasons given in his judgment ([2007] EWHC 219 Ch) Rimer J referred three questions to the European Court of Justice. In his judgment giving his reasons for making that reference Rimer J observed in paragraphs 14 and 15

> "14. As to the correct interpretation of article 4.5, [counsel for HMRC] emphasised that this depends not just on an interpretation of its text but on its consideration against the relevant principles of Community law. He said the most relevant principle is that of fiscal neutrality, one which "precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned" (paragraph 20 of the ECJ's

judgment in *Gregg and another v Commissioners of Customs and Excise* [1990] STC 934).

> 15. The importance of that principle in VAT law is not in dispute although it is unclear to me how it can be relevant to the interpretation of article 4.5. The scheme of article 4.5 is that article 4.5(1) confers an exemption from taxability on public bodies in relation to their activities as such; but that article 4.5(2) cancels it in relation to any activity where its conferring would significantly distort competition. It does not, however, cancel it in cases in which an exemption would only distort competition insignificantly, a situation in which those carrying on the same activities *are* intended to be treated differently as regards the levying of VAT. If fiscal neutrality is the sacred watchword, there would be no scope for the article 4.5(1) exemption in such a case; and the only case in which any exemption might harmonise with the principle would or might be one in which the local authority is performing an activity which is not carried on in competition with others at all."

24. The three questions Rimer J referred were:

> "1. Is the expression 'distortions of competition' to be ascertained on a public body by public body basis such that, in the context of the present case, it should be determined by reference to the area or areas where the particular body in question provides off-street parking or by reference to the totality of the national territory of the Member State?
>
> 2. What is meant by the expression 'would lead to'? In particular, what degree of probability or level of certainty is required for that condition to be satisfied?
>
> 3. What is meant by the word 'significant'? In particular, does 'significant' mean an effect on competition that is more than trivial or *de minimis*, a 'material' effect or an 'exceptional' effect?'"

25. In its judgment in **HMRC v Isle of Wight Council** (2008) C-288/07 the European Court of Justice explained the interrelationship of the various subparagraphs of Article 4(5) of the Sixth Directive. In paragraphs 40 to 43 it added:

> "40. It follows that the treatment of bodies governed by public law as taxable persons, either on the basis of the second subparagraph of Article 4(5) of the Sixth Directive, or on that of the third subparagraph of that provision,

> results from the carrying-on, as such, of a given activity, irrespective of whether or not those bodies face competition at the level of the local market on which they engage in that activity.
>
> 41. That conclusion is supported by the general principles of Community law applicable to fiscal matters, such as the principles of fiscal neutrality and legal certainty.
>
> Thus, the principle of fiscal neutrality, a fundamental principle of the common system of VAT (see, particularly, Case
>
> C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 92), precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (see, particularly, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20).
>
> 42. In that regard, it must be recalled that the second subparagraph of Article 4(5) of the Sixth Directive is intended to ensure compliance with the principle of fiscal neutrality (Case C-430/04 *Feuerbestattungsverein Halle* [2006] ECR I-4999, paragraph 24).
>
> 43. Whilst it is true that the Sixth Directive provides for certain derogations which may interfere to some extent with the application of the principle of fiscal neutrality, like the derogation under the second subparagraph of Article 4(5) of the Sixth Directive (see, to that effect, Case C-378/02 *Waterschap Zeeuws Vlaanderen* [2005] ECR I-4685, paragraph 43), since that provision permits the treatment of bodies governed by public law as non-taxable persons provided that such treatment would only distort competition insignificantly, the fact remains that that derogation must be interpreted in such a way that the least possible damage is done to that principle."

26. Counsel for the University submits that these observations only go to the second and third sub-paragraphs of Article 13.1 and not the first. The response of counsel for HMRC is to point to a later passage in the judgment of the court in which it deals with observations made by some member states in relation to the second question referred to it by Rimer J. In that context the European Court of Justice added in paragraphs 60 and 61:

> "60. It is important to record, as is clear from paragraph 30 of the present judgment, that the treatment of bodies governed by public law as non-taxable persons under the first subparagraph of Article 4(5) of the Sixth Directive

> constitutes a derogation from the general rule that any activity of an economic nature be subjected to VAT, and that this provision must, therefore, be interpreted strictly. But the second subparagraph of Article 4(5) restores that general rule in order to avoid such treatment of those bodies leading to significant distortions of competition. The latter provision cannot therefore be construed narrowly.
>
> 61. The scope of the first subparagraph of Article 4(5) of the Sixth Directive would be enlarged unduly if the treatment, under the second subparagraph of Article 4(5), of those bodies as taxable persons had to be confined to cases of distortion of actual competition, which would, were they confronted only with potential competition, permit their treatment as non-taxable persons."

27. In my view it is not possible, when reading the judgment of the court as a whole, to conclude that the principle of fiscal neutrality does not apply to all the subparagraphs of Article 13.1. If the second sub-paragraph is to be narrowly construed, as the court considered in paragraph 43, so as to minimise the effect of the derogation then so must the first because that is the primary derogation. That, albeit in a different context, is what the court said in paragraph 60. It follows that, in my judgment, the Tribunal was right when, in paragraph 16, it tested the submissions of counsel for the University by reference to the principle of fiscal neutrality.

28. I turn now to the second limb of the attack on the decision of the Tribunal mounted by counsel for the University, namely that the cases relied on by the Tribunal did not justify their conclusion that the concept of 'a body governed by public law' is one of Community law. They are those to which I have referred in paragraph 17 above. I will consider them in chronological order. The first is **The European Commission v The Netherlands** [1987] ECR 1471. That case concerned the supply of services in the Netherlands by notaries and bailiffs. The European Commission considered that notaries and bailiffs carried on an economic activity in the Netherlands and that the Kingdom of the Netherlands had infringed the Sixth Directive in failing to levy VAT on such activities. In a direct action the Commission sought a declaration as to the alleged default of that member state. The Kingdom of the Netherlands defended the action on two bases, first that in view of the statutory organisation of the profession of notary and bailiff their activities were not economic; second, that Article 4(5) Sixth Directive applied to their official acts.

29. The Court concluded that the activities of the notaries and bailiffs were independent of the state and economic in nature. In relation to the second point the court stated:

> "20.....it should be observed that article 4(5) provides an exemption only for bodies governed by public law, and

> even then only for the activities or transactions in which they engage as public authorities.
>
> 21. It is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply; the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. This means that bodies governed by public law are not automatically exempted in respect of all the activities in which they engage but only in respect of those which form part of their specific duties as public authorities.... and, secondly, that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority.
>
> 22. Consequently, even assuming that in performing their official services notaries and bailiffs exercise the powers of a public authority by virtue of their appointment to public office, it does not follow that they may enjoy the exemption provided for in article 4(5). The reason is that they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession."

30. Counsel for the University submits that the last sentence of paragraph 22 is a mere reprise of the court's conclusion on the first issue. Counsel for HMRC contends that it is an explicit recognition of its submission that the concept of 'a body governed by public law' is one to be determined in accordance with Community law and not by reference to the domestic law of member states. Further, he submits, it is indicative of the content of that concept, namely that a body governed by public law is one which forms "part of the public administration". Before expressing my conclusion on those submissions I should refer to the other cases on which the Tribunal relied.

31. The second was **Ayuntamiento de Sevilla v Recaudadores de Tributos de los Zonas primera y segunda** [1991] ECR I-4135. That case concerned the addition of VAT to the premiums (being a proportion of the tax collected) paid to tax collectors appointed by local authorities in Spain. Such tax collectors were regulated by statute. The local authority refused to pay the VAT added to the premiums on the ground amongst others that Article 4(5) applied to exempt the activities of the tax collectors. The court in Spain referred to the European Court of Justice the question whether the activity of the tax collector must be considered to be non-taxable because it comprised activities or transactions in which those concerned engaged as public authorities in accordance with Article 4(5) of the Sixth Directive. The conclusion of the Court is tersely given in paragraphs 17 to 20 of its judgment in these terms:

> "17. The second question concerns the interpretation of Article 4(5) of the Sixth Directive, the first subparagraph of which provides as follows:
>
> "States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions."
>
> 18. As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (judgments in Case 107/84 Commission v Germany [1985] ECR 2655, paragraph 11; Case 235/85 Commission v Netherlands, cited above, paragraph 21; Joined Cases 231/87 and 129/88 Comune de Carpaneto Piacentino and Others [1989] ECR 3233, paragraph 12).
>
> 19. With regard to the first of those two conditions, the Court has already held in its judgment in Commission v Netherlands (at paragraph 21) that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority.
>
> 20 It follows that, if a commune entrusts the activity of collecting taxes to an independent third party, the exclusion from VAT provided for by the abovementioned provision is not applicable."

32. Counsel for the University points out that the court did not in that case refer to the need for the activity in question to form part of the public administration. In contrast counsel for HMRC points out that the final sentence in paragraph 19 points to a concept which is at least similar.

33. The third case on which the Tribunal relied is **European Commission v UK** [2000] ECR I-6355. That case was concerned with whether VAT should be levied on tolls charged for the use of roads and bridges in the UK. They fell into three categories. The first category included bridges owned and operated by central government, the second related to bridges and tunnels owned and operated by local passenger authorities and the third comprised what are known as PFIs, namely Private Finance Initiatives. These are concessionaires of central government which operated certain crossings and bridges. The UK did not levy

VAT on the toll charges. By this direct action the Commission sought to compel the UK to do so. The UK relied on Article 4(5) of the Sixth Directive as a defence to the claim.

34. The defence failed. The Court considered that the various operators were carrying out an economic activity (paragraph 42). The fact that the facilities provided were in the public interest was irrelevant (paragraph 43). There being a direct link between the services provided and the consideration paid for them entailed a relevant supply of services (paragraph 46). The Court then considered the defence under Article 4(5). The court noted that there were two conditions for the application of that Article. In relation to the first it said:

> "54. However, as also noted in paragraph 49 of this judgment, the non-taxable status provided for in Article 4(5) of the Sixth Directive requires that the activities be carried out not only as a public authority but also by a body governed by public law.
>
> 55. In that regard the Court has held that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority (Case 235/85 *Commission* v *Netherlands*, cited above, paragraph 21, and *Ayuntamiento de Sevilla*, cited above, paragraph 19). The Court held, in paragraph 20 of the latter judgment, that it follows that if a commune entrusts the activity of collecting taxes to an independent third party the exclusion from VAT provided for by Article 4(5) of the Sixth Directive is not applicable. Similarly, the Court held in paragraph 22 of the judgment in Case 235/85 *Commission* v *Netherlands*, cited above, that even assuming that in performing their official services notaries and bailiffs in the Netherlands exercise the powers of a public authority by virtue of their appointment to public office, they cannot enjoy the exemption provided for in Article 4(5) of the Sixth Directive because they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession.
>
> 56. In the present case it is common ground that, in the United Kingdom, the activity of providing access to roads on payment of a toll is carried out in certain cases not by a body governed by public law but by traders governed by private law. In such cases the exemption provided for by Article 4(5) of the Sixth Directive is not applicable."

This conclusion related to tolls levied by operators in the third category of PFI.

35. Counsel for the University submits that this case shows that the PFI operators were not public bodies under the domestic law of the UK but does not enunciate any proposition of Community law. But, as counsel for HMRC points out by reference to paragraphs 40 to 44, the PFI concessionaires were not operating under the aegis of private domestic law but were bound by the same statutes as the public bodies.

36. The last case relied on by the Tribunal under this heading is **CO.GE.P Srl v Ministero delle Finanze-Ufficio IVA di Milano** (2007) C-174/06. In that case the Consortium of the Port of Genoa let areas of state-owned maritime property for the storage, manufacture and handling of mineral oils. The issue was whether VAT was payable on the consideration for those lettings. The basis on which the court approached that question is clearly set out in paragraphs 24 and 25 of the Court's decision in these terms:

> "24. It should be noted at the outset that it is apparent from the order for reference that the Consortium is a public economic entity which, as regards the management of the State property entrusted to it, acts not in the name of and on behalf of the State, which remains the owner of that property, but on its own account, in so far as it administers that property, inter alia by making independent decisions.
>
> 25. Thus, so far as the Consortium is concerned, the cumulative conditions required to apply the rule of treatment as a non-taxable person under the first subparagraph of Article 4(5) of the Sixth Directive, namely, that the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority, are not fulfilled (see, to that effect, Case C-446/98*Fazenda Pública* [2000] ECR I-11435, paragraph 15)."

37. Counsel for the University suggests that no conclusions can be drawn from this judgment. What, he asks, is meant by the apparently new concept of a 'public economic entity'. He submits that the form of reference dictated the result, not a decision of the Court. By contrast Counsel for HMRC contends that paragraph 24 shows clearly that the relevant concept is one of Community, not domestic, law.

38. I can express my conclusions on this part of the appeal quite shortly. In each of the four cases the European Court of Justice went out of its way to consider the content of the concept of a body governed by public law and some of the attributes such a body must possess. If that content and those attributes were matters for the domestic law of each member state then the European Court of Justice was exceeding its jurisdiction in considering them. Thus paragraph 21 of **The European Commission v The Netherlands** [1987] ECR 1471, paragraph 19 of **Ayuntamiento de Sevilla v Recaudadores de Tributos de los Zonas primera y segunda** [1991] ECR I-4135, paragraph 55 of **European Commission v UK** [2000] ECR I-6355, paragraph 24 of **CO.GE.P Srl v Ministero delle Finanze-**

Ufficio IVA di Milano (2007) C-174/06 and paragraph 60 of **HMRC v Isle of Wight Council** (2008) C-288/07 could not have been properly included in the judgment of the European Court of Justice if the issue of what is a body governed by public law is to be determined in accordance with the domestic law of each member state.

39. Counsel for the University also criticised the conclusion of the Tribunal in paragraph 86 of its decision that its construction of the relevant phrase was consistent with the Explanatory Memorandum on the Sixth Directive issued by the European Commission. Counsel contends that the Memorandum is of no assistance on the issue of whether a body governed by public law is a concept of Community law and if so what its content is. Further, he submits that in so far as it deals with the second condition imposed by Article 13.1 it was not achieved. There is substance in both those observations but the terms of the Explanatory Memorandum, whatever they are, cannot nullify the effect of decisions of the European Court. Further, as the Tribunal noted, there is nothing in the Explanatory Memorandum inconsistent with its conclusion.

40. I should now refer to various cases which Counsel for the University submitted supported his proposition that it was a matter for the domestic law of each member state to determine the conditions to be possessed by 'a body governed by public law'. They are **Fiorenzuola d'Arda District Tax Office v Commune di Carpaneto Piacentino** [1989] ECR 3323; **Commune di Carpaneto Piacentino v Piacenza District Tax Office** [1990] ECR I-1869; **Waterschap Zeeuws Vlaanderen v Staatssecretaris van Financien** [2005] ECR I-4685 and **T-Mobile Austria GmbH v Republic of Austria** [2008] STC 184. Each of them was primarily concerned with the second condition imposed by Article 13.1 namely that the body should have engaged in the relevant activities "as public authorities".

41. In **Fiorenzuola d'Arda District Tax Office v Commune di Carpaneto Piacentino** [1989] ECR 3323 the European Court of Justice was concerned with transactions entered into by local authorities in relation to graves, vaults, cemeteries and other facilities. The questions referred related to the application of Article 4(5) of the Sixth Directive in the absence of any implementing domestic legislation. In paragraphs 15 and 16 the Court said:

> "15. An analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive shows that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting "as public authorities", it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law.

> 16. It follows that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities "as public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting "as public authorities". It is for the national court to classify the activity at issue in the light of that criterion."

This passage was repeated more or less verbatim in the second of these cases, namely, **Commune di Carpaneto Piacentino v Piacenza District Tax Office** [1990] ECR I-1869. Counsel for the University fastens on the last sentence of paragraph 16 in the first case and submits that it must also be for the national court to classify 'a body governed by public law'. I do not accept that submission. The application of Article 4(5) depended on satisfaction of both conditions. The court's reference to the national court related only to the second. I can understand and accept that in the case of a body governed by public law which satisfies the criteria for such a body laid down by Community law then the test in relation to the second condition to be applied by the national court will involve ascertaining whether or not the activities in question were undertaken under the special legal regime applicable to that body under its national law. But the converse is not the case. The fact that under the national law a particular body carries on its operations under a legal regime special to itself, which might be described in that member state as public, does not, of itself, constitute that body a body governed by public law for the purposes of Article 13.1.

42. **Waterschap Zeeuws Vlaanderen v Staatssecretaris van Financien** [2005] ECR I-4685 concerned the construction of sewage works by Waterschap, which under its national legislation was governed by public law. It sought to recover the VAT paid in respect of capital items used in its construction so far as they had been used for the activities in which it engaged as a public authority. Counsel for the University points out that Advocate-General Jacobs in paragraph 11 of his opinion appears to have accepted that Waterschap was a body governed by public law because that is what it was under the relevant national legislation. But there was no issue in that case whether the body was one governed by public law in the Community sense.

43. In **T-Mobile Austria GmbH v Republic of Austria** [2008] STC 184 the control commission, TCK, was responsible to authorising the use of frequencies for mobile telecommunications in return for a fee. T-Mobile had paid such fees and sought the issue of VAT invoices so that it might deduct the amount of VAT as input tax. TCK refused to do so. The European Court of Justice concluded that Article 4(5) did not enter into the argument as the activities of TCK were not economic activities at all. But the Advocate-General in paragraphs 105 to 107 of her opinion said:

> "105. Under the first subparagraph of art 4(5) of the Sixth Directive two conditions must be fulfilled in order for there

> to be no liability to tax: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority.
>
> 106. The court has ruled with regard to the first condition that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. There, however, the court was particularly concerned with persons pursuing an independent economic activity who were not part of the public administration.
>
> 107. The Telekom-Control-Kommission is located at Telekom-Control GmbH. Although its form is that of a company governed by private law none of the parties involved in this case have expressed any doubt as to whether the Telekom-Control-Kommission should be considered part of the public administration. It is for the national court to examine whether this categorisation is correct under national law."

44. Counsel for the University relies on the last sentence in paragraph 107 as support for his proposition that it is for the national court to determine what criteria are required by 'a body governed by public law". I do not agree. In the final sentence of paragraph 106 the Advocate-General recognised, in terms, the Community law concept requiring the body to be part of the public administration. In the second sentence of paragraph 107 she recorded that it was common ground that TCK should be considered to be part of the public administration. The third sentence points out, as is uncontroversial, that it is for the national court to determine in any given case whether the Community concept is satisfied.

45. For all these reasons I do not accept that any of the cases relied on by the University is support for the proposition that it is for the national courts to determine what are the content and attributes of a body governed by public law as opposed to the different question whether any particular body has the attributes required of such a body by Community law.

46. Finally I should refer to the principles by which, in the submission of counsel for the University, a body governed by public law is to be ascertained in accordance with the law of the UK. He submits that the University is such a body because it is a creature of statute, its powers or duties are derived from legislation primary or secondary. These features distinguish it from private traders. Accordingly it is by its very nature a public body governed by public law. He suggests that this approach mirrors the principles to be applied to determine whether any particular body is amenable to judicial review. Alternatively he draws an analogy with the tests for determining whether any particular body is a public authority for the purposes of the Human Rights Act 1998.

47. In my view it is this submission which demonstrates most clearly that the proposition in support of which it is advanced cannot be right. Not all universities are incorporated or governed by statute. Not all universities are amenable to judicial review. **R v University of Nottingham, ex parte K** [1998] ELR 184. Even those which are, such as the University, are not amenable to judicial review in respect of all their activities, compare **R v Cambridge University, ex parte Persaud** [2001] EWCA Civ. 534 and **Evans v University of Cambridge** [2002] EWHC 1382. Further, it is well recognised that concepts of EU law do not provide a reliable guide to the application of the Human Rights Act 1998 or vice versa, see **R v Quadrant Housing Trust, ex parte Weaver** [2008] EWHC Admin 1377, para 47. The recognition of any such proposition as counsel for the University advances would introduce anomalies and uncertainties into this field which no legislature could possibly have intended.

48. I would reject the first proposition on which the University relies. Article 13.1 is part of a directive having direct effect in all member states, see **Fiorenzuola d'Arda District Tax Office v Commune di Carpaneto Piacentino** [1989] ECR 3323. It would be inconsistent for such a directive to have as one of its central concepts a term the meaning of which is to be determined by the national law of member states. It would also be wholly at variance with the principle of fiscal neutrality for the ambit of an exemption to depend on the manner in which each national court interprets that concept. The decisions of the European Court of Justice on which the Tribunal relied contradict the proposition for which counsel for the University contends and the decisions on which he relied to do not support it. They establish that "a body governed by public law" must, as a matter of Community law, be identified as part of the public administration of the relevant member state. Whether or not any particular institution can be so identified is a matter for the national court. The Tribunal considered that the University could not be so identified. In my judgment they were right for the reasons they gave.

Does the University engage in its activities or transactions "as [a] public authorit[y]"?

49. This is the second proposition on which counsel for the University relied. Given my conclusion on the first, the answer must be in the negative.

Does the proper application of Article 13 require that the activities and transactions of the University do not constitute the carrying on an economic activity?

50. In the light of my conclusions on the first and second propositions this issue does not arise. But having heard full argument on it from counsel for the University it may be helpful if I indicate shortly my conclusion.

51. Counsel for the University submits that the effect of Article 13 in cases to which it applies is to remove the activity in question from the ambit of VAT altogether. He relies on what he describes as the scheme of the Directive, the observations of the Advocates-General in **Waterschap Zeeuws Vlaanderen v Staatssecretaris van Financien** [2005] ECR I-4685, 4694 para 41 and **T-Mobile Austria GmbH**

v Republic of Austria [2008] STC 184, 199 para 78 and various anonomalies he suggests would otherwise arise.

52. The object of this argument is to persuade the court to go beyond the consequence of the application of Article 13 for which it provides. The Article states in terms that in cases to which it applies the 'body governed by public law' 'shall not be regarded as [a] taxable person in respect of the activities or transactions in which [it] engage[s] as [a] public authorit[y]'. A taxable person is defined in Article 9.1 of EU Principal VAT Directive (2006/112/EC) as:

> "...any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

Had it been intended that the effect of Article 13 should be, as counsel for the University contends, then it would have been a simple matter for the Directive so to have provided.

53. I agree with the Tribunal's view expressed in paragraph 45 that it requires a convincing case to establish that in promulgating Article 13 the Council of the European Union intended that the activities of the public body should be treated as not economic rather than that the public body should not be regarded as a taxable person. I do not consider that all or any of the arguments advanced by counsel for the University are sufficient.

Conclusion

54. For all these reasons I consider that the Tribunal was right in point of law to have concluded that the University is not a body governed by public law. Consequently Article 13 cannot have the effect of deeming the activities of the University for which the electricity is to be supplied to be undertaken otherwise than in the course of furtherance of a business. It follows that the lower rate of VAT for which s.29A of and Note 3 of Group 1 to Schedule 7A to the VAT Act 1994 provides is not applicable to the supplies of electricity to the Faculty of Education.

55. I dismiss this appeal.

R. (ON THE APPLICATION OF WEAVER) v LONDON & QUADRANT HOUSING TRUST

COURT OF APPEAL (CIVIL DIVISION)

Rix L.J., Lord Collins of Mapesbury and Elias L.J.: June 18, 2009

[2009] EWCA Civ 587; [2009] H.L.R. 40

Housing management; Housing trusts; Human rights; Public authorities; Public functions; Social housing; Social landlords; Tenancies; Termination

Introduction

Registered social landlords

H1 Part 1 of the Housing Act 1996 (*Encyclopedia*, para.1-3218) governs the registration of social landlords in England, initially by the Housing Corporation, the powers of which passed to the Tenant Services Authority (TSA), established under the Housing and Regeneration Act 2008. The provisions replaced those of Pt 1 of the Housing Associations Act 1984, in which similar bodies were referred to as registered housing associations.

H2 To be eligible for registration, a landlord either has to be a registered charity which is a housing association or, subject to conditions, an industrial and provident society or a company: s.2(1).

H3 Registered social landlords are eligible for social housing grants to assist them in performing their housing activities: s.18.

H4 The TSA has a number of regulatory powers in relation to registered social landlords. In particular, it has power to issue guidance to registered social landlords on various matters, including terms of tenancies and the principles on which levels of rent should be determined: s.36.

H5 If requested, registered social landlords must co-operate with local housing authorities in offering accommodation to persons under an authority's allocation scheme: s.170 of the 1996 Act.

Human Rights Act 1998

H6 By s.6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. By s.6(3) and (5):

> "(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,

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

. . .

(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."

H7 In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546, the House of Lords considered the meaning of s.6(3)(b) of the 1998 Act. Lord Nicholls said, at [12]:

> "What then is the touchstone to be used in deciding whether a function is public for this purpose? Clearly, there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

H8 In *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95; [2007] H.L.R. 44, the defendant authority arranged for the claimant to be accommodated in a nursing home, which was owned and run by a private company. The company decided to terminate the claimant's placement at the home. The House of Lords held that the company was not acting as a public authority for the purposes of s.6(3)(b) of the 1998 Act, in providing residential accommodation under arrangements with a local authority. (The effect of this decision was reversed by statute: see s.145 of the Health and Social Care Act 2008.)

H9 In *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48; [2001] 33 H.L.R. 73, the Court of Appeal held that a registered social landlord which had acquired a substantial part of a local authority's housing stock was acting as a public authority within s.6(3)(b) of the 1998 Act in providing rented accommodation to the defendant and in seeking possession against her. The court identified a number of significant factors, including, at [65], the closeness of the relationship between the authority and the landlord, including that the landlord had been created by the authority to take a transfer of part of the authority's housing stock and that five of the landlord's board members were also members of the authority.

H10 In *YL*, however, it was said that the Court of Appeal in *Donoghue* had placed too much emphasis on the close historical links between the landlord and the authority in deciding that it was exercising a function of a public nature (per Baroness Hale at [61]; see also Lord Mance at [105]). The court should have concentrated on the nature of the function of providing social housing.

Assured tenancies

H11 Part 1 of the Housing Act 1988 (*Encylcopedia*, para.1-2363 et seq.) makes provision for assured tenancies.

H12 In order to obtain possession of premises let under an assured tenancy, a landlord must first serve notice of proceedings for possession, informing the tenant that he intends to seek possession of the property and identifying the grounds

 © 2009 THOMSON REUTERS (LEGAL) LIMITED

on which he intends to rely (providing the tenant with particulars): s.8 of the 1988 Act.

H13 By s.7(1), a court may not make an order for possession against an assured tenant except on one of the grounds set out in Sch.2 Pt 1 of which contains mandatory grounds (grounds 1–8); Pt 2 contains discretionary grounds (grounds 9–17).

H14 There are three grounds which are concerned with rent arrears. Two of these—grounds 10 (rent lawfully due from the tenant) and 11 (persistent delay in paying rent)—are discretionary. Ground 8, however, affords a mandatory ground where, both at the date of service of the notice of proceedings for possession and at the date of the hearing, a specified minimum amount of rent is unpaid. In the case of a tenancy under which the rent is payable weekly or fortnightly, that amount is at least eight weeks rent.

H15 The *Housing Corporation Regulatory Circular 07/04* (issued under s.36 of the Housing Act 1996, subsequently replaced by *Circular 02/07* in similar terms), provided:

> "Before using ground 8, associations should first pursue all other reasonable alternatives to recover the debt."

Judicial Review

H16 In *Peabody Housing Association Ltd v Green* (1979) 38 P. & C.R. 644, it was held that a registered housing association, and in *R. v Servite Houses Ex p. Goldsmith* (2001) 33 H.L.R. 35 QBD, that a registered social landlord, was not a body susceptible to judicial review in domestic law. That proposition was accepted in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*, above (at [63]–[64]). *Servite Houses* was cited with approval in *YL* (at [120]).

Legitimate expectation

H17 Where an authority publish a policy or give an undertaking as to how they will decide a particular matter, the policy or undertaking may give rise to a legitimate expectation that a decision will be reached in that way. See, e.g. *R. (on the application of Bibi) v Newham LBC (No.1)* [2001] EWCA Civ 607; (2001) 33 H.L.R. 84; *R. v Newham LBC Ex p. Miah (Suitable Accommodation)* (1998) 30 H.L.R. 691 QBD; *R. v Lambeth LBC Ex p. Trabi* (1998) 30 H.L.R. 975 QBD; *R. (on the application of Giles) v Fareham BC* [2002] EWHC 2951; [2003] H.L.R. 36; and, *R. (on the application of Bath) v North Somerset Council* [2008] EWHC 630 (Admin); [2009] H.L.R. 1.

H18 In *R. v North and East Devon HA Ex p. Coughlan* [2001] Q.B. 213, the Court of Appeal held that, if a public body exercising a statutory function has made a promise as to how it would behave in the future, which promise has induced a legitimate expectation of a benefit which was substantive rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power. In such circumstances, the court has to determine whether there is

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

a sufficient overriding interest to justify a departure from what had previously been promised.

Facts

H19 The defendant housing association was an industrial and provident society and a charity, registered by the Housing Corporation as a registered social landlord. The association was the parent body of a group of bodies, some of which were also charities and/or registered social landlords. The association's activities included arranging and managing lettings, acquisition of land, building homes for sale, managing leasehold properties and managing accommodation let at a market rent.

H20 Most of the association's housing stock had been purchased on the open market, although about 10 per cent of it had been acquired by transfer from a local authority.

H21 In the financial years 2004–2006, the association's group of companies received £268,700,000 by way of grants from the Housing Corporation. This sum reflected less than half of the group's capital finance.

H22 The association had agreements with a number of local authorities under which those authorities were able to nominate tenants for the association's properties. In the financial year ending March 2006, 64 per cent of new tenancies granted by the association resulted from such nominations.

H23 The claimant was the assured tenant of a property owned by the association. It was a term of her tenancy agreement that:

> "In providing a housing service [the association] will comply with the regulatory framework and guidance issued by the Housing Corporation."

H24 The claimant fell into arrears of rent. The association decided to seek possession and served notice of proceedings relying on the Housing Act 1988 Sch.2 ground 8. The claimant sought judicial review of the association's decision, contending that she had a legitimate expectation that the association would not use ground 8 because the association had agreed to comply with guidance issued by the Housing Corporation and that the Corporation's *Circular 07/04* provided, inter alia, that:

> "Before using ground 8, associations should first pursue all other reasonable alternatives to recover the debt."

H25 In the Divisional Court, the claimant argued that the association was a public authority within Human Rights Act 1998 s.6(3)(b), because in managing social housing it was performing a public function. It was contended that this rendered the association susceptible to challenge both on human rights grounds and on domestic public law grounds. The association responded that management of its own housing stock was not a public function and that, in any event, termination of a tenancy was not a public function but a private act governed by the terms of the tenancy agreement, which therefore fell within s.6(5) of the 1998 Act. It also

argued that—even if a public authority for the purposes of the 1998 Act—it was not susceptible to domestic public law grounds.

H25 The claim for judicial review was dismissed: [2008] EWHC 1377 (Admin). It was held that the claimant had no legitimate expectation that the association would not use ground 8 and that, even if she had such an expectation, the association had not breached it. The court did, however, grant a declaration that in managing its accommodation, the association was exercising a public function and that the act of terminating a tenancy was part of that public function; the association's decision to terminate the tenancy had accordingly been susceptible to judicial review both on human rights and domestic public law grounds.

H27 The association appealed to the Court of Appeal, conceding that if a public authority for the purposes of the 1998 Act, the association would also be susceptible to domestic public law.

Held (dismissing the appeal, Rix L.J. dissenting):

H28 (1) (per Elias L.J. and Lord Collins) When considered cumulatively, the following factors were sufficient to establish that in providing social housing the defendant housing association was exercising a public function for the purposes of s.6(3)(b) of the Human Rights Act 1998 [72], [101]:

(i) the Housing Corporation provided the association with substantial public subsidy which enabled the association to achieve its objectives [68], [101];

(ii) the association's freedom to allocate its properties was severely circumscribed by nomination agreements made with local housing authorities under its duty to co-operate under s.170 of the Housing Act 1996; this factor was reinforced by the fact that the association had taken a transfer of local authority housing stock [69], [101];

(iii) the provision of subsidised housing, as opposed to the provision of housing per se, is a governmental function and not a commercial activity; as one of the larger registered social landlords, the association made a valuable contribution to achieving the government's objective of providing subsidised housing [70];

(iv) the association was acting in the public interest and had charitable objectives [71]; and,

(v) the Housing Corporation's regulation of the association was not designed simply to render its activities more transparent nor to ensure proper standards of performance in the public interest; rather, regulation of matters such as levels of rent and eviction were designed to ensure that government objectives with respect to a vulnerable group in society were achieved and that low cost housing was effectively provided to those in need of it [71], [101].

H29 (2) (per Elias L.J. and Lord Collins) As provision of social housing by the association was a public function, it followed that acts which were necessarily involved in the regulation of that function must also be public acts; the grant of a tenancy and its subsequent termination are part and parcel of determining

who should be allowed to take advantage of a public benefit; accordingly, termination of the claimant's tenancy was not a private act for the purposes of s.6(5) of the 1998 Act [76], [102].

H30 (3) (per Elias L.J.) The protection afforded by the 1998 Act will apply to all of those tenants of the association who are in social housing and not just those whose homes were acquired as a result of grant assistance; the 1998 Act will not apply, however, to those tenants who do not occupy social housing and who are paying a market rent [80].

H31 (4) (per Elias L.J.) Not every registered social landlord will necessarily be in the same position as the defendant association; determination of the public status of a body is fact sensitive [84].

H32 (5) (per Rix L.J., dissenting) The association's decision to terminate the claimant's tenancy was not the exercise of a function of a public nature but was a private act arising out of the contract between the parties which fell within s.6(5) of the 1998 Act [147].

H33 *Richard Drabble Q.C.* and *Matthew Hutchings* (instructed by Brian McKenna & Co) for the claimant.
Andrew Arden Q.C. and *Christopher Baker* (instructed by the Devonshires for Disability Rights Commission) for the defendant.
Jan Luba Q.C. (instructed by Louise Curtis, Solicitor, Equality and Human Rights Commission) for the intervener.

JUDGMENT

1 **ELIAS L.J.:** The appellant in this case, the London and Quadrant Housing Trust (the Trust), provides social housing, which means housing at less than the market rate, to those in need. The Trust is a registered social landlord (RSL), being registered under the Housing Act 1996. The principal question in issue is whether, when terminating the tenancy of someone in social housing, the Trust is subject to human rights principles. The Divisional Court (Richards L.J. and Swift J.) held that it was. The Trust appeals that ruling and contends that it was not.

2 The case comes before the court in somewhat unusual and not altogether satisfactory circumstances. The respondent Mrs Susan Weaver, who was the claimant before the Divisional Court, is an assured tenant of the Trust. She was served with an Order for Possession for rent arrears. She wished to challenge that Order on the basis that the Trust had acted in breach of a legitimate expectation arising out of guidance issued by the Housing Corporation. She also contended that to evict her from her home would interfere with her rights under art.8 of the European Convention on Human Rights. However, that argument was advanced in a way which also depended upon her being able to establish the legitimate expectation.

3 Even if a legitimate expectation could be established on the facts, the argument could successfully be advanced only if the Trust, in the exercise of its eviction powers, was a public body attracting the operation of judicial review principles.

The art.8 argument depended upon establishing that the Trust was a public authority within the meaning of s.6(3)(b) of the Human Rights Act 1998 and that the act of termination was not a private act within the meaning of s.6(5). The Trust contended that no legitimate expectation was created, and that in any event it was exercising purely private functions when it dealt with issues relating to the allocation and management of housing, and that all its acts in performance of those functions, including the termination of the tenancy, were private acts. Accordingly, it was subject to neither human rights nor judicial review principles.

4 The Divisional Court found that there had been no legitimate expectation created and therefore the case failed on the facts on both grounds. Strictly it was unnecessary for the court to determine the wider question raising the public law status of the Trust. However, the court did so. It held, contrary to the submissions of the Trust, that the Trust was a public authority under s.6(3)(b) arising from the exercise of its function of allocating and managing its housing, and that the act of terminating the tenancy was not a private act under s.6(5). The court also held that it was susceptible to judicial review principles in the exercise of that function.

5 Notwithstanding that they had succeeded in defending the particular application, the Trust wished to appeal that finding in relation to its status in public law. The Divisional Court granted permission to appeal and facilitated this by making a formal declaration, which could be the subject of challenge, in the following terms,

> "(a) that the management and allocation of housing stock by the defendant (including decisions concerning the termination of a tenancy) is a function of a public nature, with the effect that the defendant is to be regarded as a public authority in that respect for the purposes of the Human Rights Act 1998, section 6(3)(b);
> (b) that the defendant is accordingly amenable to judicial review on conventional public law grounds in respect of its performance of the above function".

6 I make two observations about the way the appeal has come before us. The first is that as Lord Collins of Mapesbury and Rix L.J. note, the applicant no longer has any interest in the appeal, and as a consequence the issue has come before the court in a somewhat abstract and academic form. We have, however, had the benefit of argument from the Mr Drabble Q.C. on behalf of the applicant (who has the benefit of a protected costs order) as well as some very helpful written submissions from Mr Luba Q.C. on behalf of the intervener, the Equality and Human Rights Commission. The second observation relates to the form of the declaration. It focuses on whether the Trust is a public body falling within s.6(3)(b) of the 1998 Act by virtue of its housing and allocation management functions. This reflects the way in which the issue was argued before the Divisional Court. It does not, however, satisfactorily encapsulate the real issue in the case which is whether the termination of this tenancy was a private act within s.6(5). I return to this point later in the judgment.

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

Social housing and registered social landlords

7 In order to understand the background of this case I shall first consider the role of RSLs in the provision of social housing, and then consider the particular features of the Trust.

8 Social housing providers seek to provide affordable housing to those who cannot secure their housing needs in the market. It is government policy to provide such housing. Those on lower incomes are able to rent properties at below market value. RSLs provide about one half of the social housing in England and Wales.

9 RSLs were at all material times regulated in various ways by the Housing Corporation. This is an executive non-departmental public body responsible to the Secretary of State. It can determine standards of performance with respect to the provision of housing by RSLs; collect information as to the levels of performance achieved by them; and lay down guidance with respect, inter alia, to the management of housing accommodation. Although there is no specific obligation to follow the guidance, one of the functions of the Housing Corporation is to ensure that an RSL is properly managed, and in that context it may have regard to the extent to which guidance is followed.

10 Housing management guidance is the subject of consultation and approval by the Secretary of State. RSLs are subject to detailed guidance on a number of matters, including the terms of tenancies, the principles upon which the level of rents should be determined, and the way in which the power of eviction should be exercised. It was the guidance on evictions which was said to give rise to the legitimate expectation relied upon by the claimant in this case.

11 There is also statutory regulation through ss.8–10 of the 1996 Act restricting the power of RSLs to dispose of land or housing (although there is a wide range of exceptions); in general the consent of the Housing Corporation is required to any disposal.

12 RSLs also typically receive grants from the Housing Corporation in respect of expenditure incurred in connection with their housing functions. Generally grants are made to assist in the acquisition of specific housing stock. There is a bidding process in which interested RSLs submit bids, and the Housing Corporation assesses value for money and financial viability. Once the grant is made, the money has to be kept in the public domain. If the properties acquired with the grant are disposed of, the moneys received must be repaid, unless they are reinvested in further new homes available for social housing. A review of social housing legislation in 2007 found that the ratio of private finance to public funding was in the region of 2:1.

13 RSLs also have an important role in assisting local authorities to carry out their statutory housing policies. This is not simply a matter of choice but is the subject of legislation. A local authority must allocate houses in accordance with certain priorities. They are required by law to make an allocation scheme, and RSLs are the only body which they are statutorily obliged to consult before adopting a scheme. s.170 of the 1996 Act requires RSLs to co-operate with local authorities if requested ‘‘to such extent as is reasonable in the circumstances’’ by offering accommodation to those with priority under the local authority’s allocation

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

scheme. Typically this co-operation is achieved by nomination agreements made between the authority and the RSL. In this way the RSL is deeply involved in assisting the local authorities in their obligations towards the homeless. Over half (some 54 per cent) of RSL lettings in England are made to local authority nominees. A further 10 per cent are made through allocations made pursuant to a common scheme in which the RSL and local authority are partners.

14 This relationship between RSLs and local authorities is reinforced by the fact that ownership of many local authority houses are being voluntarily transferred to RSLs, subject to the tenant's consent. Some 10 per cent of the Trust's housing has been acquired in that way.

15 Mr Luba referred us to the following passage in annex 5 of the statutory *Code of Guidance on Homelessness* (July 2006) which succinctly summarises the increasingly important role which RSLs play in the field of social housing in the following terms:

> "Virtually all provision of new social housing is delivered through RSLs and, under the transfer programme, ownership of a significant proportion of housing authority stock is being transferred from housing authorities to RSLs, subject to tenants' agreement. This means that, increasingly, RSLs will become the main providers of social housing. Consequently, it is essential that housing authorities work closely with RSLs, as well as all other housing providers, in order to meet the housing needs in their district and ensure that the aims and objectives of their homelessness strategy are achieved."

16 RSLs also have certain statutory powers, identical to those enjoyed by local authorities but not private landlords, empowering them to take action in respect of the conduct of their tenants. For example, they may apply for antisocial behaviour orders under Pt 1 of the Crime and Disorder Act 1998, or for a parenting order under the Anti-Social Behaviour Act 2003 in respect of the parents of children causing a nuisance.

The Housing and Regeneration Act 2008

17 Parts 1 and 2 of the Housing and Regeneration Act 2008 have restructured the system for providing social housing as from December 1, 2008. That Act has also for the first time provided a statutory definition of social housing and it is now a statutory prerequisite of registration as an RSL under s.112 of the 2008 Act that the body demonstrates that it provides accommodation at rents below market rates to those in housing need. The Act has split the roles of funding and regulation which were both formerly carried out by the Housing Corporation. Funding is now the province of the Homes and Communities Agency (HCA) and regulation is by the Regulator of Social Housing (RSH). However, the essential elements of the scheme remain the same as in the 1996 Act. The Secretary of State retains ultimate control since both bodies are funded by her and subject to guidance and specific directions from her (see ss.46–47 and 197).

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

18 It is not necessary to set out the effects of the 2008 Act in any detail. We are not directly concerned with it; this case must be determined by considering the position of the Trust under the 1996 Act. However, it is potentially significant to this extent: Mr Arden realistically accepts that if the termination of a tenancy is not a private act under the 1996 Act, then inevitably it will not be under the tighter regulatory regime of the 2008 Act.

The Trust

19 The Trust was founded in 1973. It is a society registered under the Industrial and Provident Societies Act 1965, and thereby has corporate status. It is also a charity and is a housing association within the meaning of s.1 of the Housing Associations Act 1985. It is the parent body of a large group of companies some, but not all, of which are themselves either charitable bodies and/or registered social landlords.

20 The rules of the Trust set out its powers and objects and provide for its business to be conducted by its Board and its shareholders. None of the Board members is a representative of a local authority or other public body, and no such authority or body has any controlling influence over the Board.

21 The Trust carries out a wide range of activities which include arranging and managing lettings, the acquisition of land, building homes for sale (either outright or with shared ownership), managing leasehold accommodation and managing market-level rented accommodation.

22 The Trust provides a number of different types of accommodation and services, under different tenures (including long leasehold), to various different groups. Most of its housing stock (including the accommodation provided to Mrs Weaver) was purchased in the open market. About 10 per cent of its housing stock has been transferred from local authority ownership by way of large scale voluntary transfer.

23 The Trust is funded by the income it receives from rents, private borrowing and grants. The grants are principally social housing grants allocated by the Housing Corporation under s.18 of the Housing Act. In the two financial years 2004–2006 the Group, of which the Trust is the parent, borrowed £268.7 million by way of grants. This, however, accounts for less than half of the Group's capital finance, and the proportion of public finance is expected to drop to around 30 per cent over the next five financial years, which would be fairly typical of the RSL sector as a whole. Private sources of finance include commercial loans and the proceeds of housing sales.

24 Control over the housing stock rests with the Trust but this is subject to allocation arrangements it makes with the local authorities. It has a number of nomination agreements. In the year ending March 2006 some 64 per cent of its new lettings were the result of nominations from local authorities.

25 The legal relationship between the tenant and the Trust is typically defined by the tenancy agreement and the standard tenancy conditions. In general the tenants hold their tenancy under a weekly agreement although there are some longer leases. The standard conditions set out the tenant's responsibilities in relation to

paying the rent, and include a warning that if the rent is not paid, the Trust may apply to the court and seek eviction. That was the reason the Trust sought to evict Mrs Weaver in this case. She was more than eight weeks in arrears.

The statutory provisions

26 Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. By subs.(3),

> ". . .'public authority' includes -
> (a)
> (b) any person certain of whose functions are functions of a public nature".

This is subject to subs.(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".

27 The effect of these provisions is that some bodies, conventionally referred to as "core authorities", are public authorities for all purposes. They must at all times act in accordance with Convention rights; subs.(5) is inapplicable to such bodies. By contrast, subs.(3)(b) identifies and brings within the scope of the Act what is termed a "hybrid authority" i.e. one which exercises both public and private functions. Where its acts are in issue, the relevant question is whether the nature of the act is private. If it is then subs.(5) provides that it will not be deemed to be a public authority with respect to that particular act.

28 Accordingly, once it is determined that the body concerned is a hybrid authority—in other words that it exercises functions at least some of which are of a public nature—the only relevant question is whether the act in issue is a private act. Even if the particular act under consideration is connected in some way with the exercise of a public function, it may nonetheless be a private one. Not all acts concerned with carrying out a public function will be public acts. Conversely, it is also logically possible for an act not to be a private act notwithstanding that the function with which it is most closely connected is a private function, although it is difficult to envisage such a case. Such situations are likely to be extremely rare.

29 The concept of "functions" is not altogether straightforward, nor is the distinction between functions and acts. The difficulty was adverted to by Lord Neuberger in *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95 at [130]. He expressed the view that the former was more conceptual and noted that a number of acts may be involved in the performance of a function. In *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1 at 29F, Lord Templeman said that the word "functions", at least as to be construed in s.111 of the Local Government Act 1972, embraced,

> "all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it".

 © 2009 THOMSON REUTERS (LEGAL) LIMITED

This would suggest that a function is a sub-species of those duties and powers; although whether and when a specific power or duty can be equated with a function is more problematic. The Divisional Court, in its declaration, referred to the act of termination of a tenancy as a ‘‘function’’.

The authorities

30 There are two decisions of the House of Lords which inform the approach which courts should take when determining whether a body is a public body within the meaning of the Human Rights Act, namely *Aston Cantlow and Wilmcote with Billisley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546 and *YL*, to which I have just referred. These decisions also deal with what is in my view the clearly related question whether a particular act is a private act within the meaning of s.6(5).

31 *Aston Cantlow* raised the question whether a parochial church council was a core public authority. The church council sought to compel the freehold owners of former rectorial land to pay for repairing the chancel of the local parish church. There was no doubt that under domestic law there was a civil obligation on the owners to meet this liability, and the only question was whether it could be said to infringe their human rights. The church council sought to enforce payment by exercising powers conferred upon them by s.2(2) of the Chancel Repairs Act 1932. The owners alleged that that the obligation involved an infringement of their right to the peaceful enjoyment of their property and constituted a breach of art.1 of Protocol 1 of the Convention. This submission depended upon establishing that the parochial church council was a public authority under the Human Rights Act. Their Lordships concluded by a majority (Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Rodger of Earlsferry; Lord Scott of Foscote dissenting) that it was not. It was neither a core nor a hybrid authority because it exercised no public functions, and therefore no human rights issue arose.

32 In the *YL* case the issue was whether a private company operating a care home for profit, Southern Cross Healthcare Ltd, was a hybrid public authority (it being accepted that it was not a core public authority.) As in this case, the actual decision in issue was whether a decision to evict a tenant from the care home was subject to the principles of human rights law. The claimant was 84 years old and suffered from Alzheimer’s Disease. Southern Cross wished to remove her from the care home because of the inappropriate behaviour of her relatives. She had been placed in the care home by the local authority in accordance with their statutory duty to arrange for her care under s.21 of the National Assistance Act 1948. The authority paid her rent. If Southern Cross were a hybrid authority, then the claimant could seek to rely upon art.8 rights unless the act of eviction was deemed to be a private one falling within s.6(5). The House of Lords held by a bare majority (Lord Scott of Foscote, Lord Mance and Lord Neuberger of Abbotsbury; Lord Bingham of Cornhill and Baroness Hale of Richmond dissenting) that it was not a hybrid authority and that the art.8 argument could not be relied upon. It is to be noted that each of the judges in the majority agreed with

each other's decision. (The actual decision in that case has now been reversed by statute: see the Health and Social Care Act 2008, s.145(1). However, plainly this does not in any way affect the binding nature of the reasoning of the majority of their Lordships.)

33 It is pertinent to note that it seems to have been assumed in *YL* that the issue whether it was a hybrid public authority rested upon whether its function of providing a place at the care home for applicants paid for by the local authority was a public function.

34 It is not necessary to analyse in detail the individual speeches of their Lordships in these two cases, not least because the principles which they establish are relatively clear and were not in dispute before us. The real issue lies not in identifying the principles, but rather in determining the result of their application to the particular circumstances of this case.

35 In my judgement, the following principles can be gleaned from these cases.

(1) The purpose of s.6 is to identify those bodies which are carrying out functions which will engage the responsibility of the United Kingdom before the European Court of Human Rights. As Lord Nicholls put it in the *Aston Cantlow* case at [6],

> ''the purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights''.

Lord Rodger at [160], Lord Hope at [52], Lord Hobhouse at [87] and Lord Scott at [129] were to the same effect. (Unfortunately, as Lord Mance pointed out in *YL* after analysing the Strasbourg jurisprudence, the case law from the European Court of Human Rights provides no clear guidance for gleaning how that test should be applied in a case such as this, where there is no formal delegation of public powers.)

(2) In conformity with that purpose, a public body is one whose nature is, in a broad sense, governmental. However, it does not follow that all bodies exercising such functions are necessarily public bodies; many functions of a kind historically performed by government are also exercised by private bodies, and increasingly so with the growth of privatisation: see Lord Nicholls in *Aston Cantlow* at [7]–[8]. Moreover, this is only a guide since the phrase used in the Act is *public* function and not *governmental* function.

(3) In determining whether a body is a public authority, the courts should adopt what Lord Mance in *YL* described as a ''factor-based approach'' ([91]). This requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round. There is, as Lord Nicholls put it in *Aston Cantlow* ([12]) ''no single test of universal application''. Lord Bingham in *YL* observed ([5]) that,

> "a number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case".

(4) In applying this test, a broad or generous application of s.6(3)(b) should be adopted: per Lord Nicholls in *Aston Cantlow* [11] cited by Lord Bingham in *YL* at [4] and by Lord Mance at [91].

(5) In *Aston Cantlow* Lord Nicholls said ([12]) that the factors to be taken into account,

> "include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service".

Some of these factors were the subject of more detailed analysis in *YL*. I shall briefly deal with them.

(6) As to public funding, it was pointed out that it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body (Lord Scott at [27]; Lord Neuberger at [141]). As Lord Mance observed ([105]):

> "Public funding takes various forms. The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangement with a company aiming to profit commercially thereby is potentially quite another."

To similar effect, Lord Neuberger opined that ([165]),

> "it seems to me much easier to invoke public funding to support the notion that a service is a function of 'a public nature' where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person".

(7) As to the second matter, the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends why they have been conferred. If it is for private, religious or purely commercial purposes, it will not support the conclusion that the functions are of a public nature: see Lord Mance in *YL* at [101]. However, Lord Neuberger thought that the "existence of wide ranging and intrusive set of statutory powers . . . is a very powerful factor in favour of the function falling within section 6(3)(b)" and he added that it will often be determinative ([167]).

(8) The third factor, where a body is to some extent taking the place of central government or local authorities, chimes with Lord Nicholls'

observation that generally a public function will be governmental in nature. This was a theme running through the *Aston Cantlow* speeches, as Lord Neuberger pointed out in *YL* at [159]. That principle will be easy to apply where their powers are formally delegated to the body concerned.

(9) The fourth factor is whether the body is providing a public service. This should not be confused with performing functions which are in the public interest or for the public benefit. As Lord Mance pointed out in *YL* ([105]), the self-interested endeavour of individuals generally works to the benefit of society, but that is plainly not enough to constitute such activities public functions. Furthermore, as Lord Neuberger observed ([135]), many private bodies, such as private schools, private hospitals, private landlords, and food retailers, provide goods or services which it is in the public interest to provide. This does not render them public bodies, nor their functions public functions. Usually the public service will be of a governmental nature.

36 Their Lordships also identified certain factors which will generally have little, if any, weight when determining the public status. First, the fact that the function is one which is carried out by a public body does not mean that it is a public function when carried out by a potentially hybrid body. The point was powerfully and cogently made by Lord Scott in *YL* at [30]–[31]. He highlighted the anomalies and absurdities that would result if this were the case. Secondly, it will often be of no real relevance that the functions are subject to detailed statutory regulation. Again, as Lord Neuberger pointed out in *YL* ([134]),

> "the mere fact that the public interest required a service to be closely regulated and supervised pursuant to statutory rules, cannot mean the provision of a service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous materials, would ipso facto be susceptible to be within the ambit of section 6(1)."

37 Thirdly, it is only of limited significance that the function will be subject to the principles of judicial review. The purpose of attaching liability under s.6 is different to the purpose of subjecting a body to administrative law principles, and it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other. So although the case law on judicial review may be helpful, it is certainly not determinative: see Lord Hope in *Aston Cantlow* ([52]) cited with approval by Lord Mance in *YL* ([87]).

38 It is also necessary to mention a Court of Appeal decision, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] Q.B. 48 in which the court held that the RSL under consideration in that case was a public authority with respect to the exercise of its functions. This was, however, principally because the body was set up at the behest of a local authority which exercised considerable control over its activities. In *YL* both Lord Mance ([87]) and Baroness Hale ([61]) observed that this was not a proper basis for reaching that

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

conclusion since the court focused on the historical ties and did not apply a functional test. However, they did not indicate whether the decision itself was correct notwithstanding the defective reasoning. Accordingly, I do not gain any assistance from that case.

What is a private act?

39 In both *Aston Cantlow* and *YL* there was some discussion whether, even if the relevant functions were public functions, the particular acts in issue were private acts. In *Aston*, all of their Lordships except Lord Scott expressed the view that the act of enforcing liability by the parish council was a private act. Lord Nicholls observed that the acts taken by the church council to compel the repair of the church was no more a public act than would be the enforcement of a restrictive covenant ([16]). Lord Hope held that the liability to repair the chancel arose as a matter of private law from the ownership of glebe land. He said that the "nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt" ([64]). Lord Hobhouse's judgment was to the same effect on this point: [90]. Lord Rodger also considered that enforcing the liability was not a public function. He appears to have treated the act and the function as the same. Lord Scott dissented on this point. He held that the parochial church council was a hybrid public authority because the act of enforcing the liability to pay was a public function. Again, he did not draw any distinction between the concepts of function and act in this context.

40 In *YL* the majority held that the act of moving the claimant out of the home was a private act. Again, emphasis was placed on the private source of power in issue. Lord Scott, with whose judgment Lords Mance and Neuberger agreed, commented that the notice to terminate the tenancy agreement was a "contractual provision in a private law agreement" which in his view "could not be thought to be anything other than private". Lord Mance, although not expressly referring to s.6(5), likewise held that the "source and nature of Southern Cross' activities differentiates them from any function of a public nature" ([120]). Lord Neuberger did not address this issue directly.

41 I would draw these tentative propositions from this analysis. First, the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Secondly, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important. This leads on to the third and related proposition, which is that the character of an act is likely to take its colour from the character of the function of which it forms part.

The decision of the Divisional Court

42 It was conceded before the Divisional Court that the Trust is a hybrid authority on the basis that certain of its functions, in particular the power to obtain parenting orders and antisocial behaviour orders, are public functions. Nonetheless the argument developed before the court (and which is reflected in the form of declaration granted) focused on whether the Trust was a public authority by virtue of its housing and management functions. The key issue was perceived to be

whether those functions constituted the exercise of a function or functions of a public nature. There was relatively little focus on s.6(5) and the question whether the termination of the tenancy was a private act.

43 In determining whether the allocation and management of housing was a public function, Richards L.J., with whose judgment Swift J. agreed, first analysed the decision of the House of Lords in *YL*, focusing solely on the speeches of their Lordships in the majority. In the light of that analysis, he identified certain features of the way in which the RSL carries out its functions which he considered to be germane to the decision he had to reach.

44 He accepted that the management and allocation of housing stock is not itself an inherently governmental activity, as indeed Mr Drabble had conceded. Plainly, this is something that private landlords also do. However, he considered that the context in which the RSL operates makes it different from the ordinary commercial provider; its non-profit making and charitable objects, whilst not indicative of being a public authority, at least placed the organisation outside the commercial sphere.

45 Furthermore, he thought it relevant that it operates in a particular public sector of social rented housing where there is extensive state regulation and where the RSL operates in close harmony with the local authority. RSLs make a significant contribution to meeting the Government's objectives with regard to affordable housing.

46 Richards L.J. recognised that their Lordships in *YL* had said that merely because a body was subject to detailed regulation that did not mean that it operated in the public sector. However, the regulation of the level of rents and the fact—which the Divisional Court said was particularly important—that there was a very significant public subsidy of RSLs, and more specifically of this Trust, designed to contribute towards Government policy of providing low cost housing, were powerful factors in favour of treating the allocation and management functions as public functions.

47 Again, from time to time there is the voluntary transfer of housing stock to RSLs from the public sector. In this case some 10 per cent or so of the Trust's housing stock fell into that category. There is also the duty of co-operation imposed by s.170 which in practice limited the freedom to allocate and gave effect to the public interest.

48 The Divisional Court considered that as a consequence of these factors taken in the round, the function of management and allocation of housing stock should be subject to the principles of the European Convention.

49 Finally, the Divisional Court considered whether it might be said that the termination of the particular tenancy should be treated as an act of a purely private nature even if the general functions of management and allocation were of a public nature. This was dealt with very briefly. Richards L.J. considered that it would be,

> "artificial to separate out the act of terminating a tenancy or indeed other acts in the course of management of a property from the act of granting a tenancy".

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

50 It was for these reasons that the court granted the declaration in the terms which it did.

Discussion

51 As I have indicated, the general scheme of the legislation is clear. If the authority is a core public authority, all its functions are public functions, as are all acts pursuant to those functions. It is a hybrid authority if only some of its functions are public functions. Even then, the particular act will not be subject to Convention principles if it is a private act.

52 Once the point was conceded and that concession was accepted by the court, the only relevant question is whether the relevant act—in this case the termination of the tenancy—is a private act. (It could, perhaps, have been suggested that the powers to obtain parenting orders or antisocial behaviour orders were simply powers and not functions, but that argument was never advanced.)

53 In my judgement, therefore, strictly the Divisional Court focused on the wrong question when it posed the issue whether the act of management and allocation of housing was a public function such as to render the Trust a hybrid public authority. In view of the concession, this point was not in issue and para.(a) of the declaration is to that extent misleading. It suggests that it is the exercise of the housing and management functions which renders the Trust a hybrid public body whereas it was one in any event; and it fails directly to address the key question, and strictly the only question which had to be answered in order to determine whether the claimant's human rights were engaged, namely whether the act of termination was a private act (although the declaration does state that acts of termination are public functions).

54 Mr Drabble submitted that the approach adopted by the Divisional Court was the proper one because it has not been accepted by the Trust that it was a hybrid body with respect to its housing allocation and management functions. However, s.6 is not structured so as to ask whether the particular function in the context of which the disputed act takes place is a public function. Moreover, it may sometimes be an irrelevant question. For example, there may be cases where the court is persuaded that whether a particular function of a hybrid body is public or not is immaterial, since it is satisfied that the particular act in dispute is a private act in any event. In those circumstances, the function question does not strictly arise and need not be resolved.

55 However, I do not thereby suggest that the analysis of the Divisional Court was to no purpose. I accept that in order to determine whether the act of termination is a private act or not, it is necessary to focus on the nature of the act in the context of the body's activities as a whole. In most, if not all, cases that is likely to require a consideration of the nature of the function or functions to which the act is contributing. Plainly the power to seek an ASBO was of no assistance in answering whether the termination of the tenancy was a private act or not.

56 By contrast, the question whether the provision by the Trust involved the exercise of a function of a public nature was in my view, highly material to that question. In short, in my judgement the scrutiny which the Divisional Court

gave to the housing functions of the Trust was relevant to the question whether the act of termination was private or not, but not to the question whether the Trust was a hybrid public authority.

57 It is plain that the Divisional Court did in fact in this case focus on the function of allocating and managing housing at least in part in order to assist it to reach a conclusion on the proper characterisation of the act of termination. I consider that it was right to do so. It may be that to describe that context by reference to allocation and management was not wholly apt: perhaps allocation alone would have sufficed. But I do not think anything significant turns on that. The important point, in my view, is to consider the act of termination in the wider context of the housing function being carried on by the Trust, whatever shorthand is used to describe that context.

The contending arguments

58 The contending arguments can be relatively shortly stated. Mr Drabble submits that the analysis of the relevant facts demonstrates that most RSLs are in significant part publicly funded in order to fulfil an important function of government. It is an essential policy of government to provide social or subsidised housing, and RSLs are a vital instrument through which that policy is achieved. They are closely regulated and controlled in what rents they can fix and even the way in which they should carry out terminating tenancies. Whilst they do not stand in the shoes of local authorities, they work in very close harmony with them.

59 The obligation to co-operate results in significant limitations on the decision to allocate. Even absent any such duty, the decision who should be allocated the benefit of social housing, the terms on which he is offered it, and the decision to remove someone from it by terminating his tenancy, all involve the exercise of rights which, although private in form, are public in substance. They determine which particular individuals can benefit from the allocation of public funds. All these factors are in play with respect to this particular Trust.

60 Furthermore, the act of termination is closely and inextricably linked to the function of allocation. It would be highly artificial to separate it out and treat it as a private act merely because the tenancy itself was a contract. The Divisional Court was correct to say that the character of the function effectively defined the character of the act.

61 Mr Arden Q.C., counsel for the Trust, says that this argument is misconceived. The fundamental and elementary point, which the respondent does not challenge, is that the provision of housing is not a governmental function. That has very recently been confirmed by Baroness Hale of Richmond. In *R. (on the application of Ahmad) v Newham LBC* [2009] UKHL 14 in which she pointed out that no-one has a right to a house, and a local housing authority is under no general duty to provide housing accommodation. Many private and public bodies fulfil the function of providing housing.

62 Nor, says Mr Arden, is the case advanced by the fact that there is regulation of certain aspects of the way in which the Trust allocates and manages its housing

functions. There has long been detailed regulation of tenancies both in the private and public sectors. Until 1988 rent officers would fix rents at levels which were often below what the market would bear, even in the private sphere. That would not have converted private landlords into bodies exercising public functions. Similarly, control over evictions has been exercised for decades. *YL* has emphasised that the mere fact of regulation tells us very little, if anything, of a body's status under s.6. It depends upon the nature and purpose of the regulation. This is not a case where the local authority has delegated its statutory powers to the Trust. The fact that both happen to be providing social housing is not enough to render the Trust's functions public.

63 In order to constitute a public body it is necessary for the state to have control over the exercise of the body's powers. Here it does not; it is for the Trust to determine who it shall house and on what terms. It may reach an agreement with the local authority about allocations, but this does not alter the fundamental point that it controls its own affairs and enters into its own contracts.

64 The tenant has no public law rights as against the Trust. Termination of the tenancy may confer fresh duties on the local authority, such as a duty to house a homeless person, and there may be claims against central government for housing benefit. But the relationship between the tenant and the Trust is entirely located in private law. It is governed by the terms of the tenancy (with such statutory overlay to confer security as Parliament has afforded) and these terms are not affected either by the nature of the Trust or the functions it performs.

65 For this reason, even if it can be said that the Trust is performing public functions with respect to the allocation and management of property generally, it is not doing so when it terminates a tenancy. This is *par excellence* the exercise of a private power in precisely the same way as the termination of the tenancy in *YL* was so characterised by Lord Scott.

Discussion and conclusions

66 The essential question is whether the act of terminating the tenancy is a private act. When considering how to characterise the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not. As Lord Mance observed in *YL*, both the source and nature of the activities need to be considered when deciding whether a function is public or not, and in my view the same approach is required when determining whether an act is a private act or not within the meaning of s.6(5). Indeed, the difficulty of distinguishing between acts and functions reinforces that conclusion.

67 In this case there are a number of features which in my judgement bring the act of terminating a social tenancy within the purview of the Human Rights Act.

68 A useful starting point is to analyse the Trust's function of allocating and managing housing with respect to the four criteria identified by Lord Nicholls at [12] in the *Aston Cantlow* case, reproduced above. First, there is a significant reliance on public finance; there is a substantial public subsidy which enables the Trust to achieve its objectives. This does not involve, as in *YL*, the payment of money by

reference to specific services provided but significant capital payments designed to enable the Trust to meet its publicly desirable objectives.

69 Secondly, although not directly taking the place of local government, the Trust in its allocation of social housing operates in very close harmony with it, assisting it to achieve the authority's statutory duties and objectives. In this context the allocation agreements play a particularly important role and in practice severely circumscribe the freedom of the Trust to allocate properties. This is not simply the exercise of choice by the RSL but is the result of a statutory duty to co-operate. That link is reinforced by the extent to which there has been a voluntary transfer of housing stock from local authorities to RSLs.

70 Thirdly, the provision of subsidised housing, as opposed to the provision of housing itself, is, in my opinion a function which can properly be described as governmental. Almost by definition it is the antithesis of a private commercial activity. The provision of subsidy to meet the needs of the poorer section of the community is typically, although not necessarily, a function which government provides. The Trust, as one of the larger RSLs, makes a valuable contribution to achieving the government's objectives of providing subsidised housing. For similar reasons it seems to me that it can properly be described as providing a public service of a nature described in the Lord Nicholls' fourth factor.

71 Furthermore, these factors, which point in favour of treating its housing functions as public functions, are reinforced by the following considerations. First, the Trust is acting in the public interest and has charitable objectives. I agree with the Divisional Court that this at least places it outside the traditional area of private commercial activity. Secondly, the regulation to which it is subjected is not designed simply to render its activities more transparent, or to ensure proper standards of performance in the public interest. Rather the regulations over such matters as rent and eviction are designed, at least in part, to ensure that the objectives of government policy with respect to this vulnerable group in society are achieved and that low cost housing is effectively provided to those in need of it. Moreover, it is intrusive regulation on various aspects of allocation and management, and even restricts the power to dispose of land and property.

72 None of these factors taken in isolation would suffice to make the functions of the provision of housing public functions, but I am satisfied that when considered cumulatively, they establish sufficient public flavour to bring the provision of social housing by this particular RSL within that concept. That is particularly so given that their Lordships have emphasised the need to give a broad and generous construction to the concept of a hybrid authority.

Is termination of a tenancy a private act?

73 That still leaves the central question whether the act of termination itself can nonetheless be treated as a private act. Can it be said that since it involves the exercise of a contractual power, it is therefore to be characterised solely as a private act? It is true that in both *Aston Cantlow* and *YL* it is possible to find

observations which appear to support an affirmative answer to that question. As I have said, in the *YL* case Lord Scott considered that the termination of the tenancy in that case was a private act, essentially because it involved the exercise of private rights. And in the *Aston Cantlow* case their Lordships focused on the private law source of the right being exercised in concluding that it was a private act.

74 Those decisions certainly lend force to the argument that the character of the act is related to and may be defined by the source of the power being exercised. Where it is essentially contractual, so the argument goes, it necessarily involves the exercise of private rights.

75 In my judgement, that would be a misreading of those decisions. The observations about private acts in *Aston Cantlow* and *YL* were in a context where it had already been determined that the function being exercised was not a public function. I do not consider that their Lordships would have reached the same conclusion if they had found that the nature of the functions in issue in those cases were public functions.

76 In my judgement, the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the Trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies. No doubt the termination of such a contract would be a private act (unless the body were a core public authority).

77 In my opinion, if an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities. Public bodies necessarily fulfil their functions by entering into contractual arrangements. It would severely limit the significance of identifying certain bodies as hybrid authorities if the fact that the act under consideration was a contractual act meant that it was a private act falling within s.6(5).

78 Assume, for example, that a local authority delegated some of its statutory functions to a private organisation, such as allocating housing to the homeless. As Lord Mance pointed out in *YL*, the express delegation of public functions in this way would certainly bring the delegatee within the range of bodies for whom the government would be liable under Strasbourg jurisprudence. It surely could not be said that the exercise of contractual powers necessarily involved in the performance of those functions and central to the concerns of the tenant, such as the termination of a tenancy, involved the exercise of private rights which thus escaped the purview of the Human Rights Act. In my judgement that would plainly be in breach of Convention principles.

79 It follows that in my view the act of terminating the tenancy of Mrs Weaver did not constitute an act of a private nature, and was in principle subject to human rights considerations. That may provide relatively limited protection in view

 © 2009 THOMSON REUTERS (LEGAL) LIMITED

of the decision of the House of Lords in *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 W.L.R. 636, following *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465. But the claimant and others in a like situation are entitled to such protection as is available to them applying human rights principles.

80 A point which then arises is whether the protection afforded by the Human Rights Act will extend to all tenants of the Trust who are in social housing or only those in properties which were acquired as a result of state grants. I agree with the Divisional Court that it should be all those in social housing. The effect of the grant is not merely to assist the Trust (and other RSLs similarly placed) in being able to provide low cost housing to the tenants in the properties acquired by the grant; it necessarily has a wider impact, and bears upon its ability to provide social housing generally. Furthermore, it would be highly unsatisfactory if the protection of human rights' law depended upon the fortuitous fact whether a tenant happened to be allocated to housing acquired with a grant or not.

81 It does not follow, however, that all tenants of the Trust will receive the same protection. Mr Drabble conceded, I think probably correctly, that human rights' principles will not apply to those tenants of the Trust (a relatively small proportion, it seems) who are not housed in social housing at all. If the tenants are paying market rents in the normal way, then no question of subsidy arises. It is not obvious why the tenant should be in any different position to tenants in the private sector where human rights principles are inapplicable.

82 The effect of drawing this distinction does not lead to the unattractive consequence which would have resulted had the care home been held to have been a hybrid authority in *YL*, namely that two persons, each subject to the same level of care in the same care home, could be subject to different degrees of legal protection. Indeed, the distinction between those in social housing and those paying market rates merely mirrors the current distinction between those housed in local authority accommodation, who do have human rights protection with respect to evictions, and those housed in the private sector who do not.

Judicial review

83 Both the *Aston Cantlow* and *YL* cases emphasised that it does not necessarily follow that because a body is a public body for the purposes of s.6, it is therefore subject to public law principles. The Divisional Court held, however, that in this case the two questions had to be determined the same way. Mr Arden does not now seek to contend otherwise. In my judgement, he was right not to do so.

Disposal

84 Accordingly, I would dismiss this appeal. In my judgement the Trust is a hybrid public authority and the act of terminating a tenancy is not a private act. It does not necessarily follow, however, that every RSL providing social housing will necessarily be in the same position as the Trust. The determination of the public status of a body is fact sensitive. For example, a potentially important difference

is that apparently some RSLs have not received any public subsidy at all, and arguably—and I put it no higher than that—their position could be different.

85 **LORD COLLINS OF MAPESBURY:** I agree with Elias L.J. that the appeal should be dismissed.

86 There are two preliminary comments to be made. The first relates to the question whether this appeal is likely to have any practical importance. In practice complaints by tenants of human rights violations on the part of local authorities or housing associations are most likely to centre on art.8(1) of the European Convention on Human Rights. In *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 the House of Lords held that the right of a public authority landlord to enforce a claim for possession would in most cases be justifiable under art.8(2). While that decision stands (*Kay v United Kingdom* is pending in the European Court of Human Rights) the practical implications of extending the protection of the Convention to tenants of RSLs must be very limited.

87 The second point relates to the context, or more accurately the lack of context, in which this appeal came to be heard. Before the Divisional Court Mrs Weaver lost comprehensively on the merits of her claim. She wholly failed in her claim that the Trust had evicted her in breach of a legitimate expectation arising out of guidance issued by the Housing Corporation, and that to evict her from her home would interfere with her rights under art.8. It was held that the claimed legitimate expectation that Housing Act 1988 Sch.2 ground 8 (arrears of rent) would not be used was far too tenuous and general to be enforceable in public law, and there was in any event no breach of it. Mrs Weaver had not given evidence that she had the expectation alleged or that she knew of the term of the contract from which the expectation is said to have arisen. The expectation was simply an artificial construct derived from the standard terms and conditions and attributed to her, rather than a genuinely held expectation of her own. The finding that there was neither a legitimate expectation nor a breach of any legitimate expectation disposed of the argument under art.8.

88 In reaching its conclusions the Divisional Court held that the Trust was subject to the Human Rights Act 1998 by virtue of s.6(3)(b) and (implicitly) that the act of termination of the tenancy was not a private act (s.6(5)). As Elias L.J. has pointed out, strictly it was unnecessary for the court to determine the wider question raising the legal status of the Trust.

89 Normally the Trust would not have been in a position to appeal from that part of the reasoning, because of the fundamental rule of procedure that appeals lie against judgments or orders only, and not against reasons: *Lake v Lake* [1955] P. 336; Supreme Court Act 1981 s.16. But because the Trust wanted to contest the Divisional Court's conclusion on that issue even if Mrs Weaver did not appeal (and not merely by way of a respondent's notice if she did appeal), the Divisional Court granted declarations (a) that the management and allocation of housing stock by the Trust (including decisions concerning the termination of a tenancy) was a function of a public nature, with the effect that the Trust was to be regarded as a public authority in that respect for the purposes of the Human Rights Act

1998 s.6(3)(b); and (b) that the Trust was accordingly amenable to judicial review on conventional public law grounds in respect of its performance of that function.

90 Whether a declaration should have been granted was of course a matter for the discretion of the Divisional Court, and there was no party at that stage, or on this appeal, with an interest in arguing that no such declaration should have been made. But the consequence of this procedural device is that this court is asked to determine the question of principle divorced from any plausible factual scenario in which the question might arise. In effect this court (by contrast with the Divisional Court) is being asked to give an advisory opinion. As Justice Heydon of the High Court of Australia has said in the context of findings which are not needed for the decision: "It is difficult to solve every aspect of a problem satisfactorily and conclusively when only one element of it is presented for concrete decision. Obiter dicta tend to share in the vice of, and even become, advisory opinions": (2006) 122 L.Q.R. 399, 417.

91 The problem is particularly acute here, because this court is being asked to determine in the abstract an issue on which the Divisional Court did not focus explicitly, namely whether in the present context, even if the Trust is a "person certain of whose functions are functions of a public nature" within the meaning of s.6(3)(b), nevertheless it is not a public authority for present purposes because, in the words of s.6(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". The question is this: even if certain of the functions of the Trust are functions of a public nature, is the termination of a tenancy in accordance with its terms a private act?

92 Richards L.J. touched on the public or private character of the termination of the tenancy. First, in the only explicit reference to s.6(5) he set out the relevant parts of s.6 (at [25]). Secondly, he referred to the argument by Mr Drabble Q.C. for Mrs Weaver (at [45]) that the acts of deciding to grant or terminate tenancies of social housing were decisions concerning the allocation of public housing resources and, as such, were not purely private in nature; that a decision to terminate a tenancy led to the withdrawal of a public funded resource from the tenant affected; that it was well established that decisions about eviction could have a public law character so as to be subject to the control of public law: e.g. *Wandsworth LBC v Winder (No.1)* [1985] A.C. 461 and *Wandsworth LBC v A* [2000] 1 W.L.R. 1246. Thirdly, he referred (at [60]) in his conclusions to the fact that, on existing authority (*Peabody Housing Association Ltd v Green* (1979) 38 P. & C.R. 644 and *R. v Servite Houses Ex p. Goldsmith* [2001] B.L.G.R. 55), a decision by an RSL to terminate a tenancy was considered to be a matter of private, not public, law and not to be susceptible to judicial review; but he thought it better to leave the question of amenability to judicial review out of account when considering the issue of public authority, not least to avoid a danger of circularity of reasoning.

93 His conclusion on this aspect was (at [62]) that, if the allocation of housing stock by the Trust was a public function, then it would be wrong to separate out "management" decisions concerning the termination of a tenancy as acts of a purely private nature. The allocation and management of the housing

stock were to be regarded as part and parcel of a single function or as closely related functions. It would be artificial to separate out the act of terminating a tenancy, from the act of granting a tenancy. The termination of a tenancy led to the withdrawal of a publicly funded or subsidised resource from the tenant and was likely to trigger fresh duties of the local authority, and had been recognised in the context of judicial review as involving decisions capable of having a public law character. If the Trust was a public authority in relation to the grant of a tenancy, then it was equally a public authority in relation to the termination of the tenancy.

94 It seems to me that the concession in the present case that the Trust is a "hybrid authority" which exercises both public and private functions does not assist in the application of s.6(5). It was conceded only that the Trust is a hybrid authority on the basis that some of its functions are public functions, such as the power to obtain parenting orders (Anti-social Behaviour Act 2003 ss.26B and 26C) and antisocial behaviour orders (Crime and Disorder Act 1998 Pt 1). In addition, the Intervener, the Equality and Human Rights Commission, refers in its written submission to powers enjoyed by RSLs which are not otherwise available to private landlords, including the power to apply to a court to demote a tenant from assured status to the status of a demoted tenant (Housing Act 1988 s.6A, inserted by Anti-social Behaviour Act 2003 s.14(4)) and the ability to grant Family Intervention Tenancies (in conjunction with which occupiers undertake behaviour support programmes) (Housing Act 1988 Sch.1 Pt 1 para.12ZA inserted by Housing and Regeneration Act 2008 s.297(2)).

95 Consequently, I do not consider that the reference to "functions of a public nature" in s.6(3)(b) becomes wholly irrelevant once that concession is made and that the focus is simply on s.6(5). It seems to me to be plain that the act in question must be an act in pursuance of the entity's relevant functions of a public nature. The fact that the Trust is conceded to perform functions of a public nature in relation to antisocial behaviour orders not only does not assist in determining whether the nature of the act of termination of a tenancy is private or public, but it deflects attention from what I consider to be an essential prerequisite to consideration of the question in s.6(5), namely that the act is in pursuance of, or at least connected with, performance of functions of a public nature.

96 That does not conclude the matter, of course, because many acts which are in pursuance of performance of functions of a public nature will be private acts. Even if the provision of social housing were a public function, it could not be suggested that the termination of a contract with a builder to repair one of the houses in the housing stock was other than a private act.

97 In *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48 this court held that the housing association was a public authority for the purposes of s.6(3)(b). The court said (at [58]): "The renting out of accommodation can certainly be of a private nature. The fact that through the act of renting by a private body a public authority may be fulfilling its public duty, does not automatically change into a public act what would otherwise be a private act . . .". It said that the "more closely the acts that could be of a private nature are enmeshed in the activities of a public

body, the more likely they are to be public'' (at [65(v)]). In the result, the court held that the eviction of the tenant engaged art.8(1) but that the obligation to make the eviction order under s.21(4) of the Housing Act 1988 was within art.8(2). But the authority of this decision has been undermined by *YL* where it was said that it relied too heavily on the historical links between the local authority and the RSL, rather than upon the nature of the function itself which was the provision of social housing: Lord Scott at [61] and Lord Mance at [105]. See also Baroness Hale, dissenting, at [81].

98 In *Aston Cantlow v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546 Lord Nicholls (at [16]) contrasted a private act with the discharge of a public function. Lord Hope (at [41]) said that whether s.6(5) applied to a particular act depended on the nature of the act which was in question in each case; and concluded (at [64]) that the nature of the act was to be found in the nature of the obligation which the PCC was seeking to enforce; it was seeking to enforce a civil debt, and the function it was performing had nothing to do with the responsibilities which were owed to the public by the state; accordingly s.6(5) applied and in relation to the act in question the PCC was not a public authority. Lord Hobhouse (at [89]) also emphasised the fact that the act was the enforcement of a civil liability, which was a private law obligation.

99 So also in *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95 Lord Scott (with whom Lord Neuberger and Lord Mance agreed) emphasised that the notice was served in purported reliance on a contractual provision in a private law agreement, and ''its nature could not be thought to be anything other than private'' (at [34]). Baroness Hale, dissenting, thought that an act in relation to the person for whom the public function is being put forward cannot be a private act for the purposes of s.6(5) (at [73]).

100 Elias L.J. is of the view that the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. I would go somewhat further. It is not easy to envisage circumstances where an act could be of a public nature where it is not done in pursuance, or purportedly in pursuance, of public functions.

101 I also agree with Elias L.J. that the following features in particular are highly relevant to the question whether the functions of the Trust are public functions (although none of them on its own is in any sense conclusive): the substantial public subsidy which enables the Trust to achieve its objectives; the way in which the allocation agreements circumscribe the freedom of the Trust to allocate properties; and the nature of the regulation to which the Trust is subject. In addition, the vast majority of RSL tenants enjoy statutory protection as regards the circumstances in which a social housing tenancy may be terminated. Secure, assured and assured shorthold tenancies (the vast bulk of RSL tenancies) can only be determined by a process of service of statutorily prescribed notices, court proceedings and a court order which ends the tenancy: cf *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 W.L.R. 636 at [100], per Lord Walker. Although I do not attach significance to the concession that the Trust is a hybrid authority because it can obtain antisocial behaviour orders, I do attach some sig-

nificance to that power in conjunction with the other powers relied on by the Equality and Human Rights Commission and referred to above.

102 Consequently it does not follow that the termination of a tenancy is necessarily a private act simply because it originates from the exercise of contractual rights. In any event, I do not read *Aston Cantlow* and *YL* as doing more than treating the private law source of the right and obligation as a factor in determining whether the act is a private act or a public act. In my judgement the act of termination is inextricably linked to the provision of social housing as part of the Trust's public function. Consequently I have come to the conclusion that the Divisional Court's decision on this point was right.

103 **RIX L.J.:** I have read Elias L.J.'s judgment in draft, and am most grateful to him for setting out the material in this case so clearly. I have the misfortune, however, to disagree with him, and with Lord Collins of Mapesbury, as to the disposal of this appeal.

104 There is something rather perplexing about this litigation. Mrs Weaver claimed judicial review of the Trust's decision to seek to terminate her tenancy on ground 8 of Sch.2 to the Housing Act 1988. That is a ground, premised on arrears of rent of more than eight weeks, which provides the landlord with a mandatory basis for recovering possession; as contrasted with grounds 10 or 11, which grant to the court a discretion whether or not to enforce possession. Mrs Weaver alleged that the Trust's use of ground 8 instead of the discretionary grounds for possession was in breach of legitimate expectation and in breach of her rights under the Convention. It was common ground that if her argument based on legitimate expectation failed, she could not succeed in reliance on art.8 of the Convention.

105 Her case on legitimate expectation sought to rely on the assumed presence in the Trust's standard terms and conditions of its assured tenancy agreement of the following statement:

> "In providing a housing service we will comply with the regulatory framework and guidance issued by the Housing Corporation."

The relevant guidance was to be found in *Housing Corporation Regulatory Circular 07/04*, issued in July 2004 under s.36 of the Housing Act 1996, and then in its replacement *Circular 02/07*. The key passage, under the heading "Clarification of the Corporation's expectations: evictions", provides:

> "Before using Ground 8, associations should first pursue all other reasonable alternatives to recover the debt."

106 In the divisional court Richards L.J. held as follows,

> "85. . . . the claimed legitimate expectation is far too tenuous and general in character to be enforceable in public law, and there was in any event no breach of it.

86. The claimant herself has not given evidence that she had the expectation alleged or even that she knew of the term of the contract from which the expectation is said to have arisen . . . Thus the expectation is simply an artificial construct derived from the standard terms and conditions and attributed to the claimant, rather than a genuinely held expectation of her own . . .
87. As to the representation itself . . . I do not think that it can be read as a clear, unambiguous and unqualified promise or commitment to do everything set out in the guidance issued by the Housing Corporation. The guidance is by its nature guidance, not prescription. The regulatory provisions to which I have referred place the Housing Corporation in a strong position to ensure that it is substantially followed, but there is nothing that turns it into the equivalent of a statutory rule-book, and the Housing Corporation looks not just at whether the guidance has been followed but at whether alternative action has been taken to achieve the same objectives . . . The statement in [the Trust's] standard terms and conditions cannot have been intended to give the guidance a status it does not have under the statute or in the Housing Corporation's own practice. At most, Mr Arden's description of it as a 'target duty' is more apt. Moreover, if the statement has the character of a promise, there is no reason why it should not be treated as a contractual promise, since it features in the contractual terms and conditions; but it is no part of the claimant's case that the statement is contractually binding. If it lacks the qualities to give it contractual force notwithstanding that it is located in a contract, I am not satisfied that it can properly be treated as having the qualities that justify its enforcement in public law as a legitimate expectation . . .
89. Thus, even if I were to accept the existence of a legitimate expectation in terms of the relevant guidance, that is a promise or commitment on the part of [the Trust] to pursue all reasonable alternatives to recover the debt before using ground 8, I would not find a breach of it on the facts of this case . . . I do not accept that the pursuit of all reasonable alternatives requires possession proceedings to be brought first on ground 10 or 11 before reliance can be placed on ground 8 . . .
90. Looking at the overall history of [the Trust's] dealings with the claimant, I am not persuaded that [the Trust] failed to use all reasonable alternatives to recover the debt before using ground 8. In particular, in the light of the history of substantial and repeated defaults, [the Trust] was in my view entitled to take the view that reliance on ground 10 or 11 did not provide a reasonable alternative means of recovering the debt, and its reliance on ground 8 was in the circumstances in accordance with the relevant guidance and justified . . .".

107 Richards L.J. then turned to the "Convention issues" but said that his finding that there was neither a legitimate expectation nor a breach of any legitimate expectation "sinks the argument" (at [94]). As for a further more fundamental argument that the very statute under which the possession order was sought

was incompatible with art.8, Richards L.J. said that it would be better not to express any view on it, since it arose on an artificial assumption and would necessarily be obiter (at [97]).

108 I have set out the public law contentions and the Divisional Court's holdings on them because it seems to me that it is necessary to put the argument before us in context. That context was the complaint that the Trust's decision to use ground 8 (rather than another method of obtaining possession) to evict Mrs Weaver was illegitimate in public law and Convention terms because a provision of the tenancy promised, although not as a contractually binding undertaking, to use other methods first. The argument failed at every point. What is significant for present purposes is that it is said that the Trust did not live up to the legitimate expectations raised by its own contract. The complaint is not even that the Trust sought to obtain possession, but that it sought to do so by one lawful method (lawful that is subject only to the more fundamental argument, not reached by the divisional court, which would have attacked the statutory basis of ground 8) before first trying to do so by another lawful method which should, for reasons engendered by its own contract, have been preferred.

109 Mrs Weaver has not sought to appeal from those decisions which the divisional court reached having first found that the Trust was a public authority within s.6(3)(b) of the HRA 1998. She is no longer interested in this litigation.

110 It is, however, the Divisional Court's decision, along its route towards dismissing Mrs Weaver's claim, that the Trust was a public authority within s.6(3)(b), that is the subject-matter of the present appeal by the Trust. The only way such an appeal could have been promoted was to grant a declaration regarding the position under s.6(3)(b), and that is what the Divisional Court did. Its declaration is set out at [5] above. It may be noted that the declaration is solely by reference to s.6(3)(b), and makes no mention of s.6(5). It may also be noted that the declaration is by reference to a single "function", namely "the management and allocation of housing stock . . . (including decisions concerning the termination of a tenancy)". It is said that such a function "is a function of a public nature". It appears that decisions concerning the termination of a tenancy are part of what is called the function of "the management and allocation of housing stock".

111 The declaration was fashioned to reflect the argument before the divisional court and its reasoning on that argument. The rival submissions of the parties before the divisional court are encapsulated in the following passages taken from the judgment of Richards L.J.:

> "44. Applying *YL v Birmingham City Council*, Mr Drabble submitted that [the Trust] is to be seen as carrying out a governmental function, namely the management and allocation of state-subsidised housing . . .
> 45. Further, the particular acts of deciding to grant or terminate tenancies of social housing are decisions concerning the allocation of public housing resources and, as such, are not purely private in nature . . .".

Those were the submissions made on Mrs Weaver's behalf. On behalf of the Trust, Mr Arden submitted that,

"48. . . . certain of the functions of an RSL may be public functions: for example, its statutory function in relation to anti-social behaviour orders, or functions carried out pursuant to specific statutory delegations by local housing authorities . . . These specific situations are to be distinguished, however, from the RSL's function of managing and allocating its own housing stock . . .
51. Even if the allocation of housing is a public function, Mr Arden submitted that the termination of a tenancy is not: it is a management decision and is governed by the terms of the contract . . .".

112 On these rival submissions Richards L.J. decided as follows:

"62. Reference to the termination of a tenancy brings me to a final point on this issue, which is that if the allocation of housing stock by [the Trust] is a public function, then it would in my view be wrong to separate out 'management' decisions concerning the termination of a tenancy as acts of a purely private nature. The allocation and management of the housing stock are to be regarded as part and parcel of a single function or as closely related functions. It would be artificial to separate out the act of terminating a tenancy, or indeed other acts in the course of management of a property, from the act of granting a tenancy. Moreover, as Mr Drabble submitted, the termination of a tenancy leads to the withdrawal of a publicly funded or subsidised resource from the tenant and is likely to trigger fresh duties of the local authority, and has been recognised in the context of judicial review as involving decisions capable of having a public law character. If [the Trust] is a public authority in relation to the grant of a tenancy, then it is equally a public authority in relation to the termination of the tenancy.
63. For those reasons I accept the claimant's case that [the Trust] is for relevant purposes a public authority within s.6(3)(b) of the Human Rights Act 1998 . . .".

113 Although Richards L.J. nowhere in that passage mentioned s.6(5) (indeed, it is mentioned only very briefly in passing in [25] of his judgment), I would be prepared to accept that in his critical [62], where he considered whether terminating a tenancy or decisions concerning termination were "acts of a purely private nature", he was implicitly having regard to s.6(5)'s provision that,

"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".

However, his reasoning was that it was artificial to separate the act of termination from the act of granting a tenancy. If, therefore, the latter was a public function, or part of the overall public function of "management of a property", then the former was as well.

114 In the light of the arguments addressed to this court, I am not surprised that s.6(5) figured so sparingly in the divisional court's judgments, for before this court too the submissions essentially focussed on s.6(3)(b) rather than on s.6(5). This was despite the fact that Mr Arden conceded (albeit Elias L.J. has

suggested, perhaps wrongly) that RSLs were hybrid public authorities within s.6(3)(b) because of their power to obtain ASBOs and parenting orders. However, he was at pains to resist any suggestion that the matter went further than that, or in particular that in matters of management or allocation RSLs had any public functions to perform of any kind whatsoever. Moreover, there was hardly any consideration of what was meant by the extremely broad expression "management" on the one hand, or on the other hand of what was involved in the much narrower field of terminating a tenancy (save in the context of the *subsequent* discussion of legitimate expectations). On the whole, submissions on all sides were addressed at a very broad level of abstraction. On one side it was being suggested that not only the Trust, but all RSLs, in all their activities, were acting as public authorities, whereas on the other side it was being suggested that (absent such peripheral matters as ASBOs and the like) RSLs were essentially commercial, albeit subsidised and regulated, entities. These were submissions at the extremes.

115 I said above that this is perplexing litigation. I have sought to illustrate what I mean by that. It is, in this court, litigation in which the respondent has no interest, having lost below and not appealed. The argument has proceeded in the main on the basis of an extremely broad canvas, without specific focus on the act of termination in this case or on the critical statutory provision, which is s.6(5), despite the concern there expressed that the focus be on the "particular act". Instead, opposing strategic positions have been taken up. In as much as "management" has been in question, there has been no real attempt to examine what is meant by that, or what is involved in it. No doubt it can cover a vast array of activity, from the purchase or development of housing to the repair of a leaking bathroom pipe in respect of a single tenancy. In as much as "allocation" and "termination" have been in question, there has been no real attempt to explain why termination of a tenancy by regard to its contractual terms is to be regarded as just the other side of the coin, or part and parcel of, a function of allocation, which is essentially precontractual. It has simply been regarded as such.

Strasbourg and domestic jurisprudence

116 In this state of affairs, I ask myself first, what guidance is given by either Strasbourg or domestic jurisprudence.

117 I begin with Strasbourg jurisprudence. This is, in my judgement, a significant starting-point, because, as Elias L.J. has pointed out (at [35(1)] above), the purpose of s.6 is to identify "those bodies for whose acts the state is answerable before the European Court of Human Rights" (per Lord Nicholls in *Aston Cantlow* at [6]). As Lord Hobhouse observed in the same case (at [87]), "The relevant concept is the opposition of the 'victim' and a 'governmental body'". Moreover, we are required to take Strasbourg jurisprudence into account in determining any question which has arisen in connection with a Convention right: HRA 1998 s.2(1): see Lord Hope (ibid. at [51]). See also Lord Rodger at [163] and in *YL* Lord Neuberger at [157].

118 What in this context is to my mind instructive is that there is no case, at any rate none has been cited, in Strasbourg jurisprudence in which the non-governmental

provider of social housing has been the cause or object of a complaint of victimhood within the meaning of the Convention. The only Strasbourg case cited in the judgments of the divisional court is *Novoseletskij v Ukraine* (2006) 46 E.H.R.R. 53, where "a body responsible for the management and distribution of part of the state-owned housing stock was held by the Strasbourg court to be a governmental organisation for whose acts and omissions the state was liable" (at [44] of the judgment below). However, that was because the organisation in question was part of that essential "core" or "governmental" fabric of the state which is at the heart of Convention liability for these purposes. The citation by Richards L.J. of that case was simply of an element within the submissions of Mr Drabble below. When I enquired of Mr Arden generally as to what the teachings of Strasbourg jurisprudence might be about non-governmental providers of social housing, he told me that there were no relevant cases. He explained that by and large there was a distinction between countries of Eastern Europe, which had used municipalities to provide social housing, and the countries of Western Europe, where subsidised private social housing prevailed. The United Kingdom had recently moved from the Eastern to the Western European model. There were a number of Strasbourg cases concerning the provision of municipal housing, but that was all. Mr Drabble did not dispute this explanation.

119 I turn to domestic jurisprudence for assistance. I am grateful for the analysis performed by Elias L.J. in respect of the two leading cases of *Aston Cantlow* and *YL*. We are to perform a multi-factorial assessment. However, how has this worked in practice? First, I remind myself of what Lord Nicholls said in *Aston Cantlow* at [16]:

> "I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function."

That is of course a reference to the "particular act" in s.6(5).

120 In this context it is to my mind instructive, in a comparatively new field of enquiry, to try to see how the emerging principles have resulted in decisions. I approach the matter chronologically, while recognising that the law has been developing during the short period under review.

121 In *R. v Servite Houses Ex p. Goldsmith* (2001) 33 H.L.R. 35, Moses J. had to consider the closure by a registered social landlord (RSL) of its purpose-built registered care home which it had assured the applicants would be their home for life. Subsequently, however, financial losses led the RSL to decide to close it. Alternative arrangements were offered. The applicants sought judicial review on the ground that the decision to close was a breach of their legitimate expectations. Although Moses J. was not operating under the HRA and its s.6, he applied a closely analogous test for susceptibility to judicial review, namely whether the RSL was performing a public duty under a statutory source for its powers or whether the source of the power it was exercising was only in contract

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

(at [56]/[67]). He concluded, albeit reluctantly, that it was the latter. It was true that the applicants had been placed with the RSL by Wandsworth LBC pursuant to a statute (ss.21 and 26 of the National Assistance Act 1948); nevertheless, "Once the placement arrangements had been made the relationship between Wandsworth and Servite [the RSL] was commercial" (at [90]). The source of the RSL's powers was purely contractual and it owed no public law obligation to the applicants. Wandsworth's public law obligations were limited to an obligation to reassess the applicant's needs. The applications failed, although Moses J. raised the question whether "the solution lies in imposing public law standards on private bodies whose powers stem from contract or in imposing greater control over public authorities at the time when they first make contractual arrangements" (at [105]).

122 In *YL*, Lord Mance referred to the judgment in *Servite* as illuminating and persuasive and clearly considered it to be correct. He observed that,

> "the essentially contractual source and nature of Southern Cross's activities differentiates them from any 'function of a public nature', even though it is (as often in the private sector) a matter of public concern, interest and benefit that reputable, efficient and properly regulated providers of such services should exist" (at [120]).

Lord Scott and Lord Neuberger agreed with Lord Mance.

123 In *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48 (*Poplar*) the claimant was an RSL which was seeking possession from its tenant, the defendant. The tenant had originally been granted a tenancy by her local housing authority on an interim basis, while the question whether she was intentionally homeless was investigated. During her tenancy the property in which she lived (together with a substantial proportion of the authority's housing stock) was transferred by the local authority to the RSL, of whom she became a tenant under a periodic assured shorthold tenancy. In due course the local authority decided that she had become intentionally homeless. The RSL then sought possession of her home under s.21(4) of the Housing Act 1988 which provided for mandatory possession by a landlord who gave the requisite notice for seeking possession.

124 The question was whether the RSL was amenable to a complaint under art.8 of the Convention as a hybrid public authority pursuant to s.6 of the HRA 1998. This court, in its judgment given by Lord Woolf C.J., regarded inter alia the following features of the case as being relevant to that question (at [65]):

> "(iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of section 6 . . . irrespective of the section of society for whom the accommodation is provided.
>
> (iv) The fact that a body is a charity or is conducted not for profit means that it is likely to be motivated in performing its activities by what it perceives to be in the public interest. However, this does not point to the body being a public authority. In addition, even if such a body performs functions, that would be considered to be of a public nature if

performed by a public body, nevertheless such acts may remain of a private nature for the purpose of sections 6(3)(b) and 6(5).

(v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of the control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private.

(vi) The closeness of the relationship which exists between Tower Hamlets and Poplar [the local authority and the RSL respectively]. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant.

(vii) The defendant, at the time of transfer, was a sitting tenant of Poplar and it was intended that she should be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets.

66. While these are the most important factors in coming to our conclusion, it is desirable to step back and look at the position as a whole. As is the position on application for judicial review, there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case, such as this, the decision is very much one of fact and degree. *Taking into account all the circumstances, we have come to the conclusion that while activities of housing associations need not involve the performance of public functions, in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions*. Poplar therefore is a functional public authority, at least to that extent. We emphasise that this does not mean that all Poplar's functions are public. We do not even decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example, their activities in raising private or public finance could be very different from those under consideration here. The raising of finance by Poplar could well be a private function." (Emphasis added.)

125 I would observe that in that reasoning this court, correctly in my judgement as subsequent House of Lords authority in *Aston Cantlow* and *YL* has shown, con-

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

centrated not so much on the question whether *any* functions of an RSL might be of a public nature, but on whether the particular act of seeking possession with which that case was concerned was of a public or private nature. It is clear that this court felt that it was highly relevant on the particular facts that provision (which had started with Tower Hamlets pending an investigation of intentional homelessness) and termination (which only occurred in the light of Tower Hamlets' decision that the defendant was intentionally homeless) were all part of the same function: see the passage emphasised in [66] above. The fact that the RSL was a not for profit charity did not point to it being a public authority. The raising of private or public finance could well be a private function.

126 In *YL*, Baroness Hale (who was of the minority) observed that "it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b)" and commented in this connection that *Poplar* "had relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing" (at [61]). Lord Mance (who was of the majority) was to similar effect (at [105]). While that criticism was made, there is no other direct guide in the speeches in *YL* as to the correctness of the decision in *Poplar*. Seeing that the subject matter of the criticism had been a significant factor in pushing this court in *Poplar* to its decision in what it regarded as a "borderline" case, it is possible to view the outcome there as of now uncertain authority. However, despite the criticism in *YL*, I have taken the liberty to quote extensively from *Poplar* because, together with *Servite*, it is the only prior authority cited to us concerning RSLs, and, in my judgement, its logic (a fortiori when the effect of the criticism is taken into account and the factor concerned is discounted) is that it was not the function of the provision of social housing which determined the result (which would have been a quite general point) but only the special circumstances of the case. I would regard *Poplar*, on the facts of the present case and in the light of the criticism of it in *YL*, as being helpful to the Trust. In particular it recognises (see [65(iii)] of Lord Woolf's judgment) that providing accommodation to rent is not without more a public function, irrespective of the section of society for whom the accommodation is provided.

127 Not long after *Poplar* was decided, it was considered and distinguished in *R. (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All E.R. 936. That was a fore-runner of the issue in *YL*. The Foundation, a large charity, operated a residential care home, which it had decided to close down, and so wished to relocate its residents. The claimants were residents for whom a local authority paid, being persons to whom the authority owed a duty to provide care and accommodation under the National Assistance Act 1948. Their argument that the Foundation owed them obligations under art.8 of the Convention on the basis that it was a hybrid public authority under s.6(3)(b) failed. Lord Woolf C.J. again gave the judgment of this court, which also comprised Laws and Dyson L.JJ. Lord Woolf said:

"35. In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions . . . While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private . . .".

128 Next in the series of cases is *Aston Cantlow* [2004] 1 A.C. 546, the first of the two cases in the House of Lords which, although they do not concern RSLs, are the leading authorities on the principles for the application of s.6. It and *YL* have been analysed by Elias L.J., and I will not reduplicate that. However, it is instructive to stand back and try to see the essence of each of the cases in their decision-making process. In *Aston Cantlow* the parochial church council's appeal succeeded because the particular act concerned, the enforcement of the liability for the repair of the chancel, was an act of a private nature. As Lord Nicholls said:

"16. I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function."

Lord Nicholls, looking at the matter realistically, concluded that "there is nothing particularly "public" about this" (ibid.). Similarly Lord Hope said that in the case of non "core" public authorities:

"Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the acts which they perform which are of a private nature." (At [35].)

His decision (at [64]) was that:

"The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State."

Lord Hobhouse thought that it was not shown that PCCs perform *any* function of a public or governmental nature (at [88]). In any event, the s.6(5) question was to be answered in the defendants' favour:

"89 . . . Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable as a civil debt by virtue of the 1932 Act."

129 Finally, in *YL* [2008] 1 A.C. 95 the House of Lords had to consider whether a private company which had contracted with a local authority and the local NHS primary care trust to provide residential accommodation and care in its care home

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

to an elderly woman, was subject to the HRA 1998 when it sought to terminate the contract (because of an irreconcilable breakdown in relations with Mrs YL's family). The House of Lords held by a narrow margin that it was not. The argument seems to have proceeded under s.6(3)(b) rather than under s.6(5). This was possibly because a declaration was sought by way of preliminary issue to the effect that in providing accommodation and care for the claimant the company was exercising public functions within s.6(3)(b) (see [1] and [76]). It does not appear to have been contended that the act of termination was a particular act with a separate, private, status within s.6(5) irrespective of the s.6(3)(b) status of the company as a whole.

130 The position is more complex because of the division of opinion between their Lordships. It is convenient to consider the position of the minority first. Thus Lord Bingham defined the relevant function under investigation as follows:

> "14. The nature of the function with which this case is concerned is not in doubt. It is not the mere provision of residential accommodation but the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

Lord Bingham continued (at [16]):

> "Counsel for the Birmingham City Council laid great emphasis on the fact that its duty under the Act [ss.21 and 26 of the National Assistance Act 1948] is to arrange and not to provide. This is correct, but not in my view significant. The intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant. By one means or another the function of providing residential care is one which must be performed. For this reason also the detailed contractual arrangements between Birmingham, Southern Cross and Mrs YL and her daughter are a matter of little or no moment."

Similarly, Lord Bingham said:

> "20. When the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind. The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace."

131 For Lord Bingham therefore, the matter was simply and clearly stated. The local authority (a "core" governmental authority) had a direct statutory duty to see to it that residential care (with special emphasis on care) was provided to Mrs YL. If that duty was delegated, at the local authority's expense, to a private company, it was still a public duty. Therefore the company, which was performing that duty, on payment, for the local authority, was a hybrid public authority

under s.6(3)(b). No question arose under s.6(5). The termination of Mrs YL's care was necessarily the antithesis of that public duty.

132 Lord Bingham said he also wholly agreed with Baroness Hale (at [2]). She considered that she had amplified Lord Bingham's reasons (see at [75]). She explained the statutory framework in more detail and summed it up in these terms:

> "52. At the same time, local authorities were placed under a duty to carry out an assessment of the need for community care services of any person who might be in need of them (section 47(1)(a) of the [Community Care Act 1990]) and then to decide whether those needs called for the provision by them of any such services: section 47(1)(b). 'Community care services' include arranging or providing accommodation under section 21(1) of the 1948 Act: section 46(3). If the person may also need health care under the National Health Service Act 1977, the local authority must invite the relevant health body to assist in the assessment. A large slice of the social security budget was transferred to local authorities to enable them to meet these new responsibilities.
> 53. The appellant's case was a good example of how the system was supposed to work . . . The local authority arranged the placement with the care home provider and undertook to meet the charges under the tripartite contractual arrangements described above. The local authority has a continuing duty of assessment and remains responsible for the resident's welfare. The local NHS primary care trust assessed her health care needs, and found them to be in the high band, entitling her to a weekly contribution towards the nursing component in her care . . .".

Thus Baroness Hale's analysis is the same as Lord Bingham's, save that she also explains the ramifications of those statutory underpinnings which emphasise the importance of care.

133 Baroness Hale went on to draw analogies with Strasbourg jurisprudence concerned with the delegation by state bodies of their public duties to private bodies (at [56]/[57]). As for s.6, she said this:

> "65. . . . While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.
> 66. One important factor is whether the state has assumed responsibility for seeing that this task is performed . . .
> 67. Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who cannot look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly. They must be provided with the specialist care, including the health care, that they need . . .

> 68. Another important factor is public funding. Not everything for which the state pays is a public function . . . But providing a service to individual members of the public at public expense is different. These are people for whom the public have assumed responsibility . . .
> 69. Another factor is whether the function involves or may involve the use of statutory coercive powers . . .
> 71. Finally, then, there is the close connection between this service and the core values underlying the Convention rights and the undoubted risk that rights will be violated unless adequate steps are taken to protect them.''

She briefly referred to s.6(5) at [73].

134 I have cited from the speeches of the minority at some length to demonstrate what, in my judgement, is clear from them: that, even though here and there some of the factors discussed by Baroness Hale may have limited application to the case presently before us, nevertheless there is nothing or little to suggest that their decision could be carried over into the facts of our case. The statutory underpinnings, the Strasbourg jurisprudence, and even the aspect of public funding are all fundamentally or at least significantly different.

135 I turn then to the speeches of the majority. It seems to me that the essential difference between them and the minority is that whereas the latter began with the statutory duties of the local authorities and considered that what followed was a delegation of duties to private bodies in circumstances where, because of the essentially non delegable nature of those duties, the state, albeit through the private body, had to remain responsible, the majority held that there was no real delegation of public functions, but only a contracting out of the provision of services, and that in this respect there was a great gulf between the obligations of the state and those of the private contractor. Lord Scott put the point in the following way:

> ``29. There are, in my opinion, very clear and fundamental differences. The local authority's activities are carried out pursuant to statutory duties and responsibilities imposed by public law. The costs of doing so are met by public funds, subject to the possibility of a means tested recovery from the resident. In the case of a privately owned care home the manager's duties to its residents are, whether contractual or tortious, duties governed by private law. In relation to those residents who are publicly funded, the local and health authorities become liable to pay charges agreed under private law contracts and for the recovery of which the care home has private law remedies . . .
> 30. As it seems to me, the argument based on the alleged similarity of the nature of the function carried on by a local authority in running its own care home and that of a private person running a privately owned care home proves too much. If every contracting out by a local authority of a function that the local authority could, in the exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes, where does this end? . . .

31. These examples illustrate, I think, that it cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those activities. A local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations . . .".

136 Lord Scott then turned his attention to the impact of regulation (see Lord Mance's speech at [79] for the extent of it) and found in it part of the private rights under contract, rather than a reason for an alternative regime of public law. He said:

"32. This regulatory framework is in place. A feature, or consequence, of it is that an obligation by Southern Cross to observe the Convention rights of residents is an express term of the agreement between the council and Southern Cross and YL. Any breach by Southern Cross of YL's Convention rights would give YL a cause of action for breach of contract under ordinary domestic law. No one has suggested that the contractual arrangements between the council and Southern Cross and between Southern Cross and YL are not typical. There is, in my opinion, no need to depart from the ordinary meaning of 'functions of a public nature' in order to provide extra protection to YL and those like her . . .".

Those remarks have resonance for the contractual situation in the present case, to which I will return.

137 Finally, Lord Scott did reach, by reference to *Aston Cantlow*, the question under s.6(5), without mentioning it in terms. He said:

"34. As to the act of Southern Cross that gave rise to this litigation, namely, the service of a notice terminating the agreement under which YL was contractually entitled to remain in the care home, the notice was served in purported reliance on a contractual provision in a private law agreement. It affected no one but the parties to the agreement . . .".

138 Lord Mance began his analysis with the Strasbourg jurisprudence (at [92ff]). He said that it lacked any case directly in point, but demonstrated two relevant principles. One was that the state may in some circumstances be responsible for failure to regulate or control the activities of private persons; the other was the state may in some circumstances remain responsible for the conduct of private law institutions to which it had delegated state powers. The first principle did not apply, because the company had no regulatory role. As for the second principle (which had clearly influenced the minority), this recognised that,

"there may be certain essentially state or governmental functions, particularly involving the exercise of duties or powers, for the manner of which the state will remain liable, notwithstanding that it has delegated them to a private law body".

[2009] H.L.R., Part 6 © 2009 THOMSON REUTERS (LEGAL) LIMITED

However, that principle requires either that the body is established and capitalised by the state for state purposes and armed with state powers, or that the functions of the state are non-delegable. However, neither principle appeared to apply to private care homes or the provision of care and accommodation. Even where a body is provided with special powers, that did not mean that they amounted to functions of a public nature, as distinct from being conferred for private, religious, or purely commercial purposes.

139 Lord Mance then turned his attention to the statutory background to the company's role in that case (at [107ff]). Even if a public authority had a duty to *provide* care and accommodation, it did not follow that its provision under contract by a private body was equally the performance of a public function, for on analysis some of the latter's functions and activities may be private in nature (at [110]). In that respect, Lord Mance critically said that he did not regard "the actual provision, as opposed to the arrangement, of care and accommodation for those unable to arrange it for themselves as an inherently governmental function" (at [115]). He added:

> "116. In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the state is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary. The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a function of a public nature."

Moreover, while it is not possible to distinguish between paying and subsidised residents in a local authority care home, because the local authority is a core authority, it is incongruous to distinguish between self-paying and publicly funded residents in a private home (at [119]). He therefore concluded that the company in providing care and accommodation to YL in its home was not exercising functions of a public nature within s.6(3)(b). He did not consider s.6(5).

140 Lord Mance's analysis may be said to be essentially as follows. The provision under contract of care and accommodation by a private care home, run for profit, is essentially the carrying out of private and not public functions. The statutory background in the obligation of local authorities to arrange and provide such care and accommodation did not turn the *provision* of such services as distinct from their *arranging* into public functions. Regulatory supervision of private care homes did not lead in a different direction, if anything it confirmed his view. Neither did the public funding of YL's placement. It was incongruous to distinguish between privately and publicly funded residents. Strasbourg jurisprudence was consistent with his view. The contracting out of services otherwise provided under statute by a public authority was not such a delegation of non-delegable duties as to require a different solution.

141 Lord Neuberger considered the problem in three stages: first, on the particular facts of the case, secondly by reference to a policy argument concerning the contracting out of services which a core public authority is under a statutory duty to provide, and thirdly by reference to still wider issues of principle (at [132]). As to the first stage, he too emphasised that close and detailed supervision did not tell in favour of the company being a hybrid public authority: "There is no identity between the public interest in a particular service being provided properly and the service itself being a public service" (at [134]). Neither did the fact that services of the kind provided by the company were also provided by charities, ie operating in the public interest for the public benefit. Not only did that not affect those who provide such services on a commercial basis, but even in the case of charities it did not mean that provision of the services was a function of a public nature. Otherwise all charities (and all private organisations providing services which could be provided by charities) would be caught by s.6 (at [135]). Nor did the fact that such services were provided to the vulnerable: the need for particular protection went rather to the responsibility of government supervision (at [136]). Such factors were not irrelevant, but not persuasive. Lord Neuberger next considered three factors which were essential to Mrs YL's case. (1) As for statutory duties, they applied to the core authority, but only the duty to arrange was inherently of a public nature. (2) The public funding could not be a sufficient condition, otherwise everything and everyone paid for by a core authority would be drawn into the concept of a public function. (3) Similarly, the fact that the service could be provided by a core authority was not sufficient.

142 As for contracting out, this was not a case of the contracting out of a duty, since statute did not require the provision of care by the authority itself. In terms of public funding, it was easier to say that a general subsidy to the business as a whole could turn the business as a whole into a function of a public nature, than in the case of the funding of specific individuals. And in any event, Mrs YL continued to have her public law remedies against the local authority in respect of their continuing statutory duty to provide care and accommodation. In truth contracting out took the matter no further, otherwise the provision of meals or the repairing of buildings or the manufacture of military materiel would be caught. More generally, policy considerations concerning contracting out weighed in the opposite direction:

> "It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting-out at least certain services previously performed by local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators. . .[T]he fact that there are competing arguments makes it hard to justify the courts resolving the instant issue by reference to policy." (At [152].)

143 Finally, Lord Neuberger came to his "wider perspective" (at [154]). He considered that only some wider policy considerations, if available, could bolster the

 © 2009 THOMSON REUTERS (LEGAL) LIMITED

various factors that he had so far considered, even taken together, into a conclusion in favour of Mrs YL on the s.6(3)(b) issue. It was at this point that Lord Neuberger turned to Strasbourg jurisprudence and to previous authority in the form of *Aston Cantlow* for guidance. There was nothing in the former to support Mrs YL's claim, while dicta in *Aston Cantlow* emphasised the distinction between functions of an inherently governmental nature (such as running a prison, discharging a statutory regulatory regime or maintaining defence, see at [166]) and those that were not, such as maintenance or cleaning contracts (at [162]).

144 It was in this context that Lord Neuberger contrasted the public funding of an impecunious individual in *YL* with the situation where,

> "the funding effectively subsidises, in whole or in part, the cost of the service as a whole . . . Thus, it appears to me to be far easier to argue that section 6(3)(b) is engaged in relation to the provision of free housing by an entity all of whose activities are wholly funded by a local authority, than it is in relation to the provision of housing by an independently funded entity to impecunious tenants whose rent is paid by the local authority."

145 In a final checklist, Lord Neuberger concluded that the following considerations, in no particular order, taken together led to his decision that the provision of care and accommodation by the company was not a function of a public nature within s.6(3)(b), despite being paid for by a local authority pursuant to its statutory duty: (a) the company's activities would not be subject to judicial review; (b) Mrs YL would not be treated by the Strasbourg court as having Convention rights against the company; (c) the company's functions with regard to the provision of care and accommodation would not be regarded as inherently governmental; (d) the company had no special statutory powers with regard to the provision of care and accommodation; (e) the care home was not funded by the local authority; (f) the rights and liabilities between the company and Mrs YL arose under a private law contract (at [160]). In essence, Lord Neuberger's analysis was very similar to that of Lord Mance.

146 Most recently, in *R. (on the application of Ahmad) v Newham LBC* [2009] UKHL 14, Baroness Hale of Richmond has emphasised that the provision of housing is not a government function. She said (at [12]):

> "Part VI of the Housing Act 1996 gives no-one a right to a house. This is not surprising as local housing authorities have no general duty to provide housing accommodation. They have a duty periodically to review housing needs in their area (Housing Act 1985, s 8). They have power to provide housing accommodation by building or acquiring it (1985 Act, s 9). They also have power to nominate prospective tenants to registered social landlords or to others. They are required to have an allocation policy which applies to selecting tenants for their own housing or nominating people for housing held by others (Housing Act 1996, s159(2)). But this does not mean that they have to have available any particular quantity of housing accommodation, still less that they must have enough of it to meet the demand,

> even from people in the 'reasonable preference' groups identified in section 167(2). In some areas there may be an over-supply of council and social housing. In others there may be a severe under-supply. Newham is one of those others."

Baroness Hale emphasises the distinction between allocation and provision.

Discussion and conclusion

147 Applying these analyses and considerations to the facts of the present case, I do not consider that the Trust's decision to terminate Mrs Weaver's tenancy by seeking possession from the court on mandatory ground 8 justified by her non-payment of rent is properly to be categorised as the exercise of a function of a public nature rather than a private act arising out of contract. In my judgement, although there may be strands based on a multi factorial approach to argue a conclusion to the contrary effect, the essential reasoning of our jurisprudence firmly supports the Trust's appeal.

148 First, Strasbourg jurisprudence does not suggest that the Trust is amenable to Convention liability or that the United Kingdom's liability can be invoked in respect of such an act.

149 Secondly, I cannot find in the decisions of domestic jurisprudence support for Mrs Weaver's case. *Servite*, which was approved by the majority of their Lordships in *YL*, runs contrary to the decision appealed against. *Poplar*, despite the criticism of it in *YL* and allowing full effect for that criticism, gives her case no principled support. *Aston Cantlow* emphasises both the importance of s.6(5) in the analysis and the significance of the Trust's claim being in support of a private contractual right. As for *YL*, the statutory underpinnings there, for the reasons preferred by the minority, were much stronger than in the present case, for statute required the provision of care to a vulnerable person in need of welfare services. Lord Bingham himself emphasised the significance for him of the facts that statute required the *provision* of services and that the services concerned went beyond the accommodation and extended to *care* for the particularly vulnerable. In the present case, however, it is quite clear and common ground that statute does not require the provision of housing accommodation (see [44]), and there is no question of Mrs Weaver being a particularly vulnerable person to whom care and medical services must also be provided. I am doubtful that even the minority view in *YL* would support the divisional court's declarations.

150 Thirdly, it seems to me that the argument in this case, reflected in the judgments of the divisional court, has been inappropriately influenced by the structure of the dispute in *YL*. Because of the nature of the declaration there sought, and also perhaps because it was common ground that, if the provision of care and accommodation was required by statute and/or inherently of a public nature then it was irrelevant that the particular act in question was a decision to terminate the contract, the argument appears to have been essentially directed to s.6(3)(b). Alternatively, the width of the argument under s.6(3)(b) subsumed any question under art.6(5). However, as emerged in submissions before us, it is clear

that in our case a major issue ought to be whether, even on the assumption that allocation is a function of a public nature, termination under the terms of the tenancy is of the same nature or alternatively is of the nature of a private act.

151 Fourthly, under the influence of the structure of the argument in our case, submissions have proceeded from the concept that "management and allocation" is an all-embracing public function which includes termination. Accordingly, the court has been encouraged to accept that if management (or allocation) is a public function, then the rest follows. I do not accept that that is a satisfactory way to analyse the housing function. It is to be noted that the declaration is not framed in terms of the "provision" of housing, nor in terms of social housing. "Management" is a vast and undifferentiated area which, as it seems to me, inevitably includes functions and acts which are most unlikely to be of a public nature: such as the commercial acquisition or even development of property, or the financing of it (even on the basis that public subsidy plays an important role, as to which see below), or the maintenance and repair of it, or the daily grind of administering a very substantial portfolio of property of all kinds. In my judgement, the acceptance that management of social housing is essentially a single integrated function of a public nature is most unlikely to be correct. Moreover, the Trust operates and manages substantial amounts of property outside the sphere of social housing, or where local authority allocation plays no role: see the figure of 36 per cent implicit in the figure quoted at [24] above. However, there has been hardly any examination of this issue of what "management" comprises in practice, and the divisional court has proceeded on the basis that management is essentially a function of either a public or a private nature and chosen between these extremes in favour of the former. It has seemed to me that both sides of this dispute have had an interest in advancing an argument which would dispose, once and for all, of the issue whether an RSL is for all purposes a hybrid public authority or not. I very much doubt, however, that such an issue can be debated in this way.

152 Fifthly, my concern becomes increasingly acute when the proposition is that because management is a public function, then allocation is, or perhaps vice versa, and because allocation is, therefore termination is. *YL* is clear authority for the proposition that even where a public authority has a statutory duty both to arrange and to provide care and accommodation for the most vulnerable of our society, the fact that the arrangement may be of an inherently governmental or public nature does not mean that their provision is. It seems to me that, as compared with the case of care and accommodation in a care home, a fortiori that is true of the case of housing, even social housing. Moreover, in as much as it is suggested that because allocation is a function of a public nature, therefore termination is, I would respectfully disagree. Allocation arises under arrangements made between an RSL and a local authority, where the local authority makes use of such arrangements to fulfil their statutory duty to have an allocation policy. However, once an allocation has been made and a prospective tenant has been accepted by an RSL as its tenant, the tenant then enters into a contractual tenancy with the RSL, and their relationship thenceforward is governed, just like any tenant's relationship with his or her landlord, by private law. That remains the

case despite the relevance of regulation. Moreover, the statutes which govern the recovery of possession apply to an RSL's social housing tenancies and other landlords' tenancies alike. All the authorities I have considered stress the importance of private contractual rights. *Poplar's* decision was driven by very special factors.

153 While it is inevitable that core public authorities who enter into contractual tenancies are subject to the Convention, it seems to me to require special circumstances to impose Convention solutions on top of the working out of private law contracts of private bodies, even if such bodies are also in some respects hybrid public authorities. Admittedly the question can always arise whether a function of a public nature intrudes into the area of the contract and decisions which have to be taken under it. Where, however, as here, the contract concerned is one so well known to private/commercial life as a tenancy agreement, where such contracts are being entered into in almost identical or standard form with social housing tenants and non social housing tenants alike, it seems to me to be counter-intuitive to suppose that the working out of that contract as between a private (non-governmental) landlord and a tenant can depend on Convention rights. An exception might be where public functions fill the whole or a substantial space of that contract. I see no reason, however, for saying that that is the situation here. On the contrary, a contract like a tenancy contract, for all that it is hedged around by statutory provisions, is made for the specific purpose of determining the rights between the parties.

154 Sixthly, there is nothing special about the regulation which applies to social housing which to my mind changes that picture. The majority in *YL* thought that if anything regulation is needed for the very reason that, regulation apart, the relevant world is governed by private contract. It is certainly clear that very large parts of commercial life are regulated; and the place and space of regulation in such life is growing all the time. It is true that the modern regulatory regime of social housing controls or influences the rents charged (see [17] above describing the 2008 Act) and that the essence of social housing as there formulated is that it is available at lower than market rents. That, however, is built into the tenancy agreement, which fixes the rent. Similarly, regulation may provide guidance for termination, such as the guidance which is in focus in these proceedings: "Before using Ground 8, associations should first pursue all other reasonable alternatives to recover the debt." However, it seems to me not to matter whether that is treated as part of the contract or not. If, as would appear to be the case, although the issue was only reached in the divisional court *after* a decision had been reached on s.6(3)(b), that guidance is part of the contract (see [3]/[5] above and the term "we will comply with the regulatory framework and guidance issued by the Housing Corporation"), then it is part of the bargain and Mrs Weaver has her contractual remedy. If, on the other hand, Mrs Weaver prefers, seeking a public law remedy outside contract, to say that that term lacks contractual force for all that it is located in the contract, then it would seem to me nevertheless that it would be incongruous on that account to bring into the world of private contractual rights and obligations an obligation which is referred to in the contract and could have been made part of it. As Richards L.J. observed (see [5] above), "if it lacks the qualities to give it contrac-

tual force notwithstanding that it is located in a contract, I am not satisfied that it can properly be treated as having the qualities that justify its enforcement in public law as a legitimate expectation. . .''. It is noticeable that in *YL* the regulatory regime does appear to have been made part of the contract (see Lord Scott at [32] of *YL*, cited at [34] above).

155 Seventhly, there is nothing about the nature of the Trust, or the typical RSL, to promote the concept that in the everyday administration of its tenancy agreements it is performing functions of a public nature. Although it is a charity, it has independent corporate status and is conducted by an independent board of directors and owned by its private shareholders. As a charity, it operates for the public benefit rather than for commercial profit, but its operations are essentially in the private and business world, rather than in the world of government, for all that. Richards L.J. in the court below and Elias L.J. in this court consider that the Trust's charitable status places it outside the sphere of commercial providers. In my judgement, however, the world of charity is essentially private, and, although a charity does not operate for profit in the ordinary way, nevertheless when its function is to provide a service such as housing in return for the payment of rent and to do so on a substantial scale (the Trust owns 33,000 dwellings), it has to operate according to (for want of a better word) business disciplines or else it is very likely to fail. It seems to me that what Lord Neuberger said about charities at [135] of *YL* puts them into the private world rather than into the world of those performing functions of a public nature. To similar effect is Lord Mance at [110] of *YL* where he quotes Lord Woolf C.J. in *R. (Heather) v London Cheshire Foundation* at [15]:

> ''If the authority itself provides accommodation, it is performing a public function . . . However, if a body which is a charity, like LCF, provides accommodation to those to whom the local authority owes a duty under s 21 in accordance with an arrangement under s 26, it does not follow that the charity is performing a public function.''

There is no suggestion in *YL* or *Heather* that a charity is other than in the private world.

156 Eighthly, the majority of the Trust's capital finance comes from private lenders and the proceeds of housing sales, while a very substantial but decreasing minority comes from public grants. The grants are available to buy social housing. If the properties purchased with the grants are resold, the grants have to be returned, unless rolled over and used on the purchase of further social housing. The Trust's revenues come from its rents. The typical ratio of private finance to public grant across the RSL sector as a whole is 2:1. Richards L.J. and my Lords in this court see the substantial degree of public subsidy in the form of the public grants as a significant factor in determining that everything that an RSL does by way of social housing it does in exercise of a public function. I accept that public subsidy is a factor in the overall assessment; and that Lord Neuberger says in *YL* that a general subsidy is in this respect more telling than the defrayment by the public purse of the cost of individuals (whereas Baroness Hale took the opposite view).

157 However, in my judgement such matters are relative and there is a danger in confusing form and substance. Public subsidy in its broadest sense comes in many different forms. Sometimes the state defrays the costs of individual consumers in need. Sometimes, by making grants to companies, it defrays the costs of particular products or services. Sometimes, by means of tax deductions, it defrays the cost to taxpayers generally of the acquisition of products (capital grants) or services (mortgage finance). Sometimes, as we have seen only recently, very large sums of general public subsidy are needed to prevent private financial institutions from collapse. It would be surprising to learn that these private institutions are hybrid public authorities. Where tax deductible capital grants are concerned, the public policy is to encourage efficiency and modernisation by reducing the cost of re-equipment. It is hard to say that one form of subsidy is essentially different from another. The state also uses taxation policy to raise revenues (as well as to expend subsidy) in the public interest: thus duty is raised from the manufacturers of alcohol and tobacco. In social housing, the role that public grants essentially play is to mediate between the commercial cost of housing, for which a lower than market price is to be paid in the form of rent by tenants, and the revenues obtainable from that rent. The overall effect is to lower the cost of borrowing across the board. There is no direct allocation, however, between the grant on any particular property and the rent payable. Mrs Weaver's home is in a building which the Trust acquired on the private market with private finance. On the other hand, the effect is also to subsidise the rents of social housing tenants. Whereas I accept that public finance is an element in the equation, I would be sceptical about allowing it, or any particular form of it, to play a dominant role in the assessment.

158 Ninthly, there is the difficult question of public policy addressed by Lord Neuberger in *YL* at [152] (see [40] above). His prescription is that the competing views about policy render this factor neutral. As such, they do not strengthen the case for hybrid status. I would add this further consideration. Lord Neuberger spoke of the policy of contracting out as being to avoid the legal constraints and disadvantages of operating as a core governmental authority. I would diffidently suggest that there is another, possibly even more significant, ambition of the policy of moving into the private sector what at some earlier period may have been carried on in the public sector. That is a recognition that, where large business operations have to be carried out, even when such operations are not governed purely by markets but have elements of social policy about them, they are better carried out by private expertise in the management of such operations, whose experience and efficiency nevertheless redound to the public interest.

159 Tenthly, and finally, the public welfare concern which all feel for those in need of social housing, and I mean to include government, the courts, the RSLs themselves and the public at large in that "all", is addressed or capable of being addressed in many different ways: in statutory provision, in regulation, in public subsidy, in the exercise of charitable status, in the contractual arrangements between local authorities and RSLs, in the form of tenancy agreements, in the expertise of RSLs, and in the ongoing duty of local authorities to assess and to allocate accommodation for those in need. It is, however, unnecessary to give

to decisions, under contract, of an essentially private nature an artificial status as acts of a public nature or in performance of public functions, in order to ensure proper protection.

160 In sum, when I consider the various factors which the authorities teach us to consider, I can find insufficient to support the conclusion that in the exercise of its contractual rights under its tenancy agreement the Trust is acting in the public rather than in the private sphere, or in performance of a function of a public nature. While it is conceded by the Trust that in certain, limited but irrelevant respects the Trust is a hybrid public authority for the purpose of s.6(3)(b), I am sceptical how far the management of social housing by an RSL can be brought within the meaning of that sub-section. Even if allocation is to be brought within that subsection, that is not the same as provision of accommodation. In my judgement, however, for the purpose of s.6(5) the Trust's decision to exercise its contractual rights by invoking a claim for possession under ground 8 cannot be attacked in public law or by reference to the Convention.

161 For my part, therefore, I would allow this appeal. In the event, however, for the reasons given by my Lords, the appeal will be dismissed

 © 2009 THOMSON REUTERS (LEGAL) LIMITED

A

Supreme Court

*Secretary of State for the Environment, Food and Rural Affairs *v* Meier and others

[2009] UKSC 11

B

2009 June 10, 11; Dec 1

Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond JJSC, Lord Neuberger of Abbotsbury MR, Lord Collins of Mapesbury JSC

Injunction — Trespass — Order for possession — Gipsies and travellers — Travellers in trespassory occupation of area of woodland owned by Secretary of State — Fear of travellers moving to other areas of woodland also owned by Secretary of State but distinct from that occupied by defendants — Secretary of State's application for possession order against defendants in respect of other land — Whether power in court to grant — Injunction to restrain occupation — Whether appropriate — Government guidance on unauthorised encampments — Effect and relevance — CPR Pt 55

C

D

A number of travellers, including the defendants, established an unauthorised encampment in an area of woodland owned by the claimant Secretary of State and managed by the Forestry Commission. The Secretary of State issued proceedings alleging trespass and seeking an order for possession of the occupied site and of a number of other unoccupied woodland sites in the vicinity likewise vested in him and managed by the commission. He also sought an injunction to restrain the defendants from re-entering the occupied site or entering the other sites. The recorder made an order of possession of the occupied site but refused the application for possession in so far as it extended to the unoccupied sites. he also refused the injunction sought. The Court of Appeal allowed an appeal by the Secretary of State, unanimously in respect of the wider possession order and by a majority in respect of the injunction.

E

On appeal by the defendants—

Held, allowing the appeal in part, (1) that a possession claim against trespassers involved the person entitled to possession seeking recovery of the land in question and, accordingly, an order for possession of land not occupied by the trespassers and of which the owner enjoyed uninterrupted possession could not be justified; that where trespassers were encamped in part of a wood a possession order might be made against them in respect of the whole wood; but that, however desirable it might be to fashion or develop a remedy to meet a practical problem such as that which arose in the present case, the Court of Appeal had had no power to make an order for possession of areas of woodland not occupied by the defendants and wholly detached and separated from the area occupied by them (post, paras 7–12, 20, 38–41, 59, 63–67, 71, 78, 95, 96–98).

F

G

Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48 and *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, CA disapproved.

University of Essex v Djemal [1980] 1 WLR 1301, CA distinguished.

(2) That where a trespass was threatened, and particularly where a trespass was being committed and had been committed in the past by the defendant, an injunction to restrain it was, in the absence of good reasons to the contrary, appropriate even though there appeared to be little prospect of enforcing it by imprisonment or sequestration; that it would not be appropriate to set aside the injunction granted by the Court of Appeal unless it had been plainly wrong to grant it or there had been an error of principle in the reasoning leading to its grant, neither of which was established; that the effect and purpose of government guidance on unauthorised

H

A encampments, relied on by the defendants, was not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed; and that, accordingly, the grant of the injunction should be upheld (post, paras 3, 20, 39, 79, 83–84, 87–88, 95).

Per Baroness Hale of Richmond JSC. I would not see procedural obstacles as necessarily precluding the "incremental development" sanctioned in the *Drury* case provided that an order could be specifically tailored against known individuals who B have already intruded on the claimant's land, are threatening to do so again and have been given a proper opportunity to contest the order. It would be helpful if the rules so provided so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case (post, para 40).

Decision of the Court of Appeal [2008] EWCA Civ 903; [2009] 1 WLR 828; [2009] PTSR 357; [2009] 1 All ER 614 reversed in part.

C The following cases are referred to in the judgments:

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Connors v United Kingdom (2005) 40 EHRR 189
Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] 1 AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
D *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)
Gledhill v Hunter (1880) 14 Ch D 492
Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 196
Hemmings v Stoke Poges Golf Club [1920] 1 KB 720, CA
Henderson v Squire (1869) LR 4 QB 170
E *McPhail v Persons, Names Unknown* [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All F ER (Comm) 1099, CA
Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48
R v Wandsworth County Court, Ex p Wandsworth London Borough Council [1975] 1 WLR 1314; [1975] 3 All ER 390, DC
Secretary of State for the Environment, Food and Rural Affairs v Drury [2004] EWCA Civ 200; [2004] 1 WLR 1906; [2004] 2 All ER 1056, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] G 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambs District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
Thompson v Elmbridge Borough Council [1987] 1 WLR 1425, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649

H The following additional cases were cited in argument:

Jephson Homes Housing Association v Moisejevs [2001] All ER 901, CA
Kanssen v Secretary of State for the Environment, Food and Rural Affairs [2005] EWHC 1024 (Admin); [2005] NPC 76; [2005] EWCA Civ 1453, CA
Leicester City Council v Aldwinckle (1991) 24 HLR 40, CA

A

APPEAL from the Court of Appeal

This was an appeal by the second and fifth defendants, Sharon Horie and Lesley Rand, by leave of the House of Lords (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury) given on 11 February 2009 from the decision of the Court of Appeal (Pill, Arden and Wilson LJJ; Wilson LJ dissenting in part) allowing an appeal by the Secretary of State for the Environment, Food and Rural Affairs from Mr Recorder Norman in the Poole County Court, sitting at Southampton.

B

The facts are stated in the judgment of Lord Neuberger of Abbotsbury MR.

Richard Drabble QC and *Marc Willers* (instructed by *Community Law Partnership, Birmingham*) for the second and fifth defendants.

C

John Hobson QC and *John Clargo* (instructed by *Whitehead Vizard, Salisbury*) for the Secretary of State.

The court took time for consideration.

1 December 2009. The following judgments were handed down.

D

LORD RODGER OF EARLSFERRY JSC

1 If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corpn v Connolly* [1970] Ch 420.

E

F

2 Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633, were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site* [2004] Env LR 196. Similarly, in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88, the Court of Appeal (Brooke LJ and Clarke LJ) granted an injunction against persons unknown "causing or permitting

G

H

A hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land" adjacent to a gipsy encampment in rural Cambridgeshire (para 3). Brooke LJ commented, at para 8: "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule." See the discussion of such injunctions by B Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" [2007] CLJ 605–624.

3 The present case concerns travellers who set up camp on the Forestry Commission's land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included "persons unknown". C Despite this, the Commission sought an injunction against all the defendants, including those described as "All persons currently living on or occupying the claimant's land at Hethfelton". The recorder declined to grant an injunction on the view that it would be disproportionate. But the Court of Appeal [2009] 1 WLR 828, by a majority, reversed the recorder on this point and granted an order that

D

> "The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the fourth respondent shall mean 'those people trespassing on, living on, or occupying the land known as Hethfelton Wood on any date between 13 February 2007 and 3 August 2007 save for those specifically identified as first, second, third, E fifth and sixth respondents.' "

In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as F to suggest that it was inherently useless: he simply took the view, at para 76, that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis.

4 This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can G bring an action for recovery of the land. That is what the Commission did in the present case: they raised an action in Poole County Court for recovery of "land at Hethfelton nr Wool and all that land described on the attached schedule all in the county of Dorset". In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they H anticipated, the defendants might well set up camp once they left Hethfelton.

5 The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in the *Drury* case

[2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not.

6 Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport plc v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See *Megarry & Wade*, *The Law of Real Property*, 7th ed (2008), para 4-026. To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land—or, more fully, "that the said AB do recover against the said CD possession" of the land: see *Cole*, *The Law and Practice in Ejectment* (1857), p 786, Form 262. The fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Assocn for the South East* [1971] Ch 204, 209C–210B.

7 *In re Wykeham Terrace* and *Manchester Corpn v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were tackled by a new RSC Ord 113, the provisions of which, with some alteration of the details, have been incorporated into the current rule 55 of the CPR. In the present case no issue arises about the wording of rule 55. But I would certainly not interpret "occupied" in rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8 The intention behind the relevant provisions of rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are—or, at least, were at the relevant time—in possession, rather than mere occupation, of the Commission's land at Hethfelton.

A *Wonnacott*, *Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

B **9** By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. But in that C case the defendant trespassers were not represented and so the point was not fully argued.

10 Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative D offices of the University of Essex, had been occupying another part of the university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university—in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C–D, per E Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, the *Heyman* case was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in the *Drury* case.

11 Mummery LJ [2004] 1 WLR 1906, 1916, para 35 described Wilson F J's approach in the *Drury* case as "pragmatic". And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

12 I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes, etc, on these remoter areas of land. Doubtless, adequate arrangements G could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than H improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission

land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language.

13 Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14 The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children.

15 Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.

16 I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Bucks District Council v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gipsies living in caravans in breach of planning controls because an injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88 which I mentioned in para 2.

17 Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 32, in connection with a possible injunction against gipsies living in caravans in breach of planning controls:

> "When granting an injunction the court does not contemplate that it will be disobeyed . . . Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."

A Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

B 18 But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is C one for the Master of the Rolls and the Rule Committee who have the leisure and facilities to consider the issues.

19 For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER OF GESTINGTHORPE JSC

D 20 I agree with all the other members of the court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief E made by Lord Rodger at the end of his judgment.

BARONESS HALE OF RICHMOND JSC

21 Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against F that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but G only because he thought the wider possession order a sufficient remedy in the circumstances.

22 The approach in the *Drury* and *Heyman* cases was rightly described by Mummery LJ in the *Drury* case, at para 35, as "pragmatic", depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he H wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23 The situation in the *Djemal* case was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the university buildings. The university wanted an order covering the whole of the university premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the university, holding that there was jurisdiction to cover "the whole of the owner's property in respect of which *his right of occupation has been interfered with*": per Buckley LJ, at p 1304 (emphasis added). Shaw LJ reasoned that the right of the university to possession of the site and buildings was "indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises": p 1305 (emphasis added). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will be noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24 The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can—indeed, one of their problems is that they are impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25 The questions raised by this case and the *Djemal* case should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26 If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27 In considering the nature and scope of any judicial remedy, the parallel existence of a right of self-help against trespassers must not be

A forgotten, because the rights protected by self-help should mirror the rights that can be protected by judicial order, even if the scope of self-help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on Ejectment* (1857), a comprehensive textbook written after the Common Law Procedure Act 1852 (15 & 16 Vict B c 76), there is considerable discussion (in chapter VII) of the comparative merits of self-help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was "by no means clear": whether no force at all, or only reasonable force, might be used against the trespasser. C Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises D without lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a "displaced residential occupier" or "protected intending occupier": section 6(1A), as inserted by Criminal Justice and Public Order Act 1994, section 72(2). This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without E offending against the criminal law. But in any event, the use of self-help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.

28 Lord Denning MR in the *McPhail* case, at pp 456–457, considered that the statutes of forcible entry did not apply because the trespassing squatters were not in possession of the land at all. He quoted *Pollock on Torts*, 15th ed (1951), p 292:

F

> "A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

A trespasser who merely interferes with the right to possession or occupation G of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one's property.

29 Although Cole contemplated that self-help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning MR thought that the statutes of forcible entry did apply to protect H them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.

30 However, Lord Denning's basic point, at p 457 B-C, is important here: "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary." It seems clear that the right of self-help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *University of Essex v Djemal* [1980] 1 WLR 1301 in possession of the university's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see the *McPhail* case, at p 456F. Were these new travellers in possession of Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31 If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like the *Djemal* case becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32 As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land*, Cambridge University Press, (2006) p 1, the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head lease if he collects rents from the subtenants, but he will not be in physical occupation of tangible land.

33 The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors

A was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873–1875: see AWB Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2nd ed (1986), ch VII).

B **34** The question for us is whether the remedy of a possession action should be limited to deciding disputes about "possession" in the technical sense described by Wonnacott. The discussion in *Cole on Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the C landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

D **35** It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Pt 55 which is inconsistent with this view, far from E it. The distinction is drawn between a "possession claim" which is a claim for the recovery of *possession of land* (rule 55.1(a)) and a "possession claim against trespassers" which is a claim for the *recovery of land* which the claimant alleges is "occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . ." (rule 55.1 (b)). The object is to distinguish between the procedures to be used where a tenant remains in occupation after the end of F his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting "only": not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of it. There is then provision for taking action against "persons unknown". But the remedy in each case is the same: an order for physical G removal from the land.

36 It was held in *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314 that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are H not lawfully there, provided that some means is specified of identifying them. No one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37 This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in the *Drury* case [2004] 1 WLR 1906, para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the "whole" may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the "estate" from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38 The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39 Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40 However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought

A through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules).

41 It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

B **LORD NEUBERGER OF ABBOTSBURY MR**

42 There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are C not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] 1 AC 367), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 189). The present appeal, D however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43 Travellers often set up their camps in wooded areas. Many woods E and forests in this country are managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs. The functions of the Commission are "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products . . .": section 1(2) of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to F such areas.

44 All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the recorder who heard this case at first instance said, "[given] the public access that it affords to its land and its G needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected".

45 In 2004, the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping*. This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are "unacceptable" (for instance, because they involve H traffic hazard or public health risks) and those which are "acceptable" (para 5.4). It further recommends that the "management of unauthorised camping must be integrated" (para 4.8), and states that "each encampment location must be considered on its merits" (para 5.4). The 2004 Guidance also indicates that specified welfare inquiries should be undertaken in

relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidance before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46 One of the woods managed by the Commission is Hethfelton Wood, near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the inquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR r 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie and "Persons Names Unknown". Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine-year-old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47 Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation, which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath, which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48 In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of "all that land described on the attached schedule all in the county of Dorset". That schedule set out more than 50 separate woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to 13, and the plan showed that those 13 woods ("the other woods") were spread over an area of Dorset around 25 miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including "Persons Names Unknown") restraining them "from re-entering [Hethfelton] or from entering [the other woods]". Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR r 55.6, together with copies of the injunction application.

A

49 The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in the surrounding area. The Commission's evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

B

50 The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

C

51 The recorder decided to grant an order for possession against the defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the recorder that consideration would be given to that guidance before any wider order for possession or any injunction was enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[the] claimant do forthwith recover the land known as Hethfelton Wood".

D

E

52 The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the recorder's refusal to grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and the injunction, and the Court of Appeal [2009] 1 WLR 828 allowed the appeal. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

F

53 In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move on to other such woods once an order for possession was made in relation to Hethfelton.

G

H

54 Arden LJ also said, in disagreement with the recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill LJ and Wilson LJ agreed. Arden LJ also considered that, for the same reasons, the recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

55 The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

An order for possession of land not occupied by the defendants

56 In the *Drury* case [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

57 The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action; (b) an injunction would be of limited, if any, real use; (c) in those circumstances, the law should provide another remedy; (d) a wider order for possession would be of much more practical value than an injunction; (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant quia timet injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances: see at paras 20–24, 34–36 and 42–46, per Wilson J, Mummery LJ and Ward LJ respectively.

58 Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as

A quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

B **59** None the less, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation—or, in C so far as they can be invoked for that purpose, by practice directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in the *Drury* case.

60 The power of the county court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it "jurisdiction to D hear and determine any action for the recovery of land". The concept of "recovery" of land was the essence of a possession order both before and after the procedure was recast by sections 168 et seq of the Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land: see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, E 457–458. None the less, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land*, p 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate in land. The F complaint is that the claimant is not currently 'in' possession of it, and . . . wants . . . to be put 'in' possession of it". See also *Simpson*, *A History of the Land Law*, 2nd ed (1986), pp 144–145 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496, per Sir George Jessel MR.

61 As Sir George Jessel MR explained, an action for ejectment and its successor, recovery of land, was normally issued "to recover possession from G a tenant" or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on trespass quare clausum fregit, physical intrusion on to the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within 12 years the ousting trespasser will often have acquired title by "adverse possession".) Accordingly, in cases H where a trespasser is actually in possession of land, an action for recovery of land, ie, for possession, is appropriate, as Lord Denning MR implicitly accepted in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457–458.

62 This analysis is substantially reflected in the provisions of the Civil Procedure Rules and in the currently prescribed form of order for

possession. CPR Pt 55 is concerned with possession claims, and CPR r 55.1 provides:

> "(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings); (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not . . ."

The special features of a possession claim against trespassers are that the defendants to the claim may include "persons unknown", such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing is two days (or five days for residential property) rather than the 28 days for other possession claims: see CPR rr 55.3(4), 55.6, and 55.5(2) and (3).

63 The drafting of CPR r 55.1 is rather peculiar in that, unlike that in rule 55.1(a), the definition in rule 55.1(b) does not include the word "possession". Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word "possession" in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of "a possession claim", like the definition of "land", in rule 55.1(a) may well be carried into sub-rule (b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers: see *Civil Procedure 2009*, vol 1, p 114, para 4PD-003, table 1. That form orders the defendant to "give the claimant possession" of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do "recover" the land in question from the defendants, that is the mirror image of ordering that the defendants "give" the claimant possession.

64 The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

65 This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty).

66 However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to

A assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property. Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant B (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving on to another property, perhaps miles away, owned by the claimant.

C **67** Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established: see, for example, albeit in a landlord and tenant context, *Henderson v Squire* (1869) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an D irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.

68 The position is more problematical where a defendant trespasses on E part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR r 55.1(b). Such "a claim" may be brought "for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without . . . consent . . ." Given that such a claim is limited to "land . . . occupied only by" trespassers, it is not F immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).

69 The Court of Appeal in *University of Essex v Djemal* [1980] G 1 WLR 1301 nonetheless decided that a university could be granted a possession order under RSC Ord 113, r 1, which was (in relation to the issue in this case) in similar terms to CPR r 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly practical decision arrived at to deal with a fairly widespread problem at the H time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trepassers, they would simply move to another part of the campus.

70 As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as

lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Ord 113, r 1. A

71 However, this is not the occasion formally to consider the correctness of the decision in the *Djemal* case [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in the *Drury* case [2004] 1 WLR 1906) relied on it, and the defendants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed. B

72 The Court of Appeal's conclusion in the *Drury* case, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in the *Djemal* case [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48, which represented an "incremental development of the ruling in [the *Djemal* case]", as Mummery LJ [2004] 1 WLR 1906, para 35 put it. However, it seems to me that the decision in the *Drury* case was an illegitimate extension of the reasoning and decision in the *Djemal* case. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned, bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership. C D E F

73 Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in the *Drury* case has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the county court by applying for a warrant of possession under CPR Sch 2, CCR Ord 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the sheriff under RSC Ord 45, r 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in the *Drury* case [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal: see RSC Ord 45, r 5(1) and, in relation to the county court, CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is G H

A to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession. They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

B **74** There is also some apparent force as a matter of principle in the notion that the courts should be able to grant a precautionary wider order for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether C in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

D **75** What the claimant is really seeking in the present case is an order that, if the defendant goes on to the other woods, the claimant should be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A quia timet injunction involves the court forbidding the defendant from doing something which he may do and which he would not entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order E requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

F **76** Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute G a warrant (or writ) of possession against all those in occupation: see *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, 209–210; *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314, 1317–1319; *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431–1432; and the full discussion in *Wonnacott, Possession of Land*, pp 146–152. It would therefore be wrong H in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. None the less, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without

having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him.

77 Quite apart from this, a warrant of possession to execute an order for possession made in the county court in a claim for possession against trespassers can only be issued without leave within three months of the order: CPR Sch 2, CCR Ord 24, r 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in the *Drury* case [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area.

78 In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following the *Drury* case, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *University of Essex v Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him.

Should an injunction be refused as it will probably not be enforced?

79 That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. None the less, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80 However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984 (RSC Ord 45, r 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] 2 AC 558 local planning authorities were seeking injunctions to restrain gipsies from remaining on land in breach of planning law, and Lord Bingham of Cornhill said, at para 32, that "[t]he court should ordinarily be slow to make an order which it would not . . . be willing, if need be, to enforce by imprisonment".

A 81 On the other hand, in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may none the less properly decide to grant the injunction. Thus, the court may take the view that the defendants are more B likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order C should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

82 It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR r 55.5(2). However, as Lord Rodger observed, if the court D were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, E it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

83 In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a F real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in G obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

84 In the present case, neither the recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well be that a case could have been (and H may well have been) developed along those lines, it was not adopted by the recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant.

It does not appear to me that either of those points has been established in this case.

The effect of the 2004 Guidance on the grant of an injunction

85 The recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced.

86 As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the defendants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods.

87 However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the court when considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us.

88 Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare inquiries in relation to defendants who might not move on to a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in

A mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare inquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

B 89 Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its C contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the defendants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the Guidance could do so.

90 If the defendants were to trespass on to land covered by the D injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a E case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

F 91 Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should G have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden LJ and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

H

The implications of this analysis

92 As I have explained, the thinking of the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or

imprisonment. In the light of the terms of CPR Sch 1, RSC Ord 45, r 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of CPR Sch 1, RSC Ord 45, r 3(1) and CPR Sch 2, CCR Ord 26, r 17(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the county court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93 However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered on to the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery: see for instance CPR Sch 1, RSC Ord 46, r 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal): see *Civil Procedure 2009*, vol 1, p 2099, para sc 46.3.3. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see *Cole on Ejectment*, pp 692–694. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered on to the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the county court to issue a warrant of restitution in such circumstances.

94 Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rule Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *University of Essex v Djemal* [1980] 1WLR 1306.

Disposal of this appeal

95 Accordingly, it follows that, for my part, I would allow the defendants' appeal to the extent of setting aside the wider possession order

A made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS OF MAPESBURY JSC

96 At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal had legitimately extended B *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not C in possession.

97 But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the university, and was correctly decided. I agree, in particular, that it can be justified on the basis that the university's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady D Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary E element: Harris, "The Concept of Possession in English Law", in *Oxford Essays in Jurisprudence* (ed Guest, 1961) p 69, at p 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, eg, in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] 1 WLR 320, para 30 and *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450, para 182.

F **98** I would therefore allow the appeal to the extent of setting aside the wider possession order.

Appeal allowed in part.
Parties to make written submissions on costs.

G M G

H

A B C D E F G H

[2010] EWHC 3977 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL

Friday, 25th November 2010

BEFORE:

MR JUSTICE HENDERSON

- - - - - -

BETWEEN:

SCHOOL OF ORIENTAL AND AFRICAN STUDIES
Claimant

- and -

PERSONS UNKNOWN
Defendants

- - - - - -

MS KATHARINE HOLLAND QC appeared on behalf of the Claimant.
MR ALEXIS SLATTER appeared on behalf of the Defendants.

- - - - -

Judgment
(As Approved)

- - - - - -

Digital Transcript of Wordwave International, a Merrill Communications Company
165 Fleet Street, 8th Floor, London, EC4A 2DY
Tel No: 020 7421 4046 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

A

Friday, 25th November 2010

J U D G M E N T
MR JUSTICE HENDERSON:

1. I have before me an application brought by the School of Oriental and African Studies ("SOAS"), seeking possession on an urgent basis of part of its campus known as the Brunei Suite, which is on the ground floor of the Brunei Gallery which is one of the principal buildings comprising the London campus of the school. The matter first came before me yesterday morning on a without notice application for a possession order sought against persons unknown, including students of SOAS who have been in occupation of the Brunei Suite since about noon on Monday of this week, conducting a "sit-in" as part of their protest against the Coalition Government's spending plans in relation to higher education. I gave permission yesterday for short notice of the effective hearing under CPR Part 55 to be given with an immediate return time of 3.30 in the afternoon, and the notice indicated that the return would take place before myself in this court.

2. In due course I will come on to what I was told yesterday afternoon, but in order to set the background I will first refer to some of the evidence in the first witness statement of Mr Richard John Poulson in support of the application. He is the Director of Estates and Facilities of SOAS, which forms part of the University of London and is a leading world centre for the study of a diverse range of subjects concerned with Asia, Africa and the Middle East. It currently has more than 4,400 students, 40 of whom are on postgraduate or research programmes. The main campus of the school is in the vicinity of Russell Square in London. A plan shows that there are three main buildings which are separated either by a courtyard with trees or roads, but they are all within a short distance of each other, and one of those three main buildings is the Brunei Gallery, of which the Brunei Suite forms part.

3. The school itself is a private charitable body and holds the premises under a lease granted to it by London University. It is convenient at this point to refer to some of the provisions in the lease, which was granted on 12 May 1993 for a term of 98 years beginning on that date. The permitted user of the premises was any purpose within paragraphs (c) and (d) of Class D1 of the Town and Country Planning (Use Classes) Order 1987 as in force at the date of the lease. The relevant use class – I do not have the text in front of me at the moment – is, in short, use for educational purposes.

4. There are, as one would expect, a number of covenants on the part of SOAS, including the user covenant (which I have already mentioned), and a covenant against causing any form of nuisance in clause 4.17, including not to do anything which may be or become a nuisance or which may cause damage, annoyance, inconvenience or disturbance to the landlord, or which may be injurious to the value, tone, amenity or character of the demised premises. There are also covenants not to use any part of the demised premises for residential or sleeping purposes in clause 4.15, and a number of provisions relating to alienation in clause 4.20, including a covenant not to part with the

A

possession or share the occupation of the whole or any part or parts of the demised premises, or to permit any person to occupy them, save by way of an assignment or underlease.

5. Since the SOAS campus is private land, it follows, as a matter of basic English property law, that the only persons who may enter upon the campus are people who have the licence or consent of SOAS. For normal purposes, of course, the students who are enrolled at SOAS have the permission of SOAS to be on the campus for the purposes of their education in the broadest sense of that term.

B

6. The particular protest with which this application is concerned began at about noon on Monday 22 November, when, according to the undisputed evidence of Mr Poulson, around 20 people took up occupation of the Brunei Suite, which Mr Poulson describes as a conference facility situated on the ground floor of the Brunei Gallery, and indicated their intention to remain in occupation as a protest against the Coalition Government's plans to increase undergraduate fees and make associated cuts to the education budget. The protestors had issued a list of demands and they have tried to negotiate with SOAS, but it is the stated policy of SOAS only to negotiate with the Student Union. Although negotiations have been in progress with the Student Union, SOAS has declined to negotiate with the particular students who are carrying on the occupation.

C

D

7. The protestors have sought support from a number of sources, including other students, members of staff, the wider University of London student body, and some political figures. However, the basic ground upon which the possession order is sought is the property rights of SOAS to have occupation of its own premises and to prevent unlawful trespass. SOAS says that the students who are conducting the sit-in are trespassers, because they have no right or licence to occupy the Brunei Suite to the exclusion of the school, and they most certainly have no right to sleep there or to control who has access to the premises.

E

8. In this context, I was referred to the regulations for students at SOAS, which are exhibited to Mr Poulson's witness statement and which provide in paragraph 9.1 under the heading "Student discipline":

F

"No student of the School shall engage in activity likely to interfere in the broadest sense with the proper functioning or activities of the School or those who work or study in the School or undertake action which otherwise damages the School."

G

It appears clear to me that conducting a sit-in on part of the school's premises is to engage in an activity which is likely to interfere in the broadest sense with the proper functioning and activities of the school, and with those who work or study there. That appears to me obvious as a matter of common sense, but is in any event borne out by the detailed evidence which Mr Poulson has adduced in his witness statement of yesterday and in a further witness statement which he has produced today.

H

A

9. To revert to his first statement, he sets out a number of concerns which SOAS has. He highlights the risk to health and safety as a result of the unauthorised occupation, and the encouragement given to others to join in the protest. He says there is a general risk to the building from the occupation, which may worsen if the protestors continue in occupation any longer. A particular concern was the large rally which took place yesterday and began at Malet Street, very close to the Brunei Gallery. That rally has, of course, now taken place, and it is only fair to record that it did not result in any incursion into the Brunei Gallery. Nevertheless, I think the school's concern on that score was understandable, although happily events have shown that it was, I will not say misplaced, but did not lead to anything untoward.

B

10. SOAS is also concerned that the current protest may escalate and may lead to confrontation, and that the premises which have been occupied are not designed to hold substantial public gatherings. Again I think it is fair to say that so far there has been no dangerous overcrowding, at least none of which I have been made aware, but the possibility does seem to me to be there, particularly given the avowed intention of the occupying students for the occupation to continue and grow in size and become a focus for possible future events. It is worth noting in this context that the next day of action against the Government's fee policy for higher education is scheduled for next Tuesday, 30 November.

C

D

11. The Brunei Suite is described by Mr Poulson as being a meeting and hospitality venue with a capacity limited to between 120 and 200 people, depending upon how it is configured.

E

12. That, in outline, was the evidence relied upon by SOAS yesterday. As I have already said, I adjourned the matter until 3.30 so that representatives of the student body, if they wished, could attend court and make representations. In the event, that is what happened and, as I said yesterday, I was genuinely grateful to them for coming along to put their side of the matter to me. I was addressed yesterday by a Mrs Hamilton, who is a non-practising barrister who had been asked to assist. She submitted that there were three possible grounds of defence to the possession application which needed to be considered. First, she thought there might be some provision in the lease which would allow wider use of the premises by the student body than what one would normally expect to find in a commercial lease of property. Having now seen the lease, there seems to me to be no substance in that particular point. Secondly, she said that there might be an infringement of the occupying students' rights under Articles 10 and 11 of the European Convention on Human Rights. That is a matter to which I will need to return later. Thirdly, she submitted, in outline, that the school's concerns about the possible repercussions of the sit-in or how it might develop were unfounded, and supported by evidence which should not be taken at face value. She submitted that the sit-in has so far been conducted in a well-organised and orderly way, without causing any real prejudice to anybody or to the proper conduct of the school's academic activities.

F

G

H

A

13. I was also addressed by a number of individual students, who reinforced some of the above points and also made a number of other points, including, in particular, expressing the wish that time should be allowed for them to obtain legal representation and give further consideration to any defences that might be available. I was also told a little more about the way in which the occupation has taken place. I was informed that on Monday a health and safety officer had toured the Brunei building without, apparently, finding anything to cause him concern. It was suggested that there was no real urgency in the school's concerns, and that the demonstration which took place yesterday had by then finished without any problems being caused to SOAS.

B

14. In those circumstances, I agreed to stand the matter over for 24 hours (or rather, slightly less than 24 hours) until 2 o'clock this afternoon, so that the student body could seek legal advice and, if so advised, put in evidence. The matter then came back before me at 2 o'clock today, when the students were represented by counsel, Mr Alexis Slatter, who appears with a junior on their behalf. Mr Slatter was only instructed this morning, and I bear in mind that he has had very little time in which to get to grips with the facts and the law in this matter. For her part, Miss Holland produced a further note dealing with the human rights aspects of the case, together with a second witness statement of Mr Poulson, which deals with some of the matters ventilated in court before me yesterday and reiterates the concerns that SOAS has about the continuing occupation. I then rose for half an hour, so that I could read Mr Poulson's second statement and a key case on Articles 10 and 11 (the Appleby case, described below).

C

D

15. I will begin with Mr Poulson's second statement, where he describes the ongoing concerns of SOAS which have in no way been allayed by developments over the last few days. In relation to the health and safety visit which took place on Monday, he says that the inspection in question was swift and only considered a few major concerns such as immediate fire risks, but since then the occupiers have reconfigured furniture and fittings, and also taken a number of further items onto the property. That apart, he points out that other staff dealing with matters such as maintenance, security and cleaning have not had access to the area, and he is therefore uncertain whether any damage has been caused, whether advertently or not. Essential services such as electrical distribution boards and isolation valves for water and heating services for the whole building are within the occupied area, and currently the school has no access to them. In addition, it is unclear whether any one individual is in charge of the occupation and whether the protestors would collectively be able to uphold appropriate standards of behaviour or conduct, although I again emphasise that there is no evidence of any failure on that score to date.

E

F

G

16. Mr Poulson refers to the repeated calls made for people to join the occupation and to give support. In his earlier statement, he said a musical event by a Cuban big band had been advertised which in the event did not take place, but other meetings and debates have taken place and yesterday evening a particular band did play in the Brunei Suite, apparently to a packed crowd. Certainly the music could be heard in the adjacent entrance foyer, and at the

H

A

same time evening classes, both at the language centre and for Birkbeck College, were being held elsewhere in the building. Mr Poulson says (and I would accept) that there was, therefore, a potential for other events of that type to cause significant disruption to the school's normal activities.

B

17. Mr Poulson explains that SOAS has deliberately adopted a low-key security presence, intended to manage access to the area. Nevertheless, the security guards have been ignored in a number of important ways. On both Tuesday and Wednesday nights, certain individuals attempted to enter by climbing in through the windows after the building had been secured; and there was a further incident of people climbing in through the windows after security staff sought to prevent entry to the suite following service of the interim injunction which I granted yesterday. He says (and again I would agree) that a number of additional concerns arise from the use of windows for gaining access to and egress from the suite. Furthermore, significant extra calls have been made on staff time and resources, and this will become much more serious if the occupation continues into the weekend. His evidence is that, given the normal limitations on staffing levels over the weekend, he would need to arrange for extra security to be on hand at an estimated cost of £2,500. That apart, he says that there has been genuine disruption to the business of the school. This partly consists of the diversion of substantial resources. Senior staff and security staff have had to devote a lot of their time since Monday to working around the occupation, and their normal day-to-day activities have been correspondingly curtailed. In addition, a number of events of an academic nature have been disrupted by the occupation, because the Brunei Suite is principally used in association with the lecture theatre in the basement below. There were several important events and conferences scheduled to take place in and around the Brunei Suite over the course of this week, which have been relocated where possible, but some events have had to be cancelled. For example, a significant conference scheduled for tomorrow, Friday, has now had to be cancelled. In those circumstances, cancellation fees apply, and there is also a significant loss of reputation to SOAS associated with the cancellations and the inability to honour commitments. Mr Poulson says that if it becomes necessary to cancel bookings scheduled for the weekend, the costs to SOAS could be in the region of £11,000. That, it seems to me, is a very significant financial detriment to SOAS which weighs heavily in the balance when I have to evaluate whether to grant an immediate possession order or allow further time to the defendants.

C

D

E

F

18. Mr Poulson then refers to the lease, and says that, to the best of his knowledge, there is nothing connected with the donation made by the Sultan of Brunei which has any impact on the contractual position under the lease or the way in which the Brunei Suite can be used. In particular, there is nothing which provides any form of authority for an occupation or sit-in. Mr Poulson then describes the school's policy on how to respond to occupations. I have already referred to one aspect of that policy, which is that negotiations should be with elected representatives of the SOAS student community, namely the Student Union. He refers to and quotes from a statement which was yesterday issued by the school's registrar and secretary expressing regret about the occupation, reaffirming the commitment of SOAS to open discussion with the

G

H

A

Student Union, and also emphasising that the school's policy on occupations had been unanimously approved in October 2009 by the SOAS governing body, which included representatives of the Student Union.

19. That is the evidential position before me. Turning to how the matter should now proceed, Miss Holland has submitted very strongly that I should make an immediate possession order today because no arguable defence has been disclosed, even though counsel has now been instructed on behalf of the students and there has been enough time for at least the bones of an arguable case to emerge. It seems to me that, if there were any arguable defence at this point, it would probably be right to allow a little further time for it to be investigated and for evidence and legal argument to be prepared. However, it also seems to me that the only plausible legal argument which has been mentioned is the human rights argument, to which I now turn.

B

C

20. The rights relied upon are those protected by Articles 10 and 11 of the Convention. Article 10 provides that everybody has the right to freedom of expression, including freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, Article 10(2) goes on to say that the exercise of those 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 a number of specific objectives, including the protection of the reputation or rights of others. Article 11(1) then provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others, but again by Article 11(2) that is qualified, because it says that no restrictions shall be placed on the exercise of those rights other than such as are presented by law and are necessary in a democratic society, again in the interests of a number of specified purposes or objectives.

D

E

21. The question whether these Articles confer a right to protest on private property has been considered by the European Court of Human Rights in the case of Appleby v The United Kingdom which was decided in May 2003 and is reported at 37 EHRR 38. The applicants had established an environmental group called the Washington First Forum to campaign against a plan to build on the only public playing field near the town centre of Washington in Tyne & Wear. They set about collecting signatures for a petition to persuade the council to reject the project, and tried to set up stands in a privately owned shopping mall in Washington known as The Galleries. They were then prevented from doing so by security guards employed by the landlord. Although the manager of one of the shops did allow the applicants to set up stands in his store, that permission was subsequently revoked, and the manager of The Galleries informed the applicants that permission had been refused because the private owner took a strictly neutral stance on all political and religious issues.

F

G

22. The applicants sought to rely on Articles 10 and 11, and complained that they had been prevented from meeting in their own town centre to share

H

information and ideas about the proposed building plans. They also had a complaint under Article 13, but for present purposes I can ignore that. The court held, by a majority of six votes to one, that there had been no violation of either Article 10 or Article 13. In paragraphs 39 and 40 the court set out the relevant general principles. It began by recalling the key importance of freedom of expression as one of the preconditions for a functioning democracy, and went on to say that genuine effective exercise of such freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals. The Court then said that, in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual.

23. Turning to the application of those general principles to the case before it, the court set out the facts, which I have summarised, and recorded that the nature of the Convention right at stake was an important consideration. However, it was also important to have regard to the property rights of the owner of the shopping centre under Article 1 of Protocol 1 to the Convention. The court considered arguments that the shopping centre in question had many of the characteristics of a traditional town centre and could, therefore, be regarded as a quasi-public space. The court also referred to inconclusive authority in the United States, which had, however, refrained from holding, at any rate at the level of the Supreme Court, that there is any federal constitutional right of free speech in a privately owned shopping mall.

24. The court then expressed its conclusions in a paragraph which I will quote because it goes to the heart of the present case:

> "47. That provision [Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example."

This paragraph appears to me to provide clear authority that Article 10 does not give any general freedom to exercise the relevant rights upon private land. The only exception which the court envisaged was where the prohibition on access might prevent any effective exercise at all of freedom of expression, or where it might be said that the underlying essence of the right had in some way been destroyed.

A

25. On the facts of the present case, it seems to me entirely fanciful to argue that preventing the students of SOAS from exercising their Article 10 rights in the Brunei Suite would in any way impinge upon the effective exercise of their right of freedom of expression. There are many other places and ways in which that right can be exercised, and as the events of the last few days have shown there are indeed many ways in which it has been exercised. The proposition that Article 10 requires the law to override the property rights of SOAS in its own buildings is, in my view, unarguable and offers no prospects of success at trial.

B

26. Similar considerations apply to Article 11 which the court went on to deal with in paragraphs 51 and 52 of its judgment, because the court found that "largely identical considerations arise under this provision". So, for the same reasons, it would be equally fanciful to suppose that the Article 11 right to freedom of peaceful assembly required the court to override the property rights of SOAS in its own premises.

C

27. The case of Appleby appears to me to be plainly and squarely against the proposition which was advanced to me yesterday by Mrs Hamilton, and was further advanced to me today by Mr Slatter, to the effect that there may be an arguable defence based upon Articles 10 and 11. Mr Slatter had a further point, which was to say that SOAS is, at least arguably, a public authority, but I am not persuaded that that makes any relevant difference for present purposes. It is not in issue that, if there were a valid human rights argument, it could be relied upon by way of defence to the possession proceedings. So for that purpose it matters not whether or not SOAS is to be regarded as a public authority. Where its standing as a public authority would be relevant is if there were to be an application for judicial review, and indeed Mr Slatter began his submissions this afternoon by suggesting that this was a course which his clients wished to investigate. The suggestion was that it might be possible to show that the decision to seek the possession order was one that no reasonable public body could have taken. I will assume for present purposes, without deciding, that SOAS might be regarded as a public body for that purpose. The problem is that the argument appears to me wholly devoid of any prospects of success, because in view of the clear law laid down in Appleby it is simply impossible to conclude that no reasonable public body could have sought to regain possession of the Brunei Suite. Indeed, it seems to me almost self-evident that it was an eminently reasonable decision for the SOAS authorities to take, given the concerns expressed in the witness statements of Mr Poulson both yesterday and today.

D

E

F

G

28. In those circumstances, I am not persuaded that there is any defence to the possession proceedings which offers any realistic prospect of success, and I therefore think it would be wrong to allow any further adjournment for the defendants to look around for other possible grounds of defence. I cannot myself think of any grounds upon which they might be able to rely, given the incontrovertible property law principles which are relied upon by the claimant. The simple truth of the matter is that SOAS is the leasehold owner of the property and has the right to immediate possession of it. The students are entitled to use it in accordance with their contracts with SOAS and for the

H

A

purposes of their education, but those rights do not extend to conducting a sit-in which excludes SOAS from the premises.

B

29. It seems to me, therefore, that SOAS is entitled to an immediate possession order and that such an order should be granted. The only remaining issue is whether the order should extend to the whole of the campus, or merely to the Brunei Suite. On that point I was referred yesterday by Miss Holland to the recent decision of the Supreme Court in Secretary of State for Environment Food and Rural Affairs v Meier & Others [2009] UKSC 11, [2009] 1 WLR 2780. The relevant principles are discussed in the judgments of Lord Rodger, Baroness Hale and Lord Neuberger, and in particular they all referred to the earlier decision of the Court of Appeal in University of Essex v Djemal [1980] 1 WLR 1301. That was an earlier case of a student sit-in, where students who had previously taken over and been removed from certain offices at the University of Essex then occupied another part of the university buildings. The Court of Appeal made an order for possession extending to the whole property of the university, in effect the whole of the campus. In paragraph 10 of his judgment Lord Rodger said:

C

D

"This was justified because the university's right to possession of its campus was indivisible."

In other words, an incursion into one part entitled the university to an order for possession in relation to the whole.

E

30. Baroness Hale, in paragraphs 22 and 23 of her judgment, referred to the Court of Appeal's decision and to the reasoning of Shaw LJ that the right of the university to possession of the site and buildings was indivisible. She said nothing to question the correctness of that analysis, and again, as a matter of common sense, I think it must be right that, provided one can regard the campus as a single piece of property for these purposes, it is appropriate for the possession order to be granted in relation to the whole rather than any part, if only to avoid the risk of the sit-in moving from one location to another. The situation that needs to be clearly distinguished is where the claimant owns other quite separate property which cannot reasonably be regarded as forming part of the same premises as those which have been occupied. In that situation, it is not possible to grant a pre-emptive possession order in relation to property of which possession has not yet been lost.

F

G

31. Lord Neuberger also dealt with this point in paragraphs 69 and following, referring to the decision in Djemal as a thoroughly practical one to deal with what he described as a fairly widespread problem at the time, namely student sit-ins. He did, indeed, go on to say in paragraph 71 that this was not the occasion formally to consider the correctness of Djemal, because it had not been put in issue by either of the parties. It is right for me to note that qualification, but nevertheless it remains Court of Appeal authority which is binding on me and, in my judgment, has not in any sense been overruled by the Meier case. Indeed, the indications are that Djemal had the clear approval of most, if not all, of the court in Meier.

H

A

32. In those circumstances, I think it is right, as I have said, to grant an immediate possession order and to grant it in relation to the whole of the SOAS campus.

B

C

D

E

F

G

H

Court of Appeal

*Mayor of London (on behalf of the Greater London Authority) *v* Hall and others

[2010] EWCA Civ 817

2010 July 9; 16 Lord Neuberger of Abbotsbury MR, Arden, Stanley Burnton LJJ

Injunction — Trespass — Order for possession — Demonstrators setting up camp on square opposite Parliament in breach of byelaws — Title to square vested in Crown but local authority responsible for control and management functions — Mayor on behalf of local authority applying for possession order and injunction requiring demonstrators to leave square — Whether mayor having right to claim possession — Whether injunction impermissible enforcement of criminal law — Whether injunction breaching defendants' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11 — Greater London Authority Act 1999 (c 29), ss 384, 385

By section 384(1) of the Greater London Authority Act 1999[1] title to the square opposite the Houses of Parliament was vested in the Crown but by section 384(3) the care, control, management and regulation of the square was the function of the Greater London Authority, to be exercised by the Mayor of London on behalf of the authority under section 384(8). Acting pursuant to section 384(8) the mayor applied for an order for possession of the square against defendants who were encamped there in order to demonstrate in respect of a number of causes and an injunction against certain defendants requiring them to dismantle the structures which they had erected on the square and to leave the square. The majority of the defendants had only been encamped on the square for a few weeks but the second defendant, a long-standing protester who had pitched a tent on a small part of the square, had been there for some nine years without causing damage to the square or discouraging lawful visitors, joined from time to time by the third defendant. The defendants contended (i) that the mayor had no right to possession of the square since title to the land was vested in the Crown; (ii) that since by camping on the square they were in contravention of byelaws made pursuant to section 385(1) of the 1999 Act, which by section section 385(3) was a criminal offence, the grant of an injunction would amount to an impermissible enforcement of the criminal law; and (iii) that the orders sought would breach their rights to freedom of expression and freedom of assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled to the Human Rights Act 1998[2]. The judge made a possession order over the whole of the square against 17 of 19 named defendants and persons unknown and imposed injunctions on 14 of the defendants and persons unknown.

[1] Greater London Authority Act 1999, s 384: see post, para 3.
S 385: see post, para 4.
[2] Human Rights Act 1998, Sch 1, Pt I, 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 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."
Art 11: "1. Everyone has the right to freedom of peaceful assembly . . . 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others . . ."

A On applications for permission to appeal by seven named defendants—

Held, granting permission to appeal to and allowing the appeals of the second and third defendants but refusing permission to all other defendants, that it was implicit in sections 384 and 385 of the Greater London Authority Act 1999 that the mayor had the right to seek possession of the square in his own name since, although bare title of the square was vested in the Crown, every aspect of ownership and possession was vested in the mayor as part of his own statutory duty and statutory B right, not as an agent of the Crown; that since the mayor was entitled, in his capacity of the person in possession of the square, to maintain an injunction to remove those in unlawful occupation and since there was evidence to support the view that the criminal penalties provided for in section 385(3) of the 1999 Act to enforce the byelaws would not have operated as a deterrent to the defendants, the judge had been entitled to grant injunctive relief; that the defendants' desire to express their views in the square in the form of a relatively long-term occupation with tents and placards C was within the scope of articles 10 and 11 of the Convention; that, although the defendants were trespassers and in breach of the byelaws, they were entitled to have the proportionality of both the making of the possession order and the granting of the injunction assessed by the court, rather than the mayor, in a balancing exercise considering the facts and focusing very sharply and critically on the reasons put forward for curtailing the expression of their beliefs in public; that, balancing the defendants' rights to freedom of expression and assembly with the need to prevent crime, protect health and protect the rights and freedoms of others to access the D square and demonstrate with authorisation, the relief granted in respect of all but the second and third defendants had been a wholly proportionate response; but that, since different considerations applied to the second defendant and those protesting with him, and since he was entitled to have his case decided on the basis of new medical evidence which he wished to put before the court, the question of whether it was proportionate to make an order for possession and to grant an injunction against him would be remitted for reconsideration by the High Court (post, paras 28–30, E 32–33, 37, 40, 43, 53–56, 65, 68–69, 72, 76, 77).

Manchester Airport plc v Dutton [2000] QB 133, CA and *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, SC(E) considered.

Decision of Griffith Williams J [2010] EWHC 1613 (QB) reversed in part.

The following cases are referred to in the judgment of Lord Neuberger of F Abbotsbury MR:

Asher v Whitlock (1865) LR 1 QB 1
Belfast City Council v Miss Behavin' Ltd [2007] UKHL19; [2007] 1 WLR 1420; [2007] 3 All ER 1007, HL(NI)
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA
City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA
G *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
Georgeski v Owners Corpn Sp49833 [2004] NSWSC 1096
Harper v Charlesworth (1825) 4 B & C 574
Hill v Tupper (1863) 2 H & C 121
Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] H 2 WLR 570; [2006] 4 All ER 128, HL(E)
Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2009] EWCA Civ 852; [2010] 1 WLR 713; [2010] PTSR 423; [2010] 3 All ER 201, CA

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 (SB) v Governors of Denbigh High School [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
Roe v Harvey (1769) 4 Burr 2484
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
West Bank Estates Ltd v Arthur [1967] 1 AC 665; [1966] 3 WLR 750, PC
Western Australia v Ward (2002) 213 CLR 1

The following additional cases were cited in argument:

Appleby v United Kingdom (2003) 37 EHRR 783
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Handyside v United Kingdom (1976) 1 EHRR 737
Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA
Özgür Gündem v Turkey (2000) 31 EHRR 1082
Powell v McFarlane (1977) 38 P & CR 452
Pye (J A) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E)
Vogt v Germany (1995) 21 EHRR 205
Westminster City Council v Haw [2002] EWHC 2073 (QB)

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

Alamo Housing Co-operative Ltd v Meredith [2003] EWCA Civ 495; [2004] LGR 81, CA
Anonymous (1704) 6 Mod 14
Blum v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2006] EWHC 3209 (Admin), DC
Buckinghamshire County Council v Moran [1990] Ch 623; [1989] 3 WLR 152; [1989] 2 All ER 225, CA
Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015
Christian Democratic People's Party v Moldova (Application No 28793/02) (unreported) given 14 May 2006, ECtHR
Ćosić v Croatia (Application No 28261/06) (unreported) given 15 January 2009, ECtHR
Countryside Residential (North Thames) v Tugwell (2000) 81 P & CR 10, CA
Crisp v Barber (1788) 2 Durn & E 749
Danford v McAnulty (1883) 8 App Cas 456, HL(E)
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Emmerson v Maddison [1906] AC 569, PC
Fuentes Bobo v Spain (2000) 31 EHRR 1115
Harrow London Borough Council v Qazi [2003] UKHL 43; [2004] 1 AC 983; [2003] 3 WLR 792; [2003] 4 All ER 461, HL(E)
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Limb v Union Jack Removals Ltd [1998] 1 WLR 1354; [1998] 2 All ER 513, CA

A *McCann v United Kingdom* [2008] LGR 474; 47 EHRR 913
Mullen v Salford City Council [2010] EWCA Civ 336; [2011] 1 All ER 119, CA
Nurettin Aldemir v Turkey (Application Nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02) (unreported) given 18 December 2007, ECtHR
Oates v Shepherd (1747) 2 Strange 1272
Paulić v Croatia (Application No 3572/06) (unreported) given 22 October 2009, ECtHR
B *Philipps v Philipps* (1878) 4 QBD 127, CA
Platform "Ärzte für das Leben" v Austria (1988) 13 EHRR 204
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312; [2008] 2 WLR 781; [2008] 3 All ER 193, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
C *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249, DC
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
Stankov v Bulgaria (Application Nos 29221/95 and 29225/95) (unreported) given 2 October 2001, ECtHR
VgT Verein gegen Tierfabriken v Switzerland (2001) 34 EHRR 159
Wibberley (Alan) Building Ltd v Insley [1999] 1 WLR 894; [1999] 2 All ER 897, HL(E)
D *Williams v Fawcett* [1986] QB 604; [1985] 1 WLR 501; [1985] 1 All ER 787, CA
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA
Ziliberberg v Moldova (Application No 61821/00) (unreported) given 4 May 2004, ECtHR

APPLICATIONS for permission to appeal from Griffith Williams J

E By a claim form dated and served on 26 May 2010, and amended pursuant to the order of Maddison J dated 3 June 2010, the claimant, the Mayor of London (on behalf of the Greater London Authority) claimed an order for possession of Parliament Square Gardens as against the defendants, Rebecca Hall, Brian Haw, Barbara Tucker, Charity Sweet, Lew Almond, Chan Aniker, Anna Chithrakla, Chris Coverdale, Joshua Dunn, Dirk Duputall, Friend (also known as Robert Hobbs), Stuart Holmes, Rodge F Kinney, Professor Chris Knight, Peace Little, Simon Moore, Anita Olivacce, Peter Phoenix, Raga Woods and persons unknown, and an injunction as against the first and fourth to twentieth defendants, requiring them forthwith to: (1) dismantle and remove from the grassed area all tents and similar structures on Parliament Square Gardens except with permission granted by the mayor or on his behalf under byelaw 5(9) of the Trafalgar G Square and Parliament Square Gardens Byelaws 2000; (2) cease to organise or take part in the assembly known as Democracy Village and thereafter not to take part in any assembly without permission under byelaw 5 of the 2000 Byelaws or section 133 of the Serious Organised Crime and Police Act 2005; and (3) leave the square in accordance with the lawful directions of the mayor or on his behalf under byelaw 5(7); and as against the second and third defendants, an injunction requiring them forthwith to: (1) dismantle H and remove all tents and similar structures except with permission from the mayor or on his behalf under byelaw 5(7); (2) cease to organise or take part in any assembly on the grassed area without permission under byelaw 5(10) and/or section 133 of the 2005 Act; and (3) leave the grassed area in accordance with the lawful directions issued on behalf of the mayor.

On 29 June 2010 Griffith Williams J granted the relief sought, making an order for possession over the whole of Parliament Square Gardens against all defendants except the fourth and nineteenth and granting injunctions against all the defendants, except the first and nineteenth.

By an appellant's notice dated 2 July 2010 the first defendant, Rebecca Hall, sought permission to appeal against the possession order made against her on the following grounds, inter alia. (1) The claimant mayor was not entitled to possession of Parliament Square Gardens and accordingly the possession order, made under CPR Pt 55, had been made in error of law. (2) For the law to attribute possession of land to a person who could establish no paper title to possession the claimant had to show both factual possession and the requisite intention to possess, and since the judge had made no finding that the mayor was in physical occupation of Parliament Square Gardens, it had been wrong for the judge to find that the mayor had a right to seek possession. (3) If, which was not accepted, the judge had found that the mayor was in factual possession of the land, in so finding he had erred in law. The Greater London Authority Act 1999 vested the legal estate in the land in the Queen and plainly did not expressly give possession, or even a right of occupation of the square, to the mayor, the duties and functions of "control, management and regulation" of Parliament Square Gardens in section 384 of the 1999 Act being distinct and different from the right to possession of the land and conferring no exclusive right to possession. Nothing in the statutory scheme created a right for the mayor *at will* to exclude *the world* from entering and/or remaining on Parliament Square Gardens which was the hallmark of the right to possession necessary to found a successful possession claim by a claimant with no title. (4) The judge had therefore misconstrued the 1999 Act in three material respects: (i) in deciding that sections 30(2)(c) and 34 were not ancillary to the duty and functions in section 384 but provided greater powers than section 384 itself; (ii) in deciding that the power to regulate the "use" of Parliament Square Gardens in section 386 by byelaws created a power to exclude the world from the square; (iii) in having made no reference to the fact that the byelaws themselves, at byelaw 5(7), did not provide a power to exclude but only a power to give a direction to leave, which direction had to be reasonable. (5) The judge had erred in treating the ability to close or fence off the square to carry out its duties and functions as a general power to exclude the whole world at will. (6) Management functions were not inconsistent with the possibility of having exclusive possession but such responsibilities did not confer a right to possession in the present case. Management functions could be incidental to possession but the converse was not true. (7) The judge had erred in rejecting the first defendant's submission that the statutory scheme under the 1999 Act was in effect no different from control or management functions conferred by a property owner on a managing agent. The judge had failed to recognise the full implications of that extension or development of the common law approach to exclusive possession, based not on a legal estate or physical occupation of the land but on a statutory duty or a function of day-to-day control and management of the land. (8) The judge had impermissibly extended the common law relating to the entitlement to possession in respect of land not owned by the claimant and over which the public had an unfettered right of entry. That approach, following Laws LJ in *Manchester Airport plc v Dutton* [2000] QB 133, was inconsistent with the

A observations of Lord Neuberger of Abbotsbury MR in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 59, as to the limits of the courts' powers to develop the common law. (9) If the first defendant was correct and the judge had erred in law in concluding that the statute had created a right of exclusive possession over Parliament Square Gardens and the mayor sought to rely on *Dutton's* case, it could be distinguished on the facts of the present case, and had in any event B been decided per incuriam in the light of *Hill v Tupper* (1863) 2 H & C 121 and *Hunter v Canary Wharf Ltd* [1997] AC 655, which had not been cited to the court in *Dutton's* case, and/or *Dutton's* case had been wrongly decided.

By an appellant's notice dated 1 July 2010 the second defendant, Brian Haw, sought permission to appeal against the possession order and the injunction against him on the following grounds, inter alia. (1) The judge, C while correctly recognising that the second defendant's rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms were engaged by the issue of whether he required to occupy a small area of Parliament Square Gardens in order to carry out his authorised protest in Parliament Square, had erred in law in concluding that there was a pressing social need not to permit an indefinite camp by the D second defendant in order to protect the rights and freedoms of others to access all of Parliament Square Gardens and to demonstrate with authorisation. (2) The judge ought to have concluded that, in view of the nine-year length of the second defendant's demonstration involving substantial periods during which use of a small part of Parliament Square Gardens had been tolerated by the claimant, and the absence of any evidence that any member of the public had been inconvenienced or prevented from E holding a permitted demonstration by the second defendant's presence there, that there was no pressing social need to require him to cease using Parliament Square Gardens to sleep in a tent. (3) The judge ought to have held that the exclusion of the second defendant from Parliament Square Gardens either by the grant of a possession order or of an injunction, and by the prohibition on the second defendant pitching a tent without F permission by way of injunction, were impermissible restrictions on the second defendant's article 10 and 11 rights.

The third defendant, Barbara Tucker, the eighth defendant, Chris Coverdale, the eleventh defendant, Friend (also known as Ian Robert Hobbs), the twelfth defendant, Stuart Holmes, and the fifteenth defendant, Peace Little, also sought permission to appeal.

The facts are stated in the judgment of Lord Neuberger of G Abbotsbury MR.

Jan Luba QC, Mark Wonnacott, Stephanie Harrison and *John Beckley* (instructed by *Bindmans LLP*) for the first defendant, Ms Hall.

Martin Westgate QC and *Paul Harris* (instructed by *Birnberg Peirce & Partners*) for the second defendant, Mr Haw.

H The third, eighth, eleventh, twelfth and fifteenth defendants appeared in person.

Ashley Underwood QC and *David Forsdick* (instructed by *Eversheds LLP*) for the mayor.

The court took time for consideration.

16 July 2010. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY MR

1 There are before us applications for permission to appeal, which have been ordered to be heard on the basis that, if permission is given, the hearing of the appeal should follow immediately. We have heard the matter on a "rolled up" basis; in other words, the application and the projected appeal have been, in effect, argued together.

2 There are two orders which are sought to be appealed, and they were made by Griffith Williams J, following a hearing spread over eight days between 14 and 24 June 2010, with judgment given on 29 June [2010] EWHC 1613 (QB). Both orders were made in favour of the claimant, the Mayor of London, suing "on behalf of the Greater London Authority". The first was an order for possession of Parliament Square Gardens, London SW1 ("PSG"), against 17 out of 19 named defendants and "persons unknown". The second order was an injunction requiring 14 out of the 19 defendants and "persons unknown" (a) to dismantle any structures on, (b) (save in the case of three of the defendants, Mr Haw, Mrs Tucker and Ms Sweet) to cease to organise assemblies on, and (c) to leave, PSG.

The legislative background

3 The principal statutory provision governing the ownership and control of PSG is section 384 of the Greater London Authority Act 1999, which is in the following terms:

> "(1) The land comprised in the site of the central garden of Parliament Square (which, at the passing of this Act, is vested in the Secretary of State for Culture, Media and Sport) is by this subsection transferred to and vested in Her Majesty as part of the hereditary possessions and revenues of Her Majesty.
>
> "(2) Nothing in subsection (1) above affects— (a) any sewers, cables, mains, pipes or other apparatus under that site, or (b) any interest which was, immediately before the passing of this Act, vested in London Regional Transport or any of its subsidiaries.
>
> "(3) The care, control, management and regulation of the central garden of Parliament Square shall be functions of the authority.
>
> "(4) It shall be the duty of the authority well and sufficiently to light, cleanse, water, pave, repair and keep in good order and condition the central garden of Parliament Square.
>
> "(5) The functions conferred or imposed on the authority by this section are in addition to any other functions of the authority.
>
> "(6) In consequence of the preceding provisions of this section, any functions of the Secretary of State under or by virtue of section 22 of the Crown Lands Act 1851 (duties and powers of management in relation to the royal parks, gardens and possessions there mentioned), so far as relating to the whole or any part of the central garden of Parliament Square, shall determine.
>
> "(7) Subsections (3) and (4) above shall have effect notwithstanding any law, statute, custom or usage to the contrary.
>
> "(8) Any functions conferred or imposed on the authority by virtue of this section shall be functions of the authority which are exercisable by the mayor acting on behalf of the authority.

A "(9) In this section 'the central garden of Parliament Square' means the site in Parliament Square on which the Minister of Works was authorised by the Parliament Square (Improvement) Act 1949 to lay out the garden referred to in that Act as 'the new central garden'."

4 It is also relevant to refer to the next section of the same Act ("section 385") which provides, so far as is relevant:

B "(1) The authority may make such byelaws to be observed by persons using Trafalgar Square or Parliament Square Garden as the authority considers necessary for securing the proper management of those squares and the preservation of order and the prevention of abuses there.

"(2) Byelaws under this section may designate specified provisions of the byelaws as trading byelaws.

C "(3) A person who contravenes or fails to comply with any byelaw under this section shall be guilty of an offence and liable on summary conviction— (a) if the byelaw is a trading byelaw, to a fine not exceeding level 3 on the standard scale, or (b) in any other case, to a fine not exceeding level 1 on the standard scale."

5 It is also convenient to set out some of the Trafalgar Square and D Parliament Square Gardens Byelaws 2000 ("the byelaws"), made pursuant to section 385(1):

"3. No person shall within the Squares . . . (6) fail to comply with a reasonable direction given by an authorised person to leave the Squares . . ."

"5. Unless acting in accordance with permission given in writing by . . . E the mayor . . . no person shall within the Squares: (1) attach any article to any tree, plinth, plant box, seat, railing, fence or other structure; (2) interfere with any notice or sign; (3) exhibit any notice, advertisement or any other written or pictorial matter . . . (7) camp, or erect or cause to be erected any structure, tent or enclosure . . . (9) make or give a public speech or address . . . (10) organise or take part in any assembly, display, F performance, representation, parade, procession, review or theatrical event . . . (13) go on any shrubbery or flower bed . . ."

The factual background to the projected appeal

6 The basic facts giving rise to these proceedings are well summarised in the opening five paragraphs of the judge's judgment:

G "1. . . . PSG . . . comprises the central area of Parliament Square around which runs the public highway, including in places pavement. To the east is the Palace of Westminster, to the south Westminster Abbey, to the west the Supreme Court and to the north, Whitehall and various government buildings. It is a highly important open space and garden at the heart of London and our parliamentary democracy; it is an area of significant historic and symbolic value worldwide.

H "2. PSG is part of the Westminster Abbey and Parliament Square conservation area and a UNESCO designated world heritage site . . . It is classified as Grade II on English Heritage's Register of parks and gardens with special historic interest. It provides world renowned views of both the palace of Westminster and Westminster Abbey.

"3. On 1 May 2010, four separate groups said to represent the four horsemen of the apocalypse and which had formed up at different locations across London arrived and set up a camp which they named their 'Democracy Village'. Their then stated intention was to remain until 6 May 2010, the date of the general election but they have continued to occupy PSG and (on the evidence of a number of the defendants . . .) have every intention to do so for the foreseeable future.

"4. Brian Haw (the second defendant) has been camping lawfully since 2001 on a pavement on the eastern side of PSG—a part of the highway controlled by Westminster City Council. He was joined some years later by Barbara Tucker (the third defendant). They have been conducting their own protest for love, peace, justice for all. They and those associated with them are in no way a part of the Democracy Village.

"5. The defendants who are a part of the Democracy Village are demonstrating variously in respect of a number of causes—these include the war in Afghanistan, the war in Iraq, genocide, war crimes and worldwide environmental issues."

7 As this attenuated summary suggests, the full factual background, particularly in the view of the defendants, is wide-ranging and involves very fundamental issues indeed. This was clear from the judge's summary of the evidence he read and heard, and it was brought home to us by the eloquent oral submissions we received from some of the defendants, revealing their strong feelings of moral and ethical outrage at various issues of undoubted public importance, identified in para 5 of the judgment below. Bearing in mind the fundamental nature of these issues, and the location where the defendants are gathered, the centrality of the two freedoms, which are undoubtedly engaged in these proceedings, freedom of expression and freedom of assembly, could not be placed under a sharper focus.

8 Mr Haw, the second defendant, (represented at first instance by Mr Harris, who was led in this court by Mr Westgate QC) has been a virtually permanent fixture on the pavement area on the east of PSG, facing the Houses of Parliament, since 2001. While some might regard his presence with his placards as an eyesore in the face of Parliament, others see him as something of a national treasure, embodying the right of free speech in the very eye of the democratic storm. There have been various attempts to remove him from the pavement area, but none have so far succeeded, and the present proceedings do not seek to remove him from there, at least directly. At some point, he erected a tent on the grassed area of PSG ("the grassed area") immediately adjoining his pitch on the pavement; there is some dispute as to when that started, he says in 2001, the evidence on behalf of the mayor is much later. The third defendant, Ms Tucker, who represented herself, has joined Mr Haw from time to time, as has the fourth defendant, Ms Sweet.

9 The other defendants have been on PSG for all, or much, of the time since Democracy Village started up at the beginning of May 2010. Of those defendants, Ms Hall, the first defendant, and a member of Democracy Village, was represented by Mr Luba QC, Mr Wonnacott, Ms Harrison and Mr Beckley. The other named defendants are members of Democracy Village, and, in so far as they took part in the proceedings below, they acted in person. All of them were added as named defendants on their application, as the proceedings originally identified only three named defendants, as well as "persons unknown".

A 10 After hearing argument and evidence, the judge made the order for possession and granted the injunction against the great majority of the named defendants, although he excluded two defendants from each order. In particular, the judge decided that no injunction should be granted against Ms Hall, although she was included in the order for possession.

11 The application for permission to appeal was made by a number of the defendants, and Smith LJ ordered that the application be heard in open B court, with appeal to follow if permission was granted. I have already referred to the fact that Mr Haw was represented before us; Mrs Tucker represented herself. Of the Democracy Village occupiers, I have already mentioned that Ms Hall was represented; other members of Democracy Village, Mr Coverdale, Friend, Mr Holmes, Mr Knight, and Peace Little (to all of whom the injunction and the order for possession extended) made C oral submissions on their own behalf.

The issues on this appeal

12 A number of issues have been raised. First, whether the trial below was fair—whether it complied with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the D Convention"). Secondly, whether the claim for possession was properly constituted. Thirdly, whether the order for possession and the injunction complied with articles 10 and 11 of the Convention in terms of proportionality. Fourthly, whether an injunction was a permissible remedy in the light of section 385 and the byelaws. Fifthly, there are issues concerning costs.

13 Mr Haw (together with Mrs Tucker) raises three arguments specific E to his case, one relating to the speed of the proceedings, the second to the form of the possession application and order against him, and the third relating to proportionality.

14 I shall take these various issues in turn, save that those relating to Mr Haw will be discussed before the question of costs.

Did the defendants have a fair trial?

F

15 The gap between the issue of these proceedings, 26 May 2010, and the commencement of the hearing before Griffith Williams J, 14 June 2010, was undoubtedly very short. However, so far as the domestic procedural aspect is concerned, CPR Pt 55 understandably envisages an abbreviated procedure in relation to "a possession claim against trespassers", and that procedure is mandatory in a case such as the present. Injunctive relief, if G justified, should, as a matter of principle, be available speedily.

16 Having said that, this was an unusual case, and it is right to consider whether the defendants were afforded a fair trial which complies with the domestic law and with article 6 (although it would be a rare case where the two requirements would not march together). There is no reason to think that there are any areas of law or fact which could be raised other than H those identified in para 12 above: if there had been, no doubt Mr Luba or Mr Westgate would have drawn them to our attention. The second and fourth issues principally involve legal argument and have been fully canvassed by counsel. The only area where it is, at least on the face of it, conceivable that more time would have been needed to gather evidence or argument would be on proportionality. However, having heard the

arguments and read the evidence and the judgment, I am quite satisfied that no prejudice whatever was caused to any of the defendants (other than Mr Haw) in relation to the presentation of their respective cases on this issue, whether in the form of evidence or arguments, by the short time between the issue of proceedings and the hearing of the claims.

17 The principal concerns expressed by the defendants who pursued this argument related to the importance attached to the issues which those defendants who participated in the Democracy Village stood for (and, in Mrs Tucker's case, the issues which Mr Haw stood for). Those issues are of prime public importance, and in the first rank of topics which article 10 is concerned to respect, in that they are political in nature. The importance of having an unrestricted right to express publicly and strongly a controversial view on a political, or any other, topic cannot be doubted: it is of the essence of a free democratic society and should be vigilantly protected by the legislature, the executive and the judiciary. Accordingly, it was unnecessary for the defendants in this case to expand on their views, with which many may agree strongly and many may disagree strongly, relating to the environment, alleged genocide, the wars in Iraq and Afghanistan, and more specific issues such as the use of depleted uranium.

18 It is true that Mr Holmes (and possibly other defendants) has applied for legal aid, and there has not been the time to have their applications processed. However, in my view, no prejudice has been caused to him as a result of his having to represent himself. The issues have been fully canvassed with the assistance of six barristers, and their instructing solicitors, acting for Mr Haw and Ms Hall, and the factual issues have been fully aired in the form of the evidence put before the judge. Indeed, without in any way intending to criticise anyone (as it is inevitable where so many defendants separately advance their respective cases), the issues were aired more fully below than they would have been if the unrepresented defendants had been represented.

19 It is also right to mention that this was not a case where the parties were forced to present their respective cases on the first occasion that the case came before a judge for hearing. The case came before Maddison J on 3 June, when he gave certain directions, and it came before him again on 7 June, when he gave further directions. The defendants therefore had significantly more time to prepare their respective cases than the minimum which they could have been given under the Civil Procedure Rules and quite rightly in the circumstances. This was not a case where they can have been taken by surprise at the hearing proceeding on 14 June. Further, because Griffith Williams J heard evidence from any party who reasonably wished to give evidence, there was time for further consideration to be given to arguments and evidence during the ten days over which the hearing was spread.

20 Accordingly, even ignoring the point that the Court of Appeal is, as a matter of principle, reluctant to interfere with a judge's case management decision (a point of very considerable importance, I should add), it seems to me that Griffith Williams J was not merely entitled, but was positively correct, in deciding to proceed with the hearing and to refuse an adjournment. If the mayor was entitled to any of the relief which he was seeking, it would be wrong to delay the proceedings for any time greater than was needed to ensure that the defendants had a fair trial.

A *Does the mayor have the right to claim possession?*

21 The powers and duties relating to PSG and conferred on the Greater London Authority (which I shall treat as conferred on the mayor, both in the light of section 384(8) and for the sake of convenience) are in sections 384(3) and (4), 385(1) and (2), and the byelaws. In my view, those provisions, as can be seen from the control which the mayor actually exercised (gardening, B refuse collection, patrolling, enforcement of byelaws), inevitably lead to the conclusion that the mayor was, at any rate until 1 May, in possession of PSG. As the majority of the Australian High Court put it, a person has possession of certain land if he can "control access to the [land] by others, and, in general, decide how the land will be used": *Western Australia v Ward* (2002) 213 CLR 1, para 52. Of course, the grassed area of PSG is not fenced off, as it is intended to be available for general public access, but the precise nature C of the acts and rights required to amount to possession varies with the nature of the land and all the circumstances: see e g *West Bank Estates Ltd v Arthur* [1967] 1 AC 665, 678B–C.

22 The argument advanced by Mr Luba and Mr Wonnacott on this first issue is simply stated, and is based on clear, if somewhat historical, principles, although, at least on its face, the argument seems absurd. Simply D stated the argument is this: a claim for possession of land, if made by a person who has been put out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land. In particular, it is insufficient for such a person to maintain such a claim, if he is merely relying on an interest or right, falling short of a legal estate, which gives him a claim or right to use and control of the land. The reason I describe the argument as apparently absurd is that it amounts E to saying that the mere fact that a person can establish that he has a right to use and control, which effectively amounts to possession, of land does not entitle him to maintain a claim for possession of that land even against someone on that land who is undoubtedly a trespasser.

23 The basis of this argument, in very summary terms, is that (i) a claim for possession of land is the modern equivalent of a claim for ejectment (see the discussion in *Secretary of State for the Environment, Food and* F *Rural Affairs v Meier* [2009] 1 WLR 2780, paras 6–7, 26–33, and 59–61); (ii) a claim for ejectment (as opposed to a claim for an injunction in trespass) could only be maintained by someone who could establish a legal estate in the land (see e g per Lord Mansfield CJ, and Aston and Willes JJ in *Roe v Harvey* (1769) 4 Burr 2484, 2487, 2488 and 2489 respectively, and per Bayley J in *Harper v Charlesworth* (1825) 4 B & C 574, 589); and (iii) it G would represent an unprincipled departure, fraught with inconsistencies and unforeseeable problems and conundrums, to depart from this rule (as the Supreme Court of New South Wales decided in *Georgeski v Owners Corpn Sp49833* [2004] NSWSC 1096).

24 This argument is inconsistent with the majority decision of this court in *Manchester Airport plc v Dutton* [2000] QB 133, where the plaintiff's case was weaker than the mayor's case here, as the mayor has actually H enjoyed possession, and his right is statutory in origin. However, it is said by Mr Luba that the reasoning of the majority in *Dutton's* case is inconsistent with authority not cited to the court in that case (such as *Hill v Tupper* (1863) 2 H & C 121), and that it is inconsistent with the more principle-based approach of the House of Lords in *Meier's* case [2009] 1 WLR 2780,

although *Dutton's* case was referred to without adverse criticism by Lord Rodger of Earlsferry JSC, at para 6.

25 Mr Underwood QC, who appeared with Mr Forsdick for the mayor, argued that, as the mayor had been in possession before the defendants wrongly dispossessed him, authority showed that, even under the arcane rules relating to ejectment proceedings, he could properly seek possession. That is true, but it is because a claimant's previous possession is evidence of his title (or, strictly speaking, of his prior seisin), but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves: see *Asher v Whitlock* (1865) LR 1 QB 1. In this case, therefore, the defendants argue, the presumption of the mayor's right to claim possession arising from his previous possession dissolves once one looks at section 384(1), which makes it clear that the mayor has no title, as the freehold is vested in the Crown.

26 As at present advised, at least if one ignores the full effect of sections 384 and 385, I think that there is real force in the defendants' argument, the erudition of whose contents was matched by the clarity and crispness of its presentation. Certainly, if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the argument seems very powerful.

27 However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question—along the lines of the views expressed by Laws LJ in *Dutton's* case [2000] QB 133 and by Baroness Hale of Richmond JSC in *Meier's* case [2009] 1 WLR 2780. Further, it is only my opinion in *Meier's* case, paras 60–69, which can be said plainly to support the argument that a possession order may be subject to the same principles as those that applied to ejectment, and even my opinion was concerned with a very different aspect of a possession order from that raised here, as the claimant's title was not in issue. Lord Rodger JSC at paras 6 and 7 can be said to provide only a little, and then only very indirect, support for the argument, and any such support is rather undermined by his uncritical citation of *Dutton's* case. The effect of the brief speeches of Lord Walker of Gestingthorpe and Lord Collins of Mapesbury JJSC is neutral on the argument, save that they can be said to have adopted a relatively orthodox approach to the concept of possession. Baroness Hale JSC's observations at paras 26–36 are rather against the argument.

28 However, even assuming that Mr Luba and Mr Wonnacott are right as a matter of general principle, the answer in this case lies in the relevant statutory provisions. As Stanley Burnton LJ pointed out, and as Mr Luba realistically accepted, it would be open to Parliament to confer by statute the power to claim possession of land on a person who has no title to that land. Although it is true that there is nothing in the 1999 Act which, in express terms, gives the mayor the right to seek possession of PSG in his own name, I have reached the conclusion that it is implicit in sections 384 and 385 that he has that right.

29 In the two sections, the legislature has distributed different aspects of ownership and control between the Crown and the mayor. Title is

A undoubtedly vested in the Crown by section 384(1), but every aspect of ownership and possession is vested in the mayor, as part of his own statutory duty and statutory right, and not as an agent of the Crown: he has complete control and regulation of PSG. The only satisfactory reason which was advanced at the hearing for vesting title to PSG in the Crown, rather than the mayor, is symbolic: Parliament Square (like Trafalgar Square, which enjoys the same regime) is a place of premier national significance B and importance.

30 While the Crown has no function other than that of bare ownership, the mayor decides what activities can occur on PSG, how it is to be laid out and maintained, what statues and other structures are to be erected there, who can come onto PSG, in what circumstances, what they can and cannot do when they are there, and when they have to leave. It is common ground C that, if, as I consider is clear, the mayor is the person entitled to lawful possession of PSG, he could obtain an injunction, such as that which he has obtained, as a claimant seeking an injunction in trespass only has to show that he is entitled to (or even only that he enjoyed) possession—see per Chadwick LJ, dissenting in *Dutton's* case [2000] QB 133, paras 146–147. In fact, the only thing which the mayor cannot do in relation to PSG, on the defendants' case, is to seek possession. D

31 Mr Luba argued that Parliament must have appreciated, or, more accurately, must be taken to have appreciated, the law, and that, by vesting the freehold of PSG in the Crown, it must have envisaged that only the Crown (presumably by relator action through the Attorney General) could bring proceedings for possession if PSG was invaded by squatters. He suggested that this was reinforced by the absence of a provision such as is E found in section 1(2) of the Crown Estate Act 1961, which specifically bestows on the Crown Estates Commissioners the ability to perform "all such acts as belong to the Crown's rights of ownership".

32 It seems obvious that, in order for the scheme envisaged by sections 384 and 385 to work properly, the mayor should have the ability to seek possession in his own name of PSG. It cannot have been envisaged that he would have to ask the Attorney General to bring proceedings, with the delay, F uncertainty and cost which such a course would involve. Indeed, the Attorney General would have a discretion whether to bring a relator action, and, for reasons which seemed good to him, he might refuse to seek an order for possession. It would be scarcely consistent with the powers and duties conferred on the mayor by sections 384 and 385 if he could be denied the ability to obtain possession of PSG. The national importance of PSG G underlines the need for minimum delay and maximum certainty and simplicity where summary action is required.

33 Reading the two sections together, they show that while bare title to PSG is vested in the Crown, the mayor is given the power to do everything in relation to the land. The mayor can, in my view, rely on the two sections to show not merely that he has a statutory right to possession of PSG, and indeed a statutory duty to enforce that right, but, crucially for present H purposes, to demonstrate that while they confer title to PSG on the Crown, it is a title which it is his right to enforce, and, bearing in mind his duties under sections 384 and 385, his obligation to enforce, in his own name. In other words, far from those two sections undermining his title to sue, they support it.

34 As to the 1961 Act, the Crown Estates Commissioners are the agents of the Crown, so it is understandable why there is specific reference to their powers in section 1(2). However, it goes a little further than that: as Arden LJ said, given the provisions of section 1(2) of that Act and the reference to the 1851 Act in section 384(6), it seems very unlikely that Parliament envisaged that the Crown would have to bring proceedings for possession of PSG in its own name.

35 It is right to refer to the fact that the possession proceedings in *Meier's* case [2009] 1 WLR 2780 were brought by the freehold title owner, the Secretary of State, rather than the Forestry Commission, in whom the management of the land was vested. The powers given to the mayor under sections 384 and 385 are considerably wider than those conferred on the forestry commissioners by the Forestry Act 1967. This would explain why the claimant was not the forestry commissioners, but the Secretary of State, to whom Crown woodlands had devolved through the Minister of Works. There was a similar line of devolution of PSG through the Minister of Works to the Secretary of State for Culture, Media and Sport, but the 1999 Act extinguished all those powers. Those powers included all the rights of the Crown in respect of PSG: hence the need for section 384(1) to revest title in the Crown. It is significant that this was done by extinguishing and not recreating in the Crown Estate Commissioners the wide powers to manage that they have in relation to Crown lands: those powers enable the Crown Estate Commissioners to exercise all the rights of ownership in Crown lands: see section 1(2) of the 1961 Act, referred to above.

Articles 10 and 11 of the Convention and proportionality

36 As I have already said, there can be no doubt that the defendants should have the right to express the views which they wish to express; similarly, there is no doubt that they should enjoy the right to assemble together. Such rights are, of course, specifically protected by, respectively, articles 10 and 11 of the Convention. However, as articles 10.2 and 11.2 of the Convention emphasise, these rights, vitally important though they are, must be subject to some constraints, and those constraints include "restrictions" provided they are, inter alia,

> "prescribed by law and . . . necessary in a democratic society in the interests of . . . public safety, for the prevention of disorder or crime . . . for the protection of the [under article 10, 'reputation or'] rights ['and', under article 11, 'freedoms'] of others."

37 The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on the basis of relatively long-term occupation with tents and placards, are all, in my opinion, within the scope of articles 10 and 11.

A 38 Having said that, the greater the extent of the right claimed under article 10.1 or article 11.1, the greater the potential for the exercise of the claimed right interfering with the rights of others, and, consequently, the greater the risk of the claim having to be curtailed or rejected by virtue of article 10.2 or article 11.2.

39 The byelaws themselves cannot be said to fall foul of articles 10 and 11: they envisage demonstrations, speeches, camping, placards and the like B being permitted subject to the mayor's consent. In this case, the mayor considered and refused an application (or, strictly, a letter which he treated as an application) for the establishment and continuance of the Democracy Village on PSG, and he refused it for reasons given in a fairly detailed letter dated 20 May 2010. That letter included the observation that:

> C "The effect of the Democracy Village is to prevent the public from exercising their rights over a very significant part of PSG for a prolonged and indefinite period [and] one impact of the Democracy Village has been to exclude others from exercising their right to protest there. The extent and duration of the impact of the Democracy Village on the lawful, reasonable and ordinary activities on PSG is the primary reason for refusing consent."

D The letter also said that "The mayor is seriously concerned about the substantial damage which is being caused by the Democracy Village to PSG", and that "the cost of reparation to return the Square to its former condition is substantial". The letter went on to state that:

> "Permissions for other peaceful protests and rallies on Parliament Square Garden are normally limited to a maximum of three hours, in E order to allow for proper management, to ensure that the day-to-day business of the city is not impeded, and to allow the maximum number of groups or individuals to use the space to exercise their democratic right to peaceful protest. As this period will be extended in appropriate cases, the mayor is not prepared to permit camping by significant numbers for a prolonged period."

F 40 The Democracy Village defendants are plainly trespassers on PSG: rightly, that is no longer in contention, although it was debated before the judge. The defendants' presence on PSG is also in breach of the byelaws, as the mayor's consent to their occupation has been refused. Although those are factors to be weighed against them, particularly after what is now more than two months of effectively exclusive occupation, the Democracy Village G defendants are still entitled to have the proportionality of both the making of the possession order and the granting of the injunction sought by the mayor assessed by the court as articles 10 and 11 are engaged, not least because it is the mayor, the person seeking the relief who could authorise them remaining lawfully on PSG.

41 This is not a case like *Kay v Lambeth London Borough Council* [2006] 2 AC 465 or *Doherty v Birmingham City Council (Secretary of State* H *for Communities and Local Government intervening)* [2009] AC 367, where (at least in the view of the majority of the House of Lords in each case) article 8 could not be invoked by an occupier of a residential property in support of his case against his landlord's claim for possession. That was because the domestic law had already taken into account, and balanced,

the public interest in a public authority landlord obtaining possession and the tenant's right to respect for his home. No such legislative balancing exercise has been carried out here. In any event, it can be argued that recent Strasbourg jurisprudence could be invoked to suggest that the reasoning of the majority in those two cases should no longer hold good (an issue which has just been argued before the Supreme Court on appeal from *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] 1 WLR 713*).

42 Quite apart from this, when freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered. Thus, in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a positive duty to take steps to ensure that lawful public demonstrations can take place, and that any prior restraint on freedom of speech requires "the most careful scrutiny".

43 Given, therefore, that articles 10 and 11 are in play, it seems to me that the decision on the balancing, or proportionality, issue is ultimately one for the court, not the mayor: see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and critically on the reasons put forward for curtailing anyone's desire to express their beliefs—above all their political beliefs—in public.

44 In that connection, it is clear both from the evidence before the judge and from some of the argument before us that the factual basis for some of the reasoning in the mayor's letter of 20 May, refusing Democracy Village the right to occupy PSG, was challenged. In particular, it was said by some of the defendants that the presence of the Democracy Village on PSG had plainly not prevented at least three significant demonstrations in Parliament Square and its vicinity since 1 May, and that, far from putting off people from visiting PSG, whether or not for the purpose of demonstrating, the Democracy Village actually encouraged people to come to Parliament Square to express or discuss the views which the defendants supported.

45 The judge received written and oral evidence from Simon Grinter, the head of the Greater London Authority's Facilities and Squares Management (who was closely cross-examined by or on behalf of a number of the defendants), which included a written note from Syed Shah (a PSG warden). He also read witness statements from nine of the defendants, and from various public figures in support of the defendants' case, and heard oral evidence from about 15 of the defendants and a number of supporting witnesses. The effect of that evidence is pretty fully summarised at [2010] EWHC 1613 (QB) at [23]–[74].

46 The judge concluded, at para 133, that there was:

> "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of

* *Reporter's note.* The Supreme Court's decision of 3 November 2010 is now reported [2010] 3 WLR 1441.

A PSG and to demonstrate with authorisation but also importantly for the protection of health—the camp has no running water or toilet facilities—and the prevention of crime—there is evidence of criminal damage to the flower beds and of graffiti."

He went on to say that he was:

B "satisfied the GLA and the mayor are being prevented from exercising their necessary powers of control management and care of PSG and the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented."

47 In my view, in so far as those conclusions amounted to findings of fact, they were, to put it at its lowest, findings which were open to the judge C on the evidence before him. Once those findings were made, there are no grounds for attacking the conclusion reached by the judge in the following paragraph, namely that

"while the removal of the defendants . . . would interfere with their article 10 and article 11 rights, that is a wholly proportionate response and so no defendant has a Convention defence . . . to the claim for D possession."

48 It is important to bear in mind that this was not a case where there is any suggestion that the defendants should not be allowed to express their opinions or to assemble together. The claim against them only relates to their activities on PSG. It is not even a case where they have been absolutely prohibited from expressing themselves and assembling where, or in the E manner, in which they choose. They have been allowed to express their views and assemble together at the location of their choice, PSG, for over two months on an effectively exclusive basis. It is not even as if they will necessarily be excluded from mounting an orthodox demonstration at PSG in the future. Plainly, these points are not necessarily determinative of their case, but, when it comes to balancing their rights against the rights F of others, they are obviously significant factors.

49 The importance of Parliament Square as a location for demonstrations and the importance of the right to demonstrate each cut both ways in this case. It is important that the Democracy Village members are able to express their views through their encampment on PSG, just opposite the Houses of Parliament. However, as Arden LJ rightly said, it is equally important to all the other people who wish to demonstrate on G PSG that the Democracy Village is removed, in the light of the judge's finding, in line with the mayor's view, and (it should be added) the preponderance of the evidence, that the presence of the Democracy Village impedes the ability of others to demonstrate there. Additionally, there are the rights of those who simply want to walk or wander in PSG, not perhaps Convention rights, but none the less important rights connected with H freedom and self-expression. The fact that Democracy Village have been effectively in exclusive occupation of PSG for over two months is also relevant, especially as there is no sign of the camp being struck, as the defendants have, it may be said, had some 70 days to make their point.

50 As to the suggestion that removing all the Democracy Village defendants was an overreaction, Mr Underwood pointed out that this was

A very much an "all or nothing" situation: either all the Democracy Village defendants go, or none of them do. He said, with force, that it was not fair, principled or practical to distinguish between the defendants (save, perhaps, Mr Haw, Mrs Tucker and Ms Sweet, the fourth defendant) when considering whom to evict. There is no good reason to let some of them stay while requiring others to leave: it would involve arbitrary selection; it would encourage other, new, supporters of Democracy Village to join the camp; B it would be unlikely to achieve the ends which the mayor is seeking, and entitled, to achieve. He also made the point that the mayor needed to recover possession in order to control the use of PSG and bring to an end the "first come first served anarchy" which currently prevailed.

51 The defendants relied on the reasoning of Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February C 2009, where this court held an attempt by the Government to prevent a protest camp being held at Aldermaston to be unlawful. However, as the judge pointed out, the facts of that case were very different from those in this case. The protest camp was on a piece of land adjoining the highway by Aldermaston, and the protest was held one weekend every month, and had taken place for over 20 years; further, there was no evidence of any significant obstruction of the highway or to any other public, or indeed D private, right; in addition, no attempt had been made by the Secretary of State to enforce his right, whether to possession or anything else, for all that time. Further, in that case, the need to balance the rights of the defendants to demonstrate against the rights of others to demonstrate did not arise, as of course it does here.

E *The injunction should not have been granted in aid of the criminal law*

52 The defendants argue that the judge should not have granted the injunction, because, as a matter of principle, it was wrong to invoke the civil law to enforce byelaws which have their own criminal sanction—see section 385(3). As a matter of principle, there is clear authority for the proposition that, particularly where "Parliament has legislated in detail", the courts should at least "in general leave the matter to be dealt with F as Parliament intended . . . save perhaps in exceptional circumstances": *Birmingham City Council v Shafi* [2009] 1 WLR 1961, para 44, following the principles laid down by Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754, 776, and Bingham LJ in *City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714. Further, it is clear that Parliament has legislated relevantly on two fairly recent occasions— G namely in the 1999 Act, which, in sections 384 and 385, relates to activities on PSG, and also in the Serious Organised Crime and Police Act 2005, which, in sections 132 and 134, contains rather controversial provisions creating criminal offences out of unauthorised demonstrations and similar activities within a specified distance of the Palace of Westminster.

53 There are, in my view, two answers to this argument. The first is that the mayor is entitled, in his capacity of the person in possession of PSG, to H maintain an injunction to remove those in unlawful occupation. Even on the assumption that, as contended by Mr Luba and Mr Wonnacott, the mayor is not entitled to maintain a claim for possession, it is accepted that, if he is entitled to use and control, effectively amounting to possession, he is entitled, in that capacity, to enjoin those in occupation of PSG from

A remaining there. If, as I have concluded, he is entitled to maintain a claim for possession, then, if the facts justify it, he is entitled to an injunction in support of the enforcement of that claim (a view which receives support from the thrust of the reasoning in *Meier's* case [2009] 1 WLR 2780).

54 In this case, the need to ensure that the defendants remove their tents and placards and do not return was, to my mind, plainly established to the judge's satisfaction. He concluded that the great majority of the defendants B would not be deterred by the threat of criminal proceedings in the magistrates' court from continuing to breach the byelaws. It must follow from this that, if not entitled to sue for possession, the mayor, as the person entitled to possession, was justified in seeking injunctive relief, and that, if he was entitled to sue for possession, he was entitled to seek injunctive relief in support.

C 55 Furthermore, the judge's finding that the criminal procedures provided for in section 385(3) would not operate as a deterrent to the defendants justified his decision to grant an injunction in aid of the enforcement of the byelaws. On this point, the judge said [2010] EWHC 1613 (QB) at [143]:

> "Whereas the standard of proof required in civil proceedings is the D balance of probabilities, I am, in fact, sure that these applications (subject to the exercise of the court's discretion) must succeed. I am satisfied, for the reasons which follow that this is an exceptional case: the identities of most of those taking part in the Democracy Village are unknown—but for their insistence in being joined as defendants to these proceedings, the identities of defendants 5 to 19 would not have been ascertained; it would impose an undue burden on the claimant to institute proceedings against E all the occupiers, with the complicating factor that some of those taking part move in and out of occupation; effecting service would not be straightforward; proceedings in the magistrates' courts would have to be by way of summons, a sometimes prolonged procedure; the refusals, hitherto, of those taking part in the Democracy Village to obey lawful instructions gives no grounds for optimism that there will be future F compliance; indeed a number of the defendants made it clear they have no intention of obeying a court order for possession; . . ."

56 Given these conclusions, which were ones which were plainly open to him on the evidence (to put it at its lowest), I consider that the judge was entitled to grant the injunction that he did, even ignoring the fact that it was sought by the person entitled to possession of the land concerned. In the G *B & Q (Retail)* case [1984] AC 754, 776J, having said that the court should, in principle, be "reluctant" to grant an injunction in aid of the criminal law which provided for penalties for Sunday trading, Lord Templeman said that "the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading". So here: the judge found that, albeit for reasons more admirable than money-making, the defendants H would not have been deterred from continuing to breach the byelaws by a level 1 fine in the magistrates' court.

57 Quite apart from this, I do not think that the byelaws were framed with a view to applying to a long-term, or even indefinite, and exclusive, or near-exclusive, occupation of PSG. Although the words of byelaws 5(a)(7),

(9) and (10), taken together, cover the sort of operation involved in the Democracy Village, I consider that that sort of exclusive long-term arrangement was not within the contemplation of those who drafted the byelaws. Although I would not suggest that this is a separate reason for upholding the judge's decision to grant an injunction, it is a point which underpins the two reasons which I do consider justify that decision.

Mr Haw's arguments

58 Separate arguments are raised on procedural aspects, on the possession application and order, and on proportionality, by Mr Westgate on behalf of Mr Haw, and, at least arguably, by Mrs Tucker who has joined in his demonstration, and by Ms Sweet, who has also done so, albeit to a lesser extent. As explained above, his long-standing presence on the pavement on the east side of Parliament Square is not challenged in these proceedings. What is challenged is his encroachment onto a small adjoining part of PSG, where he has pitched a tent.

59 Mr Haw makes the general point that he is entirely separate from the other, Democracy Village, defendants. He has pitched his tent on what is only a very small part of the grassed area, and has done so since about 2001 (albeit that he has also pitched it on the pavement where he demonstrates) and there is no suggestion that his presence, unlike that of the Democracy Village defendants, has discouraged other visitors or demonstrators to PSG or has damaged the flowers on PSG.

60 The first of Mr Haw's arguments that it is convenient to consider is that the application and order for possession against Mr Haw both extend to the whole of PSG, and not just the small part which he occupies. At first sight that submission derives some support from the decision in *Meier's* case [2009] 1 WLR 2780, which underlines the point that possession can only be sought of the land occupied by the defendant. However, where only part of what can fairly be described as one piece of land is occupied by a defendant, it is clear that the owner of the land can claim possession of the whole piece. The point is most clearly made by Lord Rodger JSC at para 10, where he refers to the right to possession of a piece of land as being "indivisible" (and see also paras 67 and 97). Further, where, as here, the whole piece of land is occupied by trespassers, and it is difficult precisely to identify who occupies what part, it is particularly unrealistic to expect the claimant to identify which part each defendant occupies, and practicality is a relevant factor, as the decision in *University of Essex v Djemal* [1980] 1 WLR 1301 establishes.

61 The other arguments raised on behalf of Mr Haw both rely on the contention that his health requires him, or at least makes it better for him, to sleep on the relatively softer grass rather than the pavement, because of an acute medical condition from which he suffers. At first sight, that is answered by Mr Underwood's point that he can get a mattress, but it is said in response that the pavement slopes in a way that prevents sleeping on the pavement being feasible in the light of his medical condition.

62 Mr Haw contends that the application for possession and for the injunction came on speedily because of factors which applied to the other, Democracy Village, defendants, and which had no application to him, as summarised in para 59 above, and that this caused him prejudice, because he was unable to obtain medical reports to support his case that he needed to be able to sleep on the grass. He says that this is very important because, if he

A has to remove the tent and restrain his presence and activities to the pavement, it would be an unfair and disproportionate interference with his presence and activities on the pavement.

63 This contention is not only based on his medical condition, but it is also based on his alleged need to sleep on the grass for reasons of safety, as he is less likely to be hit by traffic or attacked by thugs than if he sleeps on the pavement. I have some doubts about this: if pitched on the grass, his tent B would be very close to the western edge of the eastern pavement, and therefore would be not much further from the traffic and would be equally accessible to thugs. And there is no evidence of his having been harmed in any traffic accident.

64 Mr Haw's argument on proportionality goes wider, in that he says that, while the judge appeared to accept [2010] EWHC 1613 (QB) at [119] C that he was in a different position from the Democracy Village defendants when embarking on the discussion of proportionality, he did not distinguish between him and the other defendants when actually considering that issue. For the reasons identified in para 59 above, he says that his claim to remain on the very small part of PSG occupied by his tent at least deserved separate consideration from the claim against the other, Democracy Village, defendants—particularly when it came to the issue of proportionality.

D **65** I accept that Mr Haw is in a different position from that of the Democracy Village defendants. He and his demonstration are quite separate from them and theirs, he has been demonstrating for far longer, and his demonstration "pitch" is not under attack in these proceedings. Further, his demonstration has not put off visitors or other demonstrators (one rather suspects that the reverse may be the case), and there is no question of his E having damaged the flora on PSG. The evidence as to when he first pitched his tent on the grass, and how often it was pitched there is in dispute, but it does seem as if he has been encamped on PSG for a significantly longer time than the Democracy Village.

66 Mr Underwood's argument that it is wrong for the mayor to try and distinguish between the various occupiers of PSG has, as I have mentioned, great force in relation to all the Democracy Village defendants. While F I accept that it can also be applied to Mr Haw, it appears to me that it has much less force in his case, essentially for the reasons identified in the preceding paragraph. Those reasons may well justify treating Mr Haw differently from the other defendants, as a matter of principle.

67 The judge did not make any findings of fact as to the effect of making an order for possession or granting an injunction against Mr Haw on his G ability to maintain his demonstration or on his rights under article 10 or article 11. Nor did he expressly consider Mr Haw separately from the other defendants when considering the proportionality under articles 10 and 11 of making the orders against him sought by the mayor, although he did consider Mr Haw separately on the issue of the likelihood of his being deterred by magistrates' court proceedings (see [2010] EWHC 1613 (QB) at [148]). Further, although the judge received the medical report on Mr Haw H before he gave judgment, it was only received on the last day of the hearing and Mr Haw had very limited opportunity to consider its contents and to make submissions about it.

68 With considerable hesitation, I have reached the conclusion that the question of whether it was proportionate to make an order for possession

and to grant an injunction against Mr Haw should be remitted for reconsideration by the High Court. Although the case against him was weaker than that against the Democracy Village defendants, for the reasons already mentioned, it was still a strong case in the sense that he had no defence to the claims for possession or an injunction other than the argument based on articles 10 and 11. In addition, in an important respect, his argument based on those articles is weaker than that of the other defendants: the orders are not intended to interfere with his desire to continue with his demonstration in Parliament Square. However, he argues that they would make it more difficult, even medically very difficult, for him to do so, because he will have to pitch his tent on the pavement.

69 I entertain very significant doubts whether Mr Haw will be able to persuade a judge that he should be able to maintain a tent on the grassed area of PSG, even if he establishes that, for the medical or other reasons, his being prevented from doing so would render it significantly harder for him to maintain his demonstration on the pavement facing the Houses of Parliament. His right to express his views is not being challenged, and it is by no means clear that, if he had to sleep elsewhere, he would be precluded from maintaining his pitch where it is. Even if his ability to maintain his pitch is, albeit indirectly, under challenge, it might well be stretching his article 10 rights too far to say that he should be entitled, particularly after having done so for so long, to maintain his demonstration in the precise location of his choice, by trespassing on adjoining public property. However, I think that he is entitled to have his case decided on the basis of the medical and other evidence he wishes to put before the court, and to have a reasoned judgment on the issue.

Issues relating to costs

70 The main argument on costs was that of Ms Hall, who was ordered to pay the costs of the possession proceedings, but not of the injunction proceedings, as the judge accepted that she would not disobey the possession order, and would be deterred by magistrates' court proceedings. She said it was illogical that she should have to pay the costs of the possession proceedings and not receive the costs of the injunction proceedings. When Stanley Burnton LJ put to him the point that it would be simpler to make no order for costs as between her and the mayor in relation to the whole proceedings, Mr Underwood realistically and fairly said that he had no submission to make.

71 So far as the other defendants are concerned, it was submitted that it was unfair that each of them should potentially be liable for the costs of an eight-day action, with two directions hearings. I have some sympathy with that view, but the judge did find that the Democracy Village defendants were, as it were, in it together. He said [2010] EWHC 1613 (QB) at [138]:

> "on the evidence and the balance of probabilities I am satisfied in the case of each defendant that he or she knew of such breaches by others who were part of Democracy Village and for the purposes of the criminal law aided and abetted the commission of such breaches."

In the light of that finding, I consider that it is hard for the Democracy Village defendants to object to an order which effectively renders each of them jointly and severally liable for the costs of these proceedings. None the

A less, I would limit the extent of those costs to 80% of the total costs, as part of the costs related to Mr Haw, Mrs Tucker, and Ms Sweet, whose case was separate, and anyway is being remitted.

Conclusions

72 On the various substantive issues which have been raised, I would B grant Mr Haw (and Mrs Tucker and Ms Sweet) permission to appeal on the issue whether it is proportionate to make an order for possession or to grant an injunction against him, grant his appeal, and would remit that issue to the High Court. Otherwise, I would refuse permission to appeal on all other substantive issues, save that the order for possession against the other defendants will have to be amended to exclude the area occupied by Mr Haw's tent.

C **73** I would grant Ms Hall permission to appeal on costs, allow her appeal, and substitute for the partial order for costs against her, a direction that there be no order for costs as between her and the mayor. I would also grant permission to the Democracy Village defendants to appeal on costs. As I have indicated, I would allow their appeal to the extent of limiting their liability to 80%, rather than 100%, of the mayor's costs on a standard basis.

74 No doubt counsel can prepare an appropriate form of order. The D order should include directions to ensure that the rehearing of the claims against Mr Haw is disposed of very speedily.

75 Finally, I would like to express my appreciation to all those, whether lawyers or defendants, who addressed the court orally or in writing: this was a case involving a large number of parties and two significant legal issues, as well as other points, and it was disposed of efficiently and fairly in a day. E Our task was also greatly assisted by the quality of the oral and written submissions and the judgment below.

ARDEN LJ

76 I agree.

STANLEY BURNTON LJ

F **77** I also agree.

Appeals of second and third defendants allowed on issue of proportionality only. Issue remitted to High Court for rehearing.

G *Permission to appeal refused to all other applicants.*

Appeal of first defendant on costs allowed.

Order for costs against Democracy Village defendants varied.

SUSAN DENNY, Barrister

H

Court of Appeal A

City of London Corpn *v* Samede and others

[2012] EWCA Civ 160

2012 Feb 13; 22 Lord Neuberger of Abbotsbury MR, Stanley Burnton, McFarlane LJJ B

Human rights — Freedom of expression — Freedom of assembly — Interference with — Demonstrators setting up camp in St Paul's Cathedral churchyard obstructing highway and in breach of planning control — Majority of occupied land owned by local authority having planning control over portion of occupied land owned by Church — Judge granting local authority's claims for possession and injunction requiring removal of all tents — Whether unjust interference with demonstrators' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11 C

In the middle of October 2011 the defendants and others set up in the churchyard of St Paul's Cathedral a protest camp consisting of a large number of tents, which were used for overnight accommodation, meetings and other activities and services. Many of the occupants of the tents designated their organisation the "Occupy Movement" or "Occupy London" whose concerns were mainly centred on the perceived crisis of capitalism and the banking industry and the inability of democratic institutions to deal with many of the world's most pressing problems. The greater part of the occupied land was open land owned by and under the responsibility of the claimant local authority as planning or highway authority, while a portion was owned by the Church over which the claimant had planning control. The local authority brought proceedings for possession of the occupied land, for an injunction requiring the defendants to remove the tents from all the occupied land and not to erect tents on that land thereafter, and for declarations that the claimant was entitled to remove the tents. The judge found that the defendants had no defence to the claim for possession, that the camp was a clear and unreasonable obstruction of the highway and a breach of planning control, and concluded that the defendants' rights of freedom of expression and freedom of assembly under, respectively, articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] were undoubtedly engaged, but that the factors for granting the claimant relief easily outweighed the factors against. The judge considered that the claimant had convincingly established a pressing social need not to permit the camp to remain, that the orders sought represented the least intrusive way to meet that need, and that it would not be disproportionate to grant the relief claimed, and he granted the orders in the claimant's favour. D E F

On the defendants' applications for permission to appeal—

Held, dismissing the applications, that the case raised the question as to the limits to the right of lawful assembly and protest on the highway; that the answer was inevitably fact-sensitive, and would normally depend on a number of factors G

[1] Human Rights Act 1998, Sch 1, Pt I, 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 health or morals, for the protection of the reputation or rights of others . . ." H

Sch 1, Pt I, 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, for the protection of health or morals or for the protection of the rights and freedoms of others . . ."

© 2012 The Incorporated Council of Law Reporting for England and Wales

A including but not limited to the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupied the land, and the extent of the actual interference the protest caused to the rights of others as well as the property rights of the owners of the land and the rights of any members of the public; that articles 10 and 11 of the Convention were undoubtedly engaged in that the defendants were entitled to invoke their rights under those provisions in relation B to the maintenance of the camp; that it could be appropriate and fair to take into account the general character of the views whose expression the Convention was being invoked to protect, but that could not be a factor which trumped all others and was unlikely to be particularly weighty; that the judge had taken into account the fact the defendants were expressing strongly held views on very important issues but further analysis of those views and issues would have been unhelpful and inappropriate; that by the time the judge came to give his judgment the camp had been for three months trespassing in the churchyard, substantially interfering with C the public right of way and the rights of those who wished to worship in the cathedral, in breach not just of the owner's property rights and of planning control but significantly causing other problems connected with health, nuisance and the like and some damage to local businesses, and was likely to continue, so that it was very difficult to see how the defendants' Convention rights could ever prevail against the will and rights of the landowner and the rights of others by their continuous and exclusive occupation of public land; that, furthermore, whether a court should make D orders which were less intrusive would require a defendant to propose a specific arrangement which would be workable in practice and would not give rise to such breaches of statutory provisions and the rights of others as in the present case; that no such proposal had been put forward nor realistically could any have been; that, therefore, there was no basis for saying that any of the defendants' criticisms, even taken together, could persuade an appellate court that the judge's decision was wrong; and that, accordingly, the judge had been entitled to reach the conclusion that E he had (post, paras 23, 28, 38, 39, 41, 44, 49, 53–55, 60).

Per curiam. In future cases of this nature, where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of others, it should be possible for the hearing to be disposed of at first instance more quickly than in the present case. Little if any court time need be taken up with evidence of the defendant protesters explaining to F the court the views they were seeking to promote. The contents of those views should not be in dispute, and they are very unlikely to be of much significance to the legal issues involved. While it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case did not take up a disproportionate amount of court time (post, paras 62, 63).

Mayor of London (on behalf of the Greater London Authority) v Hall [2011] G 1 WLR 504, CA applied.

Decision of Lindblom J [2012] EWHC 34 (QB) affirmed.

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

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)
Appleby v United Kingdom (2003) 37 EHRR 783
H *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
G v Federal Republic of Germany (1989) 60 DR 256
G v Norway (1984) 6 EHRR SE 357, EComHR
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR

© 2012 The Incorporated Council of Law Reporting for England and Wales

London (Mayor of) (on behalf of the Greater London Authority) v Hall [2010] EWHC 1613 (QB); [2010] HRLR 723; [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Lucas v United Kingdom (Application No 39013/02) (unreported) 18 March 2003, ECtHR
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2011] PTSR 61; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] 1 All ER 285, SC(E)
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)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA

The following additional cases were cited in argument:

R (British Broadcasting Corpn) v Secretary of State for Justice [2012] EWHC 13 (Admin); [2012] 2 All ER 1069, DC
Steel v United Kingdom (2005) 41 EHRR 403
Sunday Times v United Kingdom (1979) 2 EHRR 245

APPLICATIONS for permission to appeal

On 15 and 16 October 2011 a protest camp was set up in the churchyard of St Paul's Cathedral consisting of a large number of tents. Notice was served by the claimant, the City of London Corpn, on the camp on 16 November requiring the removal of the tents by the next day. The tents not having been removed, on 18 November the claimant issued proceedings against persons unknown for possession of the highway and other open land in the churchyard and injunctions requiring the removal of the tents and other structures in the camp. On 25 November at a directions hearing Wilkie J appointed Tammy Samede as the representative defendant of those taking part in the protest, and George Barda and Daniel Ashman were added as litigants in person as second and third defendants. After a five-day hearing in December 2011, Lindblom J on 18 January 2012 [2012] EWHC 34 (QB) granted orders for possession in favour of the claimant, an injunction and declarations that the claimant was entitled to remove the tents from all areas, and he refused permission to appeal.

The defendants applied for permission to appeal on the ground that the judge's decision was wrong because it was not the least intrusive interference with the defendants' engaged rights that could be justified under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998. On 30 January 2012, the Court of Appeal (Stanley Burnton LJ) directed that all applications for permission to appeal be listed before a three-judge Court of Appeal to include the Master of the Rolls and two Lords Justices of Appeal on 13 February 2012. The fourth and fifth defendants, Paul Randle-Jolliffe and Stephen Moore were added as parties before the hearing of the permission to appeal.

The facts are stated in the judgment of the court.

John Cooper QC and *Michael Paget* (instructed by *Kaim Todner Solicitors Ltd*) acting pro bono for the first defendant.

Felicity Williams (instructed directly) acting pro bono for the second defendant.

© 2012 The Incorporated Council of Law Reporting for England and Wales

A The third to fifth defendants, with assistants, in person.

David Forsdick and *Zoe Leventhal* (instructed by *Comptroller and City Solicitor, City of London Corpn*) for the claimant local authority.

The court took time for consideration.

22 February 2012. **LORD NEUBERGER OF ABBOTSBURY MR**
B handed down the following judgment of the court to which all members had contributed.

1 On 18 January 2012 Lindblom J handed down a very full and careful judgment, following a five-day hearing the previous month. Having heard consequential arguments, he then made orders in favour of the Mayor Commonalty and Citizens of the City of London ("the City"), against three
C named defendants Tammy Samede (who had been appointed by the court as a representative defendant), George Barda, and Daniel Ashman and "persons unknown". If implemented, the effect of these orders would be to put an end to the camp which has been located in the St Paul's Cathedral churchyard in London since 15 October 2011, and has received much publicity.

D
The factual background

2 The camp was described by the judge in his judgment [2012] EWHC 34 (QB) at [4] in these terms:

> "It consists of a large number of tents, between 150 and 200 at the time of the hearing, many of them used by protestors, either regularly or from
> E time to time, as overnight accommodation, and several larger tents used for other activities and services including the holding of meetings and the provision of a 'university' (called 'Tent City University'), a library, a first aid facility, a place for women and children, a place where food and drink are served, and a 'welfare' facility. The size and extent of the camp has varied over time. Shortly before the hearing its footprint receded in some
> F places. At an earlier stage some adjustments had been made to it in an effort to keep fire lanes open."

3 Many of the occupiers of the camp have designated their organisation the "Occupy Movement". The concerns of the Occupy Movement were summarised by the judge, at para 155 as:

> "largely [centring] on, but . . . far from being confined to, the
> G crisis—or perceived crisis—of capitalism, and of the banking industry, and the inability— or perceived inability—of traditional democratic institutions to cope with many of the world's most pressing problems. They encompass climate change, social and economic injustice, the iniquitous use of tax havens, the culpability of western governments in a number of conflicts, and many more issues besides. All of these topics,
> H clearly, are of very great political importance."

4 The concerns of those in the camp are well summarised in that passage, and they were well articulated before us. In particular, Mr Barda, Mr Ashman and the Mr Randle-Jolliffe, in powerful, eloquent and concise submissions, advanced the causes which the Occupy Movement and the

© 2012 The Incorporated Council of Law Reporting for England and Wales

camp stand for, with a passion which was all the more impressive given the restraint and humour with which their arguments were presented.

5 The majority of the area occupied by the camp consists of a piece of highway land owned by the City, but the occupied area also includes other open land which is owned by the Church. The City's claim was for orders for (i) possession of the highway land which it owns and which is occupied by the camp, (ii) an injunction requiring the removal of the tents from that land, and restraining the erection of tents thereon in the future, (iii) an injunction requiring the removal of the tents from the land owned by the Church, and restraining the erection of tents thereon in the future, (iv) possession of adjoining highway land and open space land owned by the City and onto which it was feared that the camp would move, and (v) an injunction restraining the erection of tents on the adjoining land in the future. Apart from its right to possession of the land referred to in (i) and (iv), the City principally relied on its power to seek injunctive relief under section 130(5) of the Highways Act 1980, as the camp obstructs the highway, and under section 187B of the Town and Country Planning Act 1990, as the camp breaches planning control and an enforcement notice has been served.

The judgment of Lindblom J

6 At [2012] EWHC 34 (QB) at [1] the judge identified the general issue which these proceedings involved as being "the limits to the right of lawful assembly and protest on the highway", which, as he said, "[in] a democratic society [is] a question of fundamental importance." More specifically, the judge said that these proceedings raised the question whether the limits on the rights of assembly and protest:

> "extend to the indefinite occupation of highway land by an encampment of protestors who say this form of protest is essential to the exercise of their rights under articles 10 and 11 of the . . . Convention on Human Rights, when the land they have chosen to occupy is in a prominent place in the heart of the metropolis, beside a cathedral of national and international importance, which is visited each year by many thousands of people and where many thousands more come to exercise their right, under article 9 of the Convention, to worship as they choose?"

7 At para 13, the judge correctly identified the three main issues for him as being:

> "first, whether the City has established that it is entitled to possession of [the areas it owns], so that, subject to the court's consideration of the interference with the defendants' rights under articles 10 and 11 of the Convention, an order for possession ought to be granted; second, whether, again subject to the court's consideration of the interference with the defendants' rights, the City should succeed in its claim . . . and third, whether the interference with the defendants' rights entailed in granting relief would be lawful, necessary and proportionate."

8 In the following two paragraphs, he recorded that the City did not dispute that the defendants' rights under articles 10 (freedom of expression)

© 2012 The Incorporated Council of Law Reporting for England and Wales

A and 11 (freedom of assembly) of the Convention were engaged. He then stated that the City contended that the orders it was seeking did not prevent the defendants from exercising those rights, and that they would amount to a "justified interference" with those rights. He also mentioned that the City's case, in summary terms, was that the defendants could not rely on articles 10 and 11 of the Convention to justify occupying land as "a semi-permanent campsite", particularly bearing in mind that such occupation was B in breach of a number of statutory provisions, infringed the property rights of the City and the Church, and also impeded other members of the public from enjoying their rights, most notably the right of access to the cathedral to worship, which engages article 9 of the Convention (freedom of religion), and obstructed the use of the highway by members of the public generally.

9 The judge then explained, at paras 17–100, in some detail the C evidence which he had heard from witnesses called on behalf of the City and on behalf of the defendants, and some of the distinguished people who had provided written evidence in support of the views supported and propagated by the Occupy Movement. In the next 13 paragraphs he summarised the arguments which had been advanced to him. At paras 114–152, the judge then discussed the various issues which had been raised under three D headings, which reflected the three main issues which he had identified.

10 Under "Possession", at paras 114–126, the judge concluded that the defendants were in occupation of the areas of land owned by the City and had no domestic law defence to the City's possession claim. Under the heading "Injunctive and declaratory relief", in the next 17 paragraphs (paras 127–143), the judge concluded that the camp was "undoubtedly" an E "unreasonable obstruction of the highway" and a breach of planning control, both of which the City had a duty to enforce, and which applied to the area of land owned by the Church.

11 In those circumstances, as the judge said, the only basis upon which the defendants could hope to succeed in resisting the relief sought by the City was under the third heading "Human rights", which he dealt with at paras 144–164. We shall describe his analysis in those paragraphs in a little F more detail.

12 He began by discussing the arguments raised by the defendants. They relied on "the fundamental importance in a democratic society of the rights under articles 10 and 11 of the Convention" (para 154), which was, as the judge accepted, a good point—as far as it went. The defendants also relied on the fundamental importance of the concerns which motivated G them. As to that the judge said, at para 155: "The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command." However, he accepted that he should:

> "give due weight not only to the defendants' conviction that their protest is profoundly important but also to their belief that it is essential H to the protest and to its success that it is conducted in the manner and form they have chosen for it—by a protest camp on the land they have occupied in St Paul's Churchyard."

13 It was next contended by the defendants, at para 156, that "some inconvenience to other members of the public would be likely to result even

© 2012 The Incorporated Council of Law Reporting for England and Wales

from a lawful protest on this part of the highway." The judge said that, in his view:

> "the harm caused by this protest camp, in this place, is materially greater than the harm that would be likely if the protest were conducted by the same protestors, assembling every day but without the tents and all the other impedimenta they have brought to the land."

He went on to reject the "suggestion that the City's main concerns could be met by an injunction stipulating that no tents were to be occupied between certain hours" on the ground that it was "wholly unconvincing". He doubted that it could be enforced. Anyway, he said, "it would not serve to remove the obstruction of the highway" or "overcome the problems attributable to the presence of the camp, including the damage being done to the work of, and worship in, the cathedral, to the amenity of the cathedral's surroundings, and to local businesses".

14 The defendants also relied on the fact that they had been prepared to negotiate after the City resorted to litigation. The judge was unimpressed with that, not least because the defendants and their representatives had not come up with any clear proposals. Finally, the defendants submitted (para 158) that "many of the protestors have done everything they can to limit the impacts of the protest camp." However, the judge said, even accepting that was true, "the defendants have not been able to prevent the camp causing substantial harm", namely obstruction of the highway, nuisance by noise, and "[disruption to] the exercise by others of their Convention rights, including the article 9 rights of those who wish to worship in St Paul's Cathedral".

15 The judge then turned to the five arguments raised by the City which he described as being, in his view, "very strong" (para 159). First, he thought he should give (para 160):

> "considerable weight to the fact that Parliament has legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them, and local planning authorities powers to enforce planning control in the public interest."

He then referred to section 2 of the Local Government Act 2000, section 137 of the Highways Act 1980, section 179 of the Town and Country Planning Act 1990, section 269 of the Public Health Act 1936, and section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict c 32). He said that the significant point was that:

> "the continued presence of the protest camp on this land is plainly at odds with the intent and purpose of [those] statutory schemes . . . The corollary is this. For Parliament's intention in enacting those statutory schemes to be given effect it is necessary for the relief sought by the City to be granted."

16 Secondly, as the judge accepted (para 161), "it would be impossible . . . to reconcile the presence of the protest camp with the lawful function and character of this land as highway". He drew support from what was said in this court in *Mayor of London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 48.

© 2012 The Incorporated Council of Law Reporting for England and Wales

A 17 Thirdly, the judge (para 162) was "convinced that the effects of [the] protest camp . . . have been such as to interfere seriously with the rights, under article 9 of the Convention, of those who desire to worship in the cathedral". He explained that:

> "During the camp's presence, and, in my view, largely if not totally as a result of its presence, there has been a drop of about two fifths in the B numbers of those worshipping in the cathedral. About the same fraction has been lost in the number of visitors, an important source of funds for the upkeep of the building and for its ministry".

He also took into account "the effects of the presence of the protest camp on the work and morale of the cathedral staff as a significant factor in the balancing exercise", referring to the fact that "noise from the camp has been C a persistent problem", that "members of the cathedral's staff have been verbally abused", and that "[graffiti have] been scrawled on the Chapter House and on the cathedral itself".

18 Fourthly, at para 163, the judge explained that the camp caused other problems. By interfering with the public right of way, and reducing pedestrian traffic, the camp had, he thought, "damaged the trade of local D businesses". Also, as the judge found, it had resulted in a "loss of open space that the public can get to", "has strained the local drainage system beyond capacity", "has caused nuisance by the generation of noise and smell", and "has made a material change in the use of the land for which planning permission would not be granted". The judge also thought that, albeit perhaps only indirectly, the camp had resulted in "an increase in crime and E disorder around the cathedral". Fifthly, the judge said, at para 164, "the length of time for which the camp has been present is relevant", citing the *Hall* case, at para 49.

19 The judge therefore concluded, at paras 165–166, that "when the balance is struck, the factors for granting relief in this case easily outweigh the factors against", that the City had "undoubtedly" "convincingly F established a pressing social need not to permit the defendants' protest camp to remain in St Paul's Churchyard, and to prevent it being located elsewhere on any of the land to which these proceedings relate", and that it would "undoubtedly" not be "disproportionate to grant the relief the City has claimed". He was clear that the orders the City was seeking represented "the least intrusive way in which to meet the pressing social need, and strikes a fair balance between the needs of the community and the individuals G concerned so as not to impose an excessive burden on them", and that to withhold relief would simply be "wrong".

These applications

20 After hearing argument as to the form of order which he should make, Lindblom J concluded that he should make: (1) orders for possession H in respect of the two areas of land owned by the City at St Paul's Churchyard and occupied by the defendants; (2) an injunction requiring the defendants (a) to remove forthwith all tents in the area currently occupied by the camp, (b) not to impede the City's agents from removing such tents, and (c) not to erect tents on the other areas around the cathedral the subject of the

© 2012 The Incorporated Council of Law Reporting for England and Wales

proceedings; and (3) declarations that the City could remove tents from all those areas.

21 Lindblom J refused permission to appeal, but the three named defendants, Ms Samede, Mr Barda, and Mr Ashman, then applied for permission to appeal from this court. Their written applications came before Stanley Burnton LJ, who ordered that the applications be heard in court with the appeals to follow if permission to appeal is granted.

22 The hearing of those applications took place on 13 February and lasted a full day. Ms Samede and Mr Barda were respectively represented by Mr Cooper QC and Mr Paget and by Ms Williams (who were acting pro bono, and should be commended for that), and Mr Ashman represented himself. Many other members of the Occupy Movement attended (and unfortunately the court room was not big enough to accommodate all of them). Two of them, Mr Randle-Jolliffe and Mr Moore, made submissions in support of an appeal, and they were added as parties.

23 Having heard the arguments we decided to reserve judgment on the question of whether to allow the projected appeals to proceed, and if so, on what points. We have decided that permission to appeal should be refused, for the reasons which follow.

Are articles 10 and 11 engaged?

24 Stanley Burnton LJ raised the question whether it was clear that the City was right to concede that articles 10 and 11 of the Convention were engaged. The European Court of Human Rights ("the Strasbourg court") jurisprudence establishes that it was. In that connection it is worth referring to *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 where the Strasbourg court considered the case of an applicant who took part in a small demonstration which, for a short time, obstructed access to a public court building. The court, at para 35,

> "[reiterated] at the outset that the right to freedom of assembly covers both private meetings and meetings on public thoroughfares, as well as static meetings and public processions; this right can be exercised both by individual participants and by those organising the assembly . . ."

25 As for article 10, it is clear from the Strasbourg court's decision in *Lucas v United Kingdom* (Application No 39013/02) (unreported) 18 March 2003, "that protests can constitute expressions of opinion within the meaning of article 10 and that the arrest and detention of protesters can constitute interference with the right to freedom of expression".

26 In *Appleby v United Kingdom* (2003) 37 EHRR 783 the Strasbourg court held that article 10 and article 11 raised the same issues in a case where a group of people were banned from seeking to collect signatures for a petition from shoppers in a privately owned shopping centre. It was held that there was no infringement of the Convention because the ban did not have "the effect of preventing any effective exercise of freedom of expression or [of destroying] the essence of the right", not least because they could carry out their activities elsewhere: paras 47 and 48.

27 Domestic law is consistent with this view. Thus in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a

© 2012 The Incorporated Council of Law Reporting for England and Wales

A positive duty to take steps to ensure that lawful public demonstrations can take place, and the same view was taken by this court in the *Hall* case [2011] 1 WLR 504. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February 2009 is also worth mentioning. In that case bylaws preventing the maintenance of the long-standing, one weekend a month, Aldermaston Women's Peace Camp, protesting on government B owned open land against nuclear weapons, were held to breach the protesters' Convention rights. As Laws LJ said, at para 37: "the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it', and, to the protesters, " 'the manner and form' *is* the protest itself".

28 It is clear from the judge's findings, and from what was said by the defendants who addressed us, that the Occupy Movement seeks to C propagate the views summarised by Lindblom J in the passage, set out in para 3 above, to educate members of the public about those views, and to engage in dialogue with others about those views. It is also clear that this aim is sought to be achieved through the activities, leaflets, books, newspapers and speeches at the camp, reinforced by its attendant publicity, which is partly attributable to its large size and prominent location, not D merely in the City of London (the heart of the financial world), but in the churchyard of St Paul's Cathedral. In those circumstances it seems clear that articles 10 and 11 of the Convention are engaged—i e the defendants can invoke their rights under those provisions of the Convention in relation to the maintenance of the camp. (During the hearing it was suggested that at least some of the defendants might also be entitled to invoke article 9; it is E unnecessary to decide the point, as it can take matters no further in the same way as article 11 took matters no further over article 10 in the *Appleby* case 37 EHRR 783, para 52.)

The argument that the judge should have dismissed the City's claim

29 With the exception of Ms Samede, the defendants making the F present applications are seeking to set aside all the orders made by Lindblom J, on the basis that they contend that the judge ought not to have found for the City at all, but should have dismissed the claim and allowed the camp to continue in place. It is convenient to deal first with one or two rather esoteric arguments raised by Mr Randle-Jolliffe.

30 First, he challenged the judgment on the ground that it did not apply G to him, as a "Magna Carta heir". But that is a concept unknown to the law. He also says that his "Magna Carta rights" would be breached by execution of the orders. But only chapters 1, 9 and 29 of Magna Carta (1297 version) survive. Chapter 29, with its requirement that the state proceeds according to the law, and its prohibition on the selling or delaying of justice, is seen by many as the historical foundation for the rule of law in England, but it has no bearing on the arguments in this case. Somewhat ironically, the other H two chapters concern the rights of the Church and the City of London, and cannot help the defendants. Mr Randle-Jolliffe also invokes "constitutional and superior law issues" which, he alleges, prevail over statutory, common law, and human rights law. Again that is simply wrong—at least in a court of law.

© 2012 The Incorporated Council of Law Reporting for England and Wales

31 Another ground he raised was the contention that the City had no locus standi to bring the proceedings "as the current mayoral position has been previously usurped by the guilds and aldermen in contravention of the City of London's 1215 Royal Charter". We do not understand that point, not least because both the Lord Mayor and the aldermen and guilds (through the Commonalty and Citizens) are included in the claimants.

32 Three arguments raised by Ms Williams on behalf of Mr Barda, and supported by Mr Ashman, can also be taken shortly. First, it was said that the City's arguments based on the breach of the various statutes identified in the judgment, and the public rights and the City's powers and duties under the statutes referred to, are not of themselves enough to render the judge's decision proportionate. Even if that is right (and we rather doubt whether it is) these concerns were only the subject of the first of the five reasons which, when combined, persuaded the judge to reach the conclusion that he reached.

33 Secondly, it was said that the judge was wrong to take into account the increase in crime: [2012] EWHC 34 (QB) at [163]. It is true that the evidence showed that the police considered that those responsible for the camp had done their best to minimise the risk of criminal activity, but there was evidence that crime had increased in the area, so there was evidence which justified the judge's view. But the point can be said to cut both ways: there is no guarantee that the admirable care to ensure that criminal activity is kept to a minimum would continue. Anyway, it is fanciful to suggest that the judge would not have reached the conclusion that he did if he had thought that the evidence or arguments did not satisfy him that he should take this factor into account.

34 Thirdly, it was said that the judge ought not to have found as he did, at para 162, that there was any interference with the rights of those who wished to worship at St Paul's Cathedral, given that (a) no worshipper gave evidence, and (b) the Occupy Movement stands for the same values as the Church of England. As to (a), the judge was plainly entitled to reach the conclusion that he arrived at. He had figures which showed a very significant reduction in worshippers at, and visitors to, the cathedral since the camp had arrived, and evidence of opinion from the cathedral registrar that the reduction was caused by the camp. While there were some other possible explanations for the reduction, the judge was, to put it at its lowest, entitled to reach the view that he did. As to point (b), it is true that some prominent members of the Church of England have expressed support for the camp, but that is no answer to the judge's concern about the interference by the camp with the access of people who wish to worship in the cathedral.

35 Mr Ashman had two further criticisms of the judgment. First, he complained that the judge wrongly referred to the camp as a "protest" camp. We accept that the aims of Occupy London are not by any means limited to protesting in the familiar sense of, say, a protest march. The aims of the movement, as implemented in the camp, include education, heightening awareness and fostering debate. However, the judge was plainly aware of this, as the passages in his judgment quoted in paras 2 and 3 above demonstrate. Further those activities do include protesting; indeed they may be said to be based on protesting, in the sense that the Occupy Movement's raison d'être is, at least to a substantial extent, based on its opposition to

© 2012 The Incorporated Council of Law Reporting for England and Wales

A many of the policies, especially economic, financial, and environmental policies, adopted by the United Kingdom Government.

36 Secondly, it is said that the defendants intend to strike the camp, possibly by the end of this month. It is by no means clear that this would happen voluntarily. Indeed, the impression given by Mr Ashman, when he was asked about this, was that the camp would only be struck when the B Occupy Movement believed that it had had a definite effect in the form of some sort of change of government policy. All in all it appears improbable that the camp will cease voluntarily within the next few months. If the judge was otherwise right to make the orders which were made, it would have required a very clear commitment by the defendants to vacate the churchyard in the very near future before there could even have been any possibility of justifying the judge not making the orders.

C 37 The broadest argument in support of the contention that the orders made by Lindblom J should simply be set aside is rather more fundamental. That argument is that, assuming the correctness of all the findings of fact made, and the relevant factors identified, by the judge in his judgment, it was an unjustified interference with the defendants' Convention rights to make any order which closed down the camp. This argument amounts to saying D that articles 10 and 11 effectively mandated the judge to hold that the camp should be allowed to continue in its current form, presumably for the foreseeable future. The basis of this argument is that, on the facts of this case, there was an insufficiently "pressing social need in a democratic society" to justify the orders which the judge made, bearing in mind the defendants' article 10 and 11 rights.

E 38 This argument raises the question which the judge identified at the start of his judgment, namely "the limits to the right of lawful assembly and protest on the highway", using the word "protest" in its broad sense of meaning the expression and dissemination of opinions. In that connection as the judge observed, at para 100, it is clear that, unless the law is that "assembly on the public highway *may* be lawful, the right contained in article 11.1 of the Convention is denied"—quoting Lord Irvine of Lairg F LC in *Director of Public Prosecutions v Margaret Jones* [1999] 2 AC 240, 259. However, as the judge also went on to say, at para 145:

> "To camp on the highway as a means of protest was not held lawful in *Director of Public Prosecutions v Jones*. Limitations on the public right of assembly on the highway were noticed, both at common law and under article 11 of the Convention: see Lord Irvine LC at p 259A–G, Lord Slynn G of Hadley at p 265C–G, Lord Hope of Craighead at p 277D–278D, and Lord Clyde at p 280F. In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping."

39 As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact sensitive, and will H normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes

© 2012 The Incorporated Council of Law Reporting for England and Wales

to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

40 The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155:

> "it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command . . . the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous."

41 Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were "of very great political importance": para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia*, para 45:

> "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means . . ."

The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate.

42 In *Appleby v United Kingdom* 37 EHRR 783 the Strasbourg court accepted that the applicants' article 10 and 11 rights were engaged, but held, at para 43, that there was no infringement of those rights because "[regard] must also be had to the property rights of the owner of the [privately owned] shopping centre", and there were other places where the applicants could exercise their article 10 and 11 rights. While St Paul's Churchyard is a particularly attractive location for the movement, in view of its prominence

© 2012 The Incorporated Council of Law Reporting for England and Wales

A in the City of London, the judge's orders clearly do not prevent the movement protesting anywhere other than the churchyard. And there are many "rights" with which the camp interferes adversely.

43 The level of public disruption which a protest on public land may legitimately cause before interference with article 10 and 11 rights is justified was discussed by the Strasbourg court in the *Kuznetsov* case, para 44. After B explaining that the demonstration in that case had lasted about half an hour, and had blocked the public passage giving access to a court house, the court emphasised that a degree of tolerance is required from the state, and then said this:

> "The court considers the following elements important for the assessment of this situation. Firstly, it is undisputed that there were no C complaints by anyone, whether individual visitors, judges or court employees, about the alleged obstruction of entry to the court house by the picket participants. Secondly, even assuming that the presence of several individuals on top of the staircase did restrict access to the entrance door, it is creditable that the applicant diligently complied with the officials' request and without further argument descended the stairs onto the pavement. Thirdly, it is notable that the alleged hindrance was D of an extremely short duration. Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all E substance . . . Accordingly, the court is not satisfied that the alleged obstruction of passage, especially in the circumstances where the applicant gave evidence of his flexibility and readiness to cooperate with the authorities, was a relevant and sufficient reason for the interference."

44 In that case, the demonstration amounted to a trespass and blocked a public right of way, but it not only lasted only 30 minutes, but it appeared to F interfere with no public rights in practice, and ended as soon as the police requested it to end. In this case, by the time that Lindblom J came to give his judgment, the camp was, and had been for three months, (i) trespassing in St Paul's Churchyard, (ii) substantially interfering with the public right of way and the rights of those who wished to worship in the cathedral, (iii) in breach of planning control, and (iv) causing strain on public health facilities, and G some damage to local businesses. In those circumstances, far from it not being open to the judge to make the orders that he made, it seems to us that there is a very powerful case indeed for saying that, if he had refused to make any order in the City's favour, this court would have reversed him.

45 The facts of this case are a long way from those in the *Tabernacle* case [2009] EWCA Civ 23 where (i) members of the public (and therefore, at least prima facie the protesters) had the right to pitch tents where the protest H was camped, (ii) the protest camp was in place only one weekend a month, (iii) there was no interference with any third party rights, (iv) the very object of their protest was on adjoining land owned by the same public landowner, and (v) the protest had continued for 20 years with no complaint. On the other hand, in one respect the defendants' case is stronger than that of the

© 2012 The Incorporated Council of Law Reporting for England and Wales

applicants in *Appleby v United Kingdom* in that the land involved here is publicly owned; against that, the activities of the applicants in the *Appleby* case, unlike those of the defendants here, did not involve possessing the land concerned, or interfering with its use by other people, or with the enjoyment of other peoples' Convention rights.

46 The contrast between the facts of this case and those in the *Kuznetsov* case is very marked. In that case the period of occupation of the public passage way by the protesters was less than an hour, during which the protesters accommodated the requests of the authorities, there was no evidence of any actual obstruction of anyone else's rights, and there was no suggestion of the breach of any statutory provisions or of any nuisance or public health implications. It is true that the Convention rights of the protesters in the *Kuznetsov* case were held to be infringed, but the way in which the Strasbourg court expressed itself (as quoted at para 43 above) is not helpful to the defendants in this case, to put it mildly. That point is reinforced by the fact, pointed out by the judge [2012] EWHC 34 (QB) at [145], that "complaints brought against evictions in cases where a protest on a far smaller scale than [the camp] has blocked a public road or occupied a public space have been held inadmissible [by the Commission]": see *G v Federal Republic of Germany* (1989) 60 DR 256 and *G v Norway* (1984) 6 EHRR SE 357.

47 It is worth referring in a little more detail to the Commission's decision in *G v Germany*, not least because it was cited with approval by the Strasbourg court in its judgment in *Lucas v United Kingdom* 18 March 2003. *G v Germany* 60 DR 256 concerned a sit-in, which was a protest against nuclear arms and which obstructed a highway, which gave access to a United States army barracks in Germany, for 12 minutes every hour. Consistently with all the relevant authorities, the Commission said that it considered that "the right to freedom of peaceful assembly is secured to everyone who organises or participates in a peaceful demonstration." However, it went on to say:

> "the applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration . . . as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued."

48 The domestic case with the greatest similarity to this case is the *Hall* case [2011] 1 WLR 504, which was concerned with a protest camp, known as the Democracy Village, on Parliament Square Gardens ("PSG") opposite

© 2012 The Incorporated Council of Law Reporting for England and Wales

A the Houses of Parliament in London. In that case, at paras 46–47, this court held that it was "to put it at its lowest . . . open to the judge" to conclude that there was

> "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of PSG and to demonstrate with authorisation but also importantly for the B protection of health . . . and the prevention of crime"

as well as to enable "the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented".

49 It would be unhelpful to attempt to determine whether in these proceedings the City had a stronger or weaker case than the Mayor of C London in the *Hall* case. Indeed, if the court entered into such a debate, it would risk trespassing into the forbidden territory discussed by the judge in the passages referred to in para 12 above. The essential point in the *Hall* case and in this case is that, while the protesters' article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner when they are continuously and D exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance, and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely.

50 During the hearing of the applications, reliance was placed on the E fact that the camp was also used as a place where the homeless could be accommodated. That is a new argument, not raised below. Further, although it may add article 8 of the Convention into the issues, in that it might be said that the orders made below would involve evicting the formerly homeless from their homes, we do not think that the point can possibly assist the defendants. It must be doubtful whether the very F temporary sleeping facilities at the camp afforded to some homeless people results in their article 8 rights being engaged. Even if it does, the defendants' article 10 and 11 (and possibly article 9) rights are not nearly close enough to balancing the factors in favour of making Lindblom J's orders, for the relatively weak article 8 rights in play to have any possibility of tipping the balance the other way.

G

The argument that the judge should have made more limited orders

51 In reliance on the principle that, even where it concludes that it is appropriate to make an order which interferes with an individual's Convention rights, the court should ensure that it identifies the least intrusive way of effecting such interference, Mr Cooper contends that the orders made by the judge were too extreme. The judge could, and should, he argues, have H made an order which was less intrusive of the defendants' Convention rights than the orders which he made.

52 The first problem with that argument is that only one possible alternative to maintaining the camp in its current state was put to the judge, namely that which he discussed in para 13 above. The judge rejected that

© 2012 The Incorporated Council of Law Reporting for England and Wales

possibility for reasons which appear to us to be plainly good, and which were not challenged by Mr Cooper. However, says Mr Cooper, the judge was none the less under a duty to investigate, effectively it would appear on his own initiative, whether there was an order which he could make which would be less intrusive than those that he did make. Furthermore, says Mr Cooper, in reliance on what Lord Bingham said in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 44, if the judge did not perform that duty, the Court of Appeal should do so.

53 We are prepared to assume that in some cases a court may have a duty to investigate whether there is a less intrusive order which could be made, even though this would involve the court taking the point itself (although that assumption seems arguably inconsistent with what the Supreme Court said, albeit on a slightly different point in *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening* [2011] PTSR 61; [2011] 2 AC 104, para 61). However, as already mentioned, the point was in fact taken by the defendants, and justifiably rejected by the judge. Assuming that the judge's duty none the less required him to consider the question further, it seems to us that it cannot have required him to do more than to raise the issue with the defendants. If they were then to persuade him to make any less intrusive order than he did, they would have had to come up with a specific arrangement which (i) would be workable in practice, (ii) would not give rise, at least to anything like the same degree, as the breaches of statutory provisions and other peoples' rights, as the current state of affairs, and (iii) would be less intrusive of the defendants' Convention rights as the orders made by the judge.

54 The defendants did not put forward a proposal which satisfied any of those criteria to the judge; nor did they put forward any such proposal to the Court of Appeal. In our view, therefore, it was not open to the judge, and it would not be open to the Court of Appeal to make any such less intrusive order. If we had been presented with a proposal which was said to satisfy the three requirements referred to at the end of the previous paragraph, then we would have had to consider whether it was arguably capable of doing so, and if it had been, we would have considered allowing permission to appeal on the basis that the case would be sent back to Lindblom J.

55 However, it is only right to add that we are very sceptical as to whether any such proposal could realistically have been put forward in this case (which may well explain why it has not happened). It is not merely that the tents appear to be an integral part of the message (to use a compendious word) which the Occupy Movement is seeking to maintain through the medium of the camp, and it is impossible to see how they could remain in St Paul's Churchyard. It is also that we think it unlikely that any scheme which satisfied the second and third of the three requirements would have much prospect of satisfying the first.

Mr Moore's application

56 Mr Moore's position is rather different. Although he occupies one of the tents in the churchyard, he is not a member of the Occupy Movement and is a member of a different, smaller group, albeit one whose principles are similar to those of the movement. His case is simply that, although bound by

© 2012 The Incorporated Council of Law Reporting for England and Wales

A the orders as one of the "Persons Unknown" or as a result of Ms Samede representing all those in occupation of the churchyard, he should be allowed to appeal as neither he nor his tent was served with the City's claim form.

57 There is telling evidence to support the view that his tent was served, but the issue is sufficiently debatable for this court to accept that it cannot be decided without proper evidence. However, despite that, we do not consider B that Mr Moore has a good argument for setting the orders made aside, at least so far as they relate to him.

58 First, he saw all the papers relating to the proceedings, and clearly must have appreciated that the City was claiming possession of the land occupied by his tent, and was seeking removal of his tent. That is because, as he fairly told us, he is not unfamiliar with legal proceedings, and had advised the Occupy Movement about the City's claims for possession orders and C injunctive relief, for which purpose he was supplied with all the court papers.

59 Secondly, essentially for the reasons contained in this judgment as to why permission to appeal should be refused to the other defendants, it seems to us that he would have no reasonable prospect of persuading the Court of Appeal that he could possibly succeed in defending the proceedings if they D were re-heard as against him.

Concluding remarks

60 For these reasons, we would refuse all the defendants permission to appeal against the orders made by Lindblom J. There is no chance that any of the criticisms raised by each of the defendants, or even all of those E criticisms taken together, could persuade an appellate court that his decision was wrong. Like Griffith-Williams J at first instance in the *Hall* case [2010] HRLR 723, in a very clear and careful judgment Lindblom J reached a conclusion which, to put it at its very lowest, he was plainly entitled to reach. Indeed, as Mr Forsdick put it on behalf of the City, this was, on the judge's findings of fact and analysis of the issues, not a marginal case.

61 The hearing of this case took up five days and resulted in a F conspicuously full and careful judgment. The hearing at first instance in the *Hall* case took eight days and also resulted in a detailed and clear judgment. Each case has now also resulted in a full judgment on the application for permission to appeal. There is now, therefore, guidance available for first instance judges faced with cases of a similar nature; indeed, that is part of the purpose of this judgment.

G 62 Of course, each case turns on its facts, and where Convention rights are engaged, case law indicates that the court must examine the facts under a particularly sharp focus. None the less, in future cases of this nature (where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of H others), it should be possible for the hearing to be disposed of at first instance more quickly than in the present case or in the *Hall* case.

63 For instance, in each case a significant amount of court time was taken up by the defendant protesters explaining to the court the views they were seeking to promote. In strict principle, little if any court time need be taken up with such evidence. The contents of those views should not be in

© 2012 The Incorporated Council of Law Reporting for England and Wales

dispute, and, as we have sought to explain, they are very unlikely to be of much significance to the legal issues involved. Of course, any judge hearing such a case will not want to be thought to be muzzling defendants, who want to explain their passionately held views in order to justify their demonstration (and, at least where the defendants are as they are in this case, it is informative and thought provoking to hear those views). Accordingly, while it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case do not take up a disproportionate amount of court time.

64 We recognise, of course, that it is one thing for the Court of Appeal to make that sort of observation about a hypothetical future claim, and that it can be quite another thing for a trial judge, faced with a difficult actual claim, to comply with it. None the less, with the benefit of the guidance given in two first instance judgments and two judgments of the Court of Appeal (and the Strasbourg and domestic decisions referred to above), it is not unreasonable to hope that future cases of this sort will be capable of being disposed of more expeditiously.

65 Not least for that reason, this judgment, like that in the *Hall* case [2011] 1 WLR 504, may be cited as an authority, notwithstanding that it is a decision refusing permission to appeal.

Applications refused.

ROBERT RAJARATNAM, Barrister

© 2012 The Incorporated Council of Law Reporting for England and Wales

Neutral Citation Number: [2013] EWHC 196 (QB)

Case No: QB/2012/0543

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th February 2013

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

DR GARY PAUL DUKE	**Appellant/ Defendant**
- AND -	
THE UNIVERSITY OF SALFORD	**Respondent/ Claimant**

- -
- -

The Appellant/Defendant appeared in person
Justin Rushbrooke (instructed by **Heatons**) for the **Respondent/Claimant**

Hearing date: 28 January 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. In this libel action the University of Salford sues Dr Gary Duke over a number of blogs published by him towards the end of 2009. He applied to have the action struck out before District Judge Richmond in Manchester on 10 March 2012 on the basis that there was no reasonable prospect of success and/or that the claim was an abuse of process. This application was rejected, however, and permission to appeal was initially refused, both by the District Judge and, on paper, by Hickinbottom J on 27 June last year. A renewed application was granted by Bean J at an oral hearing so as to enable two specific matters to be resolved. The first question was a pure matter of law; namely whether a university can sue for libel at all. On the assumption that it has the capacity to bring such proceedings, the second issue for which permission was granted was whether or not this claim, or any part of it, should be struck out in accordance with the principles outlined by the Court of Appeal in *Jameel (Yousef) v Dow Jones Inc* [2005] QB 946.

2. I was surprised by the submission that no university has the capacity to sue for libel: see e.g. *University of Glasgow v Economist Ltd* [1997] EMLR 495 and *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1997] 7 HKPLR 286. I had always understood that a university would be able to sue to protect its reputation (provided the words complained of genuinely referred to the university itself, as opposed to identifiable individuals with responsibilities for its administration) and that they were such as to damage its reputation. Dr Duke, however, wished to revive an argument very similar to, if not identical with, the submission that was rejected by the Hong Kong Court of Appeal in the *Next Magazine* case. Obviously, the High Court in this jurisdiction is not bound by such a decision, but Dr Duke argues that it should not be followed in any event because, in the first place, it is simply wrong and, secondly, because Hong Kong jurisprudence does not have to take account of Article 10 of the ECHR, which enshrines and protects the rights of citizens to communicate freely and impart information.

3. The argument which Dr Duke wishes to resurrect is that the decision of the House of Lords in *Derbyshire County Council v Times Newspapers* [1993] AC 534 has the effect of preventing universities from suing for libel on the basis that they are to be regarded as public or governmental bodies providing higher education on behalf of central government which has delegated the task to them. This is simply not correct. Mr Rushbrooke, appearing for the University, pointed out that it is not the function of government to administer or provide higher education. He described that as an "Orwellian" prospect.

4. Of course, it is true that universities receive large sums of public money and that they have to comply with various statutory provisions, but that is not to say that they are to be equated with central or local government. The Court of Appeal in Hong Kong held that the *Derbyshire* case was distinguishable. As it was put by Litton VP at p.291:

> "In my judgment, the consultations which govern a body like a university are far removed from those in the *Derbyshire County Council* case. In no way does the university take part in the government of Hong Kong. It is not an organ of government, democratically elected or otherwise. If public interest be the

> test, I would hold that it strongly favours the protection of the reputation of institutions of learning like the university."

5. In this jurisdiction, if it were decided that as a matter of public policy universities should not have the right to sue for libel, that could only be implemented by the legislature or, perhaps, by the Supreme Court. In this respect, therefore, I would uphold the decision of the District Judge. It follows incidentally that the related argument put forward by Dr Duke, to the effect that a decision adverse to him would open the "floodgates" and lead to a multiplicity of libel actions brought by universities and colleges of higher education, is simply misconceived. No such flood has resulted from the law as it now stands.

6. The important question on the present appeal, therefore, is whether the claim should be struck out as an abuse of process or, as I would formulate it more specifically, whether the words complained of do actually refer to the University or defame it.

7. One can envisage circumstances in which allegations of a general nature about a university could cause genuine damage to its reputation. Such allegations, if they reflect adversely upon its employment practices or admissions policy, might well discourage prospective employees or students from making applications. One can readily understand that such an institution would have a reputation as an employer and as a teaching or research body. What must be of central importance in every case is the extent to which the words do indeed reflect upon the university itself.

8. From time to time, it has been emphasised how important it is for the court to be wary, in cases where a corporate entity is suing for libel, to ensure that it is not being "put up" or used as a protective shield when the real gravamen of the defamatory words is to reflect upon the reputation of an individual or individuals: see e.g. *Gatley on Libel and Slander* (11th edn) at para 28.4, n.16; *Carter-Ruck on Libel and Privacy* (6th edn) at para 8.7, n.1; and *Duncan & Neill on Defamation* (3rd edn) at para 10.05, n.1. Considerations of this kind have a particular resonance in the present case.

9. The words complained of appeared on a website under the name "Rat Catchers of the Sewers". A blog was operated, whereby members of the public or students of the University were encouraged to make contributions to an ongoing discussion either anonymously or by way of pseudonyms. It seems that one of the main functions of the blog was to provide a platform for criticism of various aspects of the University's administration.

10. Dr Duke criticises the lack of particularity, as he sees it, in the words complained of in the particulars of claim, but it is possible to identify the main thrust of the complaints. It would be tedious to set out all of the allegations identified in the pleading, but the publications are identified in sub-paragraphs 7(a)-(j). There is no doubt that the University was referred to in various contexts and criticisms were made as to the way it was being administered. A persistent theme, however, was the focus upon two individuals in particular, namely Dr Adrian Graves and Professor Martin Hall. Professor Hall is the Vice-Chancellor of the University and Dr Graves holds the post of Deputy Vice-Chancellor. Dr Duke told me that he has nothing against the University as such, and indeed that he has considerable respect for its high standards and its accomplishments. His criticisms were directed towards those responsible for its administration. I hasten to add that what Dr Duke himself says about this cannot

be determinative. What matters is the import of the words complained of themselves. I have come to the conclusion that any adverse comments about the University are, in context, really incidental to the attacks made upon the conduct attributed to the two individuals.

11. Mr Rushbrooke has submitted that, simply because libellous allegations reflect upon individual members of the academic staff, that does not mean that the University itself cannot also be defamed by the same words. He is quite right about that, of course, as a matter of general principle. What is important, however, is how the court construes the specific words which form the subject of complaint. I regard it as wholly unreal, and indeed an abuse of the court's process, for these proceedings to continue on the basis that the only claimant is the University when the conduct to be examined in any plea of justification or fair comment would be that of Dr Graves and Professor Hall.

12. I need to make good my conclusions by referring in a little detail to the individual passages complained of in paragraph 7.

13. The point is illustrated well by sub-paragraph (a), which refers to a blog under the heading "Registrar and Antipodean: has Dr Deputy made another grave error of judgment?" Dr Graves is referred to as "secretive" and Professor Hall (with, I believe, some irony) as a "vehement human rights activist and social-justice believer". They are said to have "adopted the antediluvian virtues of yester-yore … and have decided that staff and the wider public have a right not to know … the two top university bosses have decided that the less you know the better off we'll all be". If that is defamatory, it seems to me plainly to reflect upon the two identified individuals and the way in which their responsibilities have been discharged. I think it is fair to describe the reference to the University as being "incidental". It is by no means the "villain of the piece"; indeed, it is portrayed almost as a "victim" in the sense that its best interests are being damaged by those identified as the culprits.

14. Sub-paragraph (b) refers to a blog headed "What a load of old bill-hooks". The sentence in question is as follows:

> "This infelicitous posturing by the University big-wigs cuts against the grain of the University's own Information Governance … "

It is said that the natural and ordinary meaning is that the University (*and its senior members of staff*) have acted inappropriately and have failed to follow the University's rules of governance. This is contrived in the extreme. It makes no sense to say of the University that *it* has failed to follow its rules of governance. The criticism only makes sense in relation to human beings rather than a corporate entity. It is they who either do or do not follow its rules.

15. Sub-paragraph (c) refers to "these two implacable University bosses" who "regard themselves as immune to the whims of mere legislature in the shape of Parliament, and feel that they can readily cock their metaphorical hind legs at the trifle of English Law whilst offering the universal one-finger salute against the Freedom of Information Act (2000)". The subject of the attack is plainly, yet again, the "University bosses".

16. Sub-paragraph (d) identifies a blog referring to the departure of a personal assistant called Susan Burgess. The suggestion seems to be that the "Graves/Hall Continuum" was wishing to conceal the circumstances of her rather hurried departure and that they authorised "a significant payment … in order to cover a heinous impropriety". This is raised by way of a question, but the implication is clear. At all events, any "heinous impropriety" can only have been brought about by one or more human beings. Again, it makes no sense to suggest that the *University* was paying money to cover a heinous impropriety. The behaviour described is such as to be ascribable only to human beings.

17. Sub-paragraph (e) refers to a suggestion that "some staff … have likened the current rule of the Strategic Leadership team to the *Majis al-shura of Hexbollah* … whereas other more cynical types suggest that it is more reflective of the *Maglis al-shura al-Karar*". It is said that the much vilified Hexbollah might appear to be more democratic, accountable and transparent than "the current ruling regime at Salford". There follows the allegation that "… under the leadership of Hall and Graves the University would seem to be adopting some of the more odious policies of the great Chinese bureaucratic dictatorship that dresses itself in the apparel of 'communism'". Again, the criticism is directed towards the individuals.

18. Sub-paragraph (f) complains of the following passage:

> "With more than a hint of irony, this week, Vice Chancellor Hall has been appointed to the Knowledge Sharing Board … Can Hall successfully square his wish to be open about other peoples research when he is so secretive about information that he ultimately controls, and which should equally be open to those who request it?"

The words speak for themselves.

19. Sub-paragraph (g) attempts to incorporate by reference, as words complained of, the content of a board game which is set out and described in an appendix. Whether that is a satisfactory way of pleading is open to question but, assuming it is, it is quite clear from the meanings pleaded that it is said to convey an imputation of "bullying" and "harassment". There is also reference to false accusations of sexual harassment. The meanings are pleaded at (probably excessive) length, but the point is that the defamatory allegations relate to behaviour that is attributable to individual human beings rather than a corporate entity.

20. Sub-paragraph (h) complains of words written under a heading "Many strings to his bow". The accusation complained of is that there have been "acts of nepotism" and appointments made, not on individual merit, but on the basis of personal relationships. It makes no sense to accuse a corporation of "nepotism". The allegations can only relate to individual human beings. From the context it is clear to whom that criticism is directed.

21. Sub-paragraph (i) refers to criticisms of members of staff being allocated excessive workloads and of lectures and tutorial groups being too large. If that is a criticism which is defamatory at all, it is surely directed towards those individuals who have imposed the excessive workloads or determined the size of tutorial groups.

22. Sub-paragraph (j) complains of an allegation that "senior members of staff" ensure that the findings of the staff mediation service are biased and that members of staff will not be given a fair or impartial hearing. That is plainly an allegation which is defamatory of those who administer the mediation service. Lack of impartiality, or "bias", must refer to human failings.

23. It is in the light of this pleading that I have come to my conclusion that, in substance and reality, this is an action about allegations against individuals rather than against the University itself. The District Judge was of the view that any damages recovered by the University were likely to be modest (although not negligible), but that it was arguable that there was nonetheless a "real and substantial tort" and also that there was a real prospect of its obtaining an injunction. Indeed, it was the injunction which was placed in the forefront of the University's argument on *Jameel* abuse. (As Dr Duke expresses it, somewhat differently, the proceedings have been brought not to protect the reputation of the University but to achieve the collateral objective of stifling free speech.) I am not convinced that there is a "real and substantial tort", so far as the University is concerned, or that the proceedings should be allowed to continue purely for the purpose of the University's obtaining an injunction to stifle criticism of Dr Graves and Professor Hall (for that is what it is about).

24. It is sometimes said that the appropriate test to apply, on such applications, is whether "the game is worth the candle": see e.g. most recently the decision of the Court of Appeal in *Cammish v Hughes* [2012] EWCA Civ 1655 at [52] *et seq*. For the reasons I have given, I am satisfied that in this instance the litigation is not worth pursuing if its sole objective is to protect the reputation of the University (any damage to which is purely incidental) or to obtain an injunction to prevent bloggers criticising Professor Hall and Dr Graves (since they are not parties).

25. Sometimes, where an employee is libelled in relation to the carrying out of his/her duties, it may be legitimate for the employer to support and fund a claim in the name of the relevant individual. If Dr Graves and/or Professor Hall wished to bring an individual libel claim (and were able to surmount any difficulties imposed by the Limitation Act 1980, as amended), it is conceivable that such an action might be supported by University funds. That would be a decision, however, for the appropriate authority to make in the circumstances prevailing when that bridge has to be crossed.

26. I will allow the appeal on the basis of *Jameel* abuse, because I cannot see that a real or substantive tort has been perpetrated against the University; nor do I foresee any tangible advantage being achieved by way of its reputation being effectively vindicated (even assuming that it has been damaged). In so far as there has been any incidental damage to the corporate reputation, it is not going to be in any real sense vindicated for so long as any defamatory allegations against Professor Hall and Dr Graves with regard to their stewardship are left in the air.

Neutral Citation Number: 2013 EWHC 862 (Ch)

Case No: HC 13 F 01135

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: Thursday, 28th March 2013

Before:

MR JUSTICE SALES

- -

Between:

UNIVERSITY OF SUSSEX	**Claimant**
- and -	
(1) PERSONS UNKNOWN	**Defendants**
(2) JOHN WALKER	
(3) MICHAEL SEGELOV	
(4) SHANICE McBEAN	

- -

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court
Chancery Lane, London WC2A 1HP.
Tel No: 020 7067 2900, Fax No: 020 7831 6864, DX: 410 LDE
Email: info@martenwalshcherer.com
Website: www.martenwalshcherer.com

- -

Miss Katherine Holland QC (instructed by **Messrs Pinsent Masons LLP**)
appeared on behalf of the **Claimant**.
Mr Jude Bunting appeared on behalf of **Katherine Barrie**.
The **Defendants** did not appear and were not represented.

- -

APPROVED JUDGMENT

- -

Mr Justice Sales :

1. This is an application for a possession order made by the University of Sussex in relation to part of the University of Sussex campus known as Bramber House. Bramber House contains various facilities, including seminar rooms, a canteen and a conference centre.

2. The background is that, since early February 2013, there has been an occupation of the third floor at Bramber House in protest at a decision by the university to 'privatise' various services and contract them out. The University tolerated this for a considerable period of time, but, on 25 March, matters escalated and the University applied to the Court for injunctive relief, with a view to securing the University premises and in contemplation of an application being made for a possession order in relation to the entirety of the campus.

3. There is considerable material before me that shows that matters got out of hand. There was damage to property and a degree of intimidation in relation to the occupation of part of the University campus called Sussex House. I have been shown photographs of smashed glass and so forth.

4. On 25 March, Proudman J granted injunctive relief and authorised short and substituted service of the application for a possession order, returnable before herself yesterday, 27 March. There was a further hearing before her yesterday, at which she granted the possession order sought by the University for all parts of the campus save for Bramber House. For the background to the present application, I refer to the note of her judgment given yesterday and approved by her.

5. At the hearing before her yesterday, Proudman J was persuaded that the protesters should be afforded a short additional period of time to prepare for an adjourned hearing in relation to the application for a possession order in relation to Bramber House, which she therefore excluded from the possession order that she made in respect of the rest of the campus, with the adjourned hearing in relation to Bramber House to come on today. The University has come back to Court today, seeking an extension of the possession order to cover Bramber House along with the rest of the University campus.

6. According to the third witness statement of Melissa Thompson, filed on behalf of the University, a further demonstration took place at the university on 27 March 2013. On that occasion, the demonstration marched to Sussex House, where a police presence prevented entry. Miss Thompson says:

> "Save for this, it is considered that the protesters would have reoccupied Sussex House. Instead, they returned to Bramber House."

7. Various witness statements have been put before the Court today from both sides. Those from the University give evidence of a degree of intimidation and damage to property in the course of the protests, including in relation to Bramber House, where it appears that wire cutters and so forth have been used to gain access to certain parts of

the premises. Those put before me on behalf of, and in support of, the protesters seek to emphasise the peacefulness of the nature of the occupation of Bramber House.

8. In my judgment, whether the particular occupation of Bramber House has been peaceful or has been attended with a degree of damage to property and intimidation, it is clear that there is no good defence available against the application now made by the University.

9. Mr Bunting of counsel appeared today to contend that the Court should adjourn the present application for seven days to allow the protesters an opportunity to gather further evidence and put together additional legal submissions. In my view, it would not be right to grant such an adjournment. In my judgment, it is clear that there is no arguable defence available to the protesters, nor is there any realistic possibility that one might be developed if the adjournment applied for by Mr Bunting were granted.

10. The two grounds on which Miss Holland QC, for the University, submits that there is no good defence available or in realistic contemplation so far as the protesters are concerned are as follows. The first submission involves facing head on the arguments which might be available to the protesters based on the Convention rights in Articles 10 and 11 of the ECHR. In relation to that possible defence, I am persuaded by Miss Holland's submissions that there is no possible or arguable defence available based on those Convention rights which could defeat the University's right to possession as the owner of property in question.

11. The leading authority from Strasbourg in relation to such a defence is Appleby v United Kingdom (2003) 37 EHRR 38. The critical paragraph in the judgment of the Court is at paragraph 47, which states, in relation to Article 10:

> "That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example ..."

12. Mr Bunting submitted that the University campus was the equivalent of a "corporate town". He said that this was a case where there was a prevention of any effective

exercise of freedom of expression so that the essence of the rights to free expression and free association had been destroyed.

13. In my judgment, that is not a tenable position to adopt on the facts. In particular, I have regard to the third witness statement of Melissa Thompson for the University, at paragraph 25, where she sets out the large number of opportunities and channels for students to express their views other than through the occupation of Bramber House. In my view, it is clear from that evidence that there are many alternative means by which students and protestors are able to express their views, including on the University's premises and within the scope of the conduct of its affairs.

14. Mr Bunting further submitted that these avenues of expression and protest will all be cut off by the injunction granted by Proudman J on 25th March. I am by no means persuaded that that is the case; but, in any event, it is clear that, since the University has adopted the position that these avenues of expression are available, if there were any difficulty about them being pursued by reason of the injunction, that would be a basis on which, first, the protesters could seek to approach the University authorities to agree to modification of the injunction and, secondly, even if that could not be agreed, it would be a basis on which there may be scope for them to apply back to Court for modification of the Order. What I am clear about for present purposes is that it cannot be said that the protesters would be prevented from any effective exercise of freedom of expression if the order sought today were granted. Nor can it be said that the essence of their rights of freedom of expression and free association have been destroyed.

15. Appleby has been followed in a series of domestic authorities, in all of which the rights of property owners to recover their property have been upheld.

16. I was referred to School of Oriental and African Studies v Persons Unknown, unreported, Henderson J, 25 November 2010. In my judgment, the reasons given by the judge in that case, which is closely analogous to the present circumstances, apply with equal force in relation to the case before me in favour of the grant of the possession order which is sought.

17. I was also referred to Sun Street Property Limited v Persons Unknown [2011] EWHC 3432 (Ch), in which Roth J, at paragraphs [29] and following, discussed the Appleby and School of Oriental and African Studies cases. Roth J, again, reached the conclusion that the rights of the property owner should be upheld.

18. Finally on this point, I was referred to the decision of the Court of Appeal in The Mayor Commonality and Citizens of London v Samede [2012] EWCA Civ 160, where the Court of Appeal discussed the proper approach to be adopted in relation to the Occupy Movement's camp outside St Paul's Cathedral. At paragraph [26] the Court referred to Appleby and emphasised the following at paragraph [39]:

> "As the Judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the

> protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

At paragraph [42], the Court referred to Appleby and emphasised, in relation to the facts in that case, that:

> "there [are] other places where the applicants could exercise their Article 10 and 11 rights."

The outcome of the case was that the landowner was found to be entitled to recover the property in question.

19. Having regard to the factors at paragraph [39] in the judgment in Samede, I am in no doubt that it is right, in the circumstances of this case, to grant the possession order which is sought. The continuation of the protest, denying the University its property rights, would be in plain breach of domestic law. The importance of the location at Bramber House to the protesters is limited, not least because of the availability to them of the alternative means of expression and ways of protesting against the cuts to which I have referred. The protest has been going on for a long time and, in my view, the University is fully entitled at this stage to seek to recover its property.

20. There is evidence before me of the significant losses that the University has suffered in relation to lost income through loss of business at its conference centre. In my judgment, the University is fully entitled at this stage to seek to bring that situation to an end and to seek a return to normal business. The protesters occupied the entirety of the third floor at Bramber House and have, in substance, completely neutralised the ability of the University to use Bramber House for various activities, including in particular as a conference centre. The interference that the protest causes to the rights of others is thus very considerable. In particular, it involves a major intrusion on the property rights of the University. But it goes wider than that, in my view. The loss of business revenue which the University is now suffering is causing strain to University finances, and ultimately the people that pay the price, if matters are not brought to an end and business resumed, will be staff at the University, who may be at risk of losing their jobs.

21. For all these reasons, I consider that - weighing the relevant factors identified in paragraph [39] of Samede and in paragraph 47 of Appleby - the clearly just and appropriate solution in the present case is that there should be no further adjournments of the application for a possession order and that this Court should order possession.

22. The second submission made by Miss Holland in answer to the suggestion that there may be a defence for the protesters is to refer to what has happened already in relation to the protest. Aspects of the overall protest at Sussex University have plainly not been peaceful. I consider that the evidence I have seen, which goes into detail about protesters moving around the campus between venues where there plainly has been a considerable amount of violence to property such as Sussex House and then back to Bramber House, with individuals being identified as being present from time to time at the two places, indicates that it is not practically feasible to treat the protests going

on on the campus as being located in and confined to discrete areas of the campus, with no inter-relationship between different parts of the campus. There is in fact clearly movement by protesters between different areas of the campus and the protest has an overall unity of personnel, purpose and to some degree method throughout the campus.

23. In the light of this, Miss Holland refers me to the Court of Appeal authority in University of Essex v Djemal [1980] 1 WLR 1301. In that case, a possession order was granted in relation to the whole of a university campus because there was a threat that the protesting students might occupy other parts of the university's premises apart from those which they had up to that time occupied. The reason for the grant of a possession order in relation to the whole of the premises was to ensure the practical effectiveness of the Court's order against a clear risk that, if one part of the university premises or campus had possession granted in relation to it, the students would decamp and move somewhere else within the same campus.

24. In my view, it is in this case clear that the protesters, as part of a single protest, have moved between different parts of the campus in pursuit of the protest which they wish to mount and a sufficient threat they would continue to do so if not prevented. I accept Miss Holland's submission that, in light of the pattern that the protests involving sit-ins and so forth has taken, on the authority of Djemal it is appropriate that a possession order be granted in relation to the whole campus. The practical effect of that is that I should extend the possession order already granted by Proudman J so as to cover Bramber House alongside the rest of the campus.

25. Miss Holland took me to the decision of the Supreme Court in Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] All ER (D) 16 (Dec); [2009] UKSC 11. I am satisfied, on a review of the judgments in that case, that the decision of the Court of Appeal in Djemal continues to be regarded as good law. The position, certainly of the majority of the Supreme Court, is summarised in the judgment of Lord Collins at paragraph [97]:

> "But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the University, and was correctly decided."

26. In forming the view that Djemal remains good law, I am fortified by the judgment of Vos J in University of Sussex v Protesters [2010] PLSCS 105, where he had to consider the point and came to the same conclusion: see in particular paragraphs [8] and [9]. In that case, Vos J considered it appropriate, particularly in circumstances where a moving body of protesters was drifting between university buildings, that a possession order should be made not only in respect of the buildings that had been originally occupied, but in respect of buildings over the entirety of the campus. He said that the Court should be flexible in granting remedies so as to ensure they are effective, referring in particular to the judgment of Lady Hale at paragraph [25] of Meier. In the light of these authorities, I accept Miss Holland's second submission.

27. This is a plain case where there is no possibility of any valid defence being put forward even if an adjournment were granted. For these reasons, I refuse the application for an adjournment and I grant the possession order which is sought.

- -

Neutral Citation Number: [2015] EWHC 544 (Ch)

Claim No. A30BM060 and A30BM065

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil & Family Justice Centre
Priory Courts
33 Bull Street
Birmingham

Date: 22 January 2015

Before:

HIS HONOUR JUDGE PURLE, Q.C.

Between:

UNIVERSITY OF BIRMINGHAM

Claimant

and

PERSONS UNKNOWN

Defendants

Transcribed by Cater Walsh Reporting Limited
(Official Court Reporters and Audio Transcribers)
1st Floor, Paddington House, New Road, Kidderminster. DY10 1AL
Tel. 01562 60921; Fax 01562 743235; info@caterwalsh.co.uk
and
Transcription Suite, 3 Beacon Road, Billinge, Wigan. WN5 7HE
Tel. & Fax 01744 601880; mel@caterwalsh.co.uk

MISS KATHARINE HOLLAND, Q.C. instructed by SGH Martineau LLP appeared on behalf of the Claimant

(There was no attendance or representation on behalf of any Defendant)

J U D G M E N T

JUDGE PURLE:

1. This is an application to extend a Writ of Possession which I made in February of last year in relation to the Birmingham University Campus. I have been much assisted by Miss Holland QC, who has addressed me since 3 o'clock this afternoon, and it is now 20 to 5. I make no complaint about the lengths to which she has gone or the time that she has taken because she has done so in recognition of her duty on this particular application to be full and frank, the application being made without notice to anyone.

2. The application is supported by a witness statement by the Director of Legal Services at the University of Birmingham, Carolyn Pike. The problem that the University has faced and was facing in February last year was a pattern of disruptive and occupational protests of University buildings across the whole of the University campus, which was having a deleterious effect upon University life generally, both of students and staff, as well as of other lawful visitors.

3. It is apparent from Carolyn Pike's witness statement that there are three well-organised protest groups, all of whom appear to have connections with and support each other. One is called "Stop Fees, Stop Cuts", another is called "Defend Education" and the third is called the "National Campaign Against Fees and Cuts", known as NCAFC for short.

4. Their coordinated protests have grown since 2010, when they were started by "Stop Fees, Stop Cuts". "Defend Education", amongst other things, have advocated that the best way of obtaining their objectives is by closing the University down, which is clearly a step too far.

5. I should emphasise at the outset that the University supports freedom of speech as a fundamental principle, and my attention has been drawn to the Code of Practice of the University, and in particular to the following statement:

   > *"The University is an academic community of staff and students. Central to this concept is the ability of all its members to freely challenge prevailing orthodoxies, query the positions and view of others and to put forward ideas that may sometimes be radical in their formulation.*
   >
   > *It is a core right of the University staff and student staff and students."*

6. The protests in this case, on the evidence, have continued since the possession order I made last year at regular intervals (all of which are listed in the witness statement of Miss Pike) in February, March, June, July and November of last year and in January of this year. At one stage in July of last year the High Court bailiffs were asked to help, but by the time they arrived the protest was effectively over and they did not, as they have confirmed in a recent email, then effect repossession of the site. In fact, the practical reality may be that

they never will effect repossession of the entire site. They are only called in as and when there is a protest that the police or University authorities themselves are not able to deal with effectively. The activities of the protestors move around the site and their occupation of parts of the campus for protest does not usually embrace all, so that any disruption would be ended by simply clearing the building or part of the site in question. In July 2014 the Strathcona Building was affected, and the protestors had in fact left that building by the time the bailiffs arrived. Even had the bailiffs effected possession of the Strathcona Building, it may be that this would not have amounted to possession of the remainder of the site as indicated on the plan attached to the Possession Order. I do not think that matters, and do not need to decide the point.

7. The question is: have good reasons been shown for extending the Writ of Possession today? Even had the bailiffs taken possession in July 2014, it would still (as Miss Holland demonstrated by reference to Wiltshire County Council v Frazer (No. 2) [1986] 1 WLR 109) be open to the University to seek a Writ of Restitution as and when trouble flares up again. The only limitation would be on the court's discretionary power to issue such a writ.

8. It is clear from the Wiltshire case that where there are connected and coordinated actions of the kind with which the University is presently faced, a Writ of Restitution can properly issue. By parity of reasoning, it is appropriate also to extend a Writ of Possession where it has not been exhausted. The reasoning and justification for doing so are the same as in the case of granting a Writ of Restitution.

9. Student protests are planned. In particular a day of action is planned in the near future by the NCAFC. As I say, this group is connected with other groups, including "Defend Education". The aims of those groups are all to promote free education and to protest against what they regard as the syphoning off of money into the pockets of the Vice-Chancellor and others. I say nothing as to whether those aims are worthy, but they are legitimately within the area of free speech that the University promotes, and the contrary is not suggested.

10. The complaint before me, which was justified a year ago and is still justified, is that the means adopted, of disrupting University life to the extent of closing it down where possible, are not legitimate, and make trespassers of those taking part in protests having that effect. That is the basis upon which the possession order was made. It is still needed, and I will therefore extend the Writ of Possession for a further twelve months. It is appropriate to do so without notice, as that appears to be the process contemplated by the rules (current and previous – it is not entirely clear which apply). Further, the defendants all remain unknown and often appear on site during the more serious of protests masked, and therefore incapable of ready identification. This makes prior notice impracticable.

11. Accordingly, I will grant the order sought.

CO/1593/2014

Neutral Citation Number: [2015] EWHC 2206 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 14 April 2015

B e f o r e:

HER HONOUR JUDGE ALICE ROBINSON
(Sitting as a Judge of the High Court)

Between:
(1) PROFESSOR OREN BEN-DOR
(2) PROFESSOR SULEIMAN ABU-SHARKH
Claimants

v

VICE-CHANCELLOR OF THE UNIVERSITY OF SOUTHAMPTON
Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Ms S Jegarajah and Mr M McDonald (instructed by Public Interest Lawyers) appeared on behalf of the **Claimants**
Mr E Capewell (instructed by The University of Southampton) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

Crown copyright©

1. THE JUDGE: This is a renewed application for permission to apply for judicial review to quash a decision of the Vice-Chancellor of Southampton University dated 1 April 2015 upholding a decision of his Chief Operating Officer dated 31 March 2015 to withdraw permission for a conference to be held at the University this weekend, 17-19 April, entitled International Law and the state of Israel: Legitimacy, Responsibility, and Exceptionalism. The claimants also seek an interim mandatory injunction and protective costs order. Permission was refused on the papers by Andrews J on 8 April. It has been renewed orally before me today given the urgency of the matter.

2. The chronology can briefly be summarised from the initial decision of the Chief Operating Officer dated 31 March. There was a call for papers in April 2014 for the conference. The deadline for papers was set as 17 October 2014. The intention was that the conference should be plenary in nature and would consist of invited keynote speakers and panels with substantial time being given for audience participation. In the early stages it was stressed that the conference was an academic conference with the intention being that a balanced view would be presented overall.

3. In mid January 2015 the Head of Faculty Operations of the Faculty of Business and Law raised the issue of whether the conference would be designated under the university's Code of Practice. As an event where there is a reasonable expectation that freedom of speech within the law may be compromised unless appropriate remedial action is taken, a list of speakers and abstracts was provided towards the end of January. In early February 2015, the Vice-Chancellor's office began to receive letters of complaint about the conference. The Chief Operating Officer requested relevant material, speakers, audience programme, risk assessment and so forth, to inform his decision about whether to designate the event or not, and if it was designated, whether to allow it to proceed.

4. By the middle of February, the matter had come to the attention of the Hampshire Constabulary who were expressing interest in the arrangements being made for the conference. A full list of some 50 speakers was made available to the Chief Operating Officer in early March 2015. He took advice from the Director of Estates and Facilities, the Head of Security, the Head of the Safety and Occupational Health, and various external third parties, including Southampton University's Students' Union, and Hampshire Constabulary. On 30 March he received an Event Assessment from the Hampshire Constabulary and held a meeting with the claimants, Professor Oren Ben-Dor and Professor Suleiman Abu-Sharkh, the principal organisers of the conference, both professors at the University of Southampton. The Chief Operating Officer's letter says:

> "As you were made aware, in confidence yesterday, the University received an Event Assessment yesterday from Hampshire Constabulary, and this was explored with you together with other information, while we explored the difficult issue of balancing the University's duty to secure freedom of speech within the law and the duty to guarantee the security and safety of staff and students on the campus.

> Having had full discussions with you yesterday and having reflected on all of the issues overnight, I have decided under section 2.3 of the University's Code of Practice to Secure Freedom of Speech within the law, to withdraw the University's permission to hold the conference: "*International Law and the State of Israel and Legitimacy, Responsibility, and Exceptionalism*" ("Conference") scheduled for 17th-19th April 2015."

5. I will return to the detail of the rest of the letter in due course. The letter informed the claimants that they had a right of appeal to the Vice-Chancellor. That right of appeal was exercised. The claimants forwarded their own Notice of Appeal together with grounds in support settled by counsel to the Vice-Chancellor. The Vice-Chancellor met with the Head of Security, the Director of Estates and Facilities, and the Head of Safety and Occupational Health on 31 March after receiving a copy of the Chief Operating Officer's decision letter to discuss the matter in the absence of the Chief Operating Officer.

6. The following morning at 10.00 am on 1 April, the Vice-Chancellor met the claimants when he outlined the University's concern, and they were given an opportunity to put forward all of the points that they wished to. After the meeting the Vice-Chancellor took the decision to uphold the decision of the Chief Operating Officer in a letter also dated 1 April.

7. In summary, it is submitted on behalf of the claimants that the University is under a duty to uphold freedom of expression arising under section 43 of the Education (No.2) Act 1986 and article 10 of the European Convention on Human Rights, and in breach of those duties has refused to hold the conference on the grounds that the views to be expressed are controversial, had given rise to complaints, and that any concerns about security and safety were exaggerated and unsubstantiated. It was submitted that the purpose of section 43 was to prevent speakers being banned from campuses where their views might be unacceptable to others in reliance on R v University College London, ex p Riniker [1995] ELR 213.

8. As a preliminary matter the claimants expressed concern as to whether the University had complied with its duty of candour and they sought disclosure of a document which the University had made clear existed but had not been produced by them.

9. Following the renewal of this application for permission to apply for judicial review, the defendant has submitted a bundle containing witness statements and exhibits from Mr White, the Chief Operating Officer, Mr Jackson, the Head of Security and Professor Nutbeam, the Vice-Chancellor. Part of the material produced by way of exhibits comprises the Event Assessment produced by Hampshire Constabulary to which Mr White's decision letter referred, a risk assessment produced by the University as well as other material. In his witness statement at paragraph 29 Mr White states that he gave Professor Sharkh a copy of the risk assessment and sought permission from the police to use the Event Assessment for the purposes of these proceedings. There was an additional document produced and shown to the claimants, however permission to use

this for the purposes of these proceedings has been refused, and the defendant places no reliance on it.

10. It was submitted on behalf of the claimants that it was a breach of the [defendant's] duty of candour not to disclose that document, and that the court should order its disclosure before proceeding with dealing with the application for permission and interim relief. I indicated at the time that I was not prepared to order disclosure and that I would give my reasons later. I do so now.

11. In my judgment, there is no evidence of any breach of the duty of candour. The defendant has made it clear from the outset what the basis of the decision is. In short, this is as set out in both Mr White's letter and the Vice-Chancellor's letter, that it is not possible to put in place measures or take remedial action to ensure that good order can be maintained on campus that will safeguard staff and students while the conference is taking place. Those concerns are detailed in Mr White's letter which the Vice-Chancellor agreed with. The material produced on behalf of the defendant comprises the documents which were relied upon by the defendant when reaching those judgments, and witness statements setting out the chronology of the matter and the advice which was given orally that was also taken into account. The only document not produced is the document referred to by Mr White. I am told by counsel that it is a Metropolitan Police report comprising a weekly round-up of intelligence by the extremism intelligence unit. It is not the defendant who is unwilling to disclose it, rather the police. That is hardly surprising given it contains intelligence about the risk of protests. Therefore, the University has disclosed all of the information on which it relies in support of its case here and in so far as there is any further material justifying that decision, the inability to rely upon it is to the disadvantage of the University and not the claimants.

12. It was submitted on behalf of the claimants that it is not for the defendants to say if the material was helpful to them or not. But, in my judgment, in the absence of some credible reason why it might be of assistance to the claimant, and none has been put forward, there is no proper basis on which to order its disclosure.

13. While dealing with documents, I will deal with another preliminary matter that is related. It was submitted on behalf of the claimant that the defendant should not be permitted to rely upon evidence in the three witness statements and the exhibits on the grounds that they elucidate, correct or add to reasons already given. The authorities which indicate the court should be slow to permit that to take place have recently been summarised in the case of Timmins & Anor v Gedling Borough Council [2014] EWHC 654 (Admin) by Green J (see paragraphs 109-114).

14. As I have already said, the evidence sets out the material on which the University relied, the advice that they were given, and a chronology. In my judgment, that was entirely legitimate and indeed some of the material is relied on by the claimant in support of their argument that the decision was arguably unlawful. I accept the submission made on behalf of the defendant that the evidence does not involve filling a gap, but rather is setting out the process by which the decision was reached and was legitimately put forward, particularly in the context of an allegation of bad faith being

made, namely that the reasons being put forward by the University for its decision were not in fact the true reasons.

15. Turning to the substance of the challenge, in oral submissions before me today Mr McDonald, counsel for the claimants, has pointed to the paucity of evidence relating to security threat. First of all it is said that reference in documents to it being necessary to take into account the risk of a terrorist attack does not justify the decision that the risk is no more or less than any academic institution faces every day of the week when speakers come to give talks on controversial subjects, and that there is no concrete evidence at all of any terrorist threat. So far as more general threats to public disorder are concerned, detailed submissions have been made about the documentation produced by the University in support of their security concerns.

16. Criticism has been made of what are said to be inconsistencies in the material. In particular in paragraphs 20 and 22 of Mr Jackson's witness statement reference is made to Special Branch expressing concern that there might be a need to provide an armed response team, something which it said came out of the blue. However, there is no reference at all to that in the Event Assessment produced by Hampshire Police on 30 March. Attention was drawn to that document which says this:

> "It is not expected that police will have any uniformed presence within any buildings."

That was also said to be inconsistent with the University's risk assessment which states on page 1 that:

> "Police indicate that 21 suitably equipped police officers per 100 protesters will be deployed on site during the conference to ensure that public order is maintained, and with at least 300 protesters anticipated (at least on 19 April), at least 63 police officers will be required, possibly more."

Later on in the document reference is made to updated information suggesting more protesters might be in attendance in which case more police officers will be on site.

17. It was also submitted that the Event Assessment discloses only one known protest, that being planned by the Sussex Friends of Israel, who are avowedly a peaceful protester, and that insofar as there is any concern that there might be counter protests the only evidence of any possible counter protests came from the English Defence League. It was pointed out that the evidence shows that the last time there was any controversial talk at Southampton University, only five or six English Defence League members came. In all the circumstances, it was submitted that the risk in so far as there was any was easily manageable and there was no evidence to justify cancelling the conference on the grounds of concerns about security.

18. In my judgment, the starting point for consideration of this challenge is the very careful and detailed letter dated 31 March from the Chief Operating Officer. After the passage I have already quoted, the letter continues:

> "I am satisfied that after you notified the Vice-Chancellor's office in July 2014 about the conference and permission, albeit only tacit, was given to you to proceed with the Conference that the University was not facing the circumstances it now faces, which in summary are as follows:
>
> **1. Speakers and Conference Programme:**
>
> 1.1 You made details of the speakers and the programme available to the University in early March 2015. This list has been reviewed and it is noted that the speakers have a distinct leaning towards one point of view, which is not an issue, save that it does not accord with the original intention expressed for the conference.
>
> 1.2 Further, a number of the speakers are regarded as not extreme but controversial. The effect of this is to provide a focus for protest and with such a large number of speakers being on campus at the same time for one event it provides a significant challenge to the University as to whether it can uphold good order on campus.
>
> **2. Risk assessment:**
>
> 2.1 The risk of protest, intimidation or violence, and injury to staff, students, attendees and speakers, has progressively worsened over the past few weeks and shows an unacceptably high level of risk. This remains the case even after considering measures to reduce the risk as we may reasonably put in place in the run up to and during the Conference.
>
> 2.2 The University of Southampton Students' Union has expressed a real concern over escalated tension and division between student groups at the University as a result of the Conference.
>
> 2.3 Whist the University can only pay attention to good order on campus, as part of its risk assessment, the inherent risk of disorder in campus as a result of this Conference must be considered in the light of the increased threat to the UK of terrorist activity and the recent attacks in Paris and Brussels.
>
> **3 Public Order, Public Safety Assessment:**
>
> 3.1 I have only paid heed to those elements of the Event Assessment from Hampshire Constabulary which refers to elements which the University is expected to be able to control. Even then, the estimated number of protestors ranges between 400 to 1000 people, over multiple sites at the University, from groups who are diverse and polarized and with an increased capacity for the University to be a focal point for mass

demonstrations on campus.

3.2 Following our consultation on the morning of the 30th March 2015, you were given the opportunity to respond to this information and to suggest any practical measures which would enable the University to continue with hosting the Conference at this time.

3.3 Following the meeting you suggested by e-mail that you were of the view *"that it is very clear from the Police's report that they are more than capable of policing the conference and ensuring the safety of university staff, speakers, delegates, students and property. This should be accepted at face value."*

3.4 With respect, I must disagree with your assessment of the Event Assessment. While advising that they are confident they could provide the necessary support to the University, if requested to assist with the mitigation of risk from any protest, the police made it clear that:

- The University and the Principal Organisers should consider the JTAC threat to the UK from terrorist activity as the event has a profile that would for some make the event a legitimate target and considerable thought needs to be given as to how this threat is mitigated against.

- They raised the issue of the University's capacity and experience to deal with protests or activity within the conference, as it is a University event and the University has the responsibility for planning and delivering safe outcomes. The University's small security team will have to be enhanced by additional skilled resources to manage the event; and

- The University is responsible for providing protest areas and clear stewarding.

3.5 Therefore your reading of their report fails to take into account those elements of public order and safety which fall within the University's precincts and for which we are liable.

3.6 I have carefully considered whether there are any other reasonably practicable measures we could take to sufficiently reduce the risk of injury faced by our staff, students and visitors to a tolerable level within the available timescale. In particular I have considered the following: -

Change of location:

All other buildings which have the capacity to seat the event have been considered but given the combustible nature of the groups, a change of venue will not alleviate the difficulty that the security staff at the University (totalling 14 – of whom 5 are committed elsewhere) are too small a group and do not have the appropriate training to deal with demonstrations of this size. In addition, there is concern that they might have to deal with disruptions within the venue and again

have not had appropriate training to deal with this.

Securing Areas:

This would require resourcing, planning and specialist arrangements to mitigate the deficiencies in our existing security provision which is not geared up to deal with events such as these. This is particularly the case given the dispersed locations. Preliminary enquiries have been made about additional resourcing and it is doubtful that the appropriate arrangements could be put in place in time given that a suitable security firm would have to be identified and once appointed, would have to conduct their own risk assessment and determine the correct measures to put in place.

Restricting Access to Campus:

In addition to the previous point it is considered that the only way to run the Conference is to lock the campus down. This poses considerable logistical difficulties over the 3 days of the Conference and it is very questionable whether this is a proportionate response, given the needs of students with the examination period coming up. Given the concerns already expressed by the Students' Union over the holding of the conference, it is unlikely that they would consider such action in the best interests of the student body. For a similar weekend, the daily head count, reflecting occupancy at a point in time for the library was in the region of 600 students and the daily gate count of entry to the library ranged from 4,600 to over 5,000.

As the principal Organiser, you have not proposed any measures which might need to be taken in order to safeguard freedom of speech and have only pointed to police involvement being taken at face value which I have already addressed above.

It is my view that the circumstances facing the University are exceptional and that we have, at least over the past decade, never faced a similar set of circumstances.

To date, the University's ability to react swiftly and in an agile manner to allow designated activities on campus to proceed reflects our commitment to take such steps as are reasonably practicable to ensure freedom of speech within the law on campus. This is not an absolute duty and on this occasion, with this set of circumstances I must withdraw permission as set out above for the reasons already enumerated.

The University takes its duty to secure Freedom of Speech within the law very seriously and has an extremely good record in this regard, as you well know. In the past it has always been able to put in place measures to allow designated activities to proceed. Therefore, it is with considerable regret that I have reached the decision that I have. With this in mind, I mentioned to you yesterday that the University is prepared to commission

an independent report to establish how a conference of this nature could be held in future; exploring and identifying how the balance between upholding freedom of speech and securing the safety and security of staff and students can be achieved, and the measures needed to achieve this. In our meeting you rejected this offer, but I make it again as a confirmation of the University's continuing commitment to uphold freedom of speech within the law."

19. That letter to my mind demonstrates the following. First, that changes to the anticipated nature of the conference had taken place. Whereas at the outset it was anticipated that the conference would present a balanced point of view, there was now a distinct leaning towards one point of view. Secondly, that the full speaker list which was not provided until early March included a number of speakers who were regarded as controversial. Third, there was a high level of risk of protest. The advice being given was of potentially 400 - 1,000 people as a result of letters of complaint to the University, intelligence provided by the police, and escalated tension and division within student groups at the University. Fourth, that the University gave the claimants an opportunity to consider and deal with the University's concerns and respond with any practical measures that they might be able to suggest in order that the conference could take place safely. However, the only response that came from them was that the police report, which is presumably the Event Assessment, says that the police take the view they are capable of policing the conference. Fifth, the Chief Operating Officer's letter goes on to consider and respond to that in detail, and concludes that the suggestion fails to address the elements of public order and safety which are within the University's precincts and for which they are liable. Sixth, the letter also goes on to consider in detail if there were any other practical measures which could be adopted in order to enable the conference to go ahead but concluded that there were not. Finally, the letter re-iterates an offer made to commission an independent report to identify how such a conference could take place again in the future.

20. In my judgment, there is no contradiction in the material before the court as to the nature of the protest which might take place or the police's response. The fact that the Event Assessment said that there would be no uniformed officers in the building is by no means inconsistent with the need for police officers to be provided outside the buildings and much of the information provided to the University was provided by the police in meetings rather than a risk assessment which was only given to them on 30 March. Whether or not the concerns about protest could be dealt with adequately by University security was a matter for the University. The Event Assessment makes clear that as the event was a private one taking place on private property it was for the University to put in place adequate security measures and that the support that would be provided by the police would be to deal with breaches of the peace.

21. Further, and importantly, in my judgment, the Event Assessment makes clear that many protest groups do not announce their intention to protest in advance because it would defeat the object of causing the maximum disruption so that the fact that the Sussex Friends of Israel were the only group who had announced an intention to attend did not mean that they would be likely to be the only protest group there.

22. So far as terrorism concerns have been raised, reliance was placed on the decision in A & Others [2005] 2 AC 68 which emphasises the importance of constitutional freedoms notwithstanding security risks. In my judgment the circumstances of that case are completely different from those of the present case. Whether a generalised threat of terrorism was sufficient justification to derogate from article 5 which protects the liberty of the person pursuant to article 15 on the grounds that there is a public emergency threatening the life of the nation is very different from whether a potential threat of terrorism is relevant to considerations of public safety when it comes to deciding whether or not to allow a conference to take place. There is no dispute that the current threat level is identified as severe.

23. There have been well publicised terrorist attacks in the last 12 months associated with concerns about Israel, Palestine and the Jewish people. In my judgment, those concerns are plainly relevant to the matters the University have to consider in this case, although clearly they were not determinative, and there is no evidence whatsoever to suggest that the University thought that they were determinative. It was simply one consideration which was quite properly taken into account.

24. Criticism was made that the offer of an independent report to decide how the conference could take place involved kicking the matter into the long grass. In my judgment, that is not a characterisation which is supported by the evidence. The letter from the Chief Operating Officer makes it clear that the University is under a duty to protect freedom of speech. Further, it cannot be said that the problem which has arisen here would be repeated because it is clear from the chronology that concerns about security have only arisen in the weeks leading up to the conference, whereas with sufficient time for planning security issues can be properly addressed.

25. Reliance was placed on the decision of the European Court of Justice in Alekseyev v Russia (Application no.s 4916/07, 25924/08 and 14599/09) where a decision by the Mayor of Moscow to prohibit a gay rally was struck down. However, in my judgment, that case is distinguishable for a number of reasons. First, in paragraphs 77 and 78 the court found that the security concerns expressed were in fact secondary to considerations of public morals. Here, in my judgment, the only evidence is that the University took their decision on the grounds of security concerns.

26. Just pausing there for a moment, it has been suggested that the University was got at, if I can use that phrase, by other organisations opposing the conference and as a result of extensive lobbying in correspondence. There is not a shred of evidence, in my view, on the material that I have seen, that that played any part in the University's decision.

27. The second ground on which Alekseyev is distinguishable is that there the government banned the event completely and repeatedly for a period of three years. Here, the University has not prevented the claimants from holding the event. As Andrews J said, the conference could be organised elsewhere. All that has happened is the University has withdrawn its permission for the conference to be held at the University premises on this occasion. That does not prevent the claimants from publicising their views and those of persons who were to present papers at the conference in any other forum. Moreover, I have already referred to the commitment given by the University to

commissioning an independent report to see if it is possible to identify how such a conference could take place in the future.

28. The third ground on which Alekseyev can be distinguished is this. There, the court held that the Government had failed to carry out an adequate assessment of risk by failing to consider the nature of the risk involved and whether arrangements could be made to deal with them. In short, in a city the size of Moscow, the presence of about 100 protesters should be capable of being adequately dealt with by the police. Here, the position is completely different. The conference was to be held on private property where the University were to be responsible for the security. The risk identified was, as I have already said, 400 - 1,000 protesters in circumstances where the Chief Operating Officer carefully considered if it were possible for the safety and security of staff and students to be secured in a number of different ways but concluded in the end that it could not. That is very far from the circumstances which existed in the Alekseyev case.

29. Thus far I have concentrated on the decision of the Chief Operating Officer. His decision was upheld by the Vice-Chancellor in the letter dated 1 April 2015. After referring to the appeal and the meeting earlier that morning the letter states:

> "I would like to thank you for engaging with me in such a thoughtful and considered way. I hope that I made clear from the start that not only do I understand the University's duty in relation to upholding freedom of speech within the law but that I take that duty very seriously. I also was able to draw your attention to the fact that at the University of Southampton, we have a record to be proud of in upholding freedom of speech.
>
> I reassured you that throughout the process, the only issues under consideration were how to balance the University's duty to uphold freedom of speech within the law with its duty to ensure the safety of staff and students of the University on University premises and these are the only considerations that have weighed in the decision making process.
>
> I advised you both that I had received advice independently from the Director of Estates and Facilities, the Head of Security and the Head of Safety and Occupational Health on the specific issues arising in relation to the conference. In addition, I have consulted fully on the principles with the University Council, the Senate and the University Academic Executive.
>
> I have also reviewed and considered the advice we have received from the Police: in particular, the wide media attention (both national and international) that the conference has attracted; the potential for protest and counter protest; the need to consider mitigation against the potential for terrorist attack; and the University's capacity and experience to deal with such matters.
>
> The University has a small security team who are not trained or resourced

to deal with public order matters. They do not have the experience or training to deal with provision of protest areas or clear stewarding. Consideration has been given to obtaining additional skilled resources but I am advised that it would not be possible to get this in place in time for this event.

The purpose of this morning's meeting was to give you an opportunity to present your appeal and make any and all representations to me that you wished to and then I would consider your representations alongside the advice and feedback that I have received as outlined above and make a decision on your appeal.

I completely accept your concern for the University with regard to its obligations to uphold freedom of speech under the law and your desire to promote the best interests of the University and academic learning. At no stage in this process have I had reason to question the sincerity or integrity or either of you and I wish to make it clear that the decision letter from Steve White set out the background and timeline to this issue and was in no way intended to suggest that you did or did not take any particular set of actions.

I have considered the specific grounds of appeal you raised but have not addressed them in detail in this letter in the interests of getting a response to you promptly. Indeed, I understand that you have asked for the outcome to the appeal to be provided to you today so that you are able to take advice about seeking interim relief prior to the Easter bank holiday weekend. Should you wish to see full reasons for the basis of this outcome, please do let us know and we will endeavour to provide them to you within 7 days.

In short, however, my decision, based on the advice that I have received, is that it is not possible to put in place measures or take remedial action to ensure that good order can be maintained on campus that will safeguard staff and students while the conference is taking place. For that reason, and that reason alone, I uphold the decision of the Responsible Officer to withdraw permission to hold the conference at the University from 17th to 19th April, 2015.

The University remains committed to taking such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for staff and students. I was impressed by the commitment you gave this morning to holding a conference reflecting a broad spectrum of views and I would like to confirm the offer that I made when we met that the University would be prepared to work with you to find a venue suitable for a conference of this nature at a later date. I remain committed to the possibility of the event taking place in the future if adequate safeguards can be put in place to minimise the risk to the safety of the university staff and students. Given the short period (sic) time between now and 17th

April, the amount of publicity that the conference has attracted and the consequent risk of protest and counter-protest, I do not believe that such measures could be put in place for the present conference."

30. It is to be noted from that letter that the claimants were given an opportunity to put their case to the Vice-Chancellor orally. He specifically referred to having taken into account all the material available. It refers to the limitations of the University security team and considers getting additional security resources. It is clear from the letter that the Vice-Chancellor has taken into account the University's duty to uphold freedom of speech but that he has concluded it is not possible to put measures in place to ensure good order can be maintained such that the staff and students can be safeguarded. And finally it contains a commitment towards working towards enabling such a conference to be held in the future.

31. The claimants have relied upon a number of authorities which emphasise the importance of academic freedom in the context of freedom of expression. In particular, Erdogan v Turkey (Application no.s 346/04 and 39779/04) where the court said at paragraph 40:

> "It is therefore consistent with the court's case law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings... This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof."

Similar points were made in Sorguc v Turkey (application no. 17089/03) in paragraphs 34 to 36.

32. As I have already said, it is important to note that the University's decision does not prevent the organisers or their speakers from expressing their opinions, only from doing so at this particular conference. They have the freedom to express those views in any other form and forum that they wish, or indeed at another conference.

33. The claimants have relied on a number of authorities which emphasise the importance of the right to freedom of expression and assembly enshrined in both articles 10 and 11 of the Convention and the common law rights in that regard. The requirements of article 10 have recently been summarised by the Supreme Court in R (Lord Carlile of Berriew and others) v Secretary of State for the Home Department [2014] UKSC 60. In the leading judgment of Lord Sumption he states:

> "13. It is well established in the jurisprudence of the European Court of Human Rights that the more important the right, the more difficult it will be to justify any interference with it. For this purpose, freedom of expression has always been treated as one of the core rights protected by

the Convention. It 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment': *Sürek v Turkey* (1999) 7 BHRC 339, at para 57. The exceptions in article 10(2) must therefore be 'construed strictly and the need of any restrictions must be established convincingly': *ibid*. In this respect, the jurisprudence of the Strasbourg court is substantially at one with the common law as it had developed for many years before the Convention received the force of law in the United Kingdom…"

34. In paragraph 31, Lord Sumption went on to say this:

> "None of this means that in human rights cases a court of review is entitled to substitute its own decision for that of the constitutional decision-maker. However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts...
>
> 32. Rather different considerations apply where the question is not what is the constitutional role of the court but what evidential weight is to be placed on the executive's judgment, a question on which the human rights dimension is relevant but less significant…In the first place, although the Human Rights Act requires the courts to treat as relevant many questions which would previously have been immune from scrutiny, including on occasions the international implications of an executive decision, they remain questions of fact. The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. Nonetheless, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends upon a judgment about the future impact of alternative courses of action, there is not necessarily a single 'right' answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range…"

35. Lord Sumption added in paragraph 34 a number of points which I have summarised I hope accurately: that the quality of judicial scrutiny called for will depend on the significance of the right, the degree to which it is interfered with and the range of factors capable of justifying that interference which may be wide-ranging. The court must test the adequacy of the factual basis of the decision and is the ultimate arbiter of the appropriate balance between two incommensurate values but is not usually

concerned with re-making the decision-maker's assessment of the evidence if it was an assessment reasonably open to him or her.

36. Applying those principles to the present case, in my judgment, the evidence demonstrates clearly that the reasons for the University's decision to withdraw permission to hold the conference on its premises were as set out in the Vice-Chancellor's letter, namely that it is not possible to put in place measures or take remedial action to ensure that good order can be maintained on campus that will safeguard staff and students while the conference is taking place. By its very nature, that involved, to some extent, a predictive and judgemental assessment. That assessment was based on the very considerable experience of its Head of Security, advice and intelligence from the police, information obtained by the University, and its own risk assessment. The decision to withdraw permission to hold the conference was plainly rationally connected to the objective sought to be achieved. Consideration was given to whether concerns could be overcome in other ways, and a conclusion was reached that they could not.

37. The decision involves the minimum derogation from the right necessary to achieve the objective of safety and security. The decision was restricted to not holding this particular conference at this particular time, without any prohibition on the conference taking place elsewhere. Publication in any other way of material that would otherwise be presented at the conference, and a commitment to commission an independent report to explore how the conference could be held in the future.

38. To conclude, this was obviously a very difficult decision for the University. Nobody could be in any doubt reading the University's decisions that there has been very careful scrutiny of all of the issues. There is no evidence the decision was taken otherwise than in good faith with a conscientious application of the duty to protect free speech. But, for the reasons I have already identified, a decision was reluctantly taken to withdraw permission for the conference. I am quite satisfied that there are no arguable grounds for challenging the decision and accordingly permission is refused. And, in those circumstances, no question of interim relief or any protective costs order arises.

39. MR CAPEWELL: My Lady, we do make an application for our costs. I appreciate that this matter has been dealt with in a slightly unusual way because of the time constraint. Obviously, the ordinary course is that one is not entitled to one's costs in an oral renewal hearing but only for the acknowledgement of service. And it is an exceptional course to take to award costs in respect of an oral hearing for a defendant at permission stage. But we do say here that those exceptional circumstances exist, the reasons essentially being these: that the claim was always very weak but nevertheless has been persisted in after the very clear order of Andrews J made last week. It also involved an allegation of bad faith for which there was no support whatsoever. That was a very serious allegation to make and it did require the University to expend considerable costs in putting together evidence for this hearing. I don't have a schedule but I am instructed that the costs that have been incurred in connection with the application for permission are in the region of £10,000.

40. THE JUDGE: Yes. Has there been any consideration given in the past as to what should happen in cases of urgency where in effect the acknowledge of service stage is bypassed, where costs are concerned?

41. MR CAPEWELL: That I am not sure of, my Lady. I think it is dealt with in the White Book at 54.12.5. And on page 2044 it does say: "The court should not order an unsuccessful claimant to pay the costs --"

42. THE JUDGE: Hold on, I think I have an up-to-date one here now. 54.12.5.

43. MR CAPEWELL: Yes, at page 2044.

44. THE JUDGE: Yes.

45. MR CAPEWELL: The last paragraph of 2044 deals with the ordinary Mount Cook principle which is that a defendant who has filed an acknowledgement of service is ordinarily entitled to the costs of that. Now, we have, of course, filed an acknowledgement of service because we did so yesterday in order to put our evidence before the court. So, on one view, we are entitled to our costs at least of the evidence, which is the acknowledgement of service. And what we say in the acknowledgement of service is that the skeleton argument I prepared for today stands as our summary grounds of resistance. But in so far as the costs of the hearing as well go, it seems to me that that must be governed by the ordinary principles that are set out at the top of 2045, that it is an exceptional course that the circumstances are taken into account. It says: such circumstances may consist in the presence of one or more of the following factors: the hopelessness of the claim; persistence by the claimant in the claim after having been alerted to facts where the law demonstrates its hopelessness; the extent to which the court considers the claimant has sought to abuse the process of judicial review for collateral purposes; and whether, as a result of full argument and deployment of documentary evidence, the claimant has, in effect, had the advantage of an early substantive hearing of the claim.

46. Really, most of those factors are present here. The claim is certainly hopeless. It was persisted in after it was pointed out, both by Andrew J and indeed by us, by the service of the skeleton argument if nothing else, that the claim was hopeless. Has the claimant sought to abuse the process of judicial review? Well, it is perhaps not an abuse of process, but nevertheless a very serious allegation of bad faith was made with nothing to support it. And we have been here all day. So there has, in effect been a substantive hearing of the claim. The claimants intimated that they did not intend to put in any evidence. We wouldn't have put in an evidence beyond what we did put in. So, in those circumstances, my Lady, we do ask for our costs both of the acknowledgement of service and of today's hearing.

47. THE JUDGE: Yes, Mr McDonald.

48. MR McDONALD: My Lady. Exceptional circumstances. It is helpful, albeit this is not a protective costs order, as my Lady said, to look at the principles (Inaudible) where actually compared it with exceptional circumstances as to whether or not this would be

a case now. My learned friend conceded that article 10 had been engaged at the start of his skeleton argument, number 1. Number 2, in relation to an alternative reason for cancelling this conference, that was outlined in the initial grounds, it has not been something that I have put forward even in the skeleton argument or in submissions. It is not something that I have relied upon. We have focused upon reasons. To now say some two weeks after those initial grounds when we had renewal grounds after, then a detailed skeleton argument that you are casting bad faith upon the defendants I am afraid flies in the face of effectively what we have been doing all day. It has been focused on the reasons, both letters. At no stage have I gone down the road except in response to my learned friend's submissions where he has raised it both in his skeleton argument -- which is not in our skeleton argument at all -- where he has raised it in oral submissions, where we didn't raise it at all in our oral submissions. So to say, well, hold on here, there has been some aspersion cast upon the defendants is wholly wrong and without merit.

49. More importantly, though, the arguments that have been had today, as my Lady has quite rightly identified in your ruling, had been something that do trigger issues of public importance. My Lady, you weren't with me in relation to my arguments as to whether or not the assessment was correct, whether or not the University were right or not to make the decision that they did. But behind the decision as to whether internationally recognised academics should be allowed to have a conference is an issue of great importance, of public importance, in a democracy. To brush that away and to say that this is simply without merit and how dare they come to court and have this argument, is simply wrong given the plethora of cases that you discussed and addressed throughout the day.

50. The claimants are two professors at a university who are themselves are simply teachers at an institution. Barristers are acting pro bono. The solicitor is acting pro bono. We are all here because we believe that we have an argument, and we still believe that we have an argument. This is not an action that is a waste of time, that it is without merit; it is an action that triggers profound and important issues. My Lady was not with me, of course, but that does not mean that it was not right and proper to have those arguments, it was not right and proper to refer to those authorities that we have done, where these matters have been discussed, more and more now in democratic countries. So, is it an exceptional circumstance? Is this an exception? My Lady, in my respectful submission, it is not an exceptional circumstance. It was right and proper that we have these arguments. And I say that costs should not be ordered, particularly given the urgency of the situation that we were in. And also another factor, and I don't wish to try my Lady's patience, but another factor is, of course this was a conference that was in a year's planning, expense, people flying all over the world, and a decision process that was made in the last two weeks after a whole year of planning the conference, organisation and time and money. And well into planning this conference it was just stopped within the last 10 days. My Lady has found right and properly so that it was stopped, but nevertheless, the hardship and the work that has gone into preparing this conference is obviously considerable. It is only right that we had these arguments here. My Lady.

51. THE JUDGE: All right. Well, I do not think that this is an exceptional case where the defendants should have their costs of the oral hearing but if the case had proceeded in a normal sense, they would have got their costs of the acknowledgement of service. The fact that it was so urgent that matters have been dealt with in the way that they have is not the fault of anybody, it is just the way this sort of case happens. So I think the fairest way of dealing with it is to order that the defendant can have their costs of submitting the written evidence and the skeleton argument but not the costs of attending today.

52. MR McDONALD: Including the one statement that arrived late last night?

53. THE JUDGE: Yes, the written evidence includes that, and the skeleton argument which, as it were, stands as a form of grounds of defence.

54. MR McDONALD: Well, I am sure a schedule will be prepared.

55. THE JUDGE: That will have to be assessed if not agreed.

56. MR McDONALD: Yes.

57. Without attempting at all to go behind my Lady's judgment, but broadly could I just clarify one point. There has not been one single terrorist action in the United Kingdom or in mainland Europe in relation to Israel and Palestine. I know that my Lady mentioned in your ruling. There hasn't been one.

58. THE JUDGE: No, I didn't say they are happening here; I said that over the last 12 months there had been.

59. MR McDONALD: There has been one.

60. THE JUDGE: No, I didn't say there had been any in the UK.

61. MR McDONALD: No, in mainland Europe. Anyway, unless my Lady is referring to the actions in Gaza last summer, there has been nothing.

62. THE JUDGE: Thank you.

Neutral Citation Number: [2017] EWHC 2945 (Ch)

Case No: HC-2017-002125

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23/11/2017

Before:

THE HONOURABLE MR JUSTICE MORGAN

- -

Between:

(1) INEOS UPSTREAM LTD	
(2) INEOS 120 EXPLORATION LTD	
(3) INEOS PROPERTIES LTD	
(4) INEOS INDUSTRIES LTD	
(5) JOHN BARRIE PALFREYMAN	
(6) ALAN JOHN SKEPPER	
(7) JANETTE MARY SKEPPER	
(8) STEVEN JOHN SKEPPER	
(9) JOHN AMBROSE HOLLINGWORTH	
(10) LINDA KATHARINA HOLLINGWORTH	**Claimants**
- and -	
(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AND BUILDINGS SHOWN SHADED RED ON THE PLANS ATTACHED TO THE AMENDED CLAIM FORM	**First Defendant**

(2) PERSONS UNKNOWN INTERFERING WITH THE FIRST AND SECOND CLAIMANTS' RIGHTS TO PASS AND REPASS WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT OVER PRIVATE ACCESS ROADS ONLAND SHOWN SHADED ORANGE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM WITHOUT THE CONSENT OF THE CLAIMANT(S) — **Second Defendant**

(3) PERSONS UNKNOWN INTERFERING WITH THE RIGHT OF WAY ENJOYED BY THE CLAIMANT(S)/OR ITS AFFILIATES AND EACH OF ITS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, EMPLOYEES, PARTNERS, CONSULTANTS, FAMILY MEMBERS AND FRIENDS OVER LAND SHADED PURPLE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM — **Third Defendant**

(4) PERSONS UNKNOWN PURSUING ANY COURSE OF CONDUCT SUCH AS AMOUNTS TO HARASSMENT OF THE CLAIMANTS AND/OR ANY THIRD PARTY CONTRARY TO THE PROTECTION FROM HARASSMENT ACT 1997 WITH THE INTENTION SET OUT IN PARAGRAPH 10 OF THE ORDER OBSTRUCTING, IMPEDING OR INTERFERING WITH THE LAWFUL ACTIVITIES UNDERTAKEN BY THE CLAIMANT(S) AND ITS AGENTS, SERVANTS, CONTRACTORS, LICENSEES AND EMPLOYEES IN CONNECTION WITH THE SEARCHING OR BORING FOR OR GETTING ANY MINERAL OIL OR RELATIVE HYDROCARBON AND NATURAL GAS EXISTING IN ITS NATURAL CONDITION IN STRATA AND ALL ASSOCIATED AND CONNECTED ACTIVITIES — **Fourth Defendant**

(5) PERSONS UNKNOWN COMBINING TOGETHER TO COMMIT THE UNLAWFUL ACTS AS SPECIFIED IN PARAGRAPH 11 OF THE ORDER WITH THE INTENTION SET OUT IN PARAGRAPH 11 OF THE ORDER — **Fifth Defendant**

(6) MR JOSEPH BOYD — **Sixth Defendant**

MR O SE H CORR — **Seventh Defendant**

- -
- -

Alan Maclean QC, Janet Bignell QC, Jason Pobjoy and Gavin Bennison (instructed by **Fieldfisher LLP**) for the **Claimants**
Heather C N laigh and Jennifer Robinson (instructed by **Leigh Day**) for the **Sixth Defendant**
Stephanie Harrison QC, Stephen Simblet and Laura Profumo (instructed by **Bhatt Murphy**) for the **Seventh Defendant**

Hearing dates: 31 October 2017, 1 and 2 November 2017
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE MORGAN

Mr Justice Morgan:

The applications

1. There are three applications before the court. The first application was made by the Claimants by application notice dated 31 July 2017. Although that application was expressed to be for final injunctions, the application was presented as an application for interim injunctions intended to last until the trial of this action. The background to that application is that on 28 July 2017, I granted the Claimants interim injunctions in similar terms to the orders which are now sought. Those injunctions were granted on the Claimants' ex parte application. I fixed a return date of 12 September 2017 and on that day I heard argument from counsel for the Claimants and from counsel who had been instructed by Mr Boyd and Mr Corré. Mr Boyd and Mr Corré were then joined as the Sixth and Seventh Defendants. On 12 September 2017, I granted interim injunctions which were intended to last for a short period until a further hearing with a time estimate of three days to enable the court to hear argument on the many points which needed to be considered. That hearing took place on 31 October and 1 and 2 November 2017.

2. The second application was made by the Sixth Defendant by application notice dated 6 September 2017. By that application, the Sixth Defendant sought the discharge and/or the variation of the ex parte order I had made on 28 July 2017. The third application was made by the Seventh Defendant by application notice dated 6 September 2017. By that application, the Seventh Defendant sought the discharge of the ex parte order I had made on 28 July 2017. The second and third applications were before the court on 12 September 2017 when I continued the ex parte order and the two applications of 6 September 2017 were presented at the three-day hearing as applications to discharge the ex parte order of 28 July 2017 and the further order which I made on 12 September 2017.

The Claimants

3. There are ten Claimants. The First Claimant is a subsidiary company of the INEOS corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The First Claimants commercial activities include shale gas exploration in the UK. It is the lessee of four of the Sites which are the subject of the Claimants' application (Sites 1, 2, 3 and 7). The lessors in relation to these four sites include the Fifth to Tenth Claimants. The Second to Fourth Claimants are companies within the INEOS corporate group. They are the proprietors of Sites 4, 5 and 6 respectively. The Fourth Claimant is the lessee of Site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the First to Fourth Claimants as "Ineos" without distinguishing between them. The Fifth to Tenth Claimants are all individuals. The Fifth Claimant is the freeholder of Site 1. The Sixth to Eighth Claimants are the freeholders of Site 2. The Ninth to Tenth Claimants are the freeholders of Site 7. The various sites are described below.

The Sites

4. There are eight sites which are relevant. Site 1 is described as land and buildings on the south side of Dronfield Road, Eckington, Sheffield. Site 2 is described as land and buildings at Carr Farm, Winney Lane, Harthill, Sheffield. Site 3 is described as land

and buildings known as Four Topped Oak, Farnworth Road, Penketh, Warrington. Site 4 is described as land and knowns known as land for a Wellhead Site, Givenhead Farm, Ebberston, Snailton, North Yorkshire. Site 5 is described as land and buildings known as Hawkslease, Chapel Lane, Lyndhurst. Site 6 is described as land and buildings known as 38 Hans Crescent, London SW1. Site 7 is described as land and buildings on the south side of Woodsetts Road, Woodsetts, Rotherham, South Yorkshire. Site 8 is described as land and buildings known as Anchor House, 15-19 Britten Street, London. Sites 1, 2, 3, 4 and 7 comprise agricultural land. The buildings on sites 5, 6 and 8 are office buildings.

5. I was given detailed evidence about the planning applications which have been made in relation to some of these sites. I will give a brief summary of that evidence. On 8 May 2017, Ineos applied for planning permission to drill a vertical core well for shale gas exploration on Site 1. That application has been the subject of a public consultation. The position is similar in relation to Site 2 where the application was made on 30 May 2017. It is expected that the application for Site 2 will be considered by the planning committee on 23 November 2017 and it is thought to be likely that the committee will receive a recommendation for refusal of permission on traffic grounds. Ineos would wish to discuss the traffic issues with the local authority with a view to resolving them.

6. Sites 3 and 4 are not the subject of a planning application in relation to shale gas exploration. Site 3 is an existing coalbed methane production site with four wells. Site 4 is a site in Scarborough with two wells on it.

7. As to Site 7, in July 2017, Ineos submitted an Environmental Assessment Screening Report in respect of an intended application for planning permission to drill a vertical core well for shale gas exploration. The local planning authority has since confirmed that it will not require an Environmental Impact Assessment as part of a future planning application for this use. Ineos' evidence stated that it intended to submit such an application at the end of October 2017 but I do not have further information about that matter.

The Defendants

8. There are seven Defendants or groups of Defendants. The first five groups of Defendants are described as persons unknown with, in each case, further wording which is designed to provide a definition of the persons who fall into the group. The First Defendant is described as:

> "Persons unknown entering or remaining without the consent of the Claimant(s) on land and buildings shown shaded red on the plans annexed to the Amended Claim Form".

9. The Second Defendant is described as:

> "Persons unknown interfering with the First and Second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the Amended Claim Form without the consent of the Claimant(s)".

10. The Third Defendant is described as

> "Persons unknown interfering with the right of way enjoyed by the Claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the Amended Claim Form".

11. The Fourth Defendant is described as

> "Persons unknown pursuing any course of conduct such as amounts to harassment of the Claimants and/or any third party contrary to the Protection from Harassment Act 1997 with the intention set out in paragraph 10 of the [relevant] order".

12. The Fifth Defendant is described as

> "Persons unknown combining together to commit the unlawful acts as specified in paragraph 11 of the [relevant] order with the intention set out in paragraph 11 of the [relevant] order".

13. The Sixth Defendant is Mr Boyd. He appeared through counsel at the hearing on 12 September 2017 and was joined as a Defendant. The Seventh Defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a Defendant.

Shale gas exploration

14. Ineos is engaged, or wishes to be engaged, in the business of shale gas exploration in the United Kingdom. One method of exploration which it wishes to use involves the hydraulic fracturing of rock formations, known as "fracking". Ineos is not the only operator in the United Kingdom engaged in fracking. Indeed, Ineos is a relative newcomer to this industry in the United Kingdom. Fracking has been carried on in the United Kingdom since the early 1990s.

15. Fracking has been, and remains, lawful in England. Exploration for gas in England can only be carried out under licences issued by the Oil and Gas Authority. Fracking requires planning permission from the local planning authority and is subject to various other controls. In order to identify sites where commercial production of shale gas extraction is considered to be profitable, an operator will need to carry out seismic surveys of the relevant land.

16. Fracking is controversial and has generated widespread public concern and opposition. Since 2013, there has been a number of significant protest events linked to fracking and other kinds of exploration. In 2015, the Association of Chief Police Officers published a report entitled: Policing Linked to Onshore Oil and Gas Operations. The report stated that the most significant of the protest events had been at Balcombe in Sussex, Barton Moss in Greater Manchester, Fylde in Lancashire and West Newton and Crawberry Hill in Humberside. Some of the protests involved the establishment of protest camps, the duration of which varied from a few days to

several weeks with the numbers of protestors involved varying from single figures to the low hundreds. The police report continued by stating that many of the protest events involved marches, static demonstrations, obstructions of the highway or site accesses, the use of lock-on type devices and office incursions or occupations. The report stated that the vast majority of the actions taken by protestors were peaceful.

The evidence

17. The parties have served a very considerable amount of evidence in relation to these applications. The Claimants filed seven witness statements before the hearing on 28 July 2017, six more before the hearing on 12 September 2017 and three further statements before the most recent hearing. The Sixth Defendant filed 10 witness statements and the Seventh Defendant filed 14 statements. More witness statements came just before or during the hearing itself. There is a core bundle consisting of five lever arch files and that is accompanied by 23 lever arch files of exhibits.

18. The evidence served by the Claimants sought to describe some of the forms of protest against fracking which have taken place in recent times. The Claimants focussed on the forms of protest which, the Claimants contend, involved unlawful acts which were harmful to fracking operators and third party contractors who supply goods or services to fracking operators. Much of the factual material in the evidence served by the Claimants was not contradicted by the Defendants, although the Defendants did join issue with certain of the comments made or the conclusions drawn by the Claimants and some of the detail of the factual material. The Defendants' evidence stressed the generally peaceful character of anti-fracking protests. The Defendants also commented upon the undesirable effects of the injunctions granted in this case in July and September 2017.

19. In this judgment, I will refer to people who are "protestors" against fracking. It must, however, be remembered that all of the individuals in the United Kingdom who are opposed to fracking do not form a homogeneous group but comprise a great range of individuals with different views as to what is appropriate by way of protesting against fracking. The focus of the Claimants' application is on protests which, the Claimants say, involve unlawful acts. In order to describe the persons who, the Claimants say, ought to be the subject of injunctions, I will refer to those persons as "protestors" but that does not mean that I necessarily agree with the Claimants that the threatened protests are unlawful. That question remains to be examined.

20. Part of the Claimants' evidence explained the Claimants' perception of the benefits of fracking exploration. This part of the Claimants' evidence drew evidence in reply from the Defendants who explained their perception that fracking was not in the public interest. It was accepted at the hearing before me that the court was not in a position to form a view as to which of these perceptions was more accurate. Indeed, it was accepted that this area of dispute, whilst important outside the court room, would not have any real impact on the court's decisions on the many issues which were argued on the present applications.

21. The greater part of the evidence from the Claimants relates to protest activities, which they say are unlawful activities, where the direct target of the protest activity was a company other than Ineos. The direct targets of the protest activities fall into two categories. The first category comprises companies who carry out shale gas

exploration or drilling. These companies have been active in the industry for some years whereas Ineos is a relative newcomer to the industry. The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier.

22. The second category of companies which are the direct targets of protest activities are companies which form part of the supply chain to the operators who carry on shale gas exploration. The evidence makes it clear that the object of the protestors is to cause those companies to withdraw from supplying shale gas operators. Indeed, the protestors have reason to believe that they might succeed with this object. The supply companies do not themselves carry out shale gas exploration and may be able to seek work and contracts in other industries. If the protestors' actions targeting the supply companies convince them that the costs and burdens of those actions are too great, then the supply companies may choose to give up supplying shale gas operators and may not themselves seek relief from the courts to prevent the protestors' actions.

23. In his second witness statement dated 26 July 2017, Mr Talfan Davies, the solicitor for the Claimants, described in detail earlier acts of trespass on the land of other fracking operators. This evidence has been summarised in the skeleton argument for the Claimants as follows:

> "*Case Study 1: Preston New Road*, Cuadrilla Resources Ltd. Cuadrilla obtained planning permission on 16 1 16. From 14 8 14 to date there have been numerous serious instances of trespass resulting in court proceedings for possession and injunctive relief.
>
> *Case Study 2: Leith Hill*, Europa Oil & Gas (UK) Ltd. Europa was granted planning permission in August 2015. On about 29 10 16, prior to works commencing, protestors moved on to the site and established a "*protection camp*". Protestors dug tunnels and built tree houses on the proposed drill site, again resulting in court proceedings.
>
> *Case Study 3: Daneshill*, Dart Energy Ltd. A camp was set up outside the site and there have been acts of trespass onto the site.
>
> *Case Study 4: Dutton's Lane, Upton*, IGas Energy plc. In May 2013, IGas was granted planning permission to begin exploratory drilling. In April 2014 protestors set up camp on the site. There were court proceedings. It took *20 months* for eviction to be achieved and the process took the police and

bailiffs 9 hours. Protestors locked themselves into structures, hid in underground tunnels and even set their hands in concrete.

Case Study 5: Barton Moss/Barton Bridge, IGas Energy plc. In June 2014 an extension to a planning permission was sought. The site was occupied by protestors.

Case Study 6: Crawberry Hill, Walkinton, Rathlin Energy (UK) Limited. In May 2014 a permit to undertake exploratory drilling was obtained. A matter of days later, a number of protestors, including D6, unlawfully trespassed on the site, and set up a protest camp, on which they constructed a small fortress from wooden pallets. This was not dismantled for some 3 months and upon being dismantled a further small fortress was constructed by protestors on adjoining land. This remained in-situ for some 6 months.

These acts of trespass have frequently been of an aggravated nature. They have required protracted and expensive proceedings to clear the sites, and have given rise to extremely dangerous conditions posing a serious risk of harm to both protestors and others. The history of activity at these sites demonstrates that trespassing protestors against hydraulic fracturing are typically well-organized, coordinated, determined. Such protestors have shown themselves not to be deterred by the prospect, some months down the line, of being the subject of eviction proceedings."

24. In his second witness statement, Mr Talfan Davies described the actions of protestors attempting to block the primary access way to operators' sites (and the sites of their contractors) either by standing or parking in front of the site entrances or by attaching themselves to the entrances. The Claimants' skeleton argument summarised this evidence (together with later evidence which updated it) as follows:

"In the period January-August 2017, at Cuadrilla's Preston New Road site, protestors locked themselves to fencing outside the site entrance; obstructed a lorry; congregated on the public highway, forcing its closure; and engaged in numerous "*lock-on*" protests outside the site entrance. D6 played a key role in these protests. The protestors continue to congregate at the site on a daily basis with the purpose of blocking access, resulting in a number of road closures over the past months.

On 6 2 17, protestors blocked access to a quarry operated by a supplier to the shale gas industry, Armstrong Aggregates, resulting in the termination of the company's supply to Cuadrilla.

On 10 3 17, AE Yates, a supplier of Cuadrilla, was subjected to a "*slow walk*" on the public highway outside the entrance of its

> depot in Bolton. The company suffered a "*lock on*" protest at the entrance to the depot on 3 4 17.
>
> On 27 3 17, protestors targeted a supplier of the shale gas industry, Tarmac and Aggregate Industries, with an 11-hour blockade.
>
> On 30 3 17, anti-hydraulic fracturing protestors blocked the entrance to Eddie Stobart's Orford Depot. They engaged in slow walking outside the depot on 3 4 17.
>
> On 6 4 17, a supplier of Cuadrilla, Lomas Distribution, was subjected to a "*slow walk*", leading to protestors being arrested on suspicion of an offence under section 137 of the Highways Act 1980.
>
> On 25 April 2017, a number of protestors blockaded access to a site operated by Third Energy UK Gas Ltd near Kirby Misperton, North Yorkshire. This protest camp is situated on private farmland off a main road, being the main road via which access is afforded to Third Energy's site. The ongoing protestor activity has escalated since the 12 September 2017 hearing. The recent activity (covering the period up to 11 October 2017) is set out in detail in the seventh witness statement of Mr Talfan Davies."

25. In his second witness statement, Mr Talfan Davies gave evidence as to the actions of protestors which were aimed directly at contractors providing services to fracking operators, where the actions were designed to force or persuade the contractors to cease to provide those services. Mr Talfan Davies referred to a large number of matters of which the following is a selection:

(1) on 10 March 2017, protestors congregated outside the depot of A E Yates, a supplier of Cuadrilla, and engaged in a slow walk in order to delay vehicles leaving the depot; on 3 May 2017, protestors engaged in a lock on at this supplier's depot in Bolton;

(2) on 3 February 2017, protestors obstructed a Moore Readymix lorry on its way to Cuadrilla's site in Preston New Road;

(3) on 6 April 2017, protestors engaged in a slow walk outside the depot of Lomas Distribution, a supplier of Cuadrilla;

(4) on 18 February 2017, protestors entered the offices of MediaZoo, PR consultants for Ineos and chained themselves to piping in the lobby of the offices;

(5) in early 2017, protestors engaged in an event called "Break the Chain" intended to break the supply chain to fracking operators; the protestors targeted Tarmac & Aggregate Industries, Yorkshire Water, Centrica, A E Yates and Bell Pottinger;

(6) on 30 March 2017, protestors blocked the entranceway to Eddie Stobart's depot in Cheshire and engaged in slow walking in front of their lorries at Appleton Thorn;

(7) on 7 April 2017, protestors targeted the drilling company P R Marriott, a shale gas industry supplier; the protestors chained themselves to the gates of P R Marriott's depot; there were further incidents concerning P R Marriott on 23 May 2017, 1 July 2017, 13 July 2017 and 18 July 2017.

26. The Claimants also rely on a witness statement dated 5 September 2017 from Mr Hobday of P R Marriott in which he gave more detail as to the nature of the protests aimed at his company and the effect of those protests on his business. In addition to many incidents of blocking the entrance to its depot and slow walking in front of its lorries, Mr Hobday refers to incidents of lock-ons and protestors climbing on to the roof of lorries to prevent them moving and trespass on to the depot itself. He also refers to the setting up during the night on 30 June 2017 of a protest camp on land near to the company's depot; the land is owned by a third party and not P R Marriott.

27. In his fifth witness statement dated 5 September 2017, Mr Talfan Davies gave further evidence of protestors' activity, trespassing on private land, blocking the entrance to the operators' sites and targeting the businesses of suppliers to operators. Mr Talfan Davies provided further detailed evidence on these matters in his seventh witness statement dated 19 October 2017 and in his eighth witness statement dated 25 October 2017.

28. On 5 September 2017, Assistant Chief Constable Terry Woods wrote to the Chief Executive of United Kingdom Onshore Oil and Gas with information as to the nature and extent of protestor activity in relation to fracking. He made the following points:

(1) there were at that date six occupied anti-fracking camps in England and Wales;

(2) in early 2016, an initial increase in oil and gas exploration activity prompted a corresponding increase in anti-fracking campaigns and protest activity;

(3) since the beginning of 2017, there had been a significant uplift in anti-fracking protests directed at active drilling sites involving community-based protestors and more established environmental protest groups;

(4) although protests had mainly been peaceful, 2017 saw a significant increase in direct action with a sizeable number of arrests; the vast majority of arrests were for obstruction of the highway and of the police, infringement of section 14 of the Public Order Act, criminal damage, threatening behaviour and assault on the police;

(5) during the first three months of 2017, there were 60 arrests of anti-fracking protestors, a considerable increase on the 2016 figures;

(6) in the second quarter of 2017, there were 138 related arrests;

(7) in the third quarter of 2017, the figures for arrests were likely to be similar to the second quarter;

(8) a small number of anti-fracking activists were willing to engage in criminality and direct action;

(9) the protests have required significant policing operations;

(10) the tactics used by some protestors included:

a. slow walking;

b. placing bicycles and cars in the path of vehicles;

c. placing placards in front of drivers' windscreens;

d. climbing onto haulage tankers;

e. haulage vehicles being followed back to the depot to identify the contractor involved;

f. parking across site gates;

g. the impeding of site workers;

h. lock-on blockades of site entrances;

i. lock-ons to the underside of vehicles;

j. the targeting of secondary and tertiary supply companies.

(11) there were protestor activities at Little Plumpton in Lancashire on 22 days in July 2017 alone, leading to multiple arrests;

(12) the above-mentioned protests in July 2017 have had a significant adverse impact on the local area, businesses, public services and the police service, in the latter case with a significant financial impact on the police budget.

29. The evidence shows clearly that there is a considerable degree of organisation and exchange of information via social media between some groups of protestors. The evidence from social media shows that the identity of Ineos is well known to many potential protestors. That evidence also shows that groups of protestors were aware of areas of land in which Ineos has an interest and where it will wish to carry out seismic testing and/or drilling. I will give some examples of these matters.

30. The website "Drill or Drop" identified Site 1 in January 2017. The same website identified Site 2 in March 2017. There were acts of trespass on Site 1 in January 2017; it is possible that these acts were by protestors against fracking but I could not find on the balance of probabilities that that was the case. There were protests against Ineos' contractor at or near Site 2 on 21 July 2017.

31. Sites 3 and 4 potentially raise different considerations. Site 3 is an existing coalbed methane production site with four wells. Site 3 has not been a target for protestors but Ineos consider that there is a risk of a breach of security at Site 3. Acts of trespass on Site 3 would pose a risk to trespassers. Site 4 is a site in Scarborough with two well

cellars on it. Site 4 has been the subject of trespass in the past and has been the subject of threats on social media. Site 4 would also pose a risk to trespassers upon it.

32. In August 2017, there were significant exchanges on social media when two protestors exchanged information about vehicles used by Ineos, including descriptions and registrations. Also in August 2017, following the granting of the ex parte injunctions, one protestor suggested visiting Ineos' office at Site 6 to "test the injunction".

33. There is clear evidence that persons opposed to seismic testing and drilling have stolen or tampered with seismic testing equipment on various of the Ineos sites.

34. I referred earlier to the fact that, on 18 February 2017, protestors entered the offices of MediaZoo, PR consultants for Ineos and chained themselves to piping in the lobby of the offices.

35. Ineos' seismic testing equipment has been stored at the P R Marriott depot which has been the subject of sustained protests.

Matters requiring consideration

36. I heard detailed submissions on a large number of matters which were said to be relevant to my decision in this case. I will consider those matters in the following order:

    (1) The acts which are alleged to be unlawful;

    (2) Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

    (3) The test for an interim injunction;

    (4) Quia timet injunctions;

    (5) The likely result at a trial;

    (6) Persons unknown;

    (7) The duty of candour on an ex parte application;

    (8) The need for clarity and precision; and

    (9) Whether I should grant any injunctions.

The acts which are alleged to be unlawful

37. The Claimants' case is that the evidence to which I have referred shows that anti-fracking protestors have in the past, to a considerable extent, committed many serious unlawful acts as part of their protests. The Claimants say that they themselves have been the subject of some of these unlawful acts but their principal concern is as to the future. They do not wish to be subjected to serious and extensive unlawful acts in the future and they submit that the court should be prepared to intervene to prevent such

unlawful acts and to allow Ineos to carry out its lawful business without such interference.

38. The Claimants have identified the following causes of action in relation to the unlawful acts to which they refer. The causes of action are:

(1) trespass on private land;

(2) actionable interference with private rights of way;

(3) public nuisance caused by interference with the Claimants' right to pass and repass on the highway, where the Claimants are able to show they have suffered particular damage over and above the ordinary damage suffered by the public at large;

(4) harassment contrary to the Protection from Harassment Act 1997; and

(5) conspiracy to injure the Claimants by unlawful means, namely, various criminal offences which are:

a. intimidation by annoyance or violence contrary to section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992;

b. criminal damage contrary to section 1 of the Criminal Damage Act 1971;

c. theft contrary to section 1 of the Theft Act 1968;

d. obstruction of the highway contrary to section 137 of the Highways Act 1980;

e. causing danger to road-users contrary to section 22A of the Road Traffic Act 1988.

39. Leaving aside the present context which involves various forms of protest in relation to a matter which is of genuine public concern, there is not much dispute between the parties as to the ingredients of the causes of action relied upon by the Claimants. I will briefly describe those causes of action in a little more detail without regard, in the first instance, to Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and then I will consider the potential impact of Articles 10 and 11 in this case.

Trespass

40. The cause of action for trespass on private land needs no further exposition in this case.

Private nuisance

41. As to the cause of action for interference with a private easement, where the cause of action is in private nuisance, the position was described by Mummery LJ in West v Sharp (1999) 79 P&CR 327 at 332, as follows:

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him."

Public nuisance

42. In relation to the cause of action for obstruction of the highway, the Claimants put their case in public nuisance. However, I note that Clerk & Lindsell on Torts, 21st ed., at para. 20-180 states that the right of an owner of land adjoining the highway to gain access to the highway is a private common law right distinct from the right of the owner of the land to use the highway itself as a member of the public.

43. Some obstructions of the highway will amount to a public nuisance. I did not hear detailed submissions as to what amounts to a sufficient obstruction of the highway for the purposes of public nuisance. Instead I heard submissions as to what would amount to an obstruction of the highway for the purposes of the criminal offence created by section 137 of the Highways Act 1980. The parties assumed that the same basic principles applied to the public nuisance and to the criminal offence.

44. The position in relation to actions which amount to an obstruction of the highway, for the purposes of public nuisance, is described in Halsbury's Laws, 5th ed. (2012) at para. 325 where it is said:

(1) whether an obstruction amounts to a nuisance is a question of fact;

(2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;

(3) generally, it is a nuisance to interfere with any part of the highway; and

(4) it is not a defence to show that although the act complained of is a nuisance with regard to the highway it is in other respects beneficial to the public.

The notes to para. 325 contain references to cases where the test for obstruction is variously described. Thus, it has been said that any wrongful act or omission upon or near a highway whereby the public is prevented from freely, safely and conveniently passing along the highway is a nuisance. An obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle.

45. In Harper v G N Haden & Sons [1933] Ch 298 at 320, Romer LJ said:

> "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others."

46. A member of the public has a right to sue for a public nuisance if he has suffered particular damage over and above the ordinary damage suffered by the public at large: see R v Rimmington [2006] 1 AC 459 at [7] and [44].

The Protection from Harassment Act 1997

47. In relation to the Protection from Harassment Act 1997, as amended by the Serious Organised Crime and Police Act 2005 (I will refer to the 1997 Act as amended as "the 1997 Act"), it is helpful to distinguish between a claim under the 1997 Act brought by an individual and a claim brought by a company. This is because section 7(5) provides that references in the 1997 Act to "a person", in the context of the harassment of a person, are references to a person who is an individual. Other references in the 1997 Act to "a person" can therefore include a company.

48. In the case of an individual, such as the Fifth to Tenth Claimants, such a person has a cause of action, under sections 1(1) and 3(1), where he or she is the victim of a course of conduct pursued by another person which course of conduct amounts to harassment of the victim and which the other person knows or ought to know amounts to harassment of the victim.

49. In the case of a company, such as the First to Fourth Claimants, such a person may have a cause of action pursuant to sections 1(1A) and 3A. Section 1A of the 1997 Act provides that a person must not pursue a course of conduct:

> "(a) which involves harassment of two or more persons, and
>
> (b) which he knows or ought to know involves harassment of those persons; and
>
> (c) by which he intends to persuade any person (whether or not those mentioned above) (i) not to do something that he is entitled to or required to do; or (ii) to do something that he is not under any obligation to do."

50. Accordingly, pursuant to section 1(1A) and 3A, Ineos can sue a defendant who pursues a course of conduct which the defendant knows or ought to know involves harassment of two or more individuals, who are (for example) members of the staff of Ineos, by which the defendant intends to persuade those members of staff or anyone else (such as Ineos itself) not to do something which it is entitled to do or to do something which it is not under an obligation to do. Similarly, Ineos can sue a defendant who pursues a course of conduct which the defendant knows or ought to

know involves harassment of two or more individuals, who are (for example) members of the staff of PR Marriott, by which the defendant intends to persuade those members of staff or anyone else (such as PR Marriott or Ineos itself) not to do something which it is entitled to do or to do something which it is not under an obligation to do.

51. Both sections 1(1) and 1(1A) are subject to section 1(3) which provides that those provisions do not apply to a course of conduct if the person who pursued it shows:

> "(a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
>
> (c) that in the particular circumstances the pursuit of the course was reasonable".

Section 1(3)(c) of the 1997 Act imposes an objective test of reasonableness: see also R v Colohan [2001] 2 FLR 757.

52. Section 7(2) of the 1997 Act provides that: "references to harassing a person include alarming the person or causing the person distress". This is a non-exhaustive definition. In Thomas v News Group Newspapers Ltd [2002] EMLR 78 at [30], Lord Phillips MR said that: ""Harassment is … a word which is generally understood".

53. More assistance as to the scope of "harassment" is provided by Majrowski v Guy's and St Thomas' NHS Trust [2007] 1 AC 224. In that case, Lord Nicholls said at [30]:

> "Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the "close connection" test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 ."

In the same case, Baroness Hale referred to the aim of the 1997 Act as being to deter, to punish and to encourage the perpetrator to mend his ways. She referred to "the sort of specific prohibitions which may be helpfully contained in an injunction". She then said at [66]:

> "If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): section 7(3) . All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2) . But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

54. Section 7(3) of the 1997 Act provides that: "a 'course of conduct' must involve ... (b) in the case of conduct in relation to two or more persons, conduct on at least one occasion in relation to each of those persons". Section 7(3A) of the 1997 Act provides that:

> "[a] person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another –
>
> (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
>
> (b). to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring."

55. Section 2 of the 1997 Act creates the crime of harassment. Sections 3 and 3A create the statutory tort. The only difference between the tort and the crime is in the standard of proof required: <u>Ferguson v British Gas Trading Ltd</u> [2009] 3 All ER 304. Sections 3 and 3A refer to the possibility of the court granting an injunction in relation to "an actual or apprehended breach" of sections 1(1) or 1(1A) and to the consequences of the grant of such an injunction.

Conspiracy

56. The type of conspiracy alleged by the Claimants is a conspiracy to injure by unlawful means. They do not seek to rely upon a conspiracy using lawful means, where the predominant intent is to injure the Claimants.

57. For there to be a conspiracy to injure by unlawful means, there must be:

    (1) a combination by two or more persons;

    (2) to undertake an unlawful act or to do a lawful act by unlawful means;

    (3) with the intention to injure the claimant; and

    (4) causing loss and damage to the claimant.

58. The unlawful acts asserted by the Claimants are said to be criminal offences. It was not disputed before me that the criminal acts which are asserted by the Claimants in this case constitute unlawful acts for the purposes of this tort: see JSC BTA Bank v Ablayazov (No 14) [2017] QB 853 at [46]-[47] and [53]-[54].

59. The Claimants rely on the tort of conspiracy to deal with the problem, as they perceive it, that the unlawful acts intended to be committed by the protestors will have a direct impact upon the supply chain of goods and services to Ineos but where the real target of the acts will be Ineos itself. The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimants' point of view is that it enables them to claim a remedy in a civil court for breach of a criminal statute where the conduct in question does not, absent a conspiracy, lead to civil liability.

60. The criminal offences which are asserted by the Claimants are:

(1) intimidation by annoyance or violence contrary to section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992;

(2) criminal damage contrary to section 1 of the Criminal Damage Act 1971;

(3) theft contrary to section 1 of the Theft Act 1968;

(4) obstruction of the highway contrary to section 137 of the Highways Act 1980; and

(5) causing danger to road-users contrary to section 22A of the Road Traffic Act 1988.

61. Section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> "(1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority –
>
> (a) uses violence to or intimidates that person or his spouse or civil partner or children, or injures his property,
>
> (b) persistently follows that person about from place to place,
>
> (c) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof,
>
> (d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or

> (e) follows that person with two or more other persons in a disorderly manner in or through any street or road."

62. This offence is not confined to the context of industrial disputes, and can be committed by protestors: DPP v Todd [1966] Crim LR 344. The word "wrongfully" requires that the offending conduct under s.241(1) be independently unlawful as a civil wrong: Blackstone's Criminal Practice 2017 at B11.140, B11.144. The words "intimidates", "persistently follows" and "in a disorderly manner" are to be given their ordinary, natural meaning. The essence of "watching and besetting" is preventing access to and egress from somewhere: Blackstone's Criminal Practice 2017 at B11.144.

63. Criminal damage and theft do not require any exposition in this case.

64. Section 137(1) of the Highways Act 1980 is in these terms:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine …".

65. In order for there to be an offence under section 137 of the 1980 Act, it must be shown that:

    (1) there is an obstruction of the highway which is more than de minimis; occupation of a part of a road, thus interfering with people having the use of the whole of the road, is an obstruction: Nagy v Weston [1965] 1 All ER 78 at 80 B-C;

    (2) the obstruction must be wilful, i.e. deliberate;

    (3) the obstruction must be without lawful authority or excuse; "without lawful excuse" may be the same thing as "unreasonably" or it may be that it must in addition be shown that the obstruction is unreasonable.

66. It is helpful to refer to four cases involving protest on the highway, namely, Hubbard v Pitt [1976] QB 142, Hirst and Agu v Chief Constable of West Yorkshire (1987) 85 CR App Rep 143, DPP v Jones [1999] 2 AC 240 and Birch v DPP [2000] Crim LR 301.

67. In Hubbard v Pitt, in relation to a claim for an interim injunction to restrain picketing outside an estate agency, Lord Denning held (applying Nagy v Weston) that the picketing was a reasonable use of the highway. There is an important passage in his judgment at pages 178-179, which I will not set out, which discussed the legal position (even before Articles 10 and 11) as to the right to demonstrate and the right to protest. He said that such demonstrations and protests were not prohibited "[a]s long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic". This was a dissenting judgment in that the majority of the court granted an injunction on the basis of a claim in private nuisance. However, the parts of Lord Denning's judgment to which I have referred have been approved in later cases.

68. In Hirst and Agu v Chief Constable of West Yorkshire, it was held that the phrase "without lawful authority or excuse" covered activities otherwise lawful in themselves which might be reasonable in all the circumstances. The court approved a passage in Nagy v Weston (not itself a case involving demonstrations or protests) which referred to the length of time taken up by the obstruction, the place where it occurred, the purpose for which it was done and whether it caused an actual obstruction rather than a potential obstruction. It was also said that the activity causing the obstruction must be inherently lawful. An obstruction caused by unlawful picketing in pursuance of a trade dispute would be "without lawful excuse".

69. In DPP v Jones, the issue was as to the scope of the public's rights of access to the public highway and whether those rights of access were restricted so that they precluded any right of peaceful assembly on the highway: see per Lord Irvine of Lairg at page 251D-E. The argument for the prosecutor in that case was that the public's right of access was restricted to a right to pass and repass and other incidental activities; any wider use of the highway was said to be a trespass. The argument arose in the context of section 14A of the Public Order Act 1986 which referred to a "trespassory assembly". This argument was rejected. Lord Irvine reviewed the cases where actions on the highway were held to exceed the public's rights of access to the highway. At page 254G-255A, he said:

> "The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway."

70. Later in his speech in DPP v Jones, Lord Irvine considered section 137 of the Highways Act and the earlier cases including Hirst and Agu with which he obviously agreed. Lord Clyde agreed with Lord Irvine and he stated at page 281E-F:

> "I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway."

Lord Hutton agreed with Lord Irvine.

71. The issue in DPP v Jones related to what amounted to a trespass on the highway and the majority in the House of Lords stressed that the assembly in that case was not obstructive. Nonetheless, the majority did approve Hirst and Agu which had considered section 137 of the Highways Act 1980 and held that it is possible to have an obstruction of the highway which is reasonable and therefore has a lawful excuse for the purposes of that section.

72. In Birch v DPP, a peaceful demonstration involved protestors sitting on the road blocking the traffic. It was held that no one was permitted unreasonably to obstruct the highway and that there was no right to demonstrate in a way which did obstruct the highway.

73. Section 22A(1) and (2) of the Road Traffic Act 1988 provides:

> "(1) A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause -
>
> (a) causes anything to be on or over a road, or
>
> (b) interferes with a motor vehicle, trailer or cycle, or
>
> (c) interferes (directly or indirectly) with traffic equipment,
>
> in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.
>
> (2) In subsection (1) above 'dangerous' refers to danger either of injury to any person while on or near a road, or of serious damage to property on or near a road; and in determining for the purposes of that subsection what would be obvious to a reasonable person in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused."

Articles 10 and 11

74. As I explained earlier, I have so far considered the causes of action relied upon by the Claimants without explicit regard being paid to Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is agreed that these Articles are engaged on the facts of this case even though none of the Claimants is a public authority.

75. Article 10 provides:

> "(1). Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …

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

76. Article 11 provides:

> "(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 exercise of these rights by members of the armed forced, or the police, or of the administration of the State."

77. The demonstrations and protests in this case do involve the expressions of opinions and assembly and association with others. Both Articles confer qualified, rather than absolute, rights. Both Articles are qualified in relation to matters which involve public safety, matters needed for the prevention of disorder or crime and for the protection of the rights of others.

78. Ms Williams QC, for the Sixth Defendant made a number of submissions as to the significance of Articles 10 and 11 and cited a number of relevant authorities. In particular, she submitted:

(1) freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and the development of every man;

(2) freedom of expression is available for ideas which offend, shock or disturb the State or any sector of the population;

(3) although Article 11 refers to "peaceful assembly" the only type of assembly which did not qualify were those in which the organisers and participants intended to use violence or where they denied the foundations of a democratic society; use by a small number of protestors of violence did not lead to the whole assembly being branded as non-peaceful;

(4) direct action protests can fall within Articles 10 and 11; such protests can include lock-ons, sit ins, protest camps and long term occupations;

(5) although Articles 10 and 11 do not justify criminality or breaches of the law, these Articles do extend to direct action protest activity which deliberately intends to cause annoyance, offence or disruption;

(6) whether the Articles confer a right to carry on direct action protest activity in a particular case will depend upon whether the rival right which is said to qualify Articles 10 and 11, for example the criminal law or the rights of others, satisfies the threefold test referred to below;

(7) the threefold test is that the matter relied upon to restrict or qualify the rights conferred by these Articles, must be:

a) prescribed by law; and

b) necessary in a democratic society; and

c) pursue one or more of the legitimate aims specified in Article 10(2) or 11(2), as the case may be.

(8) a matter is prescribed by law only if it satisfies the established principles as to certainty and legality;

(9) whether something is necessary in a democratic society requires the court to consider whether the interference with the Article 10 or Article 11 right corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued; restraints on freedom of expression are acceptable only to the extent that they are necessary and justified by compelling reasons; the need for restraint must be convincingly established; this submission applied not only as to whether Articles 10(2) and 11(2) restricted the rights to freedom of expression and assembly by reference to the rights of others but also extended to the question whether the rights of others should be protected by the criminal law or additionally protected by the grant of an injunction.

79. In addition to a number of leading Strasbourg cases which established the above propositions, Ms Williams cited a number of domestic decisions, namely, Westminster CC v Haw [2002] EWHC 2073 (QB), Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, Mayor of London v Hall [2010] EWCA Civ 817, [2011] 1 WLR 504 and City of London v Samede [2012] EWCA Civ 160, [2012] 2 All ER 1039 which are relevant in the present case as they concerned protests involving direct action.

80. In Westminster CC v Haw, the highway authority sought a final injunction to remove Mr Haw who was camping on the pavement opposite the Houses of Parliament. The court (Gray J) applied the authorities to which I have earlier referred as to section 137 of the Highways Act 1980 and asked whether Mr Haw's obstruction of the pavement was unreasonable. The court had regard to the duration, place, purpose and effect of the obstruction as well as the fact that Mr Haw was exercising his right to freedom of expression under Article 10. It was held that the obstruction was reasonable.

81. In Tabernacle v Secretary of State for Defence, the Court of Appeal considered an application for judicial review of a bye-law made by the Secretary of State for Defence which would have the effect of banning a protest camp at Aldermaston. The court asked itself whether the Secretary of State had justified the bye-law in a way which satisfied the requirements of Articles 10 and 11. It was held that he had not done so as the suggested justification was limited to dealing with possible nuisance created by the camp. Laws LJ then said at [43]:

> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope."

82. In Mayor of London v Hall, the Court of Appeal refused permission to appeal to a group of protestors who were camping on Parliament Square against an order for possession and an injunction requiring their removal from the Square. The court regarded the location of the protest as significant (in the protestors' favour) for the purpose of Articles 10 and 11. The court was required to balance the protestors' rights to protest against other matters referred to in Articles 10(2) and 11(2), including the rights of others. The trial judge had referred to issues as to public health and the prevention of criminal damage; he also referred to the rights of others to use the Square. He held that the balancing exercise resulted in it being appropriate to make the order for possession and grant the injunction. The Court of Appeal added into the balancing exercise the rights of different protestors to demonstrate on the Square. The decision in Tabernacle was distinguished. A different result was reached in relation to Mr Haw and a supporter of his and their cases were remitted for further consideration.

83. In City of London v Samede, the Court of Appeal refused permission to appeal to a group of protestors against a possession order and an injunction requiring their removal from St Paul's Churchyard. The protestors relied on Articles 10 and 11 and submitted that the judge had reached the wrong conclusion when carrying out the balancing exercise required by Articles 10 and 11. Referring to the question, posed by the judge, as to the limits to the right of lawful assembly and protest on the highway, Lord Neuberger MR (giving the judgment of the court) said at [39]:

> "As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the

> protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public."

As to the extent to which the court should take into account the views being expressed by the protestors, Lord Neuberger said at [41]:

> " … we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were "of very great political importance": para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree."

The test for an interim injunction

84. I will now address the test which I should apply to an application for an interim injunction. Normally, the test is that stated in American Cyanamid Co v Ethicon Ltd [1975] AC 396 which requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience). The Defendants say that this does not identify the appropriate test in the present case and that the right test to apply is that laid down in section 12 of the Human Rights Act 1998 which provides:

> "12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made (*"the respondent"*) is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

85. The meaning of "likely" in section 12(3) was considered in Cream Holdings Ltd v Banerjee [2005] 1 AC 253, in particular at [22] per Lord Nicholls. I do not think that any of the special considerations referred to by Lord Nicholls apply in the

circumstances of the present case. I consider that in this case "likely" can simply be taken to mean "more likely than not".

86. The parties did not agree as to whether section 12(3) applies in this case. I am satisfied that it does. I have to ask whether the order I am asked to make "might" affect the exercise of the Convention right to freedom of expression. As I am not granting a final injunction after a trial and as I have not therefore made a final determination as to the extent of the Defendants' rights as to freedom of expression, an interim order which restricts demonstrations and protests "might" affect the Defendants' rights to freedom of expression.

Quia timet injunctions

87. The interim injunctions which are sought are mostly, but not exclusively, claimed on a quia timet basis. There are respects in which the Claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a quia timet basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to, seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the Claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will approach the present applications as if they are made solely on the quia timet basis.

88. The general test to be applied by a court faced with an application for a quia timet injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in London Borough of Islington v Elliott [2012] EWCA Civ 56, per Patten LJ at 29, as follows:

> "29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."

89. In London Borough of Islington v Elliott, the court considered a number of earlier authorities. The authorities concerned claims to quia timet injunctions at the trial of the action. In such cases, particularly where the injunction claimed is a mandatory

injunction, the court acts with caution in view of the possibility that the contemplated unlawful act, or the contemplated damage from it, might not occur and a mandatory order, or the full extent of the mandatory order, might not be necessary. Even where the injunction claimed is a prohibitory injunction, it is not enough for the claimant to say that the injunction only restrains the defendant from doing something which he is not entitled to do and causes him no harm: see Paul (KS) (Printing Machinery) v Southern Instruments (Communications) [1964] RPC 118 at 122; there must still be a real risk of the unlawful act being committed. As to whether the contemplated harm is "imminent", this word is used in the sense that the circumstances must be such that the remedy sought is not premature: see Hooper v Rogers [1975] Ch 43 at 49-50. Further, there is the general consideration that "Preventing justice excelleth punishing justice": see Graigola Merthyr Co Ltd v Swansea Corporation [1928] Ch 235 at 242, quoting the Second Institute of Sir Edward Coke at page 299.

90. In the present case, the Claimants are applying for quia timet injunctions on an interim basis, rather than at trial. The passage quoted above from London Borough of Islington v Elliott indicated that different considerations might arise on an interim application. The passage might be read as suggesting that it might be easier to obtain a quia timet injunction on an interim basis. That might be so in a case where the court applies the test in American Cyanamid where all that has to be shown is a serious issue to be tried and then the court considers the adequacy of damages and the balance of justice. Conversely, on an interim application, the court is concerned to deal with the position prior to a trial and at a time when it does not know who will be held to be ultimately right as to the underlying dispute. That might lead the court to be less ready to grant quia timet relief particularly of a mandatory character on an interim basis.

91. I consider that the correct approach to a claim to a quia timet injunction on an interim basis is, normally, to apply the test in American Cyanamid. The parts of the test dealing with the adequacy of damages and the balance of justice, applied to the relevant time period, will deal with most if not all cases where there is argument about whether a claimant needs the protection of the court. However, in the present case, I do have to apply section 12(3) of the Human Rights Act 1998 and ask what order the court is likely to make at a trial of the claim.

92. I have dealt with the question of quia timet relief in a little detail because it was the subject of extensive argument. However, that should not obscure the fact that the decision in this case as to the grant of quia timet relief on an interim basis is not an unduly difficult one.

93. What is the situation here? On the assumption that the evidence does not yet show that protestors have sought to subject Ineos to their direct action protests, I consider that the evidence makes it plain that (in the absence of injunctions) the protestors will seek to do so. The protestors have taken direct action against other fracking operators and there is no reason why they would not include Ineos in the future. The only reason that other operators have been the subject of protests in the past and Ineos has not been (if it has not been) is that Ineos is a more recent entrant into the industry. There is no reason to think that (absent injunctions) Ineos will be treated any differently in the future from the way in which the other fracking operators have been treated in the past. I therefore consider that the risk of the infringement of Ineos' rights is real.

94. The next question is whether the risk of infringement of Ineos' rights is imminent. I have described earlier the sites where Ineos wish to carry out seismic testing and drilling. It seems likely that drilling will not commence in a matter of weeks or even months. However, there have been acts of trespass in other cases on land intended to be used for fracking even before planning permission for fracking had been granted and fracking had begun. I consider that the risk of trespass on Ineos' land by protestors is sufficiently imminent to justify appropriate intervention by the court. Further, there have already been extensive protests outside the depots of third party contractors providing services to fracking operators. One of those contractors is P R Marriott. Ineos uses and intends to use the services of P R Marriott. Accordingly, absent injunctions, there is a continuing risk of obstruction of the highway outside P R Marriott's depot and when that contractor is engaged to provide services to Ineos, those obstructions will harm Ineos.

95. To hold that the risk of an infringement of the rights of Ineos is not imminent with the result that the court did not intervene with injunctions at this stage would leave Ineos in a position where the time at which the protestors might take action against it would be left to the free choice of the protestors without Ineos having any protection from an order of the court. I do not consider that Ineos should be told to wait until it suffers harm from unlawful actions and then react at that time. This particularly applies to the injunctions to restrain trespass on land. If protestors were to set up a protest camp on Ineos' land, the evidence shows that it will take a considerable amount of time before Ineos will be able to recover possession of such land. In addition, Ineos has stated in its evidence on its application that it wishes to have clarity as to what is permitted by way of protest and what is not. That seems to me to be a reasonable request and if the court is able to give that clarity that would seem to be helpful to the Claimants and it ought to have been considered to be helpful by the Defendants. A clear injunction would allow the protestors to know what is permitted and what is not.

96. At this point, I will comment on a slightly different but related point. Was it premature for Ineos to seek ex parte relief in this case on 28 July 2017? The Defendants say that I was misled on the ex parte application into believing that an interference with Ineos's rights was so imminent that it was appropriate for Ineos to apply to the court on an urgent ex parte basis. In fact, I did not grant the injunction ex parte on the basis of alleged urgency. I did not form the view that the order had to be made on 28 July 2017 and could not wait for a day or so to allow the Defendants to be given notice of the hearing. Instead, I took the view that the giving of notice of the application to the Defendants would tip them off as to what might happen at a hearing of the application which might have led them to take some of the action which the injunctions which were sought were intended to prevent. The evidence did show that it was possible for protestors to trespass on land and set up protest camps on short notice.

The likely result at a trial

97. In this case, I am not asked to grant a final injunction but am asked to grant an interim injunction until trial or further order. I recognise however that the grant of an interim injunction is likely to have a significant effect on some of the methods the Defendants wish to use in order to protest against Ineos' intended fracking operations. I cannot predict whether this case will ever go to trial.

98. I have considered above the test to be applied for the grant of an interim injunction ("more likely than not") and the test for a quia timet injunction at trial ("imminent and real risk of harm"). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the Claimants.

99. Before addressing the legal points which arise, I will make my findings as to which of the risks apprehended by the Claimants would be considered to be imminent and real. I consider that on the evidence before me there is an imminent and real risk of:

    (1) trespass on the Claimants' land;

    (2) interference with equipment on the Claimants' land;

    (3) substantial interference with the private rights of way enjoyed by some of the Claimants;

    (4) action to prevent the Claimants leaving their land and passing and repassing on the highway; and

    (5) action to prevent third party contractors leaving their land and passing and repassing on the highway.

100. I referred earlier to the police report as to the types of direct action which the police have noted in the past. Based on how matters are there described, I consider that there is an imminent and real risk of specific actions such as:

    (1) trespass on land;

    (2) slow walking;

    (3) protestors placing themselves and things such as bicycles and cars and other objects in the path of vehicles;

    (4) placing placards in front of drivers' windscreens;

    (5) climbing onto vehicles;

    (6) parking across site gates;

    (7) the impeding of site workers;

    (8) lock-on blockades of site entrances;

    (9) lock-ons to the underside of vehicles; and

    (10) the targeting of secondary and tertiary supply companies.

101. I consider that the particular causes of action which need to be explored to consider the remedy which might be appropriate for these risks are:

    (1) trespass to land;

(2) damage to, and theft of, equipment on the Claimants' land;

(3) actionable interference with an easement;

(4) interference with the common law right to access the highway from private land;

(5) obstruction of the highway as an actionable public nuisance; and

(6) conspiracy to injure Ineos by means of the matters in (1) to (5) above in relation to third party contractors supplying goods and services to Ineos.

102. For the reasons which I will give later in this judgment, I do not favour the grant of an injunction against "harassment" largely because of the lack of clarity of that term for the purposes of being included in an injunction. Further, if it is appropriate to grant injunctions against the specific matters referred to in paragraphs 99 and 100 using the causes of action referred to in paragraph 101 above, then that is preferable to an injunction designed to restrain "harassment" without further specification. I take a similar view in relation to some of the generally expressed terms of section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.

103. As regards the cause of action in trespass, the right to freedom of expression and the right of assembly under Articles 10 and 11 are relevant. However, there is clear authority as to how those Articles should be applied in cases where the claim is for trespass to private land. I was referred to Appleby v United Kingdom (2003) 37 EHHR 783, School of Oriental and African Studies v Persons Unknown [2010] EWHC 3977 (Ch) and Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 (Ch). Although the law is quite clear and the result of applying it in the present case was not really in dispute before me, I will refer further to the last of these three cases as it is relevant to submissions I will later deal with as to whether I was misled when I granted injunctions ex parte on 28 July 2017.

104. In Sun Street, the judge (Roth J) referred to Articles 10 and 11 and to the earlier cases of Appleby and School of Oriental and African Studies. He also referred to Mayor of London v Hall and quoted two paragraphs ([37] and [38]) from that case which referred to a number of relevant matters when balancing competing rights for the purposes of Articles 10 and 11. Roth J then contrasted the position of a prominent public space with private land. On the facts of the particular case, Roth J said at [32] in relation to submissions as to Article 10:

> "Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question whether if the bank, or, more accurately, its subsidiary, recovered possession, the Occupiers would be prevented from exercising *any* effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals or groups currently in the Property can manifestly communicate their views about waste of

> resources or the practices of one or more banks without being in occupation of this building complex. No one is seeking to prevent them from coming together to campaign or promulgate those views. I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property."

105. In the present case, if a final injunction were sought on the basis of the evidence presented on this interim application, the court is (to put it no higher) likely to grant an injunction to restrain the protestors from trespassing on the land of the Claimants. The land is private land and the rights of the Claimants in relation to it are to be given proper weight and protection under Articles 10(2) and 11(2). The Claimants' rights are prescribed by law, namely the law of trespass, and that law is clear and predictable. The protection of private rights of ownership is necessary in a democratic society and the grant of an injunction to restrain trespass is proportionate having regard to the fact that the protestors are free to express their opinions and to assemble elsewhere. There would also be concerns as to safety in the case of trespass on the Claimants' land at a time when that land was an operational site for shale gas exploration.

106. I take the same view as to the claim in private nuisance to prevent a substantial interference with the private rights of way enjoyed in relation to Sites 3 and 4. I would not distinguish for present purposes between the claim in trespass to protect the possession of private land and the claim in private nuisance to protect the enjoyment of a private right of way over private land.

107. The Claimants' claim in relation to obstruction of the highway outside Sites 1 to 8 is put in public nuisance. However, as indicated earlier, based on the passage in Clerk & Lindsell referred to above, the Claimants have a private common law right to access the highway from their land which fronts upon the highway but I will assume in favour of the protestors that if they were carrying on a reasonable use of the highway which impacted on the Claimants' right to access the highway, that would not be an infringement of the right of access to the highway.

108. Two matters need to be considered as to the use of the highway. The first is as to whether the actions of the protestors amount to a reasonable use of the highway and the second is as to the application of Articles 10 and 11. I will proceed on the basis that these matters should be dealt with in the same way for the purposes of the law as to public nuisance as they do in relation to the criminal offence under section 137 of the Highways Act 1980.

109. It is clear from the authorities that, to some extent, demonstrations and protests on the highway can be a reasonable use of the highway. The question is whether direct action of the kind used in the present case would be held to be reasonable use. The particular direct action of which there are examples in the present case are slow walking, lock-ons and other obstructions of the highway.

110. I have seen video footage of the way in which slow walking has been carried out as part of anti-fracking protests. One type of slow walking involved a number of protestors walking on the main road in front of a vehicle, with the result that the

vehicle and all of the traffic backed up behind it was forced to proceed at the pace of the walkers. The "walking" by the protestors was at an unnaturally slow pace. Anyone who was out for a walk or who wanted to get somewhere would not have walked at the pace shown in the video evidence. The pace of the walking was as slow as possible so as not to amount to the protestors being stationary on the highway. Another example of slow walking shown by the video evidence was where the protestors walked in front of vehicles trying to leave a depot of one of the fracking operators. Again, the pace of the walking was the bare minimum so as not to amount to the protestors being stationary on the highway.

111. It is perhaps implicit in the protestors' wish not to remain stationary on the highway that they recognised that to do so would have amounted to an unreasonable use of the highway. In any event, I think that it is likely that on an application for a final injunction, a court would take the view that standing still in order to block the passage of vehicles on the highway because the vehicles are being used for a purpose to which the protestor objects would not be a reasonable use of the highway. If so, I simply do not see that the somewhat token amount of movement involved in slow walking would change the legal assessment of the protestors' actions.

112. The lock-ons in the present case involve protestors being locked-on to each other or to something which cannot easily be moved. The idea is that when the police wish to remove the protestors, the process of removal will take much longer because of the need to cut through the means by which the protestors are locked-on. If the protestors are lying on the highway in a way which obstructs the traffic then the additional element of locking-on is designed to prolong the period of such obstruction. On an application for a final injunction, I think that it is likely that a court would hold that the act of lying in the road to obstruct traffic particularly with the additional delay in removal caused by locking-on to someone else or to something would not be regarded as a reasonable use of the highway.

113. I reach these conclusions as to what would amount to reasonable use of the highway by paying proper attention to the facts of the earlier cases which accepted that demonstrations and protests on the highway could be considered to be a reasonable use of the highway. The degree of obstruction of the highway which was contemplated in those cases as being potentially reasonable was strikingly more limited than what has been involved in the direct action protests of the anti-fracking protestors in this case.

114. Accordingly, if on the application for a final injunction, it is likely that a court would hold that the direct action protests on the highway amounted to a public nuisance and a criminal offence under section 137 of the Highways Act 1980, what then would be the result of an application of Articles 10 and 11? As explained in Mayor of London v Hall and Samede, that question is fact sensitive. The court has regard to number of factors which include the extent to which the continuation of the protest would breach domestic law, the importance of the location of the protest to the protestors, the duration of the protest and the extent of the actual interference with the rights of others, including the public. I consider that a court considering whether to grant a final injunction would take the view that the rights of the fracking operators should prevail over the claims of the protestors to be entitled to do what they do under Articles 10 and 11. The protestors are doing much more than expressing their opinions about the undesirability of fracking. They are taking direct action against the

fracking operators in an attempt to make them stop their fracking activities. It would not be surprising in such a case that the court would take the view that balancing the entitlement to freedom of expression and assembly against the rights of others, the balance should be struck in favour of protecting the rights of others from a direct interference with those rights. As to the location of the protests, the location of the direct action is chosen as the best place to interfere with the activities of the fracking operators rather than (as in Parliament Square or St Paul's Churchyard) the best place to express opinions to the general public. As to the duration of the obstruction of the highway and the interference with the rights of others, the duration is intended to be long enough to have an adverse impact on the activities of the fracking operators.

115. As explained above, there are a number of ingredients to the tort of conspiracy to injure by unlawful means. I will start by considering the unlawful means. Theft and criminal damage are plainly unlawful means. There is clear evidence as to criminal offences under section 137 of the Highways Act 1980 aimed at third party contractors providing services to fracking operators. There is also evidence which shows that there have been activities contrary to section 22A of the Road Traffic Act 1988. Locking-on to a vehicle is an interference with the vehicle which is dangerous.

116. As to the combination by protestors to commit unlawful acts, there is clear evidence as to such a combination. In particular, the offences under section 137 of the Highways Act 1980 involved a number of protestors acting together in a way which must have been planned and were not coincidence. Further, the evidence shows that the protestors intended to injure the fracking operator whether the protests took place in relation to the premises and vehicles of the operator or of the third party contractors.

Persons unknown

117. I am asked to grant interim injunctions against five categories of "Persons Unknown". In paragraphs 8 - 12 above, I have set out the descriptions of the first five sets of Defendants, variously described as Persons Unknown.

118. The Claimants submit that the joinder of parties as "Persons Unknown" is now an established and permissible way to proceed. Accordingly, they submit that they are able to use that procedure in this case and no special justification for using it needs to be shown. They say that they do not have to show that it is impossible for them to ascertain the names of any of the protestors who might be involved in the conduct which is to be restrained by the injunctions. They say that they do not have to use the different procedural rules whereby a claimant can sue a named defendant as a representative of others with the same interest: see CPR rule 19.6.

119. At the inter partes hearing in September 2017, I heard submissions from the Defendants on the procedure used by the Claimants in this respect. I was concerned at the idea that the court might be asked to grant a quia timet injunction against persons who had not yet committed the acts which the injunction would prevent them from doing but yet they would be defined as defendants as Persons Unknown who have committed such acts. For example, the First Defendants are defined as Persons Unknown entering or remaining on specified areas of land but when the proceedings were issued and the ex parte injunctions were granted, no one had entered on the specified land as a trespasser (subject to the possibility that there might have been a

trespass on Site 1). Proceeding in this way would seem to produce the result that at the time when the court made its order there were no persons within the defined category of Persons Unknown. How then, later, did some persons come within that category and become subject to the court's order? Did they become parties by their unilateral action which was action forbidden by the court's order?

120. The first case which permitted a claimant to sue persons unknown defined by other words of description (without specific statutory authority for that procedure) was Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] 1 WLR 1633. In that case, the judge (Sir Andrew Morritt V-C) said at [21] that it was not material that the description of persons unknown might apply to no one. In Hampshire Waste Services Ltd v Intended Trespassers [2004] Env LR 196, the same judge granted a quia timet injunction to restrain future trespass by protestors. The judge amended the description of the persons unknown in that case so that it referred to persons entering or remaining on the relevant land without the consent of the owner of it. The judge did not favour a description which involved a legal concept such as "trespass" nor did he favour a description which involved a person's subjective state of mind, for example, his intentions. These two cases were discussed with approval by Lord Rodger of Earlsferry in Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 at [2].

121. Before the development of the law in Bloomsbury Publishing, in 1991, Parliament had introduced a new section, section 187B, into the Town and Country Planning Act 1990 which provided for the making of rules of court so as to permit a local authority in certain cases to obtain injunctive relief against persons unknown. Those powers were considered by the Court of Appeal in South Cambridgeshire DC v Gammell [2006] 1 WLR 658. At [32], Sir Anthony Clarke MR described the position where an injunction had been granted against persons unknown of a certain description and following that order a person had done the thing which the order provided should not be done. It was held that when that person did the thing forbidden by that order, that person became a party to the proceedings and committed a breach of the order. It was not necessary to make a further order of the court adding that person as a party.

122. Although, in Hampshire Waste, the judge did not favour a description of persons unknown which included a reference to their intentions (and the same view was taken in South Cambridgeshire DC v Persons Unknown [2004] EWCA Civ 1280) there have been later cases where words such as "intending" or "proposing" have been used.

123. Since Bloomsbury Publishing, there have been many cases where the courts have been asked to grant, and have granted, injunctions against persons unknown. As it happens, many of these involved injunctions against various kinds of protestors. I consider that the position has now been reached that the procedure adopted by the Claimants in the present case is a course which was open to them. Although the Defendants made detailed submissions calling into question the use of this procedure, the Defendants did not focus on the words of description which were used in this case and did not suggest modifications to the wording adopted by the Claimants.

The duty of candour on an ex parte application

124. Before considering whether to grant injunctions in this case and, if so, the terms of any injunctions, it is necessary to consider the submission made by the Defendants which criticised the Claimants' conduct of the ex parte application made to the court on 28 July 2017. The Defendants submitted that the Claimants had not conducted that application in a fair way, informing the court in a full and frank way of the points which were available to the Defendants and which could have been put forward by the Defendants if they had been given proper notice of that hearing.

125. There was no real dispute as to the relevant legal principles. The problem, as always in this area, was said to arise in relation to the application of those principles. The Claimants said that there had been no breach of the duty of candour in relation to the ex parte application. The Defendants said that there were several grave breaches of the duty of candour and that the right response from the court would be to discharge the ex parte injunctions (and the continuation of them in September 2017) and to refuse to grant to the Claimants any injunctive relief prior to the trial of the action.

126. Although there was no real dispute as to the legal principles which are well known, it is helpful to set out an often quoted summary of the principles together with some more recent comments since that summary was first provided. The summary is in the judgment of Mr Boyle QC sitting as a Deputy High Court Judge in The Arena Corporation Ltd v Schroeder [2003] EWHC 1089 (Ch) at [213] in these terms:

> "(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

> (6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

127. That summary was cited by Christopher Clarke J in Re OJSC ANK Yugraneft [2008] EWHC 2614 (Ch), [2010] BCC 475 and he added his own comments at [103]-[106], as follows:

> "103 I regard that as a helpful review of the applicable principles, subject to the overriding principle, reflected in proposition (9), that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion, to which (as Mr Boyle observes at [180]) the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the court, like Janus, looks both backwards and forwards.
>
> 104 The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.

> 105 As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.
>
> 106 As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

128. Thus, if the court finds that an applicant has obtained ex parte relief but has failed to comply with the duty or candour or of full and frank disclosure, the court can respond in a number of ways. One response is to discharge the ex parte order which was obtained. If the court does discharge the ex parte order, the court needs to consider whether to grant the same or a similar order following an inter partes hearing. The fact that the court has discharged the ex parte order by reason of the non-disclosure can be enough to persuade the court not to make an inter partes order to which the applicant would otherwise be entitled but a refusal to make an inter partes order does not automatically follow from a decision to discharge the ex parte order.

129. Ms Williams on behalf of the Sixth Defendant made the following principal submissions:

(1) The relief sought on an ex parte basis was in wide sweeping terms;

(2) There was no genuine urgency;

(3) The Claimants had spent an enormous amount of time in preparing the application;

(4) The voluminous extent of the exhibits meant that the court would be heavily reliant on the Claimants' summaries of what the evidence showed;

(5) There was a heavy onus on the Claimants to ensure that the summaries of the evidence did not overstate the evidential position;

(6) The Claimants misled the court in relation to matters of law, as follows:

a) The Claimants did not inform the court that there would only be an actionable obstruction of the highway, or the criminal offence of obstruction of the highway, if the use of the highway was unreasonable;

b) The Claimants' description of the three-pronged test to be applied pursuant to Articles 10 and 11 was inadequate; and

c) The Claimants failed to identify the correct test as to the right to protest on public land;

(7) The Claimants misled the court in relation to factual assertions, as follows:

a) The court was misled as to the alleged urgency of the application;

b) The evidence materially overstated the allegedly imminent risk of injury death or harm and the nature of Ineos' duties in that respect;

c) The selections from social media were unrepresentative;

d) The court was played an unrepresentative 10 minutes of video evidence;

e) The Claimants did not make it clear that the vast majority of anti fracking protests were peaceful and lawful;

f) The Claimants did not make it clear that peaceful protest activity had already taken place in relation to Sites 1 and 2;

g) Mr Fellows' witness statement was unfair in its description of what happened at a meeting in January 2017 in relation to Site 1;

h) Mr Pickering overstated the extent to which there was a consensus that fracking was safe;

i) The Claimants did not make it clear that there was usually, but not always, a delay between the grant of planning permission for drilling on land and the occupation of that land;

j) The experiences of other fracking companies was misdescribed in Mr Talfan Davies' second witness statement; and

k) There were other examples of the facts being misdescribed.

130. Ms Harrison QC for the Seventh Defendant made the following submissions on this part of the case:

(1) At no point was there any inkling of the court being told what could have been said by someone acting for a potential defendant;

(2) The material provided to the court at the ex parte hearing was very extensive; the draft order ran to many pages; there was a 37-page skeleton argument; there were seven witness statements with three lever arch files of exhibits; there was six hours of video footage;

(3) The court was heavily dependent on the material put before it by the Claimants so that the duty of candour on the Claimants was particularly high;

(4) The Claimants misled the court into thinking there was an imminent threat of tortious conduct;

(5) The Claimants referred to "militant protestor activity" and "a recent escalation of unlawful activity";

(6) The Claimants should have told the court that there had been peaceful protests;

(7) The Claim Form stated that the case did not raise any issues under the Human Rights Act 1998;

(8) The court was misled as to the position in relation to Articles 10 and 11;

(9) The court was misled as to the right to protest on the highway and DPP v Jones was not cited;

(10) There was no mention of Article 8;

(11) The description of the position under the Protection from Harassment Act 1997 was inadequate;

(12) The Claimants misrepresented the controversial nature of fracking;

(13) Ineos did not tell the court of its safety failings at other sites;

(14) The Claimants did not explain the rural nature of the drilling sites and the effect of fracking on the local community;

(15) The Claimants falsely alleged that the police supported the application for injunctions; and

(16) The Claimants did not tell the court that posting up notices of the injunction would be a criminal offence of fly-posting.

131. As can be seen, the Defendants' criticisms of the Claimants' conduct of the ex parte application are very extensive. I am quite clear that as regards many of the matters which are now raised by the Defendants, I was not misled. As regards some of the other contentions that the court was misled as to the facts, I consider that it is not appropriate on the Defendants' applications to discharge an ex parte injunction for the court to engage with the underlying disputes of fact. The duty of candour requires the court to be told the crucial facts or the material facts. As to which facts are material, that is judged in a broad sense. The court must preserve a sense of proportion in reacting to a complaint that it was misled. It must not allow the argument to descend into such a degree of detail that it is in danger of not being able to see the wood for

the trees. Further, an application to discharge an ex parte injunction on the ground of non-disclosure ought to be capable of being dealt with reasonably concisely. One of the things which normally cannot be done is to determine what the disputed facts are in order to assess whether the court was misled as to the facts. The position is otherwise if the facts are truly so plain that they can be readily and summarily established. The resolution of disputes as to the facts is normally a matter for the trial rather than for an application to discharge an ex parte injunction. In making the comments in this paragraph, I have followed the guidance given in Kazakhstan Kagazy plc v Arip [2004] EWCA Civ 381 at [36].

132. I will now deal with the allegation that I was misled as to the facts in accordance with the above guidance. By this stage, I have spent a considerable amount of time absorbing what is said in the various witness statements and the exhibits so that I am familiar with all of that material. I have re-read the 37-page skeleton argument which was before me on 28 July 2017. I have also read a transcript of that hearing. The ex parte application was a heavy application. The court was provided with an enormous amount of material. However, the witness statements themselves were not unmanageable, although still lengthy. Whether the exhibits fully supported the statements made by the witnesses is not a question which can be adjudicated upon on the applications to discharge the ex parte injunctions. It is certainly not plain and obvious that they did not. I have of course considered in a general way the allegations of misleading facts but my overall assessment is that the court was not misled.

133. I turn then to consider the submissions that I was misled as to the law to be applied. I deal first with the submission that I was misled as to the civil and criminal law as to what amounts to an obstruction of the highway and the extent to which protests on the highway are lawful. The skeleton argument prepared for the ex parte hearing referred to the law as to public nuisance and, separately, as to section 137 of the Highways Act 1980. In relation to section 137, the skeleton argument referred to the defence of lawful authority and excuse and separately to the question whether a defendant's use of the highway was reasonable, citing both Westminster CC v Haw and Nagy v Weston. The former of those cases cited both Hurst and Agu and DPP v Jones. I consider that the skeleton adequately directed me to the point that some protest activity on the highway could be a reasonable use of the highway. I considered at the ex parte hearing that it was likely (see section 12(3) of the Human Rights Act 1998) that at trial the Claimants would establish that the obstructions of the highway complained of in this case were actionable and an infringement of section 137. Following the three day inter partes hearing, I plainly have an even deeper understanding of what the case law says about non-obstructive protests on the highway but I remain of the view that the present case is a clear one that the direct action protests on the highway in this case go well beyond lawful reasonable use of the highway.

134. As to the position under the Human Rights Act 1998, the ex parte application was presented on the basis that Articles 10 and 11 were engaged and that section 12(3) applied. As to the potential application of Articles 10 and 11, it was submitted:

> **"The Relevance of t D f d t ' Co v to Rg t to the Applicable Test**

23. For the purpose of the present application only, Cs accept that the court must be satisfied that any relief granted by it would not amount to a disproportionate interference with Ds' Convention rights under Articles 10 and 11 of the European Convention, when balanced against Cs' rights to peaceful enjoyment of their possessions (including their real property, personal property and corporate goodwill) under Article 1 of Protocol 1 of the European Convention ("A1P1"). These rights are all qualified rights.

24. A corporate entity's goodwill and intangible assets are possessions which qualify for protection under A1P1, albeit that an entity's expected or anticipated future income is not a possession: Clayton and Tomlinson, *The Law of Human Rights* (2nd Ed, 2009) at 18.22, citing R (Countryside Alliance) v Attorney-General [2008] 1 AC 719; [2007] UKHL 52 at 747C-G ([22]), per Lord Bingham.

25. Cs' case is that Ds' have no defence to this application based on their Convention rights, as:

a. in the balancing exercise between Cs' A1P1 rights and Ds' Convention rights, Article 10 has no presumptive priority over other qualified Convention rights, including A1P1: Thames Cleaning and Support Services Ltd v United Voices of the World [2016] EWHC 1310 (QB) at [35], per Warby J.

b. when a private landowner's A1P1 rights are to be balanced against protesters' rights under Articles 10 and 11 of the European Convention, the latter will only be capable of altering the position which would obtain under domestic law where the failure to restrict the landowner's property rights would prevent any effective exercise of freedom of expression, or where the essence of the right would be destroyed: Appleby v United Kingdom (2003) 37 EHRR 38 at [47], applied in Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 at [32]-[33], per Roth J; and Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 646 (Ch) at [37], per HHJ Pelling QC.

c. there can be no argument that the injunction sought by Cs would have this effect, as Cs seek no more than to prevent Ds engaging in activities which are unlawful under domestic law."

135. In Thames Cleaning, the judge (Warby J) dealt with Articles 10 and 11 and section 12(3) in four short paragraphs. It might be said that his discussion on those matters was not a full exposition of the relevant principles but, conversely, the Claimants can say that their description of the legal position was not inadequate because it was at least as thorough as the judge's in that case.

136. At the ex parte hearing, I was specifically taken to the decision in Sun Street where the judge (Roth J) set out the full text of Articles 10 and 11 and the decision in Appleby. Sun Street also referred to Mayor of London v Hall and I was provided with a copy of the decision at first instance in that case. Earlier in this judgment, I have described what was decided in that case. It was argued at the inter partes hearing that the decision in Sun Street only deals with the right to possession of private land and therefore has nothing to say about the right to protest on the highway. Although this was not argued before me, it may be that Sun Street is a potentially relevant authority even when the "rights of others" referred to in Article 10(2) or 11(2) are the rights of a private operator, who is not a public authority, to carry on a lawful business (with or without goodwill) and so that the authority is not restricted to a case where the right in question is a right to the possession of private land.

137. Of course, after three days of an inter partes hearing with lengthy skeleton arguments, the citation of many authorities and oral submissions from four leading counsel, my understanding as to the operation of Articles 10 and 11 is now deeper than it was on 28 July 2017. However, on 28 July 2017, I was not misled as to the importance of the rights conferred by Articles 10 and 11. Further, much of the case law on these Articles to which I was referred by Ms Williams is an elaboration of the words of the Articles and many of the principles are clear enough from the wording of Articles 10(2) and 11(2). Further, I was aware from the authorities cited to me on 28 July 2017 that Articles 10 and 11 extended to direct action protests and involved a fact sensitive assessment. I also bear in mind that after the detailed exposition from the Defendants as to Articles 10 and 11, the case remains a clear one where I consider that it is not open to the Defendants to rely on Articles 10 and 11 in an attempt to justify direct action for the purpose of harming the Claimants with a view to forcing them to give up their lawful business. I consider that I was not misled as to the basic principles as to Articles 10 and 11 by reason of any breach by the Claimants of their duty of candour.

138. For the sake of completeness, the fact that the Claimants' solicitor ticked the box on the Claim Form saying that there were no issues under the Human Rights Act 1998 has no significance, particularly in the light of the way matters were described in the skeleton argument.

139. As to the position under the Protection from Harassment Act 1997, the matter was not very clearly presented initially at the ex parte hearing but during the hearing, I was taken to the basic provisions of the 1997 Act and the distinction between a case where the victim of the harassment is an individual and a case was made within section 1(1A) and section 3A. Also, I raised the question whether it was appropriate to grant an injunction against "harassment" without further specification and with some hesitation, I made such an order.

140. Having considered the applications to discharge the ex parte injunction and the order in September 2017 which continued it, I am not persuaded that the Claimants did break their duty of candour to the court. If I had been persuaded that there was a breach of that duty, based on the submissions made to me, I would not have refused to grant an injunction until trial on account of the earlier breach of duty. Applying the approach in paragraphs [103]-[106] of OJSC Ank Yugraneft, I would have held that any breach was innocent and insubstantial and the case for an injunction was strong.

That would have led me to grant an injunction until trial even if the facts of this case had crossed the line into being a breach of the duty of candour.

The need for clarity and precision

141. It is important in this case that any injunction granted must be expressed in clear and precise terms. There is a general requirement to that effect, as explained in A-G v Punch Ltd [2003] 1 AC 1046 per Lord Nicholls at [35]:

> "35 Here arises the practical difficulty of devising a suitable form of words. An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. An order expressed to restrain publication of "confidential information" or "information whose disclosure risks damaging national security" would be undesirable for this reason."

Should I grant injunctions and if so, in what terms

142. I have held that there is an imminent and real risk that, in the absence of injunctions, the Defendants will interfere with the legal rights of the Claimants. Further, in the absence of injunctions, it is unlikely that the Claimants will receive any legal redress or compensation for the infringement of their rights. Ineos's business activities are lawful. The Defendants wish Ineos to stop carrying on those activities and wish to put pressure on Ineos to stop. However, on my findings in this judgment, the Defendants' means of putting pressure on Ineos involve unlawful behaviour on their part, including criminal acts. I have also held, applying section 12(3) of the Human Rights Act 1998, that it is likely that the court following a trial would grant a permanent injunction to restrain the interferences with the Claimants' legal rights. The normal response of a court to this state of affairs would be to grant similar interim injunctions without further ado.

143. The Defendants submit that this is not a proper case in which the court should intervene by granting interim injunctions. It is said that the civil courts should leave it to the criminal law and to the police to deal with any criminal behaviour which arises. Put that way, I am not attracted to that submission. The fact that the same conduct might involve criminal offences as well as wrongdoing which is actionable in a civil court is not usually a reason to deny a claimant in a civil court an injunction to restrain interference with his legal rights. The detection and prosecution of alleged criminal offenders is generally left to public authorities but there is no reason for a civil court to deny to a claimant the advantages which ought to flow from the grant to it of an injunction. It was also suggested that if Ineos were granted injunctions that would complicate the position of the police and would result in Ineos being in a position to tell the police what to do and contrary to the wishes of the police. I do not see how that would be so. If the injunctions are complied with then the result ought to

be that there would be less need for the police to be involved. If the injunctions are not complied with and the police are involved, then they will be free to form their own decisions as to the appropriate response to the situation as they find it. It is not appropriate for me to try to predict whether any injunctions which are granted will be obeyed. I was not asked to refuse to grant injunctions on the ground that they would not be obeyed and it would not be right to refuse relief on that ground. Equally, it is not appropriate for me to speculate as to the ease or difficulty which the Claimants would have in seeking to enforce any clearly expressed injunction.

144. I conclude that I ought to grant injunctions in this case provided that they can be expressed in clear terms having regard to the matters emphasised in Attorney General v Punch Ltd.

145. In relation to the injunctions to restrain trespass on Sites 1, 3, 4, 5, 6 and 8 (where there are no public footpaths) are concerned, it is a straightforward matter to grant an injunction in terms which prevent the Defendants entering or remaining on that land without the consent of the relevant Claimants. The Defendants say that such an order would go too far as it would prevent the Defendants attending on such a site, for example the offices of Ineos, to hand in a petition against fracking. The Defendants say that they are entitled to enter Ineos' offices for such a purpose as part of their rights under Articles 10 and 11. They also submit that they are entitled to go on to Ineos' land to stand there with a placard. I do not agree with these submissions. At the lowest, I consider that it is likely that a court asked to grant a final injunction against trespass would hold that the Defendants were not so entitled.

146. In the case of Sites 2 and 7, there is a public footpath across the sites. The orders granted in July and September 2017 provided that the injunction was not to prevent a member of the public using those footpaths. The Defendants made a number of practical points about what is involved in using a public footpath. A public footpath will have a particular width in legal terms although there may be a lack of clarity both in fact and in law as to what that width is. Further, there will be occasions when a walker will leave the footpath without causing any harm to anyone but yet leaving the footpath will result in an act of trespass and a breach of an order restraining trespass. An obvious example would be where the walker is pulled off the path by his dog or he goes off the path to retrieve his dog. My view is that the order should continue to provide as it did in July and September 2017. It is not sensible to start drafting elaborate wording dealing with various practical problems which walkers face when asked to keep to a public footpath. Conversely, it is not sensible to refuse to grant an injunction against trespassing on Sites 2 and 7 on account of what is suggested to be a particular difficulty in this respect.

147. Another point raised as to the public footpaths is that it was submitted that the legal principles as to reasonable use of a highway should apply equally to reasonable use of a public footpath. Thus, it is submitted, if the public are entitled to protest on a highway, they are entitled to protest on a public footpath. I consider that I do not need to rule on this submission. The injunction in relation to trespassing on Sites 2 and 7 will permit the public to use the public footpaths in accordance with their rights to do so, whatever they are. If members of the public wish to use the footpath to protest against fracking but without otherwise trespassing on Sites 2 and 7, then it remains to be seen whether there will be any complaint about such protests. If there are complaints, then at that stage they can be raised and determined.

148. I will also grant injunctions to restrain the Defendants from causing damage to, or removal of, equipment on Sites 1, 2, 3, 4 and 7. It will not be necessary to join a new class of Defendants for this purpose as they will be the First Defendants because they have entered upon those Sites.

149. As regards the injunctions to restrain interference with the private rights of way in the case of Sites 3 and 4, I will grant the injunctions in the terms granted in September 2017. The injunctions will prevent "substantial interference" with the rights of way. I was not asked to include any definition of what would amount to substantial interference and I do not think that it is appropriate to do so. The concept of substantial interference with a right of way is simple enough and is well established.

150. I now turn to consider what restrictions, if any, should be placed on protestors' activities on the highway. In September 2017, the injunction referred to the Defendants “unreasonably interfering and/or interfering without lawful authority or excuse” with the right to pass and repass. I consider that it is appropriate for any order to be more clear as to what is not allowed. I will restrain any obstruction which prevents the Claimants accessing the highway from any of their Sites, with the intention of causing inconvenience and delay. Given that there has been argument about slow walking on the highway, I consider that the injunctions should expressly state that walking in front of vehicles with the object of slowing then down and with the intention of causing inconvenience and delay is not permitted. Other activities which are not to be permitted are blocking the highway with persons or things when done with a view to slowing down or stopping the traffic and with the intention of causing inconvenience and delay. Similarly, I will restrain the climbing by protestors on to vehicles being used by the Claimants (which would be a trespass to such vehicles).

151. There will also be an injunction to restrain a combination, with the intent of causing injury to Ineos, where the combination is to commit any of the modes of obstructing access to the highway or use of the highway referred to above, the access and use in question being by a third party contractor engaged to supply goods or services to Ineos. The injunction will name the contractors intended to be embraced by this order.

152. That brings me finally to the injunctions sought in relation to harassment. The principal injunction which is sought in respect of harassment relates to the corporate claimants rather than the individuals. In relation to the corporate claimants, the ingredients of the statutory tort are a little complicated and require a claimant to show that a defendant has carried on a course of conduct (as defined in section 7) with the relevant knowledge (as defined in section 1(2)) which involves harassment of two or more persons by which he intends to persuade any person not to do something which he is entitled or required to do or to do something that he is not under an obligation to do. Accordingly, any injunction granted to prevent the commission of the statutory tort would have to be expressed to refer to all of the necessary ingredients of the tort. Such an injunction would involve a considerable measure of complication.

153. I consider that there is a further difficulty with the harassment injunction in this case. As explained earlier, "harassment" is not defined by the 1997 Act. The authorities say that the court can be expected to distinguish between things which are, and which are not, harassment. However, this produces the result that an order which simply restrains "harassment" without more would not be as certain as is desirable as a

defendant would not know in advance what the court's decision would ultimately be. This is a particularly acute problem where the courts have explained that behaviour which is annoying and irritating may not be harassment. In the present context, of protest on a matter of public importance, there are likely to be strongly expressed objections to fracking. The expression of those objections may lead to the making of abusive and insulting comments about Ineos (and indeed about the individual Claimants who have made their land available to Ineos) where there might be real difficulty in knowing whether the conduct amounts to harassment. It would be unfortunate if any order made by the court did not enable a Defendant to know what was being restrained. If the order is not clear, a Defendant might commit a breach of it whilst believing that he was complying with the order. There would also be the risk of a chilling effect if a Defendant felt constrained not to do something which he was lawfully entitled to do for fear of finding himself in breach of a court order.

154. The order put forward by the Claimants does not provide any information as to what is and is not permitted beyond the use of the word "harassment". The draft order does contain a qualification as to the intention with which the "harassment" is done but a Defendant who does wish to harm Ineos still has to know whether his intended conduct will or will not amount to harassment and breach the order.

155. In Majrowski, Lady Hale referred to an injunction under the 1997 Act "specifying" the matters to be restrained by the injunction. I was shown a large number of cases where courts have granted injunctions restraining harassment. Many of these cases involved injunctions against protestors wishing to pursue various kinds of protests. In many of these cases, the orders granted spelt out the behaviour which was to be restrained. It is true that in such cases, it was normal for the order to add a general prohibition on "harassment" although I have some reservations as to the appropriateness of doing so. In Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB), the judge (Swift J) declined to grant an injunction against harassment under the 1997 Act in a case involving public protest: see at [99]. She was influenced, as I am, by the lack of clarity as to what is forbidden and what is not forbidden by such an order.

156. In the present case, I have identified what the Claimants have established in relation to an imminent and real risk of harm. The matters established primarily relate to trespass on land and obstructions of the highway. If those matters are restrained, as I hold that they can be, by an order which is clear and precise, I do not consider that the Claimants have demonstrated a need for the court to make an order against harassment within the Protection from Harassment Act 1997, where there is no clear definition to what is restrained and what is permitted. I consider than such an order could have undesirable consequences which the court would wish to avoid. However, I will give the Claimants permission to apply in the future for an injunction against harassment expressed in clear and precise terms specifying the matters which are restrained by such an order if the Claimants can demonstrate that there is a need for such an order in addition to the other orders which are in force.

157. Having made these findings, the Claimants in the first instance will need to draft an order to give effect to them. If the terms of an order are not agreed, I will determine any outstanding matters following the hand down of this judgment.

Court of Appeal

Ineos Upstream Ltd and others *v* Persons Unknown and others (Friends of the Earth intervening)

[2019] EWCA Civ 515

2019 March 5, 6; April 3 Longmore, David Richards, Leggatt LJJ

Practice — Parties — Persons unknown — Injunction — Claimants seeking injunctions on quia timet basis to prevent anticipated unlawful "fracking" protests against various classes of unknown defendants — Whether injunctions properly granted — Guidance as to granting of injunction as against persons unknown

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

Held, allowing the appeal in part, that, while there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort, the court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance; that, although it was not easy to formulate the broad principles on which an injunction against unknown persons could properly be granted, the following requirements might be thought necessary before such an order could be made, namely (i) there had to have been shown a sufficiently real and imminent risk of a tort being committed to justify a quia timet injunction, (ii) it had to have been impossible to name the persons who were likely to commit the tort unless restrained, (iii) it had to be possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they had not to do, and (vi) the injunction ought to have clear geographical and temporal limits; that, on the facts, the first three requirements presented no difficulty, but the remaining requirements were more problematic where the injunctions made against the third and fifth defendants had been drafted too widely and lacked the necessary degree of certainty; and that, accordingly, those injunctions would be discharged, and the claims against the third and fifth defendants dismissed; but that the injunctions against the first and second defendants would be maintained pending remission to the judge to reconsider (i) whether interim relief ought to be granted in the light of section 12(3) of the Human Rights Act 1998, and (ii) if the injunctions were to be continued against the first and second defendants, what would be the appropriate temporal limit (post, paras 29–34, 35, 39–42, 43, 47–51, 52, 53).

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471, SC(E) considered.

Decision of Morgan J [2017] EWHC 2945 (Ch) reversed in part.

APPEAL from Morgan J

© 2019. The Incorporated Council of Law Reporting for England & Wales

The claimants, Ineos Upstream Ltd, Ineos 120 Exploration Ltd, Ineos Properties Ltd, Ineos Industries Ltd, John Barrie Palfreyman, Alan John Skepper, Janette Mary Skepper, Steven John Skepper, John Ambrose Hollingworth and Linda Katharina Hollingworth, were a group of companies and individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions to restrain potentially unlawful conduct against the first to fifth defendants, each described as a group of persons unknown engaging in various defined activities, the sixth defendant, Joseph Boyd, and the seventh defendant, Joseph Corré. By a decision dated 23 November 2017 Morgan J, sitting in the Chancery Division (Property, Trusts and Probate), granted injunctions against the first to third and the fifth defendants so identified [2017] EWHC 2945 (Ch). No order was made against the sixth and seventh defendants.

By an appellant's notice and with the permission of the Court of Appeal the sixth and seventh defendants appealed on the grounds: (1) whether the judge had been right to grant injunctions against persons unknown; (2) whether the judge had failed adequately or at all to apply section 12(3) of the Human Rights Act 1998, which required a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and (3) whether the judge had been right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Friends of the Earth were given permission to intervene by written submissions only.

The facts are stated in the judgment of Longmore LJ, post, para 1–11.

Heather Williams QC, *Blinne Ní Ghrálaigh* and *Jennifer Robinson* (instructed by *Leigh Day*) for the sixth defendant.

Stephanie Harrison QC and *Stephen Simblet* (instructed by *Bhatt Murphy Solicitors*) for the seventh defendant.

Alan Maclean QC and *Jason Pobjoy* (instructed by *Fieldfisher llp*) for the claimants.

Henry Blaxland QC and *Stephen Clark* (instructed by *Bhatt Murphy*) for the intervener, by written submissions only.

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

1 This is an appeal from Morgan J [2017] EWHC 2945 (Ch) who has granted injunctions to Ineos Upstream Ltd and various subsidiaries of the Ineos Group ("the Ineos companies") as well as certain individuals. The injunctions were granted against persons unknown who are thought to be likely to become protesters at sites selected by those companies for the purpose of exploration for shale gas by hydraulic fracturing of rock formations, a procedure more commonly known as "fracking".

2 Fracking, which is lawful in England but not in every country in the world, is a controversial process partly because it is said to give rise to (inter alia) seismic activity, water contamination and methane clouds, and to be liable to injure people and buildings, but also because shale gas, which is a fossil fuel considered by many to contribute to global warming and in due course unsustainable climate change. For these reasons (and no doubt others) people want to protest against any fracking activity both where it may be taking place and elsewhere. In the view of the Ineos companies these protests will often cross the boundary between legitimate and illegitimate activity as indeed they have in the past when other companies have sought to operate planning permissions which they have obtained for exploration for shale gas by fracking. The Ineos companies have therefore sought injunctions to restrain potentially unlawful acts of protest before they have occurred.

3 The judge's order extends to 8 relevant sites described in detail in paras 4–7 of his judgment [2017] EWHC 2945 (Ch); sites 1–4 and 7 consist of agricultural or other land where it is intended that fracking will take place; sites 5, 6 and 8 are office buildings from which the Ineos companies conduct their business.

© 2019. The Incorporated Council of Law Reporting for England & Wales

The claimants

4 There are ten claimants. The first claimant is a subsidiary company of the Ineos corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The first claimant's commercial activities include shale gas exploration in the United Kingdom. It is the lessee of four of the sites which are the subject of the claimants' application (sites 1, 2, 3 and 7). The lessors in relation to these four sites include the fifth to tenth claimants. The second to fourth claimants are companies within the Ineos corporate group. They are the proprietors of sites 4, 5 and 6 respectively. The fourth claimant is the lessee of site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the first to fourth claimants as "Ineos" without distinguishing between them. The fifth to tenth claimants are all individuals. The fifth claimant is the freeholder of site 1. The sixth to eighth claimants are the freeholders of site 2. The ninth to tenth claimants are the freeholders of site 7.

The defendants

5 The first five defendants are described as groups of "Persons unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6 The second defendant is described as:

> "Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)."

7 The third defendant is described as:

> "Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form."

8 The fourth defendant is described as: "Persons unknown pursuing conduct amounting to harassment". The judge declined to make any order against this group which, accordingly, falls out of the picture.

9 The fifth defendant is described as: "Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order."

10 The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12 September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28 July 2017 against the first five defendants until a return date fixed for 12 September 2017. On that date a new return date with a three-day estimate was then fixed for 31 October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

11 As is to some extent evident from the descriptions of the respective defendants, the potentially unlawful activities which Ineos wishes to restrain are: (1) trespass to land; (2) private nuisance; (3) public nuisance; and (4) conspiracy to injure by unlawful means. This last group is included because protesters have in the past targeted companies which form part of the supply chain to the operators who carry on shale gas exploration. The protesters' aim has been to cause those companies to withdraw from supplying the operators with equipment or other items for the supply of which the operators have entered into contracts with such companies.

The judgment

12 The judge (to whose command of the voluminous documentation before him I would pay tribute) absorbed a considerable body of evidence contained in 28 lever arch files including at least 16 witness statements and their accompanying exhibits. He said of this evidence, at para 18 [2017] EWHC 2945 (Ch), which related largely to the experiences of fracking companies other than Ineos, which is a newcomer to the field:

© 2019. The Incorporated Council of Law Reporting for England & Wales

> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

In the light of this comment and the limited grounds of appeal for which permission has been granted, we have been spared much of this voluminous documentation.

13 The judge then commented, at para 21:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

14 The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that: (1) the first defendants were restrained from trespassing at any of the sites; (2) the second defendants were restrained from interfering with access to sites 3 and 4, which were accessed by identified private access roads; (3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to sites 1–4 and 7–8, such interference being defined as (a) blocking the highway; (b) slow walking; (c) climbing onto vehicles; (d) unreasonably preventing access to or egress from the Sites; and (e) unreasonably obstructing the highway; (4) the fifth defendants were restrained from combining together to (a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992; (b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968; (c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and (d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment "in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous" all with the intention of damaging the claimants.

15 These separate orders related, therefore, to causes of action in trespass, private nuisance, public nuisance and causing loss by unlawful means.

16 It is a curiosity of the case that the judge made no order against either Mr Boyd or Mr Corré but they have each sought and obtained permission to appeal against the orders made in respect of the persons unknown and they have each instructed separate solicitors, junior counsel and leading counsel to challenge the orders. They profess to be concerned about the width of the orders and seek to be heard on behalf of the unknown persons who are the subject matters of the judge's order. Friends of the Earth are similarly concerned and have been permitted to intervene by way of written submissions. Any concern about the locus standi of Mr Boyd and Mr Corré to make submissions to the court has been dissipated by the assistance to the court which Ms Heather Williams QC and Ms Stephanie Harrison QC have been able to provide.

This appeal

17 Permission to appeal has been granted on three grounds:

(1) whether the judge was correct to grant injunctions against persons unknown;

(2) whether the judge failed adequately or at all to apply section 12(3) of the Human Rights Act 1998 ("HRA") which requires a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and

© 2019. The Incorporated Council of Law Reporting for England & Wales

(3) whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Persons unknown: the law

18 Under the Rules of the Supreme Court ("RSC"), a writ had to name a defendant: see *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. Accordingly, Stamp J held in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204 that no proceedings could take place for recovery of possession of land occupied by squatters unless they were named as defendants. RSC Ord 113 was then introduced to ensure that such relief could be granted: see *McPhail v Persons, Names Unknown* [1973] Ch 447, 458 per Lord Denning MR. There are also statutory provisions enabling local authorities to take enforcement proceedings against persons such as squatters or travellers contained in section 187B of the Town and Country Planning Act 1990 ("the 1990 Act").

19 Since the advent of the Civil Procedure Rules, there has been no requirement to name a defendant in a claim form and orders have been made against "Persons Unknown" in appropriate cases. The first such case seems to have been *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 in which unknown persons had illicitly obtained copies of the yet to be published book "Harry Potter and the Order of the Phoenix" and were trying to sell them (or parts of them) to various newspapers. Sir Andrew Morritt V-C made an order against the person or persons who had offered the publishers of the Sun, the Daily Mail and the Daily Mirror copies of the book or any part thereof and the person or persons who had physical possession of a copy of the book. The theft and touting of the copies had, of course, already happened and the injunction was therefore aimed at persons who had already obtained copies of the book illicitly.

20 Sir Andrew Morritt V-C followed his own decision in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action Against Incinerators" on 14 July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

21 Both these authorities were referred to without disapproval in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, para 2.

22 In the present case, the judge held, at para 121, that since *Bloomsbury* there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the 1990 Act (section 187B, as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) or by the Civil Procedure Rules (eg CPR r 19.6 dealing with representative actions or CPR r 55.3(4), the successor to the RSC Ord 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

23 She pointed out that when the statutory powers of the 1990 Act were invoked that was precisely the position and she submitted that that could only be explained by the existence of the statute. This was most clearly apparent from the South Cambridgeshire litigation in which the Court of Appeal in September 2004 granted an injunction against persons unknown restraining them from (inter alia) causing or permitting the deposit of hardcore or other materials at Smithy Fen, Cottenham or causing or permitting the entry of caravans or mobile accommodation on that land for residential or other non-agricultural purposes, see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P LR 88. Brooke LJ cited both *Bloomsbury* and

© 2019. The Incorporated Council of Law Reporting for England & Wales

Hampshire Waste as illustrations of the way in which the power to grant relief against persons unknown had been used under the CPR.

24 On 20 April 2005 Ms Gammell stationed her caravan on the site; the injunction was served on her and its effect was explained to her on 21 April 2005; she did not leave and the council applied to commit her for contempt. Judge Plumstead on 11 July 2005 joined her as a defendant to the action and held that she was in contempt, refusing to consider Ms Gammell's rights under article 8 of the ECHR at that stage and adjourned sentence pending an appeal. On 31 October 2005 the Court of Appeal dismissed her appeal and upheld the finding of contempt, holding that the authority of *South Buckinghamshire District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, which required the court to consider the personal circumstances of the defendant under article 8 before an injunction was granted, only applied when the defendants were in occupation of a site and were named as defendants in the original proceedings: see *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) held, at para 32, that Ms Gammell became a party to the proceedings when she did an act which brought her within the definition of the defendant in the particular case and, at para 33, that, by the time of the committal proceedings she was a defendant, was in breach of the injunction and, given her state of knowledge, was in contempt of court. He then summarised the legal position:

> "(1) The principles in the *South Buckinghamshire* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the principles in the *South Buckinghamshire* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Buckinghamshire* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Buckinghamshire* case and in the *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Buckinghamshire* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

25 Ms Harrison said that this was unacceptable unless sanctioned by statute or rules of court contained in the CPR, because the persons unknown had no opportunity, before the injunction was granted, to submit that no order should be made on the grounds of possible infringements of the right to freedom of expression and the right peaceably to assemble granted by articles 10 and 11 of the ECHR or, indeed, any other grounds.

26 Ms Harrison further relied on the recent case of *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that

© 2019. The Incorporated Council of Law Reporting for England & Wales

unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed DPSC, Lord Carnwath, Lord Hodge and Lady Black JJSC agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding, at para 26, that a person, such as the driver of the Micra car in that case, "who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with".

27 In the course of his judgment he said, at para 12, that the CPR neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers; the critical question was what, as a matter of law, was the basis of the court's jurisdiction over parties and in what (if any) circumstances jurisdiction can be exercised on that basis against persons who cannot be named. He then said, at para 13, that it was necessary to distinguish two categories of cases to which different considerations applied: the first category being anonymous defendants who are identifiable but whose names are unknown; the second being anonymous defendants who cannot even be identified, such as most hit and run drivers.

> "The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not."

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard: para 17.

28 Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

© 2019. The Incorporated Council of Law Reporting for England & Wales

> "Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell*, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.

31 That is by no means to say that the injunctions granted by Morgan J should be upheld without more ado. A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance.

32 It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations, Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

33 Ms Williams for Mr Boyd, in addition to submitting that the judge had failed to apply properly or at all section 12(3) of the HRA, submitted that the injunction should not, in any event, have been granted against the fifth defendants (conspiring to cause damage to the claimants by unlawful means) because the term of the injunctions were neither framed to catch only those who were committing the tort nor clear and precise in their scope. There is, to my mind, considerable force in this submission and the principles behind that submission can usefully be built into the requirements necessary for the grant of the injunction against unknown persons, whether in the context of the common law or in the context of the ECHR.

34 I would tentatively frame those requirements in the following way: (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

Application of the law to this case

35 In the present case there is no difficulty about the first three requirements. The judge held that there was a real and imminent risk of the commission of the relevant torts and permission has not been granted to challenge that on appeal. He also found that there were persons likely to commit the torts who could not be named and was right to do so; there are clear provisions in the order about service of the injunctions and there is no reason to suppose that these provisions will not constitute effective notice of the injunction. The remaining requirements are more problematic.

© 2019. The Incorporated Council of Law Reporting for England & Wales

Width and clarity of the injunctions granted by the judge

36 The right to freedom of peaceful assembly is guaranteed by both the common law and article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on private property. Professor Dicey in his *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at p 271:

> "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."

37 This neatly states the common law as it was in 195: see Oxford Edition (2013), p 154, I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said, at para 149, that it was not appropriate to do so since the concept of substantial interference was simple enough and well established. I agree.

38 The one possible drafting point that arises is that it was said by Ms Harrison that, as drafted, the injunctions would catch an innocent dog-walker exercising a public right of way over the claimants' land whose dog escaped onto the land and had to be recovered by its owner trespassing on that land. It was accepted that this was not a particularly likely scenario in the context of a fracking protest but it was said that the injunction might well have a chilling effect so as to prevent dog-walkers exercising their rights in the first place. I regard this as fanciful. I can see that an ordinary dog-walker exercising a public right of way might be chilled by the existence of an anti-fracking protest and thus be deterred from exercising his normal rights but, if he is not deterred by that, he is not going to be deterred instead by thoughts of possible proceedings for contempt for an inadvertent trespass while he is recovering his wandering animal. If this were really considered an important point, it could, no doubt, be cured by adding some such words as "in connection with the activities of the claimants" to the order but like the judge (in para 146) I do not consider it necessary to deal with this minor problem. Overall, this case raises much more important points than wandering dogs.

39 Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by ((c)(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or ((c)(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the

© 2019. The Incorporated Council of Law Reporting for England & Wales

order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

41 Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order, which comprise public access ways to sites 1–4, 7 and 8 and public footpaths or bridleways over sites 2 and 7. The defendants are restrained from: (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of quia timet relief.

42 Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example.

Geographical and temporal limits

43 The injunctions granted by the judge against the first and second defendants have acceptable geographical limits but there is no temporal limit. That is unsatisfactory.

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
> "(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

45 Ms Williams submitted that the judge had failed to apply section 12(3) because the claimants had failed to establish that they would be likely to establish at trial that publication should not be allowed. She relied in particular on the manner in which the judge had expressed himself [2017] EWHC 2945 (Ch), para 98:

> "I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm'). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants."

She submitted that it was not correct to ask what a trial judge would be likely to do "if the court accepted the evidence put forward by the claimants". The whole point of the subsection is that it was the duty of the court to test the claimants' evidence, not to assume that it would be accepted.

© 2019. The Incorporated Council of Law Reporting for England & Wales

46 Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual evidence of the claimants was not contradicted by the defendants because he had added: "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

47 This submission has to be assessed on the basis (if my Lords agree) that the injunctions relating to public nuisance and the supply chain will be discharged. The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish that at trial publication of views by trespassers on the claimants' property should not be allowed.

48 Nevertheless, I consider that there is force in Ms Williams's submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought.

49 A number of other matters are identified in para 8 of Ms Williams's skeleton argument. We did not permit Ms Williams to advance any argument on the facts which contravened the judge's findings on the matters relevant to the grant of interim relief, apart from section 12(3) HRA considerations, and those findings will stand. Nevertheless, some of those matters may in addition be relevant to the likelihood of the trial court granting final relief. It is accepted that this court is in no position to apply the section 12(3) HRA test and that, if Ms Williams's submissions of principle are accepted, the matter will have to be remitted to the judge for him to re-consider, in the light of our judgments, whether the court at trial is likely to establish that publication should not be allowed.

Disposal

50 I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants pending remission to the judge to reconsider: (1) whether interim relief should be granted in the light of section 12(3) HRA; and (2) if the injunctions are to be continued against the first and second defendants what temporal limit is appropriate.

Conclusion

51 To the extent indicated above, I would allow this appeal.

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

© 2019. The Incorporated Council of Law Reporting for England & Wales

Court of Appeal

Cuadrilla Bowland Ltd and others *v* Persons Unknown and others

[2020] EWCA Civ 9

2019 Dec 10, 11; 2020 Jan 23 Underhill, David Richards, Leggatt LJJ

Contempt of court — Committal proceedings — Appeal — Protestors deliberately disobeying injunction found guilty of contempt and sentenced to imprisonment — Whether injunction insufficiently clear and certain to allow committal — Whether suspended orders for imprisonment appropriate sanction

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". The claimants had been granted an injunction against the first to third defendants, who were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group, to prevent trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. The judge subsequently made an order committing three protestors to prison for contempt of court. Their contempt consisted in deliberately disobeying the injunction and as punishment for two deliberate breaches of the injunction, the judge committed one of the protestors to prison for two months plus four weeks. The other two were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that each obeyed the injunction for a period of two years. The protestors appealed against the committal orders contending that the judge erred in committing them under two paragraphs of the injunction—paragraph 4 (trespass) and paragraph 7 (unlawful means conspiracy)—as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

On the appeal—

Held, dismissing the appeal in part, (1) that the terms of an injunction might be unclear if a term was ambiguous in that the words used had more than one meaning, vague in so far as there were borderline cases to which it was inherently uncertain whether the term applied, or by its language too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction was addressed; that all those kinds of clarity (or lack of it) were relevant at the stage of deciding whether to grant an injunction and, if so, in what terms; that they were also relevant where an application was made to enforce compliance or punish breach of an injunction by seeking an order for committal; that, in principle, people should not be at risk of being penalised for breach of a court order if they acted in a way which the order did not clearly prohibit so that a person should not be held to be in contempt of court if it was unclear whether their conduct was covered by the terms of the order; that that was so whether the term in question was unclear because it was ambiguous, vague or inaccessible and it was important to note that whether a term of an order was unclear in any of those ways was dependent on context; that there was nothing objectionable in principle about including a requirement of intention in an injunction, nor was there was anything in such a requirement which was inherently unclear or which required any legal training or knowledge to comprehend; that it was not in fact correct that the requirement of the tort of conspiracy to show damage could only be incorporated into a quia timet injunction by reference to the defendant's intention, since it was perfectly possible to frame a prohibition which applied only to future conduct that actually caused damage; that it was, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that was lawful, it was necessary to include a requirement that the defendant's conduct was intended to cause damage to the claimant and there was nothing ambiguous, vague or difficult to understand about such a requirement; that limiting the scope of a prohibition by reference to the intention required to make the act wrongful

© 2020. The Incorporated Council of Law Reporting for England & Wales

avoided restraining conduct that was lawful; that in so far as it created difficulty of proof, that was a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provided an additional protection; and that, accordingly, although the inclusion of multiple references to intention risked introducing an undesirable degree of complexity, there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the injunction in the present case provided a reason not to enforce it by committal (post, paras 57–60, 65, 69, 74, 110, 111, 112).

Dicta of Longmore LJ in *Ineos Upstream Ltd and others v Persons Unknown and others (Friends of the Earth intervening)* [2019] 4 WLR 100, para 40 not followed.

(2) That it was clear from the case law that, even where protest took the form of intentional disruption of the lawful activities of others, as it did here, such protest still fell within the scope of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that any restrictions imposed on such protestors were therefore lawful only if they satisfied the requirements set out in articles 10(2) and 11(2) and that was so even where the protestors' actions involved disobeying a court order; that although the protestors' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2); that the judge was entitled to conclude that the restrictions which he imposed on the liberty of the protestors by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority, which was an aim specifically identified in article 10(2), and to prevent disorder as identified in both articles 10(2) and 11(2); that in deciding what sanctions were appropriate, the judge had approached the decision, correctly, by considering both the culpability of the protestors and the harm caused, intended, or likely to be caused by their breaches of the injunction; that there was no merit in the protestors' argument that, in making that assessment, he had misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order; and that, as to the sanction applied, the court would vary the committal order made in relation to the first protestor by substituting for the period of imprisonment of two months a period of four weeks (post, paras 100–102, 110, 111, 112).

Per curiam. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule (post, para 50, 111, 112).

APPEAL from Judge Pelling QC, sitting as a judge of the High Court

Pursuant to an application by Cuadrilla Bowland Ltd and others for an injunction to prevent trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant, Judge Pelling QC, sitting as a judge of the High Court granted an injunction on 11 July 2018 to run until 1 June 2020 against persons unknown.

On 3 September 2019 the judge made an order to commit three protestors, Katrina Lawrie, Lee Walsh and Christopher Wilson to prison for contempt of court. As punishment for two deliberate breaches of the injunction, the judge committed the first protestor to prison for two months plus four weeks. The other two protestors were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that they obeyed the injunction for a period of two years.

By an appellant's notice dated 24 September 2019, the protestors sought permission to appeal against the committal order with appeal to follow. The grounds of appeal were that, in relation to the two incidents on which the order for committal was based: (1) the judge had erred in committing the protestors under paragraphs 4 (nuisance) and 7 (unlawful means conspiracy) of the injunction, as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge had erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

The facts are stated in the judgment of Leggatt LJ, post, paras 3–23.

Kirsty Brimelow QC, *Adam Wagner* and *Richard Brigden* (instructed by *Robert Lizar Solicitors, Manchester*) for the protestors.

Tom Roscoe (instructed by *Eversheds Sutherland (International) llp*) for the claimants.

© 2020. The Incorporated Council of Law Reporting for England & Wales

The court took time for consideration.

23 January 2020. The following judgments were handed down.

LEGGATT LJ

Introduction

1 On 3 September 2019 Judge Pelling QC, sitting as a judge of the High Court, made an order committing the three appellants to prison for contempt of court. Their contempt consisted in deliberately disobeying an earlier court order, which I will refer to as "the Injunction", made on 11 July 2018 with the aim of preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant ("Cuadrilla"). As punishment for two deliberate breaches of the Injunction, the judge committed one of the appellants, Katrina Lawrie, to prison for two months plus four weeks. The other appellants, Lee Walsh and Christopher Wilson, were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that the appellant obeys the Injunction for a period of two years.

2 The appellants have exercised their rights of appeal against the committal order. They appeal on the grounds (1) that the relevant terms of the Injunction were insufficiently clear and certain to be enforceable by committal because those terms made the question whether conduct was prohibited depend on the intention of the person concerned; and (2) that imposing the sanction of imprisonment (albeit suspended) was inappropriate and unduly harsh in the circumstances of this case. Relevant circumstances include the facts that the Injunction was granted, not against the appellants as named individuals, but against "persons unknown" who committed specified acts, and that the acts done by the appellants in breach of the Injunction were part of a campaign of protest involving "direct action" designed to disrupt Cuadrilla's activities. This context is one in which the appellants' rights to freedom of expression and assembly are engaged.

Background

3 Cuadrilla and the other claimants own an area of land off the Preston New Road (A583), near Blackpool in Lancashire, on which Cuadrilla has engaged in the hydraulic fracturing, or "fracking", of rock deep underground for the purpose of extracting shale gas. It is not in dispute that all Cuadrilla's activities have been carried out in accordance with the law. Equally, there is no dispute that Cuadrilla's activities are controversial and that a significant number of people, including the appellants, have sincere and strongly held views that fracking ought not to take place because of its impact on the environment. It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. The right of protest is protected both by the common law of England and Wales and by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention") which is incorporated into UK law by the Human Rights Act 1998.

4 Protests on and near Cuadrilla's site started in 2014, well before any drilling or preparatory work had commenced, when part of the site was occupied by a group of protestors. On 21 August 2014 Cuadrilla issued proceedings to recover possession of the land and for an injunction to prohibit further trespassing. Such an injunction was granted until 6 October 2016.

5 Protests intensified after work in preparation for exploratory drilling at the site started in January 2017. The evidence adduced by the claimants when they applied for a further injunction in May 2018 showed that, since January 2017, Cuadrilla and its employees, contractors and suppliers had been subjected to numerous "direct action" protests, designed to obstruct works on the site. The actions taken by some protestors included "locking on"—that is, chaining oneself to an object or another person—at the entrance to the site in order to prevent vehicles from entering or leaving it; "slow walking"—that is, walking on the highway as slowly as possible in front of vehicles attempting to enter or leave the site; and climbing onto vehicles to prevent them from moving.

6 The overall scale of such protest activity is indicated by the fact that, between January 2017 and May 2018, the police had made over 350 arrests in connection with protests against Cuadrilla's operations, including 160 arrests for obstructing the highway, and substantial police resources had to be deployed in order to deal with the actions of protestors, with around 100 officers directly involved each day and at a total policing cost of some £7m.

© 2020. The Incorporated Council of Law Reporting for England & Wales

7 In July 2017 a group calling themselves "Reclaim the Power" organised a "month of action" targeting Cuadrilla. Of the many actions taken by protestors during that month to attempt to disrupt transport to and from the Preston New Road site, one particularly disruptive incident involved criminal offences and led to sentences which were the subject of an appeal to the Criminal Division of the Court of Appeal: see *R v Roberts (Richard) (Liberty intervening)* [2018] EWCA Crim 2739; [2019] 1 WLR 2577. That incident began on the morning of 25 July 2017, when two protestors managed to climb on top of lorries approaching the site along the Preston New Road, forcing the lorries to stop to avoid putting the safety of the two men at risk. Two more men later climbed on top of the lorries. Each of the protestors stayed there for two or three days and the last one did not come down until 29 July 2017. For all this time the lorries were therefore unable to move, with the result that one carriageway of the road remained blocked. Substantial disruption was caused to local residents and other members of the public.

8 Further particularly serious disruption occurred on 31 July 2017. The events of that day were described in a letter from Assistant Chief Constable Terry Woods put in evidence by Cuadrilla, as follows:

> "The last day of the RTP [Reclaim the Power] rolling resistance month of action saw a final lock-in involving a supposedly one tonne weight concrete barrel lock-on in the rear of a van with a prominent RTP activist attached to it via an arm tube. This action, coupled with an already tense atmosphere amongst the RTP activists, anti-fracking activists and local protestors, resulted in confrontation with police and they arrested two protestors. During the evening the protestors then became aware of a convoy en route to the drill site resulting in four protestors deploying in two pairs with arm tube lock-ons and blocking the A583. Further confrontation and aggression towards police ensued, with one of the locked-on protestors also assaulting a police officer. A security staff van was then mobbed by protestors and damaged, with a further protestor being arrested from that incident. Protestors also blockaded three vans of police protest liaison officers outside the Maple Farm Camp. The vehicle of a drill site staff member's partner dropping them off was then confronted by protestors, with a number of protestors climbing on the roof of the vehicle as it attempted to reverse away. The A583 was finally reopened to traffic at around 21:00 once police had removed all the protestors locked on, resulting in four arrests …"

9 At the hearing of the application for an injunction on 31 May and 1 June 2018, evidence was also adduced that the "Reclaim the Power" protest group was planning and promoting a further campaign of sustained direct action targeting Cuadrilla from 11 June to 1 July 2018. The group had openly stated their intention to organise a mass blockade of the Preston New Road dubbed "Block around the Clock" with the aim of completely preventing access to and egress from Cuadrilla's site for four days from 27 June to 1 July 2018.

The Injunction

10 It was against this background that Judge Pelling QC granted an interim injunction on 1 June 2018 to restrain four named individuals and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with the claimants' rights of passage to and from their land and unlawfully interfering with Cuadrilla's supply chain. This injunction was granted until 11 July 2018. On that date it was replaced by a further order in similar terms, to continue until 1 June 2020 (unless varied or discharged in the meantime). This is the Injunction that was in force when the appellants did the acts which led to their committal for contempt of court.

11 As with the order initially made on 1 June 2018, the Injunction had three limbs, each designed to prevent a different type of wrong (tort) being done to the claimants.

Paragraph 2: trespass

12 The first type of wrong, prohibited by paragraph 2 of the Injunction, was trespassing on the claimants' land situated off the Preston New Road. The land was identified by reference to the title numbers under which it is registered at the Land Registry and was denoted in the order as "the PNR Land".

Paragraph 4: nuisance

13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct

© 2020. The Incorporated Council of Law Reporting for England & Wales

or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181.

14 These rights protected by the law of nuisance underpinned paragraph 4 of the Injunction, which applied to the second defendant. The second defendant to the proceedings is described as:

> "Persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highway known as Preston New Road."

Paragraph 4 of the Injunction prohibited persons falling within this description from carrying out the following acts on any part of "the PNR Access Route":

> "4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;
> "4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;
> "4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance; in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees."

An exception was made in paragraph 5 for a weekly walk or march from Maple Farm on the Preston New Road to the Site Entrance followed by a meeting or assembly for up to 15 minutes at the bell-mouth of the Site Entrance.

15 The "PNR Access Route" was defined in paragraph 3 to mean:

> "The whole of the Preston New Road (A583) between the junction with Peel Hill to the northwest and 50 metres to the east of the vehicular entrance to the PNR Site ("the Site Entrance" —as marked on the plan annexed to this Order as Annex 2) …"

Paragraph 7: unlawful means conspiracy

16 The third type of wrong which the Injunction was designed to prevent was unlawful interference with Cuadrilla's supply chain. This was the subject of paragraph 7 of the Injunction, which prohibited persons unknown from "committing any of the following offences or unlawful acts by or with the agreement or understanding of any other person":

> "7.2 obstructing the free passage along a public highway, or the access to or from a public highway, by: (i) blocking the highway or access thereto with persons or things when done with a view to slowing down or stopping vehicular or pedestrian traffic, and with the intention of causing inconvenience and delay; (ii) slow walking in front of vehicles with the object of slowing them down, and with the intention of causing inconvenience and delay; (iii) climbing onto or attaching themselves to vehicles … in each case with an intention of damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors, sub-contractors, suppliers or service providers engaged by [Cuadrilla], in connection with [Cuadrilla's] searching or boring for or getting any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata at the PNR Site or on the PNR Land."

17 The tort underpinning this limb of the Injunction was that of conspiracy to injure by unlawful means.

18 Conspiracy is one of a group of "economic torts" which are an exception to the general rule that there is no duty in tort to avoid causing economic loss to another person unless the loss is parasitic upon some injury to person or damage to property. As explained by Lord Sumption JSC and Lord Lloyd-Jones JSC in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2018] 2 WLR 1125, para 7, the modern law of conspiracy developed in the late 19th and early 20th centuries as a basis for imposing civil liability on the organisers of strikes and other industrial action. In the form of the tort relevant for present purposes, the matters which the claimant must

© 2020. The Incorporated Council of Law Reporting for England & Wales

prove to establish liability are: (i) an unlawful act by the defendant, (ii) done with the intention of injuring the claimant, (iii) pursuant to an agreement (whether express or tacit) with one or more other persons, and (iv) which actually does injure the claimant.

The breaches of the Injunction

19 As required by the terms of the Injunction, extensive steps were taken to publicise it and bring it to the notice of protestors. These steps included: (i) fixing sealed copies of the Injunction in transparent envelopes to posts, gates, fences and hedges and positioning signs at no fewer than 20 conspicuous locations around the PNR Land including at the Site Entrance and at either side of the public highway in each direction from the Site Entrance advertising the existence of the Injunction; (ii) leaving a sealed copy of the Injunction at protest camps; (iii) advertising and making copies of the Injunction available online; and (iv) sending a press release and copies of the Injunction to 16 specified news outlets.

20 Despite this publicity, a number of incidents occurred in the period July to September 2018 which led Cuadrilla on 11 October 2018 to issue a committal application.

The incident on 24 July 2018

21 The first main incident occurred on 24 July 2018 and involved all three appellants. The facts alleged, which were not seriously disputed by the appellants, were that at around 7 am on the morning of that day they (and three other individuals) lay down in pairs on the road across the Site Entrance. Each person was attached to the other person in the pair by an "arm tube" device. This was done in such a way as to prevent any vehicle from entering or leaving the site. The protestors remained in place for some six and a half hours until around 1.30 pm, when they were cut out of the arm tube devices and removed by the police.

The incident on 3 August 2018

22 The second main incident occurred on 3 August 2018 and involved Ms Lawrie alone. It took place on the "PNR Access Route" (as defined in paragraph 3 of the Injunction) about 1200 metres to the west of the Site Entrance. At about 12.55 pm Ms Lawrie, along with three other people, attempted to stop a tanker lorry which was on its way to the site in order to collect rainwater. In doing so she stood in the path of the lorry, raising her arms above her head. To avoid hitting her, the lorry had to veer across the centre line of the carriageway into the opposite lane. These facts were proved by video evidence from a camera on the dashboard of the lorry cab.

The other breaches of the Injunction

23 There were three more minor incidents: (1) On 1 August 2018 Ms Lawrie trespassed on the PNR Land for approximately two minutes. (2) Also on 1 August 2018, Mr Walsh sat down on the road in front of the Site Entrance until he was forcibly removed by police officers. (3) On 22 September 2018, as a sewage tanker was attempting to enter the site, Ms Lawrie ran into its path, forcing it to stop. She then lay on the ground in front of the lorry before being helped to her feet by security staff and persuaded to move.

The findings of contempt of court

24 Although two other individuals were also named as respondents, the committal application was pursued only against the three current appellants. The application was heard in two stages. The first stage was a hearing over four days from 25 to 28 June 2019 to decide whether the appellants were guilty of contempt of court.

The legal test for contempt

25 It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) at [20]. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.

26 For reasons given in a judgment delivered on 28 June 2018, the judge found all the relevant factual allegations proved to the requisite criminal standard of proof. There is no appeal against any of his factual findings.

Knowledge of the Injunction

27 The main factual dispute at the hearing concerned the appellants' knowledge of the Injunction at the time when the incidents occurred. Although they gave evidence to the effect

© 2020. The Incorporated Council of Law Reporting for England & Wales

that they did not know of its terms, the judge rejected that evidence as inherently incredible and untruthful.

28 The judge explained in detail his reasons for reaching that conclusion. In the case of Ms Lawrie, the relevant evidence included her own admissions that there was a lot of discussion about the Injunction around the time that it was granted and that she was concerned about its effect on lawful protesting. As the judge observed, that evidence only made sense on the basis that she was aware of its terms. There were also photographs showing Ms Lawrie placing decorations on the fence around the site "in such close proximity to the notices summarising the effect of the [Injunction] as to make it virtually impossible for her not to have read the information in the notice unless she was deliberately choosing not to do so". In the case of Mr Walsh, the relevant evidence included social media posts that he had shared with others that referred to or summarised the main effects of the Injunction. The third appellant, Mr Wilson, accepted that he was aware of the Injunction and that it affected protests at the site entrance. There was also video evidence of Cuadrilla's security guards seeking to draw the Injunction to the attention of the appellants by providing them with copies of it, which they refused to take.

The intentions proved

29 In relation to the first main incident on 24 July 2018, in which each of the appellants lay in the road across the Site Entrance attached to another person by an arm tube device, they all gave evidence that in taking this action they intended to protest. The judge accepted this but thought it obvious from what they did, and was satisfied beyond reasonable doubt, that they also intended to stop vehicles from entering or leaving the site and thereby cause inconvenience and delay to Cuadrilla. Having found on this basis that the appellants were in breach of paragraph 4 of the Injunction, he considered it unnecessary to decide whether they were also in breach of paragraph 7.

30 In relation to the second main incident which occurred on 3 August 2018, Ms Lawrie admitted that she together with others was attempting to stop the lorry. The judge found it proved beyond reasonable doubt that she was acting with the agreement or understanding of others present and with the intention of slowing down or stopping the vehicle, causing inconvenience and delay, and thereby damaging Cuadrilla by interfering with the activities undertaken at the site. He accordingly found that she was in breach of paragraph 7 of the Injunction.

31 The judge also found that the three more minor incidents (referred to at para 23 above) all involved intentional breaches of the Injunction, but he did not consider that it was in the public interest to impose any sanction for those breaches.

The committal order

32 The second stage of the committal application was a hearing held on 2 and 3 September 2019 to decide what sanctions to impose for the two principal breaches of the Injunction found proved at the earlier hearing. The judge had already made it clear that he would not impose immediate terms of imprisonment, so that the available penalties were (a) no order (except in relation to costs), (b) a fine or (c) a suspended term of imprisonment.

33 The judge was satisfied that, in relation to both incidents, the custody threshold was passed such that it was necessary to make orders for committal to prison, although their effect should be suspended. In reaching that conclusion and in fixing the length of the suspended prison terms, the judge had regard to his finding that the breaches were intentional and to the need not only to punish the appellants for their intentional disobedience of the court's order, but also to deter future breaches of the order (whether by them or others).

34 The judge recognised that the breaches were committed as part of a protest but was not persuaded that this should result in lesser penalties. The judge also had regard, by analogy, to the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. This guideline identifies three levels of culpability, where level A represents a very serious or persistent breach, level B a deliberate breach falling between levels A and C, and level C a minor breach or one just short of reasonable excuse. Harm—which includes not only any harm actually caused but any risk of harm posed by the breach—is also divided into three categories. Category 1 applies where the breach causes very serious harm or distress or "demonstrates a continuing risk of serious criminal and/or anti-social behaviour". Category 3 applies where the breach causes little or no harm or distress or "demonstrates a continuing risk of minor criminal and/or anti-social behaviour". Category 2 applies to cases falling between categories 1 and 3.

35 In the case of the first incident involving all three appellants, where the Site Entrance was blocked by a "lock-on" for several hours, the judge assessed the level of culpability as

© 2020. The Incorporated Council of Law Reporting for England & Wales

falling at the lower end of level B and the harm caused together with the continuing risk of breach demonstrated as falling at the lower end of category 2. The guideline indicates that the starting point in sentencing for breach of a criminal behaviour order in category 2B is 12 weeks' custody, with a category range between a medium level community order and one year's custody. A community order is not an available sanction for contempt of court. In the circumstances the judge concluded that the appropriate penalty was a short suspended term of imprisonment, which he fixed at four weeks.

36 In relation to the second main incident, involving Ms Lawrie alone, the judge assessed the level of culpability as at the top end of level B within the guideline and the degree of harm that was at risk of being caused as in the top half of category 2. In making that assessment, he said:

> "The risk I have identified was a serious one, involving the risk of death or injury to Ms Lawrie; to the driver of the vehicle she was attempting to stop by standing in front of it in the highway; and those driving on the other side of the road into which the lorry was forced by reason of the presence of Ms Lawrie in the road. Those risks were worsened by the fact that the incident occurred during a period of heavy rain …"

The judge also found that the breach was aggravated by "the failure of Ms Lawrie to acknowledge the danger posed by her conduct, or to apologise for it, or to offer any assurance that it will not happen again".

37 The sanction imposed for this contempt of court was committal to prison for two months. As with the penalties imposed in relation to the first incident, execution of the order was suspended on condition that the Injunction is obeyed for a period of two years.

Variation of the Injunction

38 In the same judgment given on 3 September 2019 in which he decided what sanctions to impose, Judge Pelling QC also dealt with an application by the appellants to vary the Injunction, in particular by removing paragraphs 4 and 7. In making that application, the appellants relied on the decision of this court in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] EWCA Civ 515; [2019] 4 WLR 100, which I will discuss shortly. For the moment I note that, while the judge on 3 September 2019 made some variations to the wording of the Injunction, he rejected the appellants' contention that the original wording was impermissibly wide or uncertain. Furthermore, none of the variations made on 3 September 2019 would, had they been incorporated in the original wording of the Injunction, have rendered the appellants' conduct not a breach.

39 The appellants applied for permission to appeal against the decision not to vary the Injunction by removing paragraphs 4 and 7. However, on 2 November 2019 the Government announced a moratorium on fracking with immediate effect. In the light of the moratorium, the claimants themselves applied on 19 November 2019 to remove paragraphs 4 and 7 of the Injunction for the future on the ground that they no longer require this protection, as Cuadrilla has ceased fracking operations on the site and will not be able to resume such operations unless and until the moratorium is lifted. On 25 November 2019 the judge granted the claimants' application. In these circumstances the appellants withdrew their appeal against the judge's previous refusal to vary the Injunction in that way, as the relief which they were seeking had been granted (albeit for different reasons from those which they were advancing).

The right to protest

40 Before I come to the grounds of the appeal against the committal order, I need to say something more about the two contextual features of this case which I mentioned at the start of this judgment. The first is the legal relevance of the fact, properly emphasised by counsel for the appellants, that the appellants' breaches of the Injunction were a form of non-violent protest against activities to which they strongly object.

41 The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.

42 Exercise of the right to protest—for example, holding a demonstration in a public place—often results in some disruption to ordinary life and inconvenience to other citizens. That

© 2020. The Incorporated Council of Law Reporting for England & Wales

by itself does not justify restricting the exercise of the right. As Laws LJ said in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 at [43]: "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them". Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.

43 The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.

44 The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in *Kudrevicius v Lithuania* CE:ECHR:2015:1015JUD003755305; 62 EHRR 34; 40 BHRC 114. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention. In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:

> "In the court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention."

Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).

45 In the present case the claimants accept that the conduct of the appellants which constituted contempt of court likewise fell within the scope of articles 10 and 11 of the Human Rights Convention, even though disruption of Cuadrilla's activities was not merely a side-effect but an intended aim of the appellants' conduct. It follows that both the Injunction prohibiting this conduct and the sanctions imposed for disobeying the Injunction were restrictions on the appellants' exercise of their rights under articles 10(1) and 11(1) which could only be justified if those restrictions satisfied the requirements of articles 10(2) and 11(2) of the Convention.

The Ineos case

46 A second significant feature of this case is that the Injunction was granted not against the current appellants as named individuals but against "persons unknown". Injunctions of this kind were considered in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, which forms an essential part of the backdrop to the issues raised on this appeal.

47 Like the present case, the *Ineos* case concerned an injunction granted on the application of a company engaged or planning to engage in "fracking" to restrain unlawful interference with its activities by protestors whom it was unable to name. In the *Ineos* case, however, the court was not concerned, as it is here, with breaches of such an injunction. The appeal involved a challenge to the making of an injunction against persons unknown before any allegedly unlawful interference with the claimants' activities had yet occurred. This context is important in understanding the decision.

48 The main question raised on the appeal was whether it was appropriate in principle to grant an injunction against "persons unknown". That question was decided in favour of the claimant companies. The court held that there is no conceptual or legal prohibition on suing

© 2020. The Incorporated Council of Law Reporting for England & Wales

persons unknown who are not currently in existence but will come into existence if and when they commit a threatened tort. Nor is there any such prohibition on granting a "quia timet" injunction to restrain such persons from committing a tort which has not yet been committed. None the less, Longmore LJ (with whose judgment David Richards LJ and I agreed) warned that a court should be inherently cautious about granting such injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance (see para 31).

49 Longmore LJ stated the requirements necessary for the grant of an injunction of this nature "tentatively" (at para 34) in the following way:

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

50 In the light of precedents which were not cited in the *Ineos* case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); [2020] 1 WLR 417 and in these circumstances I express no opinion on the point.

51 In the *Ineos* case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar—although in some respects wider and more vaguely worded—terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach—which simply accepted the claimants' evidence at face value—did not adequately justify granting a quia timet injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty. I will come back to one aspect of the reasoning on that point when discussing the first ground of appeal.

This appeal

52 I turn now to the issues raised on this appeal. The appellants' notice puts forward three grounds. However, Ms Brimelow QC, who now represents the appellants, did not pursue one of them. This challenged the judge's finding that Ms Lawrie was in contempt of court by trespassing on the "PNR Land" on 1 August 2018 in breach of paragraph 2 of the Injunction. As Ms Brimelow accepted, a challenge to that finding, even if successful, would provide no reason for disturbing the committal order, as the judge considered that there was no public interest in taking any further action in relation to the three minor incidents, of which the trespass incident was one, and made no order in respect of them. The order under appeal was based only on the "lock-on" at the Site Entrance by all three appellants on 24 July 2018 and Ms Lawrie's action in standing

© 2020. The Incorporated Council of Law Reporting for England & Wales

in the path of a lorry on 3 August 2018. Nothing turns, therefore, on whether or not Ms Lawrie trespassed on the "PNR Land" on 1 August 2018.

53 The two grounds of appeal pursued are that, in relation to the two incidents on which the order for committal was based: (1) the judge erred in committing the appellants under paragraphs 4 and 7 of the Injunction, as these paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

(1) Was the Injunction unclear?

54 It is a well-established principle that an injunction must be expressed in terms which are clear and certain so as to make plain what is permitted and what is prohibited: see eg *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, para 35. This is just as, if not even more, essential where the injunction is addressed to "persons unknown" rather than named defendants. As Longmore LJ said in the *Ineos* case, para 34, in stating the fifth of the requirements quoted at para 49 above: "the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

55 A similar need for clarity and precision "to a degree that is reasonable in the circumstances" forms part of the requirement in articles 10(2) and 11(2) of the Convention that any interference with the rights to freedom of expression and assembly must be "prescribed by law": see *Sunday Times v United Kingdom* CE:ECHR:1979:0426JUD000653874; 2 EHRR 245, para 49; *Kudrevicius v Lithuania* 62 EHRR 34, para 109.

The references to intention in the Injunction

56 As mentioned, the aspect of paragraphs 4 and 7 of the Injunction which the appellants contend made those terms insufficiently clear and certain to support findings of contempt was the fact that they included references to the defendant's intention. Paragraph 4.1, of which all three appellants were found to be in breach by their "lock on" at the Site Entrance on 24 July 2018, prohibited "blocking any part of the bell mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic" and "with the intention of causing inconvenience or delay to the claimants". Establishing a breach of this term therefore required proof of two intentions. Paragraph 7.2(1), of which Ms Lawrie was found to have been in breach when she stood in front of a lorry on 3 August 2018, required proof of three intentions: namely, those of "slowing down or stopping vehicular or pedestrian traffic", "causing inconvenience and delay", and "damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors …" It was also necessary to prove that the act was done with the agreement or understanding of another person.

Types of unclarity

57 There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".

58 A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.

© 2020. The Incorporated Council of Law Reporting for England & Wales

59 All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

60 It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the "PNR Land" was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial.

The concept of intention

61 Of these three types of unclarity, it is the third that is said to be material in the present case. For the appellants, Ms Brimelow argued that references to intention in an injunction addressed to "persons unknown" made the terms insufficiently clear because intention is a legal concept which is difficult for a member of the public to understand. In the judgment given on 28 June 2019 in which he made findings of contempt of court, the judge referred to the maxim that a person "is presumed to intend the natural and probable consequences of his acts", citing a passage from the speech of Lord Bridge of Harwich in *R v Maloney* [1985] AC 905, 928–929. Ms Brimelow submitted that a person with no legal knowledge or training would not understand that, even if they do not have in mind a particular consequence of their action, they will be held to intend any natural and probable consequence of it. Such a person might reasonably consider that their intention was, for example, to prevent fracking, or to protect the environment, or to protest, rather than, say, to cause inconvenience and delay to Cuadrilla, even if such inconvenience and delay was a natural or probable consequence of what they did.

62 I do not accept that the references in the terms of the Injunction to intention had any special legal meaning or were difficult for a member of the public to understand. In criminal law there has not for more than 50 years been any rule of law that persons are presumed to intend the natural and probable consequences of their acts. That notion was given its quietus by section 8 of the Criminal Justice Act 1967, which provides:

> "A court or jury, in determining whether a person has committed an offence — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

63 This was the point that Lord Bridge was making in the *Maloney* case in the passage to which Judge Pelling QC referred. The House of Lords made it clear in that case that juries should no longer, save in rare cases, be given legal directions as to what is meant by intention. Lord Bridge described it (at p 926) as the "golden rule" that, when directing a jury on intent, a judge should avoid any elaboration or paraphrase of what is meant by intent and should leave it to the jury's good sense to decide whether the person accused acted with the intention required to be guilty of a crime. Just as no elaboration of the concept of intention is required for juries, so equally its meaning does not need to be explained to members of the public to whom a court order is addressed. It is not a technical term nor one that, when used in an injunction prohibiting acts done with a specific intention, is to be understood in any special or unusual sense. It is an ordinary English word to be given its ordinary meaning and with which anyone who read the Injunction would be perfectly familiar.

64 That is not to say that proof of an intention is always straightforward. Often it causes no difficulty. A person's immediate intention may be obvious from their actions. Thus, when the appellants and three others lay across the Site Entrance on 24 July 2018 in pairs linked by

© 2020. The Incorporated Council of Law Reporting for England & Wales

arm tube devices, it was obvious that they were intending to stop vehicles from entering or leaving the site. Had that not been their intention, they would not have positioned themselves where they did. Similarly, when in the incident on 3 August 2018 Ms Lawrie stood in the road in front of a lorry, waving her arms, there could be no doubt that her intention was to cause the vehicle to stop. To determine whether less direct consequences or potential consequences of a person's actions are intended may require further knowledge of, or inference as to, their plans or goals. In so far as there is evidential uncertainty, however, a person alleged to be in contempt of court by disobeying an injunction is protected by the requirement that the relevant facts must be proved to the criminal standard of proof. Hence where the injunction prohibits an act done with a particular intention, if there is any reasonable doubt about whether the defendant acted with that intention, contempt of court will not be established.

65 I accordingly cannot accept that there is anything objectionable in principle about including a requirement of intention in an injunction. Nor do I accept that there is anything in such a requirement which is inherently unclear or which requires any legal training or knowledge to comprehend.

Dicta in the Ineos case

66 Nevertheless, I acknowledge that the appellants' argument gains some traction from a statement in the judgment of Longmore LJ in the *Ineos* case. One of the terms of the injunction granted by the judge at first instance in that case, like paragraph 7 of the Injunction in this case, was designed to protect the claimants from financial damage caused by an unlawful means conspiracy. In the *Ineos* case the term in question prohibited persons unknown from "combining together to commit the act or offence of obstructing free passage along a public highway (or access to or from a public highway) by … slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or … otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants." The wording of this prohibition was held to be insufficiently clear, both because it contained language which was too vague ("slow walking" and "unreasonably and/or without lawful authority or excuse obstructing the highway") and because, as Longmore LJ put it, "an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse": see *Ineos Upstream Ltd v Persons Unknown* at para 40.

67 In addition to making these points, however, Longmore LJ also agreed with a submission that one of the "problems with a quia timet order in this form" was that "it is of the essence of the tort [of conspiracy] that it must cause damage". He commented, at para 40:

> "While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible to change and, for that reason, should not be incorporated into the order."

68 Although this was not an essential part of the court's reasoning, I agreed with the judgment of Longmore LJ in the *Ineos* case and therefore share responsibility for these observations. However, while I continue to agree with the other reasons given for finding the form of order made by the judge in the *Ineos* case unclear as well as too widely drawn, with the benefit of the further scrutiny that the point has received on this appeal I now consider the concern expressed about the reference to the defendants' intention to have been misplaced.

69 It is not in fact correct, as suggested in the passage quoted above, that the requirement of the tort of conspiracy to show damage can only be incorporated into a quia timet injunction by reference to the defendants' intention. It is perfectly possible to frame a prohibition which applies only to future conduct that actually causes damage. It is, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that is lawful, it is necessary to include a requirement that the defendants' conduct was intended to cause damage to the claimant. As already discussed, there is nothing ambiguous, vague or difficult to understand about such a requirement. The only potential difficulty created by its inclusion is one of proof.

© 2020. The Incorporated Council of Law Reporting for England & Wales

The Hampshire Waste case

70 The case of *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9, to which Longmore LJ referred, involved an application by companies which owned and operated waste incineration sites for an injunction to restrain persons from trespassing on their sites in connection with a planned day of protest by environmental protestors described as "Global Day of Action Against Incinerators". On similar occasions in the past protestors had invaded sites owned by the claimants and caused substantial irrecoverable costs.

71 The injunction was sought against defendants described in the draft order as "Persons intending to trespass and/or trespassing" on six specified sites "in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003". Sir Andrew Morritt V-C considered that the case for granting an injunction to prevent the threatened trespass to the claimants' property was clearly made out and that, in circumstances where the claimants were unable to name any of the protestors who might be involved, it was appropriate to grant the injunction against persons unknown. He raised two points, however, about the proposed description of the defendants (see para 9). The two points were that:

> "it seems to me to be wrong that the description of the defendant should involve a legal conclusion such as is implicit in the use of the word 'trespass'. Similarly, it seems to me to be undesirable to use a description such as 'intending to trespass' because that depends on the subjective intention of the individual which is not necessarily known to the outside world and in particular the claimants, and is susceptible of change."

To address these points, the Vice-Chancellor amended the opening words of the proposed description of the defendants to refer to: "Persons entering or remaining without the consent of the claimants" on the specified sites.

72 I take the Vice-Chancellor's objection to the use of the word "trespass" to have been that trespass is a legal concept and that the class of persons affected by the injunction ought to be identified in language which does not use a legal term of art. His objection to the reference to intention was different. It was not that intention is a legal concept which might not be clear to persons notified of the injunction. It was that "the outside world and in particular the claimants" would not necessarily know whether a person did or did not have the relevant intention and also that this state of affairs was susceptible of change.

73 Although the Vice-Chancellor did not spell this out, what was particularly unsatisfactory, as it seems to me, about the proposed description was that it would have made the question whether a person was a defendant to the proceedings dependent not on anything which that person had done (with or without a specific intention) but *solely* on their state of mind at any given time (which might change). Thus, a person who had formed an intention of joining a protest which would involve entering on the claimants' land would fall within the scope of the injunction even if he or she had done nothing which interfered with the claimants' legal rights or which was even preparatory or gave rise to a risk of such interference. It is easy to see why the Vice-Chancellor regarded this as undesirable.

74 I do not consider that the same objection applies to a term of an injunction which prohibits doing specified acts with a specified intention. Limiting the scope of a prohibition by reference to the intention required to make the act wrongful avoids restraining conduct that is lawful. In so far as it creates difficulty of proof, that is a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provides an additional protection. Accordingly, although the inclusion of multiple references to intention —as in paragraph 7 of the Injunction in this case—risks introducing an undesirable degree of complexity, I would reject the suggestion that there is any reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the Injunction in the present case provided a reason not to enforce it by committal.

The width of the Injunction

75 I mentioned earlier that the appellants withdrew their appeal against the judge's decision on 3 September 2019 to refuse their application to vary the injunction, when the relief which they were seeking was granted for different reasons following the Government's moratorium on fracking. The arguments which the appellants would have made on that appeal, however, did not disappear from the picture.

76 It is no defence to an application for the committal of a defendant who has disobeyed a court order for the defendant to say that the order is not one that ought to have been made.

© 2020. The Incorporated Council of Law Reporting for England & Wales

As a matter of principle, a court order takes effect when it is made and remains binding unless and until it is revoked by the court that made it or on an appeal; and for as long as the order is in effect, it is a contempt of court to disobey the order whether or not the court was right to make it in the first place: see eg *M v Home Office* [1992] QB 270, 298–299, *Burris v Azadani* [1995] 1 WLR 1372, 1381. In the present case, therefore, it is not open to the appellants to argue that they were not guilty of contempt of court because the Injunction should not have been granted or should not have been granted in terms which prohibited the acts which they chose to commit in defiance of the court's order.

77 If it were shown that the court was wrong to grant an injunction which prohibited the appellants' conduct, that would none the less be relevant to the question whether it was appropriate to punish the appellants' contempt of court by ordering their committal to prison. Although no such argument was raised in the appellants' grounds of appeal against the committal order, in the course of her oral submissions Ms Brimelow suggested that this was the case. She did so, as I understood it, by reference to the grounds on which the appellants had sought permission to appeal against the judge's refusal to remove paragraphs 4 and 7 of the Injunction (before that appeal was withdrawn). Although there was no formal application to rely on those grounds for the purpose of the appeal against the committal order, it would be unreasonable not to permit this.

78 The grounds on which the appellants argued that paragraphs 4 and 7 should not have been included in the Injunction were essentially the same, however, as the grounds on which they argued that those terms could not properly form the basis of findings of contempt of court—namely, that the terms were insufficiently clear and certain because of their references to intention. For the reasons already given, I do not consider this to be a valid objection.

79 I would add that it has not been argued—and I see no reason to think—that on the facts of this case paragraph 4 of the Injunction, as it stood when the breaches occurred, was too widely drawn. Although a similarly worded term was criticised by this court in the *Ineos* case, there was in that case, as I have emphasised, no previous history of interference with the claimants' rights. The injunction sought was therefore what might be called a "pure" quia timet injunction, in that it was not aimed at preventing repetition of wrongful acts which had caused harm to the claimants but at preventing such acts in circumstances where none had yet taken place. The significance which the court attached to this can be seen from para 42 of the judgment of Longmore LJ, where he said:

> "[Counsel] for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."

80 In the present case, by contrast, there was a well documented history of obstruction and attempts to obstruct access to and egress from Cuadrilla's site by blocking the Site Entrance and by obstructing the highway or otherwise interfering with traffic on the part of the Preston New Road defined in paragraph 3 of the Injunction as the "PNR Access Route". That history of conduct which clearly infringed the claimants' rights of free passage provided a solid basis for the prohibition in paragraph 4.

81 Paragraph 7 is a different matter. The only breach of paragraph 7 in issue on this appeal, however, is Ms Lawrie's conduct on 3 August 2018 in standing in the road in an attempt to stop a lorry which was approaching the Site Entrance and with the intention of causing inconvenience and delay to Cuadrilla. Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct. It clearly amounted to an actionable public nuisance. As such, the prohibition in paragraph 4 could have been framed so as to prohibit such conduct. Indeed, one of the variations made to the Injunction on 3 September 2019 was an amendment to paragraph 4 to prohibit:

> "Standing, sitting, walking or lying in front of any vehicle on the carriageway with the effect of interfering with the vehicular passage along the PNR Access Route by the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees;"

© 2020. The Incorporated Council of Law Reporting for England & Wales

This squarely covered conduct of the kind which occurred on 3 August 2018.

82 The word "effect" was included in the variations made on 3 September 2019 to avoid referring to intention. In my view, reference to intention should not have been removed because there is nothing unclear in such a requirement and I see no sufficient justification for framing the prohibition more widely so as to catch unintended effects. But what matters for present purposes is that the terms of the Injunction were not criticised—and it seems to me could not reasonably be criticised—as too wide in so far as they prohibited the conduct of Ms Lawrie on 3 August 2018, as they did both before and after the variations were made.

83 I am therefore satisfied that, when considering the sanctions imposed on the appellants, it cannot be said in mitigation that the acts which formed the basis of the committal order were not acts which ought to have been prohibited by the Injunction.

(2) Were the sanctions too harsh?

84 The second ground of appeal pursued by the appellants is that—on the footing that the relevant restrictions placed on their conduct by the Injunction were legally justified—the judge was nevertheless wrong to punish their breaches of the Injunction by ordering their committal to prison (albeit that execution of the order was suspended).

The standard of review on appeal

85 In deciding what sanction to impose for a contempt of court, a judge has to assess and weigh a number of different factors. The law recognises that a decision of this nature involves an exercise of judgment which is best made by the judge who deals with the case at first instance and with which an appeal court should be slow to interfere. It will generally do so only if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge. It follows that there is limited scope for challenging on an appeal a sanction imposed for contempt of court as being excessive (or unduly lenient). If, however, the appeal court is satisfied that the decision of the lower court was wrong on one of the above grounds, it will reverse the decision and either substitute its own decision or remit the case to the judge for further consideration of sanction. See *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA 392; [2019] 1 WLR 3833, paras 44–46 and *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524; [2019] 4 WLR 65, paras 37–38.

86 The appellants' case that the judge's decision was wrong is put in two ways. First, it is argued that the judge made an error of principle and/or failed to take into account a material factor in treating as irrelevant the fact that, when they disobeyed the Injunction, the appellants were exercising rights of protest which are protected by the common law and by articles 10 and 11 of the Convention. Secondly, it is argued that, in having regard (as the judge did) to the guideline issued by the Sentencing Council which applies to sentencing in criminal cases for breach of a criminal behaviour order, the judge misapplied that guideline and, in consequence, reached a decision that was unduly harsh.

Sentencing protestors

87 The fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest will seldom provide a defence to a criminal charge. But it is well established that it is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case. On behalf of the appellants, Ms Brimelow QC emphasised the following observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

88 This passage was quoted with approval by Lord Burnett of Maldon CJ, giving the judgment of the Court of Appeal (Criminal Division) in *R v Roberts* [2019] 1 WLR 2577, the case

© 2020. The Incorporated Council of Law Reporting for England & Wales

mentioned earlier that arose from "direct action" protests at Cuadrilla's site in July 2017 by four men who climbed on top of lorries. Three of the protestors were sentenced to immediate terms of imprisonment, but on appeal those sentences were replaced by orders for their conditional discharge, having regard to the fact that they had already spent three weeks in prison before their appeals were heard. The Court of Appeal indicated that the appropriate sentence would otherwise have been a community sentence with a punitive element involving work (or perhaps a curfew). The Lord Chief Justice (at para 34) summarised the proper approach to sentencing in cases of this kind as being that:

> "the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

89 Ms Brimelow submitted that this approach to sentencing should have been, but was not, followed in the present case when deciding what sanction to impose for the breaches of the Injunction committed by the appellants.

Were custodial sentences wrong in principle?

90 At one point in her oral submissions Ms Brimelow sought to argue that, where a deliberate breach of a court order is committed in the course of a peaceful protest, it is wrong in principle to punish the breach by imprisonment, even if the sanction is suspended on condition that there is no further breach within a specified period. This mirrored a submission which she made when representing the protestors in the *Roberts* case. The submission was rejected in the *Roberts* case (at para 43) and I would likewise reject it as contrary to both principle and authority.

91 There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used. Court orders would become toothless if such an approach were adopted—particularly in relation to those for whom a financial penalty holds no deterrent because it cannot be enforced as they do not have funds from which to pay it. Unsurprisingly, no case law was cited in which such an approach has been endorsed. Not only, as mentioned, was it rejected in the *Roberts* case in the context of sentencing for criminal offences, but it is also inconsistent with the jurisprudence of the European Court of Human Rights.

92 Thus, in *Kudrevicius v Lithuania* 62 EHRR 34 mentioned earlier, the Grand Chamber of the European Court saw nothing disproportionate in the decision to impose on the applicants a 60-day custodial sentence suspended for one year (along with some restrictions on their freedom of movement)—a sentence which the court described as "lenient" (see para 178). The Grand Chamber also referred with approval to earlier cases in which sentences of imprisonment imposed on demonstrators who intentionally caused disruption had been held not to violate articles 10 and 11 of the Convention. For example, in *Barraco v France* CE:ECHR:2009:0305JUD003168405; (Application No 31684/05) 5 March 2009, the applicant had taken part in a protest which involved blocking traffic on a motorway for several hours. The European Court held that his conviction and sentence to a suspended term of three months' imprisonment (together with a fine of €1,500) did not violate article 11.

93 Another case cited by the Grand Chamber in *Kudrevicius* that is particularly in point because it involved defiance of court orders is *Steel v United Kingdom* CE:ECHR:1998:0923JUD002483894; 28 EHRR 603; 5 BHRC 339. In that case the first applicant took part in a protest against a grouse shoot in which she intentionally obstructed a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing. She was convicted of a public order offence, fined and ordered to be bound over to keep the peace for 12 months. Having refused to be bound over, the applicant was committed to prison for 28 days. The second applicant took part in a protest against the building of a motorway extension in which she stood under the bucket of a JCB digger in order to impede construction work. She was likewise convicted of a public order offence, fined and ordered to be bound over. She also refused to be bound over and was committed to prison for seven days. The European Court held that in each of these cases the measures taken against the protestors interfered with their rights under article 10 of the Convention but that in each case the measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and also (in relation to

© 2020. The Incorporated Council of Law Reporting for England & Wales

their committal to prison for refusing to agree to be bound over) maintaining the authority of the judiciary.

94 The common feature of these cases, as the court observed in the *Kudrevicius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case—like the *Kudrevicius* case—involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see para 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.

95 Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.

96 On the other hand, courts are frequently reluctant to make orders for the *immediate* imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct action protest for conscientious reasons. It is notable that in the *Kudrevicius* case and in the earlier cases there cited in which custodial sentences were held by the European Court to be a proportionate restriction on the rights of protestors, in all but one instance the sentence imposed was a suspended sentence. The exception was *Steel v United Kingdom*, but in that case too the protestors were not immediately sentenced to imprisonment: it was only when they refused to be bound over to keep the peace that they were sent to prison. A similar reluctance to make (or uphold) orders for immediate imprisonment is apparent in the domestic cases to which counsel for the appellants referred, including the *Roberts* case. As Lord Burnett CJ summed up the position in that case (at para 43): "There are no bright lines, but particular caution attaches to immediate custodial sentences." There are good reasons for this, which stem from the nature of acts which may properly be characterised as acts of civil disobedience.

Civil disobedience

97 Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see eg John Rawls, *A Theory of Justice* (1971) p 364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act—in contrast to the actions of other law-breakers who generally seek to avoid detection—is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.

98 It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally—apart from their protest activity—a law-abiding citizen, there is reason to expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of

© 2020. The Incorporated Council of Law Reporting for England & Wales

what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases".

99 These considerations explain why, in a case where an act of civil disobedience constitutes a criminal offence or contempt of a court order which is so serious that it crosses the custody threshold, it will none the less very often be appropriate to suspend the operation of the sanction on condition there is no further breach during a specified period of time. Of course, if the defendant does not comply with that condition, he or she must expect that the order for imprisonment will be implemented.

The judge's approach

100 The judge had regard to the fact that the breaches of the Injunction committed by the appellants in this case were part of a protest but did not accept that this was relevant in deciding what sanction to impose. That was an error. As I have indicated, it is clear from the case law that, even where protest takes the form of intentional disruption of the lawful activities of others, as it did here, such protest still falls within the scope of articles 10 and 11 of the Convention. Any restrictions imposed on such protestors are therefore lawful only if they satisfy the requirements set out in articles 10(2) and 11(2). That is so even where the protestors' actions involve disobeying a court order. Although—as the judge observed—the appellants' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2) of the Convention.

101 That said, the judge was in my opinion entitled to conclude—as he made it clear that he did—that the restrictions which he imposed on the liberty of the appellants by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority. The latter aim is specifically identified in article 10(2) as a purpose capable of justifying restrictions on the exercise of freedom of expression. It is also, as it seems to me, essential for the legitimate purpose identified in both articles 10(2) and 11(2) of preventing disorder.

Reference to the Sentencing Council guideline

102 In deciding what sanctions were appropriate, the judge approached the decision, correctly, by considering both the culpability of the appellants and the harm caused, intended or likely to be caused by their breaches of the Injunction. I see no merit in the appellants' argument that, in making this assessment, he misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. In *Venables v News Group Newspapers Ltd* [2019] EWHC 241 (QB) at [26], the Divisional Court thought it appropriate to have regard to that guideline in deciding what penalty to impose for contempt of court in breaching an injunction. As the court noted, however, the guideline does not apply to proceedings for committal. There is therefore no obligation on a judge to follow the guideline in such proceedings and I do not consider that, if a judge does not have regard to it, this can be said to be an error of law. The criminal sentencing guideline provides, at most, a useful comparison.

103 Caution is needed in any such comparison, however, as the maximum penalty for contempt of court is two years' imprisonment as opposed to five years for breach of a criminal behaviour order. It would be a mistake to assume that the starting points and category ranges indicated in the sentencing guideline should on that account be made the subject of a linear adjustment such that, for example, the starting point for a contempt of court that would fall in the most serious category in the guideline (category 1A) should only be of the order of ten months' custody (which is roughly 40% of the guideline starting point of two years' custody). As the Court of Appeal observed in *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65, para 40:

> "[Counsel for the appellant] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

104 A further material difference is that, in proceedings for contempt of court, a community order is not available as a lesser alternative to the sanction of imprisonment. There may therefore be cases where, although the sentencing guideline for breach offences might suggest that a

© 2020. The Incorporated Council of Law Reporting for England & Wales

community order would be an appropriate sentence, it is necessary to punish a contempt of court by an order for imprisonment because the contempt is so serious that neither of the only alternative sanctions of a fine and/or an order for costs could be justified.

Sanction for the first incident

105 In relation to the first incident on 24 July 2018 involving all three appellants, there is no basis for saying that the judge's assessment of culpability and harm by reference to the sentencing guideline for breach offences, or his decision on sanction in the light of that assessment, was wrong on any of the grounds listed in para 85 above. The judge was right to start from the position that a deliberate breach of a court order is itself a serious matter. He was entitled, as he also did, to treat the appellants' culpability as aggravated by the element of planning involved in their use of lock-on devices and to take account of (i) the number of hours of disruption and delay caused by their conduct, (ii) evidence that the incident caused Cuadrilla additional (and irrecoverable) costs of around £1,000, and (iii) the fact that the incident only ended when police were deployed to cut through the arm lock devices and remove the appellants. It was also relevant that the appellants expressed no remorse and gave no indication that they would not commit further breaches of the Injunction. Nor were they entitled to any credit for admitting their contempt, as they declined to do so, thereby necessitating a trial at which evidence had to be called.

106 Had it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience in the sense I have described, short immediate custodial terms would in my view have been warranted. As it is, it cannot be said that the judge's decision to impose suspended terms of imprisonment of four weeks was wrong in principle or outside the range of decisions reasonably open to him.

Sanction for the second incident

107 In relation to the second incident on 3 August 2018 involving Ms Lawrie alone, somewhat different considerations apply. Although Ms Lawrie's action in standing in the path of a lorry to try to stop it was also found to be a deliberate breach of the court's order, there was no evidence of planning and the incident was far shorter in duration lasting only a few seconds. In assessing the harm caused or risked by Ms Lawrie's breach of the Injunction, the judge emphasised the danger of injury or death to which her action had exposed Ms Lawrie herself, the driver of the lorry and other road-users. However, as David Richards LJ pointed out in the course of argument, in approaching the matter in this way the judge seems to have lost sight of the fact that the purpose of paragraph 7 of the Injunction, which he was punishing Ms Lawrie for disobeying, was not to protect the safety of road-users but was to protect Cuadrilla from suffering economic loss as a result of conspiracy to disrupt its supply chain by unlawful means. In assessing the seriousness of the breach, the judge should have focused on the extent to which the breach caused, or was intended to cause or risked causing, harm of the kind which the relevant term of the Injunction was intended to prevent. Had he done this, the judge would have been bound to conclude not only that no harm was actually caused but that the amount of economic loss intended or threatened by delaying a lorry on its way to collect rainwater from the site was slight.

108 The judge was, I consider, entitled to take into account as aggravating Ms Lawrie's culpability the nature of the unlawful means used and the fact that, on his findings, it amounted not merely to a public nuisance through obstruction of the highway but to an offence of causing danger to road-users contrary to section 22A of the Road Traffic Act 1988. To be guilty of an offence under that statutory provision, it is not necessary that the person concerned should have intended to cause, or realised that they were causing, danger to life or limb, and the judge made no such finding in relation to Ms Lawrie. It is sufficient that it would be obvious to a reasonable person that their action would be dangerous—a matter of which the judge was clearly satisfied on the evidence.

109 Ms Lawrie was not prosecuted, however, and the judge was not sentencing her for a criminal offence under the Road Traffic Act. In the circumstances, giving all due weight to the nature of the unlawful means used, the fact that this was Ms Lawrie's second deliberate breach of the Injunction and her complete lack of contrition, I do not consider that the term of imprisonment of two months which the judge imposed was justified. In my judgment, although the judge was right to conclude that the custody threshold was crossed, the appropriate penalty for this contempt of court was the same as that imposed for the earlier contempt committed by all three appellants—that is, a suspended term of imprisonment of four weeks.

© 2020. The Incorporated Council of Law Reporting for England & Wales

Conclusion

110 For these reasons, I would vary the committal order made by Judge Pelling QC on 3 September 2019 by substituting for the period of imprisonment of two months in paragraph 2 of the order a period of four weeks. In all other respects I would dismiss the appeal.

DAVID RICHARDS LJ

111 I agree.

UNDERHILL LJ

112 I agree with Leggatt LJ, for the reasons which he gives, that this appeal should be dismissed save in the one respect which he identifies. The courts attach great weight to the right of peaceful protest, even where this causes disruption to others; but it is also important for the rule of law that deliberate breaches of court orders attract a real penalty, and I can see nothing wrong in principle in the judge's conclusion that the appellants' conduct here merited a custodial sentence, albeit suspended.

Appeal dismissed in part.
Variation of committal order.

ALISON SYLVESTER, Barrister

© 2020. The Incorporated Council of Law Reporting for England & Wales

A

Supreme Court

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25 — Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC

B

Human rights — Freedom of expression and assembly — Interference with — Defendants charged with obstructing highway during demonstration against arms fair — Whether defendants lawfully exercising Convention rights so as to have "lawful . . . excuse" — Whether interference with defendants' Convention rights proportionate — Proper approach to proportionality by appellate court on appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

C

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the middle of the approach road to the conference centre and attaching themselves to two lock boxes with pipes sticking out from either side, making it difficult for police to remove them from the highway. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted "without lawful . . . excuse" within the meaning of section 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The prosecution appealed by way of case stated, pursuant to section 111 of the Magistrates' Courts Act 1980[3]. The Divisional Court of the Queen's Bench Division allowed the appeal, holding that the district judge's assessment of proportionality had been wrong. The defendants appealed. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under articles 10 or 11.

D

E

F

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with the protesters' rights was proportionate for the purposes of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that, rather, there had to be an assessment of the facts in each individual case to determine whether the interference was "necessary in a democratic society" for the purposes of articles 10(2) and 11(2); that, therefore, deliberate physically obstructive conduct by protesters was capable of being something for which there was a "lawful . . . excuse" for the purposes of section 137(1) of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users was more than de minimis and

G

H

[1] Highways Act 1980, s 137: see post, para 8.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 14.
Art 11: see post, para 15.
[3] Magistrates' Courts Act 1980, s 111(1): see post, para 36.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A prevented them, or was capable of preventing them, from passing along the highway; and that whether or not the protesters had a lawful excuse would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether the protesters' convictions for offences under section 137(1) were justified restrictions on their Convention rights or (per Lord Hodge DPSC and Lord Sales JSC) whether the police response in seeking to remove the obstruction involved the exercise of their powers in a proportionate manner (post, paras 63–70, 94, 99, 121, 154).

B (2) (Lord Hodge DPSC and Lord Sales JSC dissenting) that, on an appeal by way of case stated under section 111 of the Magistrates' Courts Act 1980, the test to be applied by the appellate court to an assessment of the decision of the trial court in respect of a defence of lawful excuse under section 137 of the Highways Act 1980 when Convention rights were engaged was the same as that applicable generally to appeals on questions of law in a case stated, namely that an appeal would be allowed where there was an error of law material to the decision reached which was C apparent on the face of the case stated or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found; that, in accordance with that test, where the defence of lawful excuse depended upon an assessment of proportionality, an appeal would lie if there had been an error or flaw in the court's reasoning on the face of the case stated which undermined the cogency of its conclusion on proportionality; that such assessment fell to be made on the basis of the primary and secondary findings set out D in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached; and that, therefore, the Divisional Court in the present case had applied an incorrect test by asking itself whether the district judge's assessment of proportionality had been wrong (post, paras 42–45, 49–54, 99, 106–108).

Edwards v Bairstow [1956] AC 14, HL(E) and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, SC(E) considered.

E (3) (Lord Hodge DPSC and Lord Sales JSC dissenting in part, but agreeing in allowing the appeal) that there had been no error or flaw in the district judge's reasoning on the face of the case stated such as as to undermine the cogency of his conclusion on proportionality; that, in particular, he had not erred in considering as relevant factors the facts that the defendants' actions (a) had been entirely peaceful, (b) had not given rise either directly or indirectly to any form of disorder, (c) had not involved the commission of any other criminal offence, (d) had been aimed only at F obstructing vehicles headed to the arms fair, (e) had related to a matter of general concern, namely the legitimacy of the arms fair, (f) had been limited in duration, (g) had not given rise to any complaint by anyone other than the police and (h) had stemmed from the defendants' long-standing commitment to opposing the arms trade; and that, accordingly, the convictions should be set aside and the dismissal of the charges against the defendants restored (post, paras 71–78, 80–88, 99, 109–113, 115–118).

G *Nagy v Weston* [1965] 1 WLR 280, DC and *City of London Corpn v Samede* [2012] PTSR 1624, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 reversed.

The following cases are referred to in the judgments:

H *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)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

© 2022 The Incorporated Council of Law Reporting for England and Wales

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bracegirdle v Oxley [1947] KB 349; [1947] 1 All ER 126, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7; [2017] NI 301, SC(NI)
D'Souza v Director of Public Prosecutions [1992] 1 WLR 1073; [1992] 4 All ER 545; 96 Cr App R 278, HL(E)
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Garry v Crown Prosecution Service [2019] EWHC 636 (Admin); [2019] 1 WLR 3630; [2019] 2 Cr App R 4, DC
Google LLC v Oracle America Inc (2021) 141 S Ct 1183
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
H v Director of Public Prosecutions [2007] EWHC 2192 (Admin), DC
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lashmankin v Russia (Application No 57818/09) (unreported) 7 February 2017, ECtHR
Love v Government of the United States of America [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
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
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
New Windsor Corpn v Mellor [1974] 1 WLR 1504; [1974] 2 All ER 510
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Oladimeji v Director of Public Prosecutions [2006] EWHC 1199 (Admin)
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, HL(E)
Primov v Russia (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest Heath District Council [1998] Env LR 9, CA
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)

© 2022 The Incorporated Council of Law Reporting for England and Wales

A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
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 (P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin); 170 JP 453
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Z) v Hackney London Borough Council [2019] EWCA Civ 1099; [2019] PTSR 2272, CA; [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
C *Smith and Grady v United Kingdom* (Application Nos 33985/96, 33986/96) (1999) 29 EHRR 493, ECtHR
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205, ECtHR (GC)

No additional cases were cited in argument.

D **APPEAL** from the Divisional Court of the Queen's Bench Division

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court, acquitted the defendants, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstructing the highway, contrary to section 137 of the Highways Act 1980. By a case stated that was served on the defendants on E 20 March 2018, the prosecution appealed. By a judgment dated 22 January 2019 the Divisional Court of the Queen's Bench Division (Singh LJ and Farbey J) [2019] EWHC 71 (Admin); [2020] QB 253 allowed the appeal.

With permission of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted on 3 December 2019, the defendants appealed.

The issues in the appeal, as stated in the parties' agreed statement of facts F and issues, were: (1) What was the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights were engaged in a criminal matter? (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate G obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

The facts are stated in the judgment of Lord Hamblen and Lord Stephens JJSC, post, paras 1–6.

H *Henry Blaxland QC*, *Blinne Ní Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

As far back as 1965 the courts explained "lawful authority or excuse" as encompassing the concept of "reasonableness": see *Nagy v Weston* [1965] 1 WLR 280. In respect of the offence of obstruction of the highway contrary to section 137 of the Highways Act 1980, reasonableness is a question of

© 2022 The Incorporated Council of Law Reporting for England and Wales

fact to be assessed having regard to all the prevailing circumstances, including the duration of the obstruction, its location and purpose and whether it did in fact cause an actual, as opposed to a potential, obstruction. A defendant will not be guilty of deliberately obstructing the highway unless it is proved that such obstruction was not reasonable.

Even before the coming into force of the Human Rights Act 1998, it was possible for protesters engaged in an obstructive protest on the highway to argue successfully that they were exercising a lawful right to protest and therefore had a "lawful" right to protest.

The Convention rights which are in issue in this appeal are the rights contained in article 10 (concerning the right to freedom of expression) and article 11 (concerning the right to freedom of peaceful assembly) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those two articles and the parallel rights and obligations arising under common law must be considered when assessing the reasonableness of any obstruction of the highway and the proportionality of any interference with a right to protest.

The assessment of whether an obstruction of the highway was reasonable in the context of articles 10 and 11 is inevitably a fact-sensitive one that will depend on factors including the extent to which the continuation of the protest would breach domestic law, the importance to protesters of the precise protest location, the duration of the protest, and the extent of the actual interference caused to the rights of others: see *City of London Corpn v Samede* [2012] PTSR 1624.

The actions of the defendants in the present case were no more than symbolic. They could not have prevented arms being delivered to the arms fair, nor could they have prevented the arms fair taking place. Their protest was aimed at raising awareness of their cause. There was no evidence led by the prosecution that the protest caused disruption to traffic, or to the venue where the arms fair was being held, or to other people. It was entirely speculative whether there was obstructive conduct on the part of the protesters. There was evidence of potential interference but not of actual interference. There was no material which showed to the criminal standard that traffic was disrupted.

[Reference was made to *Kudrevičius v Lithuania* (2015) 62 EHRR 34.]

Even deliberate interference with the activities of others can fall within the protection of article 11. It must be shown by the prosecution that there was interference with the rights of others. Article 11 must be construed in a way which does not limit free speech and peaceful assembly. The defendants' intention was to cause some disruption but it did not take them outside article 11.

The trial judge's decision was impeccable and contained no legal error. The Divisional Court failed to accord due weight to the trial judge's findings, contrary to the need for appellate caution in relation to both findings of fact and value judgments. The Divisional Court substituted its own view of the evidence for that of the trial judge despite the fact it had not seen the live evidence and the video footage of the protest which was the material on which the trial judge had assessed the nature of the protest and the disruption it caused.

Where a statutory defence such as that arising under section 137 of the Highways Act 1980 encompasses the engagement of one or more

© 2022 The Incorporated Council of Law Reporting for England and Wales

A Convention rights, the assessment of whether the prosecution has disproved that a defendant's use of the highway was reasonable constitutes an evaluative assessment within the province of the tribunal of fact. Therefore the approach to be taken by an appellate court is not simply to consider whether in its view the conclusion of the court below was "wrong", but rather whether that conclusion was reached either as a result of an identifiable flaw in the court's logic or reasoning or whether it was a B conclusion which no properly directed tribunal could have reached. The Divisional Court fell into error in determining otherwise.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The Divisional Court did not conclude as a matter of law that, in a prosecution under section 137 of the Highways Act 1980, findings of fact of C a complete obstruction of the highway for a significant period of time can never constitute a "lawful . . . excuse" for wilful obstruction within the meaning of section 137(1) of the Highways Act 1980. The Divisional Court held that those facts were "highly relevant" and "highly significant" to the assessment of proportionality in this case and concluded that the trial judge had given insufficient consideration to them in striking a fair balance D between the defendants' Convention rights and the rights and interests of others.

The essential facts can be ascertained from the case stated. It was clear that there was a deliberate or "wilful" obstruction of the highway which was planned rather than spontaneous. Its specific purpose was disruption of the traffic to the venue at which the arms fair was being held. It was aimed at a particular type of traffic which was delivering material to the arms fair. E The disruption lasted 90 minutes, which was a period of some length in the circumstances. The defendants used apparatus which was hard to disassemble in order to lock themselves together. They refused to unlock themselves and it can be inferred that they knew there would be a delay in removing them from the highway because police removal experts and specialist cutting equipment were needed. The reality was that the defendants knew they would remain on the road until the police were able, F with difficulty, to remove them.

In essence the primary facts were not in issue. But whether the facts as found did or may have constituted a lawful excuse called for a value judgment by the trial judge: see *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin). The tribunal of fact was dealing with the balancing act.

G The decision depended on the proportionality between the offence and the defendants' Convention rights. The Divisional Court concluded that the trial judge had erred in its assessment of proportionality and had not struck the fair balance necessary in that assessment.

On an appeal by way of case stated the High Court has a very wide discretion: see section 28A of the Senior Courts Act 1981. In the fact-specific circumstances of this case, the Divisional Court's review did accord due H weight to the assessment made by the trial judge, and correctly concluded that it was wrong.

Blaxland QC replied.

The court took time for consideration.

© 2022 The Incorporated Council of Law Reporting for England and Wales

25 June 2021. The following judgments were handed down. A

LORD HAMBLEN and **LORD STEPHENS JJSC**

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the B days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of C the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation D of demonstrations. Police officers approached the appellants almost immediately and went through the "five-stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble. E

4 The appellants were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the F European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable". G

5 The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2018, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' H application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted permission to appeal.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A 7 The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?

B (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

C 8 Section 137 of the 1980 Act provides:

> "137 *Penalty for wilful obstruction*
> "(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale."

D 9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

> E "there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

10 In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ("the HRA") needs to be read in the light of the HRA.

F 11 Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

12 Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (section 6(3)(a)), as are the police.

G 13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

> H "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

© 2022 The Incorporated Council of Law Reporting for England and Wales

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."

A

15 Article 11 ECHR materially provides:

B

"1. Everyone has the right to freedom of peaceful assembly . . .

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

C

16 In the present case the Divisional Court explained how section 137(1) of the 1980 Act can be interpreted compatibly with the rights in articles 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows:

D

"62. The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

E

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

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

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

F

"(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?

"(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

G

"64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

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

H

"(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?

© 2022 The Incorporated Council of Law Reporting for England and Wales

A "65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry."

17 Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of* B *London Corpn v Samede* [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul's Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras 39–41:

"39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful C assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of D the owners of the land, and the rights of any members of the public.

"40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in E bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command . . . the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or F wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

"41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the G topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia* (Application No 10877/04) H (unreported) 23 October 2008, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a

© 2022 The Incorporated Council of Law Reporting for England and Wales

democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means . . .' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

3. The case stated

18 The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

19 All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

> "All . . . defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route."

20 The district judge identified the issue for decision at para 37 of the case stated, as being:

> "whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway."

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

> "(a) The actions were entirely peaceful—they were the very epitome of a peaceful protests [sic].
>
> "(b) The defendants' actions did not give rise either directly or indirectly to any form of disorder.
>
> "(c) The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A "(d) The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair . . . I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether 'non-DSEI traffic' was or was not in fact obstructed since the authorities cited B above appeared to envisage 'reasonable' obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration . . .

"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for C torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this D since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did E not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own F initiative.

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the long-standing commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose G to attend this event hoping to cause trouble."

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

H "The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

© 2022 The Incorporated Council of Law Reporting for England and Wales

4. The decision of the Divisional Court

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see e g per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)."

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103:

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the

© 2022 The Incorporated Council of Law Reporting for England and Wales

A assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law."

26 Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong "because (i) he took into account certain considerations which were irrelevant; B and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes" (para 129).

27 Of the factors listed at paras 38(a) to (h) of the case stated as cited in para 21 above, the Divisional Court considered those set out at paras 38(a), C (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of "limited duration". The Divisional Court considered that to be a "significant period of time". Its core criticism was of para 38(d), in relation to which it stated as follows at para 112:

D "At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not a case where, as commonly occurs, *some* E *part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said F (depending on the facts) that a 'fair balance' is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*." (Emphasis added.)

G **28** The Divisional Court explained at para 117 that the "fundamental reason" why it considered the district judge's assessment of proportionality to be wrong was that:

"there was no 'fair balance' struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the H highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

© 2022 The Incorporated Council of Law Reporting for England and Wales

5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows:

> "the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them."

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows:

> "Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do."

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse" defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows:

> "On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse . . . : *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse."

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in

© 2022 The Incorporated Council of Law Reporting for England and Wales

A which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it—see, for example, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) at [40] (Auld LJ) (article 10 ECHR); *Hammond v Director of Public Prosecutions* (2004) 168 JP 601, para 33 (May LJ) (articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

B **34** *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment C homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at D para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one E she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in F *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which G is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to H the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on

© 2022 The Incorporated Council of Law Reporting for England and Wales

A questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an "adventure . . . in the nature of trade". The B commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows (at p 36):

> "When the case comes before the court it is its duty to examine the C determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination D under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law . . . the true and only reasonable conclusion contradicts the determination."

38 This approach has been followed for other case stated appeal E procedures—see, for example, *New Windsor Corpn v Mellor* [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 the question arose as to F the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at pp 752–753:

> "My Lords, in *Edwards v Bairstow* [1956] AC 14, 36, Lord Radcliffe made it plain that the court should only interfere with the conclusion of G special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal H test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

© 2022 The Incorporated Council of Law Reporting for England and Wales

A 39 The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

B 40 In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] KB 349, 353:

> C "It is said that this court is bound by the findings of fact set out in the cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived . . . if magistrates come to a decision to D which no reasonable bench of magistrates, applying their minds to proper considerations, and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it."

In *R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest E Heath District Council* [1998] Env LR 9, 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

> "It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley.* But it is not perverse, even if it may be mistaken, to prefer the F evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court."

41 In *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way G of case stated in criminal proceedings concerning whether the appellant, who had absconded from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was "unlawfully at large and whom [the police constables were] pursuing" under section 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as "a question of fact" but one which "must be answered within the relevant H legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> "I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the

© 2022 The Incorporated Council of Law Reporting for England and Wales

constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

In re B

42 In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under section 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

43 *In re B* [2013] 1 WLR 1911 was a family law case and involved the appellate test under CPR r 52.11(3) that an appeal will be allowed where the decision of the lower court is "wrong", whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* [2018] 1 WLR 2889 but that too involves a wide right of appeal "on a question of law or fact" (sections 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if "the district judge ought to have decided a question before him differently" and "had he decided it as he ought to have done, he would have been required to discharge the appellant"—see sections 27(3) and 104(3). In argument, reliance was also placed on the application of *In re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a magistrates' court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review—see, for example, *R (P) v Liverpool City Magistrates' Court* (2006) 170 JP 453, para 5.

44 It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

45 A prosecution under section 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful authority or excuse. Some cases stated in relation to section 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

46 Whilst we do not consider that *In re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *In re B* has been

© 2022 The Incorporated Council of Law Reporting for England and Wales

A developed in later cases. In *In re B* at para 88 Lord Neuberger PSC stated as follows:

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on B the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

C **47** This approach was qualified by the Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. In that case Lord Carnwath JSC (with whom the other justices agreed) said at para 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to D point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. E However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge F below was wrong . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. G Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the H factors which the court considers to be relevant to that assessment are likely to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the

© 2022 The Incorporated Council of Law Reporting for England and Wales

face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not "any relevant evidence".

50 In his judgment Lord Sales JSC sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

51 As Lady Arden JSC's analysis at para 101 of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

52 Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *In re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

53 In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

54 For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under section 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *In re B*, where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A *6. Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?*

The second certified question

B **55** As the Divisional Court explained, (see para 28 above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time". That fundamental reason led the Divisional C Court to certify the second question which the parties agreed as being in the terms set out in para 7(2) above ("the second certified question"). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of D preventing users, from passing along the highway. In those circumstances, the interference with the protesters' article 10 and article 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to section 137 of the 1980 Act.

56 On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of E constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's order directing convictions should be set aside and that this court should F issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

57 The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) G and 11(2): see paras 14–15 above. Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society". In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as H punitive measures, taken afterwards" so that it accepted at para 101 "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest,

© 2022 The Incorporated Council of Law Reporting for England and Wales

which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales JSC (see for instance para 120, 153 and 154) who considers that the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden JSC at para 94 that "the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not" (emphasis added).

58 As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

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

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

61 In this case both articles 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under article 10 or article 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the court. In *Kudrevčius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis

© 2022 The Incorporated Council of Law Reporting for England and Wales

A pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

B

Deliberate obstruction with more than a de minimis impact

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, C paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevičius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first D applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She E complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the* F *activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' G freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the H proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those

© 2022 The Incorporated Council of Law Reporting for England and Wales

separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

65 The case of *Hashman and Harrup v United Kingdom* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their article 10 rights. At para 28 the ECtHR noted that "the protest took the form of impeding the activities of which they disapproved" but considered "nonetheless that it constituted an expression of opinion within the meaning of article 10" and that "The measures taken against the applicants were, therefore, an interference with their right to freedom of expression". Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

66 In *Kudrevičius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to article 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by articles 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that

© 2022 The Incorporated Council of Law Reporting for England and Wales

A heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage
B had not been calculated.

67 The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out*
C *by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevičius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications
D for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in
E view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants
F breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usukhchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to
G the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population.
> H Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance (see *Galstyan* [*Galstyan v Armenia* (2007) 50 EHRR 25], paras 116–117, and *Bukta* [*Bukta v*

© 2022 The Incorporated Council of Law Reporting for England and Wales

Hungary (2007) 51 EHRR 25], para 37). The appropriate 'degree of tolerance' cannot be defined in abstracto: the court must look at the particular circumstances of the case and particularly to the extent of the 'disruption of ordinary life'."

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

69 This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of article 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to "peaceful assembly". As the ECtHR stated at para 92 of *Kudrevičius*:

> "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevičius*. At para 155 of its judgment in *Primov and v Russia* the ECtHR stated that "article 11 does not cover demonstrations where the organisers and participants have violent intentions . . . However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour". Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

70 It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society".

Factors in the evaluation of proportionality

71 In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

72 A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] PTSR 1624 (see para 17 above). The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of

© 2022 The Incorporated Council of Law Reporting for England and Wales

A the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is B hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

73 In *Nagy v Weston* [1965] 1 WLR 280 (see para 9 above) one of the factors identified was "the place where [the obstruction] occurs". It is apparent, as in this case, that an obstruction can have different impacts C depending on the commercial or residential nature of the location of the highway.

74 A factor listed in *City of London Corpn v Samede* was "the extent of the actual interference the protest causes to the rights of others". Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in D relation to proportionality by the ECtHR was the availability of "alternative thoroughfares where the traffic could have been diverted by the police".

75 Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevičius* in that it took into account that "the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of E another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products". So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

76 Another factor identified in *City of London Corpn v Samede* was "the importance of the precise location to the protesters". In *Mayor of* F *London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 37 it was acknowledged by Lord Neuberger MR, with whom Arden and Stanley Burnton LJJ agreed, that "The right to express views publicly . . . and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends . . . to the location where they wish to express and exchange their views". In *Sáska v Hungary* G (Application No 58050/08) (unreported) 27 November 2012, at para 21 the ECtHR stated that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11". This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia*, 7 February 2017. At para 405 it was stated that:

H

> "the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target*

© 2022 The Incorporated Council of Law Reporting for England and Wales

object and at a time when the message may have the strongest impact." (Emphasis added.)

In this case the appellants ascribed a particular "symbolic force" to the location of their protest, in the road, leading to the Excel Centre.

77 It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corpn v Samede*, namely "the extent to which the continuation of the protest would breach domestic law". So, the manner and form of a protest on a highway will potentially involve the commission of an offence contrary to section 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (Application No 25/02) (unreported) 29 November 2007, at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case "presented a danger to public order, apart from possibly blocking the tram line". So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

78 Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, paras 34–38 and *DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301, para 61.

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

79 A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the case stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the articles 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

80 The Divisional Court at paras 111–118 considered the assessment of proportionality carried out by the district judge (see para 21 above). The

© 2022 The Incorporated Council of Law Reporting for England and Wales

A Divisional Court considered that the factors at paras 38(a) to (c) were of little or no relevance. We disagree. In relation to the factor at para 38(a), article 11 protects peaceful assembly. The ECtHR requires "a certain degree of tolerance towards peaceful gatherings", see *Primov v Russia* at para 68 above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in para 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. B There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest C was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no "clashes" with the police. The factor taken into account by the district judge at para 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corpn v Samede* (see para 17 above) in which one of the factors listed was "the extent to which the continuation of the protest would breach domestic law". The Divisional Court considered that none of these factors prevented the offence of D obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether E the appellants should be convicted under section 137 of the 1980 Act.

81 The Divisional Court's core criticism related to the factor considered by the district judge at para 38(d). We have set out in para 27 above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para 112 the Divisional Court stated that the "highway *to and from* the Excel Centre was completely obstructed" but later stated F that "members of the public were *completely prevented* from" using "the highway for passage *to* get to the Excel Centre" (emphasis added). We also note that at para 114 the Divisional Court again stated that there was there was "*a complete obstruction of the highway*" (emphasis added). In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be G used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not "completely prevented" from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that "actions" were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair was relevant: see para 75 H above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed

© 2022 The Incorporated Council of Law Reporting for England and Wales

since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

© 2022 The Incorporated Council of Law Reporting for England and Wales

A As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the B district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any C longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot . . . be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which D potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a E fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

F **85** The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated was "of little if any relevance to the assessment of proportionality". The factor was that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In G relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of H demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no

© 2022 The Incorporated Council of Law Reporting for England and Wales

substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a "relatively minor issue", noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that "This was not a group of people who randomly chose to attend this event hoping to cause trouble". The Divisional Court held that this factor had "no relevance to the assessment which the court was required to carry out when applying the principle of proportionality" and that "It came perilously close to expressing approval of the viewpoint of the defendants, something which . . . is not appropriate for a neutral court to do in a democratic society". However, as set out at para 72 above, whether the appellants "believed in the views they were expressing" was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike "vapid tittle-tattle" are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

87 We would answer the second certified question "yes". The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under section 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. Overall conclusion

88 For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para 54 above; answering the certified question set out in para 7(2) "yes"; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN JSC

The context in which the certified questions arise

89 This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two

© 2022 The Incorporated Council of Law Reporting for England and Wales

A certified questions set out in para 7 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by B the Human Rights Act 1998. The European Court of Human Rights ("the Strasbourg court") has described this important right as follows:

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted C restrictively." (*Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 91.)

90 The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

> "1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ('DSEI') weapons fair taking D place at the centre.
>
> "2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ('lock box'), using a carabiner.
>
> "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', intended to persuade them to remove themselves voluntarily from the E public highway.
>
> "4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).
>
> "5. The left-hand dual lane carriageway of the public highway leading to F the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.
>
> "6. The appellants were charged with obstructing the highway contrary to section 137 of the Highways Act 1980.
>
> G "7. They were tried before District Judge (Magistrates' Court) ('DJ(MC)') Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.
>
> "8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under articles 10 and 11, 'on the specific facts of these H particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'." (Case stated, para 40.)

91 Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free

© 2022 The Incorporated Council of Law Reporting for England and Wales

passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale]."

92 As Lord Sales JSC, with whom Lord Hodge DPSC agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by articles 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful. As Lord Bingham of Cornhill observed in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 127: "The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a 'constitutional shift'."

93 Article 11, which I set out in para 95 below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to article 10 of the Convention (freedom of expression), as well as article 11, but its importance as a Convention right must also be acknowledged.

94 I pause here to address a point made by Lord Sales JSC and Lord Hodge DPSC that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is article 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself article 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair—a high profile and controversial event—and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was article 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under article 11 or not.

95 Article 11 provides:

> "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.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

"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."

B

96 Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an end marks the end of the duration of any offence under section 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under section 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales JSC and Lord Hodge DPSC in Lord Sales JSC's judgment, the appellants did not in fact intend that their protest should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

C

D

97 It follows from the structure of article 11 and the importance of the right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (2018) 68 EHRR 25:

E

"137. The court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

F

G

The certified questions

H

98 The issues of law in the appeal, as certified by the Divisional Court, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in

© 2022 The Incorporated Council of Law Reporting for England and Wales

particular the lower court's assessment of whether an interference with Convention rights was proportionate?

(2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time?

Overview of my answers to the two certified questions

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("*R (R)*"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("*In re B*"), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49).

(2) *Whether the exercise of articles 10 and 11 rights may involve legitimate levels of obstruction.* My answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens JJSC on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did.

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these types of appellate review is clear.

101 But there are many other standards. In appeals by case stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, section 111). As Lord Hamblen and Lord Stephens JJSC have explained, the standard of review is

© 2022 The Incorporated Council of Law Reporting for England and Wales

A that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone* [2001] STC 214.

B **102** Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one C end of the gamut of possibilities, there is the de novo hearing and the pure correctness standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because D there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, E which even though for well-intentioned reasons may also be inconsistent with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the F evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

103 I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to G disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the H recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court.

104 As to the standard of appellate review of proportionality assessments, no one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *In re B* [2013] 1 WLR 1911, a family case. However, in *R (R)* [2018] 1 WLR 4079 this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para 64 of the judgment of Lord Carnwath JSC with whom the other members of this court agreed:

B

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'."

C

D

E

105 The refinement by this court of the *In re B* test in *R (R)* as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations.

F

G

106 In short, I would hold that the standard of appellate review applicable in judicial review following *R (R)* should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it.

107 Since circulating the first draft of this judgment I have had the privilege of reading paras 49–54 and 78 of the joint judgment of Lord Hamblen and Lord Stephens JJSC. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R (R)* which I have already set

H

© 2022 The Incorporated Council of Law Reporting for England and Wales

A out in para 104 of this judgment, Lord Carnwath JSC was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for example, what actually was the legitimate aim and how far was it furthered B by the action of the state and was there any less restrictive means of achieving the legitimate end.

108 In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to C analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para 102 above).

109 As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales JSC and Lord Hodge DPSC for two reasons. First, they hold that the district judge was in D error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was "completely blocked" by the appellants' actions (Lord Sales JSC's judgment, para 144). But, as para 5 of the statement of facts and issues set out in para 90 above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute E that such routes were available. As the district judge said at para 16 of the case stated:

> "All eight defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not* F *in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route*." (Emphasis added.)

110 The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge G could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete impediment to other road-users that that conclusion could be challenged H under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality

© 2022 The Incorporated Council of Law Reporting for England and Wales

assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para 96 above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under section 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

112 This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the case stated which reads:

> "The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A *Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case*

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted B and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

C

> "Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance."

D

115 In the case stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of articles 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

116 I agree with Lord Hamblen and Lord Stephens JJSC's thorough E review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales JSC and Lord Hodge DPSC consider were rightly made. So, I make only some brief concluding points at this stage.

117 Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was F required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Crim PR r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales JSC and Lord Hodge DPSC, which could enable the G prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the case stated.

Conclusion

118 For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens JJSC.

H

LORD SALES JSC (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton

© 2022 The Incorporated Council of Law Reporting for England and Wales

A ("the district judge") in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under section 137 of the Highways Act 1980 ("section 137"). The case stated procedure is governed by section 111 of the Magistrates' Courts Act 1980 and section 28A of the Senior Courts Act 1981. So far as relevant, section 111 only permits the appeal court to allow an appeal if the decision is "wrong in law": section 111(1).

B **120** I respectfully disagree with what Lord Hamblen and Lord Stephens JJSC say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" under section 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. C I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more D than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 E regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. F I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a G statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it H unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the

© 2022 The Incorporated Council of Law Reporting for England and Wales

A duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by B arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

125 This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be C an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, D the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (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) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been E struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the F arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action G against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and article 11, alleging that their arrest and removal by the police would be in H breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an

© 2022 The Incorporated Council of Law Reporting for England and Wales

alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

129 The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under section 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of article 10 and article 11 and therefore held that a protester had no "lawful excuse" defence under section 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

130 It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40–42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29–31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the

© 2022 The Incorporated Council of Law Reporting for England and Wales

A proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham B noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat C greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality D as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

E 132 Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate F court is entitled to find an error of law if the decision of the lower court or tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC, G explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach H which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do.

© 2022 The Incorporated Council of Law Reporting for England and Wales

In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *In re B (A Child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London Borough Council*.

133 In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with article 10 or article 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was "wrong" according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

134 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

135 By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against the police, to enforce their obligation under section 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of section 137. The approach on an appeal in such judicial review proceedings would be that set out in *In re B (A Child)* and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

136 To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *In re B (A Child)* is not inconsistent with the leading authority of *Edwards v Bairstow* [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said (p 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word "trade" or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits "within which it would be permissible to say that a 'trade' [within the meaning of the statutory rule] does or does not

© 2022 The Incorporated Council of Law Reporting for England and Wales

A exist". If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows (p 36):

> "If the case [as stated] contains anything ex facie which is bad law and B which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, C there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. D For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

137 In a well-known passage in *Council of Civil Service Unions v* E *Minister for the Civil Service* [1985] AC 374, 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law. However, as stated by Lord Bingham in the *Belmarsh* case and other F authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it G may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of proportionality.

H 138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester*

© 2022 The Incorporated Council of Law Reporting for England and Wales

Police [2018] 1 WLR 4079 at para 64 (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens JJSC also draw attention:

> "to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

139 I find myself in respectful disagreement with para 44 of the judgment of Lord Hamblen and Lord Stephens JJSC. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow.* The effect of the rights-compatible interpretation of section 137 pursuant to section 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of "lawful excuse" in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

140 It is clearly right to say, as Lady Arden JSC emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under article 10 (para 52(iii), omitting footnotes):

> "The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and

© 2022 The Incorporated Council of Law Reporting for England and Wales

A determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."

B Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

The decision of the district judge

141 I turn, then, to the decision of the district judge in applying C section 137, in order to assess whether the case stated discloses any error of law.

142 Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective D way: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97. The district judge directed himself correctly as to the interpretation of section 137 and the significance of an assessment of the proportionality of the intervention by the police.

143 However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at E para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para 112 of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the F proportionality of police action to clear the highway, this was a highly material feature of the case. Since it was not referred to by the district judge, he failed to take account of "a material factor" (in the words of Lord Carnwath JSC) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

G **144** Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para 114 of its judgment, the Divisional Court said:

"In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the H police intervened to make arrests and to remove the respondents from the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not

© 2022 The Incorporated Council of Law Reporting for England and Wales

insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." A

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as B disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce. C

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the D district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of E proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the F appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for G itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

"The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make H such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of

© 2022 The Incorporated Council of Law Reporting for England and Wales

A section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

B **150** In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to C have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the D Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect E would have been that there was a mistrial and further examination of the facts would have to be by way of a retrial.

151 I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the F convictions which the Divisional Court ordered should be entered.

152 In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the protesters had committed the offences under section 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens JJSC, I do not myself read the Divisional Court as saying that G points (a) to (c) in para 38 of the case stated were of little or no relevance; at para 111 of its judgment the court only said that none of those points "prevents the offence of obstruction of the highway being committed in a case such as this". The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens JJSC that the Divisional Court's assessment of point (h) at para 116 was flawed: para 80 above and *City of* H *London Corpn v Samede* [2012] PTSR 1624, paras 39–41. This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

153 I would answer the first question certified by the Divisional Court (para 7(1) above) as follows: in a case like the present, where the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *In re B (A Child)* and the cases which follow and apply it.

B

154 I would answer the second question certified by the Divisional Court (para 7(2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a "lawful excuse" for the purposes of section 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

C

Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister

D

E

F

G

H

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

Court of Appeal

*Global 100 Ltd *v* Laleva and others

[2021] EWCA Civ 1835

2021 Nov 25; Dec 3 — Lewison, Macur, Snowden LJJ

B

Housing — Licence to occupy — Proceedings for possession — Claimant granting defendant licence to occupy vacant building as property guardian — Claimant bringing possession claim against defendant — Whether claim "genuinely disputed on grounds which appear to be substantial" — Whether claimant having sufficient interest in property to bring possession claim — Whether defendant estopped from denying claimant having sufficient interest — CPR r 55.8(2)

C

The owner of a vacant building entered into an agreement with a property management company pursuant to which that company agreed to secure the building against squatters, vandals and dereliction by arranging for its occupation by property guardians under weekly licences. In turn, the property management company granted the claimant the right to grant licences to persons selected by the claimant to act as property guardians. The claimant granted a licence to the defendant to occupy the building as a property guardian. Subsequently the claimant brought a possession claim against the defendant under the procedure laid down by CPR Pt 55[1]. The defendant filed a defence in which she contended variously that the claimant had no sufficient interest in the property to bring a claim for possession, that the agreement between her and the claimant had created a tenancy rather than a licence and that the agreement was a sham. The district judge made the possession order sought without giving directions for trial, finding that the claim was not "genuinely disputed on grounds which appear to be substantial" within CPR r 55.8(2). Among other things she held that the defendant was estopped from denying that the claimant had sufficient interest in the property to bring a claim for possession. The County Court judge allowed the defendant's appeal, holding that although the claimant did have the right to bring the claim the other grounds of the defence appeared to be substantial. The claimant applied for permission to appeal and the defendant applied for permission to cross-appeal.

D

E

F

On the applications and the appeal and cross-appeal—

Held, granting both parties permission to appeal and allowing the claimant's appeal but dismissing the defendant's cross-appeal, (1) that when determining whether a claim was "genuinely disputed on grounds which appear to be substantial", within the meaning of CPR r 55.8(2), the test to be applied, both at first instance and on appeal, was the same test as that for summary judgment under CPR Pt 24, namely whether the defendant had shown a real prospect of success in defending the claim (post, paras 14–15, 84, 85).

G

Dicta of Lawrence Collins LJ in *Ashworth v Newnote Ltd* [2007] BPIR 1012, para 33, CA and *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643, CA applied.

(2) That, since the principle of estoppel as between landlord and tenant applied equally to a licence of land as between licensor and licensee, a licensee was estopped from denying the title of the person from whom he had accepted the licence so long as he remained in possession under it; that the fact that there was an estoppel meant that, as between claimant and defendant, it made no difference whether the claimant did or did not have a possessory interest in the land; that, in the present case, such an

H

[1] CPR r 55.8: see post, para 7.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A estoppel had arisen since the claimant had granted the defendant a licence by virtue of which she was permitted to live in the building in order to perform the services of property guardian; that it followed that the claimant was entitled to bring a possession claim against the defendant pursuant to the procedure contained in CPR Pt 55; that, further, on the proper interpretation of the agreement in the present case, considered in the light of the surrounding circumstances and the purpose of the agreement, there was no real prospect of establishing that the agreement created a B tenancy rather than a licence or that the agreement was a sham; that it followed that the claimant's claim for possession was not genuinely disputed on grounds which appeared to be substantial, for the purposes of CPR r 55.8(2); and that, accordingly, the district judge had been right to grant a possession order without giving directions for trial (post, paras 48, 57, 68, 79–83, 84, 85).

Government of the State of Penang v Beng Hong Oon [1972] AC 425, PC applied.

C *Per curiam.* It may be procedurally unfair to decide a case against an occupier who turns up unannounced at a hearing without having filed a defence, but who tells the district judge that there is (or may well be) a substantive defence which he wishes to advance (post, paras 9, 84, 85).

The following cases are referred to in the judgment of Lewison LJ:

AG Securities v Vaughan [1990] 1 AC 417; [1988] 3 WLR 1205; [1988] 3 All ER D 1058, HL(E)
Alamo Housing Co-operative Ltd v Meredith [2003] EWCA Civ 495; [2004] LGR 81, CA
Allan v Liverpool Overseers (1874) LR 9 QB 180
Ashworth v Newnote Ltd [2007] EWCA Civ 793; [2007] BPIR 1012, CA
Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone [2015] UKSC 15; [2015] AC 1399; [2015] 2 WLR 721; [2015] 3 All ER 725, E SC(E)
Australia (Commonwealth of) v Anderson (1960) 105 CLR 303
Bell v General Accident Fire and Life Assurance Corpn Ltd [1998] 1 EGLR 69, CA
Birmingham City Council v Stephenson [2016] EWCA Civ 1029; [2016] HLR 44, CA
Bruton v London & Quadrant Housing Trust [2000] 1 AC 406; [1999] 3 WLR 150; [1999] 3 All ER 481, HL(E)
Camelot Guardian Management Ltd v Khoo [2018] EWHC 2296 (QB); [2019] HLR F 26
Clark v Adie (No 2) (1877) 2 App Cas 423, HL(E)
Collier v P & M J Wright (Holdings) Ltd [2007] EWCA Civ 1329; [2008] 1 WLR 643, CA
Comr of Valuation for Northern Ireland v Fermanagh Protestant Board of Education [1969] 1 WLR 1708; [1969] 3 All ER 352, HL(NI)
Cuthbertson v Irving (1859) 4 H & N 742; (1860) 6 H & N 135
G *Doe d Johnson v Baytup* (1835) 3 A & E 188
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)
Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64; [2014] 1 WLR 4495; [2015] 2 All ER 206, SC(E)
Hill v Tupper (1863) 2 H & C 121
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER H 426, HL(E)
Hutcheson v Popdog Ltd (Practice Note) [2011] EWCA Civ 1580; [2012] 1 WLR 782; [2012] 2 All ER 711, CA
King v David Allen and Sons Billposting Ltd [1916] 2 AC 54, HL(I)
Leadenhall Residential 2 Ltd v Stirling [2001] EWCA Civ 1011; [2002] 1 WLR 499; [2001] 3 All ER 645, CA

© 2022 The Incorporated Council of Law Reporting for England and Wales

Ludgate House Ltd v Ricketts (Valuation Officer) [2020] EWCA Civ 1637; [2021] 1 WLR 1750, CA
Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
National Westminster Bank plc v Jones [2001] 1 BCLC 98
Penang, Government of the State of v Beng Hong Oon [1972] AC 425; [1972] 2 WLR 1; [1971] 3 All ER 1163, PC
Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs [2014] UKSC 16; [2014] 2 All ER 685, SC(E)
Smith v Seghill Overseers (1875) LR 10 QB 422, DC
Snook v London and West Riding Investments Ltd [1967] 2 QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518, CA
Stewart v Watts [2016] EWCA Civ 1247; [2018] Ch 423; [2017] 2 WLR 1107, CA
Street v Mountford [1985] AC 809; [1985] 2 WLR 877; [1985] 2 All ER 289, HL(E)
Terunnanse v Terunnanse [1968] AC 1086; [1968] 2 WLR 1125; [1968] 1 All ER 651, PC
Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd [2019] UKSC 46; [2020] AC 1161; [2019] 3 WLR 852; [2020] 2 All ER 81, SC(E)
Vehicle Control Services Ltd v Revenue and Customs Comrs [2013] EWCA Civ 186; [2013] RTR 24, CA
Westminster City Council v Clarke [1992] 2 AC 288; [1992] 2 WLR 229; [1992] 1 All ER 695, HL(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Ashburn Anstalt v Arnold [1989] Ch 1; [1988] 2 WLR 706; [1988] 2 All ER 147, CA
Benesco Charity Ltd v Kanj [2011] EWHC 3415 (Ch)
Bristow v Cormican (1878) 3 App Cas 641, HL(I)
Ceballos v Southwark London Borough Council [2014] EWHC 1450 (QB)
Countryside Residential (North Thames) Ltd v Tugwell [2000] 2 EGLR 59, CA
Danford v McAnulty (1881) 6 QBD 645, CA
Dutton v Persons Unknown [2015] EWHC 3988 (Ch)
Evans v Brent London Borough Council [2012] EWHC 4443 (QB)
Georgeski v Owners Corpn Sp49833 [2004] NSWSC 1096
Hounslow London Borough Council v DeVere [2018] EWHC 1447 (Ch)
Ibrahim v Haringey London Borough Council [2021] EWHC 731 (QB)
Islington London Borough Council v Jones [2012] EWHC 1537 (QB)
Lyell v Kennedy (1883) 8 App Cas 217, HL(E)
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399, CA
Tadman v Henman [1893] 2 QB 168

APPLICATIONS for permission to appeal and **APPEAL** and **CROSS-APPEAL** from Judge Luba QC sitting in the County Court at Central London

By a claim form dated 7 October 2020 the claimant, Global 100 Ltd, brought a claim under CPR Pt 55 against the defendants, Maria Laleva, Andrea Kyselakova, Jason Walker, Charmaine Griffiths, Gentian Lumani, Henry Blidgeon and others, for possession of the Stamford Brook Centre, 14–16 Stamford Brook Avenue, London W6 0YD. On 29 March 2021 District Judge Parker sitting in the County Court at Wandsworth made a

© 2022 The Incorporated Council of Law Reporting for England and Wales

A summary possession order against the defendants. The defendant, Maria Laleva, appealed.

By an order dated 25 August 2021 Judge Luba QC sitting in the County Court at Central London allowed the appeal on the ground that District Judge Parker was wrong to find that the defence advanced did not even appear to raise substantial grounds for defending the claim.

B By an appellant's notice filed on 4 November 2021 the claimant applied for permission to appeal against the order of Judge Luba QC, seeking restoration of the original possession judgment, on the grounds that Judge Luba QC: (1) had erred in applying the wrong test under CPR r 55.8(2); and (2) was wrong to hold that it was not open to District Judge Parker to find that neither of the defences pleaded appeared to raise genuine grounds for disputing the claim that appeared to be substantial.

C By a respondent's notice the defendant applied for permission to cross-appeal, seeking dismissal of the claim in limine, on the grounds that the contractual sub-licence asserted by the claimant was not a sufficient title to bring the claim in the first place.

By an order dated 4 November 2021 the Court of Appeal (Bean LJ) listed the applications for permission to appeal and cross-appeal for a rolled up D hearing with the substantive appeals to follow if permission was granted.

The facts are stated in the judgment of Lewison LJ, post, paras 17–26.

Nicholas Grundy QC and *Sean Pettit* (instructed by *Kelly Owen Ltd*) for the claimant.

Mark Wonnacott QC and *Nick Bano* (instructed by *Edwards Duthie Shamash*) for the defendant.

E

The court took time for consideration.

3 December 2021. The following judgments were handed down.

LEWISON LJ

F **1** The issue on this appeal is whether Judge Luba QC was wrong to reverse the decision of District Judge Parker that a claim by Global 100 Ltd ("G100") against Ms Laleva for possession of 14–16 Stamford Brook Avenue ("the Property") "was not genuinely disputed on grounds which appear to be substantial".

2 The case came before us in the form of an application for permission to appeal and an application to cross-appeal, with the appeal and cross-G appeal to follow if permission is granted.

3 There is, however, a further procedural wrinkle. Since the hearing before Judge Luba a second action was brought against Ms Laleva by NHS Property Services Ltd, which owns the property. An order for possession has been made against her. In those circumstances it could be said that the appeal is now academic.

H **4** In *Hutcheson v Popdog Ltd (Practice Note)* [2012] 1 WLR 782 Lord Neuberger of Abbotsbury MR set out the principles applicable to appeals which have become academic. He said at para 15:

> "save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may

© 2022 The Incorporated Council of Law Reporting for England and Wales

(and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

5 At the outset of the hearing, we informed the parties that we considered that the appeal and cross-appeal satisfied these criteria. The first of them also corresponds to the second appeals test. We therefore granted permission both to appeal and to cross-appeal.

The procedure

6 The claim was brought under the procedure laid down by CPR Pt 55. CPR r 55.1 contains a definition of "a possession claim" in the following terms: "a claim for the recovery of possession of land (including buildings or parts of buildings)".

7 Rule 55.2 provides that the procedure under that Part must be used where the claim includes (among other things) a claim by a licensor (or former licensor). When the claim is issued the court will fix a hearing date. Rule 55.8 provides:

"(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may— (a) decide the claim; or (b) give case management directions.

"(2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."

8 Before going into the remaining issues it is important to establish what is the test to be applied under rule 55.8(2); both by the judge who conducts that hearing, and also any appellate court which is asked to overturn the decision of a first instance judge. This is a question on which Judge Luba said in terms that a "clear steer" from this court would be helpful to first instance judges.

9 Judge Luba held that the threshold which a defendant must surmount "must be a relatively low one". He reached that conclusion in part from the contrast between grounds "which *appear*" to be substantial (which is what the rule provides) and grounds "which *are* substantial" (which is not what the rule provides). He also reasoned that a low threshold was supported by the rule (CPR r 55.7) that a defendant who has not filed a defence may still "take part in any hearing". So far as the latter point is concerned, in my opinion that is simply a matter of timing. It may be procedurally unfair to decide a case against an occupier who turns up unannounced at a hearing without having filed a defence, but who tells the district judge that there is (or may well be) a substantive defence which he wishes to advance. But that does not tell you much, if anything, about the test to be applied once an occupier *has* filed a defence.

10 That was in effect the position in *Birmingham City Council v Stephenson* [2016] HLR 44 (a judgment of mine with which Moore-Bick LJ

© 2022 The Incorporated Council of Law Reporting for England and Wales

A agreed; and which Judge Luba cited in support of his conclusion). *Stephenson* was a very different case from this one. The evidence before the district judge in that case was that Mr Stephenson had paranoid schizophrenia, which could be alleviated by medication, but which he was not taking. The council began possession proceedings against him on the ground of noise nuisance. The council acknowledged that he had "mental health" issues. By the time B that the matter came before the district judge (following one adjournment) Mr Stephenson had only just managed to make contact with a solicitor. The solicitor asked for a short adjournment in order to file a pleaded defence. It was that opportunity which Mr Stephenson was denied by the refusal of the adjournment. In other words, the district judge simply refused to allow Mr Stephenson even to articulate what might have amounted to a defence. I held that he had made no allowances for Mr Stephenson's mental health C problems; and that there was potentially a real question whether the possession proceedings were a proportionate means of pursuing a legitimate aim (in which event the burden of proof would have been on the council). That case did not consider what the appropriate threshold in a case in which a defence has actually been put forward. I do not consider that it is of any relevance to the question before us, where a defence has been pleaded. The D question in this case is what test is to be applied in evaluating that defence.

11 I turn, then, to the phrase used in the rule: "genuinely disputed on grounds which appear to be substantial". The judge emphasised the word "appear" but does not seem to have given any weight to the word "substantial". Under rule 10.5(5) of the Insolvency (England and Wales) Rules 2016 a court may set aside a statutory demand in bankruptcy if "the E debt is disputed on grounds which appear to the court to be substantial". That phrase is strikingly similar to that which is used in CPR r 55.8(2). The predecessor of rule 10.5 was considered by this court in *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643. Arden LJ discussed the meaning of the phrase in some detail. She expressly disapproved an earlier case which had held that the threshold under the rule was lower than the threshold required to resist summary judgment under CPR Pt 24. She said F at para 21:

"If the test in [that] case . . . were applicable, the court would have to apply a lower threshold than real prospect of success, and that would mean that it would be enough on an application to set aside a statutory demand if the dispute were merely arguable. However, that approach G would give no real weight to the word 'substantial' in the rule 6.5(4); nor would it give any meaning to the word 'genuine' in para 12.4 of the practice direction. In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It H would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation . . . But a mere assertion

© 2022 The Incorporated Council of Law Reporting for England and Wales

by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue."

12 Mr Grundy QC did place some emphasis on the adverb "genuinely". He suggested that that might import a test that was higher than the test applicable to an application for summary judgment. In that connection it is pertinent to refer to the decision of this court in *Ashworth v Newnote Ltd* [2007] BPIR 1012 (to which Arden LJ referred in *Collier*). In that case Lawrence Collins LJ said:

"32. Prior to the CPR, it had been held that the 'bona fide disputed on substantial grounds' test in the context of a winding up petition, could be satisfied even if the debtor could not resist summary judgment under Order 14: *In re Welsh Brick Industries Ltd* [1946] 2 All ER 197. But in that context the distinction has not survived the CPR. In *In re The Arena Corpn Ltd* [2004] BPIR 415, 433 Sir Andrew Morritt V-C said that in the context of winding up proceedings the test is whether the debt is bona fide disputed on substantial grounds, which, for practical purposes, is synonymous with 'real as opposed to frivolous'. See also *Hofer v Strawson* [1999] 2 BCLC 336; *Guinan III v Caldwell Associates Ltd* [2004] BPIR 531.

"33. It seems to me that a debate (see e g *Kellar v BBR Graphic Engineers (Yorks) Ltd* [2002] BPIR 544, 551) as to whether there is a distinction between the 'genuine triable issue' test for cross-claims and 'real prospect of succeeding on the claim' (i e on the cross-claims) involves a sterile and largely verbal question, and that there is no practical difference between 'genuine triable issue' and 'real prospect' of success and certainly not in this case."

13 Mr Bano, who argued this aspect of the appeal for Ms Laleva, placed some reliance on the decision of the Supreme Court in *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] AC 1399. That was a case in which the defendant to a possession claim asserted that the claim amounted to discrimination on the ground of disability. That is a particular context (as in *Stephenson*) in which the court needs to be very cautious. He referred to Lord Neuberger of Abbotsbury PSC's judgment at para 60 in which his Lordship said that the problem facing a landlord who attempted to obtain summary judgment in a discrimination case was a practical one rather than one of principle. The reason for that was that there might be disputed facts or assessments which could not be dealt with summarily. In addition in para 59 of his judgment Lord Neuberger PSC acknowledged that, even in a discrimination case, a landlord *could* obtain summary judgment. Baroness Hale of Richmond DPSC dealt with the question of summary judgment at paras 35 and 36. She agreed with this court that the court can deal with possession claims summarily "without the summary judgment provisions of CPR Pt 24 being invoked". If that is the case (and I respectfully agree that it is) then it is inconceivable that a different test would be applied under CPR r 55.8(2) from that applicable to an application under Part 24.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A 14 In my judgment the test for summary judgment is the same test as that which applies to the required threshold under CPR r 55.8(2). Were the test to be a lower test, it would be a waste of resources (both the parties' resources and the court's resources) to give directions for trial on the basis of a defence (whether pleaded or not) that would not survive an application for summary judgment. Were it to be a higher test, it is difficult (if not impossible) to formulate it with any precision. The question, then, is B whether the defendant has shown a real prospect of success in defending the claim. The principles applicable to an application for summary judgment are well-settled (see for example *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch)); and I need not set them out here.

15 We were, of course, shown high authority for the proposition that an appellate court should not interfere with a case management decision unless C the decision is plainly wrong in the sense that it is outside the generous ambit where reasonable decision makers may disagree: *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495. But I do not consider that a decision that a defendant has shown no real prospect of success in defending a claim is a case management decision. Rather, it is an evaluation of the merits of a potential defence.

D 16 Although an appeal court must respect the decision of the first instance judge, the first instance judge is not exercising a case management discretion. The question for the appeal court is not whether the first instance judge wrongly exercised a discretion; but whether the first instance judge was wrong in their evaluation of the merits of a defence.

The background facts

E 17 The Property in question is owned by NHS Property Services Ltd. It has been used in the past to accommodate NHS nursing staff, although at the time of the events with which we are concerned its last use had been use as offices. By 2016 the Property was empty.

18 In March 2016 NHS Property Services entered into a written agreement with Global Guardians Management Ltd ("GGM") for the F provision of what were described as property guardian services. According to the agreement the purpose of supplying guardians is to secure a vacant building against squatters, vandals and dereliction. The agreement stated:

> "The quality of our guardians is high due to our rigid vetting process. This enables us to be able to supply immediate occupation of a void property with no hesitation . . . When you need our guardians to vacate G the property this is arranged by our Building Managers who return the building clear and empty with all keys to your chosen contact."

19 For the purpose of providing the guardian services GGM agreed to provide reliable, vigilant and socially responsible working people to occupy the property. Each guardian would live in their own lockable space. That would create an orderly environment of the shared space and also ensure H that there was a guardian presence evenly distributed across the Property. The guardians would occupy under weekly licences which would state that no tenancy was to be created. GGM would manage all access to the property, including that by the owner and their contractors. GGM was responsible for council tax. GGM would return to the owner £600 per

© 2022 The Incorporated Council of Law Reporting for England and Wales

month of the property guardian fees. Upon termination of the agreement between GGM and the owner, the guardians would vacate the property.

20 On 19 January 2018 GGM entered into an inter-company arrangement with G100. The arrangement recorded that GGM provided services to property owners to secure premises against trespassers and protect such premises from damage. To assist it in providing those services GGM granted G100 the right to grant temporary, non-exclusive licences to persons selected by G100 to share occupation of such part or parts of the property as G100 might from time to time specify. The grant of the licence from GGM to G100 conferred on G100 "such rights to manage protect and occupy the premises as are required for the proper protection of the properties through their residential guardians". It also purported to confer on G100 "sufficient interest in the properties for G100 to bring claims for possession if required against the Guardians who whom it has granted licences".

21 On 16 or 17 April 2020 G100 and Ms Laleva entered into a written agreement, described as a temporary licence agreement. The agreed purpose of the licence was described as follows:

> "G100 is an approved supplier of 'Guardians' who, in order to perform their Guardian Functions to protect vacant properties from intruders, anti-social behaviour and metal theft, must occupy certain properties as designated by G100.
>
> "The Guardian is an individual who is willing to pay a weekly licence fee for use and occupation of the designated space in order to perform the Guardian's Functions."

22 Clause 1.1 of the agreement stated that the Guardians are allocated properties "from which they perform those Guardian functions which necessarily required them to occupy their designated space with others for the period of the agreement". Clause 1.3 gave G100 the right to alter the extent and location of the living space. Clause 1.5 stated that the agreement did not give the guardian a right to use any specific room as living space within the property. Clause 4 provided for the guardian to be given one set of keys to the Property and to his or her allocated space. Clauses 4.1 and 4.2 required the guardian to sleep at the Property for at least five nights out of seven; and to ensure that they or at least one other guardian was at the Property for at least one hour in every 24; and that at least one guardian was in the Property at any time. Clause 4.3 required the guardian to share "amicably and peacefully" with such other persons as Global 100 should permit to make use of the Property.

23 Clause 7.3 provided that the agreement could be terminated by G100 on giving 28 days' notice. The Guardian had a similar right to terminate. Clause 7.6 provided that on termination of the agreement the guardian "shall immediately cease to be entitled to the use of the Property . . . and shall restore the Property leaving it clean and tidy, removing all of the Guardian's belongings and shall return keys to G100 immediately".

24 The schedule to the agreement specified the non-exclusive shared occupation of premises known as and located at 14–16 Stamford Brook Avenue.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A **25** On 3 September 2020 NHS Property Services gave notice to GGM terminating the agreement. On 1 October 2020 it entered into an agreement with GGM which provided:

> "To the extent that such a right does not already exist on an ongoing basis under the terms of the agreement . . . NHS PS Ltd hereby grants GGM Ltd a right of possession of the Property for the sole purpose of enabling eviction of GGM's former licensees and any other person occupying the Property."

B

26 The claim form was issued on 7 October 2020. G100 is the sole claimant. The defendants to the claim were ten named persons (and persons unknown). The particulars of claim alleged that GGM had been licensed under the agreement with NHS Property Services to provide guardian services; and pleaded the inter-company agreement under which G100 provided those services. They also alleged that on various dates G100 entered into agreements with the defendants to perform guardian services at the Property; and that those agreements had been terminated.

C

The defence

D **27** The defence as pleaded takes a number of points, only some of which are of continuing relevance to this appeal. Although it admits that GGM entered an agreement with NHS Property Service "in respect of a guardianship arrangement" it asserts that Ms Laleva is entitled to an assured shorthold tenancy.

28 Ms Laleva entered into occupation of the Property on 29 September 2019 and moved to the room that she currently occupies on 17 April 2020 (which is the last of the two days on which the licence agreement was signed). She pays a "rent" of £92.31 per week and was granted exclusive occupation. The defence goes on to plead what is alleged to be the "factual reality".

E

29 I summarise the defence as follows. The Property was a purpose-built residential building designed and constructed to be let as individual residential units of accommodation. Ms Laleva has exclusive possession of a numbered lockable room. She was required to seek G100's permission to move room. Although she shares communal space she has exclusive possession of her own room which she herself selected. She was entitled to decide whether to admit G100's agents when they visited the premises. The clauses of the agreement are not incompatible with "exclusive occupation" in that G100 does not exercise such degree of control over the use and occupation of the premises as would be incompatible with exclusive occupation.

F

G

30 In the alternative it is alleged that the written agreement was a sham arrangement in consequence of the pleaded factual realities; and its purpose was "to create the appearance of a personal licence".

31 The defence also challenged G100's right to bring possession proceedings at all, because it had no sufficient interest in the land and the remedy sought exceeded its rights as pleaded.

H

The judgments below

32 The district judge decided:

(i) That G100 had been granted sufficient right to pursue the possession claim and that in any event Ms Laleva was estopped from denying its right.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

(ii) The agreement and its terms (together with "contextual information" about the background) supported the proposition that it created a licence.

(iii) There was no arguable defence that it was a sham.

33 On appeal Judge Luba took a different view. He held:

(i) G100 had sufficient interest to bring the claim.

(ii) He declined to decide whether Ms Laleva was estopped from denying that interest.

B

(iii) The threshold for defending a claim under rule 55.8 was "a relatively low one"; and that unless the points pleaded by the defence were unarguable, then the case should not be summarily decided.

(iv) The district judge was wrong to decide that the defence "did not even *appear* to raise substantial grounds for defending the claim".

C

Is the written agreement a licence or a tenancy?

34 I propose first to consider whether the agreement as drawn creates a licence or a tenancy, leaving aside for the time being the question of sham.

35 The starting point is *Street v Mountford* [1985] AC 809. Lord Templeman said (p 819):

D

> "Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence."

E

36 This approach is not peculiar to the question whether an agreement creates a licence or a tenancy. In *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] 2 All ER 685, para 32 the Supreme Court approved an observation of mine in an earlier case:

F

> "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v Comr of Inland Revenue* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."

G

H

37 As well as what is written on the page, the court may consider the circumstances in which the agreement was made. In *AG Securities v Vaughan* [1990] 1 AC 417, 458 Lord Templeman put it this way:

© 2022 The Incorporated Council of Law Reporting for England and Wales

A "In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation."

B 38 If, as a matter of interpretation, the rights and obligations created by the agreement confer on the occupier the right to exclusive possession, for a term at a rent, then in all likelihood a tenancy has been created. But exclusive possession is not necessarily conclusive as Lord Templeman explained in *Street v Mountford* [1985] AC 809, 818:

"There can be no tenancy unless the occupier enjoys exclusive
C possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier."

39 Moreover, sole use is not the same as exclusive possession as Blackburn J explained in *Allan v Liverpool Overseers* (1874) LR 9 QB 180, 191–192 (approved in *Street v Mountford*):
D
"A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the
E occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger."

40 The distinction between exclusive occupation and legal possession is well-established, even outside the context of lodgers in lodging houses; and may be relevant even where the occupier is in sole occupation of a self-
F contained dwelling for which they pay: see *Stewart v Watts* [2018] Ch 423 (occupier of an almshouse).

41 The surrounding circumstances include the reason why the occupier has been let into occupation. In *Westminster City Council v Clarke* [1992] 2 AC 288 the House of Lords considered a hostel for the homeless. Mr Clarke had the sole occupation of a room in the hostel and claimed to be a secure tenant of it. In explaining why he did not have exclusive possession,
G Lord Templeman said (pp 300–301):

"From the point of view of the council the grant of exclusive possession would be inconsistent with the purposes for which the council provided the accommodation at Cambridge Street. It was in the interests of Mr Clarke and each of the occupiers of the hostel that the council should retain possession of each room . . . If the occupier of a room had exclusive
H possession he could not be obliged to comply with the terms and the conditions of occupation . . . In the circumstances of the present case I consider that the council legitimately and effectively retained for themselves possession of room E and that Mr Clarke was only a licensee with rights corresponding to the rights of a lodger. In reaching this

© 2022 The Incorporated Council of Law Reporting for England and Wales

conclusion I take into account the object of the council, namely the provision of accommodation for vulnerable homeless persons, the necessity for the council to retain possession of all the rooms in order to make and administer arrangements for the suitable accommodation of all the occupiers and the need for the council to retain possession of every room not only in the interests of the council as the owners of the terrace but also for the purpose of providing for the occupiers supervision and assistance."

42 In the present case the purpose of G100 in allowing Ms Laleva (together with others) into occupation was to provide guardian services to NHS Property Services. It was essential, in order to fulfil that purpose, that G100 should be able to hand back the Property as and when NHS Property Services required it. Those who occupied the various rooms in the Property were chosen by G100. They were not a self-selected group.

43 Turning to the substantive terms of the agreement, there are a number of points to be made. First, the purpose of the agreement was set out at its inception. It was to enable the provision of guardian services which required Ms Laleva to occupy the designated space in order to perform those services. Second, that was repeated in the Preamble to clause 1 and in clause 1.1. Clause 1.3 entitled G100 to alter the location and extent of the living space, which is, in itself, inconsistent with the grant of exclusive possession. That, in turn was reinforced by clause 1.5. Third, clause 4.3 required amicable and peaceful sharing of the property with others selected by G100. Fourth, the description of the rights granted was "non-exclusive occupation" of the whole property, not any particular part of it.

44 As I have said, the nature of the agreement was the provision of the guardian services. Occupation of the property by Ms Laleva and others was necessary in order for those services to be provided. That is reinforced by clauses 4.1 and 4.2 of the agreement which required Ms Laleva to sleep in the property for at least five nights out of seven; and to ensure that she or at least one other guardian was in the property at any given time. Those obligations were necessary in order to perform the guardian services.

45 One classic situation in which a person who is apparently in exclusive possession of residential property does not acquire exclusive possession in law is that of a service occupier. A person who lives in a house will not have exclusive possession of it if either (a) it is essential to the performance of his duties that he should occupy the particular house or a house within a particular perimeter; or (b) he is required by contract to occupy the house and by so doing he can better perform his duties to a material degree: *Comr of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708. That proposition has been applied to the case of property guardians, even though they are not, strictly speaking, employees of the company providing the guardian services to the property owner: *Ludgate House Ltd v Ricketts (Valuation Officer)* [2021] 1 WLR 1750, para 66. The essential elements of service occupation were described in *Smith v Seghill Overseers* (1875) LR 10 QB 422, 428 (approved in *Street v Mountford*) by Mellor J:

"Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform

© 2022 The Incorporated Council of Law Reporting for England and Wales

A those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant."

46 In this case it was necessary for the provision of the guardian services that Ms Laleva should occupy the Property.

47 As this court held in *Leadenhall Residential 2 Ltd v Stirling* [2002] B 1 WLR 499, para 23, "there is no defined list of special cases in which a person who is let into, or allowed to remain in, another's property, with exclusive possession and paying for his occupation may be a licensee rather than a tenant".

48 In my judgment, on the proper interpretation of Ms Laleva's agreement considered in the light of the surrounding circumstances and the C purpose of the agreement, the argument that it created a tenancy rather than a licence has no real prospect of success.

Is there a real prospect of establishing that it is a sham?

49 The classic exposition of what amounts to a sham is that of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] D 2 QB 786, 802:

> "I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. E But one thing, I think, is clear in legal principle, morality and the authorities . . . that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, *all the parties thereto* must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party F whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged 'sham'. So this contention fails." (Emphasis added.)

50 It is of considerable importance that the intention must be a common intention, shared by all the parties to the agreement: see *Hitch v Stone* [2001] STC 214, para 69.

G **51** I am prepared to assume that Ms Laleva has a real prospect of establishing that, as far as she was concerned, her intention was to obtain a tenancy rather than a licence, even though she accepts that the purpose of the agreement was the provision of guardian services. But does she have a real prospect of establishing that G100 shared that intention?

52 As Neuberger J pointed out in *National Westminster Bank plc v Jones* [2001] 1 BCLC 98, para 46 there is a strong presumption that parties H to what appear to be perfectly proper agreements on their face intended them to be effective and that they intend to honour and enjoy their respective rights and obligations.

53 Mr Bano suggested that some of the rights purportedly conferred by the licence agreement had never been exercised. This is not a pleaded

© 2022 The Incorporated Council of Law Reporting for England and Wales

allegation. But even if it were the fact that rights have not actually been exercised is no evidence of a sham. Many agreements contain a large variety of rights which are not in practice exercised (and in many cases the parties hope that they will never have occasion to exercise them). But the fact that such rights are not exercised does not mean that they do not exist as a matter of reality: see for example *Ludgate House* [2021] 1 WLR 1750, paras 43 and 77.

54 In *Camelot Guardian Management Ltd v Khoo* [2019] HLR 26 Butcher J considered a guardianship agreement very similar to the one in our case. One of the arguments raised was whether the agreement was a sham. I agree entirely with the way in which Butcher J dealt with that question (para 34):

> "I consider that a case that there was a relevant sham or pretence in the present case was not made out. In entering into the Agreement, as both parties knew and must be taken to have intended, the basis of the arrangement was that CGML was providing some protection to temporarily-vacant premises against vandals and trespassers by arranging for accommodation by Guardians. As I have set out above, it was essential to such an arrangement that the Guardians should not have tenancies. The inference I would draw is that CGML did indeed intend, when entering into the Agreement, that its terms would be enforceable by and capable of being enforced against it. It was in its interests that they should be."

55 He added (para 36):

> "This is not a case where there is 'an air of total unreality' (to use the expression of Lord Oliver of Aylmerton in *AG Securities v Vaughan* at p 467H) about reading the Agreement as meaning what it says in the light of the circumstances in which it was entered into. Those circumstances include that this was an unusual arrangement whereby office accommodation would be occupied by a number of different people who might be entire strangers to each other at the outset of their occupation, where their presence was desirable because of concerns as to the security of the premises, and where it was essential that the building should be capable of being restored to its owner at short notice. Given those matters, I cannot for my part see how it can be concluded that the true bargain was not that in the Agreement or that there was a sham or pretence. Nor do I see a basis for considering that there was any element of dishonesty on the part of CGML."

56 On the contrary, the very purpose of the arrangement between NHS Property Services and GGM was so that the latter could provide guardian services to the former. It was essential, in order to fulfil that purpose, that GGM should be able to hand back the Property as and when NHS Property Services required it. There is no basis on which it could successfully be argued that the arrangement between NHS Property Services and GGM was a sham (even if such an allegation had been pleaded). The inter-company arrangement between GGM and G100 was made in furtherance of that arrangement. Given that it is common ground (expressly admitted in the defence) that the purpose of the agreement between G100 and Ms Laleva

© 2022 The Incorporated Council of Law Reporting for England and Wales

A was also that she would occupy the Property in order to facilitate the provision of guardian services by G100, the unreality is in the contention that the agreement was a sham, for all the reasons that Butcher J gave.

57 In my judgment the argument that the agreement was a sham has no real prospect of success.

Is Global 100 entitled to the order?

B

58 Both judges found against Ms Laleva on this question, which she raises by way of cross-appeal. We were shown a number of cases decided by this court in which it has been held that a person who has no more than a licence over land is entitled to use the procedure under CPR Pt 55 (or its predecessor) in order to eject a trespasser. It was those cases on which Judge Luba relied in rejecting this ground of appeal.

C

59 Mr Wonnacott QC argued the cross-appeal on Ms Laleva's behalf. In a characteristically erudite and forceful argument, he submitted that these cases were wrong as a matter of principle, logic, history, statute and authority. I hope the following summary captures its essentials. The essential difference between a licence and a tenancy is that a tenancy confers a possessory interest in land, whereas a licence does not. Only someone with D a possessory interest is entitled to bring an action for possession. The remedies of a licensee lie purely in contract. Thus a licensee is not entitled to bring a claim in nuisance (which is an interference with the possession of land): *Hunter v Canary Wharf Ltd* [1997] AC 655. Nor can a licensee bring a claim in trespass: *Hill v Tupper* (1863) 2 H & C 121. If a licensee cannot complain of trespass, it follows that he is not entitled to bring a claim for E possession. The old action of ejectment got its name not because the claimant wished to eject the defendant from the land, but because the claimant asserted that he had himself been wrongfully ejected from the land which he, the claimant, rightfully possessed: *Commonwealth of Australia v Anderson* (1960) 105 CLR 303. Back in the mists of time, questions of title to land were determined in the so-called "real actions". The action of ejectment, which was a developed form of the writ in trespass, was available F only to leaseholders. In order to overcome procedural complications of the old real actions the action of ejectment was pressed into service by freeholders. This involved inventing a make-believe lease so that the nominal plaintiff was a fictitious leaseholder (usually called Doe or Roe). Thus the action would be titled "Doe on the demise of" the real plaintiff. The need for these fictions was abolished by the Common Law Procedure G Act 1852; and the action was thenceforth described as an action for the recovery of land. But the substance of the cause of action was not changed then, and never has been. A trespasser has title simply by virtue of his possession; and anyone who seeks to dispossess him must show a better title. The trespasser is therefore entitled to require a claimant to prove his title; and that title must be a title to possession. Accordingly, since G100 does not have a possessory interest, it is not entitled to bring the action at all. H Procedural convenience cannot override substantive law.

60 I express no view, one way or the other, about whether Mr Wonnacott is right in the case of a person who has entered and remains on land without any consent, except to say that at this level of the judicial hierarchy the argument is a difficult one to sustain in the face of case law

© 2022 The Incorporated Council of Law Reporting for England and Wales

which binds us (see, in particular, *Manchester Airport plc v Dutton* [2000] QB 133; *Alamo Housing Co-operative Ltd v Meredith* [2004] LGR 81; *Mayor of London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504; *Vehicle Control Services Ltd v Revenue and Customs Comrs* [2013] RTR 24). That, however, is not this case for two reasons.

61 The principle of estoppel as between landlord and tenant has been settled for centuries. In that context the title by estoppel that the landlord has is a title in fee simple: *Bell v General Accident Fire and Life Assurance Corpn Ltd* [1998] 1 EGLR 69. But it is not a principle that is confined to the relationship of landlord and tenant. One striking illustration is the relation between a patentee and a licensee permitted to work the invention. Lord Blackburn explained in *Clark v Adie (No 2)* (1877) 2 App Cas 423, 436:

> "The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot shew anything of the sort; it must be taken as against him that the lessor had a title to the land. Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The two cases are very closely analogous; in analogies there are always apt to be some differences, but I know of none in this . . . If he has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might shew that the patent was as bad as any one could wish it to be, the licensee must not shew that."

62 The licensee was not, therefore, entitled to contend that the patent was invalid. A similar principle apples as between bailor and bailee.

63 If a person with no interest in land purports to grant another a tenancy of it, that person (if let into possession) is estopped from disputing the grantor's title. If the grantor subsequently acquires title, then the estoppel is, as the old phrase puts it, "fed". This means that the landlord by estoppel is treated as if he had always owned the estate out of which the lease could have been granted. The tenant thereupon acquires the interest in the land which the transaction purported to grant him and which, up to that time, rested purely in estoppel.

64 The first reason why Mr Wonnacott's broad submission does not apply to this case is that this is a case in which GGM granted G100 a right to possession for the purpose of bringing claims for possession against guardians to whom it had granted licences. Even if that was not effective as at the date of the inter-company agreement between GGM and G100, GGM subsequently acquired a right to possession granted by NHS Property Services before the date of issue of the claim form. As at the date of the inter-

© 2022 The Incorporated Council of Law Reporting for England and Wales

A company arrangement, G100 would have been estopped from challenging GGM's title to grant it that right, and the subsequent grant of that right by NHS Property Services would have fed the estoppel.

65 Mr Wonnacott said that the agreement between NHS Property Services and GGM of 1 October 2020 was ineffective to create a right to possession. Possession is exclusive; and it is not possible to create a B qualified right to possession by restricting it to the sole purpose enabling eviction of former licensees. But there are two answers to this argument. The first is that in *Alamo* [2004] LGR 81 precisely this form of clause was held by this court to be enough to entitle the claimant in that case to maintain an action for possession under Part 55. The second is that, like any agreement, the agreement should be interpreted if possible so as to make it effective. Mr Wonnacott accepted that it was possible to grant a C right of legal possession (in the ordinary sense) with restrictions on what the possessor could do with the right. In my judgment that is how the agreement should be interpreted in this case.

66 Nor do I accept Mr Wonnacott's submission that if the owner of land grants another a contractual right to have possession of land it must be a tenancy of one kind or another. Not only is it contradicted by what Lord D Templeman said in *Street v Mountford* [1985] AC 809, it is also inconsistent with the decision of the Supreme Court in *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2020] AC 1161.

67 Second, and independently, this is a case in which Ms Laleva was given the right by G100 to enter into occupation of the Property, yet on termination of her right she claims to be entitled to dispute G100's right to E remove her.

68 The principle of estoppel as between landlord and tenant applies equally to a licence of land as between licensor and licensee. In *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, 433 Lord Cross of Chelsea, giving the advice of the Privy Council said:

> "There is no doubt that under English law as it stood in 1872 and F stands today there was and is no difference as regards the matter in hand between a tenant and a licensee. Each is estopped from denying the title of the person from whom he accepted the tenancy or licence so long as he remains in possession under it but each is permitted to deny that title as from the time that he is no longer in possession under it. Counsel for the defendants was unable to suggest any plausible reason for drawing G the distinction between tenant and licensee for which he contended . . . The person who is not permitted to deny his licensor's title is a person who 'came upon' the land under the licence and those words themselves suggest that he is still upon the land."

69 The claim under consideration in that case appears to have been no more than a claim for a declaration. But in the course of his opinion, Lord H Cross expressly approved the earlier decision of the Board in *Terunnanse v Terunnanse* [1968] AC 1086. In the course of that case Lord Devlin said at pp 1092–1093:

> "This form of estoppel, although it has since the decision in *Doe d Johnson v Baytup* been extended to licensor and licensee and other

© 2022 The Incorporated Council of Law Reporting for England and Wales

similar relationships, originated out of the relationship of landlord and tenant."

70 Lord Devlin's statement is a clear one. The principle applicable to landlord and tenant applies to licensor and licensee. It is clear that the cause of action in that case was a claim in ejectment made by the chief priest of a temple. Although he had certain rights over the temple, there is no finding that they amounted to a possessory interest in the land. Nevertheless the occupying licensee was estopped from challenging his title to possession of the land.

71 *Doe d Johnson v Baytup* (1835) 3 A & E 188, to which Lord Devlin referred, is a decision of the Court of King's Bench. It was a claim in ejectment by the fictional Doe under a fictional lease granted by Mrs Johnson, the widow of a former occupier. A house was put up to let; and the keys were left with Mary Batcomb for her to show prospective tenants the house. She gave permission to Miss Baytup to get vegetables from the garden; and for that purpose Mary Batcomb lent her the keys. Miss Baytup used them to get into the house and refused to leave. The jury found that Mrs Johnson had no title to the land. Nevertheless she (or the fictitious Doe) succeeded in the action for ejectment. Lord Denman said at p 191:

> "In this transaction the defendant waived any title which she might previously have been able to assert. She held possession through a licence, whether for a longer or a shorter time is immaterial. *She cannot claim against the party by whom she was let in; that party, as between them, has the title*." (Emphasis added.)

72 Littledale J said: "Possession having been fraudulently obtained, if the title is to be disputed, the lessor of the plaintiff may insist upon being first put into the situation in which she was before the possession was taken."

73 I do not, however, regard the fact that possession had been fraudulently obtained affects the principle.

74 Patteson J said at p 192: "The rule, as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant."

75 Coleridge J said:

> "There is no distinction between the case of a tenant and that of a common licensee. The *licensee, by asking permission*, admits that there is a title in the landlord . . . Here is a party quietly in possession. The defendant comes and asks for the key. If she had intended to make a claim of title, she might have come as a trespasser to disseise, and, having entered, might have stood upon her right. But here that was not done; and under the circumstances of this case, the defendant, before she could dispute the title, was bound to put the lessor of the plaintiff in the situation in which she stood before the leave was granted."

76 The claim in ejectment therefore succeeded. Miss Baytup was estopped from disputing that Mrs. Johnson had the requisite title, because she (Miss Baytup) had been let into possession by Mary Batcomb as agent for Mrs Johnson. The critical point is that the act of asking permission to come in gives rise to the estoppel. The title (or the lack of it) in the licensor is

© 2022 The Incorporated Council of Law Reporting for England and Wales

A simply irrelevant. Moreover, as everyone knew, the fictious lease to Doe was precisely that: a mere fiction.

77 Mr Wonnacott placed some reliance on the statement in the licence that GGM provides "guardian management services to property owners". That, he said, meant that Ms Laleva was not prevented from asserting that the (unnamed) property owner was the correct claimant. But in my B judgment that is not correct. The fact that there is a property owner in the background does not tell you anything about the interest which GGM or G100 had. As I have said, as between Ms Laleva and G100, it is not a relevant question. Moreover at the time when Ms Laleva was granted the licence G100 was, to all intents and purpose, in control of the Property. It was G100 who selected the occupiers and who managed the Property. Its right to do so is irrelevant to the position as between it and Ms Laleva.

C 78 Of course, it goes almost without saying that the fee simple title by estoppel is not binding on anyone who is not estopped. Consequently the true owner would be entitled to show that he had a better title than either of the estopped parties. That, in my judgment, is the context in which *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 54 was decided. That case stands for the proposition that a licence granted by a freeholder to place D advertisements on the flank wall of a building does not bind a subsequent tenant of the building. In other words, the tenant, as a third party to the relationship between licensor and licensee, was entitled to challenge the effectiveness of the licence by showing that he had a better title than the licensee.

79 The fact that there is an estoppel means that, as between claimant E and defendant, whether the claimant does or does not have a possessory interest in the land makes no difference. Either way, the defendant is unable to set up an alternative title whether in herself or a third party. That is entirely consistent with the bedrock principle of relativity of title which pervades English land law. The policy underlying the principle was well stated by Martin B in *Cuthbertson v Irving* (1859) 4 H & N 742, 758 (affirmed (1860) 6 H & N 135):

F

> "This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of this lessor, really is. All that is required of him is, that having received the full consideration for the G contract he has entered into, he should on his part perform it."

80 Here Ms Laleva has enjoyed everything that the licence purported to grant her. Having done so, she must now perform her part of the bargain by leaving the Property.

81 Judge Luba declined to decide this point, largely, as I read his judgment, because an estoppel ought to be pleaded. But all that needs to be H pleaded are the relevant facts. In this case the only relevant facts are that G100 granted Ms Laleva a licence by virtue of which she was permitted to live in the Property in order to perform the guardian services. The estoppel thus created is no more and no less than one of the legal consequences of that arrangement. It is not an estoppel which depends on reliance or detriment.

© 2022 The Incorporated Council of Law Reporting for England and Wales

As Lord Hoffmann put it in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, 416 it is not the estoppel which creates the relationship, but the relationship which creates the estoppel. The grantor's title or lack of title is irrelevant.

82 In my judgment, therefore, G100 was entitled to use the procedure under CPR Pt 55 (which is a summary version of the old claim in ejectment) against Ms Laleva. Whether it would have been able to do so against a pure trespasser is not the question.

Result

83 I would allow the appeal and dismiss the cross-appeal.

MACUR LJ

84 I agree.

SNOWDEN LJ

85 I also agree.

Permission to appeal and cross-appeal granted.
Appeal allowed.
Cross-appeal dismissed.

FRASER PEH, Barrister

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

Queen's Bench Division

Director of Public Prosecutions *v* Cuciurean

[2022] EWHC 736 (Admin)

2022 March 23; 30 Lord Burnett of Maldon CJ, Holgate J

B

Human rights — Freedom of expression and assembly — Interference with — Defendant trespassing on land with intention of obstructing or disrupting construction of railway — Defendant charged with aggravated trespass — Whether court required to be satisfied that defendant's conviction proportionate interference with his Convention rights — Criminal Justice and Public Order Act 1994 (c 33), s 68 — Human Rights Act 1998 (c 42), ss 3, 6, Sch 1, Pt I, arts 10, 11, Pt II, art 1

C

The defendant was charged with aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994[1], the prosecution case being that he had trespassed on land and dug and occupied a tunnel there with the intention of obstructing or disrupting a lawful activity, namely the construction of the HS2 high speed railway. The deputy district judge acquitted the defendant, finding that the prosecution had failed to prove to the requisite standard that a conviction was a proportionate interference with the defendant's rights to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The prosecution appealed by way of case stated on the ground that, if the defendant's prosecution did engage his rights under articles 10 and 11, a conviction for the offence of aggravated trespass was intrinsically a justified and proportionate interference with those rights, without the need for a separate consideration of proportionality in the defendant's individual case.

D

E

On the appeal—

Held, allowing the appeal, that there was no general principle in criminal law, nor did section 6 of the Human Rights Act 1998 require, that where a defendant was being tried for a non-violent offence which engaged his or her rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms the court would always have to be satisfied that a conviction for that offence would be a proportionate interference with those rights; that, rather, the court would only have to be so satisfied where proportionality was an ingredient of the offence, which would depend on the proper interpretation of the offence in question; that if the offence were one where proportionality was satisfied by proof of the very ingredients of that offence, there would be no need for the court to consider the proportionality of a conviction in an individual case; that proportionality was not an ingredient of the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, which was compatible with articles 10 and 11 of the Convention without having to read in a proportionality ingredient pursuant to section 3 of the 1998 Act; that, in particular, (i) section 68 of the 1994 Act had the legitimate aim of protecting property rights in accordance with article 1 of the First Protocol to the Convention and, moreover, protected the use of land by a landowner or occupier for lawful activities and helped to preserve public order and prevent breaches of the peace, (ii) a protest which was carried out for the purposes of

F

G

H

[1] Criminal Justice and Public Order Act 1994, s 68: see post, para 10.
[2] Human Rights Act 1998, s 3: see post, para 29.
S 6: see post, para 30.
Sch 1, Pt I, art 10: see post, para 26.
Art 11: see post, para 27.
Pt II, art 1: see post, para 28.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A obstructing or disrupting a lawful activity, contrary to section 68, would not lie at the core of articles 10 and 11, even if carried out on publicly accessible land and (iii) articles 10 and 11 did not bestow any "freedom of forum" to justify trespass on land; that, therefore, proof of the ingredients of the offence of aggravated trespass set out in section 68 of the 1994 Act ensured that a conviction was proportionate to any article 10 and 11 rights which might be engaged; that it followed that it had not been open to the deputy district judge to acquit the defendant on the basis that the B prosecution had not satisfied her that the defendant's conviction of an offence of aggravated trespass contrary to section 68 was a proportionate interference with the defendant's rights under articles 10 and 11; and that, accordingly, the defendant's case would be remitted to the magistrates' court with a direction to convict (post, paras 57–58, 65–69, 73–81, 89–90).

Bauer v Director of Public Prosecutions [2013] 1 WLR 3617, DC, dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3, C SC(E) and *James v Director of Public Prosecutions* [2016] 1 WLR 2118, DC applied.

Appleby v United Kingdom (2003) 37 EHRR 38, ECtHR considered.

Director of Public Prosecutions v Ziegler [2022] AC 408, SC(E) distinguished.

Per curiam. It is highly arguable that articles 10 and 11 of the Convention are not engaged at all on the facts of the present case. There is no basis in the jurisprudence of the European Court of Human Rights to support the proposition that articles 10 and 11 include a right to protest on privately owned land or on publicly owned land from which the public are generally excluded. The furthest that that court has been D prepared to go is that, where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, it would not exclude the possibility of a state being obliged to protect those rights by regulating property rights. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the rights protected by articles 10 and 11 would be destroyed. Legitimate protest can take E many other forms (post, paras 45–46, 50).

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

Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21; [2013] EMLR 28, ECtHR (GC)

Annenkov v Russia (Application No 31475/10) (unreported) 25 July 2017, ECtHR

Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR

F *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009, ECtHR

Bauer v Director of Public Prosecutions [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC

Blumberga v Latvia (Application No 70930/01) (unreported) 14 October 2008, ECtHR

Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

G *City of London Corpn v Samede* [2012] EWHC 34 (QB); [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

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

Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)

Ezelin v France (Application No 11800/85) (1991) 14 EHRR 362, ECtHR

H *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), DC

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

Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC

Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)

© 2022 The Incorporated Council of Law Reporting for England and Wales

A

James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lambeth London Borough Council v Grant [2021] EWHC 1962 (QB)
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC

B

R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA
R v E [2018] EWCA Crim 2426; [2019] Crim LR 151, CA
R v R (Practice Note) [2015] EWCA Crim 1941; [2016] 1 WLR 1872; [2016] 1 Cr App R 20, CA
R (AB) v Secretary of State for Justice [2021] UKSC 28; [2022] AC 487; [2021] 3 WLR 494; [2021] 4 All ER 777, SC(E)
R (Leigh) v Comr of Police of the Metropolis [2022] EWHC 527 (Admin); [2022] 1 WLR 3141, DC

C

R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Richardson v Director of Public Prosecutions [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20; [2014] 1 Cr App R 29, SC(E)
Taranenko v Russia (Application No 19554/05) (2014) 37 BHRC 285, ECtHR

D

The following additional cases were cited in argument:

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Director of Public Prosecutions v Barnard [2000] Crim LR 371, DC
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 and 37038/13) (2017) 68 EHRR 1, ECtHR
Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch)

E

National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)
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)
RMC LH Co Ltd v Persons Unknown [2015] EWHC 4274 (Ch)
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Whitehead v Haines [1965] 1 QB 200; [1964] 3 WLR 197; [1964] 2 All ER 530, DC

F

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

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
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)
Manchester City Council v Pinnock (Nos 1 and 2) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)

G

Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
UK Oil & Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

CASE STATED by Deputy District Judge Evans sitting at City of London Magistrates' Court

H

On 21 September 2021, after a trial before Deputy District Judge Evans in the City of London Magistrates' Court, the defendant, Elliott Cuciurean, was acquitted of the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. The prosecution

© 2022 The Incorporated Council of Law Reporting for England and Wales

A appealed by way of case stated. The questions for the opinion of the High Court are set out in the judgment of the court, post, para 3.

The facts are stated in the judgment of the court, post, paras 2–9.

Tom Little QC and *James Boyd* (instructed by *Crown Prosecution Service*) for the prosecutor.

B The prosecutor's appeal concerns the question whether, in light of the Supreme Court's judgment in *Director of Public Prosecutions v Ziegler* [2022] AC 408, a fact-specific assessment of the proportionality of a conviction's interference with an individual's rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms is required in any prosecution for offences of trespass committed during a public protest. The C appeal should be allowed on three mutually alternative grounds: (i) the defendant's Convention rights under articles 10 and 11 were not engaged; (ii) alternatively, if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is, inherently and without the need for a separate consideration of proportionality, a justified and proportionate interference with those rights, and so the deputy district judge erred in treating the decision in *Ziegler* as compelling her to undertake an D additional assessment of proportionality; and (iii), alternatively, if a fact-sensitive assessment of proportionality were required, the deputy district judge reached a decision on that assessment which was so unreasonable that no reasonable tribunal would have taken it.

On the preliminary procedural issue as to the jurisdiction of the court to determine grounds (i) and (ii), although, contrary to Crim PR r 35.2(2)(c), E the prosecutor failed to include ground (i) in its application to the magistrates' court for a case to be stated, and accepted before the deputy district judge that the defendant's Convention rights under articles 10 and 11 were engaged, it would nevertheless not be right for the court to decline to determine a pure point of law open on the facts found in the case stated: *Whitehead v Haines* [1965] 1 QB 200. There is uncertainty as to the correct F approach to the assessment of proportionality following the decision in *Ziegler* which is affecting a large number of cases at first instance and which calls for exploration by the higher courts (see dicta of Lord Burnett of Maldon CJ in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, para 29). On account of that uncertainty, the points being advanced now were not obvious to the prosecutor below, and they were not argued, expressly considered or conceded and then discarded on appeal. However, the G substance of the prosecutor's argument remains the same: that conviction was proportionate and it was not open to the deputy district judge to conclude otherwise. Accordingly, despite the breach of the rules, there are compelling and exceptional reasons for a higher court to determine the issue and it is in the interests of justice for the court to so do.

As in ground (i), the issue before the court on ground (ii) is a pure point of H law which it would not be right for the court to decline to determine (see *Whitehead v Haines*) and the same compelling and exceptional reasons for a higher court to determine the issue apply. However, in relation to ground (ii), the prosecution case has always been that it was not open to the deputy district judge to conclude that a conviction for aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994

© 2022 The Incorporated Council of Law Reporting for England and Wales

represented a disproportionate interference with the defendant's Convention rights.

[*Lord Burnett of Maldon CJ*. The court will hear argument on grounds (i) and (ii) de bene esse.]

On ground (i), the Convention rights to freedom of expression contained in article 10 and to peaceful assembly and freedom of association contained in article 11 cover a broad range of opinions and expressions thereof. Opinions such as the one held by the defendant concerning the development of the HS2 high speed railway would be protected by article 10 and he would be entitled to express his opinions in a number of ways, including by participating in public protest, which right is protected by article 11. The jurisprudence of the European Court of Human Rights demonstrates that such expressions may extend to protests impeding activities of which the protestor disapproves: *Steel v United Kingdom* (1998) 28 EHRR 603.

However, both article 10 and article 11 rights are qualified and not without limit. Some individual conduct, by its nature and degree, would mean it could fall outside the scope of protection under article 11. Article 11 of the Convention only protects the right to "peaceful assembly". Therefore, where a protestor is personally involved with violence or intends to commit or incite violent acts, or by some other conduct "rejects the foundations of a democratic society", that conduct would not attract the protection of the Convention; whereas conduct which is intended to be disruptive, such as obstructing traffic on a highway, while not an activity lying at the core of the protected freedom, might not be such as to remove participation in the protest from the scope of protection in article 11: *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 92, 97–98.

Thus, the jurisprudence recognises that there may be conduct which falls outside that protected by a Convention right and conduct which, although protected by the right, does not lie at its core. In respect of the offences of aggravated trespass and criminal damage, there is no relevant jurisprudence to support the proposition that article 10 and 11 rights are engaged. Neither do articles 10 and 11 confer a right of entry to private property (or publicly owned property with no right of access) unless a bar to entry would effectively extinguish the essence of those rights, which will not be the case where alternative options for effective protest exist: *Appleby v United Kingdom* (2003) 37 EHRR 38, para 47. Where deliberate acts of obstruction and inconvenience do not lie at the core of the right but close to the limit of the conduct in scope of the protection of article 11 (as in *Kudrevičius*), trespassing on private land (or publicly owned land over which there is no right of access as in the present case), damaging it by building a tunnel with the intent of preventing the landowner from doing what it is lawfully entitled to do are also likely to be a considerable distance from the core of the right, thus falling outside the scope of Convention protection.

The European court held that the rights in articles 10 and 11 were engaged in *Taranenko v Russia* (2014) 37 BHRC 285 for a protestor who participated in the occupation of an office in the President's administration building, the group having forced their way through security, locked themselves in the office, called for the President's resignation, distributed leaflets from the window, destroyed furniture and equipment and damaged the walls and ceiling. However, that should not be understood as

© 2022 The Incorporated Council of Law Reporting for England and Wales

A establishing that the protestor had any right protected by articles 10 and 11 to trespass and cause damage. The court held that the domestic courts had concluded the protestor's political beliefs were fundamental to the prosecution and had not established that the individual had personally participated in causing any damage. Accordingly, it could be inferred both that the court accepted that, as in *Kudrevičius*, the acts of one protestor could not necessarily be used to justify restricting the rights of another and B that those who actually cause damage or commit violent or otherwise reprehensible acts in the course of a protest can be prosecuted for doing so without engaging Convention rights. That principle should apply in the current case, since trespassing on land and intentionally damaging it is an unacceptable way in which to engage in political debate in a democratic society. The rights under articles 10 and 11 cannot be used to support the C proposition that the defendant was entitled unlawfully to enter private land and purposely to damage it by building a tunnel when there were numerous alternative and effective ways available to him to protest and express his objection to the HS2 high speed railway.

With regard to ground (ii), even if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is inherently, D and without need for a separate consideration of proportionality, a justified and proportionate interference with those rights. In a prosecution, it is not necessary to read words into a criminal offence in order to give effect to the rights of the defendant under articles 10 and 11: *James v Director of Public Prosecutions* [2016] 1 WLR 2118, paras 32–35. In determining how the court should address the interaction of those rights with criminal offences, there are two distinct categories of case. First, where there is available a E statutory defence that the defendant's conduct was "reasonable", article 10 and 11 rights and the qualifications to them and thus the proportionality of any conviction may be expressly considered in an assessment of the facts as part of the defence. Secondly, where, once the specific ingredients have been proved, the defendant's conduct has gone beyond what could be described as reasonable conduct in the exercise of Convention rights, Parliament can be taken to have defined the parameters of lawful conduct as a matter of public F policy and within its margin of appreciation. Thus, a fact-sensitive assessment of the proportionality of any prosecution and conviction would only be relevant where the reasonableness defence is provided for in the statute: *R v Brown (James Hugh)* [2022] 1 Cr App R 18.

Similarly, in *Animal Defenders International v United Kingdom* [2013] EMLR 28, the Grand Chamber of the European court held that the state can, G consistently with the Convention, adopt general rules which apply to pre-defined situations notwithstanding that it might result in some hard cases, provided that the prohibition is necessary in a democratic society and thus proportionate. That principle applies in the present case. Section 68 of the 1994 Act is a general measure which is intrinsically compliant with the Convention, being one which is narrowly drawn and balances the rights of landowners and the rights of protestors, allowing the exculpation of those H who trespass but who can show a justification defence. However, the state is entitled to prevent aggravated trespass as defined in section 68(1) for the prevention of disorder and for the protection of property rights. Article 1 of the First Protocol to the Convention ("A1P1") provides that the landowner has the right to peaceful enjoyment of his property. Although also a

© 2022 The Incorporated Council of Law Reporting for England and Wales

qualified right, the state is under a positive obligation to protect the A1P1 rights of the landowner by law against interference. Where the interference is criminal in nature the authorities are obliged to conduct such criminal investigation and prosecution as appropriate. Section 68(1) strikes a fair and proper balance with the need to protect acts and freedoms of those on private land acting lawfully under A1P1: *Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008. Interference with the article 10 and 11 rights of a protestor who had trespassed with the intention to disrupt the lawful activity of the landowner would not therefore be disproportionate.

Articles 10 and 11 do not provide a defence as a matter of criminal law or confer a right to trespass. Trespass is by definition unlawful and a conviction for the offence of aggravated trespass provides a lawful limitation on the exercise of rights of free expression which Parliament deemed to be a justified sanction: see dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3. Once the elements of the offence of aggravated trespass are made out, there can be no question of a breach of articles 10 or 11: *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617. Accordingly, no fact-sensitive proportionality assessment is required from the court. In that context, any distinction between articles 10 and 11 is of no consequence: see *James* [2016] 1 WLR 2118.

It follows that a conviction for the offence of aggravated trespass under section 68(1) of the 1994 Act inherently constitutes a justified and proportionate interference with the defendant's article 10 and 11 rights without the need for any separate consideration of proportionality, and the decision in *Ziegler* [2022] AC 408 did not create an extra ingredient to the offence of aggravated trespass that the prosecutor had to prove with a need for the judge to undertake a *Ziegler*-style factual analysis.

As to ground (iii), if an assessment of proportionality was required, the deputy district judge reached a decision on that basis at which no reasonable tribunal properly directing itself on all the material considerations could have arrived.

In failing to analyse the nature and degree of the conduct involved in the offence and to recognise that, even if it could fall within the scope of rights protected by articles 10 and 11, it would not lie at the core but rather at the outside edges of those rights, the deputy district judge neglected to consider a material consideration which was highly relevant to the determination of the proportionality of any interference with those rights. Furthermore, the Convention rights of the landowner, specifically protected under A1P1 and therefore a highly relevant consideration, were not acknowledged and thus not appropriately balanced against the defendant's article 10 and 11 rights. In contrast to the situation in *Ziegler*, the land trespassed upon in this case was not land over which the public had a right to assemble. That ought to have been properly weighed in the balance by the deputy district judge since different considerations applied: *Appleby v United Kingdom* 37 EHRR 38.

The deputy district judge's reasoning was further flawed, being based as it was on an irrelevant finding of fact that the land concerned was merely a small part of the HS2 high speed railway project, projected to take up to 20 years to complete at a cost of billions of pounds. Those factors were not relevant in determining whether a conviction for obstructing and disrupting those activities was a proportionate interference with Convention

© 2022 The Incorporated Council of Law Reporting for England and Wales

A rights. Accordingly, the deputy district judge reached a decision which no reasonable tribunal, properly directing itself as to the relevant considerations, could have reached and she was wrong to have acquitted the defendant.

Tim Moloney QC, *Adam Wagner* and *Blinne Ní Ghrálaigh* (instructed by *Robert Lizar Solicitors, Manchester*) for the defendant.

B The appeal should not be allowed for four reasons: (1) the court should not permit grounds (i) and (ii) to proceed since they are procedurally barred; (2) articles 10 and 11 of the Convention are engaged; (3) in a case involving the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of the rights under articles 10 and 11, which will require a fact-sensitive C enquiry; and (4) the deputy district judge's decision to acquit the defendant was reasonable.

On the procedural issue, ground (i) of the prosecutor's appeal was not raised at first instance as required by Crim PR r 35.2(2)(c); moreover, in the original application for permission to appeal, the prosecutor expressly disavowed that ground and expressly stated that articles 10 and 11 were D engaged. For reasons of the interests of justice and to discourage attempts to circumvent the strict time limit in rule 35.2, he should not now be permitted to advance an appeal entirely different from that for which permission was sought in an earlier application or which would be a second bite of the cherry: see *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [31].

Only in very exceptional circumstances should a party be permitted to E renounce its agreement to an approach in which it acquiesced before the judge at first instance and advance a different approach on appeal. Parties are expected to get it right first time: *R v E* [2018] EWCA Crim 2426 at [19]. That will especially be the case where the party is sophisticated and fully represented, as is the prosecutor in the present case: *Food Standards Agency*, para 26. None of the reasons advanced by the prosecutor are exceptional.

F Unlike the situation in *Whitehead v Haines* [1965] 1 QB 200, this is not a case where the prosecutor genuinely was not aware of a new point of law which if taken could prevent conviction for the defendant. The defendant's advocate submitted a skeleton argument before the trial, supported by authority which was served on the court. Therefore the issues in the case were clear. By contrast, according to the case stated, the prosecutor neither submitted a skeleton argument nor made submissions to the effect that the G defendant's article 10 or 11 rights could not be engaged in relation to the offence of aggravated trespass or that the principles in *Director of Public Prosecutions v Ziegler* [2022] AC 408 did not apply. It was therefore accepted by the prosecutor that the defendant's article 10 and 11 rights were engaged and not disputed that the prosecution was required to prove that interference with those rights was proportionate.

H Insofar as the decision in *Ziegler* has caused uncertainty as to the legal position, there is nothing exceptional in a legally significant decision of the higher courts causing some uncertainty in the lower courts. It would undermine the principle in *Food Standards Agency* that parties should get it right first time if an argument that resolution of an important point of law, in existence and obvious during the proceedings at first instance, be permitted

© 2022 The Incorporated Council of Law Reporting for England and Wales

to amount to a sufficiently exceptional reason as to allow it to be raised on appeal when not raised at first instance. Accordingly, none of the reasons advanced by the prosecutor are exceptional and the court should not permit grounds (i) and (ii) to proceed.

Wagner following.

In any event, the prosecution did engage the defendant's article 10 and 11 Convention rights. The right to freedom of assembly in article 11 is a fundamental right in a democratic society and, like the right to freedom of expression in article 10, one of the foundations of such a society: *Kudrevičius v Lithuania* (2015) 62 EHRR 34. It is an established principle in the jurisprudence of the European Court of Human Rights that the scope of those rights should not be interpreted restrictively. That principle was recently reaffirmed by the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408, paras 69–70, 89.

All forms of peaceful, i e non-violent, assembly engage article 11, unless they otherwise reject the foundations of a democratic society when the actions of protestors may take them outside of the protection of Convention rights so that the question of proportionality does not arise: *Ziegler*, para 69. The only three categories of case in which direct action protest would fall outside of the scope of articles 10 and 11 are as set out in *Kudrevičius*: where organisers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society. The guarantees of article 11 therefore apply to all other gatherings: *Ziegler*. The jurisprudence of the European court shows that even protests which are intentionally disruptive are capable of falling within the scope of article 10: see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241. Article 11 has been found to remain engaged even in relation to demonstrations where protests have involved aspects of violence, showing that the actions of one protestor cannot necessarily be used to restrict the rights of another: *Kudrevičius*.

There is no authority to support the proposition that committing trespass or digging a tunnel as part of a protest render it not peaceful and therefore falling outwith the protection of article 11. Whilst it is right that articles 10 and 11 do not provide a right to trespass, the jurisprudence of the European court demonstrates that the court should ask first whether the right is engaged and then consider proportionality. Creation of a bright line rule that articles 10 and 11 are not engaged where an otherwise peaceful protestor has trespassed on private property would run counter to the established jurisprudence where any exclusionary category has been construed very narrowly. Individuals from the Occupy Movement who had been trespassing for three months on public land by setting up a protest camp were held to have engaged rights to articles 10 and 11: *City of London Corpn v Samede* [2012] PTSR 1624, para 49. Similarly, in *Appleby v United Kingdom* (2003) 37 EHRR 38 the court considered that the article 10 and 11 rights of protestors who were prevented from setting up a stand and distributing leaflets concerning their opposition to the development plans of the local authority were engaged, albeit no violation of those rights was found to have occurred. The removal and subsequent conviction of protestors in *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017 were held to constitute an unjustified interference with the article 11 rights of the protestors, notwithstanding their conduct in taking

© 2022 The Incorporated Council of Law Reporting for England and Wales

A possession of privately held land, impeding access to the land by its lawful owners and committing acts of violence against private security guards.

By analogy, in cases involving civil injunctions and contempt, the article 10 and 11 rights of individuals accused of trespass and nuisance and conduct causing considerable economic damage were found to be relevant: see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), B where a *Ziegler*-style analysis was undertaken. Similarly, the article 10 and 11 rights of individuals who had trespassed were found to be engaged in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29; and considered to be factors to be weighed in the balance in *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) and *RMC LH Co Ltd v Persons Unknown* [2015] EWHC 4274 (Ch).

C In the present case, the deputy district judge made no finding of damage or intentional damage caused to the land by the defendant. It is therefore not open to the prosecutor to now invite the court to reach a finding of fact in that regard. Accordingly, the prosecution's argument that the defendant trespassed and intentionally damaged land and that that therefore puts him outside the scope of protection which would be afforded to his Convention D rights under articles 10 and 11 has no basis in fact and is wrong. Moreover, the jurisprudence of the European court also provides that protests involving damage still fall within the scope of article 10: see e g *Taranenko v Russia* (2014) 37 BHRR 285, para 10. Were trespass and damage to property to be interpreted as violence or reprehensible acts, it would be an overly restrictive interpretation.

E Conduct which might not be considered to be at the core of the rights under articles 10 and 11 still requires careful evaluation and is not determinative of proportionality: *Ziegler* [2022] AC 408, para 67. Any reprehensible behaviour would be considered in the proportionality assessment but not as a barrier to engagement of the rights. The focus would be on the conduct of the individual concerned. In the present case, the conduct of the defendant was targeted at disrupting the activity of the HS2 high speed railway, i e those at F whom the protest was targeted. Accordingly, it ought to be closer to the core of the rights protected under article 11 than the conduct of protestors in *Ziegler*, whose protest seriously disrupted the everyday activities of others. The protest organiser should retain autonomy in deciding where, when and how the protest should take place and it is recognised that the purpose of an assembly is often linked to a certain location: *Lashmankin v Russia* (2017) G 68 EHRR 1, para 405 and *Ziegler*, para 72. Although the jurisdictions differ, it would be illogical if trespassing protestors disrupting the activities of people not connected to the protest object retained the protection of article 11 when, as in the present case, a trespassing individual protesting at the precise location of the environmental damage being caused by the high speed railway but only disrupting the activity of the protest object was not so protected.

H The section 68 offence requires, in addition to trespass, an additional act of intimidation, obstruction or disruption: *Director of Public Prosecutions v Barnard* [2000] Crim LR 371. It is to that additional act that the question of whether articles 10 or 11 are engaged applies, rather than whether or not the protestor is trespassing.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A In a case involving the offence of aggravated trespass contrary to section 68 of the 1994 Act, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of rights under articles 10 and 11, which will require a fact-sensitive enquiry. Although the Supreme Court judgment in *Ziegler* [2022] AC 408 was concerned with obstruction of the highway, the principles apply in any potential conviction which would be a restriction on article 10 and 11 rights. B The jurisprudence of the European Court of Human Rights clearly shows that a conviction is a restriction which represents a distinct interference with article 10 and 11 rights: see e g *Kudrevičius* 62 EHRR 34, para 101. That distinct interference requires justification separately from any which might be required due to any interference caused to those rights by arrest or disposal of a protest because different considerations may apply: *Ziegler*, paras 57, 60. C In order to determine the proportionality of an interference with Convention rights, a fact-sensitive enquiry will be required to evaluate the circumstances in the individual case. Any restriction on the exercise of article 10 and 11 rights, including a criminal conviction, must be (1) prescribed by law, (2) in pursuit of a legitimate aim and (3) necessary in a democratic society.

Accordingly, section 68 of the 1994 Act cannot predetermine what is D inherently a fact-sensitive consideration of proportionality. The issue is not whether section is 68 is a proportionate restriction generally but whether what happens to an individual when section 68 is applied is proportionate having regard to all the circumstances. The interference with an accused's rights under articles 10 and 11 would be different at the stages of arrest, prosecution decision and conviction and, thus, the proportionality assessments would require separate fact-specific enquiries: *Ziegler*. E In addition, in making those decisions, each public authority has its own duty under section 6 of the Human Rights Act 1998 not to act in way which is incompatible with Convention rights. The wide impact of articles 10 and 11 on public order offences was emphasised by Lady Arden JSC at para 92 of *Ziegler*, citing Lord Bingham of Cornhill's observation in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 34 F that giving effect to those rights under the 1998 Act represented a "constitutional shift".

The court, when considering an offence of aggravated trespass or other public order offence, is obliged by section 3 of the Human Rights Act 1998 to read and, so far as it is possible to do so, give effect to the relevant statutory provisions in a way which is compatible with the Convention G rights. Where it is not possible to do so, the court may make a declaration of incompatibility under section 4 of the 1998 Act. Accordingly, as in the present case, where a statutory provision is likely to interfere with article 10 and 11 rights but on its face contains no element which would make it compatible with those Convention rights, the court is required to read in that proportionality element to give effect to them. Thus, no bright line distinction exists or is required between convictions for an offence which H includes a lawful excuse defence and those which do not.

Section 68 of the 1994 Act was enacted before the 1998 Act came into force. That distinguishes the situation in the present case from that in *Animal Defenders International v United Kingdom* [2013] EMLR 28 on which the prosecutor relies as authority for the principle that the state can

© 2022 The Incorporated Council of Law Reporting for England and Wales

A adopt general measures which apply to predefined situations regardless of the individual facts of each case. In *Animal Defenders*, the legislative provision concerned had been debated in Parliament with full reference to Convention rights, whereas section 68 of the 1994 Act was not. Therefore, the intentions of Parliament in enacting it are of little relevance in the current case. In any event, the case does not provide authority for the proposition that in the context of a protest the proportionality of a restriction on B Convention rights, in this case a conviction, can be predetermined through a statutory provision without the need for a fact-specific assessment in each case.

Section 68 of the 1994 Act is listed as a public order offence aimed at disruptive protests which involve trespass. The gravamen of the offence requires an element of intimidation, obstruction or disruption in addition to C trespass. Thus, the Convention rights of the landowner under article 1 of the First Protocol to the Convention ("A1P1") become less relevant to the exercise of assessing the proportionality of any interference with the article 10 and 11 rights of the defendant. Indeed, any interference with the A1P1 rights of the landowner are also subject to a proportionality assessment to balance any competing rights and freedoms of other people. If the prosecutor's argument that priority should be given in advance to the D A1P1 rights of the landowner were successful, engagement of the rights under articles 10 and 11 would effectively be excluded altogether. In so far as the rights under A1P1 are capable of outweighing those under articles 10 and 11, it remains the case that a fact-sensitive balancing exercise is required to determine the issue.

Moloney QC

E The deputy district judge's decision to acquit was plainly reasonable in that it was open to her to make. Although another judge might have reasonably reached another conclusion on the facts, there is no flaw of reasoning which undermines the cogency of the conclusion reached. The judge applied the non-exhaustive list of factors set out in *Ziegler* [2022] AC 408, finding that the protest was peaceful, there was no disorder and the F defendant had committed no other criminal offences, his actions were carefully targeted to impact on the particular part of the development to which he objected, the protest related to a matter of general concern and was one which the defendant had a long-standing commitment to opposing, the delay to the project was relatively short and it was unclear whether there was a complaint about his conduct. In the circumstances, it was plainly open for the deputy district judge to acquit.

G Although it is correct that the deputy district judge made no direct reference to the A1P1 rights of the landowner, it can reasonably be inferred that those rights were in her mind when finding "no inconvenience to the general public or interference with the rights of anyone other than HS2". Furthermore, whereas in civil injunction cases the A1P1 rights of a claimant landowner are directly balanced against the article 10 and 11 rights of those H who wish to protest on or around the land, in a criminal case the parties are the Crown and the defendant, which makes it unclear whether or to what extent the A1P1 rights of the landowner need to be balanced.

Moreover, the deputy district judge was entitled to take into account the relative impact of the cost and disruption of a protest to a development project. In doing so, it was necessary to make reference to the total

© 2022 The Incorporated Council of Law Reporting for England and Wales

estimated time and cost of the project and reasonable to conclude that, overall, the relative impact of the protest was minor. In the context of a fact-sensitive proportionality exercise it was an entirely appropriate consideration.

The appeal should therefore be dismissed.

The court took time for consideration.

30 March 2022. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2 The defendant was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The deputy district judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the defendant that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11". In short, the judge accepted that there was a new ingredient of the offence to that effect.

3 Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the defendant's article 10 and 11 rights were engaged, to acquit the defendant on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's article 10 and 11 rights applying the principles in *Ziegler*?
>
> "2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4 The prosecution appeal against the acquittal on three grounds:

(1) The prosecution did not engage articles 10 and 11 rights;

(2) If the defendant's prosecution did engage those rights, a conviction for the offence of aggravated trespass is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights. The decision in *Ziegler* did

© 2022 The Incorporated Council of Law Reporting for England and Wales

A not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

(3) In any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5 Before the judge, the prosecution accepted that the defendant's article 10 and 11 rights were engaged and that there was a proportionality B exercise of some sort for the court to perform, albeit not as the defendant suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither ground 1 nor ground 2 was advanced before the judge.

6 The defendant contends that it should not be open to the prosecution C to raise grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that ground 1 is being pursued; and that although ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7 Crim PR r 35.2(2)(c) relating to an application to state a case requires: "The application must— . . . (c) indicate the proposed grounds of D appeal . . ."

8 The prosecution did not include what is now ground 1 of the grounds of appeal in its application to the magistrates' court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it E been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9 Applying well-established principles set out in *R v R (Practice Note)* [2016] 1 WLR 1872 at paras 53–54, *R v E* [2018] EWCA Crim 2426 at [17]–[27] and *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [25]–[31], we are prepared to deal with ground 2. F It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the defendant, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are G determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10 Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons H 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."

© 2022 The Incorporated Council of Law Reporting for England and Wales

"(2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

"(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

"(4) [Repealed.]

"(5) In this section 'land' does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of land in subsection (9) of that section; or (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11 Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12 The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity; (iii) the defendant must do an act on the land; (iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13 Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual background

14 The defendant was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15 The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London – West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

16 The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

© 2022 The Incorporated Council of Law Reporting for England and Wales

A 17 Protesters against the HS2 project had occupied the Land and the defendant had dug a tunnel there before 2 March 2021. The defendant occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18 The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed B from trees on the site. On the same day the team found the defendant in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The defendant went back into the tunnel.

19 The HS2 team instructed health and safety experts to help with the C eviction of the defendant and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The defendant left the Land voluntarily at about 14.00 on 18 March 2021.

20 The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21 HS2 contractors were unable to go onto the Land until it was D completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The proceedings in the magistrates' court

22 On 18 March 2021 the defendant was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not E guilty. The trial took place on 21 September 2021.

23 At the trial the defendant was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions:

(i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 [of the F Convention]. It is of general applicability. It is not limited to offences of obstructing the highway";

(ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

(a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at G para 12). Accordingly, in determining a criminal charge where issues under articles 10 and 11 of the Convention are raised, the court is obliged to take account of those rights;

(b) Second, violence is the dividing line between cases where articles 10 and 11 apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest H in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the defendant was not violent;

(iii) Accordingly, before the court could find the defendant guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate

© 2022 The Incorporated Council of Law Reporting for England and Wales

interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at paras 71–78, 80–83 and 85–86). This required a fact-sensitive assessment.

24 The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the defendant's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see para 10 of the case stated).

25 The judge made the following findings:

"1. The tunnel was on land owned by HS2.

"2. Albeit that the defendant had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

"3. The act of defendant taking up occupation of the tunnel on 15 March, sleeping overnight and retreating into the tunnel having been served with the notice to vacate was an act which obstructed the lawful activity of HS2. This was his intention.

"4. The defendant's article 10 and 11 rights were engaged and the principles in *Ziegler* were to be considered.

"5. The defendant was a lone protester only occupying a small part of the land.

"6. He did not act violently.

"7. The views of the defendant giving rise to protest related to important issues.

"8. The defendant believed the views he was expressing.

"9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

"10. The land specifically related to the HS2 project.

"11. HS2 were aware of the protesters were on site before they acquired the land.

"12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of £billions.

"13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195,000, I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the defendant's article 10 and 11 rights."

Convention rights

26 Article 10 of the Convention provides:

"*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

© 2022 The Incorporated Council of Law Reporting for England and Wales

A 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 B 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."

27 Article 11 of the Convention provides:

C "*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 D 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."

E **28** Because section 68 is concerned with trespass, it is also relevant to refer to article 1 of the First Protocol to the Convention ("A1P1"):

"*Protection of property*

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the F public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

G **29** Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: "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."

30 Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court H (section 6(3)).

31 In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v France* (1991) 14 EHRR 362 at para 37).

© 2022 The Incorporated Council of Law Reporting for England and Wales

32 The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevičius v Lithuania* (2015) 62 EHRR 34 at para 91).

33 Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevičius*, the Grand Chamber of the European Court of Human Rights ("the Strasbourg court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" (para 92).

34 The defendant submits, relying on the Supreme Court judgment in *Ziegler* [2022] AC 408 at para 70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the defendant's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality.

35 Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see e g *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 at para 44, cited in *City of London Corpn v Samede* [2012] PTSR 1624 at para 43; *Kudrevičius* at paras 150 and 155).

36 The defendant relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (e g *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 at para 28). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevičius* at para 97).

37 Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevičius* at paras 149 and 172–174; *Ezelin* at para 53; *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009 at paras 43–44 and 47–48).

38 In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights.

39 *Barraco* and *Kudrevičius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no

© 2022 The Incorporated Council of Law Reporting for England and Wales

A right of access at all. The defendant submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (para 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the defendant's B argument (e g *Samede* [2012] PTSR 1624 at para 5 and see Lindblom J (as he then was) in *Samede* [2012] EWHC 34 (QB) at [12] and [136]–[143]; *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth London Borough Council v Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40 Instead, we gain much assistance from *Appleby v United Kingdom* C (2003) 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg court decided that the landowner's A1P1 rights were engaged (para 43). It also D observed that a shopping centre of this kind may assume the characteristics of a traditional town centre (para 44). Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41 Instead, the court stated at para 47:

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the E exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise F of freedom of expression or it can be said that the essence of the right has been destroyed, the court would not exclude that a positive obligation could arise for the state to protect the enjoyment of the Convention rights by regulating property rights. The corporate town, where the entire municipality is controlled by a private body, might be an example (see *Marsh v Alabama* [(1946) 326 US 501], cited at para 26 above)."

G The court indicated that the same analysis applies to article 11 (see para 52).

42 The example given by the court at the end of that passage in para 47 shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the H applicants did have alternative methods by which they could express their views to members of the public (para 48).

43 Likewise, *Taranenko v Russia* (2014) 37 BHRC 285 does not assist the defendant. At para 78 the court restated the principles laid down in *Appleby* at para 47. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public

© 2022 The Incorporated Council of Law Reporting for England and Wales

building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks (paras 25, 61 and 79). The qualified public access was an important factor.

44 The defendant also relied upon *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business people protested by occupying the market at night. The Strasbourg court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

45 We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at paras 47 and 52). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights.

46 The approach taken by the Strasbourg court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47 We now return to *Richardson* [2014] AC 635 and the important statement made by Lord Hughes JSC at para 3:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an

© 2022 The Incorporated Council of Law Reporting for England and Wales

A injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. 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 B 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. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case C concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

48 *Richardson* was a case concerned with the meaning of "lawful activity", the second of the four ingredients of section 68 identified by Lord Hughes JSC (see para 12 above). Accordingly, it is common ground between the parties (and we accept) that the statement was obiter. Nonetheless, D all members of the Supreme Court agreed with the judgment of Lord Hughes JSC. The dictum should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

49 The proposition which the defendant has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg court". It is clear E from the line of authority which begins with *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20 and has recently been summarised by Lord Reed PSC in *R (AB) v Secretary of State for Justice* [2022] AC 487 at paras 54–59, that this is not the function of a domestic court.

50 For the reasons we gave in para 8 above, we do not determine ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg court it is highly arguable F that articles 10 and 11 are not engaged at all on the facts of this case.

Ground 2

51 The defendant's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* [2022] AC 408 had decided that in any criminal trial involving an offence which has the effect of restricting the G exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in H question did not have a "lawful excuse". If that submission is accepted, ground 2 would fail.

52 Secondly, if that first contention is rejected, the defendant submits that the court cannot allow the appeal under ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it

© 2022 The Incorporated Council of Law Reporting for England and Wales

is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53 On this second part of ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54 In *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617, the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at para 4). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Kenneth Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do so (paras 27–36). One reason for this was to avoid the risk of inhibiting legitimate participation in protests (para 27). It was in that context that Liberty had intervened (para 37).

55 Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 (para 37). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly, he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass (para 38). It was in this context that he said at para 39:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56 Moses LJ then went on to say that his earlier judgment in *Dehal v Crown Prosecution Service* (2005) 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is

© 2022 The Incorporated Council of Law Reporting for England and Wales

A nothing more to prove, including proportionality, to convict of that offence (para 40).

57 In *James v Director of Public Prosecutions* [2016] 1 WLR 2118, the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any B 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. In such cases the prosecution must prove that any such restriction was proportionate (paras 31–34). Offences falling into that first category were the subject of the decisions in *Norwood v Director of Public Prosecutions* [2003] Crim LR 888, *Hammond v Director of Public Prosecutions* (2004) 168 JP 601 C and *Dehal*.

58 The second category comprises offences where, once the specific 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. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado." Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see D Ouseley J at para 35).

59 The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required (paras 37–38).

60 *James* concerned an offence of failing to comply with a condition E 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 which the prosecution had to prove 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 or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a F 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 satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. G There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 (paras 38–43). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61 There are also some instances under the common law where proof H of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 of the Convention. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the

© 2022 The Incorporated Council of Law Reporting for England and Wales

community. In *Gifford v HM Advocate* 2011 SCCR 751, the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" (para 15). Lord Reed added at para 17:

> "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."

62 Similarly, in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, the appellant rightly accepted that articles 10 and 11 of the Convention do not provide a defence to the offence of public nuisance as a matter of substantive criminal law (para 37). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights (paras 24–39).

63 *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James*. Indeed, in *Ziegler* [2020] QB 253 at paras 87–91, the Divisional Court referred to the analysis in *James*.

64 The second question certified for the Supreme Court in *Ziegler* [2022] AC 408 related to the "lawful excuse" defence in section 137 of the Highways Act (paras 7, 55–56 and 98–99). Lord Hamblen and Lord Stephens JJSC referred at para 16 to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65 The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way sub silentio suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* [2013] 1 WLR 3617 or offences such as section 68. That was unnecessary to resolve the issues before the court.

66 Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the

© 2022 The Incorporated Council of Law Reporting for England and Wales

A statement in *Richardson* [2014] AC 635 at para 3 or to cases such as *Appleby* 37 EHRR 38.

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 B rights.

68 The passages in *Ziegler* upon which the defendant relies have been wrenched completely out of context. For example, the statements in para 57 about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application C whenever a criminal offence engages articles 10 and 11. The same goes for the references in paras 39–60 to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paras 62–70 are entitled "Deliberate obstruction with more than a de minimis impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

D **69** We are unable to accept the defendant's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends E on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70 Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be F no need for the interpretative provisions in section 3 of the 1998 Act to be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration G of incompatibility under section 4 of the 1998 Act would arise. If granted, it would remain a matter for Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71 Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory H offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well established that such measures are permissible (see e g *Animal Defenders International v United Kingdom* [2013] EMLR 28).

© 2022 The Incorporated Council of Law Reporting for England and Wales

72 It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights. A

73 The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged. B

74 First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the state to ensure sufficient protection for such rights in its legal system (*Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008). C

75 Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities. D

76 Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms. E

77 Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly. F

78 Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities. G

79 Sixthly, the Supreme Court in *Richardson* [2014] AC 635 regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies a fortiori to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion. H

80 We gain no assistance from para 80 of the judgment in *R (Leigh) v Comr of Police of the Metropolis* [2022] 1 WLR 3141, relied upon by Mr Moloney. The legislation considered in that case was enacted to address

© 2022 The Incorporated Council of Law Reporting for England and Wales

A public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81 It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision B of the Supreme Court in *Ziegler* [2022] AC 408 nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on ground 2.

Ground 3

C **82** In view of our decision on ground 2, we will give our conclusions on ground 3 briefly.

83 In our judgment the prosecution also succeeds under ground 3.

84 The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention D rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the E national interest. One object of section 68 is to discourage disruption of the kind committed by the defendant, which, according to the will of Parliament, is against the public interest. The defendant (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg court has often observed F that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the common law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.

G **85** The judge accepted arguments advanced by the defendant which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a H proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86 In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the defendant did not act violently. But if the defendant had been violent, his

© 2022 The Incorporated Council of Law Reporting for England and Wales

protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

87 It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to "only" £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions of pounds. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

88 In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89 We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler* [2022] AC 408:

(1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the Convention;

(2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevičius* 62 EHRR 34 and *Barraco* 5 March 2009 are instructive on the correct approach (see para 39 above);

(3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question.

90 The appeal must be allowed. Our answer to both questions in the case stated is "no". The case will be remitted to the magistrates' court with a direction to convict the defendant of the offence charged under section 68(1) of the 1994 Act.

Appeal allowed.
Case remitted to magistrates' court with direction to convict.

JO MOORE, Barrister

© 2022 The Incorporated Council of Law Reporting for England and Wales

Neutral Citation Number: [2022] EWHC 1215 (QB)

Case No: QB-2022-001420

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

SHELL UK OIL PRODUCTS LIMITED	**Claimant**
- and -	
PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION	**Defendants**

- -
- -

Toby Watkin QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Claimant

Hearing date: 13 May 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on 20 May 2022.

Mr Justice Johnson :

1. The claimant sells fossil fuels to those who run Shell branded petrol stations. The defendants are climate and environmental activists who say that the claimant's activities are destroying the planet. They engage in protests to draw attention to the issue and to encourage governmental and societal change.

2. The claimant seeks to maintain an injunction that was granted on an emergency basis by McGowan J on 5 May 2022. It restrains the defendants from undertaking certain activities such as damaging petrol pumps and preventing motorists from entering petrol station forecourts when that is done to prevent the claimant from carrying on its business – see paragraph 20 below. The claimant recognises that the injunction interferes with rights of assembly and expression but contends that the interference is proportionate and justified to protect its rights to trade.

3. The order of McGowan J was necessarily made without notice to the defendants or anybody else. McGowan J made provision for the order to be widely published (including at every Shell filling station in England and Wales, and to over 50 email addresses that are associated with protest groups). McGowan J also required that the order be reconsidered at a public hearing on 13 May 2022 so that the court could reconsider the continuation of the order, and its terms. This provided a specific opportunity for anyone affected by the order to seek to argue that it should be set aside or varied. In the event, nobody did so.

4. Mrs Nancy Friel, who describes herself as an environmental activist, attended the hearing. She asked for the hearing to be adjourned so that she could secure representation and argue that the order should be set aside or varied. I declined the request to adjourn. It was important that this injunction, which was granted without notice to the defendants and which impacts on their rights of assembly and expression, was considered by a court at a public hearing without further delay. Continuing with the hearing does not prejudice any application that Mrs Friel (or anybody else) might wish to make to vary the order or to set it aside: the terms of the order itself permit such an application to be made (and see also rule 40.9 of the Civil Procedure Rules).

5. Mrs Friel was concerned that the terms of the order require that any person who wishes to apply to vary or discharge the order must first apply to be joined as a named defendant. She did not consider that was appropriate, because she is not taking part in any unlawful activity and does not therefore come within the scope of the description of the defendants. There are two answers to that concern. First, the description of the "unknown" defendants does not prevent Mrs Friel from being added as a second defendant to the proceedings; she may be affected by the order – and may be entitled to be joined as a party – even if she does not come within that description. Second, if she otherwise has a right to apply to set aside the order without being joined as a party then she may do so under CPR 40.9, notwithstanding the terms of the order (see *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) *per* Bennathan J at [20]-[22] and *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [89]).

6. It is not, however, appropriate to vary the terms of the order to give a general right to anyone (beyond that recognised by CPR 40.9) to apply to vary the order without first applying to be a party. That would risk going beyond the ambit of CPR 40.9: although

that provision is stated in wide terms, in practice the circumstances in which a non-party may successfully apply to vary an order are more limited (see the commentary to CPR 40.9 in the 2022 White Book). There is therefore a risk of creating an unjustified advantage for such an applicant (for example, as regards costs) or an unjustified disadvantage for the claimant, without first considering the particular circumstances of the application. The question of whether it is necessary for a person to be joined as a party is best addressed (if and when the issue arises) as and when any application is made, and on the facts of the particular application.

Factual background

7. Benjamin Austin is the claimant's Health, Safety and Security Manager. He has provided two witness statements, supported with extensive exhibits. I take the account of events from his statements and exhibits.

The claimant

8. The claimant is part of a group of companies that are ultimately owned and controlled by Shell plc. It markets and sells fuels to retail customers in England and Wales through a network of 1,062 "Shell-branded" petrol stations ("Shell petrol stations"). The stations are operated by third party contractors, but the fuel is supplied by the claimant. In some cases, the claimant has an interest in the land where the Shell petrol station is located.

Insulate Britain, Just Stop Oil and Extinction Rebellion

9. Insulate Britain, Just Stop Oil and Extinction Rebellion are environmental protest groups that seek to influence government policy in respect of the fossil fuel industry, so as to mitigate climate change. These groups say that they are not violent. I was not shown any evidence to suggest that they have resorted to physical violence against others. They are, however, committed to protesting in ways that are unlawful, short of physical violence to the person. Their public websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time". The activities of their supporters also demonstrate this, as explained below.

The protests

10. In autumn 2021 a number of protests took place. These involved blocking major roads in the UK, including the M25, including by activists gluing themselves to roads, immovable objects, or each other. Injunctions to restrain such activities were made by the court on the application of National Highways Limited. There were many breaches of those injunctions. Committal proceedings were brought. Initially, the defendants to those proceedings evinced an intention to carry on with the protests in defiance of court orders. Orders for immediate imprisonment for contempt of court were imposed - see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB). Thereafter, unlawful protests in this form came to an end. In subsequent committal hearings, the respondents were unrepentant. They maintained that they were justified in their conduct because of the very great dangers of climate change. However, they did not demonstrate an intention to commit further breaches of court orders. Many indicated that they would find other, lawful, ways to draw attention to the climate crisis and to seek to influence government policy. The court responded by imposing orders of imprisonment for contempt of court that were suspended, subject to compliance with conditions imposed

by the court – *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) (*per* Dingemans LJ at [57]) and *National Highways Ltd v Springorum* [2022] EWHC 205 (QB) (*per* William Davis LJ at [65]).

11. In spring 2022, protests involving similar tactics re-commenced, but directed at the fossil fuel industry rather than the road network. Reports include cases of protesters climbing onto fuel delivery lorries, cutting the air brake cables so that the lorries cannot move, tunnelling under roadways to seek to make them impassable to lorries, climbing onto equipment used for storage of fuels, and tampering with safety equipment, such as valves. One of these protests was at a terminal owned by the Shell Group.

12. On 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, Clacket Lane and Cobham. Protestors arrived at around 7am. Video, photographic and written evidence (largely deriving from the websites and media releases of protest groups) show that:

    (1) The entrance to the forecourts were blocked.

    (2) The display screens of fuel pumps were smashed with hammers.

    (3) The display screens of fuel pumps were obscured with spray paint.

    (4) The kiosks were "sabotaged… to stop the flow of petrol".

    (5) Protestors variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other.

13. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed. Five people were arrested and charged with offences, including criminal damage. They are subject to bail conditions. The claimant has not sought to join them as individual named defendants to this claim because (in the case of four of them) it considers that, in the light of the bail conditions, there is not now a significant risk that they will carry out further similar activities, and (in the case of the fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the injunction.

14. In April 2022 there were protests at an oil storage depot in Warwickshire, which is partly owned by the claimant. These involved the digging of a tunnel under a tanker route, to stop oil tankers leaving the terminal and distributing fuel. An injunction was granted on an application made by the local authority. Protests at the depot have continued. On 9 May 2022 drones were flown over the depot and along its external fence. The claimant thinks this may have been a form of reconnaissance by a group of protestors.

15. On 3 May 2022 more than 50 protestors from Just Stop Oil attended the Nustar Clydebank Oil Depot in Glasgow. They climbed on top of tankers, locked themselves to the entrance of the terminal and climbed onto pipework at height. Their actions halted operations at the depot.

16. The campaign orchestrated by these (and other) groups of environmental activists continues. Just Stop Oil's website says that the disruption will continue "until the government makes a statement that it will end new oil and gas projects in the UK."

17. The claimant says that there is thus an ongoing risk of further incidents of a similar nature to those seen on 28 April 2022.

The risks at petrol stations

18. Aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on the claimant (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on "Storing petrol safely" and "Dispensing petrol as a fuel: health and safety guidance for employees", and non-statutory guidance, "Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions."

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: "Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion."). The evidence shows that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.

The injunction

20. The operative paragraphs of the injunction are:

> "2. For the period until 4pm on 12 May 2023, and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> 3. The acts referred to in paragraph 2 of this order are:

3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;

3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;

3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station.

3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;

3.5. erecting any structure in, on or against any part of a Shell Petrol Station;

3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.

3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ("depositing… any substance on… any part of a Shell Petrol Station" would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are "damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, with the intention of disrupting the sale or supply of fuel to or from the said station." So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken "in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station."

22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see paragraph 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure.

The legal controls on the grant of an injunction

23. The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The claimant must demonstrate:

(1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 *per* Lord Diplock at 407G.

(2) Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid per* Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 *per* Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 *per* Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 *per* Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: *Canada Goose* at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].

(7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998.

24. Section 12 Human Rights Act 1998 (see paragraphs 23(11) and (12) above) states:

“**12 Freedom of expression.**

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).”

(1) Serious issue to be tried

25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations.

26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ("conspiracy to injure"). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 [2020] 4 WLR 29 *per* Leggatt LJ at [18]: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.

27. As I have explained, the claimant has a strong case that the defendants have acted unlawfully. To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19 [2008] 1 AC 1174 *per* Lord Walker at [94] and Lord Hope at [44]. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300 [2021] Ch 233 *per* Arnold LJ at [155].

28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14)* [2018] UKSC 19 [2020] AC 727. Lord Sumption and Lord Lloyd-Jones observed, at [15], that the issue was complex, not least because it might – in the case of a breach of statutory duty – depend on the purpose and scope of the underlying statute and whether that is consistent "with its deployment as an element in the tort of conspiracy."

29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am

therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act.

30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel.

31. I am therefore satisfied that there is a serious issue to be tried.

32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim.

(2) Adequacy of damages

33. The claimant asserts that damages are not an adequate remedy because they could not be quantified. It is difficult to see why that should be so. Any losses ought to be capable of assessment. For example, loss of sales can be assessed by (broadly) identifying the time period when sales were affected, and comparing the sales made during that period with the sales made during the equivalent period the previous week. The possible difficulties in calculation are not a convincing reason for concluding that damages are an inadequate remedy.

34. There is, though, no evidence that the defendants have the financial means to satisfy an award of damages. It is very possible that any award of damages would not, practically, be enforceable. Further, the defendants' conduct gives rise to potential health and safety risks. If such risks materialise then they could not adequately be remedied by way of an award of damages to the claimant.

35. For these reasons, damages are not an adequate remedy for the claimant.

36. Conversely, if any defendant sustains loss as a result of the injunction, then the claimant undertakes to pay any damages which the court considers ought to be paid. It has the means to satisfy any such order. The injunction interferes with rights of expression and assembly, but it does not impact on the core of those rights. It does not prevent the defendants from congregating and expressing their opposition to the claimant's conduct (including in a loud or disruptive fashion, in a location close to Shell petrol stations), so long as it is not done in a way which involves the unlawful conduct prohibited by

paragraphs 2 and 3 of the injunction. To the extent that there is an interference with rights of assembly and expression then (if a court subsequently finds that to be unjustified) that can be met by the cross-undertaking: interferences with such rights to assembly and expression can be remedied by an award of damages, even where the loss is not monetary in nature (see section 8 of the Human Rights Act 1998).

37. So, while damages are not an adequate remedy for the claimant, the cross-undertaking in damages is an adequate remedy for the defendants.

(3) Balance of convenience

38. The fact that damages are not an adequate remedy for the claimant but that the cross-undertaking is adequate protection for the defendants means that it may not be necessary separately to consider the balance of convenience.

39. In any event, the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions. It will only run for a maximum of a year before having to be reconsidered by a court. It only applies to Shell petrol stations (not other places where the claimant does business).

(4) Real and imminent risk of harm

40. Harm has already occurred as a result of the protests on 28 April 2022. The risk of repetition is demonstrated by the further protests that have occurred since then, and the public statements that have been made by protest groups as to their determination to continue with similar activities.

41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.

42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm.

(5) Prohibited acts to correspond to the threatened tort

43. The acts that are prohibited by the injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure. The structure and terms of the injunction have been drafted to achieve that.

44. It would be permissible for an injunction to prohibit behaviour which is otherwise lawful (or which is not actionable by the claimant) if there are no other proportionate means of protecting the claimant's rights. The claimant does not contend that is the case here, because an order that closely corresponds to the threatened tort will afford adequate protection. I agree.

(6) Terms sufficiently clear and precise

45. The terms of the injunction (see paragraph 20 above) are in clear and simple language that avoids technical legal expression.

46. It is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. The drafting of paragraph 3 satisfies that criterion. There is an element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") but that is unavoidable because of the nature of the tort of conspiracy to injure. It is the inevitable price to be paid for closely tracking the tort. The alternative would be to leave out the subjective element and focus only on the objective conduct. That would give wider protection than is necessary or proportionate. It is also necessary to introduce the language of intention to avoid some of the prohibitions having a much broader effect than could ever be justified (for example, the sweet wrapper example at paragraph 21 above).

(7) Clear geographical and temporal limits

47. There are clear geographical limits to the order: it applies only to Shell petrol stations.

48. It is convenient, at this point, to address the question of whether those geographical limits can be justified as being no more than is necessary and proportionate to protect the claimant's interests (so as to ensure compatibility with articles 10 and 11 ECHR – see paragraphs 55-62 below). The only Shell petrol station where acts of conspiracy to injure have occurred so far is on the M25. It is perhaps unsurprising that petrol stations of that profile (large, and on the London orbital motorway) have been targeted. It would be possible to grant an injunction that only applied to the station that has been targeted, but that would leave many other petrol stations vulnerable. The claimant's interests would not be sufficiently protected. It would be possible to fashion an injunction that only targeted certain types of petrol station (for example, those on motorways, or those on trunk roads). Again, that would not properly protect the claimant's interests because there would be plenty of other available targets. It is possible to envisage that the risk at some individual Shell petrol stations is very low, but it is not practical to draft the order in a way that excludes such petrol stations: that would be self-defeating because any excluded station would then be at a heightened risk. I have concluded that the ambit of coverage is justified as being necessary and proportionate to protect the claimant's interests.

49. There is also a clear temporal limit. It will not last for longer than 12 months, without a further order of the court. *Canada Goose*, on one view, might suggest (and at first instance in the cases that led to *Barking and Dagenham* was taken as suggesting) that interim orders should not last for as long as this, that there is an obligation to progress litigation to a final hearing, and that an interim order should only be imposed for so long as is necessary for the case to be progressed to a final hearing. However, the notion that there is a fundamental difference between what can be justified by an interim order, and what can be justified by a final order, was dispelled in *Barking and Dagenham*. In that case, Sir Geoffrey Vos MR made it clear that both interim and final orders should be time-limited, and that it is good practice to provide for a review. Sir Geoffrey Vos MR agreed with the suggestion of Coulson LJ in *Canada Goose* that "persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review." I do not consider it appropriate to grant this interim injunction for longer than a year. But I consider that a year can be justified (bearing in mind the right to apply to vary or set aside at any earlier point). The pattern of protest activity is unpredictable. Providing a much shorter time period might mean that the court will be in no better position then than it is now to predict what is necessary to protect the claimant's interests. Moreover, the period of a year will allow the claimant to progress the litigation so that if continued restraint is necessary after the current order expires the court may have the option of making a final order (albeit, as *Barking and Dagenham* shows, that too will have to be time-limited).

(8) Persons unknown are unidentified but could, in principle, be identified and served

50. Five of those who took part in the protests on 28 April 2022 have been identified. For the reasons explained at paragraph 13 above, the claimant does not seek injunctive relief against them. Others who were involved on 28 April 2022, and others who may undertake such activities in the future, have not been identified. In principle, as and when they take part in such protests, they could be identified and could then be personally served with court documents.

51. In the interim, the issue as to how service should take place was the subject of careful consideration by McGowan J and is reflected in the order that was made on 5 May 2022. That provides on the face of the order that the matter would be considered by the court on 13 May 2022. It also provides that the claimant must send a copy of the order to more than 50 email addresses that are linked with the protest groups. That was done. It also provides that a copy should be made available on the claimant's website "shell.co.uk". Again, that was done. The frontpage of the website contains a link, with the text "Notice of injunction", from which the court documents, including the order of 5 May 2022, can be downloaded. The order also requires that the claimant use all reasonable endeavours to display notices at the entrances of every Shell Petrol station (and also elsewhere within the station) that identify a point of contact from which the order can be requested and identify a website where it can be downloaded. At the time of the hearing, the claimant had done this in respect of well over 50% of Shell petrol stations.

52. As to the future, there is good reason to make slight adjustments to the order that was made by McGowan J. That order was designed only to cover the short period between 5 May 2022 and 13 May 2022. The injunction will (subject to any further order) now remain in place for a longer period of time. It is appropriate therefore to require the claimant not just to take steps to ensure that the notices are displayed at the Shell petrol

stations, but also now to take steps to ensure that those notices remain in place. On the other hand, the order made by McGowan J required a degree of saturation (notices on every entrance to the petrol station, and on every upright steel structure forming part of the canopy infrastructure, and every entrance door to every retail establishment at the petrol station). That was appropriate to ensure initial notification of the existence of the order, but it is logistically difficult to maintain in the long term. It remains necessary for there to be clear notices at every Shell petrol station that draw attention to the injunction, but I do not consider that it remains necessary for these to be displayed on every single upright steel structure. It is also possible to make the order a little more flexible. That will ensure that notices are clearly visible but that the precise mechanism by which this is done can be tailored to the circumstances of individual petrol stations. I will adjust the order accordingly. This means that it is practically unlikely that a defendant could embark on conduct that would be in breach of the injunction without knowing of its existence.

53. By these means I am satisfied that effective service on the defendants can continue to take place.

(9) Persons unknown are identified by reference to their conduct

54. The persons unknown are described in the claim form, and in the injunction, in the way set out in the heading to this judgment. That description is in clear and simple language and relates to their conduct. It is usually desirable that such descriptions should, so far as possible, be based on objective conduct rather than subjective intention. The description that has been used does that. There is an element of subjective intention ("with the intention of disrupting the sale or supply of fuel to or from the said station") but (as with the terms of the injunction) that is unavoidable because of the nature of the tort of conspiracy to injure.

(10) Is the injunction necessary for and proportionate to the need to protect the claimant's rights?

55. The injunction interferes with the defendants' rights to assemble and express their opposition to the fossil fuel industry.

56. Unless such interference can be justified, it is incompatible with the defendants' rights under articles 10 and 11 ECHR and may not therefore be granted (see sections 1 and 6 of the Human Rights Act 1998). Articles 10 and 11 ECHR are not absolute rights. Interferences with those rights can be justified where they are necessary and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) ECHR. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2021] UKSC 23 [2022] AC 408 *per* Lord Sales JSC at [125].

57. Here, the aim is to protect the claimant's right to carry on its business. On the other hand, the defendants are motivated by matters of the greatest importance. The defendants might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is

thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison. This is not, however, "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" – *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039 *per* Lord Neuberger at [41]. It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants' actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the injunction is therefore sufficiently important to justify interferences with the defendants' rights of assembly and expression: cf *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 *per* Morgan J at [105] and *Cuadrilla per* Leggatt LJ at [45] and [50].

58. There is a rational connection between the terms of the injunction and the aim that it seeks to achieve. As explained at paragraphs 43-44 above, the terms are constructed so as only to prohibit activity that would amount to the tort of conspiracy to injure. That also means that the terms are no more intrusive than necessary to achieve the aim of the injunction. For the reasons given above (at paragraphs 47-49) the territorial and temporal provisions within the injunction are no more than is necessary to achieve its aim.

59. The injunction also strikes a fair balance between the important rights of the defendants to assembly and expression, and the rights of the claimant. It protects the latter so far as it is necessary to do so, but no further. It does not remove the rights of the defendants to assemble and express their opposition to the fossil fuel industry. It does not prevent them from expressing their views (including in a way that is noisy and/or otherwise disruptive) in close proximity to places where that industry takes place (including Shell petrol stations). It does not therefore prevent activities that are "at the core of these Convention rights" or which form "the essence" of such rights – see *DPP v Cuciurean* [2022] EWHC 736 *per* Lord Burnet of Maldon CJ at [31], [36] and [46]. Although the defendants' activities come within the scope of articles 10 and 11, they are right at the margin of what is protected.

60. All that is prohibited is specified deliberate tortious conduct (in one sense deliberate doubly tortious conduct, because of the nature of conspiracy to injure) that is carried out as part of an agreement and with the intention of harming the claimant's lawful business interests. It would not strike a fair balance between the competing rights simply to leave matters to the police to enforce the criminal law. Such enforcement could only, practicably, take place after the event, meaning that loss to the claimant is inevitable. Moreover, some of the activities that the injunction seeks to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions.

61. In *Cuadrilla* Leggatt LJ said (at [94]-[95]):

> "… the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest... this is an important distinction. …intentional disruption of activities of

> others is not "at the core" of the freedom protected by article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.
>
> Where… individuals not only resort to compulsion to try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect their conscientious motives will insulate them from the sanction of imprisonment." [original emphasis]

62. The context was different (the case was concerned with an appeal against an order for committal), but the same essential distinction applies to the fair balance question. Here, the injunction restrains protests which have as their aim (rather than as a side-effect) intentional unlawful interference with the claimant's activities.

(11) Notification of defendants

63. Section 12(2) of the Human Rights Act 1998 (see paragraph 24 above) requires that the claimant has taken all practical steps to notify the defendants of its application, or else that there are compelling reasons not to notify the defendants.

64. The identity of the defendants is unknown. It was thus impossible to serve them personally with the application. As explained at paragraph 51 above, McGowan J made extensive directions in respect of the service of the injunction (which contains details of the return date).

65. By these means, I am satisfied that the claimant has taken all practical steps to notify the defendants of its application (and I note that Mrs Friel was aware of the application, because she attended the hearing).

(12) Does the order restrain "publication"?

66. The injunction affects the exercise of the Convention right to freedom of expression. Section 12(3) of the Human Rights Act 1998 (see paragraph 24 above) provides that "[n]o such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Limited v Banerjee* [2004] UKHL 44 [2005] 1 AC 253 (at [15]). There was concern that the

incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at common law. The policy motivation that gave rise to section 12(3) has no application here.

69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].

70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication.

71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

72. I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context.

73. It is, though, necessary to address the decisions in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945. That case concerned an injunction that appears to have been similar in scope to the injunction in the present case. At first instance, Morgan J held (a) that section 12(3) applied (at [86]) and (b) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). As to the applicability of section 12(3), Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given.

74. On appeal ([2019] EWCA Civ 515 [2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applies. The Court of Appeal did not therefore consider or rule on that question. It did not need to do so because it was not in issue. The only issue in relation to section 12(3) was whether (on the assumed basis that it applied) the judge was wrong to approach the statutory test without subjecting the claimants' evidence to critical scrutiny. In that respect, the court accepted the "submissions of principle" and remitted the case for the judge to reconsider "whether interim relief should be granted in the light of section 12(3) HRA."

75. The Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, but (because it was assumed rather than determined that section 12(3) applied) I do not consider that it is authority that section 12(3) applies in the circumstances of the present case: *Re Hetherington* [1990] Ch 1 *per* Sir Nicholas Lord Browne Wilkinson VC at 10, *R (Khadim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 *per* Buxton LJ at [33] and [38].

76. *Ineos* does not therefore determine that section 12(3) applies to a case such as the present where there is no question of restraining the defendants from publishing anything. *Ineos* does not mandate a finding in this case that section 12(3) applies. I have concluded that section 12(3) does not apply. If I am wrong, then I have, anyway, found that the claimant is likely to succeed at a final trial (see paragraph 32 above).

Outcome

77. The claimant succeeds in securing the continuation of the order made by McGowan J so as to restrain, for a period of up to a year, at any Shell petrol station, the specified acts of the defendants (set out at paragraph 20 above) that amount to a conspiracy to injure the claimant.

Neutral Citation Number: [2022] EWHC 2421 (KB)

Case No: QB-2021-003782

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

DR THEODORE PIEPENBROCK	**Claimant**
- and -	
(1) LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE	**Defendants**
(2) NEMAT SHAFIK	
(3) CRAIG CALHOUN	
(4) SUSAN LIAUTAUD	
(5) ALAN ELIAS	
(6) JOANNE HAY	
(7) SAUL ESTRIN	
(8) GWYN BEVAN	
(9) HPN	
(10) ASSOCIATED NEWSPAPERS LIMITED	
(11) JONATHAN HARMSWORTH	
(12) GEORDIE GREIG	
(13) TOBYN ANDREAE	
(14) ANTONIA HOYLE	
(15) MARK DUELL	

- -
- -

Garry Piepenbrock, addressing the Court as McKenzie Friend for the **Claimant**
Laura Johnson QC (instructed by **DAC Beachcroft LLP**) for the **First – Eighth Defendants**
Alexandra Marzec (instructed by **ACK Media Law LLP)** for the **Tenth – Fifteenth Defendants**

Hearing dates: 23, 24 June & 14 July

- -

Approved Judgment

....

Mrs Justice Heather Williams:

Introduction	Paras 1 - 3
The issues	Paras 4 - 10
Orders made in the proceedings	Paras 11 - 18
The course of the hearing	Paras 19 - 28
The material facts and circumstances	Paras 29 - 59
The claims made in these proceedings	Paras 60 - 118
The 2020 Claim	Para 119
Strike out and summary judgment: the legal framework	Paras 120 - 130
Abuse of process and issue estoppel: the legal framework	Paras 131 - 134
The pleaded claim in negligence	Paras 135 - 167
Amendment to add a claim for intentional infliction of psychiatric injury	Paras 168 - 173
The pleaded claim under the PHA 1997	Paras 174 - 199
The pleaded claim under the EQA 2010	Paras 200 - 211
The pleaded claim under the HRA 1998	Para 212
The Data Protection pleaded claims	Paras 213 - 223
The CPR 3.4(4) applications	Paras 224 - 235
Totally without merit	Paras 236 - 240
The MAC List application	Paras 241 - 244

Ancillary matters	**Paras 245 - 247**
Conclusions and consequential orders	**Paras 248 - 251**

Introduction

1. The Claimant was employed as a Teaching Fellow by the London School of Economics and Political Science ("LSE") between September 2011 and September 2014. After the termination of this employment he commenced High Court proceedings in negligence, breach of contract and under the Protection from Harassment Act 1997 ("PHA 1997"). In a judgment handed down on 5 October 2018, [2018] EWHC 2572 (QB), Nicola Davies J (as she then was) rejected the PHA 1997 claim and accepted some of the allegations of negligence and breach of contract but dismissed those causes of action as the psychiatric illness upon which the Claimant relied had not been reasonably foreseeable. I refer to this as "the 2018 Judgment". Following this, articles about the Claimant's case were published in the *MailOnline* on 10 and 12 October 2018 and in the *Daily Mail* on 13 October 2018. The Claimant began a claim for defamation against Associated Newspapers Limited ("ANL"), as the publishers of the articles; and against the LSE and an employee, Joanne Hay, on the basis that she was the anonymous source referred to in two of the articles ("the 2020 Claim"). On 1 July 2020, Nicklin J declared that the Claim Form was not served during its period of validity and consequently the Court had no jurisdiction over the claim: [2020] EWHC 1708 (QB) ("the 2020 Judgment").

2. On 7 October 2021 the Claimant commenced the current action, relying on claims in negligence and under the PHA 1997, the Equality Act 2010 ("EQA 2010"), the Human Rights Act 1998 ("HRA 1998"), the Data Protection Act 2018 ("DPA 2018") and the General Data Protection Regulations 2018 ("GDPR 2018"). The Second to Eighth Defendants are sued on the basis of their relationship to the LSE. I refer to them collectively as "the LSE Defendants" and individually as "D2", "D3" and so forth. The Ninth Defendant, HPN ("D9") was formerly a graduate teaching assistant ("GTA") at the LSE. She is separately represented in these proceedings and was not directly involved in the applications before me. The Eleventh to Fifteenth Defendants are sued on the basis of their relationship to ANL. I refer to them collectively as "the ANL Defendants" and individually as "D11", "D12" and so forth.

3. There are three applications before me. Firstly, by an application notice dated 2 March 2022, the LSE Defendants applied for the Claimant's Particulars of Claim to be struck out in whole or part pursuant to CPR 3.4(2)(a), (2)(b) or (2)(c) and the claim dismissed and/or for summary judgment or for an order staying any remaining part of the claim pending payment of the costs ordered in the defamation claim and/or provision of a CPR compliant Particulars of Claim. Secondly, by an application notice

dated 7 March 2022, the ANL Defendants made a similar application. The ANL Defendants also applied for the claim to be transferred to the Media and Communications ("MAC") List; and by an Order dated 9 March 2022 Nicklin J transferred the case to the MAC list. By an application notice dated 4 May 2022, the Claimant applied to vary or discharge this Order, which is the third application that I am concerned with.

The issues

4. At the hearing Ms Johnson QC clarified that the LSE Defendants' no longer relied upon CPR 3.4(2)(c). The following contentions were maintained:

   i) The Particulars of Claim disclose no reasonable grounds for bringing the claim against any of the LSE Defendant and thus should be struck out in their entirety pursuant to CPR 3.4(2)(a);

   ii) The Particulars of Claim are an abuse of the Court's process in so far as they relate to the LSE Defendants and thus should be struck out in their entirety pursuant to CPR 3.4(2)(b). This submission rests primarily on the *Henderson v Henderson* (1843) 3 Hare 100 form of abuse, namely that in certain circumstances a party is precluded from raising in subsequent proceedings matters which could have been part of an earlier claim. Reliance is also placed on the form of abuse that may arise where a second claim is brought in relation to the same subject matter as a first claim which was struck out as an abuse of process or for inexcusable procedural failure;

   iii) Alternatively, summary judgment should be entered in respect of the claims against all of the LSE Defendants pursuant to CPR 24.2, as these claims have no reasonable prospect of succeeding and there is no other compelling reason why the case should be disposed of at trial;

   iv) Alternatively and in so far as any claims remain, they should be stayed pursuant to CPR 3.4(4) as the Claimant has not paid the costs he was ordered to pay following the 2020 Judgment and the current proceedings arise out of the same or substantially the same facts;

   v) In the further alternative, the Particulars of Claim should be struck out and "unless orders" made directing that the claim will be automatically struck out unless a properly pleaded Particulars of Claim compliant with CPR Part 16 is provided; a CPR compliant medico-legal report in support of the claim for psychiatric injuries is served; and the outstanding costs are paid by a stipulated deadline.

5. In so far as the strike out and/or summary judgment applications are granted, the LSE Defendants invite the Court to certify that the claim or the relevant part of it is totally without merit. Further, the LSE Defendants ask the Court to: (a) order that the Claimant must correspond solely with their legal representative in relation to this claim and not email or contact the LSE Defendants directly; and (b) give case management directions as appropriate, including that the Claimant's son, Garry Piepenbrock, is not authorised to act on his behalf.

6. The ANL Defendants' application is based on equivalent contentions, save in two respects: (a) they also submit that the Particulars of Claim should be struck out pursuant to CPR 3.4(2)(c) because there has been a failure to comply with a rule, practice direction or order; and (b) the second form of abuse of process referred to in para 4 (ii) above is not relied upon.

7. The LSE Defendants' application is supported by a witness statement from Tom Walshaw, solicitor at DAC Beachcroft LLP dated 2 March 2022. The ANL Defendants' application is supported by a statement dated 7 March 2022 from Susan Aslan, a partner at ACK Media Law LLP.

8. The Claimant resists the applications. He filed a witness statement dated 3 May 2022 in support of his position. He submits that the pleaded Particulars of Claim do disclose claims with reasonable prospects of success. He emphasises that he is a litigant in person and that in so far as there are any deficiencies in the pleading, the proportionate approach is to permit him an opportunity to rectify this by amendment. He also suggests that strike out or summary judgment would be premature; the evidence should be heard and evaluated at trial. He disputes that there has been any abuse of process, contending that this claim has been carefully tailored to avoid raising issues which have already been litigated. He says that the 2020 Judgment did not strike out the 2020 Claim and nor was there a finding of abuse of process or inexcusable procedural failure. He submits that it would be an infringement of his rights under Article 6, European Convention on Human Rights ("ECHR") to stay this claim until he has paid the costs ordered against him in the 2020 Claim. Whilst indicating a willingness to amend the claim, he resists the imposition of unless orders. He also takes issue with the ancillary orders sought by the Defendants.

9. In relation to his own application, the Claimant submits that it would be more appropriate for this case to be heard in the King's Bench Division's general list, given the central importance of the claim for psychiatric injury. The ANL Defendants maintain that the case should remain in the MAC list and D9 has filed written submission in support of that position. The LSE Defendants are neutral on this issue.

10. Helpful skeleton arguments were prepared by the Claimant and on behalf of the LSE Defendants and the ANL Defendants in advance of the hearing. By Order dated 8 March 2022, Nicklin J had directed that the Defendants' skeleton arguments be filed and served at least seven working days before the hearing, so that the Claimant had an adequate opportunity to consider the points raised.

Orders made in the proceedings

11. As I have already indicated, by an Order dated 9 March 2022 Nicklin J directed that the claim be transferred to the MAC List. In his accompanying reasons he explained that this was because the Particulars of Claim contained claims falling within the MAC List's jurisdiction. As the Order had been made without a hearing, he indicated the parties could apply to vary or discharge this direction. He also directed that until the applications of the LSE Defendants and the ANL Defendants had been determined, any non-party wishing to inspect or obtain a copy of the Particulars of Claim must apply to the Court on notice to the parties.

12. Following an application made by D9, by Order dated 27 April 2022, Nicklin J directed pursuant to CPR 39.2(4) that her name and address was to be withheld from the public and not to be disclosed and that in these proceedings she was to be referred to as “HPN” (and any references to her address were to be substituted with references to her solicitor’s address). He also directed that no non-party could inspect or obtain a copy of any document on the Court file, without the permission of a Master or Judge; and that pursuant to s.11 Contempt of Court Act 1981 (“CCA 1981”), there was to be no publication in any report, or otherwise in connection with these proceedings, of the identity of D9 or of any matter likely to lead to her identification.

13. In the same Order of 27 April 2022, Nicklin J directed that D9’s application for a declaration that the Court has no jurisdiction over the claim against her was to be heard by a Judge of the MAC List in the period 3 October – 25 November 2022. Accordingly, I am not concerned with that application at this stage.

14. By application notice dated 4 May 2022, the Claimant applied to set aside the anonymity provisions in the Order of 27 April 2022. On 5 May 2022, Nicklin J directed that the set aside application would be heard at the same time as D9’s jurisdiction application.

15. By an Order amended on 25 May 2022, Nicklin J directed that the Claimant’s application to vary or discharge his order transferring the case to the MAC List would be heard with the Defendants’ strike out and summary judgment applications, (which by then had been listed for hearing on 23 – 24 June 2022). The Judge also directed that the parties were to co-operate in drawing up a timetable for submissions at this hearing, including making provision for regular scheduled breaks, if requested by the Claimant.

16. By application notice dated 15 June 2022, the Claimant applied for three adjustments in respect of the forthcoming hearing. He relied upon the report of Dr Martin Pearson, Chartered Clinical Psychologist, dated 26 June 2019, which diagnosed him as having Asperger’s Syndrome and Autistic Spectrum Disorder without intellectual or language impairment. The Claimant emphasised the importance for him of having a clear and predictable structure for the hearing and the risks of him experiencing sensory overload. He also referred to his health problems concerning long-term anxiety and depression.

17. By Order dated 21 June 2022 I granted the adjustments sought as follows:

    i) I permitted the hearing to be held remotely via MS Teams. None of the Defendants objected to this and the Claimant indicated it would assist him in managing his stress levels;

    ii) I permitted the Claimant’s son, Garry Piepenbrock, to act as his McKenzie Friend at the hearing, including by making submissions to the Court. I emphasised that he was granted rights of audience for this purpose only and that this was not an authority to conduct litigation on the Claimant’s behalf. The other parties did not object and I was satisfied that there was good reason to grant the application. Mr Piepenbrock had assisted his father in several previous hearings before Courts and Tribunals and was familiar with the matter. He had acted as his father’s representative at the recent merits hearing

before the Employment Tribunal ("ET"). The ET's judgment, promulgated on 8 June 2022, indicated that Dr Piepenbrock had not attended parts of this (remote) hearing after experiencing what he characterised as autistic meltdowns. It appeared from the judgment that Garry Piepenbrock's representation had been of assistance all round. I accepted that the Claimant would experience difficulties representing himself and that to require him to do so would likely lead to the hearing being disrupted unnecessarily and disproportionately prolonged;

iii) I set out a timetable for the hearing that would apply in default of the parties' agreement (as they had not been able to agree on one thus far). The Defendants were to have the first day to make their submissions and the Claimant the second day to respond. There would be a scheduled ten minute break after every 50 minutes of the hearing and unscheduled breaks would be accommodated if the need arose.

18. I was aware that the ET had expressed concerns about aspects of Dr Pearson's report at paras 7.5 – 7.7 of its judgment. I was not in a position to make and have not made specific findings about the extent of any disabilities that the Claimant has. However, I was willing to proceed on the basis of Dr Pearson's report for the purposes of considering what, if any, adjustments to make for the hearing and for the purposes of considering the substantive applications that were before me (and the Defendants did not suggest otherwise).

The course of the hearing

19. The hearing took place via MS Teams. Scheduled ten minute breaks were permitted after each 50 minutes of Court time, with some flexibility applied where Mr Piepenbrock asked to take a break a little early. On three occasions I allowed the Claimant to have an unscheduled break in the circumstances I explain below. Dr Piepenbrock sat next to his son during the majority of the hearing and was able to provide him with instructions as matters progressed. I pay tribute to the calm, measured, courteous and clear way in which Mr Piepenbrock (who is only 19 years old) conducted himself and presented the submissions on behalf of his father. I am quite satisfied that all parties had a fair and reasonable opportunity to present their submissions.

20. In addition to the adjustments I had directed in advance, during the hearing:

i) I allowed Mr Piepenbrock to pause his submissions and mute his microphone to take instructions from his father when he asked to do so;

ii) I explained various matters of law and procedure and checked that Mr Piepenbrock did not require further clarification;

iii) I made it clear to Mr Piepenbrock that he should feel able to check with me if he was unsure about anything and he did so on various occasions;

iv) At Mr Piepenbrock's request, I permitted the hearing to finish earlier than scheduled on the second day (at around 3.45 pm) as he was clearly tiring; and

v) I did not prevent Dr Piepenbrock from interjecting his own remarks on occasions, albeit I suggested that it would probably be easier for Mr Piepenbrock to maintain his focus and the flow of his submissions if these interjections were avoided as much as possible.

21. On the first day of the hearing matters proceeded smoothly until shortly before 3pm. Ms Johnson had completed her submissions and Ms Marzec was in the process of making her submissions. As she was reading from the 10 October 2018 *MailOnline* article, Dr Piepenbrock became visibly agitated, making rapid thumbs up gestures. Ms Marzec commented that it appeared he liked the article. In response the Claimant became very upset, saying that Ms Marzec should show him respect as an autistic person rather than mocking him. Dr Piepenbrock then left the video call abruptly. Mr Piepenbrock asked for a break so that he could check on his father, which I granted. I asked him to provide an update on the position in ten minutes. I also made clear that it was not helpful for any party to comment upon gestures being made by another party and that this should not happen again. After ten minutes, Mr Piepenbrock reported that his father had undergone an autistic meltdown and was not able to continue that day. He asked for the case to be adjourned until the following day as his first concern was to attend to his father. Neither Ms Johnson nor Ms Marzec objected to this request, which I granted. Mr Piepenbrock was evidently distracted by what had occurred and it would not have been fair to require him to continue in these circumstances and without his father available to hear the submissions and give instructions.

22. As a result of the early finish, hearing time was lost. I indicated before adjourning for the day that as Ms Marzec had yet to make a substantial part of her submissions, I would not require Mr Piepenbrock to complete his submissions the next day if he felt unable to do so and that if necessary we would adjourn part heard.

23. The hearing began as scheduled on the second day. Mr Piepenbrock thanked me for granting the adjournment. Dr Piepenbrock was present; he said that it should be appreciated that his gestures were a part of managing his stress levels and he reiterated his upset with Ms Marzec's comment. I reminded the parties of the observations I had made at the end of the previous day. I said I understood why the events had been upsetting for Dr Piepenbrock, but I did not consider that Ms Marzec had intended to mock him. I indicated that I did not agree with his characterisation that I had "reprimanded" Ms Marzec the previous day.

24. Ms Marzec began her submissions by returning to the point she had been making at the end of the first day (that the Claimant had not appeared to be upset by the 10 October 2018 *MailOnline* article at the time). Dr Piepenbrock immediately became agitated. I considered it unnecessary for this point to be reiterated and asked Ms Marzec to move on.

25. The hearing proceeded relatively smoothly for the remainder of the second day. At one point whilst Mr Piepenbrock was making his submissions, Dr Piepenbrock intervened and became tearful. I granted a short unscheduled break and after this both father and son indicated that they felt able to resume. It was apparent that submissions could not be concluded that day and I granted Mr Piepenbrock's request to rise a little earlier than usual. The hearing was then adjourned to a further half day on 14 July 2022.

26. The third day proceeded smoothly until almost the end of the hearing, when Ms Marzec was making her submissions in reply. She made an observation about the Claimant's family finances which Dr Piepenbrock found upsetting and insulting. He interrupted to remonstrate with her and then abruptly left the call. I agreed to a short adjournment to enable Mr Piepenbrock to check on his father and to see if he could re-attend. He provided an update a few minutes later. He said that his father had suffered a meltdown and would not be able to continue that day. He proposed that the outstanding matters were dealt with by way of written submissions. Ms Marzec indicated that she only had one point left to make which would take no more than two minutes. In the circumstances I ruled that the hearing should proceed, as no prejudice would result to the Clamant from this course. Mr Piepenbrock had already made his submissions and did not have a further right of reply and thus he did not need to be able to take instructions at this juncture and the submissions in reply were very close to finishing. (Ms Johnson had already given her reply.)

27. Ms Marzec duly concluded her submissions in two minutes or less, simply making the point that whilst the Claimant had submitted he should be allowed to amend his claim to add a cause of action for intentional infliction of psychiatric injury (if I decided this was not already pleaded), the appropriate course was to strike out the current claim and to address any new claim, including any abuse of process arguments, if and when it was brought.

28. However, Ms Marzec then sought to re-visit the events that had led to Dr Piepenbrock leaving the call. Whilst I understood that she wanted to respond, given she had been criticised in trenchant terms by both the Claimant and Mr Piepenbrock, I was not willing to permit this. The point she had made which had caused the upset was not helpful to me in terms of the issues that I had to resolve at this stage and it had plainly had an inflammatory effect on the Claimant and was likely to cause further difficulties if the matter was re-visited at this juncture. In declining to permit Ms Marzec to address me on this, I did indicate that I did not consider that she had intentionally caused upset. I then brought the hearing to a conclusion. At the end Mr Piepenbrock thanked me for the fair way in which I had conducted the hearing.

<u>The material facts and circumstances</u>

29. I stress that it is not my role to resolve any factual disputes at this stage of the proceedings. I will provide a neutral chronology of the events necessary to understand the pleaded claim and the rival submissions made by the parties, including a summary of earlier judgments, where relevant.

Events 2011 - 2014

30. From 1 September 2011 the Claimant was employed as a Teaching Fellow in the LSE's Department of Management on the Executive Global Master's in Management ("GMiM") programme. His contract was initially for a year and was subsequently extended to a three year period. On 1 September 2012 he was also appointed to the role of Deputy Academic Dean in the GMiM programme. In September 2012, D9, one of his former students, was appointed as his GTA.

31. In November 2012 the Claimant undertook a lecture tour in the United States. The Claimant and D9 were in Boston on 12 November and then in Seattle on 13 – 14

November. On 18 November 2012 D9 sent an email to the LSE resigning her position. The events in Boston and Seattle were considered in the 2018 Judgement and by the ET, as I will come on to. In summary, the Claimant said that on 12 November 2012 D9 invited him to her hotel room and greeted him in a state of partial undress (having been infatuated with him for some time). He said that he spurned her advances and she was very unhappy about this. Although some of the content was disputed, it was agreed that extensive conversations took place between the Claimant and D9, firstly in a park in Boston and secondly in a hotel room in Seattle. The LSE, who had been contacted by or on behalf of D9, paid for her to fly out of Seattle in the early hours of 14 November 2012.

32. D9 gave her account of events in an email sent to D7 and D6 on 18 November 2012. She said that on the first night in Boston, Dr Piepenbrock had tried to make her admit that she had feelings for him and had said she had a beautiful body. She said that when she had not responded he had described her as “damaged” and “destructive”. After arriving in Seattle at about 11pm they had been met by Mike Wargel (a former colleague of Dr Piepenbrock); and although it was late, the Claimant had insisted that the three of them went to his hotel room to have a discussion about self-growth. She said that she felt pressured to discuss things that she did not wish to talk about and that the Claimant had referred to her as “unstable” and “unpredictable”. She said he had threatened to ruin her reputation; and that whilst she had spoken to her family, who had helped her to book a flight, Dr Piepenbrock and Mr Wargel had waited outside her door. The full email account appears at Appendix 1 to the 2018 Judgment. Subsequently D9 made a formal complaint of harassment dated 10 December 2012, which is set out at Appendix 2 to the 2018 Judgment.

33. On 12 December 2012 the Claimant was told of the fact of the formal complaint. He was not given the details at this stage. He commenced a period of sickness absence and did not return to work at the LSE at any stage thereafter. He did not attend meetings that were arranged to discuss his absence.

34. On 10 January 2013 the Claimant was sent a redacted version of D9’s complaint. He did not receive an unredacted version until 17 April 2013. On 19 June 2013 a finding was made that D9’s grievance was “not proven”. The Claimant submitted numerous complaints and grievances about various LSE employees. Some of these grievances were upheld, others were rejected. His contract was not renewed when the three year fixed term came to an end.

The 2018 Judgment

35. Dr Piepenbrock was represented by leading and junior counsel at the July 2018 hearing. His claim under the PHA 1997 was based on the proposition that the LSE was vicariously liable for the actions of D9 (known as “Miss D” in those proceedings) who he alleged had made false and malicious allegations against him. The breach of contract claim was based on failure to follow the LSE’s Harassment Policy, which was incorporated into the Claimant’s contract. The alleged negligence related to the LSE’s handling of D9’s complaint. The Claimant alleged that he had sustained consequential psychiatric injury and he claimed substantial past and future loss of earnings on the basis that his psychiatric injury had rendered him unable to continue with his chosen career.

36. As material to the current claim and the issues before me, Nicola Davies J found:

i) In all likelihood D9 had developed an infatuation with the Claimant. This should have alerted him to the need for professional boundaries with her when he embarked on the American trip (paras 205 - 206);

ii) D9's conduct in Boston caused the Claimant considerable concern (para 208);

iii) D9's contemporaneous Skype messages indicated that the Claimant had not made his concerns clear to her during their conversation in the Boston park. It was inappropriate and unnecessary for him to have embarked on a further two-hour conversation with her on the same day (para 209);

iv) In Seattle, the conversation began at 12.30 am. To embark upon yet another conversation in the early hours of the morning in a hotel room with a young woman in her twenties and two older men went beyond inappropriate; it was unprofessional and wrong. The Claimant told D9 that he was going to have to end their working relationship and she became very upset (para 211);

v) There was no sensible justification for the Claimant's conduct in the hotel room in Seattle. There was nothing sexual in the Claimant's persistence in requesting these conversations; it was an inability to recognise boundaries and a lack of insight (paras 212 and 213);

vi) In the circumstances, it was not difficult to understand why D9 felt she had a legitimate cause to complain to the LSE about his conduct;

vii) By 22 November 2012 it was known that D9 was communicating her concerns to fellow students and subsequently to members of the faculty. No steps were taken to stop this until she was spoken to on 29 November 2012. No good or adequate explanation for this delay had been given (para 219);

viii) Once D9 filed her formal complaint on 10 December 2012 it was incumbent on the LSE to proceed expeditiously in accordance with the Harassment Policy, but it was not until the Claimant's wife chased the matter that a redacted version of the complaint was supplied on 13 January 2013. The redacted text concerned the account of Mr Wargel (para 220). The unredacted version of the complaint was not supplied until April 2013 (para 221);

ix) It was not difficult to understand why D9 sent her email of 18 November 2012. It was substantially based on the events in Seattle which (unlike those in Boston) were undisputed. It showed a course of conduct by the Claimant which, whilst well intentioned on his part, was inappropriate and unprofessional. It was a legitimate complaint and it was not made maliciously. She should not have disseminated the complaint, but no one told her not to and she stopped when they did do so (paras 229 - 230). Accordingly, D9's conduct did not amount to harassment within the meaning of the PHA 1997 (para 230);

x) There were a series of failures by the LSE that represented a breach of the duty of care owed to the Claimant as an employee. The process was unnecessarily protracted. Within two working days of 19 November 2012 the LSE should

have attempted to ascertain whether D9 wished to pursue a formal complaint. There was a failure to take steps to prevent her from disseminating her email to staff and students at a time when the Claimant was unaware of it. Once the formal complaint was received it should have been disclosed to the Claimant within days and the redactions were unnecessary. The entirety of the complaint should have been disclosed no later than 19 December 2012 (paras 231 – 232);

xi) The following allegations did not breach the duty of care owed to the Claimant: not disclosing the 18 November 2012 email to him; not asking him about that account; not permitting him to recruit another GTA from the student cohort that had included D9; instructing him not to attend the student graduation and party; and not promoting him to Professor of Practice (para 234);

xii) Refusing to allow the Claimant's wife to act as his "friend" was in breach of the Harassment Policy and thus a breach of contract (para 236); and

xiii) It had emerged during his cross-examination that whilst the Claimant was on sickness absence from the LSE he had visited India where he had given talks and/or lectures. This was at a time when his wife had been informing the LSE that he was too ill to attend an interview and he had not responded to requests to attend an occupational health assessment. The Claimant's omission to mention this earlier did not wholly undermine his evidence, but it did call into question how much he was able to do in the early months of 2013 and whether he could have responded more positively to the LSE's attempts to communicate with him during this time (para 204).

37. Mrs Justice Nicola Davies dismissed the PHA 1997 claim on the basis that I indicated at para 36(ix) above. In her carefully worded judgment she did not make a specific finding, one way or the other, as to whether D9 had behaved as the Claimant alleged in her hotel room doorway in Boston on 12 November 2012. By way of example: "if Miss D did behave in a provocative, even sexually provocative manner…" (para 207); "if Miss D did behave in the manner alleged…" (para 208); "…on his account, it manifested itself in sexually provocative behaviour…"(para 214); and "whatever it is Miss D did when she opened the hotel door to the claimant in Boston…" (para 227). The Claimant is not correct in asserting that the 2018 Judgment found that D9 had behaved in the hotel doorway as he alleged.

38. Having found breaches of contract and the duty of care, Nicola Davies J went on to consider whether the LSE's acts or omissions had created a foreseeable risk of injury to the Claimant against which it should have protected him (para 242). She noted that on his undisputed account, it was the events of 12 December 2012 when he was notified of D9's complaint that triggered the development of his psychiatric illness (para 243). She observed: "The subsequent delay [by the LSE] and the failure to allow the claimant's wife to act as his 'friend' would aggravate the illness, on the claimant's case, it was not causative of it" (para 243). She found the Claimant had suffered from a depressive illness from 12 December 2012, preferring the Claimant's medical evidence from Professor Fahy "as to the illness suffered by the claimant" to that of the Defendant's expert, Professor Maden (paras 247 – 249). However, she did not consider that this illness have been reasonably foreseen by the LSE. There had been nothing to put them on notice of a prior vulnerability; and it was foreseeable that

notification of the complaint would cause stress, but not that it would cause psychiatric illness; the severity of the Claimant's reaction was a reflection of his own personality (para 250).

39. The Claimant was refused permission to appeal the 2018 Judgment.

The Daily Mail articles

40. On 10 October 2018, five days after the 2018 Judgment was handed down, ANL published an article in the *MailOnline* written by D15 ("Article 1"). It was headlined: "*We must protect MEN in #MeToo era: Academic, 52, loses £4m claim against London School of Economics after an assistant, in her 20s, 'ruined his life' with false claims when he rejected her*". The body of the article referred to the Claimant's allegations concerning D9's behaviour and to Nicola Davies J's ruling that she did not harass him. It included quotes from the Claimant urging balance in the need to protect both men and women in the context of a rising number of complaints of sexual harassment.

41. Two days later on 12 October 2018 a second article appeared in the *MailOnline*, written this time by D14 ("Article 2A"). It was headlined: "'*He's a master manipulator': Professor who put himself forward as a MeToo martyr after being accused of impropriety by spurned assistant is not what he seems, associate claims*". The text included reference to the Claimant's allegations, the development of his depression from December 2012, the LSE's finding that D9's complaint was "not proven" and aspects of the 2018 Judgment. The article said that whilst the Claimant had been cleared of impropriety, Nicola Davies J had "delivered a scathing verdict on his conduct in respect to his assistant's actions" and she had not accepted that D9's complaint was oppressive or unacceptable. The Claimant was described as: "intent on putting himself forward as a spokesperson for men who have faced unfounded allegations of sexual harassment".

42. Of particular concern to the Claimant, the text said: "Speaking to the Mail this week, one former associate of Ted and Miss D claimed that Ted was a 'really good manipulator' who sought to promote his own version of events. 'I know the student' they said. 'He was the teacher. He had power over her. The onus was on him to check his own behaviour'".

43. The article went on to say that "the source who the Mail spoke to" knew D9 and thought the characterisation of her in the High Court trial (in which she did not give evidence) as dressing inappropriately and craving attention "simply wasn't true". The writer of the article commented that it "hardly seems sensible" for the Claimant to have invited D9 on the American trip given he believed her to have developed a crush on him. The events in Boston and Seattle were referenced, including the Claimant's allegation concerning D9 opening her door in a state of undress. In relation to that, D14 said: "Two conflicting versions of events, then, yet regardless of whether she had exposed herself to Ted or not, it is easy to see how the young woman would be intimidated by an overnight altercation in a hotel room with two middle-aged men her professional seniors". It was said that after the return to London the Claimant was told of the complaint but not of its contents and: "Ted's paranoia, perhaps understandably went into overdrive".

44. In relation to D9's dissemination of her complaint, the text said that "the Mail's source…believes her actions were understandable". Reference was made to the Claimant having travelled to India to give lectures whilst on sick leave and to the Judge's observations as to his non-engagement with the LSE during this period. The "former associate" was quoted as saying: "refusing to co-operate, that makes me angry. I think he's a master manipulator".

45. D14 wrote that: "Despite repeated requests from the Mail, Dr Piepenbrock has not responded to the allegations against him". The article included a further quotation from the "former associate" that: "He was in a position of power, she looked up to him, and it got to the point where she felt unsafe". The author concluded: "Put like that, many might wonder whether he is quite the martyr he claims to be".

46. The article that was published on 13 October 2018 in the print edition of the *Daily Mail* ("Article 2B") had essentially the same contents as Article 2A, but a different headline: "MeToo martyr or 'manipulator'?".

The 2020 Judgment

47. On 11 October 2019 the Claimant issued the Claim Form in Case No. QB-2019-003622 against ANL, the LSE and D6. The claim was described as follows:

> "The Claimant claims compensation for damages arising from defamation (slander and libel) in accordance with the Defamation Act 2013 and arising from malicious falsehoods in accordance with the Defamation Act 1952.
>
> These arise from defamatory articles about the Claimant published in the MailOnline on 12 October 2018 and the Daily Mail on 13 October 2018 and which contain defamatory statements and malicious falsehoods made by Associated Newspapers Ltd and Ms Joanne Hay, the Deputy Chief Operating Officer of the [LSE], while acting in the course of her employment with the LSE."

48. The Claimant elected to serve the Claim Form himself. There was some correspondence between the parties in the period 11 October – late November 2019 (described at paras 13 – 17 of Nicklin J's judgment). After that there were no communications from the Claimant until 10 February 2020 when emails were sent to various individuals at ANL and at the LSE (copying in the Defendants' solicitors) purporting to serve the Claim Form along with Particulars of Claim. The latter ran to 300 pages with appendices and included claims, outside the terms of the Claim Form, under the PHA 1997, the EQA 2010, the HRA 1998 and the DPA 2018. The Defendants did not accept that the Claim Form had been validly served. After receiving a communication to that effect from ANL's solicitors on 13 February 2020, the Claimant re-sent the Claim Form and the Particulars of Claim by post. It was agreed that this was after the four month time limit for service of the Claim Form had expired at midnight on 11 February 2020.

49. Mr Justice Nicklin ruled that the Claim Form had not been validly served. Service on the solicitors had been ineffective because: (a) the requirements of CPR 6.7 were not

met as the Defendants had not provided their solicitors' addresses as addresses at which the Claim Form could be served and the solicitors had not stated that they were instructed to accept service; and (b) they had not previously indicated in writing that they were willing to accept service by email, as required by Practice Direction 6A, para 4.1. Furthermore, service on the Defendants was ineffective as none of them had indicated in writing that they were willing to accept service by email (para 37). The Judge took into account the fact that both solicitors firms had previously told the Claimant that he should correspond with them rather than their clients; however, this did not alter the requirements for valid service of a Claim Form and the relevant provisions of the CPR and Practice Direction 6A were perfectly clear (para 38).

50. Mr Justice Nicklin refused the Claimant's application under CPR 7.6(3) for a retrospective extension of time for serving the Claim Form as he had not taken all reasonable steps to serve it within its period of validity (para 46). He did not have a good reason for failing to attempt service at an earlier stage; he had been able to prepare the 300 page Particulars of Claim during this period (para 47). Further, he had not responded to the Defendants' offer of a standstill agreement, which would have suspended the operation of the one year limitation period for up to four months (paras 48 – 49).

51. The Judge also rejected the Claimant's application under CPR 6.15 to permit service of the Claim Form by the alternative means employed (para 67). In so doing he rejected the proposition that the Claimant had been misled by the solicitors' earlier correspondence asking him to correspond with them rather than their clients; he had also sent the Claim Form to the individual Defendants and his principal error had been the unrelated one of thinking that email was an acceptable form of service (paras 61 - 62). The Claimant had relied upon a letter from his doctor, Dr Andrew Iles, noting that he had symptoms of depression and met the diagnostic criteria for Asperger's syndrome without intellectual or language impairment. The Judge did not accept that his disabilities had significantly contributed to the failure to serve the Claim Form in time, given that Dr Piepenbrock said he had considered the terms of CPR and he had the assistance of his wife (paras 61 - 62). The damage was self-inflicted by leaving service of the Claim Form to the last minute and there was no "good reason" within the meaning of CPR 16.5(2) (paras 63, 65 and 67).

52. For similar reasons, the Judge rejected the Claimant's applications: to dispense with service of the Claim Form pursuant to CPR 16.6 (para 70); for relief from sanctions pursuant to CPR 3.9; and for rectification of an error of procedure under CPR 3.10 (paras 72, 82 and 83).

53. Accordingly, by his Order dated 1 July 2020, Nicklin J granted a declaration that the Claim Form was not served during its period of validity. He ordered the Claimant to pay the Defendants' costs of the action and their costs of a contested anonymity application in respect of D9, to be subject to detailed assessment if not agreed. The Claimant was directed to pay the following suns on account of costs by 4.30 pm on 31 July 2020: £30,000 to ANL and £25,000 to the LSE and D6. He also refused the Claimant's application for permission to appeal. In his accompanying reasons, the Judge noted that the Claimant had referred to his dire financial position, but had not provided any real evidence of this and that in any event it was not relevant to the Defendants' costs entitlement. By Orders dated 18 November 2020 and 5 February 2021, Lewison LJ refused the Claimant's applications for permission to appeal.

Subsequent correspondence regarding costs

54. It is agreed that the Claimant has not made the payments on account of costs ordered by Nicklin J. Detailed assessment of costs has yet to take place.

55. On 2 October 2021, ANL's solicitors wrote to the Claimant requesting payment. On the same day the Claimant's wife (Professor Sophie Marnette-Piepenbrock) emailed D12 and D13 responding on his behalf, accusing them and their solicitors of causing or exacerbating his psychiatric injury and threatening to bring harassment proceedings for foreseeably causing psychiatric injury.

56. By letter dated 26 April 2021, ANL's solicitors wrote to the Claimant again about the outstanding costs, pointing out that with accrued interest the sum due was now £31,966.03. The Claimant was asked to respond with payment proposals by 4.30 pm on 3 May 2021. Professor Marnette-Piepenbrock replied by email sent on 3 May 2021 in similar terms to her previous communication. A further letter dated 2 February 2022 requesting payment was sent to the Claimant.

The ET Claim

57. The Claimant brought claims in the ET for unfair dismissal, for discrimination arising from disability under s.15 EQA 2010 and for victimisation pursuant to s.27 EQA 2010. The proceedings were stayed pending resolution of the High Court claim. The disability discrimination allegations are listed in para 2.10 of the ET's judgment. Broadly they related to the contents of various internal emails sent between LSE personnel; the non-renewal of the Claimant's employment contract; and the non-renewal of his Deputy Academic Dean contract. The 19 allegations of victimisation are listed at para 2.19. They concerned the LSE's response to grievances raised by the Claimant; the contents of internal emails passing between LSE personnel; the means of communications with the Claimant when he was off sick; and failing to renew his fixed-term contract.

58. In April 2020 the ET refused the Claimant's out of time application to amend his claim to add new causes of action for discrimination and harassment based on sex, disability, race and religion and to add 13 new Respondents. The Claimant appealed this refusal to the Employment Appeal Tribunal ("EAT"). One aspect was permitted to proceed to a full appeal hearing. This concerned allegations of sex discrimination and harassment in respect of a grievance the Claimant said he had raised on 19 November 2012. Following a hearing on 30 November 2021, the judgment of HHJ Shanks was handed down on 21 December 2021 dismissing the appeal. He found that the Employment Judge ("EJ") had been wrong to conclude that the new claim added little or nothing to the existing claims, but that even if this error had not been made, the EJ would properly have reached the same outcome, given his other findings, including that the new claims could and should have been brought at the outset.

59. The ET dismissed each of the claims. It considered that it was bound by the findings made in the 2018 Judgment. The ET concluded that the Claimant was fairly dismissed for the reasons it identified in paras 7.90 – 7.102. The ET accepted that the Claimant was disabled on the basis of his anxiety and depression which had developed from December 2012 (paras 7.12 – 7.15, 7.18). No findings were made as to whether the Claimant was autistic (para 7.11). As regards the discrimination arising from

disability claim, his dismissal was found to be a proportionate means of achieving a legitimate aim (para 7.134) and the other allegations were rejected on the basis that they did not constitute unfavourable treatment and/or were justified (paras 7.135 – 7.148). The victimisation claim was rejected on the basis that the Claimant had not satisfied the s.27 requirement of having undertaken a "protected act" because the communications he relied upon had not been made in good faith (paras 7.53 – 7.60). This was because the Claimant's allegations concerning D9's sexual advances on 12 November 2012 in Boston were false (paras 5.204 – 5.224, 7.34 and 7.60).

The claims made in these proceedings

The Defendants

60. The individual LSE Defendants are as follows:

i) Nemat Shafik, D2, has served as Director of the LSE since September 2017. She was not personally involved in any of the matters in issue;

ii) Craig Calhoun, D3, was the Director of the LSE between 2012 and 2016. Although in post during some of the pleaded events, the Claimant does not suggest that he was involved in any of the matters in issue;

iii) Susan Liautaud, D4, is an independent member of the LSE's Council. She has been Chair of Council since August 2020. She was Vice-Chair of the Court of Governors between 1 August 2015 and 31 July 2016 and again between 1 August 2018 and 6 January 2019. The Claimant does not suggest that she was personally involved in any of the matters in issue;

iv) Alan Elias, D5, was a Member of the Court of Governors and Council between 1 August 2011 and 31 July 2014 (his second term). He was Vice-Chair of the Governors between 1 August 2014 and 20 March 2016. He was Interim Chair of the Court of Governors between 21 March 2017 and 31 July 2017. The Claimant does not suggest that he was personally involved in any of the matters in issue;

v) Joanne Hay, D6, was the Manager of the Department of Management during the Claimant's employment at the LSE. More recently she has become the Deputy Chief Operating Officer. She was a witness at the 2018 High Court trial. Along with D9, she is the focus of many of the Claimant's allegations in the current proceedings;

vi) Saul Estrin, D7, is an Emeritus Professor of Management Economics and Strategy at the LSE. He was also the founding Head of the Department of Management. He was a witness at the 2018 trial; and

vii) Gwyn Bevan, D8, is an Emeritus Professor of Policy Analysis at the LSE and was previously Head of the Department of Management. He was a witness at the 2018 trial.

61. As I have already indicated, D10 is the publisher of the *Daily Mail*, *Mail On Sunday* and *MailOnline*. The other five ANL Defendants are as follows:

i) Jonathan Harmsworth, D11, is Lord Rothermere, Chairman of Daily Mail General Trust plc, which wholly owns ANL;

ii) Geordie Greig, D12, was the editor of the *Daily Mail* at the time when the articles were published;

iii) Tobyn Andreae, D13, is the deputy editor of the *Daily Mail*;

iv) Antonia Hoyle, D14, authored Articles 2A and 2B; and

v) Mark Duell, D15, authored Article 1.

The Claim Form

62. The "Brief details of claim" section of the Claim Form says:

> "The Claimant claims compensation for personal injury, loss and damage arising from psychiatric injury caused by negligence and /or breach of statutory duty and/or harassment under the Protection from Harassment Act 1997 (including Harassment by Publication) and/or discrimination under the Equality Act 2010 (including sex and disability discrimination) and/or violation of the Human Rights Act 1998 (Articles 8 and 10) and/or the Data Protection Act 2018 and/or the General Data Protection Regulations 2018, by the Defendants, and/or their employees, and/or their owners, and/or their agents.
>
> These arise from matters including, but not limited to, defamatory articles about the Claimant published in the MailOnline on 10 October 2018 and 12 October 2018, and the Daily Mail on 13 October 2018, which contain false and defamatory statements made and enabled by Associated Newspapers Ltd (and their owners and agents) and the London School of Economics and Political Science (and their agents). Since these articles remain public, they constitute ongoing and continuing acts."

The Particulars of Claim

Introductory sections

63. The Particulars of Claim dated 4 February 2022 are 250 pages long (minus the appended articles). Paragraphs 1 – 10 introduce the parties. Paragraphs 11 – 15 set out "Brief Details of a Claim", reproducing the text I have quoted from the Claim Form and adding that the "defamatory anonymous source of Ms Hoyle's articles is believed to be originated by Joanne Hay…while acting in the course of her employment with the LSE" (para 14). The next paragraph lists the causes of action relied upon, namely: "personal (psychiatric) injury"; harassment under the PHA 1997; discrimination under the EA 2010; violation of the HRA 1998 and ECHR articles 8 and 10; and violation of the DPA 2018 and the GDPR 2018.

64. The value of the claim is summarised in para 16 as follows:

> "As the High Court ruled in 2018 that the LSE was found to have caused the Claimant's career-ending disability and personal injury (albeit not foreseeably so at the time), the disabled autistic Claimant seeks damages including for his lost 'residual earnings', which is calculated to be in excess of £1 million as shown later in the Particulars of Damages."

65. This passage does not reflect the 2018 Judgment. Mrs Justice Nicola Davies found that the Claimant's psychiatric illness was triggered by him learning of D9's formal complaint in December 2012 (para 38 above). However, in light of her conclusion on foreseeability it appears that she did not make specific findings as to legal causation, albeit her observation in para 243 (para 38 above) indicates that she viewed the LSE's failings as, at best, aggravating the condition caused by him learning of D9's complaint. No findings were made as to whether his illness was career ending.

66. Paragraph 18 sets out a table indicating the causes of action that arise from the articles. It is headed "Summary of Defamatory Articles".

Background / context

67. Paragraphs 19 – 66 encompass a number of topics. After a passage referring to Lord Woolf's 2011 report concerning the LSE's links with Libya (which has no factual relationship to the claims raised), paras 23 – 35 set out a number of allegations against D6. Reference is made to her operating "a harassment machine" against various named former LSE employees and to an incident in September / October 2011 when she is said to have made sexual advances towards the Claimant which he rejected, thereby triggering "a multi-year campaign of vengeance" against him. Between paras 36 – 53 the Claimant focuses upon D9, reiterating the allegation that she sexually harassed and exposed herself to him in Boston in November 2012. He also says that the LSE failed to investigate the grievance he brought against her which D6 "unethically buried" and that D6 co-ordinated with D9 to "file a false and malicious formal grievance" against him. The Claimant refers to D9's subsequent circulation of her grievance within the LSE, to the LSE's delay in supplying him with the details and to the LSE illegally terminating his employment based on the disability that it had caused.

68. It will be apparent from my earlier summary that the 2018 Judgment rejected the proposition that D9's complaint was false and malicious (para 36(ix) above); and that the ET found both that the Claimant's account of D9 exposing herself to him in November 2012 was false and that his dismissal was lawful (para 59 above).

69. The pleading then refers rather selectively to aspects of the 2018 Judgment, alleging that this gave the LSE and D6 ample reason to feel ashamed and humiliated (paras 54 – 60). The Claimant refers to articles in the media published by the *Evening Standard* and *The Times* which he says compounded their humiliation (paras 61 – 66).

Claim in negligence

70. The claim in negligence is set out from para 67 under the heading "Particulars of Personal Injury". The pleading says that the LSE and ANL are vicariously liable for the acts of the responsible individuals (para 67).

71. The Claimant says that after he was "unequivocally and publicly cleared of sexual misconduct" by the 2018 Judgment he was finally in a position to begin NHS treatment for his depression, but then the publication of the ANL articles re-opened the wounds, causing an autistic meltdown/shutdown which deepened his chronic depression (para 68). He pleads that in light of matters documented in the 2018 Judgment, the LSE and the ANL were well aware of his vulnerability and disability, so that it was "clearly foreseeable to…[them] that publishing false and defamatory articles would cause the Claimant a new/worsened personal psychiatric injury" (para 71).

72. As regards the existence of a duty of care, he says at para 72:

> "The *LSE* and *ANL* had a duty of care towards Dr Piepenbrock as the subject of their journalism, not to destroy his life and career (with false and malicious career-ending allegations and false and defamatory statements) and not to foreseeably cause a further personal psychiatric injury on the basis of their defamation, harassment and discrimination. They equally have a duty of care to the public, as providers of 'information' as publishers and 'sources', not to lie and mislead them with false material about Dr Piepenbrock. The Defendant's acted negligently and breached the statutory duty of care that they owed to the Claimant."

73. The next few paragraphs proceed on the basis that in *Caparo Industries v Dickman* [1990] UKHL 2, [1990] 2 AC 605 ("*Caparo*") the House of Lords established three principles to determine if a duty of care exists, namely: whether there is a relationship of proximity between the parties; whether injury to the claimant was foreseeable; and whether it is fair, just and reasonable to impose a duty. The Claimant addresses those points in para 74:

> "First, as the Claimant is a former employee of the *LSE* and the subject of their statements as a 'source', there is a clear relationship of proximity between the Claimant and the *LSE*, and as the Claimant is the subject of *ANL*'s three articles, there is a clear relationship of proximity between the Claimant and the *ANL*. Second, as detailed above, the Claimant's injury was highly foreseeable to the *LSE* and *ANL*. Third it is fair, just and reasonable to impose a duty on the *LSE* and *ANL* for the reasons given above and because they grossly violated his HRA and ECHR rights (which will be detailed later) which they had a duty to respect, and they have duties to the subjects and recipients of their journalism in line with their professional obligations (see for example the 'Editor's Code of Practice' detailed later in this section). Just as common carriers, (e.g. bus drivers, train drivers and airplane pilots) have an established duty of care to passengers, the press and its sources have a duty of care to the subjects or 'suppliers' of their journalism and to their readers or 'customers'."

74. The pleading goes on to draw a parallel with a negligent misstatement case, saying that: "the Claimant must foreseeably rely on what is said about him in the press because it inevitably forms the basis of his reputation" (para 76).

75. The Claimant addresses medical evidence in para 77. He indicates that he will rely on the medical evidence produced in the previous High Court claim and in the ET Claim. He continues:

> "In addition, the Claimant will produce medical documentation during the discovery phase of this litigation chronicling his autism and chronic depression since the defamatory publications…As the Claimant is disabled and unemployed due to the actions of the Defendants, he cannot afford to hire a new medical expert to produce a new report for the court in this litigation."

76. The pleading states that the "main cause" of the Claimant's "new/worsened psychiatric injury" was the "Defendant's widespread defamation of him in the international media" in Articles 1, 2A and 2B (para 79). He says that as he is autistic he cannot handle lies and false accusations, which bring about an autistic meltdown/shutdown (para 80).

77. There is no pleading that the duty of care has been breached and nor are particulars given. Instead there follows a very lengthy section setting out why the articles were defamatory. It is introduced in para 81 as follows:

> "As a Litigant in Person, the Claimant does not know whether or not he is required to prove that the statements that cause his new/worsened personal psychiatric injury were legally defamatory and/or malicious falsehoods. Therefore, erring on the side of caution in this regard, the Claimant will show that these statements were defamatory and/or malicious falsehoods, and if this is not required then this analysis will in any event be helpful to show how and why the statements caused serious harm and psychiatric injury to the Claimant."

78. I can summarise this next section quite briefly:

    i) Paragraphs 82 – 115 set out why Article 1 is said to be defamatory. The Claimant addresses the meaning of the words used, the serious harm threshold required by s.1 Defamation Act 2013 ("DA 2013") and why a public interest defence would not succeed. In terms of injury, he pleads that the serious harm caused to his reputation foreseeably deepened his ongoing psychiatric injury and disability and seriously harmed his reputation in the workplace, resulting in the loss of his ability to try and establish a residual earning capacity after the LSE had previously caused his career-ending illness;

    ii) Paragraphs 116 – 372 set out why Articles 2A and 2B are said to be defamatory. The Claimant addresses the identity of the anonymous source, the meaning of the words used, satisfaction of the serious harm threshold and the unavailability of an honest opinion or public interest defence;

iii) Paragraphs 377 – 536 set out why Articles 2A and 2B are said to contain malicious falsehoods. Thirty statements are identified, with an explanation given in relation to each as to why it is said that it was false and made maliciously. The pleading states that the articles were likely to cause pecuniary damage and foreseeably deepened the Claimant's ongoing psychiatric injury and disability and seriously harmed his reputation in the workplace, resulting in the loss of his ability to try and establish a residual earning capacity;

iv) Paragraphs 537 – 555 contain a section on "Discourse Analysis" which is said to show D14's bias against the Claimant; and

v) Paragraphs 556 – 567 address "Journalistic Malpractice", specifically that D14 used a single anonymous source and failed to corroborate the allegations made.

79. As regards the identity of the anonymous source referred to in Articles 2A and 2B, at paras 189 – 191 the Claimant lists the six people who gave evidence for the LSE at the 2018 High Court trial, observing that only three of them knew both him and D9. He goes on to say that only one of these three, D6, had a clear motive to "break ranks with the LSE's directive to not speak with the media" due to the Claimant spurning her sexual assault in 2011 and her being personally humiliated at the 2018 trial (paras 192 – 194). He goes on to say that if it was not D6 herself, she likely used one of her closest confidantes in the LSE's "harassment machine" as a proxy (para 197). The pleading then analyses: (a) the information given in the articles about the source and sets out how this is said to link to D6 (paras 201 – 222); and (b) alleged similarities between terminology that has been used by D6 and the language used in the quotes from the source (paras 228 – 232). The Claimant says that the identity of the source will be sought during discovery, relying on s.10 CCA 1981 and / or the *Norwich Pharmacal* jurisdiction (paras 235 – 240).

Claims under the PHA 1997

80. The Claimant says that if any of the acts mentioned are the same or similar to previous claims and in the interests of avoiding any estoppel issues, he reserves the right to remove / amend any such elements (para 574).

81. In the next paragraph he summarises this part of his claim saying:

> "Under the PHA 1997, the Defendants behaved in an oppressive and unacceptable manner, with their actions constituting a clear course of conduct of harassment. Furthermore, the Defendants are guilty of Harassment by Publication, as was the case in Thomas v News Group Newspapers Ltd…"

82. The pleading then quotes from paras 49 – 51 of the Court of Appeal's judgment in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 ("*Thomas*") contending that in the Claimant's case replacement of the word "racist" with "sexist" would result in the same legal outcome (para 575).

83. The Claimant says that three main individuals have conducted "a clear oppressive and unacceptable course of conduct of harassment against" him, for which the LSE and ANL are vicariously liable (para 576). These individuals are identified as D6, D9 and D14 and he then identifies the actions relied upon in relation to each of them.

84. As regards D6, her "oppressive and unacceptable course of conduct of harassment" is said to include:

   i) Sexually assaulting the Claimant at the LSE in September 2011;

   ii) Refusing to investigate the serious grievance of gross sexual misconduct made by D9 made in November 2012;

   iii) Lying in March 2016 that documentary evidence of his serious grievance against D9 never existed;

   iv) Committing perjury on oath in the High Court in July 2018, designed to rob him of justice and damages;

   v) Defamation and slander of the Claimant in Article 2A;

   vi) Defamation and slander of the Claimant in Article 2B; and

   vii) Sending herself a harassing email on 7 November 2019 at 22:39 hours and then trying to blame the Claimant's wife for sending it and subsequently trying to get her sacked from her job as a Professor at Oxford University (as further detailed in para 580).

85. The Claimant pleads that D2 – D5, D7 and D8 allowed and enabled these acts which "constitutes an oppressive and unacceptable course of conduct of harassment by these individuals as well" (para 578). Vicarious liability is pleaded on the basis that D6 carried out each of the acts in the course of her employment with the LSE (para 579) and that the LSE have "openly supported and defended Ms Hay throughout her campaign of oppressive and unacceptable harassment".

86. The Claimant concludes this part by referring to D6 actions as "vengeance stalking … designed to destroy the health and career of an innocent man, and which all started because [the Claimant] spurned her unwanted sexual advances in 2011". He pleads that D6 knew or ought to have known that her actions would cause foreseeable harm to him (para 583).

87. As I am not considering an application from D9, the details of her alleged actions are only relevant to the vicariously liability claim against the LSE. Her alleged acts of harassment are listed in para 584 as follows:

   i) Stalking and exposing herself to the Claimant on 12 November 2012 in Boston during the course of her employment with the LSE;

   ii) Calling security guards on the Claimant at the hotel in Seattle, falsely and maliciously alleging that she was in physical danger;

   iii) Contributing to the defamation of the Claimant in Article 2A;

iv) Contributing to the defamation of the Claimant in Article 2B; and

v) Filing a false, malicious, harassing and defamatory witness statement in the ET proceedings.

88. Paragraph 585 pleads that D2 – D5, D7 and D8 allowed and enabled these acts and paragraph 586 addresses vicarious liability, stating:

> "Some of these acts were carried out by [D9] while she was acting in the course of her employment at the LSE. After Dr Piepenbrock terminated [her] employment with him on 15 November 2012 and she subsequently resigned from the LSE on 18 November 2012, the LSE was still vicariously liable for her actions as an alumni of the LSE and as a former employee of the LSE, which were tied to her employment at the LSE."

89. The Claimant says that D9's actions were "vengeance stalking … designed to destroy the health and career of an innocent man and which all started because [the Claimant] spurned her unwanted sexual advances in 2012" and that she knew or ought to have known that her actions would cause him foreseeable harm (para 587).

90. The actions relied upon in respect of D14 are "Defamation (libel) of the innocent Dr Piepenbrock by writing and publishing" Articles 2A and 2B (para 588). Vicarious liability is asserted on the basis that D14 was acting in the course of her employment as an agent of ANL (para 590). It is also said that D11 – D13 "allowed and enabled" her acts by publishing the defamatory articles, despite multiple emails warning of their defamatory contents (para 589).

91. D14's actions are described as "vengeance stalking…designed to destroy the health and career of an innocent man, and which all started because ANL had published a defamatory article… [Article 1]…which drew the attention and anger of the radical feminist author, Ms Hoyle".

92. Lastly, the Claimant relies upon harassment by the LSE and ANL, which he describes in paras 592 – 594:

> "592. The LSE and ANL have also harassed the Claimant as Defendants themselves, which adds to their course of oppressive and unacceptable conduct through their individual actors. The LSE and ANL have been harassing the disabled autistic Dr Piepenbrock over costs for which they unequivocally know that there is no prospect of success of recovering. The LSE caused Dr Piepenbrock to be disabled, unemployed and facing bankruptcy for the past nearly decade, making him a 'Man of Straw' with no income or assets and only considerable liabilities, which the Defendants clearly know through the 2018 High Court proceedings, countless medical reports and countless correspondence from the Claimant and his representatives informing them that this is the case. In fact, the LSE even admit that they cannot get secure any costs from Dr Piepenbrock when they unequivocally stated

> in their second failed application to Strike Out Dr Piepenbrock's meritorious ET claim:
>
> > *'...**the Claimant routinely describes himself as 'bankrupt' in correspondence**...the Claimant was ordered to pay the Respondent £25,000 on account by 31 July 2020 but to date he had not done so. **There is undoubtedly little prospect of the Respondent being able to enforce an order for costs against the Claimant in these circumstances.**'*
>
> 593. Although the LSE clearly acknowledges that Dr Piepenbrock is a 'Man of Straw' with no income or assets and only considerable liabilities, they continue to maliciously and vexatiously pursue him for costs, threatening further legal actions against him. [Reference is then made to a 21 October 2021 letter from Pinsent Masons, the LSE's former solicitors]
>
> 594. The only plausible reason that the LSE would go after a disabled 'Man of Straw' whom they have known for years cannot pay any costs, is to harass him and cause as much fear and distress to the innocent disabled autistic man as possible so that he gives up his pursuit of justice against the Defendants." (Emphasis in the text.)

93. The Claimant goes on to allege that the harassment was made explicit in the letter dated 29 September 2021 from ANL's solicitors, where they threated to bring costs proceedings for the outstanding costs if he pursued this claim (para 595). He also refers to an email from ANL's solicitors sent on 2 February 2022 in which they threatened him with a Bill of Costs.

94. The Claimant concludes this section of the pleading by saying that the earlier High Court proceedings covered the LSE's torts up until March 2013 and that he is justified in now relying on a course of conduct after March 2013 and acts that were not argued in that earlier action (para 598).

<u>Claims under the EQA 2010</u>

95. The section commences with an equivalent passage to that which began the section on the PHA 1997 claim (para 80 above). The Claimant then says that he relies upon the protected characteristics of sex and disability (pleading, para 601).

96. The Claimant address the sex discrimination claim from para 602, where he indicates that he relies upon direct sex discrimination, harassment relating to sex and victimisation. The direct sex discrimination is described in para 603 as having:

> "…occurred when, because of his sex, the Defendants treated him worse than someone of the opposite sex who is in a similar situation, which began when the Claimant was an employee at the LSE and continued when the Defendants defamed and harassed the Claimant in the media in October 2018, prejudging him as guilty on the basis of his sex."

97. The Claimant refers to "Examples of direct sex discrimination, which were revealed during the High Court trial" as including D7's "declaration of the Claimant's guilt of sexual misconduct immediately after receiving [D9's] false and malicious allegation of sexual misconduct which had yet to be investigated". Quotes from an email sent by D7 on 18 November 2012 and excerpts from witness statements for the 2018 High Court trial are then set out. No other allegations of sex discrimination are identified.

98. The pleading then says that the Claimant relies upon three types of harassment related to sex:

i) When the Defendants made him feel humiliated, offended or degraded "e.g. via the publishing of harassing and defamatory materials regarding his sex";

ii) When the Defendants treated him unfairly because he refused to put up with sexual harassment whether by D6 or D9, resulting in the publishing of harassing and defamatory materials; and

iii) When the Defendants made him feel humiliated, offended or degraded by treating him in a sexual way as D6 and D9 had done.

99. No further particulars are given of the harassment related to sex claim. The victimisation claim is then briefly addressed at para 607:

> "The Claimant was treated badly (e.g. defamed in the international media) by the Defendants because he made complaints of sexual assault, harassment, gross sexual misconduct, and sex discrimination against the LSE."

The respects in which the Claimant was treated badly are not specified.

100. The pleading contends that no limitation issues arise as the discrimination has been continuing, in terms of the Defendants' ongoing failures to deal with the defamatory articles generated by the LSE and published by ANL, which remain available online (para 608).

101. Paragraphs 610 and 611 address estoppel issues. The Claimant says that his ET claim relates to disability discrimination and unfair dismissal, but if he is permitted to add a claim for sex discrimination by the Court of Appeal (if his ongoing appeal from the EAT's decision succeeds), "this would preclude litigating Sex Discrimination which occurred from 2011 – 2014 in these proceedings". However, he says his claim for sex discrimination arising from acts after he left the LSE has not been litigated elsewhere.

102. The Claimant refers to his depression and anxiety when identifying his disability (para 612). He says that D14 was aware of this (para 616). It may be that his intention is also to rely upon autism as a disability; he refers to this in para 613 but does not say so in terms. He then indicates that he relies upon five forms of disability discrimination: indirect discrimination; a failure to make reasonable adjustments; discrimination arising from disability; harassment relating to disability; and victimisation (para 617).

103. The indirect discrimination against ANL is contained in para 618. It relates to the time frame that he was given to respond to D14 before Article 2A was published. The Claimant says:

> "…expecting a person like the Claimant, with a known, serious long-term mental health illness and disability to have to answer false and malicious allegations from a known stalker on a path of malicious vengeance like Ms Hay, in an incredibly short time frame (shorter than one would expect someone who does not have such a mental disability) is indirect disability discrimination. This especially the case for autistics such as the Claimant who (because of their obsession with truth and justice) find it extremely difficult to deal with lies and false accusations, which will likely lead to autistic meltdowns/shutdowns. This is what happened in the Claimant's case."

104. The alleged breach of a duty to make reasonable adjustments raises a similar point, contending that D14 should have asked the Claimant when he would be able to speak with her and adjusted her editorial schedule accordingly (para 621). The claim for discrimination arising from disability raises a similar point at para 624.

105. Thus far the pleaded disability discrimination claim has only related to the ANL Defendants. However, the alleged harassment relating to disability appears to concern the LSE too, as it is said that both D6 and D14 made the Claimant feel humiliated, offended and degraded by the publishing of harassing and defamatory materials regarding his disability, which was disbelieved and downplayed (paras 626 - 627). Paragraph 629 also says that the harassment took the form of "defamation of an innocent disabled man".

106. The victimisation claim relies on the acts of both D6 and D14. It is said that they treated him badly because he had complained about his treatment by the LSE in regard to his psychiatric illness in the earlier High Court claim. He says that they victimised him by questioning his disability and implying that he had caused it himself through being a "martyr" (paras 630 – 631). He also refers to the treatment that he says was received by a Dr Paul Thornbury, the LSE's Head of Security, who was asked to attend a grievance meeting after he sought to provide a witness statement for the Claimant in the ET claim (para 632).

107. At paras 633 – 634 the Claimant makes the same point about time limits as he raised in the sex discrimination claim. As regards estoppel issues, he acknowledges that disability discrimination is a cause of action in the ET Claim but says that the present claim concerns discriminatory treatment after the end of his High Court trial in 2018 (paras 637 – 638).

<u>Claims under the HRA 1998</u>

108. At paragraphs 639 – 645 the Claimant indicates that he relies upon violations of Articles 8 and 10, ECHR. He says that the three defamatory articles violated his Article 8 right to a private life and that the same publications violated the Article 10 "duties and responsibilities for the protection of the reputation and rights of the

Claimant by making false and defamatory statements about him in the international media".

Claims under the DPA 2018 / GDPR 2018

109. Paragraphs 647 – 648 contain an allegation that the LSE failed to notify the Information Commissioner's Office ("ICO") of a data breach that D2 was advised of by the Claimant in an email sent on 15 October 2018, as required by s.67 DPA 2018. Paragraphs 649 – 650 refer to the criminal offence of obtaining or disclosing personal data or procuring the disclosure of personal data to another person without the consent of the controller. No specific allegation is made, but there is a quote from the ICO's document "*Data Protection and Journalism: A guide for the Media*" concerning sources leaking information to journalists without their own organisation's knowledge. Next it is said that s.198 DPA 2018 and GDPR 2018 establishes the vicarious liability of the LSE for the actions of D6 and ANL for the actions of D14 and D15 (para 651).

110. In the next section headed "Flagrant violations of Data Laws by destroying critical evidence" allegations are made that the LSE destroyed the email accounts of critical witnesses in relation to the earlier High Court claim and the ET Claim (paras 652 – 658).

111. Under the heading "LSE's refusal to comply with GDPR SARs", the Claimant pleads that the LSE illegally withheld evidence critical to the earlier High Court Claim and failed to comply with multiple subject access requests ("SARs") (paras 659 - 683). The SARs that are relied upon are listed in paras 660 – 661. There are 12 of them, spanning the period 4 February 2013 – 30 September 2021. The last three post-date the handing down of the 2018 Judgment. It is said that the LSE has refused to hand over "a significant amount of critical DPA SAR information". The missing data is said to include the six items listed in para 664. From the contents of paras 665 – 667, it appears that these are largely, if not entirely, items of correspondence between LSE employees and D9 in the period November 2012 – January 2014. Paragraphs 678 – 681 concern the three more recent SARs. It is alleged that "the LSE refused to hand over any correspondence regarding the investigation of the leak to the *Daily Mail/MailOnline*". The Court is asked to require the LSE to hand over this documentation. The remainder of this section queries the ability of the LSE to rely upon the legal professional privilege exemption in Schedule 2 DPA 2018. Reference is also made to an alleged failure to comply with an SAR relating to Mr Piepenbrock (para 682); and to the Claimant and his son having complained to the ICO about the LSE's failure to disclose the data sought (para 683).

112. The Claimant then alleges that ANL has failed to comply with SARs (paras 684 - 686). He identifies a number of requests that were made on his behalf by his wife, including for ANL's internal correspondence concerning him in the period 10 – 13 October 2018. He notes a response of 20 December 2019 that personal data had been withheld as it was third party data that ANL did not have consent to disclose; and a further response on January 2020 confirming that it was not being said that there was no personal data held, rather that data that was held was not disclosable. The basis for challenging this position is not set out.

113. The next section sets out the power of the Information Commissioner to impose monetary penalties and in this context reference is made to the LSE's "unauthorised leak of false and defamatory information about the Claimant" to ANL (para 689). Paragraphs 691 – 694 discuss why the DPA 2018 exemption for journalistic purposes would not apply.

Particulars of damages

114. The last section of the pleading (from para 695) addresses the damages claimed. Under the first sub-heading "General Damages" the Claimant refers to the very good name that he had throughout his professional and personal life, to the extensive readership of the *Daily Mail* and the *MailOnline* and to the "defamatory article" being easily found via a *Google* search (paras 697 – 700). He says that the distress and humiliation caused to him and his family has been profound (para 701). He makes reference to various awards made in defamation cases, before indicating that he seeks general damages "in the region of £100,000". No specific claim is made for damages for pain and suffering and loss of amenity, consequent upon psychiatric injury.

115. The next section contains a claim for aggravated damages. Specific reference is made to alleged malicious and unethical actions by D6, which appear to largely concern the Claimant's wife (paras 705 – 709). The Claimant says that he seeks aggravated damages "in the region of £100,000".

116. The section that follows is headed "Special / Exemplary Damages". It mainly concerns a claim for loss of residual career earnings. This claim is summarised in para 712:

> "The *Daily Mail / Mail Online's* defamatory articles of 10 – 13 October 2018, have caused 'serious harm' and immense damage to the Claimant's health and career. He will therefore never work again, and he had not worked since the defamatory articles were published. He will therefore lose the 'residual' income that it was believed that he could have earned after the High Court lawsuit ended, were it not for the malicious and/or negligent actions of the Defendants in this case. The Defendants' actions were career ending for this extraordinary man, who formerly earned $10,000 per hour for his lectures and whose successful and lucrative career was valued at £4 million for his 2018 High Court trial."

117. The Claimant says that in light of the defamatory articles no right minded employer would hire him as a professor (para 713). He says that the LSE's breaches of the duty of care and breach of contract identified in the 2018 Judgment "caused the Claimant's career-ending disability" (para 715) and that in the present case he is arguing for loss of his "residual" career "that could reasonably have been expected" after the LSE caused the loss of his original career (para 716). He explains this as follows:

> "In principle, the Claimant could have begun his 'residual' career after a successful High Court judgement in October 2018. Instead, as a result of the Defendant's malicious and/or negligent actions described in these particulars of claim, the

> Claimant will have no 'residual' earning capacity in the future, as he has not worked since the Defendant's defamation due to the deepened psychiatric illness foreseeably caused by the Defendants as well as due to the greatly reduced/tarnished reputation that the Claimant now has, especially in the 'business management guru' marketplace, which he previous enjoyed."

118. The Claimant goes on to say that his residual earning capacity is illustrated by his 2013 consulting work in India, his 2014 employment with Ashridge Business School and an international one-hour lecture he gave charged at $10,000 (paras 717 – 721). A residual earning capacity is calculated on the basis that, absent the matters complained of, he would have been able to give ten one hour lectures a year at a rate of £7,500 each, thereby giving an annual figure of £75,000; increasing after treatment to a figure of £150,000 per year. He takes an average of £100,000 and a retirement age of 67, to produce a total of "approximately £1,300,000" (paras 722 – 723). He also claims for the costs of ten years of therapy, totalling £100,000 (para 725).

The 2020 Claim

119. In light of the Defendants' submissions it is also necessary to refer to the Particulars of Claim (dated 10 February 2020) that were prepared in the 2020 Claim. In summary:

i) An introductory section between paras 1 – 17 reflected the text on the Claim Form (para 47 above) and indicated that, in addition, the Claimant claimed compensation for damages arising from violations of the DPA 2018 and GDPR 2018, the PHA 1997, the EQA 2010 and "for personal (psychiatric) injury" against the LSE and ANL (paras 11 – 14);

ii) A "Background / Context" section between paras 18 – 61 was almost the same as paras 19 – 67 of the current Particulars of Claim, save that the allegations concerning D6 are expanded upon in the current pleading;

iii) The document then addressed "Particulars of Defamation / Malicious Falsehood" between paras 62 - 643. The content is very similar to paras 82 – 573 of the current pleading, save that some additional matters were addressed, including D9's liability under the DA 2013 and the single publication rule. It was not preceded by the section on personal injury that appears at paras 67 – 81 of the present Particulars of Claim;

iv) Paragraphs 644 – 660 concerned "Particulars of Data Protection Act violations" alleged against the LSE and ANL. It contained allegations that the LSE had breached a requirement to notify the ICO and a section on criminal offences, equivalent to paras 647 – 650 of the current pleading. Paragraph 650 said that the LSE had refused to comply with an SAR made on 18 November 2019 in not handing over correspondence regarding the investigation of the leak to the *Daily Mail / MailOnline*. Sections on monetary penalties and on the unavailability of the exemption for journalistic purposes followed at paras 651 – 660;

v) Paragraphs 661 – 706 concerned claims for sex discrimination and disability discrimination under the EQA 2010. Much of the text is identical to that contained in paras 600 – 638 of the current pleading, although there are some small differences of expression;

vi) Paragraphs 707 – 718 set out a claim under the PHA 1997. At this stage the claim only concerned the alleged actions of D6, which appeared in a list at para 714 and were similar, although not identical, to the list at para 577 of the current Particulars of Claim (para 84 above);

vii) The section between paras 719 – 730 was headed "Particulars of Personal Injury". It indicated that the Claimant claimed compensation for psychiatric injury caused by the LSE and its employees and agents (not limited to D6) and by ANL (including the actions of D14). The basis of the claim was said to be that after being cleared of sexual misconduct by the 2018 Judgment the Claimant was in a position to begin treatment for his anxiety and depression, but then the defamatory articles and the LSE's actions in relation to them had caused his psychiatric injury to start all over again. The Claimant said that both the LSE and ANL owed him "a professional duty of care, not to harass and defame an innocent man" and that was precisely what they had done; and

viii) Paragraph 731 set out the damages claim. General damages for distress and humiliation were claimed "in the region of £50,000". The basis of this appeared in paras 733 – 738, which is reflected in paras 697 – 702 of the current pleading. The next section on aggravated damages was in very similar terms to paras 704 – 709 of the current pleading (para 115 above). A figure "in the region of £50,000" was claimed. The section on "Special / Exemplary Damages" advanced a claim for loss of residual career earnings calculated on the basis of a loss of £100,000 a year. The defamatory articles were said to have caused serious harm and immense damage to the Claimant's health and career, such that he would never be able to work again as the actions complained of had deepened his psychiatric illness and greatly reduced his reputation (paras 752 - 756).

Strike out and summary judgment: the legal framework

120. CPR 3.4(1) states that for the purposes of this rule, reference to a statement of case includes reference to part of a statement of case. CPR 3.4(2) provides:

> "(2) The court may strike out a statement of case if it appears to the court-
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

121. When the court strikes out a statement of case it may make any consequential order it consider appropriate (CPR 3.4(3)).

122. CPR 3.4(4) provides:

> "(4) Where-
>
> (a) the court has struck out a claimant's case;
>
> (b) the claimant has been ordered to pay costs to the defendant; and
>
> (c) before the claimant pays those costs, the claimant starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out,
>
> the court may, on the application of the defendant, stay that other claim until the costs of the first claim have been paid."

123. If the Court strikes out a statement of case and it considers that the claim is totally without merit, the Court must record that fact and must consider at the same time whether it is appropriate to make a civil restraint order (CPR 3.4(6)).

124. CPR 24.2 provides that the Court may give summary judgment against a claimant on the whole of a claim or on a particular issue if "the claimant has no real prospect of succeeding on the claim or issue" and there is "no other compelling reason" why the case should be disposed of at trial.

125. When applications are made to strike out Particulars of Claim pursuant to CPR 3.4(2)(a) as disclosing "no reasonable grounds" for bringing the claim and, in the alternative for summary judgment in the defendant's favour, there is no difference between the tests to be applied by the Court under the two rules: *Begum v Maran (UK) Limited* [2021] EWCA Civ 326 ("*Begum*") per Coulson LJ at paras 20 – 21. In para 22(a) he described the applicable test as follows:

> "The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is 'bound to fail': *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [80] and [82]."

126. The parties were agreed that the onus lies on the Defendants to establish that this test is made out.

127. The extent to which it is appropriate for the Court to consider the evidential position when applying the test was summarised in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) as follows:

> "iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision…where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) …if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it…If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

128. It is well-recognised that it is not generally appropriate to strike out a claim on assumed facts in a developing area of jurisprudence. At para 23 in *Begum*, Coulson LJ cited the earlier observations of Lord Browne-Wilkinson at 557e-g in *Barrett v Enfield DC* [2001] 2 AC 550:

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740 – 741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer

> to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of law that was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike-out."

129. Where a statement of case is found to be defective, the Court should consider whether the defect might be cured by amendment and, if it might be, the Court should give the party concerned an opportunity to amend: White Book, para 3.4.2 citing *In Soo Kim v Young* [2011] EWHC 1781 (QB). When the Court strikes out Particulars of Claim, it will often be appropriate to make an order dismissing the claim or giving judgment upon it, but the Court may instead give further directions. For example in *Brown v AB* [2018] EWHC 623 (QB) Pepperall J struck out an unwieldy and unnecessarily complex defence but directed the defendant to file a fresh pleading complying with limitations as to its length, as he considered that the defence was arguable (as discussed at para 3.4.22 of the White Book).

130. I address the principles relating to the CPR 3.4(4) power to stay a claim at paras 224 – 230 below.

Abuse of process and issue estoppel: the legal framework

131. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at para 17, Lord Sumption JSC summarised six different legal principles with different juridical origins under the heading "Res judicata: general principles". This summary included:

> "The first principle is that once a cause of action has been held to exist or not exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings……Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the other earlier occasion and is binding of the parties… 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197 – 198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings,

which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

132. The classic statement of when an abuse of process arises because the relevant matters could and should have been raised in earlier proceedings appears in Lord Bingham's speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31B-D where he said:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some other dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

133. In *Dexter Limited (In Administrative Receivership) v Vlieland-Boddy* [2013] EWCA Civ 14 at para 49, Clarke LJ (as he was then) summarised the principles to be derived from the authorities as follows:

> "i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as

to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

134. A further form of abuse may arise where a party brings a second action covering the same subject matter as was raised in a first action that was struck out for a wholesale failure to comply with procedural grounds. The circumstances in which this form of abuse can arise were summarised by Newey LJ in *The Commissioners for Her Majesty's Revenue and Customs v Kishore* [2021] EWCA Civ 1565 at paras 20 – 27 ("*Kishore*"). It applies where the first action was struck out as an abuse of process and where the conduct of that first action was inexcusable and involved wholesale disregard of court rules: Newey LJ at para 24, citing para 52 of Morris J's judgment in *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB), [2018] 1 WLR 1734. By contrast, a mere negligent failure to serve a Claim Form in time is insufficient to engage this principle: Newey LJ at para 23, citing *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894 at para 90.

The pleaded claim in negligence

135. I have already set out the way in which the claim in negligence is pleaded (paras 70 – 78 above). The Defendants submit that the pleaded claim is bound to fail because it does not disclose an arguable duty of care and it constitutes an abuse of process in attempting to circumvent the law on defamation. They also contend that the factual basis of the claim for consequential psychiatric injury has no realistic prospect of success and that it is fatally undermined by the absence of supporting medical evidence. In addition, the LSE Defendants submit that the Claimant's case as to the identity of the anonymous source referred to in Articles 2A and 2B is inherently weak and the evidential position will not be improved if the claim proceeds.

Duty of care

136. I will focus firstly on whether the Particulars of Claim disclose an arguable claim in law. I emphasise that *for these purposes*, and in accordance with established principles, I proceed on the basis of the *assumed facts* as pleaded in the Particulars of Claim (save where they are contrary to binding findings made in earlier judgments). Accordingly, and by way of example only, I proceed on the *assumed* basis that the published articles contained false and defamatory material as alleged and that the Claimant would be able to link the anonymous source to the LSE. For the avoidance of doubt, in so doing I am not making any assessment of the prospects of proving these matters were the action to proceed to trial.

137. The essence of the Claimant's argument is that the ANL Defendants owed him a duty of care when writing and publishing the articles and that the LSE Defendants owed him a duty of care when purported information was provided via the source. For the

purposes of considering the duty of care issue I will not distinguish between the role of particular Defendants within these two cohorts (a topic which I address subsequently at paras 164 - 167 below).

138. Dr Piepenbrock submits that the three stage criteria of the *Caparo* test are met and that there is a very strong case for showing a duty of care here. He also says that in so far as this is a novel situation not covered by existing case law, the claim should be allowed to proceed to trial and the issue decided upon the facts that are then found. Although there was a claim in defamation, this does not preclude an action in negligence; multiple causes of action can arise from the same events. Furthermore, this claim is not simply about damage to reputation, it concerns a duty to protect from psychiatric injury. He says that in so far as there is any deficiency or lacuna in the pleading, he should be given the opportunity to amend the claim, rather than it being struck out, given that he is a litigant in person and given the difficulties he faces with his anxiety and depression and autism. A specific submission was advanced by reference to the tort of intentionally causing psychological harm identified in *Wilkinson v Downton* [1897] 2 QB 57 ("*Wilkinson*").

The caselaw

The correct approach

139. The correct approach to determining whether a duty of care in negligence arises in a situation that has not previously been the subject of judicial consideration was explained by Lord Reed JSC in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 ("*Robinson*") at paras 21 – 29. He identified how Lord Bridge's speech in *Caparo* had been misunderstood in subsequent authorities; far from laying down a single tripartite test for whether a duty of care arose, Lord Bridge had emphasised that the common law would proceed on the basis of precedent and the incremental development of the law by analogy with established authorities. Lord Reed indicated that the "drawing of an analogy depends on identifying the legally significant features of the situations with which earlier authorities were concerned" (para 27). He summarised the position in para 29 as follows:

> "In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

Negligence and protection of reputation

140. In *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021 ("*James-Bowen*") the Supreme Court rejected the proposition that the Commissioner owed a duty to officers in his force to take reasonable care to safeguard their welfare and reputational interests when conducting litigation. The action arose

from the basis upon which the Commissioner had settled a tortious claim for damages brought by an individual who the officers had arrested and detained. Whilst this was not the only reason for rejecting the alleged duty of care, the Court noted that the common law did not generally recognise a duty of care in negligence to protect reputation. Giving the leading judgment (with which the other members of the Court agreed), Lord Lloyd-Jones JSC summarised the position in para 24:

> "The law protects reputation in a variety of ways in different circumstances. Causes of action such as libel, slander, malicious falsehood and passing off are designed to protect reputation. Moreover, a variety of other causes of action, including breach of confidence, misuse of private information and causes of action in relation to data protection and intellectual property, may often indirectly achieve this result. The common law does not usually recognise a duty of care in the tort of negligence to protect reputational interests. However, there are exceptions. In *Spring v Guardian Assurance plc* [1995] 2 AC 296 a majority of the House of Lords held that an employer who gave a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence for breach of duty which caused him economic loss. Lord Lowry, Lord Slynn and Lord Woolf reached this conclusion on the basis of the three ingredients identified by Lord Bridge in *Caparo*. Lord Goff concluded at p 316E-F, that a duty of care was owed to the former employee on a narrower ground. In his view the source of the duty of care was the principle in *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465, i e an assumption of responsibility by the authors of the reference to the plaintiff in respect of the reference, and reliance by the plaintiff upon the exercise by them of due care and skill in respect of its preparation. This case was essentially concerned with negligent misstatement and it may be that assumption of responsibility is the better rationalisation of the recognition of a duty in these circumstances."

141. I have included Lord Lloyd-Jones' discussion of *Hedley Byrne & Co v Heller & Partners Ltd* ("*Hedley Byrne*") and *Spring v Guardian Assurance plc* ("*Spring*") because the Claimant submits that the current claim is analogous. Before I assess that proposition, I will consider whether and to what extent the present situation has been the subject of examination in earlier cases.

Media defendants and negligence

142. The Defendants assert, and the Claimant has not disputed, that there is no decided case which has found that a publisher of an article owed a duty to the subject to take reasonable care as to its contents. Similarly, no duty of care has been found to be owed by a source quoted in a published article in respect of the comments they made.

143. Ms Marzec drew attention to two cases where a duty of care was found not to arise that are discussed at para 23.6 in *Gatley on Libel and Slander* (12th ed) ("*Gatley*") under the heading "Media defendants and negligence".

144. The first case, *Midland Metals Overseas Pte Ltd v Christchurch Press Co. Ltd* [2001] NZCA 321, [2002] N.Z.L.R. 289 ("*Midlands Metals*"), concerned a claim in negligence for damage to reputation brought by a company who supplied underground cables to a subsidiary of the second defendant. It arose out of remarks to the press made by employees of the second defendant about the poor quality of these cables. The remarks were reported by the first defendant and other newspapers. The New Zealand Court of Appeal held that the claim had been properly struck out, rejecting the proposition that the source of the article and/or its media publishers owed a duty to take reasonable care to investigate the subject matter before publication. The authors of *Gatley* summarise the reasoning of the combined judgment of Gault, Keith and McGrath JJ as being that the plaintiff's argument would "produce a number of fundamental changes in the balance of the law; it would render the notion of a duty of care based on proximity largely otiose; it would in effect create a liability akin to that for malicious falsehood but based on negligence rather than malice and it would bypass the law of defamation with its specific defences crafted to produce a balance between freedom of speech and the protection of reputation". The authors also cite from para 54 of the judgment of Blanchard J:

> "…to permit [the plaintiffs] to sue the defendants for damage caused by breach of alleged duties of care, namely, in the case of the newspapers, to adequately investigate…It would appear that these duties would apply in the case of any media defendant. It seems also that any person being interviewed by a journalist in connection with a forthcoming story would be under a duty to refer the journalist to any person potentially affected by it. So, where there was to be a statement about goods in the story, the person being interviewed would be under a duty to refer the journalist to the supplier of the goods. These would be far reaching duties which a newspaper, its reporters and their interviewees would have to fulfil many times every day."

145. The second case, *Shtaif v Toronto Life Publishing Co Ltd* (2013) ONCA 405 ("*Shtaif*"), concerned a claim in negligence and in defamation brought against the publishers of an internet article about a Canadian businessman. The article included reference to his business dispute with the plaintiffs. The Ontario Court of Appeal rejected the alleged duty of care in negligence. The authors of *Gatley* summarise the Court's reasoning as follows:

> "On the facts, however, a sufficiently close relationship of proximity was not made out. There were only two telephone interviews between the plaintiffs and the defendants, and no other pre-existing relationship between the parties. While in a general sense the media has, or should have, an obligation to adequately investigate a story to ensure the accuracy of the facts about any person referred to in the story, and to obtain that person's side of the story, to say that these contacts by

> themselves gave rise to a duty of care would mean that in virtually every case a plaintiff could proceed with a negligence claim as well as a defamation claim."

Cases relied upon by the Claimant

146. I turn next to the Claimant's reliance upon allegedly analogous cases. In *Hedley Byrne* the House of Lords decided that a duty of care arose when a party seeking information from another party possessed of a special skill, trusts him or her to exercise due care and that other party knew or ought to have known that this reliance was being placed on their skill and judgment. Mr Piepenbrock submitted that the present case should be viewed as akin to a negligent misstatement case. He emphasised the statements that the source had made to D14 and he reminded me of para 76 of the Particulars of Claim (para 74 above).

147. In my judgment the *Hedley Byrne* negligent misstatement situation is quite distinct from the pleaded circumstances. The duty of care in such circumstances rests on the fact that: (a) the claimant has sought information from a person who holds themselves out as having a particular skill in that regard; (b) the claimant relies on the information that is thereby provided; and (c) the other party knew or ought to have known of this reliance. None of those elements apply in this instance. On any view the ANL articles were not information sought by the Claimant from the Defendants; they were not provided to him by the Defendants in that capacity; Dr Piepenbrock did not rely upon the Defendants' particular expertise; and nor did he sustain loss or damage by placing reliance upon the accuracy of the articles. To the contrary, the allegedly defamatory content was published to the world at large and the Claimant has disputed, rather than relied upon, its accuracy.

148. I have already cited Lord Lloyd-Jones' summary of the House of Lords' decision in *Spring* (para 140 above). A majority of their Lordships (Lords Goff, Lowry, Slynn and Woolf) rejected the proposition that defamation and malicious falsehood provided an exclusive legal regime that did not allow for the introduction of liability in negligence *where the circumstances otherwise indicated the existence of a duty of care*: Lord Goff at 324D-E, Lord Lowry at 325E-F, Lord Slynn at 334E-H and Lord Woolf at 350B-351D.

149. However, I do not consider that the basis upon which a duty of care was found to exist in *Spring* assists Dr Piepenbrock. Lord Goff considered that a duty of care arose through the application of the *Hedley Byrne* principle (319H). He held that when an employer provides a reference in respect of an employee to a prospective future employer, a duty of care would ordinarily be owed in relation to the preparation of that reference because the employer was possessed of special knowledge and it was plain that the employee relied upon him / her to exercise due skill and care in its preparation (319E-H). He also emphasised the closeness of the relationship between the parties as employer – employee (320A). He regarded the position as distinct from one where an employee sought a reference from a third party, where absent an assumption of responsibility there would be "great difficulty" in holding that any greater duty was imposed than that arising under the law of defamation (322F).

150. Lord Slynn also emphasised the employment context (335A). He considered it would be unsatisfactory if the recipient of a reference who relied upon its accuracy could sue

on the basis of the *Hedley Byrne* principle, but the employee who was the subject of the carelessly given reference had no recourse against the employer (335E). Both Lord Slynn and Lord Woolf noted that it did not follow from liability being imposed on an employer, that the same would apply to a non-contractual situation (336F-G and 345B-C). Lord Woolf emphasised that a person who suffered loss and damage as a result of a careless reference was inadequately protected by the law of defamation, as the qualified privilege defence meant that they would have to establish malice to succeed in a claim for libel (346C-E). He also emphasised that there was likely to be limited publication of a reference and that if there was any re-publication the re-publisher would not owe a duty of care to the subject of the reference (349F-G).

151. Accordingly, there are a number of significant distinctions between the *Spring* context and the pleaded circumstances in the present case. Firstly, as I have already identified, the situation is not analogous to a *Hedley Byrne* negligent misstatement situation. Secondly, there was no employment or equivalent relationship between the Claimant and the ANL Defendants. Whilst the Claimant had been employed by the LSE, this relationship had come to an end four years earlier and it cannot be suggested that the acts complained of (vengeful communication of inaccurate and malicious material to a media organisation) were done in the LSE's capacity as his former employer. Thirdly, on any view publication was not on a limited scale. Fourthly, unlike the position in *Spring*, Dr Piepenbrock does not suggest that he did not have a remedy in defamation; rather he is unable to pursue that cause of action because he did not serve the Claim Form in the 2020 Claim in time and the expiry of the one-year limitation period prevents him from bringing a further claim. I appreciate that the claim in *Spring* was for economic loss, rather than for psychiatric injury, but I do not consider that this assists the Claimant in light of the substantial differences that I have discussed. It is clear from the speeches in *Spring*, that their Lordships did not consider that they had gone further than identifying a closely defined scenario in which a duty of care could arise.

Intentional infliction of harm

152. I have also considered the *Wilkinson* line of authorities. Dr Piepenbrock relies upon these cases as illustrating that liability can be imposed for statements that cause psychiatric injury. He submits that this bolsters his duty of care argument. Furthermore, as I clarified during oral submissions, if his pleading does not currently include a claim in the tort of intentional infliction of injury, permission to amend is sought to add such a claim.

153. The ingredients of the tort of intentionally causing physical or psychological harm were clarified by the Supreme Court in *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219 ("*Rhodes*"). The leading judgment was given by Baroness Hale DPSC and Lord Toulson JSC (with whom Lord Clarke and Lord Wilson JJSC agreed). They described the tort as having three elements: a conduct element, a mental element and a consequence element. As regards the latter, physical harm or recognised psychiatric illness is required (para 73). The conduct element entails the claimant proving that the words or conduct were directed towards them and that there is no justification or reasonable excuse (para 74). Baroness Hale and Lord Toulson observed that the tort involves the curtailment of freedom of speech "which gives rise to its own particular considerations"; and that the tort was "confined to those towards whom the relevant

words or conduct were directed, but they may be a group" (para 74). They noted at para 77:

> "Freedom to report the truth is a basic right to which the law gives a very high level of protection…It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself…there is no general law prohibiting the publication of facts which cause distress to another, even if that is the person's intention…"

154. As the Court found that the conduct element was not established, the mental element of the tort did not arise in *Rhodes*. However, having heard argument on the issue, Baroness Hale and Lord Toulson addressed what was required. They concluded that the concept of imputed intent should no longer apply to the tort (paras 81 – 82); and that the mental element involved an intention to cause physical harm or severe mental and emotional distress (paras 87 - 88). They observed that the need to show a deliberate intention to inflict (at least) severe distress "should not be understated".

155. Lord Neuberger PSC, agreed with their reasoning and added some remarks of his own. He emphasised that "given the importance of freedom of expression…it is vital that the boundaries of the cause of action are relatively narrow" (para 104).

156. In my judgment *Rhodes* does not assist the Claimant's claim in negligence. To the contrary, the reasoning of the Supreme Court underscores that the circumstances in which tortious liability will result from words or conduct which cause psychiatric injury are limited and that the parameters have been carefully identified to ensure an appropriate balance with freedom of expression rights. *Rhodes* does not suggest that the Courts should adopt an expansionist approach to the circumstances in which a duty of care will arise in negligence where psychiatric injury results from words used.

157. The Claimant pleads that the Defendants were responsible for false and defamatory articles which foreseeably caused him psychiatric injury (para 72 above). The requisite elements of a claim for intentional infliction of psychiatric injury are not pleaded. In particular, it is not alleged that the words complained of were directed at the Claimant or that the Defendants *intended* to cause him psychiatric injury or (at least) severe mental distress. I return to the question of whether the Claimant should be allowed an opportunity to amend his pleadings to add a claim in this distinct tort after my consideration of the negligence claim (para s 168 – 173 below).

<u>Application to the pleaded circumstances</u>

158. The negligence claim is founded upon the publication of the articles which are alleged to be false and defamatory (paras 72, 73 and 76 above). The duty of care is said to be owed to the Claimant by the LSE and ANL "as the subject of their journalism" (para 72 above). In both the section headed "Particulars of Personal Injury" and the later section addressing his damages claim, Dr Piepenbrock alleges that it was the defamatory contents that damaged his reputation and caused him psychiatric injury.

159. As I have indicated, I am not aware of any case that has accepted the proposition that a publisher owes a duty to its subject to take reasonable care in respect of the accuracy of the published text or in the pre-publication investigations into the material that is used. If a Court were to conclude that a duty of care existed in such circumstances it would represent a very substantial expansion of the current position that would go far beyond proceeding by incrementalism or by analogy with cases where a duty of care has been found to arise (paras 139 – 151 above). The ambit and consequences of such a duty of care would be vast; potentially it would be owed to the subjects of every publication, or at least in every instance where there was a basis for foreseeing that the contents were such that psychiatric injury could result. The law of negligence does not usually recognise a duty of care to protect reputational interests (para 140 above). In the only examples from comparative jurisdictions that have been drawn to my attention, the Courts have rejected the proposition that a duty of care was owed to the subject of the publication (paras 142 – 145 above). Accordingly, the existing caselaw points very strongly against the arguable existence of a duty of care.

160. I have also considered the particular features that are relied upon in the Particulars of Claim. I do not accept that there is an arguably sufficient relationship of proximity. Dr Piepenbrock highlights that he was the subject of the three articles (paras 72 - 73 above). However, this is plainly insufficient to indicate proximity; it would apply to all who were written about. Although the case is not pleaded in this way, in the interests of completeness I add that the fact that there was some communication between the Claimant and ANL before publication (which he criticises as insufficient) does not alter this position; again this is an entirely commonplace feature. Similarly, the sheer fact that the source spoke to D14 about the Claimant does not give rise to an arguable duty of care on the part of the source any more than it did in *Midland Metals*.

161. I am also quite satisfied that it would not be fair, just and reasonable to impose a duty of care in the pleaded circumstances and that the contrary is unarguable. I have already referred to a number of the relevant considerations, but I will collate the points that are particularly significant at this stage:

i) The current state of the law did not preclude the Claimant from bringing a claim in libel in respect of the articles which he says were false and defamatory. Furthermore, he seeks to recover essentially the same heads of damage in both proceedings. As is shown by my earlier summary of the respective Particulars of Claim, the central claim in both instances is for loss of a residual earning capacity caused by an inability to work due to a combination of consequential damage to reputation and consequential psychiatric injury. The Claimant's inability to sue in defamation does not arise from a lacuna in the law (as was the case in *Spring*), but because Dr Piepenbrock did not serve his Claim Form on time;

ii) As my comparison of the two Particulars of Claim shows, that the 2020 Claim has simply been slightly re-packaged in the present pleading. The *substance* of the respective claims advanced are essentially the same;

iii) As I have discussed, a duty of care has not been recognised in any analogous circumstances and to find a duty of care in the present circumstances would present a very substantial extension of the law with wide-sweeping consequences;

iv) The Courts have recognised the importance of balancing the interests of those seeking compensation against the fundamental right to freedom of expression and incursions upon that area have been specific and carefully calibrated (paras 153 and 155 above);

v) A claim in defamation would have a number of safeguards or control mechanisms that would not apply to a claim in negligence, including the one-year limitation period pursuant to s.4A Limitation Act 1980 ("LA 1980") and the single publication rule imposed by s.8 DA 2013; the need to show a defamatory meaning; and the threshold requirement imposed by s.1 DA 2013 to show that the publication has caused or is likely to cause "serious harm" to the claimant's reputation. Additionally, the defences of honest opinion and publication on a matter of public interest available to a defendant in a libel claim would not apply; and

vi) No good policy reason has been identified for extending the duty of care to the current circumstances.

162. I do not consider that this is an area of uncertain or developing law such as could warrant the Court deciding to permit the negligence action to proceed to trial to enable the question to be resolved on established, rather than assumed, facts. The legal position is clear at this stage. For the reasons that I have identified, the negligence claim has no realistic prospect of success and is bound to fail. For the avoidance of doubt, this conclusion has not involved evidential assessments or factual determinations. I have reached it on the basis of the Claimant's pleaded case. The position would not be improved by giving Dr Piepenbrock an opportunity to re-plead his case in negligence – the essence of the claim is apparent and it is equally apparent that it does not arguably give rise to a relevant duty of care. Accordingly, the pleaded claim in negligence will be struck out.

The Defendants' other contentions

163. As I summarised earlier, the Defendants raise a number of additional or alternative reasons why the negligence claim should be struck out or dismissed. As I have concluded that the pleaded duty of care has no realistic prospect of success and is bound to fail against all of the LSE Defendants and the ANL Defendants, it is unnecessary for me to resolve those contentions. In particular:

i) I have not determined the Defendants' alternative (but related) contention that the claim in negligence is an abuse of process because it is a thinly disguised defamation claim that attempts to circumvent the limitation difficulties with such an action;

ii) I have not determined the LSE Defendants' argument based on the *Kishore* form of abuse of process (para 134 above). However, it seems unlikely that they would be able to show that the 2020 Judgment established that the Claimant's conduct amounted to a wholesale *disregard* of the Court rules as opposed to carelessness (paras 49 – 52 above);

iii) I have not determined the LSE Defendants' contention that as a matter of evidence the claim against them would be bound to fail as the Claimant would

not be able to establish that the source referred to in Articles 2A and 2B was an LSE employee. To do so would involve a consideration of the disputed evidential position and s.10 CCA 1981 and the *Norwich Pharmacal* jurisdiction, I do not consider that it is necessary or proportionate to do so in circumstances where the claim in negligence is in any event bound to fail;

iv) I have not determined the ANL Defendants' contention that the Particulars of Claim should be struck out pursuant to CPR 3.4(2)(c) as there has been a failure to comply with a rule, practice direction or order;

v) Whilst I do not strike out the claim on this basis, I note that the absence of expert medical evidence presents a real difficulty for the Claimant. Actionable damage must be shown for a cause of action in negligence to exist. Damage to reputation is not usually recoverable in a negligence claim as I have discussed. As matters stand, no medical evidence has been served in support of the claimed psychiatric injury. The claim cannot be established without supporting medical evidence. Paragraph 4.3 of Practice Direction 16 requires a claimant who relies on the evidence of a medical practitioner to serve their report with the Particulars of Claim. The Claimant's pleading indicates that he will rely on the medical evidence produced in the earlier claims (para 75 above). However, that evidence was focused upon the consequences of the actions of the LSE during the Claimant's employment; whereas the present claim concerns an alleged exacerbation of his condition several years later after the publication of the articles. Mr Piepenbrock suggested that the Claimant could submit to examination by a medical expert instructed by the Defendant or the Court could order the evidence to be given by a jointly instructed expert pursuant to CPR 35.7. However, there is generally no need for a defendant to instruct an expert unless it takes issue with the claimant's expert evidence. The costs of a jointly instructed expert are normally shared between the parties, whereas the Claimant says at para 77 of the Particulars of Claim that he is unable to finance the preparation of expert evidence.

The position of specific Defendants

164. In light of my conclusion in respect of the duty of care it is also unnecessary for me to address the position of individual Defendants in any detail. However, I will summarise the position, as it is quite plain that some of the Defendants could not be liable in negligence even if the alleged duty of care were owed.

165. Whilst there is no clear pleading of the alleged *breach* of duty, paras 68 – 80 of the Particulars of Claim indicate that the alleged negligence lies in the *contents* of the articles, which are said to be false and defamatory. As regards the individual LSE Defendants, only D6 is alleged to have played a specific role in relation to this, as the presumed anonymous source. Paragraph 195 of the Claimant's pleading says that D7 and D8 "were likely to have assisted Ms Hay in carrying out the defamation" but no specifics whatsoever are identified in the very lengthy document. Furthermore, in so far as it is suggested that D2 – D4 have some responsibility in law for the actions of an LSE employee, the proposition is misconceived. Accordingly, I can see no basis at all for the claim in negligence against D2, D3, D4, D5, D7 and D8. The pleaded negligence claims against those Defendants have no realistic prospect of success and are bound to fail.

166. An employer is vicariously liable for the wrongful conduct of its employee where their wrongful conduct was so closely connected with the acts that they were authorised to do in their employment that it could fairly and properly be regarded as having been done by that employee while acting in the ordinary course of their employment: *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12, [2020] AC 989 at paras 23 – 24. The pleaded case against D6 as the alleged anonymous source is that she acted for personal motives of revenge (paras 67 above) and that she was motivated to "break ranks with the LSE's directive not to speak to the media" (para 79 above). Accordingly, even if it could be established that she was the source (which, as I have indicated, I am not determining at this stage), I cannot see any basis upon which such actions could be regarded as part of the ordinary course of her employment. Consequently, the pleaded negligence claim against D1 has no realistic prospect of success and is bound to fail.

167. As regards the ANL Defendants, D11 is the Chairman of DMGT, which does not publish the *Daily Mail* or the *MailOnline*. Furthermore, no individualised allegations have been made in relation to him. In the circumstances, even if a duty of care was owed in respect of the articles, the claim against him would have no realistic prospect of success and would be bound to fail.

Amendment to add a claim for intentional infliction of psychiatric injury

168. Mr Piepenbrock submitted that the Claimant, as an autistic litigant in person, should have the opportunity to amend the Particulars of Claim to add a claim for intentional infliction of psychiatric injury if (as I have done earlier) I concluded that such a claim was not already pleaded and that the pleaded claim in negligence should be struck out. However, for the reasons that I go on to identify, I do not consider that permitting this opportunity to amend would be in the interests of justice or in accordance with the overriding objective.

169. Firstly, this amendment would involve the introduction of an entirely new claim, not currently referred to explicitly or in substance in either the Claim Form or the lengthy Particulars of Claim (para 157 above). Secondly, no formal application to amend has been made or, more importantly, no formulated amendment has been provided. It would not be appropriate to give permission to amend in the abstract. Further, I am not prepared to grant time to submit a proposed amendment to this effect, given that no arguable basis for this claim has been identified and the Claimant is effectively seeking an opportunity to completely re-cast his claim and to do so without commencing new proceedings.

170. Thirdly, I cannot see any realistic basis that could support an assertion that the Defendants *intended* to cause the Claimant psychiatric injury or serious mental distress. Mr Piepenbrock relied on the proposition that this was the foreseeable consequences of their deliberate actions, but this line of argument is precluded by *Rhodes*, where the Supreme Court held that the doctrine of imputed intent no longer applies (para 154 above). The ANL Defendants had very limited contact with the Claimant prior to publication, the proposition that any of them published the articles with the specific intention of causing him serious mental distress or psychiatric harm is fanciful. As regards the LSE Defendants, I have already noted that only D6 is identified in the Particulars of Claim as having been the source, or the figure behind the source, and in so far as it is said that she acted for personal revenge, the LSE could

not be vicariously liable for the same (para 166 above). Accordingly, a claim against anyone other than D6 would be hopeless even on the Claimant's articulation of his case; and thus, in turn, a very different proposition from the current pleading.

171. Fourthly, in considering whether to permit an amendment, it is legitimate to consider whether the proposed allegation appears to give rise to a real prospect of success (para 17.3.6 of the White Book). In this regard I am not confined to the assumed facts. I note that in the earlier High Court claim (where he was represented by a very experienced legal team), the Claimant made no equivalent allegations that D6 acted out of a desire to gain personal revenge because he had spurned her advances in 2011. In contrast, it is now pleaded that she was motivated by this desire for revenge throughout the material period from 2012 onwards. In so far as it is may be said that it was the 2018 Judgment that tipped the balance in terms of D6's state of mind, it is apparent from my earlier summary (paras 36 – 39 above) that this was not an unequivocal victory for the Claimant, as he suggests.

172. Fifthly, as I have explained at para 153 above, a claim in this tort requires the Claimant to show psychiatric injury as an essential constituent element. There is likely to be a real difficulty with him doing so for the reasons I have identified at para 163 (v) above.

173. Mr Piepenbrock submitted that I should make allowance for the fact that Dr Piepenbrock is a disabled litigant in person. I have taken this into account. However, even if a pleaded case in this tort was prepared, it would not overcome the fundamental difficulties that I have identified.

<u>The pleaded claim under the PHA 1997</u>

174. I have summarised the pleaded claim under the PHA 1997 at paras 80 - 93 above. The Defendants advance a number of reasons why they say that summary judgment or strike-out should be ordered. I consider them after addressing the statutory provisions and caselaw.

The legal framework

175. The relevant provisions of the PHA 1997 are as follows:

> "**1. Prohibition of harassment**
>
> (1) A person must not pursue a course of conduct-
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> …..
>
> (2) For the purposes of this section…the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Subsection (1)…does not apply to a course of conduct if the person who pursued it shows-

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances, the pursuit of the course of conduct was reasonable.

3. Civil remedy

(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim damages may be award for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

…..

7. Interpretation of this group of sections

(1) This section applies for the interpretation of sections 1 to 5A.

(2) References to harassing a person include alarming that person or causing the person distress.

(3) A 'course of conduct' must involve-

(a) in the case of conduct in relation to a single person (section 1(1)), conduct on at least two occasions in relation to that person,

…..

(4) Conduct includes speech. "

176. In *Canada Goose UK Retail Limited & Ors v Persons Unknown* [2019] EWHC 2459 ("*Canada Goose*") at para 51, Nicklin J identified what amounts to harassment for these purposes by reference to Warby J's (as he then was) summary of the authorities in *Hourani v Thomson* [2017] EWHC 432 (QB) at paras 138 – 146. He said:

> "i) Reference in the PfHA to harassment including alarming the person or causing the person distress is not definitive of the tort; it is merely guidance as to one element of it: [138]. Nor is it an exhaustive statement of the consequences that harassment may involve. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct

[139], which is calculated to, and does, cause that person alarm, fear or distress: *Hayes v Willoughby* [2013] 1 WLR 935 [1] per Lord Sumption.

ii) The behaviour must reach a level of seriousness before it amounts to harassment within the scope of s.1 PfHA; not least because the Act creates both a tort and, by s.2 a crime of harassment: [139]. The authoritative exposition of this point is that of Lord Nicholls in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 [30]:

> '[Where] the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyance, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.'

iii) There must be conduct, on at least two occasions, which is, from an objective standpoint, calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that would sustain criminal liability [140] and *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) [142] per Simon J.

iv) The objective nature of the assessment of harassment is particularly important where the complaint is of harassment by publication. In any such case, the claim engages Article 10 of the Convention and, as a result, the Court's duties under ss. 2, 3, 6 and 12 Human Rights Act 1988. '*It would be a serious interference with the freedom of expression if those wishing to express their own views could be silenced or threatened with, claims for harassment based on <u>subjective</u> claims by individuals that they feel offended or insulted'*: *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) [267] per Tugendhat J (emphasis added)."

177. Harassment by publication was considered in *Thomas*, where the Court of Appeal upheld a refusal to strike out a PHA 1997 claim on the basis it disclosed an arguable claim. Dr Piepenbrock relies upon this outcome (paras 81 – 82 above). The first defendant was the publisher of an article in *The Sun* newspaper about two police sergeants who had been demoted over a remark made about an asylum-seeker. The article said that "a black clerk at their station", Esther Thomas, had complained that the officers had made racist jokes. The article was sympathetic to the demoted officers. A few days later the newspaper published letters from "furious" readers criticising the way the officers had been treated and the clerk for having reported them. A third article referred to the officers having been hauled in front of a

disciplinary tribunal "after a black civilian clerk complained about a series of exchanges". Ms Thomas pleaded that the articles had caused her distress and anxiety and caused her to be fearful to go to work. She had received race hate mail at her work place. She said that it was unnecessary for the articles to have referred to the fact that she was black and to have given her name and place of work.

178. Lord Phillips, MR (as he then was), considered the defendants were correct to concede that a press article *could* amount to harassment (para 14). He noted that s.3 HRA 1998 required the Court, so far as it was possible to do so, to interpret and give effect to the PHA 1997 in a manner that was compatible with ECHR rights and that accordingly harassment "must not be given an interpretation which restricts the right to freedom of expression, save in so far as this is necessary in order to achieve a legitimate aim" (para 24). He described the duty to give effect to Article 10 as "an important consideration to any court when considering whether…a civil tort has been committed contrary to the 1997 Act" (para 26). He provided the following guidance:

> "32. Whether conduct is reasonable will depend upon the circumstances of the particular case. When considering whether the conduct of the press in publishing articles is reasonable for the purposes of 1997 Act, the answer does not turn upon whether opinions expressed in the article are reasonably held. The question must be answered by reference to the right of the press to freedom of expression which has been so emphatically recognised by the jurisprudence both of Strasbourg and this country.
>
> 33. …Protection of reputation is a legitimate reason to restrict freedom of expression. Subject to the law of defamation, the press was entitled to publish an article, or series of articles, about an individual, notwithstanding that it could be foreseen that such conduct was likely to cause distress to the subject of the article.
>
> 34. The 1997 Act has not rendered such conduct unlawful. In general press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading, which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.
>
> 35. It is common ground between the parties to this appeal, and properly so, that before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare.
>
> …..

> 37. …the parties are agreed that the publication of press articles calculated to incite racial hatred of an individual provides an example of conduct which is capable of amounting to harassment under the 1997 Act…Mr Browne recognises that the Convention right of freedom of expression does not extend to protect remarks directly against the Convention's underlying values…
>
> …..
>
> 50. ….On my analysis, the test requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society required should be curbed." (Emphasis added)

179. Accordingly, it is clear that publishing robust criticism of an individual that will foreseeably cause them distress is insufficient in itself to amount to harassment for the purposes of the PHA 1997; something exceptional amounting to an abuse of the freedom of the press is required.

180. As regards the circumstances in *Thomas*, Lord Phillips said that in light of the parties' agreement regarding incitement to racial hatred, the issue was a narrow one and when the three articles were considered together there was an arguable case that the claimant had been harassed by racist criticism which was foreseeably likely to stimulate a racist reaction on the part of the readership and cause her distress (paras 38 and 47 – 48).

181. Lord Phillips' judgment in *Thomas* was cited by Tugendhat J in *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB), [2012] 4 All E.R. 717 ("*Trimingham*") at para 267 before the passage cited at para 176 (iv) above. In that case the claimant was unsuccessful in establishing harassment in relation to a series of 65 published articles that made pejorative references to her sexual orientation (in the context of reporting her affair with a cabinet minister).

182. Lord Phillips' judgment was also cited in an unsuccessful claim for harassment by publication by Warby J in *Sube v News Group Newspapers Ltd* [2020] EWHC 1125 (QB), [2020] E.M.L.R 25 ("*Sube*"). At para 68 he summarised the points that emerged from the authorities. With the citations from *Thomas* and from *Trimingham* that I have already set out omitted, he said:

> "(1) It is for the claimant to demonstrate that the conduct complained of is unreasonable, to the degree required…it is not a question of assessing the reasonableness of any opinions expressed in the publications complained of… [part of para 32, *Thomas* was cited].
>
> (2) The Court must test the '*necessity*' of any interference with freedom of expression by using the well-known three part test:

'The test of 'necessity in a democratic society' requires the Court to determine whether the 'interference' corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given… to justify it are relevant and sufficient'

Nilsen and Johnsen v Norway (1999) 30 E.H.R.R. 878 [43].

(3) In general, techniques of reporting, including the tone and editorial decisions about content, are matters for the media and not the Court to determine, see for instance *Jersild v Denmark* (1995) 19 E.H.R.R 1 [31]…*Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) [85] (Tugendhat J).

(4) The court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant… [para of para 267, *Tirmingham* was cited].

(5) Applied to the tort of harassment, these principles mean that nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment… [part of para 50, *Thomas* was cited].

(6) It will be a rare or exceptional case in which these criteria are satisfied, in relation to media publication… [part of paras 34 – 35, *Thomas* was cited]."

The pleaded case against the LSE Defendants

The allegations concerning D6

183. As I have summarised in para 84 above, Dr Piepenbrock pleads that he was harassed by D6 in six respects. The first two allegations concern conduct in September 2011 (the sexual assault by D6) and November 2012 (refusal to investigate his grievance against D9). They are plainly out of time, as a six year limitation period applies by virtue of ss 2 and 11(1A) LA 1980. Whilst that is a conclusive answer, I also conclude that the pursuit of these allegations would amount to an abuse of process for the reasons I discuss in relation to the third allegation.

184. The third allegation is that in March 2016 D6 lied in saying that there never existed evidence of Dr Piepenbrock instituting a grievance against D9 in November 2012. This allegation (and the second allegation) refers back to matters set out in paras 151 – 162 and 203 – 204 of the Particulars of Claim. I accept Ms Johnson's submission that the pursuit of this allegation is an abuse of process as if it was to be made, it could and should have been raised in the earlier High Court claim that was tried in 2018.

185. In accordance with Lord Bingham's guidance in *Johnson v Gore-Wood* (para 132 above), I have approached this question on the basis that the failure to raise this allegation in the earlier proceedings does not in and of itself amount to an abuse and

that I must make a broad merits-based judgment taking into account all of the facts of the case and focusing upon whether the Claimant is misusing the processes of the Court by seeking to raise the issue at this stage. I am influenced by the following in particular:

i) The High Court claim that was tried in 2018 concerned the November 2012 US trip, D9's subsequent complaint and the way the LSE handled this. D6 was a central witness for the LSE in those proceedings, given her role as the Department Manager. Indeed, the Claimant describes her as the LSE's "key witness" at para 203 of his Particulars of Claim. Her involvement in the events is summarised in paras 90 – 102 of the 2018 Judgment. Her conduct was heavily criticised by the Claimant in the allegations of negligence that were advanced. He was represented by a highly experienced legal team. Nonetheless he did not assert in those proceedings that D6 (as opposed to D9) was responsible for conduct that amounted to harassment under the PHA 1997 and the particulars of negligence and / or breach of contract did not allege that she (or other members of the LSE staff) had failed to investigate a grievance that he had instituted in November 2012 against D9 or that D6 had subsequently lied about this. (His evidence is summarised in detail at paras 6 – 48 of the 2018 Judgment.) This would have been the obvious time to raise allegations (if pursued) that D6's alleged failings were the product of a "multi-year campaign of vengeance" on her part (para 35, current Particulars of Claim) and /or that the Claimant's own grievance about D9's conduct had been supressed. No sufficient explanation for these omissions has been advanced by the Claimant;

ii) The trial in 2018 occupied nine days of Court time. Accordingly, a considerable proportion of the Court's resources were devoted to the matter at that stage;

iii) In support of his current allegation that D6 lied about the existence of documents confirming that he raised a grievance in November 2012, the Claimant relies on statements made and disclosure given in those earlier proceedings, see paras 153 – 156 of the Particulars of Claim. This underscores the point that, if these matters were worthy of exploration, the time and place for that to be done was within the earlier High Court claim;

iv) The current Particulars of Claim disparage D6 in a gratuitous and unnecessary way (even allowing for the specific harassment allegations that the Claimant makes). By way of example, scattergun allegations are made including: that she has been a bully to others; that she drinks alcohol to excess (and a superfluous photograph of her holding what appears to be a glass of wine is included in the pleading); and that she has run a "harassment machine" against named others (paras 23 – 29). Her alleged harassment is compositely described as "vengeance stalking" although the six individual allegations, even if taken at face value, do not warrant this description;

v) The alleged conduct in March 2016 (the third allegation) would need to be considered in the context of the second allegation, which, as I have indicated, is statute barred. Pursuit of this aspect of the claim would involve the Court considering heavily disputed events that occurred many years ago.

Furthermore, the Claimant appears to accept in para 598 of his current pleading that the previous High Court claim covered the LSE's torts up to March 2013, which would include an alleged failure to address a grievance submitted in November 2012;

vi) Although it is not suggested that an issue estoppel arises in relation to this aspect (as the ET claim contained no pleaded allegations against her), the ET's conclusions in relation to D6 are relevant to the broad merits-based assessment. Dr Piepenbrock filed a witness statement in those proceedings which made a series of allegations about D6 that are similar to those made in the current proceedings. The ET concluded that no rational explanation had been provided for his failure to include these allegations when the claim was pleaded in 2015, particularly as he now describes her as the central player in the alleged harassment he received (para 4.148). The ET rejected the explanation that he had not done so earlier because he was scared of her as "fanciful" (para 7.32). The ET also found on the balance of probabilities that D6 had become a focus of Dr Piepenbrock's allegations because he believed that she was the source of the ANL published articles and that his actions were "essentially retaliatory" for this (paras 4.149 and 7.32). Furthermore, in its factual findings, the ET rejected in terms the proposition that the Claimant had raised a grievance against D9 in November 2012 (paras 5.69, 5.70, 5.76 and 5.84 – 5.88). Accordingly, the ET rejected the factual proposition upon which the second and third allegations of harassment by D6 are founded;

vii) The ET hearing spanned 28 days (excluding the days spent deliberating in chambers) and 16 witnesses gave oral evidence;

viii) The Claimant now seeks to raise issues in a third set of proceedings that were either not raised in these earlier multi-day proceedings when they could have been or which (in the case of the ET claim) have now been the subject of adverse findings in a number of respects. To allow these matters to proceed now would be oppressive and an abuse of the Court's processes.

186. The fourth allegation of harassment by D6 relates to evidence that she gave at the High Court trial in 2018. As such, this is covered by the very well-established principle of witness immunity which includes anything said or done in the ordinary course of Court proceedings including by witnesses: *Darker & Ors. v Chief Constable of the West Midlands Police* [2001] 1 AC 435 per Lord Hope at 446A-B. Certain torts are recognised exceptions to the witness immunity rule, but a civil claim under the PHA 1997 is not one of them.

187. The fifth and sixth allegations made against D6 relate to her alleged role as the source referred to in Articles 2A and 2B. As I have already indicated in respect of the negligence claim, I do not consider it appropriate to strike out and/or give summary judgment at this stage on the basis that the allegation that she is the anonymous source is bound to fail (para 163 (iii) above). Nonetheless, there are two free-standing reasons why this aspect of the harassment claim is bound to fail.

188. Firstly, harassment under the PHA 1997 can only arise where there is a "course of conduct" involving at least two occasions (paras 175 above). An essential element of "harassment" is that the conduct is "persistent" (para 176 above). However, Articles

2A and 2B both contain the same material from the source and accordingly both relate to the same act of communication/s between the source and D14. The fact that the same act of alleged harassment is subsequently documented on more than one occasion does not change the character of the act itself if that is a single act. Accordingly, the fifth and sixth allegations concern the same alleged conduct by D6. As the other pleaded allegations against her fall to be struck out, there is no other conduct that is capable of constituting the course of conduct.

189. Secondly, as I do not consider it arguable that the articles amounted to harassment by publication (paras 195 – 197 below), it follows that the source's provision of material contained within Articles 2A and 2B is likewise incapable of amounting to harassment.

190. The seventh pleaded allegation of harassment involves action that is said to have been directed at the Claimant's wife, Professor Marnette-Piepenbrock (para 84 (vii) above). As clarified in oral submissions, the pleaded actions of D6 are said to have generated a threatening and harassing email sent by Pinsent Masons to the Claimant's wife (see also para 580). As such, the complaint relates to action directed towards a third party and it does not appear to me to be capable of founding a claim for harassment brought by *the Claimant* and therefore it is also bound to fail.

191. I note for completeness, that even if there were any allegations of harassment by D6 that survived this evaluation, there is plainly no basis for a claim to be made against any of the other LSE Defendants, essentially for analogous reasons to those that I have identified in respect of the negligence claim (paras 165 and 166 above).

<u>The allegations concerning vicarious liability for D9</u>

192. I have summarised the five allegations for which it is said that the LSE are vicariously liable (para 87 above). The first two allegations relate to alleged events in November 2012 and as such they are statute-barred as the limitation period has expired. Whilst the claim against the LSE falls to be struck out on that basis, I also note that the first allegation is outside the jurisdictional reach of the provisions of the PHA 1997, which apply to England and Wales only: see s.14 of the Act and para 225 of the 2018 Judgment. Furthermore, both allegations have already been rejected in earlier judgments and therefore would be precluded by issue estoppel. The ET found that the Claimant's allegation that D9 had exposed herself on 12 November 2012 was false (para 59 above), addressing this issue because it went directly to the question of whether the alleged protected acts had been undertaken in good faith (para 59 above). Furthermore the 2018 Judgment rejected the proposition that D9's allegations were false and malicious (para 36 (vi) and (ix) above).

193. The conduct that comprises the third and fourth allegations (contributing to the false and defamatory Articles 2A and 2B) occurred many years after the cessation of D9's employment with the LSE in 2012. This is also the position with the fifth allegation (filing a false and malicious statement in the ET Claim). In the circumstances no arguable basis has been pleaded or otherwise identified to support the proposition that the LSE was liable for this conduct. The case against the LSE is bound to fail.

194. I also note for completeness that the premise of the fifth allegation is undermined by the findings made by the ET, who essentially accepted D9's account of events on the

US trip in November 2012 and rejected the Claimant's account as false (para 59 above). The ET described Dr Piepenbrock's behaviour towards D9 as "obsessive and destructive" and his conduct as "extreme and indefensible", including vilifying her on a website. Furthermore, witness immunity extends to the contents of a witness statement submitted in legal proceedings.

The claim against the ANL Defendants

195. The Particulars of Claim rely on the alleged defamation of Dr Piepenbrock in Articles 2A and 2B as constituting the harassment. There are two free-standing reasons why I conclude that this part of the claim has no realistic prospect of success and is bound to fail. The first is that the two articles are essentially the same article published in two different media. The only difference is that the print edition (Article 2B) had a more equivocal headline (para 46 above). As I have discussed when considering the allegations against D6, harassment requires a course of conduct entailing persistent oppressive or unacceptable behaviour on at least two occasions (para 188 above). I do not consider it arguable that publishing these two versions of the article constituted a course of conduct.

196. Secondly, I conclude that the allegation that the articles constituted publication by harassment has no realistic prospect of success and is bound to fail for the following reasons:

i) Harassment entails conduct which is oppressive and or unacceptable to such a degree that it would sustain criminal liability (para 176 above);

ii) As I have set out in paras 177 – 182 above, the threshold is a high one in alleged harassment by publication cases and it will only be met in exceptional cases; nothing short of a conscious or negligent abuse of media freedom is required;

iii) The contents of these articles were not all one way. They included material that was favourable to the Claimant, as well as comments that were highly critical of him. By way of example, the articles contained a summary of the 2018 Judgment, including findings in the Claimant's favour; references to his illness; the LSE's finding that D9's complaint was non proven; and the rival versions of D9's conduct in Boston were summarised (paras 41 – 43 above). Further, I note that some of the comments attributed to the source were in line with conclusions that were expressed in the 2018 Judgment, for example regarding the inappropriateness of the Claimant's conduct in Seattle;

iv) The likely impact is to be evaluated objectively, rather than by reference to the Claimant's description of the effect that the articles had upon him (paras 176 and 182 above);

v) The parallel that the Claimant seeks to draw with *Thomas* is not well-founded. In that case it was arguable that wholly gratuitous reference had been made to Ms Thomas' race with the foreseeable effect of stirring up racial hatred; and, in turn, *The Sun* had published the letters that this then generated. There is nothing equivalent in Articles 2A and 2B;

vi) The fact that an article may foreseeably cause distress is insufficient (para 178 above). If the proposition that D14 wrote an article that she knew would upset him was a sufficient basis for a harassment claim, the cause of action would be available in respect of a very extensive number of stories published every day by the media;

vii) As I have discussed in respect of the negligence claim, on his pleaded case, the Claimant had a potential remedy in defamation in respect of the articles, if he had served his earlier Claim Form in accordance with the rules. It is neither a necessary nor a proportionate interference with freedom of expression rights to permit him to sue under the PHA 1997 in respect of the same matters; and

viii) There is nothing rare or exceptional about the pleaded circumstances and this is plainly not a case involving abuse of the freedom of the press, even if the Claimant was only given a limited opportunity pre-publication to comment on the article that D14 was writing, as he alleges.

197. I do not consider that the prospects of success in respect of these allegations would be likely to improve if the claim were permitted to proceed to trial, given my assessment is based on the contents of the published articles and the assumed facts.

Further alleged harassment by the LSE and ANL

198. This part of the PHA 1997 claim is pleaded at paras 592 – 597 of the Particulars of Claim (paras 92 above). The Claimant contends that the harassment lies in threatening to pursue him for costs that the Defendants know he has no means to pay. I have summarised the costs correspondence shown to me at paras 54 – 56 above. I do not consider that the pleaded allegation is capable of amounting to harassment; in my judgment it has no realistic prospect of success and is bound to fail for the following reasons:

i) The high threshold test which I have already identified;

ii) The Defendants were awarded their costs following the 2020 Judgment (para 53 above). On the face of it, they are entitled to seek to enforce that Court order by the lawful means available to them. It is agreed that nothing has been paid so far and it not suggested that the Claimant has made any proposals to pay the costs;

iii) The relevant correspondence from the Defendants' respective solicitors is expressed in moderate terms. There is nothing abusive or oppressive in the language used. The means of enforcing the costs order referred to, such as preparing a Bill of Costs and proceeding to detailed assessment, are legitimate ways for a receiving party to progress recovery of costs pursuant to an order for costs made in their favour;

iv) The claim is predicated on the basis that the Defendants know that the Claimant is a "man of straw". However, the material in the Claimant's pleading does not provide the support that he asserts it does. The letter from the ET proceedings that is quoted at para 592 simply refers to Dr Piepenbrock describing himself as bankrupt, it does not say that this proposition is

accepted. The text goes on to say that the Respondent does not expect to succeed in enforcing the costs order made in the 2020 Claim in circumstances where that is Dr Piepenbrock's position and he has paid nothing towards the order so far. The letter does not say that the Defendants know or accept that the Claimant is without means;

v) Although knowing that this part of his pleading was challenged as bound to fail, the Claimant has filed no evidence detailing his financial position in the present proceedings;

vi) The reasoning at para 594 of the Particulars of Claim is manifestly flawed. Self-evidently there are financial and deterrence reasons why a party will seek the payment of costs that they are owed; it does not follow that "the only plausible reason" for doing so was to "harass him and cause as much fear and distress… as possible".

199. For the reasons set out above, I conclude that the entirety of the pleaded PHA 1997 claim against the LSE Defendants and the ANL Defendants should be struck out.

The pleaded claim under the EQA 2010

200. I have summarised the claims brought under the EQA 2010 at paras 95 – 107 above. There are fundamental difficulties with the claim.

201. Firstly, there is a jurisdictional issue. If and in so far as the complaint relates to the Claimant's employment (Part 5 of the Act), the claim would come within the ET's jurisdiction by virtue of s.120(1) EQA 2010. If and in so far as the complaint relates to services and public functions (Part 3 of the Act) it is the County Court that has jurisdiction by virtue of s.114. The High Court has a power to transfer proceedings to the County Court if it is satisfied that they are required by an enactment to be in that court: s.40(1) County Court Act 1984. It is not suggested that transfer is precluded by s.40(1)(b); I accept that the Claimant was not aware of the jurisdictional position in relation to non-employment claims.

202. Nonetheless, in order to ascertain whether there is a recognisable claim that can be transferred, it is necessary to consider whether the pleaded claim is one that comes within, or at least could come within, Part 3 of the Act. None of the other Parts of the EQA 2010 could conceivably apply. For present purposes I will use the term "discrimination" as a shorthand to refer collectively to discrimination, harassment and victimisation. The Particulars of Claim allege various forms of discrimination without identifying which Part of the Act the conduct in question falls under. I accept that the Claimant did not appreciate that it is insufficient to rely on one or more of the forms of discrimination defined in ss.14 – 27 EQA 2010 and that they do not give rise to free-standing causes of action. The conduct complained of is only unlawful if it occurred in one of the contexts where discrimination is outlawed by the EQA 2010. These include work, education and transport. As the Claimant is a litigant in person, I would not strike the claim out on the basis of this omission if there was reason to believe that the position could be improved by amendment, but I do not consider that it can be.

203. Section 29(1) – (2) EQA 2010 provides that a "service-provider…concerned with the provision of services to the public or a section of the public…must not discriminate against a person requiring the service" in not providing the service or in the terms upon which it is provided. Subsections (3) – (5) afford equivalent protection from harassment or victimisation of a person requiring a service from a service-provider. Section 31(6) states that: "A reference to a person requiring a service including a reference to a person who is seeking to obtain or use the service".

204. As regards public functions, s.29(6) EQA 2010 provides that a person must not "in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation". Section 31(4) says that a public function is one that is a function of a public nature for the purposes of the HRA 1998. It is therefore necessary to refer to s.6(3)(b) HRA 1998 which provides that a "public authority" is "any person certain of whose functions are functions of a public nature". However, this is qualified by subsection (5) which says: "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".

205. These concepts were explained by Baroness Hale in *YL v Birmingham City Council & Ors.* [2007] UKHL 27, [2008] 1 AC 95 ("*YL*"). It is the nature of the function being performed, rather than the nature of the body performing it, which matters for the purposes of s.6(3)(b) (para 61). She continued at para 62:

> "The contrast is drawn in the Act between 'public' functions and 'private' acts. This cannot refer to whether or not the acts are performed in public or in private. There are many acts performed in public (such as singing in the street) which have nothing to do with public functions. And there are many acts performed in private which are nevertheless in the exercise of public functions (such as care or prisoners or compulsory psychiatric patients). The contrast is between what is 'public' in the sense of it being done for or by or on behalf of the people as a whole and what is 'private' in the sense of being done for one's own purposes."

206. Between paras 65 – 71 Baroness Hale identified a number of factors that were likely to indicate that the act was a public function, including: if the state had assumed responsibility for seeing that the task in question was performed; if there was a public interest in having the task undertaken; if there was provision of public funding in respect of it; and if statutory coercive powers were involved.

207. As regards the claim made in respect of the LSE Defendants:

i) The allegations of discrimination because of sex and sex related harassment, concern the Claimant's treatment as an employee and the actions of the source in communicating material to D14 (paras 96 - 98 above). The former is within the ET's jurisdiction. As regards the latter, it is plain that providing unflattering material to a journalist about the Claimant's character or conduct does not involve the exercise of a public function and does not entail the provision of a service to him. The contrary is unarguable;

ii) No specific acts are identified in relation to the victimisation claim at para 607 of the pleading (para 99 above). In any event, there is no reason to suppose that such acts, if identified, could escape the difficulties that I have identified in sub-paragraph (i);

iii) As I have noted earlier, the disability discrimination claim is primarily articulated in respect of the ANL Defendants. In so far as the alleged harassment relating to disability also relies on the actions of the source, this could not fall within the EQA 2010 for the reasons I have identified in sub-paragraph (i);

iv) The victimisation claim that is pleaded in respect of disability relies on the contention that I have already addressed in sub-paragraph (i), namely the actions of D6 as the alleged source.

208. Accordingly, it is quite clear that the discrimination claim against the LSE Defendants is bound to fail because the allegations in question are not capable of coming within the services and public functions provisions of the EQA 2010 and in so far as they concern the Claimant's previous employment with the LSE they could only be considered by the ET.

209. As regards the allegations made in respect of the ANL Defendants:

i) The only pleaded allegations in respect of sex discrimination and/or harassment related to sex, concern the publication of the allegedly defamatory articles (paras 96 and 98 above). It is quite clear that the publication of a print newspaper or online article by a media organisation does not involve the exercise of a public function. It is an activity undertaken for profit for the benefit of the publisher and it has none of the hallmarks of a public function that I have already discussed. I have explained by reference to Baroness Hale's judgment in *YL* why the sheer fact that this was done in the public eye does not make it a public function (as the Claimant suggests). Equally it cannot be said that publishing the unflattering articles about the Claimant involved provision of a service to him. There is no caselaw that suggests that these activities would come within the s.29 concept of a service-provider. In *Trimingham*, Tugenhadt J referred to the claimant's counsel "rightly making clear that the anti-discrimination legislation does not apply to statements published to the public at large in the press or online";

ii) The pleaded allegations of disability discrimination and harassment either concern the publication of the articles or the steps leading up to this, in particular the extent to which the Claimant was afforded an opportunity to respond (paras 103 - 105 above). Accordingly, these allegations are not capable of coming within the EQA 2010 for the same reasons as I have explained in sub-paragraph (i); and

iii) In so far as allegations of victimisation are made against these Defendants, the same analysis applies.

210. In the circumstances there is nothing to transfer to the County Court as the Claimant has not pleaded a claim that is capable of coming within the EQA 2010 services and

public functions provisions. For the reasons I have explained, the matter could not be improved by permitting time for amendment. The discrimination claims against the LSE Defendants and the ANL Defendants have no realistic prospect of success and are bound to fail. Accordingly, the pleaded claims under the EQA will be struck out.

211. In these circumstances it is unnecessary for me to deal in detail with the other objections to the EQA 2010 claim raised by the Defendants. I merely indicate for completeness that:

i) There would likely be substantial difficulties with time limits, given that the primary time limit is one of six months;

ii) Some of the allegations would be precluded by issue estoppel as the ET has now determined that D9 did not behave as alleged by the Claimant on 12 November 2012 (para 59 above); and the High Court has already determined in the 2018 Judgment that her grievance was not false and malicious (para 36 (ix) above). In so far as the allegations relate to the Claimant's employment with the LSE, his failure to litigate them in the earlier proceedings would give rise to the *Johnson v Gore-Wood* type of abuse of process for reasons similar to those that I have identified at para 185 above; and

iii) In the circumstances I do not consider it necessary to address the Defendants' various criticisms regarding the vague way in which the discrimination claim has been pleaded.

The pleaded claim under the HRA 1998

212. I can deal with this claim very shortly. Section 6(1) HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Proceedings may be brought under the Act where a person claims that a public authority has acted, or proposes to act, in a way which is made unlawful by s.6(1). Accordingly, claims under the HRA 1998 can only be brought in relation to the acts of public authorities. For reasons that I explained in relation to the EQA 2010 claims, the Claimant will be unable to establish that the matters complained of in these proceedings were the acts of public authorities. Accordingly, the pleaded claims under the HRA 1998 against the LSE Defendants and the ANL Defendants have no realistic prospect of success. As they are bound to fail they will be struck out.

The Data Protection pleaded claims

213. It is readily apparent that part of the pleading refers to matters that could not in themselves gives rise to a civil liability for damages, specifically: failing to notify the ICO (para 109 above); the alleged commission of criminal offences (para 109 above); and the Information Commissioner's powers to impose monetary penalties (para 113 above). Accordingly, these aspects of the pleading disclose no arguable claim that has a realistic prospect of success. They are bound to fail and will be struck out. This leaves the complaints that the LSE destroyed data and that both sets of Defendants failed to comply with SARs (paras 110 – 112 above).

Claims against the LSE Defendants

214. The claim pleaded at paras 652 – 658 of the Particulars of Claim alleges that the LSE failed to comply with its disclosure obligations in the High Court action that was tried in 2018 (para 110 above). I understand that there were a number of allegations made regarding the adequacy of disclosure during the course of those proceedings. I was told by counsel that they were either dealt with as matters of case management at the time or, in relation to alleged destruction of evidence, allegations were initially raised that were not pursued. It would plainly be an oppressive act and an abuse of the Court's processes to permit the Claimant to now resurrect those matters in these subsequent proceedings when the time for pursuing them (if there was merit in their pursuit) was within that earlier litigation. I will therefore strike out this part of the pleading.

215. Much of the pleaded complaint about the LSE's response to the Claimant's SARs also relates to the alleged withholding of material in the earlier High Court litigation (para 111 above). Thus, the conclusion that I have set out in the preceding paragraph regarding abuse of process also applies to this aspect.

216. My conclusion that the allegations are an abuse is reinforced by the fact that they are premised on allegations that have now been rejected by the ET. The Claimant pleads that evidence was withheld by the LSE in order to conceal the fact that he had raised a grievance against D9 in November 2012. (There is an inadvertent error in para 659 of the Particulars of Claim where the month is stated to be October, rather than November 2012, but it is clear that the Claimant is referring to the aftermath of the US trip, not to matters prior to it.). However, the ET found that no such grievance complaint was made (para 185 (vi) above) and it further found at para 5.126 of its judgment that the first time that Dr Piepenbrock complained about D9 making a sexual advance to him in Boston, was on 10 June 2013. Even if these findings do not give rise to an issue estoppel, they support the conclusion that pursuing the allegations in the present proceedings would amount to an abuse of process.

217. There then remains the three more recent SARs listed in para 661 of the Particulars of Claim, which were sent on 18 November 2019, 19 August 2020 and 30 September 2021. The only specifics that are provided appear at paras 678 – 681 of the Particulars of Claim. Reference is made to the LSE's refusal to hand over correspondence relating to an investigation into the actions of the source for the ANL articles. Ms Johnson submits that the pleading of this aspect of the claim is wholly inadequate and in breach of the requirements of the CPR.

218. CPR 16.4(1) requires a Particulars of Claim to include "a concise statement of the facts upon which the claimant relies". In a similar vein, the Practice Direction to CPR 53 provides that statements of case "should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim" (para 2.1). In a claim for breach of data protection legislation, the Particulars of Claim must specify: (1) the legislation and provision that the claimant alleges was breached; (2) any specific data or acts of processing to which the claim relates; (3) the specific acts or omissions said to amount to such a breach and the grounds for that allegation; and (4) the remedies which are sought (PD 53, para 9).

219. The Particulars of Claim are very far from concise and they contain a great deal of extraneous material. More specifically, in relation to the LSE's alleged failure to comply with the three more recent SARs:

i) The SARs are said to have been "partially fulfilled" (para 661). Reference is made to a refusal to handover correspondence regarding the investigation into the actions of the source (para 678). However, it is unclear: (a) why the Claimant says that this material exists; (b) more specifically, what material is believed to exist that has not already been provided; (c) the extent to which it constitutes personal data in respect of the Claimant; and (d) whether this is the only failure alleged in relation to these three SARs;

ii) The pleading does not specify the legislative provisions that are said to have been breached or why this is said to be the case; and

iii) No specific remedies are sought in relation to the data protection claim, in circumstances where it is not pleaded that the failure to provide this material was itself causative of psychiatric injury or destructive of residual career earnings.

220. After the hearing the Claimant provided me with a letter to the LSE from the ICO to the LSE dated 12 August 2022. The letter refers to Mr Piepenbrock's concern that a SAR on behalf of his father has not received an appropriate response and the author says that based on what Mr Piepenbrock has provided, it appears that the LSE had not responded to his concerns. It is not clear from this letter: which SAR is being referred to; the account that the ICO was given by Mr Piepenbrock; nor the respects in which it is said that there has been a failure by the LSE to respond. Accordingly, this letter does not improve the state of affairs that I have described.

221. In the circumstances, I am unable to determine whether or not an arguable claim *could* exist in respect of this very limited aspect of the data protection claim if a revised CPR-compliant pleading was provided. Given the deficiencies in the pleading, no arguable claim is identified at present. Furthermore, only the LSE and D6 are named in the pleading of the data protection claim; so that, in any event, it can be seen at this stage that any claim against the other LSE Defendants is bound to fail. If an arguable claim were properly pleaded in relation to D1 and/or D6 it would be a very modest claim indeed in comparison to that set out in the current pleading, both in terms of its scale and its value. However, a very substantially revised pleading would be required. In any event, it is necessary to first consider the CPR 3.4(4) application, which I turn to after addressing the data protection claims brought against the ANL Defendants.

Claims against the ANL Defendants

222. This is addressed briefly in paras 684 – 686 of the Particulars of Claim (para 112 above). The gist of what is said is that ANL have failed to provide the Claimant's data in response to a series of requests that are listed in para 684. It is said that ANL declined to do so on the grounds that third party data is involved. I agree with Ms Marzec's submission that as currently pleaded this is not a coherent claim, in particular:

i) The correspondence indicates that some data was provided and the Claimant has not identified the data which has not been provided in breach of ANL's obligations. The requests themselves appear to have been made in wide terms, for example: "for all the personal information you hold on [Dr Piepenbrock] from 5 October 2018 to present";

ii) The Claimant has not identified why ANL's reliance upon the information constituting third party personal data is inapplicable or incorrect;

iii) The pleading does not specify the legislative provisions that are said to have been breached or why this is said to be the case; and

iv) No specific remedies are sought in relation to the data protection claim, in circumstances where it is not pleaded that the failure to provide this material was itself causative of psychiatric injury or destructive of residual career earnings.

223. Absent a coherent pleading it is not possible to determine whether an arguable claim could exist. Given the extremely vague nature of what is alleged here, no arguable claim is identified at present. Furthermore, only ANL, D14 and D15 are named in the pleading of the data protection claim; so that, in any event, it can be seen at this stage that any claim against the other ANL Defendants is bound to fail. However, as the Claimant is a litigant in person who seeks an opportunity to amend his pleading to take account of guidance provided by the Court, were it not for the CPR 3.4(4) issue I would be inclined to give him an opportunity to do so, albeit, as I have observed in relation to the LSE Defendants, if such a claim could be identified, it would be a very modest one in comparison to the current pleading and a very substantially revised pleading would be required.

The CPR 3.4(4) applications

224. I have set out CPR 3.4(4) at para 122 above. The Claimant challenges the proposition that the 2020 Claim was "struck out" so as to engage this provision. The Glossary at Section E of the White Book describes a strike out as: "the court ordering written material to be deleted so that it may no longer be relied upon". The 1 July 2020 Order determined that the Claim Form was invalid, consequently the Claimant was unable to rely upon his Claim Form and Particulars of Claim in those proceedings. In my judgment the concept of striking out in this context looks to the substance of what occurred. It is broad enough to include circumstances where a Court orders that a claim cannot proceed as a result of the Claimant's acts or omissions (as Nicklin J found); and it is not confined to those instances where the phrase "struck out" appears in the Court's Order. Where costs awarded in the first proceedings then remain unpaid, the institution of second proceedings engages this form of abuse of process and its rationale, as described in the citations I have quoted at paras 228 and 230 below. I indicate for completeness, that if I am wrong about this, for the reasons identified in this section of the judgment, the grant of a stay would in any event be appropriate pursuant to the Court's more general power under CPR 3.1(2)(f), exercised by reference to the overriding objective.

225. There is no doubt that criterion 3.4(4)(b) is satisfied in light of the costs awarded by Nicklin J in his 1 July 2020 Order. As regards the requirement at 3.4(4)(c), it is not in

dispute that the costs have not been paid and that this claim includes the same Defendants. The next question is whether the current claim arises out of facts "which are the same or substantially the same as those relating to the claim in which the statement of case was struck out". That test is plainly satisfied in relation to the respective claims looked at as a whole, as is apparent from my earlier summary of the two sets of pleadings.

226. Furthermore, the test is still met if the focus is upon the claims that I have indicated I am not going to strike out as bound to fail or an abuse of process at this stage. The remaining claims are limited to the data protection SAR allegations that I have discussed in paras 221 and 223 above. As regards the LSE, para 650 of the Particulars of Claim in the 2020 Claim alleged in terms that there had been a failure to provide correspondence from its investigation into ANL's source in response to the 18 November 2019 SAR (para 119 (iv) above). This is directly comparable to the complaint that is made in the present pleading (para 111 above), which includes reliance on the same factual allegations. As regards ANL, the allegations made in the earlier Particulars of Claim are extremely vague – see para 644 and 649 - but on the face of it they are wide enough to encompass the SARs claim that is made in the current Particulars of Claim (para 112 above) and, more particularly, the central underlying facts that are relied upon are common to both cases, namely an alleged failure to provide the Claimant's personal data in respect of internal communications during the period when the articles were in preparation.

227. Dr Piepenbrock submits that as he is a "man of straw" unable to pay the costs ordered against him in 2020, it would be unfair, disproportionate and a breach of his article 6 ECHR rights to stay the present proceedings until those costs are paid. I will return to this submission after summarising the relevant caselaw.

228. The nature of this form of abuse was explained by Briggs J in *Wahab v Khan & Ors*. [2011] EWHC 908 (Ch) ("*Wahab*") at para 19:

> "Where the first claim has neither been adjudicated upon nor compromised, but merely struck out for specific procedural default or more generally for want of prosecution, then different types of potential abuse may arise. The first is where the claimant brings the second claimant without complying with any relevant order for costs made against him in the first. In such a case the potential for abuse lies in the unfairness of putting the defendant to the expenses of fresh proceedings whilst his costs of the previous proceedings remain unpaid…It has been recognised since the mid-nineteenth century that the normal response of the court to such a case is to stay the second claim until the costs ordered in the first claim have been paid."

229. In the same paragraph, Briggs J went on to note that the "jurisdiction to stay is discretionary and depends upon a consideration of all the circumstances". He also observed that it "may be appropriate to provide, in addition to a stay, for a striking out of the second claim if the costs of the first claim are not paid by a certain date". In the case before him, Briggs J ordered that the sum due on an interim costs order be paid within 14 days and, if that was paid and an application for detailed assessment lodged

within a stipulated period, the claim was to remain stayed until after detailed assessment of the costs owed and payment of those costs (para 40).

230. In *Stevens Associates v The Aviary Estate* 2000 WL 33122440 Pumfrey J refused a renewed application for permission to apply for judicial review of a Master's decision pursuant to CPR 3.4(4) to stay the second proceedings until the claimant had met his outstanding costs liability in respect of earlier proceedings. One of the grounds advanced was that to stay the proceedings without a trial of the allegations infringed the claimant's article 6 ECHR rights as he would not be able to pay the outstanding costs. In explaining his reasons for dismissing this point, Pumfrey J said:

> "I am satisfied that the answer to this point is entirely clear. In my judgment it is absolutely correct that every person is entitled to a fair and public hearing in respect of the determination of his civil rights and obligations. However, that provision is not a licence to attempt to litigate that determination more than once. Once an action has been commenced and has been struck out, it seems to me to be a proper exercise of the court's powers to regulate its procedure to prevent further litigation over the same areas until the costs occasioned by the original unsuccessful attempt have been paid. It does not seem to me that can in any way be thought to be inconsistent with the right to a fair and public hearing of the determination of the claimant's legal rights.
>
> In my judgment, to put the matter shortly, the claimant can indeed pursue the defendant once but if he fails, and in particular if the action is struck out then he may not pursue it again until he has put the defendant back in the position he was before the original action started by paying his costs."

231. As I have noted when considering the harassment allegations, the Claimant has not advanced any evidence as to his means (para 198 (v) above) and therefore there is no evidential basis before me to support the proposition that he is unable to satisfy the costs order. In any event, I agree with Pumfrey J's reasoning that there is no violation of Article 6 in circumstances where the Claimant has already brought a claim on the basis of the same or similar facts, which did not proceed because of his failure to adhere to the CPR and where the other parties were occasioned costs in those proceedings which remain unpaid. Article 6 does not require litigants to be given unfiltered access to the Courts; by way of example, it is well-established that the application of limitation periods, the abuse of process jurisdiction and the power to strike out where there are no reasonable grounds of claim, do not in themselves violate Article 6.

232. Some of Mr Piepenbrock's submissions sought to re-argue points that had been rejected in the 2020 Judgment. This included the contention that the Claimant had been misled by earlier correspondence from the Defendants' solicitors and that his disabilities had significantly contributed to his failure to serve the Claim Form on a timely basis. Mr Justice Nicklin rejected these points, concluding that the position in which Dr Piepenbrock found himself was self-inflicted (para 51 above). There is no basis for re-opening these findings.

233. In my judgment, having regard to all the circumstances, it is appropriate and proportionate to impose a stay in relation to the surviving data protection claims, in particular as:

 i) Nothing has been paid towards the earlier costs order made in the 2020 Claim and the Claimant has advanced no proposals to do so;

 ii) The substance of the pleaded claims in the present proceedings are very similar to those in the 2020 Claim;

 iii) The Claimant has adduced no evidence as to his means;

 iv) As a result of the decisions that I have set out earlier in this judgment, the vast majority of the currently pleaded claim against the LSE Defendants and the ANL Defendants will be struck out and will not proceed in any event. The question of whether to impose a stay only concerns a portion of the data protection claims, in relation to which it is not clear, as matters stand, that they are in fact viable claims and in any event any compensation awarded if such claims succeeded would be far more modest than the currently pleaded claim for damages;

 v) It follows from the decisions that I have set out earlier in this judgment that the Claimant has pursued multiple claims in these proceedings which are bound to fail and /or which are abusive and these will have occasioned very significant additional costs for the LSE and ANL Defendants; and

 vi) Given the unfocused manner in which this litigation has so far been conducted by the Claimant, it appears likely that considerable further costs will be occasioned, even if I were to direct provision of a concise CPR-compliant pleading of the surviving data protection claims at this stage.

234. Dr Piepenbrock also submitted that it would be disproportionate to order a stay as the Defendants were responsible for his current impecunious state, as it was their actions that had damaged his reputation and caused him psychiatric injury. However, that proposition not only assumes that his impecuniosity has been established, but it assumes the success of the claims made in these proceedings, which I have concluded are bound to fail and/or are an abuse of process.

235. Accordingly, I am persuaded that it is appropriate to stay the pleaded allegations against the LSE Defendants and the ANL Defendants (in so far as they are not struck out) until the Claimant has paid the costs that he was directed to pay at para 6 of the 1 July 2020 Order made in the 2020 Claim. I propose to limit the stay to payment of the costs that the Claimant was ordered to pay on account (which total £55,000). However, I propose to provide that payment is to be made within a specified period of time (for which I will allow months rather than weeks), so that a balance is struck in terms of affording fairness to all parties.

Totally without merit

236. Both the LSE Defendants and the ANL Defendants submit that the claims are totally without merit. The meaning of "totally without merit" is "bound to fail": *R (Grace) v*

Secretary of State for the Home Department [2014] EWCA Civ 1091, [2014] 1 WLR 342 at para 13. In *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] 1 WLR 2793 ("*Wasif*") the Court of Appeal distinguished between circumstances where: (i) a claim was "not arguable" or had no "realistic prospect of success" because the Judge was convinced that although a rational argument had been advanced it was wrong (not totally without merit); and (ii) a claim that was "bound to fail" in the sense that it was "hopeless" or had "no rational basis upon which the claim could succeed" (totally without merit) (paras 13 and 15). Lord Justice Underhill also observed that the distinction was not "black-and-white", but "nevertheless real"; that the terms used were necessarily imprecise; and that it was a matter for the assessment of the Judge in each case (paras 15 and 17).

237. In light of that analysis (given in the context of refusal of permission to apply for judicial review: but cited at para 3.4.25 of the White Book as of more general application) it may be that there is some difference of emphasis between the use of "bound to fail" in the totally without merit test and in relation to whether a claim should be struck out as disclosing no reasonable grounds for bringing it: see *Begum* (at para 125 above), where "bound to fail" is equated to an absence of a "realistic prospect of success".

238. In these circumstances, (rather than seeking to resolve this potential tension) I will take the most favourable approach to the Claimant that is reasonably possible, applying the distinction discussed by Underhill LJ. However, even on this basis the claims that have been brought in negligence, under the EQA 2010 and the HRA 1998 are undoubtedly hopeless. I refer back to my full reasoning in respect of those claims, but, in summary: (i) there is no conceivable basis upon which the Claimant will establish the pleaded duty of care, to do so would involve an extremely substantial extension of existing case law in circumstances where the Courts proceed incrementally and where no good reason has been shown for such an extension; (ii) there is no basis upon which the pleaded claims of discrimination could come within Part 3 of the EQA 2010, as it is beyond rational argument that the LSE and ANL were not exercising public functions or providing services to the Claimant in respect of the acts complained of; and (iii) there is no basis upon which the Claimant could conceivably show that the LSE or ANL are public authorities within the meaning of the HRA 1998 for the purposes of the actions he relies upon. Thus, I will certify that the pleaded claims in negligence, under the EQA 2010 and under the HRA 1998 are totally without merit.

239. Whilst I have no doubt that all of the claims under the PHA 1997 meet the test for strike out, the position here may be said to be less clear-cut, given that there are a range of reasons why I have concluded that the claims will fail (depending on the particular allegation), some of which involve an evaluation of the circumstances, rather than simply the claim being precluded by the application of a clear provision or principle. Overall, I consider the position to be a borderline one, in terms of the application of the *Wasif* approach and thus I have decided that the fairer course is not to certify this claim. I will not certify the data protection claim given I have not ruled at this stage that it is bound to fail in its entirety.

240. The terms of CPR 3.4 plainly allow for the striking out and (where appropriate) the certification of particular claims as totally without merit. However, for the avoidance of doubt, the certification in this instance is to be treated as one certification for the

purposes of Practice Direction 3C. Accordingly, although CPR 3.4(6) requires me to consider making a civil restraint order (in accordance with the PD 3C criteria), no basis for doing so arises at this stage; and it has not been suggested to me that any earlier claim or application brought by the Claimant has been certified as totally without merit.

The MAC List application

241. CPR 5.3.1(3) is expressed in unequivocal terms:

> "A High Court claim must be issued in the [MAC] List if it is or includes a claim for defamation, or is or includes-
>
> (a) A claim for misuse of private information;
>
> (b) A claim in data protection law; or
>
> (c) A claim for harassment by publication."

242. Practice Direction 53A, para 5 provides that a MAC List Judge deciding whether to transfer a claim to or from the MAC List will consider whether the claim or any part of it "falls within the scope of the list but would more conveniently be dealt with in another court or list".

243. As the Particulars of Claim include both a claim in data protection and a claim for harassment by publication, the claim was rightly transferred to the MAC List. Furthermore, the claim in negligence involved consideration of the interface with claims in defamation, as my earlier analysis shows.

244. In light of the conclusions expressed in this judgment as regards the LSE Defendants and ANL Defendants, only limited claims against them for alleged breach of data protection obligations survive the strike out applications (which will be stayed for the reasons that I have explained). The subject matter of the stayed claim will come within the scope of the MAC List and in my judgment no good reason to transfer the case to the general King's Bench Division list has been shown. The Claimant's application largely emphasised the psychiatric injury component of the claim. In light of my judgment that is no longer a live claim so far as the LSE Defendants and the ANL Defendants are concerned. Accordingly, as matters stand the case should remain in the MAC List.

Ancillary matters

245. Although the LSE Defendants and the ANL Defendants have solicitors on the record, the Claimant (via Mr Piepenbrock) has corresponded with individual Defendants, despite being repeatedly asked not to do so by the Defendants' legal representatives (examples appear in exhibit TW10 to Mr Walshaw's witness statement). There is no good reason for this to occur. The only reason that has been advanced, is that the Claimant was misled by the Defendants' solicitors into failing to serve the Claim Form in the 2020 Claim. As I have already indicated, this proposition was rejected in the 2020 Judgment (paras 49 – 51 above). As Mr Walshaw explains in his statement, sending correspondence to individual Defendants escalates costs and occasions unnecessary stress for some of them.

246. As the Claimant and/or those assisting him have not complied with the requests made in correspondence to communicate only with the solicitors who are on record, regrettably it does appear necessary for me to make an order prohibiting the Claimant or anyone purporting to represent him or assist him from directly contacting any of the Defendants from whom there is a solicitor on record. My understanding is that is the case for all of the Defendants.

247. The other ancillary matter that was raised by the Defendants concerns the role of Mr Piepenbrock. I addressed this in the 21 June 2022 Order. Whilst I permitted him to act as his father's McKenzie friend in relation to the hearing of the applications before me, he does not have authority to conduct litigation on the Claimant's behalf (para 17 (ii) above). If the Defendants seek a more specific order than this, the terms can be addressed in the written submissions that I will give the parties a chance to file.

Conclusion and consequential orders

248. By way of re-cap and for the reasons that I have explained when considering each of the issues, the decisions I have made are as follows:

i) The pleaded duty of care has no realistic prospect of success and, in consequence, the pleaded claims in negligence against the LSE Defendants and the ANL Defendants are bound to fail and are to be struck out (para 162 above);

ii) The pleaded claims in negligence are in any event bound to fail in respect of D1 – D5, D7, D8 and D11 (paras 165 – 167 above);

iii) No sufficient basis has been shown for permitting the Claimant an opportunity to amend the claim to add a cause of action for the intentional infliction of psychiatric injury (para 168 above);

iv) The pleaded claim under the PHA 1997 in respect of D6 is bound to fail and/or is an abuse of process and is to be struck out (paras 183 – 190 above);

v) In any event there is no basis for a claim under the PHA 1997 in respect of the other LSE Defendants (para 191 above);

vi) The vicarious liability case in respect of the pleaded actions of D9 under the PHA 1997 is also bound to fail and is to be struck out (para 193);

vii) The pleaded claim of harassment by publication is bound to fail in relation to all of the ANL Defendants and is to be struck out (paras 195 – 196 above);

viii) The pleaded claim under the PHA 1997 in relation to the pursuit of costs is bound to fail and is to be struck out (para 198 above);

ix) All the pleaded claims under the EQA 2010 in respect of the LSE Defendants and the ANL Defendants are to be struck out as they are bound to fail as the conduct relied upon is not capable of coming within Part 3 of the Act (paras 208 – 210 above);

x) All the pleaded claims under the HRA 1998 in respect of the LSE Defendants and the ANL Defendants are to be struck out as they are bound to fail as there is no realistic prospect of showing that they are public authorities (para 212 above);

xi) The data protection pleaded claims are in part bound to fail or constitute an abuse of process. These claims are to be struck out (paras 213 – 216 above);

xii) I am unable to conclude from the non CPR compliant Particulars of Claim whether there are claims with a realistic prospect of success in relation to alleged failings concerning the three most recent SARs pleaded in respect of the LSE and the SARs pleaded in respect of ANL. In any event there is no basis for a data protection claim in respect of D2 – D5, D7, D8 and D10 – D13 (paras 221 and 223 above);

xiii) A stay of the proceedings will be granted in respect of those claims that are not struck out (as bound to fail or an abuse of process) pending payment by the Claimant of the costs he was ordered to pay at para 6 of the 1 July 2020 Order made in the 2020 Claim (para 235 above);

xiv) The claims brought in negligence, under the EQA 2010 and under the HRA 1998 are totally without merit (para 238 above);

xv) As matters stand, the case will remain in the MAC List (para 244 above);

xvi) I will direct that where a solicitors' firm is on record, the Claimant is to correspond solely with the Defendants' solicitors in relation to this claim and must not email or contact the LSE Defendants or the ANL Defendants in relation to it (para 246 above).

249. For the avoidance of doubt and as I have explained when considering each of the causes of action relied upon, in determining that claims are to be struck out as bound to fail or are an abuse of process, I have considered and rejected the possibility of the position being materially altered if the Claimant was given the opportunity to amend his claim. Accordingly, those claims will be dismissed.

250. For the further avoidance of doubt: (i) the decisions I have made at this stage do not affect the claims brought against D9, as the applications made on her behalf were not before me; and (ii) pursuant to the terms of the 27 April 2022 Order, the directions that were made in respect of anonymity, reporting restrictions and third party access to the Court file remain in place.

251. As I indicated at the conclusion of the hearing, as not all parties are legally represented I have not circulated a draft of this judgment for the submission of typographical corrections. I will, however, give the parties an opportunity to make concise written submissions on consequential orders and any applications for permission to appeal (as I have set out in the Order accompanying the hand down of this judgment). As regards the former, the written submissions are only to address the terms of consequential orders that follow from the decisions set out in this judgment or the ancillary matter raised in para 247 above; this is not an opportunity to re-open matters that have been determined or to raise new matters that were not before me at

the hearing. I have allowed an extended period for these written submissions in keeping with earlier adjustments that have been made for the Claimant. Whilst I have not specifically directed sequential submissions, I will expect the LSE Defendants and the ANL Defendants to provide the Claimant with the terms of their proposed Order/s as soon as they can and in any event in sufficient time to enable him to have a reasonable opportunity to consider and respond.

A

Court of Appeal

Attorney General's Reference (No 1 of 2022)

[2022] EWCA Crim 1259

2022 June 29, 30; Sept 28 — Lord Burnett of Maldon CJ, Holgate, Saini JJ

B

Crime — Court of Appeal (Criminal Division) — Jurisdiction — Attorney General referring points of law to Court of Appeal for opinion following acquittal of defendants — Attorney General advancing different arguments from those advanced by Crown at trial — Whether court having jurisdiction to give opinion on points of law referred — Whether points of law referred ones which had arisen in the case — Criminal Justice Act 1972 (c 71), s 36(1)

C

Human rights — Freedom of thought, expression and assembly — Interference with — Defendants charged with causing criminal damage to statue during protest and committed to Crown Court for trial — Whether jury required to be sure that defendants' convictions proportionate interference with their Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 9, 10, 11

D

Four defendants who had caused over £5,000 worth of damage to a public statue during a protest were charged with criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971[1], and committed to the Crown Court for trial. In advance of the trial two of the defendants applied to stay the proceedings as an abuse of process on the grounds, inter alia, that the prosecution involved a disproportionate interference with their rights under articles 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The Crown submitted that the defendants' conduct had not been peaceful and therefore was not protected by the Convention. The judge, who did not rule on the Crown's submission, rejected the defendant's application for a stay but directed the jury that they should only convict the defendants of criminal damage if they were sure that doing so would be a proportionate interference with the defendants' Convention rights. The defendants were acquitted. The Attorney General made a reference under section 36 of the Criminal Justice Act 1972[3] seeking the opinion of the Court of Appeal on three points of law relating to the question of proportionality. The defendants submitted that the court did not have jurisdiction to give its opinion on any of the points of law referred because they had not "arisen in the case" within the meaning of section 36(1) of the 1972 Act, particularly since the Crown had not advanced at the trial any of the points of law upon which the Attorney General sought to rely.

E

F

On the reference—

Held, (1) that the three points of law which the Attorney General had referred to the Court of Appeal under section 36(1) of the Criminal Justice Act 1972 were all points of law which had "arisen in the case", since they all sought the opinion of the court on the question whether the trial judge had been correct to proceed on the assumption that, contrary to the submission of the Crown at trial, the defendants' conduct attracted the protection of articles 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and, if not, how the matter should be dealt with; that there was no principle which prevented the Attorney General on a reference under section 36 of the 1972 Act from advancing a different

G

H

[1] Criminal Damage Act 1971, s 1: see post, para 23.
[2] Human Rights Act 1998, Sch 1, Pt I, art 9: see post, para 36.
Art 10: see post, para 37.
Art 11: see post, para 38.
[3] Criminal Justice Act 1972, s 36(1): see post, para 16.

© 2023 The Incorporated Council of Law Reporting for England and Wales

(or developed) argument from that advanced by the Crown at trial in relation to a point of law that was in issue; and that, accordingly, the Court of Appeal had jurisdiction under section 36(1) to deal with the points of law referred (post, paras 18–21). A

(2) That there was no principle that where a defendant was being tried for an offence which had arisen out of non-violent protest the Crown would always have to prove that a conviction would be proportionate to the defendant's rights under articles 9, 10 and 11 of the Convention; and that, rather, there was a category of criminal offence where proof of the ingredients of the offence would, without more, be sufficient to render a conviction proportionate to any interference with the defendant's rights under articles 9, 10 and 11, in so far as those rights were engaged, without the need for a fact-sensitive proportionality assessment in individual cases (post, paras 42, 46–53, 78). B

Animal Defenders International v United Kingdom (2013) 57 EHRR 21, ECtHR (GC), *James v Director of Public Prosecutions* [2016] 1 WLR 2118, DC, *Director of Public Prosecutions v Ziegler* [2022] AC 408, SC(E), *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, SC(E) and *Director of Public Prosecutions v Cuciurean* [2022] QB 888, DC applied. C

(3) That articles 9, 10 and 11 of the Convention did not protect conduct during a protest which caused damage to property from prosecution and conviction (i) if that damage was inflicted in a violent or non-peaceful manner, in which case the conduct fell outside the protection of the Convention altogether, or (ii) if the damage (even if inflicted in a way that was peaceful) was significant, in which case prosecution and conviction would clearly be proportionate; that, however, prosecution and conviction for conduct during a peaceful protest which caused damage that was minor or temporary might constitute a disproportionate interference with a defendant's rights under articles 9, 10 and 11 of the Convention; that, therefore, proof of the ingredients of the offence of criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971, was not, without more, sufficient to render *any* conviction proportionate to any interference with the defendant's rights under articles 9, 10 and 11, in so far as those rights were engaged, without the need for a fact-sensitive proportionality assessment, although the circumstances in which such an assessment would be needed were very limited; that, given the nature of cases that were heard in the Crown Court, it was inevitable that the issue of proportionality should not be left to the jury on a trial for criminal damage in that court, because the damage would either have been inflicted in a violent or non-peaceful manner or would be significant; but that it was at least theoretically possible that cases involving minor or trivial damage to property might arise in the magistrates' court, thus requiring a proportionality assessment, albeit that the threshold of "significant damage" would be crossed a long way below the statutory divide between those courts (post, paras 87–90, 102, 110, 115–116, 120–121). D E F

Kudrevičius v Lithuania (2015) 62 EHRR 34, ECtHR (GC) and *Handzhiyski v Bulgaria* (2021) 73 EHRR 15, ECtHR applied. G

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

Alekhina v Russia (Application No 38004/12) (2018) 68 EHRR 14, ECtHR
Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21, ECtHR (GC)
Attorney General's Reference (No 2 of 1975) [1976] 1 WLR 710; [1976] 2 All ER 753; 62 Cr App R 255, CA H
Attorney General's Reference (No 4 of 1979) [1981] 1 WLR 667; [1981] 1 All ER 1193; 71 Cr App R 341, CA
Attorney General's Reference (No 3 of 1994) [1998] AC 245; [1997] 3 WLR 421; [1997] 3 All ER 936; [1998] 1 Cr App R 91, HL(E)

© 2023 The Incorporated Council of Law Reporting for England and Wales

A *Bauer v Director of Public Prosecutions* [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC
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
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 Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)
B
Genov v Bulgaria (Application No 52358/15) (unreported) 30 November 2021, ECtHR
Gifford v HM Advocate [2011] HCJAC 101; 2011 SCCR 751
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
C *Hardman v Chief Constable of Avon and Somerset* [1986] Crim LR 330
Ibrahimov v Azerbaijan (Application Nos 63571/16, 2890/17, 39541/17, 74143/16, 2883/17 and 39527/17) (unreported) 13 February 2020, ECtHR
James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
D *Kudrina v Russia* (Application No 34313/06) (unreported) 6 April 2021, ECtHR
Morphitis v Salmon (1989) 154 JP 365; [1990] Crim LR 48, DC
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Perinçek v Switzerland (Application No 27510/08) (2015) 63 EHRR 6, ECtHR (GC)
E *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v Bianco (Leonardo) [2001] EWCA Crim 2516, CA
R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA
R v Fiak [2005] EWCA Crim 2381; [2005] Po LR 211, CA
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 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)
F
R v Martin (Jovan) [2017] EWCA Crim 1359; [2018] Crim LR 340, CA
R v Nicholson [2006] EWCA Crim 1518; [2006] 1 WLR 2857; [2006] 2 Cr App R 30, CA
R v Wang [2005] UKHL 9; [2005] 1 WLR 661; [2005] 1 All ER 782; [2005] 2 Cr App R 8, HL(E)
R v Whiteley (1991) 93 Cr App R 25, CA
G *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487; [2021] 3 WLR 494; [2021] 4 All ER 777, SC(E)
R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
R (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927, HL(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)
H
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Roe v Kingerlee [1986] Crim LR 735, DC
Shvydka v Ukraine (Application No 17888/12) (unreported) 30 October 2014, ECtHR

© 2023 The Incorporated Council of Law Reporting for England and Wales

Taranenko v Russia (Application No 19554/05) (2014) 37 BHRC 285, ECtHR
Vona v Hungary (Application No 35943/10) (2013) 37 BHRC 239, ECtHR
Vural v Turkey (Application No 9540/07) (unreported) 21 October 2014, ECtHR
Women on Waves v Portugal (Application No 31276/05) (unreported) 3 February 2009, ECtHR

A

The following additional cases were cited in argument:

B

Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR
Bédat v Switzerland (Application No 56925/08) (2016) 63 EHRR 15, ECtHR (GC)
Blumberga v Latvia (Application No 70930/01) (unreported) 14 October 2008, ECtHR
Brown v Public Prosecution Service for Northern Ireland [2022] NICA 5
Ezelin v France (Application No 11800/85) (1991) 14 EHRR 362, ECtHR
Food Standards Agency v Bakers of Nailsea Ltd [2020] EWHC 3632 (Admin); [2021] Crim LR 582, DC

C

Gayford v Chouler [1898] 1 QB 316, DC
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Pretty v United Kingdom (Application No 2346/02) (2002) 35 EHRR 1, ECtHR
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R (Director of Public Prosecutions) v Stratford Magistrates' Court [2017] EWHC 1794 (Admin); [2018] 4 WLR 47; [2017] 2 Cr App R 32, DC

D

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 (MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10; [2017] 1 WLR 771, SC(E)
Richardson v Director of Public Prosecutions [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20; [2014] 1 Cr App R 29, SC(E)

E

Scottow v Crown Prosecution Service [2020] EWHC 3421 (Admin); [2021] 1 WLR 1828; [2021] 1 Cr App R 13, DC
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Seray-Wurie v Director of Public Prosecutions [2012] EWHC 208 (Admin)
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Taxquet v Belgium (Application No 926/05) (2010) 54 EHRR 26, ECtHR (GC)
Wong Pooh Yin v Public Prosecutor [1955] AC 93; [1954] 3 WLR 471; [1954] 3 All ER 31, PC

F

Yordanovi v Bulgaria (Application No 11157/11) (unreported) 3 September 2020, ECtHR

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

G

A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E)
Attorney General's Reference (No 3 of 2004) [2005] EWCA Crim 1882; [2006] Crim LR 63, CA
Birch v Director of Public Prosecutions [2000] Crim LR 301, DC
G (Adoption: Unmarried Couple), In re [2008] UKHL 38; [2009] AC 173; [2008] 3 WLR 76, HL(NI)

H

Handyside v United Kingdom (Application No 5493/72) (1976) 1 EHRR 737, ECtHR
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hirst v Chief Constable of West Yorkshire (1986) 85 Cr App R 143, DC

© 2023 The Incorporated Council of Law Reporting for England and Wales

A *Mouvement Raëlien Suisse v Switzerland* (Application No 16354/06) (2012) 56 EHRR 14, ECtHR (GC)
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
R v Charles [2009] EWCA Crim 1570; [2010] 1 WLR 644; [2010] 4 All ER 553; [2010] 1 Cr App R 2, CA
R v Gunning 2005 SCC 27; [2005] 1 SCR 627
R v Pendleton [2001] UKHL 66; [2002] 1 WLR 72; [2002] 1 All ER 524; [2002]
B 1 Cr App R 34, HL(E)
R v Roberts (Richard) [2018] EWCA Crim 2739; [2019] 1 WLR 2577, CA
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
R v Y (A) [2010] EWCA Crim 762; [2010] 1 WLR 2644; [2010] 2 Cr App R 15, CA
R (Conway) v Secretary of State for Justice [2018] EWCA Civ 1431; [2020] QB 1; [2018] 3 WLR 925; [2019] 1 All ER 39, CA
C *R (Lewis) v Mid and North Shropshire Coroner* [2009] EWCA Civ 1403; [2010] 1 WLR 1836; [2010] 3 All ER 858, CA
R (Youngsam) v Parole Board [2019] EWCA Civ 229; [2020] QB 387; [2019] 3 WLR 33; [2019] 3 All ER 954, CA

REFERENCE by the Attorney General under section 36 of the Criminal Justice Act 1972

D Four defendants who had caused over £5,000 worth of damage to a large bronze statue while participating in a protest were charged with causing criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971. At trial in the Crown Court at Bristol before Judge Blair QC and a jury one of the defences was that the prosecution involved a disproportionate interference with the defendants' rights under articles 9, 10 and 11 of the
E Convention for the Protection of Human Rights and Fundamental Freedoms. The judge directed the jury that if there was an interference with Convention rights, they could consider proportionality. On 5 January 2022 the four defendants were acquitted by the jury.

By a reference dated 11 April 2022 and made under section 36(1) of the Criminal Justice Act 1972 the Attorney General sought the opinion of the Court of Appeal on three questions, which are set out in the judgment of
F the court, post, para 4.

The facts are stated in the judgment of the court, post, paras 5–9.

Tom Little KC and *Victoria Ailes* (instructed by *Treasury Solicitor*) for the Attorney General.

The points of law referred for the opinion of the Court of Appeal in the
G present case are points of law that have "arisen in" this case within section 36(1) of the Criminal Justice Act 1972. The fundamental underlying question referred is whether the judge was right to direct the jury as he did in relation to proportionality. Each of the questions posed for the opinion of the court reflects a basis upon which it is submitted that the trial judge was wrong in law to direct the jury as he did. The question whether a judge wrongly directed a jury in a trial on indictment is, paradigmatically, a point
H of law arising in that case. There is no rule that the Attorney General must align herself with the position taken by the prosecution at trial when she refers a point for the opinion of the Court of Appeal; nor has the jurisdiction invariably been exercised in order to do so: see, for example, *Attorney General's Reference (No 2 of 1975)* [1976] 1 WLR 710. Nor is there

© 2023 The Incorporated Council of Law Reporting for England and Wales

anything in the statutory test to suggest such a rule. For the meaning of "arisen in the case" in section 36(1) see *Attorney General's Reference (No 3 of 1994)* [1998] AC 245. If the submissions made by the Attorney General in answer to the questions posed are accepted, the consequence would in each case be that the jury was misdirected in relation to proportionality and that questions in relation to proportionality should not have been left to them at all. The questions are therefore theoretical only in the narrow sense—inevitable in any reference—that the defendants will remain acquitted irrespective of the court's view. If the question of proportionality had not been left to the jury for its consideration, it is self-evident that this might have affected the outcome of the trial. The reference cannot be characterised as a reference in the abstract. Questions which may appear broad and abstract are to be understood within the context of the criminal case in which they arose: see *Attorney General's Reference (No 2 of 1975)*. All of the matters in issue between the parties in connection with the second question are matters which (if addressed differently at trial) might have affected the outcome.

The first question is whether criminal damage is within the category of offences identified in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 and *Director of Public Prosecutions v Cuciurean* [2022] QB 888, where any proportionality balance which may arise is struck by the terms of the offence-creating provision, without more ado, so that it is therefore unnecessary for the prosecution to prove separately, whether as part of disproving lawful excuse or otherwise, that a conviction would represent a proportionate interference with any right under articles 9, 10 or 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms that may be engaged. *James* and *Cuciurean* were rightly decided for the reasons given in those cases, reasoning mischaracterised in the defendants' submissions. *Cuciurean* did not involve an impermissible restriction of the Supreme Court's decision in *Director of Public Prosecutions v Ziegler* [2022] AC 408. In *Cuciurean* the Divisional Court correctly concluded that the Supreme Court's reasoning in *Ziegler* was expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act 1980; that *Ziegler* was concerned only with protests obstructing a highway where it is well established that articles 10 and 11 are engaged; and that the Supreme Court had no need to consider, and did not express any views about, offences falling into the second category defined in *James*, where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. *Ziegler* was predicated on the assumption that a fact-specific proportionality assessment was required to be carried out by the district judge in a case of obstruction of the highway, but that assumption, which coloured all of the observations made by the Supreme Court, does not hold in relation to criminal damage.

Cuciurean correctly recognised the permissibility of a general measure that satisfactorily addresses proportionality but, contrary to the defendants' submissions, concluded that general criminal provisions will either always or almost always be justified without the need for an individual assessment of the facts. Self-evidently, the compatibility of a criminal measure with the

© 2023 The Incorporated Council of Law Reporting for England and Wales

A Convention will depend upon the ingredients of the offence created. As recognised in *Cuciurean*, in reliance on *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, the necessity for general measures has been examined and upheld by the European Court of Human Rights in a variety of contexts, including the criminal context: see, for example, *Pretty v United Kingdom* (2002) 35 EHRR 1. Nothing in *Perinçek v Switzerland* B (2015) 63 EHRR 6 or *Handzhiyski v Bulgaria* (2021) 73 EHRR 15 is inconsistent with this analysis. There is nothing arbitrary in the outcome of *Cuciurean* or of any of the examples upon which the defendants rely. The fact that different jurisdictions have different laws, and that different laws cover obstruction of the highway and acts carried out on private land, is inoffensive. So too is the fact that the mechanism by which Convention compliance may be assured may not be the same in relation to each offence C (that is, that some offences require individual proportionality assessments and others do not). The underlying rationale of the *James* categories is that in neither category will a prosecution lead to a violation of the Convention. It is not for a defendant to choose how a violation is to be avoided: the relevant Convention rights are rights of outcome (that is, not to be the victim of a violation), not of process (for example, a right to have proportionality D left to a jury). The reasoning in *Cuciurean*, reliance being placed in particular on paras 69–71, is not inconsistent with sections 3 and 6 of the Human Rights Act 1998. The fact that an offence was enacted prior to the passage of the 1998 Act does not mean that it is incapable of satisfying this test, any more than the fact that it was enacted thereafter means that it should be assumed to do so. In each case the question is one which is to be answered by reference to the ingredients of the offence in question.

E Convention jurisprudence establishes that Convention rights under articles 9, 10 and 11 are not engaged in relation to acts which reject the foundations of a democratic society, or "other reprehensible acts". These include violent acts. Acts of criminal damage constitute, or at least usually constitute, acts of violence or other analogous acts. Acts may constitute a rejection of the foundations of a democratic society if they seek to bring about F the outcome sought by coercion or force, rather than by communication of ideas, persuasion and engagement in democratic processes. Any interference with Convention rights involved in the present case is clearly in pursuit of a legitimate aim: namely for the prevention of disorder or crime, and for the protection of the rights of others. If a prosecution for criminal damage is well founded, it follows that the case is necessarily one in which the property rights G of another are interfered with; and the state has a positive obligation under the Convention to ensure an effective system of prosecution in such cases: see *Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008. A system of legal protection for property rights cannot be effective if it is dependent on a fact-sensitive proportionality balance carried out after the event. Moreover, no such balancing exercise is appropriate: damage to property is, like violence to the person, simply an unacceptable way in which H to engage in political debate in a democratic society. The same principles will apply even in a case where it is arguable that the property in question belongs to a public entity which is not capable of being a "victim" of a human rights violation: see *Cuciurean* [2022] QB 888 at para 28. It could certainly never be said that intentional or reckless damage to property are at the core of the

© 2023 The Incorporated Council of Law Reporting for England and Wales

rights protected by articles 10 and 11. There would be a clear risk of abuse if criminal damage were an offence requiring an individual proportionality balance to be carried out in each case in that protesters might adopt a tactic of seeking to achieve maximum "permitted" levels of property damage at each protest as a way to exert pressure, and even that rival groups might carry out such acts against one another. The conclusion that the offence of criminal damage is inherently compatible with the Convention is consistent with the observation in *Cuciurean* at para 87 that it was not relevant to the question of proportionality to weigh up the relative cost and delay caused by a protest. The fact that the Criminal Damage Act 1971 contains a defence to criminal damage which uses the same words ("lawful excuse") as the defence to obstruction of the highway, which was the defence considered in *Ziegler* [2022] AC 408, is of no assistance because the defence under the 1971 Act has a very different purpose and scope from the defence to obstruction of the highway: the question is one of statutory construction, and each Act must be interpreted in its proper context. Whereas it has been long inherent in the courts' understanding of the offence of obstruction of the highway that Parliament intended, when creating the offence, that the public should be entitled to make reasonable use of the highway, by contrast, there has never been any suggestion that Parliament, when enacting the 1971 Act, intended that individuals should be entitled to carry out a "reasonable" level of criminal damage. Strasbourg case law, in particular *Shvydka v Ukraine* (Application No 17888/12) (unreported) 30 October 2014, *Genov v Bulgaria* (Application No 52358/15) (unreported) 30 November 2021 and *Handzhiyski v Bulgaria* 73 EHRR 15, does not suggest that criminalising criminal damage is capable of constituting a disproportionate interference with an individual's rights under article 10.

The second question asks what principles should judges in the Crown Court apply when determining whether the qualified rights found in articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest. It arises only if the answer to the first question is "no". In summary form the answer to the second question is that Convention jurisprudence establishes that Convention rights under articles 9, 10 and 11 are not engaged in relation to acts which reject the foundations of a democratic society, or "other reprehensible acts", including violent acts; acts of criminal damage constitute, or at least usually constitute, acts of violence or other, analogous, acts; acts may constitute a rejection of the foundations of a democratic society if they seek to bring about the outcome sought by coercion or force, rather than by communication of ideas, persuasion and engagement in democratic processes: see, in particular, *Kudrevičius v Lithuania* (2015) 62 EHRR 34 and *Taranenko v Russia* (2014) 37 BHRC 285.

The third question asks, on the premise that the qualified rights found in articles 9, 10 and 11 of the Convention are engaged, under what circumstances any question of proportionality should be withdrawn from the jury. The judge should ask the usual question before doing so: whether, on the facts most favourable to the defendant, the argument that it would be a disproportionate interference with the defendant's human rights to convict him is capable of affording a defence to the charge. Even in cases where

© 2023 The Incorporated Council of Law Reporting for England and Wales

A human rights are arguably engaged, the same factors (including the use of violence or force, a rejection of the foundations of a democratic society, or other reprehensible conduct) may mean that no jury could properly find that any interference with Convention rights was disproportionate.

[Reference was also made to *Attorney General's Reference (No 4 of 1979)* [1981] 1 WLR 667, *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617, *Gifford v HM Advocate* 2011 SCCR 751, *Kudrina v Russia* B (Application No 34313/06) (unreported) 6 April 2021, *R v Fiak* [2005] Po LR 211, *R v Wang* [2005] 1 WLR 661, *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, *R (Corner House Research) v Director of the Serious Fraud Office* [2009] AC 756, *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, *Roe v Kingerlee* [1986] Crim LR 735, *Bédat v Switzerland* (2016) 63 C EHRR 15, *Ezelin v France* (1991) 14 EHRR 362, *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), *R (Director of Public Prosecutions) v Stratford Magistrates' Court* [2018] 4 WLR 47, *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] 1 WLR 771, *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 and *Taxquet v Belgium* (2010) 54 EHRR 26.]

D *Clare Montgomery KC* and *Blinne Ní Ghrálaigh* (instructed by *Hodge, Jones and Allen*) for the defendants.

The questions referred do not concern "point[s] of law which ha[ve] arisen in the case" and do not therefore meet the test for a referral under section 36(1) of the Criminal Justice Act 1972. The first question is premised on an argument that did not arise at trial and where the central contention E had not even been identified by the court or the parties. The second and third questions constitute a reference "in the abstract", which is self-evidently not "in relation to the case in which the point has arisen": see *Attorney General's Reference (No 2 of 1975)* [1976] 1 WLR 710, 714E. The questions seek the court's opinion in relation to any offence on any facts in relation to which a defence concerning human rights may or may not arise in a criminal case, untethered from the facts of the defendants' case. To F respond properly and comprehensively to all the permutations of the second and third questions "would be the function of a textbook, not a judgment" and the Attorney General is not entitled "to set in train a judicial roving commission on a particular branch of the law, with the aim of providing clear, practical and systematic solutions for problems of current interest": see *Attorney General's Reference (No 3 of 1994)* [1998] AC 245, 265D–F. It G was never submitted during the trial: (1) that lawful excuse in criminal damage was not to be interpreted as allowing for a fact-specific article 10 proportionality analysis either as a general or a specific point; (2) that article 10 was not engaged; or (3) that the fact-specific proportionality assessment should be withdrawn from the jury. It is now too late to argue those points: see *Attorney General's Reference (No 3 of 1994)*. It follows that the court may not lawfully respond to the questions referred.

H Even accepting the analysis in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 and *Director of Public Prosecutions v Cuciurean* [2022] QB 888, there could be no basis for concluding that a conviction for criminal damage will invariably constitute a justified and proportionate interference with articles 9, 10 or 11 of the Convention for the Protection of

© 2023 The Incorporated Council of Law Reporting for England and Wales

Human Rights and Fundamental Freedoms or that the ingredients of the offence could render it "intrinsically" proportionate. For three reasons it is obvious that a conviction for criminal damage under section 1 of the Criminal Damage Act 1971 is capable of engaging articles 9, 10 or 11 of the Convention.

First, the offence of criminal damage may be committed where the damage caused is of a minor or incidental nature that may commonly occur in the course of expressing political beliefs or participating in public assembly. In *Morphitis v Salmon* (1989) 154 JP 365, Auld J held that "damage" within the meaning of section 1 of the 1971 Act is to be interpreted widely so as to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness. He confirmed that the defendant in that case might have been charged with damage to a barrier, even though he had merely removed a component part of the barrier without otherwise damaging it. Examples of minor damage are to be found in *Seray-Wurie v Director of Public Prosecutions* [2012] EWHC 208 (Admin), *Hardman v Chief Constable of Avon and Somerset* [1986] Crim LR 330 and *Gayford v Chouler* [1898] 1 QB 316. As the advocate to the court observes, if, during a protest, a woman chains herself to a set of railings causing a small scratch to the paintwork, that may in principle constitute damage for the purposes of section 1 of the 1971 Act and bring her within the ambit of the offence.

Secondly, articles 9 and 10 of the Convention are broad in scope and plainly apply to expressive conduct that may constitute "damage" to property: the property concerned may include items that are significant mediums for expression (e g walls or billboards), symbolic objects that may be impaired to imply political beliefs (e g statues or flags) or physical barriers to assembly (e g road cones or crowd control barriers). Article 10 has been held to be engaged in relation to "direct action" protests: see *Vural v Turkey* (Application No 9540/07) (unreported) 21 October 2014, *Ibrahimov v Azerbaijan* (Application Nos 63571/16, 2890/17, 39541/17, 74143/16, 2883/17 and 39527/17) (unreported) 13 February 2020, *Handzhiyski v Bulgaria* (2021) 73 EHRR 15, and *Genov v Bulgaria* (Application No 52358/15) (unreported) 30 November 2021. Article 10 protects not only the substance of the expression, but also the form in which it is conveyed: *Women On Waves v Portugal* (Application No 31276/05) (unreported) 3 February 2009; and it protects the place at which it takes place: *Alekhina v Russia* (2018) 68 EHRR 14. Crucially the act of damage itself may constitute expressive conduct within the meaning of article 10. The distinction sought to be drawn by the Attorney General between "offences criminalising forms of speech" and the offence of criminal damage misses this point. Criminal damage (like the offence of wilfully obstructing a highway contrary to section 137 of the Highways Act 1980 considered by the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408) is an offence that potentially criminalises a form of expression. Physical conduct is expressive if it conveys meaning; in the context of the Black Lives Matter march, in the circumstances on the day in Bristol, the removal of the statute of Edward Colston from its pedestal conveyed, amongst other things, support for the proposition that black lives really do matter.

© 2023 The Incorporated Council of Law Reporting for England and Wales

A As to article 11 of the Convention, the Strasbourg case law is clear that the only conduct in the context of an assembly that falls outside the protections of article 11 is conduct that: (a) is violent; (b) incites violence; or (c) otherwise rejects the foundations of democracy: see *Ziegler* [2022] AC 408, para 69 and *Navalnyy v Russia* (2018) 68 EHRR 25, para 98. Strasbourg case law has not equated all physical acts against statues with damage or violence and has also drawn a distinction between violence and B damage to property more generally: see *Taranenko v Russia* (2014) 37 BHRC 285 and *Shvydka v Ukraine* (Application No 17888/12) (unreported) 30 October 2014. It follows that causing damage to property in the domestic sense is not necessarily damage, still less violent conduct, in Convention terms. The threshold which conduct must meet to be considered not "peaceful" is set high: the contention that any damage to property in a C protest context, however trivial and incidental, is violent or otherwise rejects the foundations of democracy is without merit. The foundations of democracy are not undermined by individual actions, interfering with people or property in a policy area, particularly in an area of intense public debate. There is no democracy without pluralism and direct action protests may play an important role in shaping policy or prompting debate without D any danger to democracy: see *Steel v United Kingdom* (1998) 28 EHRR 603.

Thirdly, any criminal conviction in the context of protest activity constitutes an interference with the rights under articles 9, 10 or 11 which must be justified. The term "restrictions" in articles 10(2) and 11(2) includes both measures taken before or during a gathering and those, such as punitive measures, taken afterwards: see *Kudrevičius v Lithuania* (2015) 62 EHRR E 34. The very fact of a criminal conviction is one of the most serious forms of interference with the right to freedom of expression: *Perinçek v Switzerland* (2015) 63 EHRR 6. The same applies to the right to freedom of association: *Yordanovi v Bulgaria* (Application No 11157/11) (unreported) 3 September 2020, para 50.

Just as the police and the Crown Prosecution Service must respectively assess whether arrest and prosecution are proportionate interferences with F qualified rights to ensure they do not infringe section 6 of the Human Rights Act 1998, so too the court must ask whether conviction is proportionate. An assessment of the proportionality of a separate interference by a different public authority at an earlier stage in the criminal process does not relieve courts of their duties at trial: see *Ziegler* [2022] AC 408.

Once it is established that a conviction for criminal damage is capable G of engaging articles 9, 10 and 11, the question then becomes whether it invariably constitutes a proportionate interference in each case. Having regard to the ambit of the offence and the Strasbourg and domestic authorities, the answer is clearly "no". This is because finding an individual criminally liable for conduct which can, in principle, fall within the definition of "damage" under section 1 of the 1971 Act may constitute a disproportionate interference with Convention rights: reliance is placed on H *Genov* 30 November 2021, in which it was not suggested that painting a monument as a form of political expression was not at the "core" of article 10, indicating that that form of expression which would in domestic terms amount to damage to property is not invariably at the margins of the right. A finding that a conviction under section 1 of the 1971 Act can never

© 2023 The Incorporated Council of Law Reporting for England and Wales

be disproportionate would be to conclude that causing damage to property (regardless of whether the damage is trivial, the property is state-owned, or the political message is of exceptional importance) invariably constitutes a greater interference with the rights of others than deliberate obstructive conduct that prevents people from passing along a highway, which the Supreme Court in *Ziegler* held must be subject to a careful proportionality analysis.

An assessment of proportionality is highly fact-sensitive. Given the breadth of conduct that could be criminalised by section 1 of the 1971 Act, it is impossible to conclude that a conviction will always constitute a proportionate interference. The interests of the individual and the wider community that hang in the balance will vary widely in each case: the proportionality analysis in relation to the individual who removes part of a barrier in the course of a protest on a matter of public importance, writes a political slogan in chalk outside Parliament, or tramples over grass in a public place during a march is very different to that of the individual who breaks the door of a politician's office. Each case will need to be assessed on its own facts and context. It is not just the extent of the damage or the nature of the property that is relevant. The commission of a "reprehensible act" does not deprive a protester of the protections of article 11, but merely means that any resulting restrictions on their rights may be proportionate on the particular facts of the case: see *Ziegler*. It follows that the ratio of *Cuciurean* [2022] QB 888, which concerned the offence of aggravated trespass, does not apply equally to the offence of criminal damage and that, instead, the analysis in *Ziegler* is applicable. To apply *Ziegler* would be particularly apt given that, in common with the offence under section 137 of the Highways Act 1980 and as distinct from aggravated trespass, section 1 of the 1971 Act is subject to a statutory "lawful excuse" defence. The two provisions are materially identical. The purpose of the "lawful excuse" defence in both provisions is to admit any defences recognised under the common law or statute that arise on the facts of the case as well as permitting the defence to rely on exculpatory facts: see *Wong Poo Yin v Public Prosecutor* [1955] AC 93.

The defence under section 1 of the 1971 Act is subject to a non-exhaustive definition of what constitutes a "lawful excuse". That term is sufficiently flexible to accommodate developments in the law, e g the passage of primary legislation that imposed an obligation on courts to construe legislation compatibly with Convention rights. In considering any "lawful excuse", it is the excuse or exculpatory reason put forward by the defendant, rather than the conduct the subject of the charges, that must be shown to be lawful: see *Ziegler* [2022] AC 408. The Attorney General's submission to the effect that Parliament intended to oust a proportionality defence in relation to criminal damage but maintain it in relation to the offence of obstructing a highway is not grounded in any analysis of the statutory language or the parliamentary debates preceding the passage of the 1971 Act or of the 1980 Act and is entirely without merit.

The general measures principle, as developed in *Animal Defenders v United Kingdom* (2013) 57 EHRR 21, is not applicable. That case concerned a non-criminal statutory prohibition on political advertisements in broadcast media. It is clear from the subsequent Strasbourg jurisprudence that the

© 2023 The Incorporated Council of Law Reporting for England and Wales

A application of a criminal conviction to expressive conduct is considered different in kind to a civil regulatory regime that limits the technical means by which people can express views: see, in particular, *Perinçek v Switzerland* 63 EHRR 6. The Attorney General's submissions and the decision of the Divisional Court in *Cuciurean* [2022] QB 888 proceed on the false premise that it is well established that general measures criminalising the exercise of B article 9, 10 or 11 rights are broadly permissible, but *Perinçek* compels precisely the opposite conclusion. *Pretty v United Kingdom* (2002) 35 EHRR 1 is distinguishable: the court's reasoning does not preclude a finding that a criminal conviction would be disproportionate in individual cases or permit the domestic authorities to forgo individualised assessments regarding a prospective criminal conviction.

The Strasbourg court approaches the general measures principle as a form C of process-based review to give effect to the principle of subsidiarity and determine the margin of appreciation that is to be afforded to national authorities. There is no authority for the proposition that there are categories of general measures that are inherently proportionate such that the domestic courts have no jurisdiction to consider whether their application is proportionate in individual cases. Margin of appreciation was the issue in D *Animal Defenders* and did not affect the proposition that the domestic authorities must still comply with their duties, pursuant to the Human Rights Act 1998, to assess the application of a measure in individual cases: see *Pretty v United Kingdom* and subsequent domestic authorities.

Even if the "general measures" principle is to be applied in the context of a criminal conviction, the offence of criminal damage does not come close to satisfying the process-based test enumerated in *Animal Defenders*. E Assessing the quality of legislative scrutiny was an essential component of the *Animal Defenders* analysis. It was recognised that the legislation concerned, the Communications Act 2003, was the culmination of intense scrutiny in which all bodies found the relevant prohibition to have been a necessary interference with article 10 rights. There is no evidence that Parliament gave any consideration to the question of whether conviction F under section 1 of the 1971 Act might interfere with rights of freedom of belief, expression or association during the passage of the legislation (or in relation to the various overlapping statutory offences that preceded it), let alone that they considered the offence itself to be proportionate. The Law Commission's *Criminal Law Report on Offences of Damage to Property* (1970) (Law Com No 29) which precipitated the passage of the Act made no G reference to the implications for protest or other forms of expression. The *Animal Defenders* analysis bears a striking resemblance to the domestic principle of legality, pursuant to which fundamental rights cannot be abrogated by statutory language which is general or ambiguous: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, per Lord Hoffmann. If Parliament wishes to override fundamental rights it must do so either using explicit statutory language or by necessary H implication. There is no basis to suggest that the statutory language of the 1971 Act shows that Parliament intended to override fundamental rights. To the contrary, Parliament enacted legislation creating an offence subject to an open-ended "lawful excuse" defence. The "general measures" case law does not licence the court to act incompatibly with the Convention; all

© 2023 The Incorporated Council of Law Reporting for England and Wales

cases—hard or otherwise—must still be on the right side of the line. As a matter of domestic law, it is not open to the court to act incompatibly with Convention rights, save where under the terms of primary legislation the court cannot act differently (section 6(2)(a) of the 1998 Act) or the court is giving effect to provisions which cannot be read or given effect in a way which is compatible with Convention rights (section 6(2)(b) of the 1998 Act). Neither category applies in this case.

In the alternative, *Cuciurean* [2022] QB 888 was wrong in holding that there is a principled basis for concluding that there are two distinct categories of criminal offences engaging articles 9, 10 or 11 of the Convention, one of which requires a proportionality assessment at trial and the other of which does not. There is no authority that binds the Court of Appeal to conclude that these two classes of offence exist, and Strasbourg and domestic authority leads to the opposite conclusion: see *Perinçek* 63 EHRR 6 and *Kudrevičius* 62 EHRR 34. The approach of the court in *James* [2016] 1 WLR 2118 and *Cuciurean* is at odds with the established domestic approach to the application of the Convention which distinguishes between Acts of Parliament and their operation in individual cases. There will be cases in which the court is invited to find that a provision of primary legislation is per se incompatible with a Convention right; in such a case it will be open to the court to make a finding that the legislation itself is compatible with the Convention because it is capable of being operated compatibly, but this does not mean it will invariably be compatible in its operation in individual cases. The court in *Cuciurean* also wrongly identified a lawful or reasonable excuse provision as the sole mechanism through which the concept of "proportionality" may be considered in relation to a criminal offence, whereas in fact it is just one possible means by which the interpretative exercise mandated by section 3 of the 1998 Act can be undertaken pursuant to the usual enquiry which needs to be conducted under the 1998 Act: see *Ziegler* [2022] AC 408. There is no principled or coherent basis for distinguishing between offences which contain a lawful or reasonable excuse defence and those which do not: see *Connolly v Director of Public Prosecutions* [2008] 1 WLR 276. The interpretative obligation under section 3 is of an "unusual and far-reaching character": *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 30. Where a criminal offence engages articles 10 or 11 of the Convention, the courts have held that this requires them to give elements of the offence a heightened meaning (see *Scottow v Director of Public Prosecutions* [2021] 1 WLR 1828) or read in a requirement that conviction must be necessary and proportionate (see *Brown v Public Prosecution Service for Northern Ireland* [2022] NICA 5) to render any conviction Convention-compliant, and *Cuciurean* represents a significant departure from this approach. The approach contemplated in *James*, applied in *Cuciurean* and now advanced by the Attorney General extinguishes the role of the courts to review the Convention-compatibility of a criminal conviction that restricts expression in individual cases once the offence has been deemed to be intrinsically proportionate; that is, at its core, fundamentally at odds with the constitutional shift brought about by the 1998 Act in the protection of rights of expression and assembly: see *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105.

© 2023 The Incorporated Council of Law Reporting for England and Wales

A As to the principles which judges in the Crown Court should apply when determining whether the qualified rights found in articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest, the relevant questions are as follows. (1) Is what the defendant did in exercise of one of the rights in articles 9, 10 or 11? (2) If so, is there an interference by a public authority B 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 article 10(2) or article 11(2), for example the protection of the rights of others? (5) If so, is the interference "necessary in a democratic society" to achieve that legitimate aim? The judgment about whether a fair balance has been struck is a matter within the competence of the jury. The proportionality assessment is a determination of fact where the jury is the sole arbiter of the C relevant facts in a Crown Court trial. It is not possible to exclude them from the fact-finding process. Any suggestion that it may be difficult for the jury to form judgments about proportionality is ill-founded.

As to the third question, which asks, on the premise that Convention rights are engaged, under what circumstances should any question of proportionality be withdrawn from the jury, it is only if there is no evidence D on which a jury could conclude that the defendant was exercising Convention rights that might be interfered with by a conviction, that the judge would be entitled to refuse to allow the questions to be considered by the jury: see, for example, *R v Bianco (Leonardo)* [2001] EWCA Crim 2516.

[Reference was also made to *Attorney General's Reference (No 4 of 1979)* [1981] 1 WLR 667, *Bauer v Director of Public Prosecutions* [2013] 1 WLR E 3617, *Gifford v HM Advocate* 2011 SCCR 751, *Kudrina v Russia* (Application No 34313/06) (unreported) 6 April 2021, *R v Fiak* [2005] Po LR 211, *R v Wang* [2005] 1 WLR 661, *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, *R (Corner House Research) v Director of the Serious Fraud Office* [2009] AC 756, *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, *R (Ullah) v Special Adjudicator* [2004] 2 AC F 323, *Roe v Kingerlee* [1986] Crim LR 735, *Vona v Hungary* (2013) 37 BHRC 239, *Bédat v Switzerland* (2016) 63 EHRR 15, *Ezelin v France* (1991) 14 EHRR 362, *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), *R (Director of Public Prosecutions) v Stratford Magistrates' Court* [2018] 4 WLR 47, *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] 1 WLR 771, *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 and *Taxquet v* G *Belgium* (2010) 54 EHRR 26.]

Louis Mably KC (instructed by *Treasury Solicitor*) as advocate to the court.

As to the preliminary issue, the key point made by the defendants is that at trial the Crown conceded (a) that the defendants' qualified rights were engaged, (b) that criminal damage was not an inherently proportionate H restriction and (c) that the question of proportionality should properly be left to the jury (or at least the Crown did not argue to the contrary). The short point to be made is that points (a) to (c) do appear to be legal matters which arose in the case for the purposes of section 36 of the Criminal Justice Act 1972. Regardless of the Crown's position, each was a matter of law

© 2023 The Incorporated Council of Law Reporting for England and Wales

which underpinned the final legal direction given to the jury by the judge on the question of proportionality. The points of law in the reference are matters which seek to examine whether, as a matter of law, the legal approach taken by the judge was correct. It is not obvious that the reference falls outside the terms of section 36 of the Criminal Justice Act 1972.

The first question is whether criminal damage is within the category of offences identified in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 and *Director of Public Prosecutions v Cuciurean* [2022] QB 888 where any proportionality balance which may arise is struck by the terms of the offence-creating provision, without more ado, so that it is therefore unnecessary for the prosecution to prove separately, whether as part of disproving lawful excuse or otherwise, that a conviction would represent a proportionate interference with any right under articles 9, 10 or 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms that may be engaged. The defendants contend that *Cuciurean* was wrongly decided, and that in all cases an individual proportionality assessment is required. Two issues appear to arise for consideration in this regard. First, is it possible for an offence-creating provision intrinsically to strike the fair balance? Secondly, if it is possible, what is the touchstone of such an offence in domestic law?

As to the first issue, the following five points are of significance. (1) There is support in domestic law for the proposition that an offence-creating provision can intrinsically strike the fair balance: see *James* [2016] 1 WLR 2118 and the obiter statement of Lord Hughes JSC giving the judgment of the Supreme Court in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3, albeit in a different context. (2) In a wide range of cases where article 10 has been engaged the courts have held that a specific, fact-sensitive enquiry, based on the circumstances of the particular case, is required to determine whether a conviction is proportionate: for example, *Scottow v Director of Public Prosecutions* [2021] 1 WLR 1828 and *Norwood v Director of Public Prosecutions* [2002] EWHC 1564 (Admin); [2003] Crim LR 888. (3) Decisions of the Strasbourg court have upheld the inherent proportionality of a number of general measures which interfere with qualified rights, regardless of the individual facts: see *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, paras 106–109. (4) However, the Strasbourg court has also observed that where an interference consists of a criminal conviction, stricter scrutiny is required than in the case of a regulatory interference, and that the particular facts of the case are likely to merit attention: see *Perinçek v Switzerland* (2015) 63 EHRR 6, *Handzhiyski v Bulgaria* (2021) 73 EHRR 15 and *Genov v Bulgaria* (Application No 52358/15) (unreported) 30 November 2021. It is, nevertheless, difficult to discern from this the existence of a hard-edged rule in the Strasbourg court's case law that a criminal provision is incapable, in its general terms, of striking a fair balance. (5) As to whether the decision in *Director of Public Prosecutions v Ziegler* [2022] AC 408 is of general application, applying to any offence when qualified rights are engaged, or is, as held in *Cuciurean*, confined to the offence which was before the court, namely obstruction of the highway contrary to section 137 of the Highways Act 1980, two matters are of note. First, the Strasbourg case law relating to

© 2023 The Incorporated Council of Law Reporting for England and Wales

A obstructions caused during protests, cited by the Supreme Court, provided a firm foundation for concluding that, in the case of the section 137 offence, a consideration of the particular facts was necessary in order to determine the question of proportionality. Secondly, it is not clear that the Supreme Court intended to lay down a general principle applicable to any offence where qualified rights are engaged, and the judgment as a whole does not appear to B provide a firm basis for concluding that a statutory offence cannot inherently strike a fair balance; further, there does not appear to be a reason why, in principle, a prohibition set out in a statute could not of itself constitute a proportionate interference with a qualified right.

As to the second issue, the following points are of significance. The question of whether an offence inherently strikes a fair balance on the one hand, or requires an individual proportionality assessment on the other, C cannot be determined by reference to whether or not the statutory ingredients include a "without lawful excuse" (or similar) element (or a defence based on "reasonableness" etc). Where the courts have held that an individual proportionality assessment is necessary, the assessment has been incorporated into those elements or defences (as in *Ziegler* itself). However, such elements or defences are simply the route by which the courts have D given effect to the proportionality assessment. Their existence is not determinative of whether such an assessment is required. In other words, the absence of such an element or defence does not mean that an offence must be considered inherently proportionate. By the same token, the presence of such an element or defence does not mean that an individual proportionality assessment must be carried out. The essential starting point under the E Human Rights Act 1998 is to consider the fundamental question of whether a conviction for the offence would be a proportionate restriction to the qualified right engaged. If proof of the ingredients of the offence would inherently constitute a proportionate interference, there is no need for the court to consider proportionality against the individual facts. If that is not the case, and an individual assessment is required, the court must strive F to find some method of importing the proportionality assessment into the elements of the offence. If there is a "without lawful excuse" or "reasonableness" element or defence, the assessment may readily be imported. In other cases, proportionality can be ensured by giving a heightened meaning to a particular element of the offence (*Connolly v Director of Public Prosecutions* [2008] 1 WLR 276) or by some other way of G interpreting of the legislation permissible under section 3(1) of the 1998 Act. If there is no means by which the assessment can be imported, the trial court will have to proceed in accordance with the legislation, and questions of proportionality and incompatibility addressed on appeal. It therefore follows that whether an offence inherently strikes a fair balance will ultimately depend on the content and scope of the right in question, as it relates to the ambit of the offence. In the present case, this requires consideration of the H content and scope of the qualified rights as they relate to the offence of criminal damage.

Examination of the case law establishes that, contrary to the position in relation to obstruction of a highway, there is no clear statement in Strasbourg or domestic case law which compels the conclusion that the offence of

© 2023 The Incorporated Council of Law Reporting for England and Wales

criminal damage does not inherently constitute a proportionate interference with qualified rights, such that it requires proportionality to be assessed on the facts of each individual case: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014, *Taranenko v Russia* (2014) 37 BHRC 285, *Genov v Bulgaria* 28 February 2022, *Handzhyski v Bulgaria* 73 EHRR 15, *R v Jones (Margaret)* [2007] 1 AC 136, *Appleby v United Kingdom* (2003) 37 EHRR 38, *Richardson v Director of Public Prosecutions* [2014] AC 635, and *Cuciurean* [2022] QB 888. It is, however, to be noted that, whilst the case law makes clear that causing damage has an impact on the question of proportionality (assuming it is caused during the exercise of qualified rights), there is no clear statement that a conviction for criminal damage will be inherently proportionate, regardless of the circumstances. Further, it is of note that the domestic offence of criminal damage may be committed where the damage caused is of a very minor or trivial nature and whereas it might be said that proportionality could easily be shown where property is destroyed or seriously damaged—or in almost all cases where damage is caused—the position might be different if the damage were trivial, was caused recklessly, or was wholly secondary to, but the inevitable consequence of, an act commonly performed in low-level forms of protest. It might be said that such examples are simply "hard cases", which do not invalidate the inherent proportionality of a general measure: see *Animal Defenders* 57 EHRR 21, para 106. It might also be said that the low level of sentence that would arise from conviction in such cases would be relevant to any assessment of proportionality. Whilst the Supreme Court in *Ziegler* [2022] AC 408 noted at para 57 that conviction and sentence are separate restrictions and may have their own proportionality considerations, the Strasbourg court has assessed the question of the proportionality of a conviction and sentence together: see *Taranenko* 37 BHRC 285, paras 93–94. In any event, a conclusion that the offence of criminal damage is an inherently proportionate restriction would have to involve a finding that the offence was inherently proportionate regardless of the article damaged, the level of damage, the nature of the protest, and whether the damage was caused intentionally or recklessly.

The second question asks what principles should judges in the Crown Court apply when determining whether the qualified rights found in articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest. The question of whether any of the qualified rights are engaged by a potential conviction is a matter to be determined by reference to Convention principles, as set out in the relevant case law of the Strasbourg and domestic courts. The matter will ultimately be determined by reference to the content of the article in question, compared to the facts of the particular case. As noted in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, the ramifications of the decision in *Ziegler* will call to be explored further. Whilst the Supreme Court was clear in stating that proportionality was a matter to be determined by the tribunal of fact, this may be one of the matters which does, in particular, call for further explanation, in order to identify the principled basis for such an outcome, how it will operate as a

© 2023 The Incorporated Council of Law Reporting for England and Wales

A matter of practice, and whether there are any alternative procedures for determining proportionality having regard to the nature of the jury system in England. Clarification may be needed in relation to determining what are matters for the judge and what are matters for the jury, and as to whether expert evidence is needed and admissible.

The third question asks, on the premise that the qualified rights found B in articles 9, 10 and 11 of the Convention are engaged, under what circumstances any question of proportionality should be withdrawn from the jury. On well established principles, the matter may only be withdrawn, as a matter of law, if the evidence is not sufficient for a properly directed jury to reasonably conclude that the defendant might have had a lawful excuse: e g *R v Nicholson (Heather)* [2006] 1 WLR 2857, para 9, *R v Martin (Jovan)* [2017] EWCA Crim 1359 at [39] and *R v G* [2010] 1 AC 43.

C *Jude Bunting KC* and *Owen Greenhall* (instructed by *Solicitor, Liberty*) for Liberty, intervening by written submissions only.

The court took time for consideration.

28 September 2022. **LORD BURNETT OF MALDON CJ** handed down D the following judgment of the court.

1 This is a reference in which His Majesty's Attorney General seeks the opinion of the court on three questions of law which are said to have arisen from a trial in the Crown Court at Bristol of four protestors for allegations of criminal damage to a statue of Edward Colston. The issue, in short, concerns the extent to which the European Convention for the Protection of E Human Rights and Fundamental Freedoms ("the Convention") sanctions the use of violence against property during protest, thereby rendering lawful causing damage to property which would otherwise be a crime. Causing damage to property is a criminal offence pursuant to the Criminal Damage Act 1971 subject to a defence of "lawful excuse".

2 On 5 January 2022 the jury acquitted the four defendants. A range of F defences was run at trial. The defence with which this reference is concerned was whether conviction for the damage done to the statue was a disproportionate interference with the defendants' right to protest. We are not concerned with the other defences. It is impossible to know whether the jury acquitted on that basis or one of the others. This reference can, in any event, have no bearing on the acquittals.

G 3 In submissions before us, both Mr Little KC for the Attorney General and Ms Montgomery KC for Ms Graham, one of the acquitted persons (neither of whom appeared below), have referred to another of the defences advanced by the defendants. That defence was that the defendants used force in the prevention of crime pursuant to section 3 of the Criminal Law Act 1967 to prevent the public display by Bristol City Council of indecent matter contrary to the Indecent Displays (Control) Act 1981. The Attorney H General did not refer a question relating to that defence because, in her view, the law is clear that the defence should not have been left. The reference procedure is not a mechanism to obtain a restatement of established law. We have not heard argument on the issue. Should the same issue arise again the point will need to be argued at trial and, if necessary, on appeal.

© 2023 The Incorporated Council of Law Reporting for England and Wales

The questions in the reference

A

4 The Attorney General refers the following questions for the opinion of the court pursuant to section 36 of the Criminal Justice Act 1972:

"*Question 1*

"Does the offence of criminal damage fall within that category of offences, identified in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 and *Director of Public Prosecutions v Cuciurean* [2022] QB 888, where conviction for the offence is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with any rights engaged under articles 9, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention')?

B

"*Question 2*

C

"If not, and it is necessary to consider human rights issues in individual cases of criminal damage:

"What principles should judges in the Crown Court apply when determining whether the qualified rights found in articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest?

"*Question 3*

D

"If those rights are engaged, under what circumstances should any question of proportionality be withdrawn from a jury?"

Factual background

5 Edward Colston (1636 to 1721) was a Bristol-born English merchant. He accumulated a large fortune in a wide range of trading activities which included, through the Royal African Company, the transportation of African slaves to the West Indies and America. He was one of the biggest philanthropists of his day giving substantial sums for charitable purposes in Bristol and elsewhere. In 1895 a bronze statue of him was erected in Bristol to mark his philanthropy. In 1977 it was designated as a Grade II listed structure.

E

F

6 The statue was about 2.5 m high placed on top of a stone pedestal nearly 1 m high which stood on a large, carved, octagonal stone base with plaques about 2.5 m high. The top of the statue was thus about 6 m above ground level. The statue was owned by Bristol City Council and held on trust for the people of Bristol. From the 1990s the continued presence of the statue and its plaque became a subject of controversy. Some campaigned for its removal from public display because of the tainted source of much of Colston's wealth. The inscription on its plaque described Colston as "one of the most virtuous and wise sons" of Bristol.

G

7 At around 14.00 on Sunday, 7 June 2020 a peaceful march attended by about 10,000 began at College Green, Bristol. It was prompted by the Black Lives Matter movement. It was a community event with a friendly atmosphere. The majority of those peacefully protesting had passed the Colston statue when at about 14.30 a large number of people congregated around the statue, including three of the four defendants.

H

8 Ms Graham and one of her co-defendants had brought ropes to the scene which were used to topple the statue. That is what happened after the

© 2023 The Incorporated Council of Law Reporting for England and Wales

A ropes were tied around it and about 20 people, including Ms Graham, pulled it and its stone plinth to the ground. The statue was damaged. Ms Graham and two co-defendants were charged on Count 1 on the indictment with this conduct.

9 A fourth defendant took part in rolling the statue through the streets to the harbour, where it was heaved into the water. This formed Count 2 of B the indictment. Ms Graham was not involved in that part of the protest.

10 Both counts alleged damage to property contrary to section 1(1) of the Criminal Damage Act 1971. The particulars of Count 1 were that the first three defendants:

> "without lawful excuse jointly and together with others, damaged a statue of Edward Colston a listed monument belonging to Bristol City C Council intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged."

The proceedings in the Crown Court

11 In advance of the trial, Ms Graham and a co-defendant made an application to stay the proceedings as an abuse of process. One of the D grounds advanced was that the prosecution involved a disproportionate interference with their rights under articles 9, 10 and 11 of the Convention. Their submissions relied upon the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408 as laying down legal principles of general application to any trial concerning conduct during the course of a protest engaging articles 10 and 11. They submitted that the E prosecution amounted to a restriction interfering with those rights and so would not be justified unless necessary in a democratic society and proportionate in the light of a fact-specific evaluation of the circumstances of the case.

12 In its written response to this application the prosecution submitted:

> "The alleged offending in this case was neither peaceful or transient in F its effect and, on that basis, this case [*Ziegler*] can be distinguished. Peaceful obstruction of the highway by protestors does not mirror the instant criminality alleged, which we note, was extraneous to the peaceful BLM [Black Lives Matter] march that preceded it."

13 At this point in their submissions the prosecution was making the straightforward point that the conduct in question was not peaceful and G so not protected by the Convention. In the alternative the prosecution submitted that even if articles 10 or 11 were engaged, the trial process could accommodate the issue. The principal prosecution argument was founded on para 69 of *Ziegler* where Lord Hamblen and Lord Stephens JJSC summarised Strasbourg jurisprudence on conduct by protestors which falls outside the protection of the Convention. Article 11 only protects peaceful H protest. By reference to *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 92 they noted that peaceful assembly:

> "does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such

© 2023 The Incorporated Council of Law Reporting for England and Wales

intentions, incite violence or otherwise reject the foundations of a democratic society."

They also noted the observations of the Strasbourg court in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014 at para 155 that an individual does not lose the protection of article 11 in circumstances where, although the organisers had no violent intentions, there are sporadic acts of violence of others during a demonstration "if the individual in question remains peaceful in his or her own intentions or behaviour".

14 The judge rejected the abuse of process application. He did not rule on the prosecution's first submission that the protest had not been peaceful and so fell outside the protection of the Convention altogether, but accepted that if there were an interference with Convention rights the jury could consider proportionality. It was on that basis that the defence was eventually left to the jury. The prosecution did not press its contention that the nature of the conduct was not peaceful. The judge was not invited to withdraw that matter from the consideration of the jury. There was discussion about which of the articles of the Convention were in play. That led to a focus on articles 9 and 10 (freedom of thought and freedom of expression) rather than article 11 (freedom of assembly). It is common ground before us that the principles in play are not affected by the analysis of which aspect of which article might be engaged: see *Ziegler* at para 61 et seq.

15 The judge dealt with this defence last in his route to verdict. The jury would only consider it if they had rejected the defence case on other issues. The final question was: "Are you sure that convicting [the defendants] of criminal damage would be a proportionate interference with their rights to freedom of thought and conscience, and to freedom of expression?" If the answer were "yes" the verdict would be guilty, otherwise, not guilty. In effect, the requirement for a conviction to be proportionate was treated as an additional, separate ingredient of the offence which the prosecution had to prove. The strict analysis was that the prosecution had to prove that the Convention did not provide a "lawful excuse" within the terms of the Criminal Damage Act.

A preliminary issue

16 Section 36(1) of the Criminal Justice Act 1972 provides:

"(1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal *on a point of law which has arisen in the case*, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it." (Emphasis added.)

17 Ms Montgomery submits that the court has no jurisdiction to give its opinion on any of these questions because none of them arose in the case. She suggests that the prosecution did not advance at the trial any of the points of law upon which the Attorney General now seeks to rely. In addition, Questions 2 and 3 are impermissibly broad. They invite consideration of a range of hypothetical situations to answer which would involve the court in

© 2023 The Incorporated Council of Law Reporting for England and Wales

A writing a textbook rather than a judgment (*Attorney General's Reference (No 3 of 1994)* [1998] AC 245, 265F).

18 In our judgment we have jurisdiction to deal with each of the three questions raised in the reference.

19 Section 36 of the 1972 Act confers a power to refer a point of law, not in the abstract, but one which arose in a real case. "There is no power to B refer theoretical questions of law, however interesting or difficult" (*Attorney General's Reference (No 2 of 1975)* [1976] 1 WLR 710, 714E; *Attorney General's Reference (No 4 of 1979)* [1981] 1 WLR 667, 672G–H). That is not, in our view, what the Attorney General has done in this reference. At the heart of the case originally advanced by the prosecution was the proposition that the conduct in question did not attract any protection under the Convention. As we have noted, the judge did not rule on that issue when C considering the abuse of process argument but proceeded on the assumption that Convention rights were engaged.

20 All three questions raise issues of law which seek the opinion of the court on whether that underlying assumption was correct; and if not, how the matter should be dealt with. We agree with Mr Little that there is no principle which prevents the Attorney General from advancing a different D (or developed) argument from that advanced by the prosecution at trial in relation to a point of law that was in issue.

21 In the present case the prosecution had contended that the protest was non-peaceful and fell outside the scope of Convention rights. The submission entailed the proposition that the defence of "lawful excuse" did not arise for Convention reasons. That is at the heart of the submission E advanced by the Attorney General and the questions of law we are asked to consider.

Criminal damage

22 The Criminal Damage Act 1971 followed the Law Commission's *Criminal Law Report on Offences of Damage to Property* (1970) (Law Com F No 29). Its object was to replace the previous complicated sets of statutory provisions with a simplified code. The essence of the new offence was destruction of, or damage to, the property of another. Legal distinctions based upon the nature of the property or its situation, or the means used to destroy or damage it, did not affect the basic nature of the offence, but went to sentence (para 13). The conduct to be penalised was as broad as possible, to cover the whole field of damage (para 15).

G 23 Section 1 of the 1971 Act provides:

"1 *Destroying or damaging property*

"(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

H "(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another— (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as

© 2023 The Incorporated Council of Law Reporting for England and Wales

to whether the life of another would be thereby endangered; shall be guilty of an offence.

"(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson."

24 The legislation provides a defence of "lawful excuse" for both subsections (1) and (2). In the case of an allegation under section 1(1), there is a partial definition of lawful excuse in section 5 regarding a defendant's belief in consent to his conduct or his protection of other property.

25 By section 4 the maximum punishment on conviction on indictment for an offence under section 1(2) or of arson is imprisonment for life. Otherwise, the maximum is ten years' imprisonment.

26 Offences under section 1(1) are triable either way but by virtue of section 22 of the Magistrates' Courts Act 1980 and Schedules 1 and 2 thereto, where the value of the property destroyed or the value of the damage is £5,000 or less it must be tried summarily. The figure previously specified was £2,000 but was increased to £5,000 by section 46 of the Criminal Justice and Public Order Act 1994 with effect from 3 February 1995. It has remained unchanged despite inflation over nearly 30 years.

27 In *Morphitis v Salmon* (1989) 154 JP 365 Auld J (as he then was) held that whether damage is caused is a question of fact and degree. The term includes not only permanent or temporary physical harm but also permanent or temporary impairment of value or usefulness. That approach was approved by this court in *R v Whiteley* (1991) 93 Cr App R 25, 29. There a computer disc was held to have been damaged by the deletion and addition of files. That was "an impairment to the value or usefulness of the disc to the owner".

28 Thus, in accordance with the approach of the Law Commission, the courts have held that damage sufficient to support a charge of criminal damage can be minor or transient.

29 The Divisional Court in *Roe v Kingerlee* [1986] Crim LR 735 held that the justices had been wrong in law to hold that smearing mud graffiti on the wall of a police cell could not amount to criminal damage. In *R v Fiak* [2005] Po LR 211 it was held that soaking a blanket and flooding three cells with water constituted "damage", albeit that it was remediable. In *Hardman v Chief Constable of Avon and Somerset* [1986] Crim LR 330 it was held in an appeal against conviction to the Crown Court from the magistrates' court that water soluble whitewash used for paintings on a pavement had caused damage, even though it would be washed away by rain over time. It had nonetheless caused expense and inconvenience to the local authority. The potential breadth of an offence under section 1(1) of the 1971 Act is something to which we will return when we consider the Attorney General's primary argument that Convention rights are irrelevant to any prosecution for criminal damage.

30 Mr Mably KC, appearing as advocate to the court, suggests that if by chaining himself to railings a protestor caused the paintwork to be scratched, that could amount to criminal damage. But whether a scratch would suffice must depend on the nature of the item affected. So, for example, in *Morphitis* the Divisional Court held that scratching a scaffold bar had not impaired its value or usefulness. That was "a normal incident of scaffolding components" and so did not amount to criminal damage.

© 2023 The Incorporated Council of Law Reporting for England and Wales

A *Human Rights Act 1998*

31 Section 6(1) of the Human Rights Act 1998 ("the 1998 Act") provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". A public authority includes a court (section 6(3)). But section 6(2) provides:

B "(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."

C 32 In relation to the interpretation of Convention rights, section 2(1) requires the court to "take into account" any judgment of the Strasbourg court. *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 established the principle that, in the absence of special circumstances, a domestic court should follow the "clear and constant" jurisprudence of the Strasbourg court. That duty "is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less": Lord Bingham of Cornhill D at para 20.

33 In *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, para 106 Lord Brown of Eaton-under-Heywood observed:

"I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more'. There seems to me, indeed, a greater danger in the national court construing the Convention too E generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg."

F 34 In *R (AB) v Secretary of State for Justice* [2022] AC 487 Lord Reed PSC restated these principles at paras 54–59 and added that they do not preclude "incremental development" of Convention jurisprudence by a domestic court "based on the principles established by the European court".

35 Section 3 deals with the interpretation of domestic legislation. Section 3(1) provides: "So far as it is possible to do so, primary legislation G and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

36 Article 9 of the Convention provides:

"*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 H 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

© 2023 The Incorporated Council of Law Reporting for England and Wales

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."

A

37 Article 10 provides:

"*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.

B

"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."

C

D

38 Article 11 provides:

"*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.

E

"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."

F

39 Article 1 of the First Protocol ("A1P1") to the Convention provides:

"*Protection of property*

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

G

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

H

Director of Public Prosecutions v Ziegler

40 Ms Montgomery submits that the Supreme Court decided that a conviction for any offence arising out of a peaceful protest involves a

© 2023 The Incorporated Council of Law Reporting for England and Wales

A restriction upon the exercise of rights under articles 9, 10 or 11 of the Convention and consequently, the prosecution must prove that the conviction would be justified and proportionate, through a fact-sensitive assessment applying the factors set out in *Ziegler* [2022] AC 408. In *Director of Public Prosecutions v Cuciurean* [2022] QB 888 the Divisional Court rejected a similar submission, holding that the decision of the Supreme B Court did not lay down any such broad principle, being concerned solely with section 137 of the Highways Act 1980: unlawful obstruction of the highway. Ms Montgomery submits that *Cuciurean* was wrongly decided on that point.

41 The arguments now advanced by Ms Montgomery formed part of an application to the Divisional Court in *Cuciurean* to certify points of law of general public importance for consideration by the Supreme Court and to C grant leave to appeal. The Divisional Court did both and arrangements were made for the appeal to be heard in the Supreme Court before the end of July 2022. Mr Cuciurean decided not to proceed with his appeal. Nonetheless, points arising from the decision in *Ziegler* were argued in the Supreme Court in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* on 19 and 20 July 2022. Judgments are awaited*. We mention this only to put D down the marker that whatever we may say or decide regarding the reach of *Ziegler* is likely soon to be subject to some clarification from the Supreme Court.

42 Despite the skill and courtesy with which Ms Montgomery argued this point (two members of this court formed the Divisional Court in *Cuciurean*) we are unpersuaded that the conclusion in *Cuciurean* was E wrong. We adhere to the conclusion at para 89(1) that *Ziegler* "does not lay down any principle that for all offences arising out of 'non-violent' protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the Convention", for the reasons given in the judgment.

43 This argument resonates in this reference because the defendants contended that their conduct was peaceful and non-violent for the F purposes of the Convention with the consequence, if that is right, that a proportionality exercise was necessarily called for.

Director of Public Prosecutions v Cuciurean

44 The main issue in *Cuciurean* [2022] QB 888 was whether proof of the ingredients of the statutory offence of aggravated trespass without more G made any conviction proportionate in Convention terms. If so, there was no need for a fact-sensitive assessment of the kind described by the Supreme Court in *Ziegler*.

45 The Divisional Court accepted that contention. The decision in *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617 dealt specifically with aggravated trespass and directly supported the prosecution's H submission: see *Cuciurean* at paras 54–56.

46 *James v Director of Public Prosecutions* [2016] 1 WLR 2118 distinguished between two categories of offence. First, offences where, once

* *Reporter's note*. The Supreme Court gave judgment on 7 December 2022: see [2022] UKSC 32; [2023] AC 505.

© 2023 The Incorporated Council of Law Reporting for England and Wales

the specific ingredients have been proved, the defendant's conduct has gone beyond what could be described as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado": Ouseley J at para 35 relying on *Bauer* as deciding that aggravated trespass was an example of such an offence. (See also *Cuciurean* at para 58.) *James* at para 34 identified a second category of offence where conduct amounting to an offence engages the freedoms of expression and of assembly, but the ingredients of the offence do not in themselves render prosecution proportionate. Some legislation provides a defence which enables a fact-specific assessment of proportionality to be made in each case, and so is straightforwardly compliant with the Convention. Cases falling within this second category include *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin); [2003] Crim LR 88; *Hammond v Director of Public Prosecutions* (2004) 168 JP 601. Those cases concerned the offence of causing harassment, alarm or distress under section 5 of the Public Order Act 1986. They involved the use of words and/or the display of writing which was said to be threatening or abusive. Section 5(3) provides a defence where the accused's conduct was "reasonable".

47 *James* was concerned with a breach of a direction imposing conditions on a public assembly contrary to section 14 of the 1986 Act. The court treated that offence as analogous to *Bauer* and falling within the first category. A conviction depended upon the prosecution proving that a police officer had reasonably believed the assembly might result in serious public disorder, serious damage to property, or serious disruption to the life of the community or that the organisers were seeking to intimidate others and had imposed a condition appearing to him to be necessary to prevent such disorder, damage, disruption or intimidation. Proof of the ingredients of the offence as enacted by Parliament demonstrates the proportionality of the condition, non-compliance with which underlies a conviction for the offence (*James* at paras 38–43 and *Cuciurean* at paras 57–60).

48 *Cuciurean* also referred to common law offences where proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11, in so far as those rights are engaged. In Scotland that applies to the offence of breach of the peace (*Gifford v HM Advocate* 2011 SCCR 751). In England and Wales the Court of Appeal endorsed a concession by counsel that this principle applies to the offence of public nuisance (*R v Brown (James Hugh)* [2022] 1 Cr App R 18, para 37).

49 In *Cuciurean* the Divisional Court placed offences under section 137 of the Highways Act 1980 in the second category: para 63. A peaceful protest on a public highway engages articles 10 or 11 even if it involves some degree of obstruction. Section 137 criminalises wilful obstruction of a highway without lawful authority or excuse. Mere proof of wilful obstruction of a highway does not suffice by itself to address proportionality. Consequently, a fact-sensitive assessment is required.

50 Given the nature of section 137, the Supreme Court in *Ziegler* had no need to address the line of authority which has established the first category of offence: *Cuciurean* at para 65. We do not consider that there is anything

© 2023 The Incorporated Council of Law Reporting for England and Wales

A in the Supreme Court's decision which casts doubt on the effect of that line of authority.

51 *Cuciurean* did not suggest that all offences, or even all public protest offences, can be placed into one of the two categories identified in *James*. There may be offences where articles 10 and 11 are engaged, but proof of the ingredients of the offence does not in itself satisfy proportionality and where B there is no defence, such as lawful or reasonable excuse, through which proportionality may be assessed on the facts of the case. A mechanism may then be needed to enable a freestanding proportionality assessment to be made. In an appropriate statutory context, section 3 of the 1998 Act may provide an avenue to secure compliance with the Convention: (see e g *Connolly v Director of Public Prosecutions* [2008] 1 WLR 276, para 18). If section 3 does not enable a statutory offence to be interpreted compatibly C with the Convention, then the question of a declaration of incompatibility under section 4 of the 1998 Act might arise at an appellate stage: paras 69–72.

52 A defence of lawful or reasonable excuse will provide a route by which a proportionality assessment may be carried out if the prosecution must prove that a conviction would be a proportionate interference with D Convention rights. That becomes necessary only if (a) Convention rights are engaged in the circumstances of the case and (b) the ingredients of the offence do not themselves strike the appropriate balance so that a case-specific assessment is required.

53 Ms Montgomery submits that *Cuciurean* and *James* were wrongly decided as a matter of legal principle. She says that the enactment of a criminal offence by Parliament may not be treated by the courts as a E general measure which in itself addresses proportionality, thus making a case-by-case assessment unnecessary. She bases this submission in part upon the decision of the Supreme Court in *Ziegler* (e g at paras 59–60). But, as we have explained, the Supreme Court did not lay down a general principle applicable to any criminal offence where Convention rights are engaged, thereby sub silencio overruling cases such as *Bauer* and *James*. F Ms Montgomery also submits that *Cuciurean* and like decisions are inconsistent with Strasbourg case law on general measures, to which we now turn.

General measures and proportionality

54 We begin with *Animal Defenders International v United Kingdom* G (2013) 57 EHRR 21. The Grand Chamber of the Strasbourg court reviewed its jurisprudence on general measures. The case was concerned with the alleged incompatibility with article 10 of a statutory prohibition on advertisements for political purposes. It was agreed that the prohibition amounted to an interference with the applicant's article 10 rights and that it pursued legitimate aims of preserving the impartiality of broadcasting and protecting the democratic process. The issue was whether the prohibition H was necessary in a democratic society: para 78.

55 The court referred to the long-established principle that freedom of expression is one of the essential foundations of a democratic society. It includes pluralism and tolerance, even of views that are offensive or shocking. Exceptions to freedom of expression must be construed strictly

© 2023 The Incorporated Council of Law Reporting for England and Wales

and the need for any restrictions established convincingly: paras 100 and 101. There is a strong public interest in broadcasting media imparting information and ideas on matters of public interest, which the public has a right to receive. Accordingly, the margin of appreciation for the state is a narrow one: paras 102–105. Nevertheless, the court concluded that the prohibition was a proportionate measure. There was no violation of article 10: paras 113–125.

56 On the use of general measures, the court said:

(i) 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.

(ii) The Strasbourg court attaches particular importance to the quality of the parliamentary and judicial review of the necessity of a measure: para 108.

(iii) A general measure may be found to be a more feasible means of achieving a legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk inter alia of significant uncertainty, or arbitrariness: para 108.

(iv) The more convincing the justifications for a general measure, the less importance will be given to its impact in particular cases: para 109.

(v) The central question is not whether less restrictive rules should have been adopted, or whether, 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 the legislature acted within its margin of appreciation: para 110.

57 Ms Montgomery emphasises the importance attached by the Strasbourg court in that case to the public consultation which had taken place and the reviews by Parliament and by the courts on the statutory prohibition of political advertising: para 114. She submits that it was significant that the 1971 Act had been enacted many years before the Human Rights Act and there was no suggestion the Parliament considered Convention rights.

58 Although the Strasbourg court acknowledged that the process of consultation and parliamentary review had been exceptional in that case (para 114), two points should be noted. First, the court did not suggest that that level of parliamentary review was necessary for establishing that a general statutory measure is proportionate. Secondly, the court attached no less importance to the consideration by domestic courts of Convention case law and proportionality issues: paras 115–116.

59 The approach of the Strasbourg court to parliamentary materials in deciding questions of proportionality does not translate to domestic courts. The issue arose in the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223. Lord Reed PSC explained how the proportionality of a general measure enacted by Parliament should be assessed in the context of this country's constitutional principles: paras 163–185. These include parliamentary process and privilege and the separation of functions between the executive, legislature and the courts. The following points emerge:

(i) When a court assesses the proportionality of legislation the facts will often speak for themselves. But parliamentary materials may provide

© 2023 The Incorporated Council of Law Reporting for England and Wales

A additional background information on the "mischief" or social problem at which the legislation is aimed and thus its underlying rationale: paras 173–174.

(ii) The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it during a debate or by the subjective state of mind of individual ministers or members. It cannot be B assumed that members necessarily agreed with statements made during a debate but may have had other reasons for approving legislation. Accordingly, recourse to Hansard will seldom be necessary: paras 175–176.

(iii) Lack of cogent justification during a parliamentary debate does not count against the legislation on issues of proportionality. The court evaluates the proportionality *of the legislation*, not the adequacy of a minister's exploration of policy options or his explanations to Parliament: C para 176.

(iv) The degree of respect to be shown by the courts to the considered judgment of Parliament will vary according to the circumstances. Relevant factors include whether the legislation is recent or dates from an age with different values, and whether Parliament can be taken to have made its own judgment on the issues which are relevant to the court's assessment: D paras 179–181.

60 Then at para 182:

> "It is of course true that the relevant question, when considering the compatibility of legislation with Convention rights, is not whether Parliament considered that issue before making the legislation in question, but whether the legislation actually results in a violation of E Convention rights. In order to decide that question, however, the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon F interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the view of the legislature. *If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying* G *appropriate respect to the will of Parliament as expressed in the legislation*." (Emphasis added.)

61 Lord Reed PSC added two caveats. First, the courts should not go beyond considering *whether* matters relevant to compatibility with Convention rights were raised during the legislative process. Given article 9 of the Bill of Rights 1688, it is not legitimate for the courts to determine the H adequacy or cogency of any parliamentary consideration of such matters: "a high level review of whether a topic was raised before Parliament, whether in debate or otherwise, should suffice". Secondly: "the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility."

© 2023 The Incorporated Council of Law Reporting for England and Wales

62 Accordingly, when a general measure is contained in legislation pre-dating the 1998 Act a court may conclude that it adequately addresses proportionality in relation to Convention rights shown to be engaged, with the result that a case-specific assessment is not required. Equally, the fact that Parliament did not consider issues relevant to Convention rights or proportionality when enacting a criminal offence does not make it inappropriate to apply the principles based upon *James* and *Cuciurean*.

63 Ms Montgomery submits that the approach taken in *Animal Defenders* is inapplicable to a prosecution and conviction for a criminal offence. Strasbourg case law suggests that when people are prosecuted for criminal offences where Convention rights are engaged, they may not be convicted unless the court decides that would be proportionate following a fact-specific evaluation. She relies upon the decision of the Grand Chamber of the Strasbourg court in *Perinçek v Switzerland* (2015) 63 EHRR 6, para 275.

64 In that case the applicant made statements at public conferences and a rally that the Armenian genocide had not taken place. He was convicted of an offence which included stirring up racial hatred and trivialising a genocide on racial grounds: para 32. The Strasbourg court considered whether the Swiss authorities, including the courts, had struck a proper balance between the applicant's rights under article 10 and the right of the Armenian people to protection of their dignity under article 8.

65 At paras 196–197 the court referred to the restatement of general principles on the protection of freedom of expression, as summarised in *Animal Defenders* (at paras 102–106). At paras 198–199 it addressed balancing articles 8 and 10. Despite the importance attached to freedom of expression, rights under article 8 "deserve equal respect". The choice of the means to secure compliance with article 8 and the assessment of whether and to what extent an interference with article 10 is necessary are both matters falling within the individual state's margin of appreciation.

66 We see no reason why the same approach should not be taken where the balance falls to be struck between articles 9, 10 and 11 on the one hand and the protection of property, for example under A1P1, on the other.

67 At para 272 the court referred to *Animal Defenders* as one of two cases where the interference with article 10 rights resulted from a "regulatory scheme". By contrast, interference in the form of a criminal conviction that could result in imprisonment, has more serious consequences for the citizen and calls for stricter scrutiny. A criminal conviction is one of the most serious forms of interference with the right to freedom of expression: para 273.

68 However, does "stricter scrutiny" mean that a fact-sensitive proportionality assessment must be carried out in every case where criminal conduct engages article 9, 10 and 11 rights? Or can the call for stricter scrutiny be satisfied by a court deciding whether proof of the ingredients of a particular offence is sufficient for a conviction to be proportionate to the interference with the accused's Convention rights? We conclude that the answers are "no" to the first question and "yes" to the second. But where the court decides that proof of the ingredients of a particular offence does not in itself demonstrate proportionality, then a fact-sensitive assessment

© 2023 The Incorporated Council of Law Reporting for England and Wales

A will generally be required, unless that would be inconsistent with the statutory language governing the offence.

69 Para 275 of the judgment reads:

> "When proposing the enactment of what would later become article 261 bis (4) of the Criminal Code, the Swiss Government referred to the potential conflict between, on the one hand, the imposition of B criminal penalties for the conduct outlawed under the intended provision and, on the other, the rights to freedom of opinion and association guaranteed under the Swiss Constitution of 1874, then in force, explaining that the two needed to be balanced in individual situations in such a way that only truly blameworthy cases would result in penalties. These concerns demonstrated that in applying that provision C in individual cases the Swiss courts needed carefully to weigh the countervailing interests. *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 D 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." (Emphasis added.)

70 Ms Montgomery emphasises the sentence we have italicised as laying down a general principle requiring a fact-specific proportionality assessment before a person may be convicted. We do not agree. The court E went on to say "In this type of case" breach of a general measure is "normally" insufficient. The court did not lay down an absolute principle, nor did it indicate circumstances in which it would not apply.

71 More importantly, the type of case which the court was considering was explained in the first part of para 275. In proposing the legislation the Swiss Government had recognised that the new criminal offence conflicted with freedoms of expression and assembly, such that the two would need to F be "balanced in individual situations" so that "only truly blameworthy cases would result in penalties". In other words, the promoter of the legislation accepted that proof of the ingredients of the offence would be insufficient to satisfy the proportionality balance without more. In addition, this was a case where the domestic courts had not addressed the balance themselves: paras 276–278. Moreover, the prohibition was on expressing a view, rather G than a restriction in the manner in which it might be expressed.

72 Ultimately, the Grand Chamber considered that the conviction amounted to a violation of the applicant's article 10 rights because his statements bore on a matter of public interest, did not amount to a call for hatred or intolerance and could not be regarded as affecting the dignity of members of the Armenian community.

H **73** Ms Montgomery also relies upon *Handzhiyski v Bulgaria* (2021) 73 EHRR 15 where the Strasbourg court said this at para 52 citing *Perinçek*:

> "When an interference with the right to freedom of expression takes the form of a 'penalty', it inevitably calls for a detailed assessment of the specific conduct sought to be punished. It cannot normally be justified

© 2023 The Incorporated Council of Law Reporting for England and Wales

solely because the expression at issue was caught by a legal rule formulated in general terms."

A

74 That statement is caveated as before with the word "normally" and so cannot be said to lay down a clear-cut rule. The applicant had been convicted of an offence of "minor hooliganism" which was expressed in broad terms, including showing an "offensive attitude towards citizens, public authorities or society" which breaches public order and quietness: para 23. Mr Handzhiyski had placed a Santa Claus cap on the head of a statue of a political figure and a sack at its base as part of a protest against the government. The action taken by the authorities sought to criminalise conduct which amounted to nothing more than the exercise of article 10 rights by carrying out a peaceful protest, and a very modest one at that. One can well understand that proof of the ingredients of the offence would not render a conviction proportionate.

B

C

75 Of more relevance for our purposes is the following passage at para 53:

"Public monuments are frequently physically unique and form part of a society's cultural heritage. Measures, including proportionate sanctions, designed to dissuade acts which can *destroy them or damage their physical appearance* may therefore be regarded as 'necessary in a democratic society', *however legitimate the motives which may have inspired such acts*. In a democratic society governed by the rule of law, *debates about the fate of a public monument must be resolved through the appropriate legal channels* rather than by covert or violent means." (Emphasis added.)

D

E

This is consistent with the proposition that a general measure may criminalise the destruction of, or significant damage to, a public monument, so that proof of the ingredients of that offence sufficiently addresses the proportionality of a conviction. Para 53 does not suggest that a fact specific assessment is always required before a conviction may result for an offence of that kind.

F

76 The Strasbourg court decided that the applicant did not engage in any form of violence and did not physically harm the statue: para 54. At para 55 it continued:

"When it comes to such acts—which, though capable of profaning a monument, *do not damage it*—the question whether it can be 'necessary in a democratic society' to impose sanctions in relation to them becomes more nuanced. In such situations, the precise nature of the act, the intention behind it, and the message sought to be conveyed by it cannot be matters of indifference. For instance, acts intended to criticise the government or its policies, or to call attention to the suffering of a disadvantaged group cannot be equated to acts calculated to offend the memory of the victims of a mass atrocity. The social significance of the monument in question, the values or ideas which it symbolises, and the degree of veneration that it enjoys in the respective community will also be important considerations." (Emphasis added.)

G

H

77 The distinction between the principles set out in paras 53 and 55 was repeated and applied in *Genov v Bulgaria* (Application No 52358/15)

© 2023 The Incorporated Council of Law Reporting for England and Wales

A (unreported) 30 November 2021. The clear implication of this passage is that prosecuting those who damage monuments and statues is proportionate.

78 We conclude that the Strasbourg case law does not support the proposition that a general criminal measure may not, in itself, strike a proportionality balance. Rather, the overall effect of the case law is to the B contrary. Accordingly, compatibly with the Convention, a criminal offence may comprise ingredients, the proof of which is sufficient to render a conviction proportionate to any interference with rights under articles 9, 10 and 11. A fact-sensitive proportionality assessment is unnecessary for a person to be convicted of such an offence.

C *The scope of the protection given to protest by Convention rights*

79 The parties agree that any difference between articles 9, 10 and 11 has no material impact on the protection given by the 1998 Act to protest for the purposes of this reference.

80 It is a well-established principle that the rights to freedom of expression and assembly are not to be interpreted restrictively. The rights cover private meetings and meetings in public places, whether static or in the D form of a procession, and may be exercised by both the organisers of, and participants in, a gathering: *Kudrevičius* at para 91.

81 Likewise, article 10 affords a broad protection to "expression". This refers not only to verbal expression but also to "expressive acts" (*Women on Waves v Portugal* (Application No 31276/05) (unreported) 3 February 2009 at para 30; *Alekhina v Russia* (2018) 68 EHRR 14 at paras 197 and E 202–206).

82 However, article 11 only protects the right to "peaceful assembly". That term does not cover a protest where the organisers or participants engage in violence, have violent intentions, incite violence or otherwise "reject the foundations of a democratic society": *Kudrevičius* at para 92.

83 Mr Little suggests that the protest in Bristol involved the rejection of F the foundations of a democratic society. In Strasbourg case law that concept typically refers to expression or an assembly which is aimed at negating democratic principles (see e g *Vona v Hungary* (2013) 37 BHRC 239 at para 63). That does not arise here.

84 The rights of a peaceful protestor are not lost because of sporadic violence "or other punishable acts" committed by other persons during the G protest if the individual in question remains peaceful in his or her own intentions and behaviour. The possibility of other persons with violent intentions joining a demonstration does not in itself take away the right of peaceful protest: *Kudrevičius* at para 94; *Primov v Russia* at para 155; *Ziegler* at para 69. Individual conduct which is not peaceful or is violent does not attract the protection of the Convention.

85 Ms Montgomery points to the principle that exceptions to the H freedoms of expression and assembly must be interpreted narrowly (see e g *Kudrevičius* at para 142 and *Navalnyy v Russia* (2018) 68 EHRR 25, para 137). Read in context those passages refer to "restrictions" on the exercise of Convention rights, in particular those set out in articles 10(2) and 11(2). Those passages were not dealing with matters which fall outside the

© 2023 The Incorporated Council of Law Reporting for England and Wales

protection of articles 10 and 11 altogether, such as violence or activity which is not peaceful.

86 Furthermore, the Strasbourg case law distinguishes conduct which falls outside a Convention right from conduct which is protected by that right but does not lie at its "core". For example, protest by physical conduct deliberately obstructing traffic on the highway and the ordinary course of life, in order seriously to disrupt the activities of others, engages Convention rights but it does not lie at the core of those rights. This is a factor which affects the proportionality balance. It may justify criminal sanctions: *Kudrevičius* at paras 97 and 101, 156–157 and 172–174; *Ziegler* at para 67; *Cuciurean* at paras 36–38 and 76.

87 The ordinary meaning of violence includes "the exercise of physical force so as to cause injury or damage to a person, property, etc" (*Shorter Oxford English Dictionary*). Violence is not confined to assaults on the person but may include damage to property; and neither is the concept of "peaceful assembly" defined by an absence of violence to the person or property. Indeed, it is not difficult to envisage a demonstration at which no violence to the person or property occurs, but which could not be characterised as peaceful, not least if it is intimidatory or causes alarm or distress. There is relatively little Strasbourg authority on cases of physical damage caused during protest. There is none to which our attention has been drawn that demonstrates that all damage to property, however trivial, would result in the perpetrator losing the protection of the Convention. Most of the cases concern damage to public property incidental to a demonstration. Several of the decisions focus on whether the punishment was disproportionate rather than the issue with which we are concerned, namely the proportionality of a conviction in Convention terms.

88 *Handzhiyski* at para 53, to which we have already referred, includes the Strasbourg court's statement that the fate of a public monument must be resolved through "appropriate legal channels rather than by covert or violent means". In our view the nature of the conduct leading to such destruction or damage may often not properly be described as "peaceful" and so fall outside the protection of the Convention altogether. In any event, measures criminalising the destruction of or damage to such a statue or monument are proportionate. It is, at least in theory, possible to cause significant financial damage to property without being violent. Smashing something with a hammer would be violent but it would be possible to cause as much financial damage to many objects by quiet and calm action. Either way, conviction for the conduct would not offend the Convention rights of the perpetrator. If it was violent and not peaceful it would fall outside the protection of the Convention altogether. If significant damage were caused, even if "peacefully", it would not even be arguably disproportionate to prosecute and convict for criminal damage.

89 Statues and public monuments are frequently the focus of protest, but the significance which the Strasbourg court placed upon destruction or significant damage in *Handzhiyski* cannot logically be confined to public monuments. Setting fire to a building or vehicle during a protest, breaking windows, trashing property and the like should be considered in the same vein. We understood Ms Montgomery to submit that even in the face of such conduct a court would be obliged in every prosecution to undertake a

© 2023 The Incorporated Council of Law Reporting for England and Wales

A proportionality exercise in accordance with the second part of the article of the Convention in question. That would include balancing the right to protest in this way against the property rights of owners before convicting. The Strasbourg case law does not support such an approach.

90 Moreover, we do not accept the distinction which Ms Montgomery seeks to draw between violence to the person (which she accepts does not attract the protection of the Convention) and damage to property. The B submission is founded on a comment in *Taranenko v Russia* (2014) 37 BHRC 285 at para 93, where the court said that "the protesters' conduct, although involving a certain degree of disturbance and causing some damage, did not amount to violence". That comment must be understood in the context of the complex facts and complaints in the case and the offences for which the applicant had been prosecuted and convicted. The First C Section of the Strasbourg court was not suggesting that damage to property could not be "violent", a proposition which would have far-reaching consequences, not least in encouraging what on any straightforward view could be violent and destructive behaviour. That would negate the principles that underlie the Convention. The comment does, however, suggest that the court would not include all damage to property as D necessarily being violent or non-peaceful for the purposes of the Convention. As it happens, the violation of the Convention found by the court did not relate to the applicant's conviction for "participation in mass disorder" but to the sentence imposed.

91 The Strasbourg court has considered incidents concerning statues in several cases. None of them involved destruction or significant damage.

92 For example, in *Ibrahimov v Azerbaijan* (Application Nos 63571/16, E 2890/17, 39541/17, 74143/16, 2883/17 and 39527/17) (unreported) 13 February 2020 the applicants sprayed graffiti on the statue of the former President who was the father of the incumbent President. The actions were in protest against the Government of Azerbaijan. They were not charged with any offence to do with that conduct. They were detained and prosecuted for fabricated drug related offences as punishment for their political protest. The F Strasbourg court found violations of article 5 (arbitrary detention) and article 18 (improper use of restrictions permitted by the Convention). At para 171 the court decided that the prosecution amounted to an interference with the applicant's article 10 rights having concluded that spraying graffiti on the statue was a form of political expression: paras 165–167.

93 It was common ground that spraying graffiti on a statue (which would at least put the state to the expense of cleaning it) "to express . . . G dissatisfaction with government policies" was conduct which fell within the ambit of article 10 of the Convention. Having decided that there was an interference with the applicants' article 10 rights it was for the state to show, in accordance with article 10(2), that the interference was "prescribed by law", pursued a legitimate aim and was proportionate. They failed to do so in fundamental terms. The finding of a violation of article 10 was H summarised as follows:

> "173. . . . In the present cases the court observes that the applicants' criminal prosecution was not formally related to their having sprayed graffiti on the statue (compare *Vural*, para 55, and *Shvydka*, para 39 . . .). Instead of acting within the constraints of the law, the authorities chose to

© 2023 The Incorporated Council of Law Reporting for England and Wales

prosecute the applicants for drug-related crimes in relation to their actions. The court considers that such interference with the applicants' freedom of expression was not only unlawful, but it was also grossly arbitrary and incompatible with the principle of the rule of law . . .

"174. There has been accordingly a violation of article 10 of the Convention."

94 The implication of these observations is that, had the prosecution related to spray-painting the statue, a conviction for an appropriate offence would have been treated differently.

95 In *Vural v Turkey* (Application No 9540/07) (unreported) 21 October 2014 the applicant was convicted of "dirtying" statues of Atatürk. The offence in question prohibits public insults to his memory. The applicant was dissatisfied with a decision of the Ministry of Education refusing to appoint him to a teaching post. He poured paint over the statues in protest at that decision and more widely at the way the country was governed.

96 The Strasbourg court discussed the wide protection article 10 provides to the way in which ideas are expressed (para 44 et seq) before concluding:

"52. The examples referred to above show that all means of expression are included in the ambit of article 10 of the Convention. The court has repeatedly stressed that there is little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest . . . In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of article 10 of the Convention should not be restrictive, but inclusive."

"54. . . . in deciding whether a certain act or conduct falls within the ambit of article 10 of the Convention, as assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question."

97 It was significant that the applicant had not been convicted of vandalism but of having insulted the memory of Atatürk. The conviction and sentence amounted to an interference with the applicant's article 10 rights: paras 55 and 56. The court continued by noting that the applicant's complaint was that "his actions had been severely and disproportionately penalised". At para 60 the court found that the interference was prescribed by law and pursued a legitimate aim. The question was one of proportionality. At para 65 the court recognised the "iconic" status of Atatürk and the choice made by Parliament to criminalise insulting his memory. At para 66 it noted the "extreme severity of the penalty" and said:

"66. . . . In principle the court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence . . . While in the present case, the applicant's acts involved a physical attack on property, the court does not consider that the acts were of a gravity justifying a custodial sentence . . ."

© 2023 The Incorporated Council of Law Reporting for England and Wales

A "68. . . . the court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore 'not necessary in a democratic society'. There has accordingly been a violation of article 10 of the Convention."

98 Once more, the implication of these observations is that a conviction founded on the physical attack would have been proportionate subject to the B penalty imposed. Furthermore, criminalising insults to the memory of Atatürk would not in itself be a disproportionate interference with Convention rights.

99 *Shvydka v Ukraine* (Application No 17888/12) (unreported) 30 October 2014 concerned the applicant's conviction for "petty hooliganism". She had removed a ribbon from a wreath laid at a monument C by President Yanukovych bearing his name and title, to express her opposition to him: paras 5–8. The wreath itself had not been damaged although the ribbon was. The Strasbourg court treated her act as a form of "political expression" (para 38) and decided that a sentence of ten days' detention had been disproportionate and therefore a violation of her article 10 rights.

100 In *Genov* the applicants were convicted of "hooliganism", defined broadly as the carrying out of indecent actions grossly infringing D public order and showing overt disrespect towards society. The applicants had spray-painted a public monument as a political protest against the government. The paint was later cleaned from the monument. The Strasbourg court applied the distinction in *Handzhiyski* between measures prohibiting the destruction or damaging of a monument and acts which, although capable of profaning a monument, did not damage it. Accordingly, E the court said that the first question was whether the statue had been damaged: paras 75–77.

101 The court concluded that the spray-painting caused "some inconvenience and expense to eliminate" but did no harm to the monument. Indeed, the court which convicted the applicants had found that there was no pecuniary damage and there was no evidence of the cost involved in cleaning. The fines imposed on the applicants were not compensatory. The F applicants' act had not "affected the monument to a degree sufficient to consider that it damaged it": paras 78–80. The issue whether it was necessary to penalise their acts had to be assessed in the light of the context-specific factors referred to in para 55 of *Handzhiyski*. That context included expressing disapproval of the government's parliamentary record, a condemnation of its role during the communist period in Bulgaria G (which had been condemned by the legislature as "criminal" and "aimed at suppressing human rights and the democratic system"). The court decided that the convictions and penalties had not been necessary in a democratic society: paras 81–84.

102 This review of Strasbourg authority has concerned cases of protest or political expression aimed at governments and involving public property rather than private property. In the context of public property, damage H inflicted in a violent or non-peaceful manner attracts no Convention protection against prosecution and conviction; and nor does causing significant damage because its infliction could not sensibly be thought of as peaceful, alternatively prosecution and conviction would necessarily be proportionate. Moreover, there is no "clear and constant" jurisprudence of

© 2023 The Incorporated Council of Law Reporting for England and Wales

the Strasbourg court that suggests that damaging private property during protest attracts the protection of the Convention in the first place or, in the second, that prosecution and conviction for damaging private property would be disproportionate even if it did. That is unsurprising because in addition to the usual questions about the applicability of a Convention right and then proportionality the A1P1 rights of the non-state owner are in play. We find it difficult to imagine that the Convention could ever be used to avoid conviction for damaging private property, even if very rarely it might be when considering damage to public property which is not significant. For domestic purposes, in our view, that is the position.

103 Our attention was drawn to *Kudrina v Russia* (Application No 34313/06) (unreported) 6 April 2021. It is factually complicated and concerned with a protest in August 2004 at the Ministry of Health and with a protest in May 2005 at the Rossiya Hotel in Moscow. Inferentially, the court proceeded on the basis that the hotel was privately owned: para 51. The applicant denied being present at the protest at the Ministry. The only evidence attesting to her presence was a written statement from a witness which was later retracted. She complained that her trial and conviction in connection with that protest for "gross breach of public order committed by an organised group and involving the use of weapons, and intentional destruction and degradation of others' property in public places" was unfair and in breach of article 6 of the Convention. The court found a violation of article 6 resulting from the failure of the criminal court to allow various witnesses to be questioned about whether she was present at the Ministry: para 41.

104 The applicant admitted taking part in the protest in May 2005 at the Rossiya Hotel for which she was convicted of the same offence. The applicant was one of two who climbed out of the window of their room at the hotel using rock-climbing equipment and hung an 11-metre poster saying "Go away Putin" on the outside wall of the hotel. They then started to wave signal flares and throw firecrackers and leaflets, which contained a series of political demands. After 40 minutes they were arrested. They offered no resistance. Some damage was caused although its extent is not described in the court's judgment. There had been evidence at trial that it had been paid for promptly by the applicant: para 23.

105 The applicant was sentenced to $3\frac{1}{2}$ years in prison.

106 The court discounted the first conviction when considering whether the punishment was proportionate because of doubts about the applicant's presence at the Ministry. It focused on the events at the hotel: para 47. In the discussion that followed between paras 51 and 55 there was no finding that her conviction for an offence arising out of the conduct at the hotel was disproportionate. Her arrest pursued the legitimate aim of preventing disorder and protecting the rights of others. Citing *Taranenko* at para 78, the court reiterated that article 10 does not bestow any freedom of forum for the exercise of that right and does not require the creation of rights of entry to private property or even to all publicly owned property, such as government offices and ministries. Since the everyday activities of the Rossiya Hotel were disrupted because of the protest, the police were justified in interfering with the expression of political opinions by the applicant with a view to restoring and protecting public order.

© 2023 The Incorporated Council of Law Reporting for England and Wales

A 107 At para 53 the Strasbourg court dealt with the proportionality of the conviction:

> "the court notes that the District Court condemned the methods employed . . . as being proscribed by the law (throwing firecrackers onto the street, attaching rock-climbing equipment in the hotel room in order to climb out of the 11th-floor room onto the exterior wall of the building, B waving signal flares from side to side near flammable objects, and damaging the property of others). Seen from this angle, *the prosecution and conviction of the applicant were justified by the need to attribute responsibility for committing such acts and to deter similar crime, without regard to the context in which they had been committed.* Therefore, the court accepts that the applicant's conviction was based on C relevant and sufficient reasons." (Emphasis added.)

108 However, the punishment was disproportionate. The court noted that the applicant's conduct, although involving disturbance and causing some damage to property, did not incite or amount to violence. The sentence was "grossly disproportionate".

109 This is a recent decision of the court (albeit not Grand Chamber), D becoming final in July 2021. It recognises that the arrest of protesters will be necessary if there are public order implications or the rights of others to go about their business are being significantly disrupted. The facts giving rise to the prosecution in connection with the Rossiya Hotel protest show that the hurdle to be surmounted before a prosecution and conviction will be disproportionate despite interfering with rights to protest is not high. The words emphasised in para 53 of the court's judgment are unequivocal.

E 110 More generally, this review of the Strasbourg jurisprudence shows that articles 9, 10 and 11 of the Convention do not protect conduct during a protest which causes damage to property from prosecution and conviction, regardless of the nature or extent of the damage caused. The conduct may not be peaceful, or conviction may be obviously proportionate. Equally, the jurisprudence does not support the proposition that the protection of the F Convention is lost (alternatively prosecution and conviction would always be proportionate for an offence of causing damage) when any damage is intentionally (or recklessly) inflicted on property during protest, however minor. The approach of the Strasbourg court is fact and context specific. Causing damage which is transient or insignificant has not been treated as placing the perpetrator outside the protection of the Convention altogether. G In those cases, prosecution, conviction and punishment are considered as part of the proportionality exercise, the focus most often being on punishment.

The domestic context

111 The question whether somebody should be prosecuted for criminal damage, leaving aside the rare possibility of a private prosecution, is a H matter for the Crown Prosecution Service independently exercising its powers. It makes its decision applying the well-known evidential and public interest test to the question whether to prosecute. It produces publicly available guidance on the circumstances in which it will prosecute including "Offences during Protests, Demonstrations or Campaigns". It must be

© 2023 The Incorporated Council of Law Reporting for England and Wales

sensitive to the Convention rights of protesters and its guidance demonstrates that decisions to prosecute will respect those rights. It is generally not the function of the trial court to second guess a prosecutorial decision and decisions to prosecute (or not) can be challenged in judicial review proceedings only exceptionally: *R (Corner House Research) v Director of the Serious Fraud Office* [2009] AC 756, 840–841, paras 30–32. The criminal court determines guilt or innocence (the function of the jury in the Crown Court) and imposes sentence in the event of a conviction.

112 The common law has always been sensitive to the position of protesters when it comes to both prosecution and sentencing. Lord Hoffmann distilled the principles in *R v Jones (Margaret)* [2007] 1 AC 136, para 89:

> "89. My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions."

113 This is important because it demonstrates two things. First, the restraint shown by prosecutors should avoid prosecutions which are themselves disproportionate in Convention terms; and, secondly, disproportionate sentences are an unlikely outcome.

Question 1

114 The first question asks whether once the prosecution has proved the two main ingredients for the offence of criminal damage under section 1(1) of the 1971 Act, namely (a) that the defendant destroyed or damaged property belonging to another and (b) did so intentionally or recklessly, no question of proportionality under the Convention can arise. Mr Little submits that the answer is yes and the offence should be treated in a similar way to aggravated trespass in *Cuciurean* [2022] QB 888. He submits that the qualification in section 1 of the 1971 Act (without lawful excuse) is not concerned with proportionality under the Convention but with other matters. Ms Montgomery submits the answer is no and that every prosecution for criminal damage arising out of a protest requires a proportionality assessment to be carried out by the fact-finder.

115 We have concluded that prosecution and conviction for causing significant damage to property during protest would fall outside the protection of the Convention either because the conduct in question was

© 2023 The Incorporated Council of Law Reporting for England and Wales

A violent or not peaceful, alternatively (even if theoretically peaceful) prosecution and conviction would clearly be proportionate.

116 The offence of criminal damage encompasses causing damage which is minor or temporary. Were a prosecution for criminal damage of that degree to be initiated arising out of a protest, the Strasbourg case law suggests that there would need to be a case-specific assessment of the B proportionality of conviction at least in connection with damage to public property. We would expect that such prosecutions would not be launched because they too would be a disproportionate reaction to the conduct in question. Thus, scrawling a message on a pavement using water soluble paint might technically be sufficient to sustain a charge of criminal damage (see para 29 above) but to prosecute or convict for doing so as part of a political protest might well be a disproportionate response. It follows that C the answer to the first question is that the offence of criminal damage does not automatically fall within the category of offences identified in *James* [2016] 1 WLR 2118 and in *Cuciurean* [2022] QB 888 whereby proof of the relevant ingredients of the offence is sufficient to justify *any* conviction as a proportionate interference with any rights engaged under articles 9, 10 and 11, without the need for a fact-specific proportionality assessment in D individual cases. That said, the circumstances in which such an assessment would be needed are very limited.

Questions 2 and 3

117 It was common ground before us that it would be convenient to deal with these two questions together. Question 2 is a broad one asking E what principles judges in the Crown Court should apply when determining whether the qualified rights found in articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants for acts of damage during protest. Question 3 asks in what circumstances the question of proportionality should be withdrawn from the jury.

118 When considering whether an issue should not be left to the jury, we have well in mind two principles. First, the judge may not direct a jury to F convict. But that prohibition is to be distinguished from circumstances in which a judge is entitled to withdraw an issue from the jury, or where an issue does not arise on the evidence and so no direction need be given about it to the jury (*R v Wang* [2005] 1 WLR 661, paras 3 and 8–14). Secondly, a judge may withdraw an issue from the jury if no reasonable jury properly directed could reach a particular conclusion (e g that the defendant might G have acted under duress (*R v Bianco (Leonardo)* [2001] EWCA Crim 2516 at [15]); that the defendant might have a "reasonable excuse" (*R v Nicholson* [2006] 1 WLR 2857, para 9; *R v G* [2010] 1 AC 43, 87D); or loss of self-control (*R v Martin (Jovan)* [2017] EWCA Crim 1359 at [40])).

119 The context of these issues is a trial in the Crown Court in respect of damage which exceeds £5,000 in value.

120 The Convention does not provide protection to those who cause H criminal damage during protest which is violent or not peaceful. Neither does it provide protection when the damage is inflicted violently or not peacefully. Articles 9, 10 and 11 are not engaged in those circumstances and no question of proportionality arises. Moreover, prosecution and conviction for causing significant damage to property, even if inflicted in a way which is

© 2023 The Incorporated Council of Law Reporting for England and Wales

"peaceful" could not, in our view, be disproportionate in Convention terms. Given the nature of cases that are heard in the Crown Court it is inevitable that, for one or both of these reasons, the issue should not be left to the jury. That will be because the conduct in question was on any view not peaceful, alternatively the damage was significant, or both.

121 It is at least theoretically possible that cases involving minor or trivial damage to property may arise in the magistrates' court albeit that the threshold of "significant damage" would be crossed a long way below that statutory divide. In those circumstances, the Strasbourg case law suggests that conviction may not be a proportionate response in the context of protest although sentence has been the focus in determining proportionality. Whatever may be the position with public property, we cannot conceive that the Convention could be used to protect from prosecution and conviction those who damage private property to any degree than is other than trivial. It is essential that prosecutorial discretion on whether to proceed to trial be exercised carefully, applying the Code for Crown Prosecutors in the context of the principles governing articles 9, 10 and 11 with a clear eye on the proportionality of prosecution and conviction.

This case

122 Although this case did not involve the destruction of the statue, the damage that was caused was clearly significant. Pulling this heavy bronze statue to the ground required it to be climbed, ropes attached to it and then the use of a good deal of force to bring it crashing to the ground. *Handzhiyski* makes it clear that the debate about the fate of the statue had to be resolved through appropriate legal channels, irrespective of evidence that those channels were thought to have been slow or inefficient, and not by what might be described as a form of criminal self-help.

123 The circumstances in which the statue was damaged did not involve peaceful protest. The toppling of the statute was violent. Moreover, the damage to the statue was significant. On both these bases we conclude that the prosecution was correct in its submission at the abuse hearing that the conduct in question fell outside the protection of the Convention. The proportionality of the conviction could not arise for consideration by the jury. We emphasise that this is not to suggest that the defendants were in fact guilty of the offence of criminal damage. We have explained (see para 2 above) that the jury was concerned with a range of defences.

Opinion accordingly.
Application for reference to Supreme Court refused.

PHILIP RIDD, Solicitor

© 2023 The Incorporated Council of Law Reporting for England and Wales

IN THE HIGH COURT OF JUSTICE
MANCHESTER DISTRICT REGISTRY

Case No. KB-2023-MAN-000079

1 Bridge Street
Manchester
M60 9DJ

Monday, 20th March 2023

Before:
HIS HONOUR JUDGE PEARCE

B E T W E E N:

THE UNIVERSITY OF MANCHESTER & ORS

and

PERSONS UNKNOWN

MR Y VANDERMAN (instructed by Pinsent Masons LLP) appeared on behalf of the CLAIMANTS
MR TAYLOR appeared on behalf of the DEFENDANTS

JUDGMENT TWO
(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice

HHJ PEARCE:

1. This is my judgment on the application by the claimants for a possession order in respect of land, the detail of which I shall come to in due course. The claimants, as one sees from their name, the University of Manchester and an associated company which operates car parking within part of the premises of the University of Manchester.
2. Since 8 February of this year, unknown defendants have occupied a number of buildings in what has been called the university's South Campus. I shall return to that term and its significance in due course, but those buildings include the John Owens Building, the Samuel Alexander Building, Engineering Buildings A and B, and the Simon Building. After initially occupying several buildings, the occupation has focused on the Simon Building and has exclusively been there since 16 February.
3. The occupation is part of a campaign which is called "UoM Rent Strike", or "UoM Rent Strike 2023", which has promoted its cause extensively on Twitter and Instagram. The main aim of the campaign group, as I understand it, is for a rent reduction for the university's student accommodation. Those involved in the campaign are particularly aggrieved at the alleged failure of the university to engage with them in discussion about the various issues.
4. I indicate that the occupation has been focused on the Simon Building since a relatively early stage. It is right to say, though, from various material put before the Court, that those involved in this campaign have threatened to continue it by whatever means might be appropriate at the relevant time, and the claimants have at least some evidence which tends to suggest that those involved in the campaign would move to other buildings, in particular, they refer to an incident involving the John Owens Building, where they see evidence of an attempt to re-enter that building that they take to be part of this campaign. Whether or not that is correct is, as I understand it, disputed.
5. In any event, that is the background to the matter, the claimants say that they are the owners and/or have right to possession of the entirety of the land that is the subject of the application. They say that those who are occupying are therefore trespassers, they having made clear through a variety of means that they do not wish the occupiers to remain on the property, and therefore they seek possession under the terms of Part 55 of the Civil Procedure Rules. The procedure that they have taken under Part 55 of the Civil Procedure Rules requires, in the case of non-residential property – and this is non-residential property – two days' notice of the application to be given. The certificates of service before me in the bundle show that on 15th of last week, Wednesday, that is to say, a period of time before today that gives two clear days, Thursday and Friday, that a variety of notices and the relevant documentation were posted in different locations around the campus, were left at the feet of at least some of the occupiers, were delivered to reception and parts of the building where it was at least possible that some of the occupiers would be going. It is apparent from the material in the bundle before the Court that those involved in the campaign are well aware of this action, because they have posted about that online, and a number of people have attended today.
6. On behalf of the defendants, Mr Taylor, who is not himself an occupier of the defendant's premises, contrary to the defendant's notice, but is obviously both trusted by the defendants and who obviously has some sympathy with the defendant's cause, has acknowledged that service is not the issue in this case; it is not being disputed that the defendants, broadly speaking at the very least, have actual notice of the application. I am satisfied that the noticed that has been given by way of the various service referred to in the certificates of service is sufficient notice in law to amount to good notice to anybody who is in occupation of the university buildings.

7. We turn from the question of notice to the question of the land, in respect of which the application is brought. There are several parcels of land here, with several titles, and one of the reasons that I took a short break between hearing submissions and delivering this judgment was that I wished to satisfy myself as to those various title documents that have been produced. The claimants are the owners or leaseholders of all of the land – which are edged in red on the plan, at page 52 in the bundle in front of me – which is the land in respect of which this application is being brought. Having looked at various office copy entries and various plans, I am satisfied that the claimants have the immediate right to possession of all of that land.

8. There has been an issues as to the extent to which that land ought to be treated as one single piece of land for the purpose of this application, or whether it ought in reality to be seen as separate parcels of land. Mr Vanderman, on behalf of the claimant, has drawn my attention to passages in the *Secretary of State for the Environment, Food and Rural Affairs v Meier and others* [2009] UKSC 11, in which, in particular, in passages in the judgments of Baroness Hale – interestingly, though, historically a lecturer at the University of Manchester – and Lord Neuberger, that the fact that an area of land is divided by a public road, by way of example, does not mean that the entirety of the land could not been seen as being the relevant land for a single order for possession. Equally, the fact that the land is in different parcels for the purposes of title would not prevent that from happening.

9. My attention has been drawn to two decisions of interest: the *University of Essex v Djemal* [1980] 2 All RE 742, in which the Court of Appeal considered and made an order for possession in respect of the entirety of the campus of the University of Essex, and the *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977, in which Henderson J made an order in similar terms in respect of the School of Oriental and African Studies, "SOAS" as it is generally known, part of London University. Each of those two institutions have some obvious differences to the position of the University of Manchester on the so-called South Campus. The University of Essex is, as I understand it, a campus university in the more conventional sense of having been built largely in one area of land, and at the same time, in contrast, the University of Manchester has grown in a very ad hoc way, in its area that is now called the South Campus, around a core nineteenth-century Victorian building, and various other buildings that have been constructed overtime, sometimes as a result of demolition of other buildings that have nothing to do with the university. The School of Oriental and African Studies is different again, being a relatively small area of self-contained land in Central London which is neatly defined, albeit an area where people may often, for example, walk through, exercising what they probably think is a right of way, but is in fact walking across private land.

10. However, in my judgment, Mr Vanderman is right in his central point, that the South Campus bears a sufficient unity to be considered as a single piece of land for the purpose of possession proceedings of this kind. Indeed, the point can be made, and indeed is made by the claimants, that the very purposes being expressed by the defendants is to occupy this area of land, and if excluded from one part of it, to move to another part of it. Thus, one can see that the defendants themselves appear to consider this to be one parcel of land sufficient for their purposes of demonstration.

11. The defendants, as I say, are entitled "Persons Unknown". The claimants have perhaps unsurprisingly been able to identify some of the individuals who have been in the premises. Perhaps, again, unsurprisingly, they have not identified all of them. However, since those who occupy the premises are a changing group, then it is not, for example, possible for the university to come before this court and say that "10, let us say, named people are the ones who are in occupation".

12. The grounds on which possession are sought are very straightforward. The claimants say they have the right to possession of the land. They say the defendants occupy and notwithstanding being asked to leave it, and therefore are trespassers on the land. They draw my attention to regulation 17 of the university's regulations, which define misconduct. Of conduct, it speaks of the misuse or unauthorised use of university premises as being an example thereof. This occupation was commenced without consent, it continues without consent, and the claimants therefore have no difficult in demonstrating in principle the right to possession of their land.

13. Against this, there are in essence two arguments, which, as I see it, are closely connected. The first is a human rights argument. What the defendants seek to do is to exercise their rights under Articles 10 and 11 of the Human Rights Convention, relating to the freedom of expression and the freedom of assembly. Those rights are obviously important rights, and the Court will bear those rights in mind, for example, when considering whether orders ought to be made to restrict the exercise of those rights in a public place. However, this is a different situation: this is, whether the defendants like it or not, private land, and it is clear from the judgment of the Divisional Court, but a divisional court led by Lord Burnett, the Lord Chief Justice, in the *Director of Public Prosecutions and Cuciurean* [2020] QB 888, that Articles 10 and 11 do not bestow any right to interfere with the property rights of those who have the right to possession of land. I have borne in mind what is said in other authorities, particular the *Canada Goose UK retail Ltd & Anor v Persons Unknown and PETA* [2019] case, and the more recent *Zebra*[?] case, which are of considerable importance to the exercise of rights of expression and indeed of protest, but in my judgment, they do not assist in principle here to say that a possession order ought not to be made.

14. The second associated argument, as I see it, is that an order that extends to the entirety of the land in the South Campus is beyond that which is proportionately required. The very introduction of the concept of proportionality hints at the idea that one is here looking at balancing rights of freedom of expression and/or freedom of protest against the rights in the property itself. In addition, it is arguable, in the light of the judgment in the case *Cuciurean* that there is no such balance to be made. It is, it seems to me, possible to conceive of circumstances – although they are somewhat fanciful – where, at its most extreme, the making of a possession order could indeed interfere with people's right to protest and/or to exercise freedom of speech; however, there are many other ways of doing it beyond occupying property, and I do not see that the defendants here have any real prospect of showing that their occupation of property is their only way to exercise such rights in a way that might limit, by some kind of test of proportionality, the claimant's corresponding right to possession of its land.

15. I have indicated already that the defendants complain that the claimants are not entering into negotiations with them. That, I am afraid, is no part of this judgment and no part of the role of this court to engage in that. What is clear, and in fairness to the defendants, they make it clear, even with the skeleton argument passed up to me, is that the purpose of this occupation is to make a political point, and there is clearly a significant risk that, unless a possession order is made across the whole of the South Campus, that the protest will move to somewhere else within the South Campus. Indeed, one might think it was not a very good protest if it did not contemplate doing that, because it would simply be rather self-defeating, would it not, to say, "Oh, well, hands up. You have excluded me from this part, there we go. I am going home".

16. In those circumstances, it seems to me that there is no defence to the possession order that is sought; there is no argument of the expression of rights to protest or freedom of speech or similar such rights to balance against the claimant's right to the possession of this land. Nor

do I see that there is any argument along a proportionality kind of basis to say that the order ought to extend over less than the entirety of the South Campus. Given what the courts have said in other cases, most particularly, the Court of Appeal in the *University of Essex and* [Inaudible], but also Henderson J in the *SOAS* case, I am satisfied that the land that is described in red can be seen as the appropriate premises in respect of which to make the possession order, and I therefore will make an order in the terms that are sought.

End of judgment.

Transcript of a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.

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

Case No: CO/1597/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2023

Before:

LORD JUSTICE BEAN
and
MR JUSTICE CHAMBERLAIN

- -

Between:

DEBORAH HICKS **Appellant**

– and –

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

- -

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

Hearing dates: 26 - 27 April 2023

- -

Approved Judgment

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

....

MR JUSTICE CHAMBERLAIN

MR JUSTICE CHAMBERLAIN:

Introduction

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

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

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

The incident giving rise to the charge

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

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

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

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

The case stated and the agreed summary of the evidence

8 The case stated was originally prepared on 22 April 2022. On 10 October 2022, Sir Ross Cranston, sitting as a judge of this Court, noted that the first question related to the evidential sufficiency of the judge's finding that the appellant's behaviour was "threatening, abusive or disorderly". The judge had set out some of the evidence in the case stated, but Sir Ross Cranston considered that the court would need a fuller account. This would require the parties to prepare an agreed version of the evidence to assist the

judge in his task. The case stated was accordingly returned to the judge with a direction that the parties prepare an agreed summary of the evidence.

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

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

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

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

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

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

> "25… I found that both Ms Williams and Ms Brown gave evidence that was cogent, credible and without exaggeration. Their accounts stood up well to cross examination.

26. Whilst it is clear that Ms Hicks did not, at first, seek confrontation with these two women on that stairwell, once enquiry was made as to whether she required 'any help' a confrontation did develop. And once engaged with them I have no doubt that both Ms Williams and Ms Brown did feel threatened and abused by Ms Hicks' words and behaviour on the stairwell of these hospital premises that afternoon. That she was aggressive and dismissive of them and attempted to conduct a non-consensual interview with them whilst holding a mobile camera phone towards their faces at arms-length and apparently filming them. Both women were visibly distressed when giving evidence about the contemporaneous impact of Ms Hicks' behaviour upon them. Both told me that they were intimidated by Ms Hicks and were concerned that any film that she was taking with her camera phone was being streamed online and that they might be identified from that footage later.

27. Both were aware of and had seen the video footage livestreamed by Ms Hicks the previous day. Both told me that in view of their own recent experiences they found that footage and what was said by Ms Hicks in her running commentary distressing. Both told me that they were aware – contemporaneously – of online comments made by others (so called antivaxxers and the like) which demonstrated the strength of feeling about the issue Ms Hicks sought to highlight.

28. Both women also expressed concern for the confidentiality of patients in that place - at the hospital. Ms Williams was so alarmed that she sought help immediately, reporting what had happened to the site office – 'raising the alarm' as she put it - so that Ms Hicks might be removed from the hospital. Both witnesses described this all to me on oath and, taken together my finding of fact is that Ms Hicks' behaviour clearly did amount to harassment and was threatening and abusive to both Ms Brown and Ms Williams.

29. I am also sure as to Ms Hicks' subjective state of mind, namely that she was bound to be aware in all of these circumstances, that her behaviour might be threatening and/or abusive to others. Ms Hicks' own case is that her attendance at the hospital was 'undercover'. Clearly she understood that she had no business being at the hospital; that she should not be there. In fact her livestream video commentary demonstrates Ms Hicks making efforts not to be noticed at all. I am also struck by the fact that, despite having the ability to do so, Ms Hicks decided, on reflection, not to live stream the key encounter with the two witnesses on the stairwell. She told me that she went on to delete the video footage that she had taken of the women on the stairwell. This suggests to me that she was well aware of the potential deleterious impact of that, had she done it. Ms Brown and Ms Williams were not to know that she was not livestreaming their encounter at the time, of course. Indeed they both told me that they thought that Ms Hicks was doing this. Both women were demonstrably alarmed by Ms Hicks behaviour toward them at their place of work.

30. At first sight, therefore the prosecution case is made out."

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

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

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

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

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

18 The judge found that there were other reasonable ways for Ms Hicks to convey and express her opinions about the pandemic and the authorities' response to it. Her conduct on this occasion was not reasonable and Ms Williams and Ms Brown deserved "not to be molested (in the ordinary sense of that word) whilst at work, and should be protected by the law". Thus, the prosecution had established that the restriction of Ms Hicks' Article 10 rights was proportionate and Ms Hicks had not made out the defence under s. 5(3) of the 1986 Act.

The law

19 Section 5 of the 1986 Act provides as follows:

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

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

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

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

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

> "….the provisions of section 5 and section 6 of the Public Order Act, as enacted and applied by the courts of this country, contain the necessary balance between the right of freedom of expression and the right of others not to be insulted and distressed. The right to freedom of expression was well established in the United Kingdom before the incorporation of the Convention. Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited: see *Brutus v Cozens* [1973] AC 854. A peaceful protest will only come within the terms of section 5 and constitute an offence where the conduct goes beyond legitimate protest and moves into the realms of threatening, abusive or insulting behaviour, which is calculated to insult either intentionally or recklessly, and which is unreasonable."

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

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

> the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached."

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

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

26 At [50], Hickinbottom LJ said this:

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

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

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

28 In *In Re Abortion Service (Safe Access Zones) (NI) Bill* [2022] UKSC 32, [2023] 2 WLR 33, Lord Reed (with whom the other members of the seven-judge Court agreed) held that questions of proportionality were often decided as a matter of general principle rather than on the facts of an individual case: [29]. When a defendant relied on Articles 9, 10 or 11 ECHR, the first question was whether those articles are engaged: [54]. If so, the

court must then ask whether the offence is one where the ingredients themselves strike the proportionality balance so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. This will be the case with many commonly encountered criminal offences, such as offences of violence and offences concerning damage to property, which are likely to be defined in such a way as to make assessment of proportionality unnecessary: [55]. If proof of the elements of the offence does not itself ensure the proportionality of a conviction, the court must consider how to ensure compatibility with Convention rights: [56]. If the offence is statutory, s. 3 of the Human Rights Act 1998 may enable the court to construe the relevant provision compatibly with Convention rights, either by construing it in a way which means that a conviction will always be proportionate, or by interpreting it as allowing for an assessment of proportionality in individual cases: [57]. But the fact that there is a statutory defence of lawful or reasonable excuse does not mean that a proportionality assessment in respect of Convention rights is appropriate: [58].

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

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

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

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

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

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

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

The proper approach to facts on an appeal by case stated

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

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

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

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

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

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

Williams and Ms Brown. Paragraph 47 records findings that Ms Hicks was "confrontational, derogatory, and aggressive in her tone".

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

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

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

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

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

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

40 Ms van Woodenberg submitted that the judge erred in taking into account the location of the incident at a hospital, which was the witnesses' place of work, and the fact that the witnesses deserved not to be "molested" there. This was wrong because the authorities

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

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

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

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

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

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

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

46 Mr Posner's submission that Articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing seems to me to be ambitious. But it is not necessary to decide it, for two reasons. First, and critically, there

was no finding by the judge that Ms Hicks was trespassing. Second, the judge approached the case on the express basis that Article 10 was engaged.

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

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

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

Conclusion

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

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

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

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

51 I would accordingly dismiss the appeal.

LORD JUSTICE BEAN:

52 I agree.

A

Supreme Court

Wolverhampton City Council and others *v* London Gypsies and Travellers and others

[On appeal from *Barking and Dagenham London Borough Council v Persons Unknown*]

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29 — Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs JJSC, Lord Kitchin

C

Injunction — Trespass — Persons unknown — Local authorities obtaining injunctions against persons unknown to restrain unauthorised encampments on land — Whether court having power to grant final injunctions against persons unknown — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37

With the intent of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued D proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The E judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

On appeal by three intervener groups representing the interests of Gypsies and F Travellers—

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so G in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new H circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

[1] Senior Courts Act 1981, s 37: see post, para 145.

© 2024 The Incorporated Council of Law Reporting for England and Wales

prohibitions directed at the world at large which operated as an exception to the normal rule that only parties to an action were bound by an injunction (post, paras 16–17, 19, 22, 42, 57, 147–148, 150–153, 238). A

Venables v News Group Newspapers Ltd [2001] Fam 430 applied.

Dicta of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361, HL(E) and of Lord Jauncey of Tullichettle in *Fourie v Le Roux* [2007] 1 WLR 320, para 25, HL(E) applied.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780, SC(E), *Cameron v Hussain* [2019] 1 WLR 1471, SC(E) and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, CA considered. B

South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, CA and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, CA not applied.

(2) That in principle it was such a legitimate extension of the court's practice for it to allow both interim and final injunctions against "newcomers", i e persons who at the time of the grant of the injunction were neither defendants nor identifiable and were described in the injunction only as "persons unknown"; that an injunction against a newcomer, which was necessarily granted on a without notice application, would be effective to bind anyone who had notice of it while it remained in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action; that, therefore, there was no immoveable obstacle of jurisdiction or principle in the way of granting injunctions prohibiting unauthorised encampments by Gypsies or Travellers who were "newcomers" on an essentially without notice basis, regardless of whether in form interim or final; that, however, such an injunction was only likely to be justified as a novel exercise of the court's equitable discretionary power if the applicant (i) demonstrated a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other available remedies (including statutory remedies), (ii) built into the application and the injunction sought, procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it, (iii) complied in full with the disclosure duty which attached to the making of a without notice application and (iv) showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made; that, if so justified, any injunction made by the court had to (i) spell out clearly and in everyday terms the full extent of the acts it was prohibiting, corresponding as closely as possible to the actual or threatened unlawful conduct, (ii) extend no further than the minimum necessary to achieve the purpose for which it was granted, (iii) be subject to strict temporal and territorial limits, (iv) be actively publicised by the applicant so as to draw it to the attention of all actual and potential respondents and (v) include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the injunction; and that, accordingly, it followed that the challenge to the court's power to grant the impugned injunctions at all failed (post, paras 142–146, 150, 167, 170, 186, 188, 222, 225, 230, 232, 238). C D E F G

Per curiam. (i) The theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is no reason why newcomer injunctions should never be granted. The question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis (post, paras 172, 216).

(i) To the extent that a particular person who became the subject of a newcomer injunction wishes to raise particular circumstances applicable to them and relevant to a balancing of their article 8 Convention rights against the claim for an injunction, this can be done under the liberty to apply (post, para 183). H

(iii) The emphasis in this appeal has been on newcomer injunctions in Gypsy and Traveller cases and nothing said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage

© 2024 The Incorporated Council of Law Reporting for England and Wales

A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11
Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)
Adair v New River Co (1805) 11 Ves 429
C *Anton Piller KG v Manufacturing Processes Ltd* [1975] EWCA Civ 12; [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA
Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)
D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)
Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)
E *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)
Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)
Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA
Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)
F *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB)
Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413;
G [1984] 3 All ER 39, HL(E)
Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA
Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA
CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm);
H [2019] Lloyd's Rep FC 62
Cameron v Hussain [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA
Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380

© 2024 The Incorporated Council of Law Reporting for England and Wales

Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Private Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA
Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd [1998] 4 VR 143

© 2024 The Incorporated Council of Law Reporting for England and Wales

A *Mercedes Benz AG v Leiduck* [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929; [1995] 2 Lloyd's Rep 417, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew (1983) 127 SJ 597, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
B *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
C *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
D *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
E *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487; [1986] 2 Lloyd's Rep 317, HL(E)
F *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
G *United Kingdom Nirex Ltd v Barton* The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
H *Z Ltd v A-Z and AA-LL* [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

The following additional cases were cited in argument:

A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)

© 2024 The Incorporated Council of Law Reporting for England and Wales

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)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176; [2021] RTR 15, CA
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

On 16 October 2020 Nicklin J, with the concurrence of Dame Victoria Sharp P and Stewart J (Judge in Charge of the Queen's Bench Civil List), ordered a number of local authorities which had been involved in 38 sets of proceedings each obtaining injunctions prohibiting "persons unknown" from making unauthorised encampments within their administrative areas, or on specified areas of land within those areas, to complete a questionnaire with a view to identifying those local authorities who wished to maintain such injunctions and those who wished to discontinue them. On 12 May 2021, after receipt of the questionnaires and a subsequent hearing to review the injunctions, Nicklin J [2021] EWHC 1201 (QB); [2022] JPL 43 held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land and, by further order dated 24 May 2021, discharged a number of the injunctions on that ground.

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council; Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR,

© 2024 The Incorporated Council of Law Reporting for England and Wales

A Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The following local authorities participated in the appeal as respondents: B (i) Wolverhampton City Council; (ii) Walsall Metropolitan Borough Council; (iii) Barking and Dagenham London Borough Council; (iv) Basingstoke and Deane Borough Council and Hampshire County Council; (v) Redbridge London Borough Council; (vi) Havering London Borough Council; (vii) Nuneaton and Bedworth Borough Council and Warwickshire County Council; (viii) Rochdale Metropolitan Borough C Council; (ix) Test Valley Borough Council and Hampshire County Council and (x) Thurrock Council. The following bodies were granted permission to intervene in the appeal: Friends of the Earth; Liberty, High Speed Two (HS2) Ltd and the Secretary of State for Transport.

The facts and the agreed issues for the court are stated in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin, post, paras 6–13.

D *Richard Drabble KC*, *Marc Willers KC*, *Tessa Buchanan* and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for the appellants.

Mark Anderson KC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for the first respondent.

Nigel Giffin KC and *Simon Birks* (instructed by *Walsall Metropolitan* E *Borough Council Legal Services*) for the second respondent.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for the third to tenth respondents.

Stephanie Harrison KC, *Stephen Clark* and *Fatima Jichi* (instructed by *Hodge Jones and Allen*) for Friends of the Earth, intervening.

Jude Bunting KC and *Marlena Valles* (instructed by *Liberty*) for Liberty, F intervening.

Richard Kimblin KC and *Michael Fry* (instructed by *Treasury Solicitor*) for High Speed Two (HS2) Ltd and the Secretary of State for Transport, intervening.

The court took time for consideration.

G 29 November 2023. **LORD REED PSC**, **LORD BRIGGS JSC** and **LORD KITCHIN** (with whom **LORD HODGE DPSC** and **LORD LLOYD-JONES JSC** agreed) handed down the following judgment.

1. Introduction

(1) The problem

H 1 This appeal concerns a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. Since the members of a group of Gypsies or Travellers who might in future camp in a particular place cannot generally be identified in advance, few if any of the defendants to the proceedings were

© 2024 The Incorporated Council of Law Reporting for England and Wales

identifiable at the time when the injunctions were sought and granted. Instead, the defendants were described in the claim forms as "persons unknown", and the injunctions similarly enjoined "persons unknown". In some cases, there was no further description of the defendants in the claim form, and the court's order contained no further information about the persons enjoined. In other cases, the defendants were described in the claim form by reference to the conduct which the claimants sought to have prohibited, and the injunctions were addressed to persons who behaved in the manner from which they were ordered to refrain.

2 In these circumstances, the appeal raises the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date: "newcomers", as they have been described in these proceedings.

3 Although the appeal arises in the context of unlawful encampments by Gypsies and Travellers, the issues raised have a wider significance. The availability of injunctions against newcomers has become an increasingly important issue in many contexts, including industrial picketing, environmental and other protests, breaches of confidence, breaches of intellectual property rights, and a wide variety of unlawful activities related to social media. The issue is liable to arise whenever there is a potential conflict between the maintenance of private or public rights and the future behaviour of individuals who cannot be identified in advance. Recent years have seen a marked increase in the incidence of applications for injunctions of this kind. The advent of the internet, enabling wrongdoers to violate private or public rights behind a veil of anonymity, has also made the availability of injunctions against unidentified persons an increasingly significant question. If injunctions are available only against identifiable individuals, then the anonymity of wrongdoers operating online risks conferring upon them an immunity from the operation of the law.

4 Reflecting the wide significance of the issues in the appeal, the court has heard submissions not only from the appellants, who are bodies representing the interests of Gypsies and Travellers, and the respondents, who are local authorities, but also from interveners with a particular interest in the law relating to protests: Friends of the Earth, Liberty, and (acting jointly) the Secretary of State for Transport and High Speed Two (HS2) Ltd.

5 The appeal arises from judgments given by Nicklin J and the Court of Appeal on what were in substance preliminary issues of law. The appeal is accordingly concerned with matters of legal principle, rather than with whether it was or was not appropriate for injunctions to be granted in particular circumstances. It is, however, necessary to give a brief account of the factual and procedural background.

(2) The factual and procedural background

6 Between 2015 and 2020, 38 different local authorities or groups of local authorities sought injunctions against unidentified and unknown persons, which in broad terms prohibited unauthorised encampments within their administrative areas or on specified areas of land within those areas. The claims were brought under the procedure laid down in Part 8 of the Civil

© 2024 The Incorporated Council of Law Reporting for England and Wales

A Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR r 8.1(2). The claimants relied upon a number of statutory provisions, including section 187B of the Town and Country Planning Act 1990, under which the court can grant an injunction to restrain an actual or apprehended breach of planning control, and in some cases also upon common law causes of action, including trespass to land.

B 7 The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons C unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth", "persons unknown entering or remaining without planning consent on those parcels of land coloured in Schedule 2 of the draft order", and "persons unknown who enter and/or occupy any of the locations listed in this order for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and D domestic paraphernalia".

8 In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR r 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly E displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

F 9 As we have explained, the injunctions were addressed in some cases simply to "persons unknown", and in other cases to persons described by reference to the activities from which they were required to refrain: for example, "persons unknown occupying the sites listed in this order". The respondents were among the local authorities who obtained such injunctions.

G 10 From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen's Bench Division and the Judge in Charge of the Queen's Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups H of local authorities) actively pursuing claims. The appellants were given permission to intervene. A hearing was then fixed at which four issues of principle were to be determined. Following the hearing, Nicklin J determined those issues: *Barking and Dagenham London Borough Council v Persons Unknown* [2022] JPL 43.

© 2024 The Incorporated Council of Law Reporting for England and Wales

11 Putting the matter broadly at this stage, Nicklin J concluded, in the light particularly of the decision of the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ("*Canada Goose*"), that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought. If the relevant local authority could identify anyone in the category of "persons unknown" at the time the final order was granted, then the final injunction bound each person who could be identified. If not, then the final injunction granted against "persons unknown" bound no-one. In the light of that conclusion, Nicklin J discharged the final injunctions either in full or in so far as they were addressed to any person falling within the definition of "persons unknown" who was not a party to the proceedings at the date when the final order was granted.

12 Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing LJJ agreed, the court held that "the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land": *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, para 7. The appellants appeal to this court against that decision.

13 The issues in the appeal have been summarised by the parties as follows:

(1) Is it wrong in principle and/or not open to a court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 ("the 1981 Act") so as to grant an injunction which will bind "newcomers", that is to say, persons who were not parties to the claim when the injunction was granted, other than (i) on an interim basis or (ii) for the protection of Convention rights (i e rights which are protected under the Human Rights Act 1998)?

(2) If it is wrong in principle and/or not open to a court to grant such an injunction, then—

(i) Does it follow that (other than for the protection of Convention rights) such an injunction may likewise not properly be granted on an interim basis, except where that is required for the purpose of restraining wrongful actions by persons who are identifiable (even if not yet identified) and who have already committed or threatened to commit a relevant wrongful act?

(ii) Was Nicklin J right to hold that the protection of Convention rights could never justify the grant of a Traveller injunction, defined as an injunction prohibiting the unauthorised occupation or use of land?

2. *The legal background*

14 Before considering the development of "newcomer" injunctions—that is to say, injunctions designed to bind persons who are not identifiable as parties to the proceedings at the time when the injunction is granted—it may be helpful to identify some of the issues of principle which are raised by such injunctions. They can be summarised as follows:

(1) Are newcomers parties to the proceedings at the time when the injunction is granted? If not, is it possible to obtain an injunction against a

© 2024 The Incorporated Council of Law Reporting for England and Wales

A non-party? If they are not parties at that point, when (if ever) and how do they become parties?

(2) Does the claimant have a cause of action against newcomers at the time when the injunction is granted? If not, is it possible to obtain an injunction without having an existing cause of action against the person enjoined?

B (3) Can a claim form properly describe the defendants as persons unknown, with or without a description referring to the conduct sought to be enjoined? Can an injunction properly be addressed to persons so described? If the description refers to the conduct which is prohibited, can the defendants properly be described, and can an injunction properly be issued, in terms which mean that persons do not become bound by the injunction until they infringe it?

C (4) How, if at all, can such a claim form be served?

15 This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in D the absence of a cause of action, (4) the commencement of proceedings against unidentified defendants, and (5) the service of proceedings on unidentified defendants.

(1) The jurisdiction to grant injunctions

16 As Lord Scott of Foscote commented in *Fourie v Le Roux* [2007] E 1 WLR 320, para 25, in a speech with which the other Law Lords agreed, jurisdiction is a word of some ambiguity. Lord Scott cited with approval Pickford LJ's remark in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 that "the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised". However, as Pickford LJ went on to observe, the F word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide—in this context, the power to grant an injunction—and the principles and practice governing the exercise of that G power.

17 The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20–21 and *Cartier* H *International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by

© 2024 The Incorporated Council of Law Reporting for England and Wales

order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

18 It is also relevant in the context of this appeal to note that, as a court of inherent jurisdiction, the High Court possesses the power, and bears the responsibility, to act so as to maintain the rule of law.

19 Like any judicial power, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court. Accordingly, as Lord Mustill observed in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361:

> "Although the words of section 37(1) [of the 1981 Act] and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints."

Nevertheless, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change. As Lord Scott observed in *Fourie v Le Roux* at para 30, practice has not stood still and is unrecognisable from the practice which existed before the 1873 Act.

20 The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the *Mareva* or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21 It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root*

© 2024 The Incorporated Council of Law Reporting for England and Wales

A *(UK) Ltd* [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

B "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC C 334 (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

D "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

22 These dicta are borne out by the recent developments in the law of E injunctions which we have briefly described. They illustrate the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice, such as freezing injunctions, *Anton Piller* orders, *Norwich Pharmacal* orders and *Bankers Trust* orders, and also, more significantly for present purposes, in respect of orders designed to protect substantive rights, such as internet blocking orders. That is not to undermine the importance of precedent, or to suggest that established F categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require.

G *(2) Injunctions against non-parties*

23 It is common ground in this appeal that newcomers are not parties to the proceedings at the time when the injunctions are granted, and the judgments below proceeded on that basis. However, it is worth taking a moment to consider the question.

24 Where the defendants are described in a claim form, or an injunction H describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As

© 2024 The Incorporated Council of Law Reporting for England and Wales

will appear, service can be problematical where the identities of the intended defendants are unknown. Furthermore, as a general rule, for any injunction to be enforceable, the persons whom it enjoins, if unnamed, must be described with sufficient clarity to identify those included and those excluded.

25 Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is that the injunction is in substance addressed to the entire world, since anyone in the world may potentially fall within the description of the persons enjoined. But persons may be affected by the injunction in ways which potentially have different legal consequences. For example, an injunction designed to deter Travellers from camping at a particular location may be addressed to persons unknown camping there (notwithstanding that no-one is currently doing so) and may restrain them from camping there. If Travellers elsewhere learn about the injunction, they may consequently decide not to go to the site. Other Travellers, unaware of the injunction, may arrive at the site, and then become aware of the claim form and the injunction by virtue of their being displayed in a prominent position. Some of them may then proceed to camp on the site in breach of the injunction. Others may obey the injunction and go elsewhere. At what point, if any, do Travellers in each of these categories become parties to the proceedings? At what point, if any, are they enjoined? At what point, if any, are they served (if the displaying of the documents is authorised as alternative service)? It will be necessary to return to these questions. However these questions are answered, although each of these groups of Travellers is affected by the injunction, none of them can be regarded as being party to the proceedings at the time when the injunction is granted, as they do not then answer to the description of the persons enjoined and nothing has happened to bring them within the jurisdiction of the court.

26 If, then, newcomers are not parties to the proceedings at the time when the injunctions are granted, it follows that newcomer injunctions depart from the court's usual practice. The ordinary rule is that "you cannot have an injunction except against a party to the suit": *Iveson v Harris* (1802) 7 Ves 251, 257. That is not, however, an absolute rule: Lord Eldon LC was speaking at a time when the scope of injunctions was more closely circumscribed than it is today. In addition to the undoubted jurisdiction to grant interim injunctions prior to the service (or even the issue) of proceedings, a number of other exceptions have been created in response to the requirements of justice. Each of these should be briefly described, as it will be necessary at a later point to consider whether newcomer injunctions fall into any of these established categories, or display analogous features.

(i) Representative proceedings

27 The general rule of practice in England and Wales used to be that the defendants to proceedings must be named, and that even a description of them would not suffice: *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25; *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204. The only exception in the Rules of the Supreme Court ("RSC") concerned summary proceedings for the possession of land: RSC Ord 113.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 28 However, it has long been established that in appropriate circumstances relief can be sought against representative defendants, with other unnamed persons being described in the order in general terms. Although formerly recognised by RSC Ord 15, r 12, and currently the subject of rule 19.8 of the CPR, this form of procedure has existed for several centuries and was developed by the Court of Chancery. Its rationale was explained by Sir Thomas Plumer MR in *Meux v Maltby* (1818) 2 Swans 277, B 281–282:

> "The general rule, which requires the plaintiff to bring before the court all the parties interested in the subject in question, admits of exceptions. The liberality of this court has long held, that there is of necessity an exception to the general rule, when a failure of justice would ensue from its enforcement."

C

Those who are represented need not be individually named or identified. Nor need they be served. They are not parties to the proceedings: CPR r 19.8(4)(b). Nevertheless, an injunction can be granted against the whole class of defendants, named and unnamed, and the unnamed defendants are bound in equity by any order made: *Adair v New River Co* (1805) 11 Ves 429, 445; CPR r 19.8(4)(a).

D 29 A representative action may in some circumstances be a suitable means of restraining wrongdoing by individuals who cannot be identified. It can therefore, in such circumstances, provide an alternative remedy to an injunction against "persons unknown": see, for example, *M Michaels (Furriers) Ltd v Askew* (1983) 127 SJ 597, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright E infringement; and *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), concerned with environmental protesters.

30 However, there are a number of principles which restrict the circumstances in which relief can be obtained by means of a representative action. In the first place, the claimant has to be able to identify at least one individual against whom a claim can be brought as a representative of all others likely to interfere with his or her rights. Secondly, the named defendant F and those represented must have the same interest. In practice, compliance with that requirement has proved to be difficult where those sought to be represented are not a homogeneous group: see, for example, *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, concerned with industrial action, and *United Kingdom Nirex Ltd v Barton* The Times, 14 October 1986, concerned with protests. In addition, G since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR r 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

H (ii) Wardship proceedings

31 Another situation where orders have been made against non-parties is where the court has been exercising its wardship jurisdiction. In *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422 the court protected the welfare of a ward of court (the daughter of an individual who had been

© 2024 The Incorporated Council of Law Reporting for England and Wales

convicted of manslaughter as a child) by making an order prohibiting any publication of the present identity of the ward or her parents. The order bound everyone, whether a party to the proceedings or not: in other words, it was an order contra mundum. Similar orders have been made in subsequent cases: see, for example, *In re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211 and *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254.

(iii) Injunctions to protect human rights

32 It has been clear since the case of *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*") that the court can grant an injunction contra mundum in order to enforce rights protected by the Human Rights Act 1998. The case concerned the protection of the new identities of individuals who had committed notorious crimes as children, and whose safety would be jeopardised if their new identities became publicly known. An injunction preventing the publication of information about the claimants had been granted at the time of their trial, when they remained children. The matter returned to the court after they attained the age of majority and applied for the ban on publication to be continued, on the basis that the information in question was confidential. The injunction was granted against named newspaper publishers and, expressly, against all the world. It was therefore an injunction granted, as against all potential targets other than the named newspaper publishers, on a without notice application.

33 Dame Elizabeth Butler-Sloss P held that the jurisdiction to grant an injunction in the circumstances of the case lay in equity, in order to restrain a breach of confidence. She recognised that by granting an injunction against all the world she would be departing from the general principle, referred to at para 26 above, that "you cannot have an injunction except against a party to the suit" (para 98). But she relied (at para 29) upon the passage in *Spry* (in an earlier edition) which we cited at para 17 above as the source of the necessary equitable jurisdiction, and she felt compelled to make the order against all the world because of the extreme danger that disclosure of confidential information would risk infringing the human rights of the claimants, particularly the right to life, which the court as a public authority was duty-bound to protect from the criminal acts of others: see paras 98–100. Furthermore, an order against only a few named newspaper publishers which left the rest of the media free to report the prohibited information would be positively unfair to them, having regard to their own Convention rights to freedom of speech.

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e g as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by

© 2024 The Incorporated Council of Law Reporting for England and Wales

A publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

35 It is the practice of some courts to circulate copies of their draft B judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] 4 WLR 103 and [2022] 1 WLR 367. Like reporting restrictions, such orders are not equitable injunctions, but they are relevant as further examples of orders directed against non-parties.

C (vi) The effect of injunctions on non-parties

36 We have focused thus far on the question whether an injunction can be granted against a non-party. As we shall explain, it is also relevant to consider the effect which injunctions against parties can have upon non-parties.

37 If non-parties are not enjoined by the order, it follows that they are D not bound to obey it. They can nevertheless be held in contempt of court if they knowingly act in the manner prohibited by the injunction, even if they have not aided or abetted any breach by the defendant. As it was put by Lord Oliver of Aylmerton in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223, there is contempt where a non-party "frustrates, thwarts, or *subverts the purpose* of the court's order and thereby interferes with the due administration of justice in the particular action" (emphasis in E original).

38 One of the arguments advanced before the House of Lords in *Attorney General v Times Newspapers Ltd* was that to invoke the jurisdiction in contempt against a person who was neither a party nor an aider or abettor of a breach of the order by the defendant, but who had done what the defendant in the action was forbidden by the order to do was, in F effect, to make the order operate in rem or contra mundum. That, it was argued, was a purpose which the court could not legitimately achieve, since its orders were only properly made inter partes.

39 The argument was rejected. Lord Oliver acknowledged at p 224 that "Equity, in general, acts in personam and there are respectable authorities for the proposition that injunctions, whether mandatory or prohibitory, operate inter partes and should be so expressed (see *Iveson v Harris*; G *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406)". Nevertheless, the appellants' argument confused two different things: the scope of an order inter partes, and the proper administration of justice (pp 224–225):

> "Once it is accepted, as it seems to me the authorities compel, that contempt (to use Lord Russell of Killowen's words [in *Attorney General v* H *Leveller Magazine Ltd* at p 468]) 'need not involve disobedience to an order binding upon the alleged contemnor' the potential effect of the order contra mundum is an inevitable consequence."

40 In answer to the objection that the non-party who learns of the order has not been heard by the court and has therefore not had the opportunity to

© 2024 The Incorporated Council of Law Reporting for England and Wales

put forward any arguments which he may have, Lord Oliver responded at p 224 that he was at liberty to apply to the court:

> " 'The Sunday Times' in the instant case was perfectly at liberty, before publishing, either to inform the respondent and so give him the opportunity to object or to approach the court and to argue that it should be free to publish where the defendants were not, just as a person affected by notice of, for example, a *Mareva* injunction is able to, and frequently does, apply to the court for directions as to the disposition of assets in his hands which may or may not be subject to the terms of the order."

The non-party's right to apply to the court is now reflected in CPR r 40.9, which provides: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." A non-party can also apply to become a defendant in accordance with CPR r 19.4.

41 There is accordingly a distinction in legal principle between being bound by an injunction as a party to the action and therefore being in contempt of court for disobeying it and being in contempt of court as a non-party who, by knowingly acting contrary to the order, subverts the court's purpose and thereby interferes with the administration of justice. Nevertheless, cases such as *Attorney General v Times Newspapers Ltd* and *Attorney General v Punch Ltd* [2003] 1 AC 1046, and the daily impact of freezing injunctions on non-party financial institutions (following *Z Ltd v A-Z and AA-LL* [1982] QB 558), indicate that the differences in the legal analysis can be of limited practical significance. Indeed, since non-parties can be found in contempt of court for acting contrary to an injunction, it has been recognised that it can be appropriate to refer to non-parties in an injunction in order to indicate the breadth of its binding effect: see, for example, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406, 407; *Attorney General v Newspaper Publishing plc* [1988] Ch 333, 387–388.

42 Prior to the developments discussed below, it can therefore be seen that while the courts had generally affirmed the position that only parties to an action were bound by an injunction, a number of exceptions to that principle had been recognised. Some of the examples given also demonstrate that the court can, in appropriate circumstances, make orders which prohibit the world at large from behaving in a specified manner. It is also relevant in the present context to bear in mind that even where an injunction enjoins a named individual, the public at large are bound not knowingly to subvert it.

(3) Injunctions in the absence of a cause of action

43 An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but

© 2024 The Incorporated Council of Law Reporting for England and Wales

A growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the B existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

44 One long-established exception is an injunction granted on the C application of the Attorney General, acting either ex officio or through another person known as a relator, so as to ensure that the defendant obeys the law (*Attorney General v Harris* [1961] 1 QB 74; *Attorney General v Chaudry* [1971] 1 WLR 1614).

45 The statutory provisions relied on by the local authorities in the present case similarly enable them to seek injunctions in the public interest. All the respondent local authorities rely on section 222 of the Local D Government Act 1972, which confers on local authorities the power to bring proceedings to enforce obedience to public law, without the involvement of the Attorney General: *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. Where an injunction is granted in proceedings under section 222, a power of arrest may be attached under section 27 of the Police and Justice Act 2006, provided certain conditions are met. Most of the E respondents also rely on section 187B of the Town and Country Planning Act 1990, which enables a local authority to apply for an injunction to restrain any actual or apprehended breach of planning control. Some of the respondents have also relied on section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, which enables the court to grant an injunction (on the application of, inter alia, a local authority: see section 2) for the purpose of preventing the respondent from engaging in anti-social behaviour. Again, a F power of arrest can be attached: see section 4. One of the respondents also relies on section 130 of the Highways Act 1980, which enables a local authority to institute legal proceedings for the purpose of protecting the rights of the public to the use and enjoyment of highways.

46 Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of G order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment H or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an

© 2024 The Incorporated Council of Law Reporting for England and Wales

order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2007] Bus LR 44).

47 Another exception is the *Norwich Pharmacal* order, which is available where a third party gets mixed up in the wrongful acts of others, even innocently, and may be ordered to provide relevant information in its possession which the applicant needs in order to seek redress. The order is not based on the existence of any substantive cause of action against the defendant. Indeed, it is not a precondition of the exercise of the jurisdiction that the applicant should have brought, or be intending to bring, legal proceedings against the alleged wrongdoer. It is sufficient that the applicant intends to seek some form of lawful redress for which the information is needed: see *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033.

48 Another type of injunction which can be issued against a defendant in the absence of a cause of action is a *Bankers Trust* order. In the case from which the order derives its name, *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (para 20 above), an order was granted requiring an innocent third party to disclose documents and information which might assist the claimant in locating assets to which the claimant had a proprietary claim. The claimant asserted no cause of action against the defendant. Later cases have emphasised the width and flexibility of the equitable jurisdiction to make such orders: see, for example, *Murphy v Murphy* [1999] 1 WLR 282, 292.

49 Another example of an injunction granted in the absence of a cause of action against the defendant is the internet blocking order. This is a new type of injunction developed to address the problems arising from the infringement of intellectual property rights via the internet. In the leading case of *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, cited at paras 17 and 20 above, the Court of Appeal upheld the grant of injunctions ordering internet service providers ("ISPs") to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions, and a principled basis for doing so, in order to compel the ISPs to prevent their facilities from being used to commit or facilitate a wrong. On an appeal to this court on the question of costs, Lord Sumption JSC (with whom the other Justices agreed) analysed the nature and basis of the orders made and concluded that they were justified on ordinary principles of equity. That was so although the claimants had no cause of action against the respondent ISPs, who were themselves innocent of any wrongdoing.

(4) The commencement and service of proceedings against unidentified defendants

50 Bringing proceedings against persons who cannot be identified raises issues relating to the commencement and service of proceedings. It is necessary at this stage to explain the general background.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 51 The commencement of proceedings is an essentially formal step, normally involving the issue of a claim form in an appropriate court. The forms prescribed in the CPR include a space in which to designate the claimant and the defendant. As was observed in *Cameron v Hussain* [2019] 1 WLR 1471 ("*Cameron*"), para 12, that is a format equally consistent with their being designated by name or by description. As was explained earlier, the claims in the present case were brought under Part 8 of the CPR. CPR B r 8.2A(1) provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant". A number of practice directions set out such circumstances, including Practice Direction 49E, paras 21.1–21.10 of which concern applications under certain statutory provisions. They include section 187B of the Town and Country Planning Act 1990, which concerns proceedings C for an injunction to restrain "any actual or apprehended breach of planning control". As explained in para 45 above, section 187B was relied on in most of the present cases. CPR r 55.3(4) also permits a claim for possession of property to be brought against "persons unknown" where the names of the trespassers are unknown.

52 The only requirement for a name is contained in paragraph 4.1 of D Practice Direction 7A, which states that a claim form should state the full name of each party. In *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 ("*Bloomsbury*"), it was said that the words "should state" in paragraph 4.1 were not mandatory but imported a discretion to depart from the practice in appropriate cases. However, the point is not of critical importance. As was stated in *Cameron,* para 12, a practice direction is no more than guidance on matters of practice issued E under the authority of the heads of division. It has no statutory force and cannot alter the general law.

53 As we have explained at paras 27–33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those F examples—representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case [2001] Fam 430—might however be said to be special in some way, and to depend on a principle which is not of broader application.

54 A wider scope for proceedings against unnamed defendants emerged in *Bloomsbury*, where it was held that there is no requirement that the defendant must be named. The overriding objective of the CPR is to enable G the court to deal with cases justly and at proportionate cost. Since this objective is inconsistent with an undue reliance on form over substance, the joinder of a defendant by description was held to be permissible, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21). It will be necessary to return to that case, and also to consider more recent decisions concerned with proceedings brought against unnamed persons.

H 55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the

© 2024 The Incorporated Council of Law Reporting for England and Wales

sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] 1 WLR 1119). Service is significant for many reasons. One of the most important is that it is a general requirement of justice that proceedings should be brought to the notice of parties whose interests are affected before any order is made against them (other than in an emergency), so that they have an opportunity to be heard. Service of the claim form on the defendant is the means by which such notice is normally given. It is also normally by means of service of the order that an injunction is brought to the notice of the defendant, so that he or she is bound to comply with it. But it is generally sufficient that the defendant is aware of the injunction at the time of the alleged breach of it.

56 Conventional methods of service may be impractical where defendants cannot be identified. However, alternative methods of service can be permitted under CPR r 6.15. In exceptional circumstances (for example, where the defendant has deliberately avoided identification and substituted service is impractical), the court has the power to dispense with service, under CPR r 6.16.

3. The development of newcomer injunctions to restrain unauthorised occupation and use of land—the impact of Cameron and Canada Goose

57 The years from 2003 saw a rapid development of the practice of granting injunctions purporting to prohibit persons, described as persons unknown, who were not parties to the proceedings when the order was made, from engaging in specified activities including, of most direct relevance to this appeal, occupying and using land without the appropriate consent. This is just one of the areas in which the court has demonstrated a preparedness to grant an injunction, subject to appropriate safeguards, against persons who could not be identified, had not been served and were not party to the proceedings at the date of the order.

(1) Bloomsbury

58 One of the earliest injunctions of this kind was granted in the context of the protection of intellectual property rights in connection with the forthcoming publication of a novel. The *Bloomsbury* case [2003] 1 WLR 1633, cited at para 52 above, is one of two decisions of Sir Andrew Morritt V-C in 2003 which bear on this appeal. There had been a theft of several pre-publication copies of a new Harry Potter novel, some of which had been offered to national newspapers ahead of the launch date. By the time of the hearing of a much adjourned interim application most but not all of the thieves had been arrested, but the claimant publisher wished to have continued injunctions, until the date a month later when the book was due to be published, against unnamed further persons, described as the person or persons who had offered a copy of the book to the three named newspapers and the person or persons in physical possession of the book without the consent of the claimants.

59 The Vice-Chancellor acknowledged that it would under the old RSC and relevant authority in relation to them have been improper to seek to identify intended defendants in that way (see para 27 above). He noted (para 11) the anomalous consequence:

© 2024 The Incorporated Council of Law Reporting for England and Wales

A

> "A claimant could obtain an injunction against all infringers by description so long as he could identify one of them by name [as a representative defendant: see paras 27–30 above], but, by contrast, if he could not name one of them then he could not get an injunction against any of them."

He regarded the problem as essentially procedural, and as having been cured B by the introduction of the CPR. He concluded, at para 21:

> "The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by C service or otherwise."

(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] D Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent E these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended F defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that G any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61 Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or H remained on any of the sites in question on or around the specified date. This is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A

(3) Gammell

62 The *Bloomsbury* decision has been seen as opening up a wide jurisdiction. Indeed, Lord Sumption observed in *Cameron*, para 11, that it had regularly been invoked in the years which followed in a variety of different contexts, mainly concerning the abuse of the internet, and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context concerned defamation, theft of information by hacking, blackmail and theft of funds. But it is upon cases and newcomer injunctions in the second context that we must now focus, for they include cases involving protesters, such as *Hampshire Waste Services*, and also those involving Gypsies and Travellers, and therefore have a particular bearing on these appeals and the issues to which they give rise.

B

63 Some of these issues were considered by the Court of Appeal only a short time later in two appeals concerning Gypsy caravans brought onto land at a time when planning permission had not been granted for that use: *South Cambridgeshire District Council v Gammell*; *Bromley London Borough Council v Maughan* [2006] 1 WLR 658 ("*Gammell*").

C

64 The material aspects of the two cases are substantially similar, and it will suffice for present purposes to focus on the *South Cambridgeshire* case. The Court of Appeal (Brooke and Clarke LJJ) had earlier granted an injunction under section 187B of the Town and Country Planning Act 1990 against persons described as "persons unknown . . . causing or permitting hardcore to be deposited . . . caravans, mobile homes or other forms of residential accommodation to be stationed . . . or existing caravans, mobile homes or other forms of residential accommodation . . . to be occupied" on land adjacent to a Gypsy encampment in rural Cambridgeshire: *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 ("*South Cambs*"). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

D

E

65 Several months later, Ms Gammell, without securing or applying for the necessary planning permission or making an application to set the injunction aside or vary its terms, proceeded to station her caravans on the land. She was therefore a newcomer within the meaning of that word as used in this appeal, since she was neither a defendant nor on notice of the application for the injunction nor on the site when the injunction was granted. She was served with the injunction and its effect was explained to her, but she continued to station the caravans on the land. On an application for committal by the local authority she was found at first instance to have been in contempt. Sentencing was adjourned to enable her to appeal against the judge's refusal to permit her to be added as a defendant to the proceedings, for the purpose of enabling her to argue that the injunction should not have the effect of placing her in contempt until a proportionality exercise had been undertaken to balance her particular human rights against the grant of an injunction against her, in accordance with *South Bucks District Council v Porter* [2003] 2 AC 558.

F

G

H

66 The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJJ agreed, stated that each of the appellants became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be B relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

C **67** We should also mention a decision of this court from about the same time concerning Travellers who had set up an unauthorised encampment in wooded areas managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 ("*Meier*"). This was in one sense a conventional case: the Secretary of D State issued proceedings alleging trespass by the occupying Travellers and sought an order for possession of the occupied sites. More unusual (and ultimately unsuccessful) was the application for an order for possession against the Travellers in respect of other land which was wholly detached from the land they were occupying. This was wrong in principle for it was simply not possible (even on a precautionary basis) to make an order requiring persons to give immediate possession of woodland of which they E were *not* in occupation, and which was wholly detached from the woodland of which they *were* in occupation (as Lord Neuberger of Abbotsbury MR explained at para 75). But that did not mean the courts were powerless to frame a remedy. The court upheld an injunction granted by the Court of Appeal against the defendants, including "persons names unknown", restraining them from entering the woodland which they had not yet occupied. Since it was not argued that the injunction was defective, we do F not attach great significance to Lord Neuberger MR's conclusion at para 84 that it had not been established that there was an error of principle which led to its grant. Nevertheless, it is notable that Lord Rodger of Earlsferry JSC expressed the view that the injunction had been rightly granted, and cited the decisions of Sir Andrew Morritt V-C in *Bloomsbury* and *Hampshire Waste Services*, and the grant of the injunction in the *South Cambs* case, without G disapproval (at paras 2–3).

(5) Later cases concerning Traveller injunctions

68 Injunctions in the Traveller and Gypsy context were targeted first at actual trespass on land. Typically, the local authorities would name as actual or intended defendants the particular individuals they had been able to identify, and then would seek additional relief against "persons H unknown", these being persons who were alleged to be unlawfully occupying the land but who could not at that stage be identified by name, although often they could be identified by some form of description. But before long, many local authorities began to take a bolder line and claims were brought simply against "persons unknown".

© 2024 The Incorporated Council of Law Reporting for England and Wales

69 A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

70 One of the first of these injunctions was granted by Patterson J in *Harlow District Council v Stokes* [2015] EWHC 953 (QB). The claimants sought and were granted an interim injunction under section 222 of the Local Government Act 1972 and section 187B of the Town and Country Planning Act 1990 in existing proceedings against over thirty known defendants and, importantly, other "persons unknown" in respect of encampments on a mix of public and private land. The pattern had been for these persons to establish themselves in one encampment, for the local authority and the police to take action against them and move them on, and for the encampment then to disperse but later reappear in another part of the district, and so the process would start all over again, just as Lord Rodger JSC had anticipated in *Meier*. Over the months preceding the application numerous attempts had been made using other powers (such as the Criminal Justice and Public Order Act 1994 ("CJPOA")) to move the families on, but all attempts had failed. None of the encampments had planning permission and none had been the subject of any application for planning permission.

71 It is to be noted, however, that appropriate steps had been taken to draw the proceedings to the attention of all those in occupation (see para 15). None had attended court. Further, the relevant authorities and councils accepted that they were required to make provision for Gypsy and Traveller accommodation and gave evidence of how they were working to provide additional and appropriate sites for the Gypsy and Traveller communities. They also gave evidence of the extensive damage and pollution caused by the unlawful encampments, and the local tensions they generated, and the judge summarised the effects of this in graphic detail (at paras 10 and 11).

72 Following the decision in *Harlow District Council v Stokes* and an assessment of the efficacy of the orders made, a large number of other local authorities applied for and were granted similar injunctions over the period from 2017–2019, with the result that by 2020 there were in excess of 35 such injunctions in existence. By way of example, in *Kingston upon Thames Royal London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB), the injunction did not identify any named defendants.

73 All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who

© 2024 The Incorporated Council of Law Reporting for England and Wales

A might in future commit the acts which the injunction prohibited (e g *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an B early return date.

74 It is important also to have in mind that these injunctions undoubtedly had a significant impact on the communities of Travellers and Gypsies to whom they were directed, for they had the effect of forcing many members of these communities out of the boroughs which had obtained and enforced them. They also imposed a greater strain on the resources of the C boroughs and councils which had not yet obtained an order. This combination of features highlighted another important consideration, and it was one of which the judges faced with these applications have been acutely conscious: a nomadic lifestyle has for very many years been a part of the tradition and culture of many Traveller and Gypsy communities, and the importance of this lifestyle to the Gypsy and Traveller identity has been recognised by the European Court of Human Rights in a series of decisions D including *Chapman v United Kingdom* (2001) 33 EHRR 18.

75 As the Master of the Rolls explained in the present case, at paras 105 and 106, any individual Traveller who is affected by a newcomer injunction can rely on a private and family life claim to pursue a nomadic lifestyle. This right must be respected, but the right to that respect must be balanced against the public interest. The court will also take into account any other E relevant legal considerations such as the duties imposed by the Equality Act 2010.

76 These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle F which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

G **77** The conflict to which these issues gave rise was recognised at the highest level as early as 2000 and emphasised in a housing research summary, *Local Authority Powers for Managing Unauthorised Camping* (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

H "The basic conflict underlying the 'problem' of unauthorised camping is between [Gypsies]/Travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want [Gypsies]/Travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no one."

© 2024 The Incorporated Council of Law Reporting for England and Wales

78 For many years there has also been a good deal of publicly available guidance on the issue of unauthorised encampments, much of which embodies obvious good sense and has been considered by the judges dealing with these applications. So, for example, materials considered in the authorities to which we will come have included a Department for the Environment Circular 18/94, *Gypsy Sites Policy and Unauthorised Camping* (November 1994), which stated that "it is a matter for local discretion whether it is appropriate to evict an unauthorised [Gypsy] encampment". Matters to be taken into account were said to include whether there were authorised sites; and, if not, whether the unauthorised encampment was causing a nuisance and whether services could be provided to it. Authorities were also urged to try to identify possible emergency stopping places as close as possible to the transit routes so that Travellers could rest there for short periods; and were advised that where Gypsies were unlawfully encamped, it was for the local authority to take necessary steps to ensure that any such encampment did not constitute a threat to public health. Local authorities were also urged not to use their powers to evict Gypsies needlessly, and to use those powers in a humane and compassionate way. In 2004 the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping*, which recommended that local authorities and other public bodies distinguish between unauthorised encampment locations which were unacceptable, for instance because they involved traffic hazards or public health risks, and those which were acceptable, and stated that each encampment location must be considered on its merits. It also indicated that specified welfare inquiries should be undertaken in relation to the Travellers and their families before any decision was made as to whether to bring proceedings to evict them. Similar guidance was to be found in the Home Office *Guide to Effective Use of Enforcement Powers* (*Part 1; Unauthorised Encampments*), published in February 2006, in which it was emphasised that local authorities have an obligation to carry out welfare assessments on unauthorised campers to identify any issue that needs to be addressed before enforcement action is taken against them. It also urged authorities to consider whether enforcement was absolutely necessary.

79 The fact that Travellers and Gypsies have almost invariably chosen not to appear in these proceedings (and have not been represented) has left judges with the challenging task of carrying out a proportionality assessment which has inevitably involved weighing all of these considerations, including the relevance of the breadth of the injunctions sought and the fact that the injunctions were directed against "persons unknown", in deciding whether they should be granted and, if so, for how long; and whether they should be made subject to particular conditions and safeguards and, if so, what those conditions and safeguards should be.

(6) Cameron

80 The decision of the Supreme Court in *Cameron* [2019] 1 WLR 1471 (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates B the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

C **81** The Court of Appeal allowed the claimant's appeal. In the Court of Appeal's view, it would be consistent with the CPR and the policy of the 1988 Act for proceedings to be brought and pursued against the unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151 of the 1988 Act for any judgment obtained against that driver.

D **82** A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who E were identifiable but whose names were unknown. Squatters occupying a property were, for example, identifiable by their location though they could not be named. The second comprised defendants, such as most hit and run drivers, who were not only anonymous but could not be identified.

83 Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all F of these modes of service was the same, namely to enable the court to be satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to enable him to do so within an appropriate period of time. The purpose of service (and substituted service) was to inform the defendant of the contents of the claim and the nature of the claimant's case against him; to give him notice that the court, being a court of competent jurisdiction, would in due G course proceed to decide the merits of that claim; and to give him an opportunity to be heard and to present his case before the court. It followed that it was not possible to issue or amend a claim form so as to sue an unnamed defendant if it was conceptually impossible to bring the claim to his attention.

84 In the *Cameron* case there was no basis for inferring that the H offending driver was aware of the proceedings. Service on the insurer did not and would not without more constitute service on that offending driver (nor was the insurer directly liable); alternative service on the insurer could not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it

© 2024 The Incorporated Council of Law Reporting for England and Wales

had not been established that this was an appropriate case in which to dispense with service altogether for any other reason. It followed that the driver could not be sued under the description relied upon by the claimant. A

85 This important decision was followed in a relatively short space of time by a series of five appeals to and decisions of the Court of Appeal concerning the way in which and the extent to which proceedings for injunctive relief against persons unknown, including newcomers, could be used to restrict trespass by constantly changing communities of Travellers, Gypsies and protesters. It is convenient to deal with them in broadly chronological order. B

(7) Ineos

86 In *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, the claimants, a group of companies and individuals connected with the business of shale and gas exploration by fracking, sought interim injunctions to restrain what they contended were threatened and potentially unlawful acts of protest, including trespass, nuisance and harassment, before they occurred. The judge was satisfied on the evidence that there was a real and imminent threat of unlawful activity if he did not make an order pending trial and it was likely that a similar order would be made at trial. He therefore made the orders sought by the claimants, save in relation to harassment. C D

87 On appeal to the Court of Appeal it was argued, among other things, that the judge was wrong to grant injunctions against persons unknown and that he had failed properly to consider whether the claimants were likely to obtain the relief they sought at trial and whether it was appropriate to grant an injunction against persons unknown, including newcomers, before they had had an opportunity to be heard. E

88 These arguments were addressed head-on by Longmore LJ, with whom the other members of the court agreed. He rejected the submission that a claimant could never sue persons unknown unless they were identifiable at the time the claim form was issued. He also rejected, as too absolutist, the submission that an injunction could not be granted to restrain newcomers from engaging in the offending activity, that is to say persons who might only form the intention to engage in the activity at some later date. Lord Sumption's categorisation of persons who might properly be sued was not intended to exclude newcomers. To the contrary, Longmore LJ continued, Lord Sumption appeared rather to approve the decision in *Bloomsbury* and he had expressed no disapproval of the decision in *Hampshire Waste Services*. F G

89 Longmore LJ went on tentatively to frame the requirements of an injunction against unknown persons, including newcomers, in a characteristically helpful and practical way. He did so in these terms (at para 34): (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable H

© 2024 The Incorporated Council of Law Reporting for England and Wales

A persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

90 The issue of unauthorised encampments by Gypsies and Travellers was considered by the Court of Appeal a short time later in *Bromley London* B *Borough Council v Persons Unknown* [2020] PTSR 1043. This was an appeal against the refusal by the High Court to grant a five-year de facto borough-wide prohibition of encampment and entry or occupation of accessible public spaces in Bromley except cemeteries and highways. The final injunction sought was directed at "persons unknown" but it was common ground that it was aimed squarely at the Gypsy and Traveller communities.

C **91** Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained them, D thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary E to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

92 The particular questions giving rise to the appeal were relatively F narrow (namely whether the judge had fallen into error in finding the order sought was disproportionate, in setting too high a threshold for assessment of the harm caused by trespass and in concluding that the local authority had failed to discharge its public sector equality duty); but the Court of Appeal was also invited and proceeded to give guidance on the broader question of how local authorities ought properly to address the issues raised by applications for such injunctions in the future. The decision is also G important because it was the first case involving an injunction in which the Gypsy and Traveller communities were represented before the High Court, and as a result of their success in securing the discharge of the injunction, it was the first case of this kind properly to be argued out at appellate level on the issues of procedural fairness and proportionality. It must also be borne in mind that the decision of the Supreme Court in *Cameron* was not cited to the Court of Appeal; nor did the Court of Appeal consider the H appropriateness as a matter of principle of granting such injunctions. Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as

© 2024 The Incorporated Council of Law Reporting for England and Wales

the elegant synthesis by Longmore LJ in *Ineos* (at para 34) of certain essential requirements for the grant of an injunction against persons unknown in a protester case (paras 29–30). He considered it appropriate to add in the present context (that of Travellers and Gypsies), first, that procedural fairness required that a court should be cautious when considering whether to grant an injunction against persons unknown, including Gypsies and Travellers, particularly on a final basis, in circumstances where they were not there to put their side of the case (paras 31–34); and secondly, that the judge had adopted the correct approach in requiring the claimant to show that there was a strong probability of irreparable harm (para 35).

94 The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

95 Coulson LJ went on (at paras 99–109) to give the wider guidance to which we have referred, and this is a matter to which we will return a little later in this judgment for it has a particular relevance to the principles to which newcomer injunctions in Gypsy and Traveller cases should be subject. Aspects of that guidance are controversial; but other aspects about which there can be no real dispute are that local authorities should engage in a process of dialogue and communication with travelling communities; should undertake, where appropriate, welfare and impact assessments; and should respect, appropriately, the culture, traditions and practices of the communities. Similarly, injunctions against unauthorised encampments should be limited in time, perhaps to a year, before review.

(9) Cuadrilla

96 The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition

© 2024 The Incorporated Council of Law Reporting for England and Wales

A against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

B **97** Only a few months later, in *Canada Goose* [2020] 1 WLR 2802 (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It C opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

98 Specifically, the claimants sought and obtained a without notice interim injunction against "persons unknown" who were described as D "persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the claimants' store]". The injunction restrained them from, among other things, assaulting or threatening staff and customers, entering or damaging the store and engaging in particular acts of demonstration within particular zones in the vicinity of the store. The terms of the order did E not require the claimants to serve the claim form on any "persons unknown" but permitted service of the interim injunction by handing or attempting to hand it to any person demonstrating at or in the vicinity of the store or by email to either of two stated email addresses, that of an activist group and that of People for the Ethical Treatment of Animals (PETA) Foundation ("PETA"), a charitable company dedicated to the protection of the rights of F animals. PETA was subsequently added to the proceedings as second defendant at its own request.

99 The claimants served many copies of the interim injunction on persons in the vicinity of the store, including over 100 identifiable individuals, but did not attempt to join any of them as parties to the claim. As for the claim form, this was sent by email to the two addresses specified for service of the interim injunction, and to one other individual who had G requested a copy.

100 In these circumstances, an application by the claimants for summary judgment and a final injunction was unsuccessful. The judge held that the claim form had not been served on any defendant to the proceedings; that it was not appropriate to permit service by alternative means (under CPR r 6.15) or to dispense with service (under CPR r 6.16); and that the interim injunction would be discharged. He also considered H that the description of the persons unknown was too broad, as it was capable of including protesters who might never intend to visit the store, and that the injunction was capable of affecting persons who did not carry out any activities which were otherwise unlawful. In addition, he considered that the proposed final injunction was defective in that it would capture

© 2024 The Incorporated Council of Law Reporting for England and Wales

future protesters who were not parties to the proceedings at the time when the injunction was granted. He refused to grant a final injunction.

101 The Court of Appeal dismissed the claimants' appeal. It held, first, that service of proceedings is important in the delivery of justice. The general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction—and that a person cannot be made subject to the jurisdiction without having such notice of the proceedings as will enable him to be heard. Here there was no satisfactory evidence that the steps taken by the claimants were such as could reasonably be expected to have drawn the proceedings to the attention of the respondent unknown persons; the claimants had never sought an order for alternative service under CPR r 6.15 and there was never any proper basis for an order under CPR r 6.16 dispensing with service.

102 Secondly, the Court of Appeal held that the court may grant an interim injunction before proceedings have been served (or even issued) against persons who wish to join an ongoing protest, and that it is also, in principle, open to the court in appropriate circumstances to limit even lawful activity where there is no other proportionate means of protecting the claimants' rights, as for example in *Hubbard v Pitt* [1976] QB 142 (protesting outside an estate agency), and *Burris v Azadani* [1995] 1 WLR 1372 (entering a modest exclusion zone around the claimant's home), and to this extent the requirements for a newcomer injunction explained in *Ineos* required qualification. But in this case, the description of the "persons unknown" was impermissibly wide; the prohibited acts were not confined to unlawful acts; and the interim injunction failed to provide for a method of alternative service which was likely to bring the order to the attention of the persons unknown. The court was therefore justified in discharging the interim injunction.

103 Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables* [2001] Fam 430, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron*—that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91). In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil

© 2024 The Incorporated Council of Law Reporting for England and Wales

A jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

104 This reasoning reveals the marked difference in approach and outcome from that of the Court of Appeal in the proceedings now before this court and highlights the importance of the issues to which it gives rise and to B which we referred at the outset. Indeed, the correctness and potential breadth of the reasoning of the Court of Appeal in *Canada Goose*, and how that reasoning differs from the approach taken by the Court of Appeal in these proceedings, lie at the heart of these appeals.

(11) The present case

C 105 The circumstances of the present appeals were summarised at paras 6–12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802. The Court of Appeal, however, D departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell* [2006] 1 WLR 658, which was binding on it.

106 The Court of Appeal's approach in the present case, as set out in the judgment of Sir Geoffrey Vos MR, with which the other members of the court agreed, was based primarily on the decision in *Gammell*. It proceeded, therefore, on the basis that the persons to whom an injunction is addressed E can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical F paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

107 Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction G had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8 procedure. Furthermore, as the facts of the H earlier cases demonstrated and *Bromley* [2020] PTSR 1043 explained, the court needed to keep injunctions against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

© 2024 The Incorporated Council of Law Reporting for England and Wales

4. A new type of injunction?

108 It is convenient to begin the analysis by considering certain strands in the arguments which have been put forward in support of the grant of newcomer injunctions, initially outside the context of proceedings against Travellers. They may each be labelled with the names of the leading cases from which the arguments have been derived, and we will address them broadly chronologically.

109 The earliest in time is *Venables* [2001 Fam 430 discussed at paras 32–33 above. The case is important as possibly the first contra mundum equitable injunction granted in recent times, and in our view correctly explains why the objections to the grant of newcomer injunctions against Travellers go to matters of established principle rather than jurisdiction in the strict sense: i e not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* [2007] 1 WLR 320 at para 25 (cited at para 16 above). In that respect the *Venables* injunction went even further than the typical Traveller injunction, where the newcomers are at least confined to a class of those who might wish to camp on the relevant prohibited sites. Nevertheless, for the reasons we explained at paras 25 and 61 above, and which we develop further at paras 155–159 below, newcomer injunctions can be regarded as being analogous to other injunctions or orders which have a binding effect upon the public at large. Like wardship orders contra mundum (para 31 above), *Venables*-type injunctions (paras 32–33 above), reporting restrictions (para 34 above), and embargoes on the publication of draft judgments (para 35 above), they are not limited in their effects to particular individuals, but can potentially affect anyone in the world.

110 *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2017] EMLR 11; *RXG v Ministry of Justice* [2020] QB 703; *In re Persons formerly known as Winch* [2021] EMLR 20 and [2022] ACD 22); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111 The next in time is the *Bloomsbury* case [2003] 1 WLR 1633, the facts and reasoning in which were summarised in paras 58–59 above. The case was analysed by Lord Sumption in *Cameron* [2019] 1 WLR 1471 by reference to the distinction which he drew at para 13, as explained earlier,

© 2024 The Incorporated Council of Law Reporting for England and Wales

A between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating B process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

112 Lord Sumption added at para 15 that where an interim injunction was granted and could be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it would sometimes be enough to bring the C proceedings to the defendant's attention. He cited *Bloomsbury* as an example, stating:

> "the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction."

D

113 Lord Sumption categorised *Cameron* itself as a case in the second category, stating at para 16:

> One does not, however, identify an unknown person simply by referring to something that he has done in the past. 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle E registration number KG03 ZJZ on 26 May 2013', does not identify anyone. It does not enable one to know whether any particular person is the one referred to."

"Nor was there any specific interim relief, such as an injunction, which could be enforced in a way that would bring the proceedings to the unknown person's attention. The impossibility of service in such a case was, Lord F Sumption said, "due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is" (ibid). The alternative service approved by the Court of Appeal—service on the insurer—could not be expected to reach the driver, and would be tantamount to no service at all. Addressing what, if the case had proceeded differently, might have been the heart of the matter, Lord Sumption added G that although it might be appropriate to dispense with service if the defendant had concealed his identity in order to evade service, no submission had been made that the court should treat the case as one of evasion of service, and there were no findings which would enable it to do so.

114 We do not question the decision in *Cameron*. Nor do we question its essential reasoning: that proceedings should be brought to the notice of a person against whom damages are sought (unless, exceptionally, service can H be dispensed with), so that he or she has an opportunity to be heard; that service is the means by which that is effected; and that, in circumstances in which service of the amended claim on the substituted defendant would be impossible (even alternative service being tantamount to no service at all), the judge had accordingly been right to refuse permission to amend.

© 2024 The Incorporated Council of Law Reporting for England and Wales

115 That said, with the benefit of the further scrutiny that the point has received on this appeal, we have, with respect, some difficulties with other aspects of Lord Sumption's analysis. In the first place, we agree that it is generally necessary that a defendant should have such notice of the proceedings as will enable him to be heard before any final relief is ordered. However, there are exceptions to that general rule, as in the case of injunctions granted contra mundum, where there is in reality no defendant in the sense which Lord Sumption had in mind. It is also necessary to bear in mind that it is possible for a person affected by an injunction to be heard after a final order has been made, as was explained at para 40 above. Furthermore, notification, by means of service, and the consequent ability to be heard, is an essentially practical matter. As this court explained in *Abela v Baadarani* [2013] 1 WLR 2043, para 37, service has a number of purposes, but the most important is to ensure that the contents of the document served come to the attention of the defendant. Whether they have done so is a question of fact. If the focus is on whether service can in practice be effected, as we think it should be, then it is unnecessary to carry out the preliminary exercise of classifying cases as falling into either the first or the second of Lord Sumption's categories.

116 We also have reservations about the theory that it is necessary, in order for service to be effective, that the defendant should be identifiable. For example, Lord Sumption cited with approval the case of *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69, as illustrating circumstances in which alternative service was legitimate because "it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form" (para 15). That was a case concerned with online defamation. The defendants were described as persons unknown, responsible for the operation of the website on which the defamatory statements were published. Alternative service was effected by sending the claim form to email addresses used by the website owners, who were providers of a proxy registration service (i e they were registered as the owners of the domain name and licensed its operation by third parties, so that those third parties could not be identified from the publicly accessible database of domain owners). Yet the identities of the defendants were just as unknown as that of the driver in *Cameron,* and remained so after service had been effected: it remained impossible to identify any individuals as the persons described in the claim form. The alternative service was acceptable not because the defendants could be identified, but because, as the judge stated (para 16), it was reasonable to infer that emails sent to the addresses in question had come to their attention.

117 We also have difficulty in fitting the unnamed defendants in *Bloomsbury* within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron.* The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord

© 2024 The Incorporated Council of Law Reporting for England and Wales

A Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's B categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose*, para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

118 We also note that Lord Sumption's description of *Bloomsbury* and C *Gammell* as cases concerned with interim injunctions was influential in the later case of *Canada Goose*. It is true that the order made in *Bloomsbury* was not, in form, a final order, but it was in substance equivalent to a final order: it bound those unknown persons for the entirety of the only relevant period, which was the period leading up to the publication of the book. As for *Gammell*, the reasoning did not depend on whether the injunctions were D interim or final in nature. The order in Ms Gammell's case was interim ("until trial or further order"), but the point is less clear in relation to the order made in the accompanying case of Ms Maughan, which stated that "this order shall remain in force until further order".

119 More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may E be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed *Gammell* solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

120 We also observe that *Cameron* was not concerned with equitable remedies or equitable principles. Nor was it concerned with newcomers. F Understandably, given that the case was an action for damages, Lord Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (e g at paras 8 and 18–19). Proceedings in which injunctive relief is sought raise different considerations, partly because an injunction has to be brought to the notice of the defendant before it can be enforced against him or her. In some cases, furthermore, the real target of the injunctive relief is not the unidentified G defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2019] Lloyd's Rep FC 62. In other words, the identification of the unknown defendant can depend H upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron*.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A

121 It also needs to be borne in mind that the unnamed defendants in *Bloomsbury* formed a tiny class of thieves who might be supposed to be likely to reveal their identity to a media outlet during the very short period when their stolen copy of the book was an item of special value. The main purpose of seeking to continue the injunction against them was not to act as a deterrent to the thieves or even to enable them to be apprehended or committed for contempt, but rather to discourage any media publisher from dealing with them and thereby incurring liability for contempt as an aider and abetter: see *Cameron*, para 10; *Bloomsbury*, para 20. As we have explained (paras 41 and 46 above), it is not unusual in modern practice for an injunction issued against defendants, including persons unknown, to be designed primarily to affect the conduct of non-parties.

B

122 In that regard, it is to be noted that Lord Sumption's reason for regarding the injunction in *Bloomsbury* as legitimate was not the reason given by the Vice-Chancellor. His justification lay not in the ability to serve persons who identified themselves by breach, but in the absence of any injustice in framing an injunction against a class of unnamed persons provided that the class was sufficiently precisely defined that it could be said of any particular person whether they fell inside or outside the class of persons restrained. That justification may be said to have substantial equitable foundations. It is the same test which defines the validity of a class of discretionary beneficiaries under a trust: see *In re Baden's Deed Trusts* [1971] AC 424, 456. The trust in favour of the class is valid if it can be said of any given postulant whether they are or are not a member of the class.

C

D

123 That justification addresses what the Vice-Chancellor may have perceived to be one of the main objections to the joinder of (or the grant of injunctions against) unnamed persons, namely that it is too vague a way of doing so: see para 7. But it does not seek directly to address the potential for injustice in restraining persons who are not just unnamed, but genuine newcomers: e g in the present context persons who have not at the time when the injunction was granted formed any desire or intention to camp at the prohibited site. The facts of the *Bloomsbury* case make that unsurprising. The unnamed defendants had already stolen copies of the book at the time when the injunction was granted, and it was a fair assumption at the time of the hearing before the Vice-Chancellor that they had formed the intention to make an illicit profit from its disclosure to the media before the launch date. Three had already tried to do so, been identified and arrested. The further injunction was just to catch the one or two (if any) who remained in the shadows and to prevent any publication facilitated by them in the meantime.

E

F

124 There is therefore a broad contextual difference between the injunction granted in *Bloomsbury* and the typical newcomer injunction against Travellers. The former was directed against a small group of existing criminals, who could not sensibly be classed as newcomers other than in a purely technical sense, where the risk of loss to the claimants lay within a tight timeframe before the launch date. The typical newcomer injunction against Travellers, on the other hand, is intended to restrain Travellers generally, for as long a period as the court can be persuaded to grant an injunction, and regardless of whether particular Travellers have yet become aware of the prohibited site as a potential camp site. The Vice-Chancellor's analysis does not seek to render joinder as a defendant unnecessary, whereas (as will be explained) the newcomer injunction does. But the case certainly

G

H

© 2024 The Incorporated Council of Law Reporting for England and Wales

A does stand as a precedent for the grant of relief otherwise than on an emergency basis against defendants who, although joined, have yet to be served.

125 We turn next to the supposed *Gammell* [2006] 1 WLR 658 solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of disobeying the relevant injunction. It has the merit of being specifically B addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

126 The circumstances and reasoning in *Gammell* were explained in paras 63–66 above. For present purposes it is the court's reasons for concluding that Ms Gammell became a defendant when she stationed her caravans on the site which matter. At para 32 Sir Anthony Clarke MR said C this:

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case . . . In the case of KG she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case D was it necessary to make her a defendant to the proceedings later."

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the E injunction and who had then continued to disobey it. He was not concerned with the position of a newcomer, wishing to camp on a prohibited site who, after learning of the injunction, simply decided to obey it and move on to another site. Such a person would not, on his analysis, become a defendant at all, even though constrained by the injunction as to their conduct. Service of the proceedings (as opposed to the injunction) was not raised as an issue F in that case as the necessary basis for in personam jurisdiction, other than merely for holding the ring. Neither *Cameron* nor *Fourie v Le Roux* had been decided. The real point, unsuccessfully argued, was that the injunction should not have the effect against any particular newcomer of placing them in contempt until a personalised proportionality exercise had been undertaken. The need for a personalised proportionality exercise is also G pursued on this appeal as a reason why newcomer injunctions should never be granted against Travellers, and we address it later in this judgment.

127 The concept of a newcomer automatically becoming (or self-identifying as) a defendant by disobeying the injunction might therefore be described, in 2005, as a solution looking for a problem. But it became a supposed solution to the problem addressed in this appeal when prayed in aid, first briefly and perhaps tentatively by Lord Sumption in *Cameron* at H para 15 and secondly by Sir Geoffrey Vos MR in great detail in the present case, at paras 28, 30–31, 37, 39, 82, 85, 91–92, 94 and 96 and concluding at 99 of the judgment. It may fairly be described as lying at the heart of his reasoning for allowing the appeals, and departing from the reasoning of the Court of Appeal in *Canada Goose*.

© 2024 The Incorporated Council of Law Reporting for England and Wales

128 This court is not of course bound to consider the matter, as was the Master of the Rolls, as a question of potentially binding precedent. We have the refreshing liberty of being able to look at the question anew, albeit constrained (although not bound) by the ratio of relevant earlier decisions of this court and of its predecessor. We conduct that analysis in the following paragraphs. While we have no reason to doubt the efficacy of the concept of self-identification as a defendant as a means of dealing with disobedience by a newcomer with an injunction, the propriety of which is not itself under challenge (as it was not in *Gammell*), we are not persuaded that self-identification as a defendant solves the basic problems inherent in granting injunctions against newcomers in the first place.

129 The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

130 A further problem with the *Gammell* solution is that where the defendants are defined by reference to the future act of infringement, a person who breaches the order will, by that very act, become bound by it. The Court of Appeal of Victoria remarked, in relation to similar reasoning in the New Zealand case of *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185, that an order of that kind "had the novel feature—which would have appealed to Lewis Carroll—that it became binding upon a person only because that person was already in breach of it": *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143, 161.

131 Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

132 As it seems to us, the difficulty which has been experienced in the English cases, and to which *Gammell* has hitherto been regarded as providing

© 2024 The Incorporated Council of Law Reporting for England and Wales

A a solution, arises from treating newcomer injunctions as a particular type of conventional injunction inter partes, subject to the usual requirements as to service. The logic of that approach has led to the conclusion that persons affected by the injunction only become parties, and are only enjoined, in the event that they breach the injunction. An alternative approach would begin by accepting that newcomer injunctions are analogous to injunctions and other orders which operate contra mundum, as noted in para 109 above and B explained further at paras 155–159 below. Although the persons enjoined by a newcomer injunction should be described as precisely as may be possible in the circumstances, they potentially embrace the whole of humanity. Viewed in that way, if newcomer injunctions operate in the same way as the orders and injunctions to which they are analogous, then anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they C have been served with the proceedings. Anyone affected by the injunction can apply to have it varied or discharged, and can apply to be made a defendant, whether they have obeyed it or disobeyed it, as explained in para 40 above. Although not strictly necessary, those safeguards might also be reflected in provisions of the order: for example, in relation to liberty to apply. We shall return below to the question whether this alternative D approach is permissible as a matter of legal principle.

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose* [2020] 1 WLR 2802. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose*?

134 Although we do not doubt the correctness of the decision in E *Canada Goose*, we are not persuaded by the reasoning at paras 89–93, which we summarised at para 103 above. In addition to the criticisms made by the Court of Appeal which we have summarised at para 107 above, and with which we respectfully agree, we would make the following points.

135 First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables*, in which a F final injunction could be granted contra mundum, but that protester actions did not fall within "that exceptional category". Accordingly, "The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive G category. Such an approach is mistaken in principle, as explained in para 21 above.

136 The court buttressed its adoption of the "usual principle" with the observation that it was "consistent with the fundamental principle in *Cameron* . . . that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be H heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

137 The court also observed at para 92 that "An interim injunction is temporary relief intended to hold the position until trial", and that "Once

© 2024 The Incorporated Council of Law Reporting for England and Wales

the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43–49 above. As we have explained (e g at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

138 We are also unpersuaded by the court's observation that private law remedies are unsuitable "as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters" (para 93). If that were so, where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end. That would prioritise formalism over substance, contrary to a basic principle of equity (para 151 below). As we shall explain, there is no overriding reason why the courts cannot devise procedures which enable injunctions to be granted which prohibit unidentified persons from behaving unlawfully, and which enable such persons subsequently to become parties to the proceedings and to seek to have the injunctions varied or discharged.

139 The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron*, and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (i e in the old jargon ex parte) injunction, that is an injunction which,

© 2024 The Incorporated Council of Law Reporting for England and Wales

A at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

B 140 More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129–132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (e g by seeing a copy of the order at the relevant site or by reading it on the internet), may be expected to comply with the injunction rather than act in breach of it. At the point of compliance that person will not be a defendant, C if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant D by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at E the interim stage.

141 In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the F assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that G they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

142 Recognition that injunctions against newcomers are in substance always a type of without notice injunction, whether in form interim or final, H is in our view the starting point in a reliable assessment of the question whether they should be made at all and, if so, by reference to what principles and subject to what safeguards. Viewed in that way they then need to be set against the established categories of injunction to see whether they fall into an existing legitimate class, or, if not, whether they display features by

© 2024 The Incorporated Council of Law Reporting for England and Wales

reference to which they may be regarded as a legitimate extension of the court's practice.

143 The distinguishing features of an injunction against newcomers are in our view as follows:

(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in *Cameron*) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.

(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.

(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.

(iv) Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.

(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.

(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.

(vii) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.

(viii) Nor is the injunction designed (like a freezing injunction, search order, *Norwich Pharmacal* or *Bankers Trust* order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some

© 2024 The Incorporated Council of Law Reporting for England and Wales

A related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

144 Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as B evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in para 143(viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that C closely related to the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

145 Faced with the development by the lower courts of what really is in substance a new type of injunction, and with disagreement among them D about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

> E "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> "(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

This or a very similar formulation has provided the statutory basis for the F grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, G to inform the judge and the parties as to what is likely to be just or convenient.

146 Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and H restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* [2007] 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the

© 2024 The Incorporated Council of Law Reporting for England and Wales

general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see e g *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

147 The expression of the readiness of equity to change and adapt its principles for the grant of equitable relief which has best stood the test of time lies in the following well-known passage from *Spry* (para 17 above) at p 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

148 In *Broad Idea* [2023] AC 389 (para 17 above) at paras 57–58 Lord Leggatt JSC (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* [2000] QB 775 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, that summary in *Spry* has come to be embedded in English law. The majority opinion in *Broad Idea* also explains why what some considered to be the apparent assumption in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 that the relevant equitable principles became set in stone in 1873 was, and has over time been conclusively proved to be, wrong.

149 The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law. That is frequently because equity perceives that the strict pursuit of a common law right would be contrary to conscience. That underlies, for example, rectification, undue influence and equitable estoppel. But that conscience-based aspect of the principle has no persuasive application in the present context.

150 Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Pt 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* [2009] 1 WLR 2780 (para 67 above) as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in

© 2024 The Incorporated Council of Law Reporting for England and Wales

A the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Baroness Hale JSC at para 25 is resonant:

> "The underlying principle is ubi ius, ibi remedium: where there is a B right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted."

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (para 130 above) at pp 499–500, C cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 at para 14.

151 The second relevant general equitable principle is that equity looks to the substance rather than the form. As Lord Romilly MR stated in *Parkin v Thorold* (1852) 16 Beav 59, 66–67:

> "Courts of Equity make a distinction in all cases between that which is D matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

That principle assists in the present context for two reasons. The first (discussed above) is that it illuminates the debate about the type of E injunction with which the court is concerned, here enabling an escape from the twin silos of final and interim and recognising that injunctions against newcomers are all in substance without notice injunctions. The second is that it enables the court to assess the most suitable means of ensuring that a newcomer has a proper opportunity to be heard without being shackled to any particular procedural means of doing so, such as service of the F proceedings.

152 The third general equitable principle is equity's essential flexibility, as explained at paras 19–22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking G development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Pt 25 and which may be modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Cia Naviera SA v* H *International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

© 2024 The Incorporated Council of Law Reporting for England and Wales

153 Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. This is best illustrated by the history of the supposed limiting principle (or even jurisdictional constraint) affecting all injunctions apparently laid down by Lord Diplock in *The Siskina* [1979] AC 210 (para 43 above) that an injunction could only be granted in, or as ancillary to, proceedings for substantive relief in respect of a cause of action in the same jurisdiction. The lengthy process whereby that supposed fundamental principle has been broken down over time until its recent express rejection is described in detail in the *Broad Idea* case [2023] AC 389 and needs no repetition. But it is to be noted the number of types of injunctive or quasi-injunctive relief which quietly by-passed this supposed condition, as explained at paras 44–49 above, including *Norwich Pharmacal* and *Bankers Trust* orders and culminating in internet blocking orders, in none of which was it asserted that the respondent had invaded, or even threatened to invade, some legal right of the applicant.

154 It should not be supposed that all relevant general equitable principles favour the granting of injunctions against newcomers. Of those that might not, much the most important is the well-known principle that equity acts in personam rather than either in rem or (which may be much the same thing in substance) contra mundum. A main plank in the appellants' submissions is that injunctions against newcomers are by their nature a form of prohibition aimed, potentially at least, at anyone tempted to trespass or camp (depending upon the drafting of the order) on the relevant land, so that they operate as a form of local law regulating how that land may be used by anyone other than its owner. Furthermore, such an injunction is said in substance to criminalise conduct by anyone in relation to that land which would otherwise only attract civil remedies, because of the essentially penal nature of the sanctions for contempt of court. Not only is it submitted that this offends against the in personam principle, but it also amounts in substance to the imposition of a regime which ought to be the preserve of legislation or at least of byelaws.

155 It will be necessary to take careful account of this objection at various stages of the analysis which follows. At this stage it is necessary to note the following. First, equity has not been blind, or reluctant, to recognise that its injunctions may in substance have a coercive effect which, however labelled, extends well beyond the persons named as defendants (or named as subject to the injunction) in the relevant order. Very occasionally, orders have already been made in something approaching a contra mundum form, as in the *Venables* case already mentioned. More frequently the court has expressly recognised, after full argument, that an injunction against named persons may involve third parties in contempt for conduct in breach of it, where for example that conduct amounts to a contemptuous abuse of the court's process or frustrates the outcome which the court is seeking to achieve: see the *Bloomsbury* case [2003] 1 WLR 1633 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, discussed at paras 37–41, 61–62 and 121–124 above. In all those examples the court was seeking to preserve confidentiality in, or the intellectual property rights in relation to, specified information, and framed its injunction in a way which would bind anyone into whose hands that information subsequently came.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 156 A more widespread example is the way in which a *Mareva* injunction is relied upon by claimants as giving protection against asset dissipation by the defendant. This is not merely (or even mainly) because of its likely effect upon the conduct of the defendant, who may well be a rogue with no scruples about disobeying court orders, but rather its binding effect (once notified to them) upon the defendant's bankers and other reputable custodians of his assets: see *Z Ltd v A-Z and AA-LL* [1982] QB 558 (para 41 B above).

157 Courts quietly make orders affecting third parties almost daily, in the form of the embargo upon publication or other disclosure of draft judgments, pending hand-down in public: see para 35 above. It cannot we hope be doubted that if a draft judgment with an embargo in this form came into the hands of someone (such as a journalist) other than the parties or C their legal advisors it would be a contempt for that person to publish or disclose it further. Such persons would plainly be newcomers, in the sense in which that term is here being used.

158 It may be said, correctly, that orders of this kind are usually made so as to protect the integrity of the court's process from abuse. Nonetheless they have the effect of attaching to a species of intangible property a legal regime giving rise to a liability, if infringed, which sounds in contempt, D regardless of the identity of the infringer. In conceptual terms, and shorn of the purpose of preventing abuse, they work in rem or contra mundum in much the same way as an anti-trespass injunction directed at newcomers pinned to a post on the relevant land. The only difference is that the property protected by the former is intangible, whereas in the latter it is land. In relation to any such newcomer (such as the journalist) the embargo is E made without notice.

159 It is fair comment that a major difference between those types of order and the anti-trespass order is that the latter is expressly made against newcomers as "persons unknown" whereas the former (apart from the exceptional *Venables* type) are not. But if the consequences of breach are the same, and equity looks to the substance rather than to the form, that distinction may be of limited weight.

F 160 Protection of the court's process from abuse, or preservation of the utility of its future orders, may fairly be said to be the bedrock of many of equity's forays into new forms of injunction. Thus freezing injunctions are designed to make more effective the enforcement of any ultimate money judgment: see *Broad Idea* [2023] AC 389 at paras 11–21. This is what Lord Leggatt JSC there called the enforcement principle. Search orders are G designed to prevent dishonest defendants from destroying relevant documents in advance of the formal process of disclosure. *Norwich Pharmacal* orders are a form of advance third party disclosure designed to enable a claimant to identify and then sue the wrongdoer. Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere.

H 161 But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP

© 2024 The Incorporated Council of Law Reporting for England and Wales

that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of "ordinary principles of equity": see *Cartier* [2018] 1 WLR 3259 (para 20 above) per Lord Sumption JSC at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2015] Bus LR 298, para 198.

162 The effect of an internet blocking order, or the cumulative effect of such orders against ISPs which share most of the relevant market, is therefore to hinder the wrongdoers from pursuing their infringing sales on the internet, without them ever being named or joined as defendants in the proceedings or otherwise given a procedural opportunity to advance any defence, other than by way of liberty to apply to vary or discharge the order: see again per Arnold J at para 262.

163 Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

164 Viewed in that way, internet blocking orders are in substance more of a precedent or jumping-off point for the development of newcomer injunctions than might at first sight appear. They demonstrate the imaginative way in which equity has provided an effective remedy for the protection and enforcement of civil rights, where conventional means of proceeding against the wrongdoers are impracticable or ineffective, where the objective of protecting the integrity or effectiveness of related court process is absent, and where the risk of injustice of a without notice order as against alleged wrongdoers is regarded as sufficiently met by the preservation of liberty to them to apply to have the order discharged.

165 We have considered but rejected summary possession orders against squatters as an informative precedent. This summary procedure (avoiding any interim order followed by final order after trial) was originally provided for by RSC Ord 113, and is now to be found in CPR Pt 55. It is commonly obtained against persons unknown, and has effect against newcomers in the sense that in executing the order the bailiff will remove not

© 2024 The Incorporated Council of Law Reporting for England and Wales

A merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

166 Tempting though the superficial similarities may be as between possession orders against squatters and injunctions against newcomers, they afford no relevant precedent for the following reasons. First, they are the B creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428–9 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons C from land, but disobedience to the bailiff does not sound in contempt. Thirdly, the possession order works once and for all by a form of execution which puts the owner of the land back in possession, but it has no ongoing effect in prohibiting entry by newcomers wishing to camp upon it after the order has been executed. Its shortcomings in the Traveller context are one of the reasons prayed in aid by local authorities seeking injunctions against D newcomers as the only practicable solution to their difficulties.

167 These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be E granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other F statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Convention G rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226–231 below); and the most generous provision for liberty (i e permission) to apply to have the injunction varied or set aside, and on H terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both

© 2024 The Incorporated Council of Law Reporting for England and Wales

to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries.

168 The issues in this appeal have been formulated in such a way that the appellants have the burden of showing that the balancing exercise involved in weighing those competing considerations can never come down in favour of granting such an injunction. We have not been persuaded that this is so. We will address the main objections canvassed by the appellants and, in the next section of this judgment, set out in a little more detail how we conceive that the necessary protection for newcomers' rights should generally be built into the process for the application for, grant and subsequent monitoring of this type of injunction.

169 We have already mentioned the objection that an injunction of this type looks more like a species of local law than an in personam remedy between civil litigants. It is said that the courts have neither the skills, the capacity for consultation nor the democratic credentials for making what is in substance legislation binding everyone. In other words, the courts are acting outside their proper constitutional role and are making what are, in effect, local laws. The more appropriate response, it is argued, is for local authorities to use their powers to make byelaws or to exercise their other statutory powers to intervene.

170 We do not accept that the granting of injunctions of this kind is constitutionally improper. In so far as the local authorities are seeking to prevent the commission of civil wrongs such as trespass, they are entitled to apply to the civil courts for any relief allowed by law. In particular, they are entitled to invoke the equitable jurisdiction of the court so as to obtain an injunction against potential trespassers. For the reasons we have explained, courts have jurisdiction to make such orders against persons who are not parties to the action, i e newcomers. In so far as the local authorities are seeking to prevent breaches of public law, including planning law and the law relating to highways, they are empowered to seek injunctions by statutory provisions such as those mentioned in para 45 above. They can accordingly invoke the equitable jurisdiction of the court, which extends, as we have explained, to the granting of newcomer injunctions. The possibility of an alternative non-judicial remedy does not deprive the courts of jurisdiction.

171 Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on

© 2024 The Incorporated Council of Law Reporting for England and Wales

A instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not engage with the detail of any of these points, their objection being more a B matter of principle.

172 We have not been able to reach any conclusions about the issue of practicality, either generally or on the particular facts about the cases before the court. In our view the theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is not shown to be a reason why newcomer injunctions should never C be granted against Travellers. Rather, the question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis. We say more about that in the next section of this judgment.

173 A second main objection in principle was lack of procedural fairness, for which Lord Sumption's observations in *Cameron* were prayed D in aid. It may be said that recognition that injunctions against newcomers are in substance without notice injunctions makes this objection all the more stark, because the newcomer does not even know that an injunction is being sought against them when the order is made, so that their inability to attend to oppose is hard-wired into the process regardless of the particular facts.

174 This is an objection which applies to all forms of without notice injunction, and explains why they are generally only granted when there is E truly no alternative means of achieving the relevant objective, and only for a short time, pending an early return day at which the merits can be argued out between the parties. The usual reason is extreme urgency, but even then it is customary to give informal notice of the hearing of the application to the persons against whom the relief is sought. Such an application used then to be called "ex parte on notice", a partly Latin phrase which captured the F point that an application which had not been formally served on persons joined as defendants so as to enable them to attend and oppose it did not in an appropriate case mean that it had to be heard in their absence, or while they were ignorant that it was being made. In the modern world of the CPR, where "ex parte" has been replaced with "without notice", the phrase "ex parte on notice" admits no translation short of a simple oxymoron. But it demonstrates that giving informal notice of a without notice application is a G well-recognised way of minimising the potential for procedural unfairness inherent in such applications. But sometimes even the most informal notice is self-defeating, as in the case of a freezing injunction, where notice may provoke the respondent into doing exactly that which the injunction is designed to prohibit, and a search order, where notice of any kind is feared to be likely to trigger the bonfire of documents (or disposal of laptops) the H prevention of which is the very reason for the application.

175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement

© 2024 The Incorporated Council of Law Reporting for England and Wales

to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

176 But advertisement in advance might well alert bodies with a mission to protect Travellers' interests, such as the appellants, and enable them to intervene to address the court on the local authority's application with focused submissions as to why no injunction should be granted in the particular case. There is an (imperfect) analogy here with representative proceedings (paras 27–30 above). There may also be a useful analogy with the long-settled rule in insolvency proceedings which requires that a creditors' winding up petition be advertised before it is heard, in order to give advance notice to stakeholders in the company (such as other creditors) and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

177 It might be thought that the obvious antidote to the procedural unfairness of a without notice injunction would be the inclusion of a liberal right of anyone affected to apply to vary or discharge the injunction, either in its entirety or as against them, with express provision that the applicant need show no change of circumstances, and is free to advance any reason why the injunction should either never have been granted or, as the case may be, should be discharged or varied. Such a right is generally included in orders made on without notice applications, but Mr Drabble KC submitted that it was unsatisfactory for a number of reasons.

178 The first was that, if the injunction was final rather than interim, it would be decisive of the legal merits, and be incapable of being challenged thereafter by raising a defence. We regard this submission as one of the unfortunate consequences of the splitting of the debate into interim and final injunctions. We consider it plain that a without notice injunction against newcomers would not have that effect, regardless of whether it was in interim or final form. An applicant to vary or discharge would be at liberty to advance any reasons which could have been advanced in opposition to the grant of the injunction when it was first made. If that were not implicit in the reservation of liberty to apply (which we think it is), it could easily be made explicit as a matter of practice.

179 Mr Drabble KC's next objection to the utility of liberty to apply was more practical. Many or most Travellers, he said, would be seeking to fulfil their cultural practice of leading a peripatetic life, camping at any particular site for too short a period to make it worth going to court to contest an injunction affecting that site. Furthermore, unless they first camped on the prohibited site there would be no point in applying, but if they did camp there it would place them in breach of the injunction while applying to vary it. If they camped elsewhere so as to comply with the injunction, their rights (if any) would have been interfered with, in circumstances where there would be no point in having an expensive and

© 2024 The Incorporated Council of Law Reporting for England and Wales

A risky legal argument about whether they should have been allowed to camp there in the first place.

180 There is some force in this point, but we are not persuaded that the general disinclination of Travellers to apply to court really flows from the newcomer injunctions having been granted on a without notice application. If for example a local authority waited for a group of Travellers to camp unlawfully before serving them with an application for an injunction, B the Travellers might move to another site rather than raise a defence to the prevention of continued camping on the original site. By the time the application came to be heard, the identified group would have moved on, leaving the local authority to clear up, and might well have been replaced by another group, equally unidentifiable in advance of their arrival.

181 There are of course exceptions to this pattern of temporary C camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for trespass: see e g the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the D site on notice, in the usual way, not least because there would be known targets capable of being served with the proceedings, and any interim application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

182 The next logical objection (although little was made of it on this E appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason why public bodies doing their public duty are relieved of this burden (see *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28), and that reasoning has generally been applied in newcomer injunction cases against Travellers where the applicant is a local authority. We address this issue F further in the next section of this judgment (at para 234) and it would be wrong for us to express more definite views on it, in the absence of any submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

G 183 The appellants' final main point was that it would always be impossible when considering the grant of an injunction against newcomers to conduct an individualised proportionality analysis, because each potential target Traveller would have their own particular circumstances relevant to a balancing of their article 8 rights against the applicant's claim for an injunction. If no injunction could ever be granted in the absence of an individualised proportionality analysis of the circumstances of every H potential target, then it may well be that no newcomer injunction could ever be granted against Travellers. But we reject that premise. To the extent that a particular Traveller who became the subject of a newcomer injunction wished to raise particular circumstances applicable to them and relevant to the proportionality analysis, this would better be done under the liberty to

© 2024 The Incorporated Council of Law Reporting for England and Wales

apply if, contrary to the general disinclination or inability of Travellers to go to court, they had the determination to do so.

184 We have already briefly mentioned Mr Drabble KC's point about the inappropriateness of an injunction against one group of Travellers based only upon the disorderly conduct of an earlier group. This is in our view just an evidential point. A local authority that sought a borough-wide injunction based solely upon evidence of disorderly conduct by a single group of campers at a single site would probably fail the test in any event. It will no doubt be necessary to adduce evidence which justifies a real fear of widespread repetition. Beyond that, the point goes nowhere towards constituting a reason why such injunctions should never be granted.

185 The point was made by Stephanie Harrison KC for Friends of the Earth (intervening because of the implications of this appeal for protesters) that the potential for a newcomer injunction to cause procedural injustice was not regulated by any procedure rules or practice statements under the CPR. Save in relation to certain statutory applications referred to in para 51 above this is true at present, but it is not a good reason to inhibit equity's development of a new type of injunction. A review of the emergence of freezing injunctions and search orders shows how the necessary procedural checks and balances were first worked out over a period of development by judges in particular cases, then addressed by text-book writers and academics and then, at a late stage in the developmental process, reduced to rules and practice directions. This is as it should be. Rules and practice statements are appropriate once experience has taught judges and practitioners what are the risks of injustice that need to be taken care of by standard procedures, but their reduction to settled (and often hard to amend) standard form too early in the process of what is in essence judge-made law would be likely to inhibit rather than promote sound development. In the meantime, the courts have been actively reviewing what these procedural protections should be, as for example in the *Ineos* and *Bromley* cases (paras 86–95 above). We elaborate important aspects of the appropriate protections in the next section of this judgment.

186 Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate exercise of the court's equitable discretion, where the general conditions set out in para 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights

187 We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further,

© 2024 The Incorporated Council of Law Reporting for England and Wales

A the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. B We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

188 Any applicant for the grant of an injunction against newcomers in a C Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i)).

189 This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are) D properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The E third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.

F

(i) An obligation or duty to provide sites for Gypsies and Travellers

190 The extent of any obligation on local authorities in England to provide sufficient sites for Gypsies and Travellers in the areas for which they are responsible has changed over time.

191 The starting point is section 23 of the Caravan Sites and Control of G Development Act 1960 ("CSCDA 1960") which gave local authorities the power to close common land to Gypsies and Travellers. As Sedley J observed in *R v Lincolnshire County Council, Ex p Atkinson* (1996) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans might be brought, whether for temporary purposes or for use as permanent H residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.

192 In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a

© 2024 The Incorporated Council of Law Reporting for England and Wales

duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

193 Some 25 years later, the CJPOA repealed section 6 of the CSA 1968. But the *power* to provide sites for Travellers and Gypsies remained. This is important for it provides a way to give effect to the assessment by local authorities of the needs of these communities, and these are matters we address below.

194 The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

195 For many years there has been an obligation on local authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers when carrying out their periodic review of housing needs under section 8 of the Housing Act 1985.

196 This obligation was first imposed by section 225 of the Housing Act 2004. This measure was repealed by section 124 of the Housing and Planning Act 2016. Instead, the duty of local housing authorities in England to carry out a periodic review of housing needs under section 8 of the Housing Act 1985 has since 2016 included (at section 8(3)) a duty to consider the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed.

(iii) Planning policy

197 Since about 1994, and with the repeal of the statutory duty to provide sites, the general issue of Traveller site provision has come increasingly within the scope of planning policy, just as the government anticipated.

198 Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled *Gypsy Sites and Planning*. This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local planning authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts

© 2024 The Incorporated Council of Law Reporting for England and Wales

A to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 13.

199 The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA B 2004") and the regulations made under it. Part 2 of the PCPA 2004 deals with local development and stipulates that the LPA is to prepare a development scheme and plan; that this must set out the authority's policies; that in preparing the local development plan, the authority must have regard to national policy; that each plan must be sent to the Secretary of State for independent examination and that the purpose of this examination is, C among other things, to assess its soundness and that will itself involve an assessment whether it is consistent with national policy.

200 Meantime, the advice in Circular 1/94 having failed to achieve its purpose, the government has from time to time issued new planning advice on the provision of sites for Gypsies and Travellers in England, and that advice may be taken to reflect national policy.

201 More specifically, in 2006 advice was issued in the form of the D Office of the Deputy Prime Minister Circular 1/06 *Planning for Gypsy and Traveller Caravan Sites*. The 2006 guidance was replaced in March 2012 by *Planning Policy for Traveller Sites* ("PPTS 2012"). In August 2015, a revised version of PPTS 2012 was issued ("PPTS 2015") and this is to be read with the National Planning Policy Framework. There has recently been a challenge to a decision refusing planning permission on the basis that one E aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2023] PTSR 312. But for present purposes it is sufficient to say (and it remains the case) that there is in these policy documents clear advice that LPAs should, when producing their local plans, identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets to address the needs of F Gypsies and Travellers for permanent and transit sites. They should also identify a supply of specific, developable sites or broad locations for growth for years 6–10 and even, where possible, years 11–15. The advice is extensive and includes matters to which LPAs must have regard including, among other things, the presumption in favour of sustainable development; the possibility of cross-authority co-operation; the surrounding population's G size and density; the protection of local amenities and the environment; the need for appropriate land supply allocations and to respect the interests of the settled communities; the need to ensure that Traveller sites are sustainable and promote peaceful and integrated co-existence with the local communities; and the need to promote access to appropriate health services and schools. The LPAs are also advised to consider the need to avoid placing undue pressure on local infrastructure and services, and to provide a settled H base that reduces the need for long distance travelling and possible environmental damage caused by unauthorised encampments.

202 The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local

© 2024 The Incorporated Council of Law Reporting for England and Wales

authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction.

(iv) Consultation and co-operation

203 This is another matter of considerable importance, and it is one with which all local authorities should willingly engage. We have no doubt that local authorities, other responsible bodies and representatives of the Gypsy and Traveller communities would benefit from a dialogue and co-operation to understand their respective needs; the concerns of the local authorities, local charities, business and community groups and members of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action.

(v) Public spaces protection orders

204 The Anti-social Behaviour, Crime and Policing Act 2014 confers on local authorities the power to make public spaces protection orders ("PSPOs") to prohibit encampments on specific land. PSPOs are in some respects similar to byelaws and are directed at behaviour and activities carried on in a public place which, for example, have a detrimental effect on the quality of life of those in the area, are or are likely to be persistent or continuing, and are or are likely to be such as to make the activities unreasonable. Further, PSPOs are in general easier to make than byelaws because they do not require the involvement of central government or extensive consultation. Breach of a PSPO without reasonable excuse is a criminal offence and can be enforced by a fixed penalty notice or prosecution with a maximum fine of level three on the standard scale. But any PSPO must be reasonable and necessary to prevent the conduct and detrimental effects at which it is targeted. A PSPO takes precedence over any byelaw in so far as there is any overlap.

(vi) Criminal Justice and Public Order Act 1994

205 The CJPOA empowers local authorities to deal with unauthorised encampments that are causing damage or disruption or involve vehicles, and it creates a series of related offences. It is not necessary to set out full details of all of them. The following summary gives an idea of their range and scope.

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a

© 2024 The Incorporated Council of Law Reporting for England and Wales

A reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

207 Following amendment in 2003, section 62A of the CJPOA confers on the police a power to direct trespassers with vehicles to leave land at the occupier's request, and that is so even if the trespassers have not caused damage or used threatening behaviour. Where trespassers have at least one B vehicle between them and are there with the common purpose of residing there, the police, (if so requested by the occupier) have the power to direct a trespasser to leave and to remove any vehicle or property, subject to this proviso: if they have caravans that (after consultation with the relevant local authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

C 208 Focusing more directly on local authorities, section 77 of the CJPOA confers on the local authority a power to direct campers to leave open-air land where it appears to the authority that they are residing in a vehicle within its area, whether on a highway, on unoccupied land or on occupied land without the consent of the occupier. There is no need to establish that these activities have caused damage or disruption. The D direction must be served on each person to whom it applies, and that may be achieved by directing it to all occupants of vehicles on the land; and failing other effective service, it may be affixed to the vehicles in a prominent place. Relevant documents should also be displayed on the land in question. It is an offence for persons who know that such an order has been made against them to fail to comply with it.

E (vii) Byelaws

209 There is a measure of agreement by all parties before us that the power to make and enforce byelaws may also have a bearing on the issues before us in this appeal. Byelaws are a form of delegated legislation made by local authorities under an enabling power. They commonly require something to be done or refrained from in a particular area or location. F Once implemented, byelaws have the force of law within the areas to which they apply.

210 There is a wide range of powers to make byelaws. By way of example, a general power to make byelaws for good rule and government and for the prevention and suppression of nuisances in their areas is conferred on district councils in England and London borough councils by G section 235(1) of the Local Government Act 1972 ("the LGA 1972"). The general confirming authority in relation to byelaws made under this section is the Secretary of State.

211 We would also draw attention to section 15 of the Open Spaces Act 1906 which empowers local authorities in England to make byelaws for the regulation of open spaces, for the imposition of a penalty for breach and for the removal of a person infringing the byelaw by an officer of the local H authority or a police constable. Notable too is section 164 of the Public Health Act 1875 (38 & 39 Vict c 55) which confers a power on the local authority to make byelaws for the regulation of public walks and pleasure grounds and for the removal of any person infringing any such byelaw, and under section 183, to impose penalties for breach.

© 2024 The Incorporated Council of Law Reporting for England and Wales

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (62 & 63 Vict c 30). A

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the Countryside Act 1949 (as amended by the Natural Environment and Rural Communities Act 2006); in relation to National Parks and areas of outstanding natural beauty under sections 90 and 91 of the 1949 Act (as amended); concerning the protection of country parks under section 41 of the Countryside Act 1968; and for the protection and preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000. B

214 We recognise that byelaws are sometimes subjected to detailed and appropriate scrutiny by the courts in assessing whether they are reasonable, certain in their terms and consistent with the general law, and whether the local authority had the power to make them. It is an aspect of the third of these four elements that generally byelaws may only be made if provision for the same purpose is not made under any other enactment. Similarly, a byelaw may be invalidated if repugnant to some basic principle of the common law. Further, as we have seen, the usual method of enforcement of byelaws is a fine although powers to seize and retain property may also be included (see, for example, section 237ZA of the LGA 1972), as may powers to direct removal. C D

215 The opportunity to make and enforce appropriate elements of this battery of potential byelaws, depending on the nature of the land in issue and the form of the intrusion, may seem at first sight to provide an important and focused way of dealing with unauthorised encampments, and it is a rather striking feature of these proceedings that byelaws have received very little attention from local authorities. Indeed, Wolverhampton City Council has accepted, through counsel, that byelaws were not considered as a means of addressing unauthorised encampments in the areas for which it is responsible. It maintains they are unlikely to be sufficient and effective in the light of (a) the existence of legislation which may render the byelaws inappropriate; (b) the potential effect of criminalising behaviour; (c) the issue of identification of newcomers; and (d) the modest size of any penalty for breach which is unlikely to be an effective deterrent. E F

216 We readily appreciate that the nature of travelling communities and the respondents to newcomer injunctions may not lend themselves to control by or yield readily to enforcement of these various powers and measures, including byelaws, alone, but we are not persuaded that the use of byelaws or other enforcement action of the kinds we have described can be summarily dismissed. Plainly, we cannot decide in this appeal whether the reaction of Wolverhampton City Council to the use of all of these powers and measures including byelaws is sound or not. We have no doubt, however, that this is a matter that ought to be the subject of careful consideration on the next review of the injunctions in these cases or on the next application for an injunction against persons unknown, including newcomers. G H

<u>(viii) A need for review</u>

217 Various aspects of this discussion merit emphasis at this stage. Local authorities have a range of measures and powers available to them to

© 2024 The Incorporated Council of Law Reporting for England and Wales

A deal with unlawful encampments. Some but not all involve the enactment and enforcement of byelaws. Many of the offences are punishable with fixed or limited penalties, and some are the subject of specified defences. It may be said that these form part of a comprehensive suite of measures and powers and associated penalties and safeguards which the legislature has considered appropriate to deal with the threat of unauthorised encampments by Gypsies and Travellers. We rather doubt that is so, particularly when B dealing with communities of unidentified trespassers including newcomers. But these are undoubtedly matters that must be explored upon the review of these orders.

(2) Evidence of threat of abusive trespass or planning breach

218 We now turn to more general matters and safeguards. As we have C foreshadowed, any local authority applying for an injunction against persons unknown, including newcomers, in Gypsy and Traveller cases must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the D threat must be real and imminent. We have no doubt that local authorities are well equipped to prepare this evidence, supported by copies of all relevant documents, just as they have shown themselves to be in making applications for injunctions in this area for very many years.

219 The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it E relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is F one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

220 The evidence in support of the application must therefore err on the side of caution; and the court, not the local authority, should be the judge of relevance.

G

(3) Identification or other definition of the intended respondents to the application

221 The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) H by name or in some other way, as Lord Sumption explained in *Cameron* [2019] 1 WLR 1471, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only

© 2024 The Incorporated Council of Law Reporting for England and Wales

permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

222 It is always important that an injunction spells out clearly and in everyday terms the full extent of the acts it prohibits, and this is particularly so where it is sought against persons unknown, including newcomers. The terms of the injunction—and therefore the prohibited acts—must correspond as closely as possible to the actual or threatened unlawful conduct. Further, the order should extend no further than the minimum necessary to achieve the purpose for which it was granted; and the terms of the order must be sufficiently clear and precise to enable persons affected by it to know what they must not do.

223 Further, if and in so far as the authority seeks to enjoin any conduct which is lawful viewed on its own, this must also be made absolutely clear, and the authority must be prepared to satisfy the court that there is no other more proportionate way of protecting its rights or those of others.

224 It follows but we would nevertheless emphasise that the prohibited acts should not be described in terms of a legal cause of action, such as trespass or nuisance, unless this is unavoidable. They should be defined, so far as possible, in non-technical and readily comprehensible language which a person served with or given notice of the order is capable of understanding without recourse to professional legal advisers.

(5) Geographical and temporal limits

225 The need for strict temporal and territorial limits is another important consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley* [2020] PTSR 1043, paras 99–109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged;

© 2024 The Incorporated Council of Law Reporting for England and Wales

A whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

226 We recognise that it would be impossible for a local authority to give effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the basis on which we have proceeded. On the other hand, in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief.

227 Here the following further points may also be relevant. First, local authorities have now developed ways to give effective notice of the grant of such injunctions to those likely to be affected by them, and they do so by the use of notices attached to the land and in other ways as we describe in the next section of this judgment. These same methods, appropriately modified, could be used to give notice of the application itself. As we have also mentioned, local authorities have been urged for some time to establish lines of communication with Traveller and Gypsy communities and those representing them, and all these lines of communication, whether using email, social media, advertisements or some other form, could be used by authorities to give notice to these communities and other interested persons and bodies of any applications they are proposing to make.

228 Secondly, we see merit in requiring any local authority making an application of this kind to explain to the court what steps it has taken to give notice of the application to persons likely to be affected by it or to have a proper interest in it, and of all responses it has received.

229 These are all matters for the judges hearing these applications to consider in light of the particular circumstances of the cases before them, and in this way to allow an appropriate practice to develop.

(7) Effective notice of the order

230 We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

231 Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this

© 2024 The Incorporated Council of Law Reporting for England and Wales

A is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) Liberty to apply to discharge or vary

232 As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) Costs protection

233 This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.

(10) Cross-undertaking

234 This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate. Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-by-case basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) Protest cases

235 The emphasis in this discussion has been on newcomer injunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A **236** Counsel for the Secretary of State for Transport has submitted and we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from B another in terms of the range and number of people who may be affected by the making or refusal of the injunction sought; the legal right to be protected; the illegality to be prevented; and the rights of the respondents to the application. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we C have explained.

(12) Conclusion

237 There is nothing in this consideration which calls into question the development of newcomer injunctions as a matter of principle, and we are satisfied they have been and remain a valuable and proportionate remedy in D appropriate cases. But we also have no doubt that the various matters to which we have referred must be given full consideration in the particular proceedings the subject of these appeals, if necessary at an appropriate and early review.

6. Outcome

238 For the reasons given above we would dismiss this appeal. Those E reasons differ significantly from those given by the Court of Appeal, but we consider that the orders which they made were correct. There follows a short summary of our conclusions:

(i) The court has jurisdiction (in the sense of power) to grant an injunction against "newcomers", that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in F the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.

(ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is G inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

(iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:

(a) That equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.

H (b) That equity looks to the substance rather than to the form.

(c) That equity takes an essentially flexible approach to the formulation of a remedy.

(d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

© 2024 The Incorporated Council of Law Reporting for England and Wales

These principles may be discerned in action in the remarkable development of the injunction as a remedy during the last 50 years.

(iv) In deciding whether to grant a newcomer injunction, the application of those principles in the context of trespass and breach of planning control by Travellers will be likely to require an applicant:

(a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.

(b) to build into the application and into the order sought procedural protection for the rights (including Convention rights) of the newcomers affected by the order, sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them. Those protections are likely to include advertisement of an intended application so as to alert potentially affected Travellers and bodies which may be able to represent their interests at the hearing of the application, full provision for liberty to persons affected to apply to vary or discharge the order without having to show a change of circumstances, together with temporal and geographical limits on the scope of the order so as to ensure that it is proportional to the rights and interests sought to be protected.

(c) to comply in full with the disclosure duty which attaches to the making of a without notice application, including bringing to the attention of the court any matter which (after due research) the applicant considers that a newcomer might wish to raise by way of opposition to the making of the order.

(d) to show that it is just and convenient in all the circumstances that the order sought should be made.

(v) If those considerations are adhered to, there is no reason in principle why newcomer injunctions should not be granted.

Appeal dismissed.

COLIN BERESFORD, Barrister

© 2024 The Incorporated Council of Law Reporting for England and Wales

European Convention on Human Rights

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

European Convention on Human Rights

as amended by Protocols Nos. 11, 14 and 15

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

The text of the Convention is presented as amended by the provisions of Protocol No. 15 (CETS No. 213) as from its entry into force on 1 August 2021 and of Protocol No. 14 (CETS No. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5 paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS No. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

Only the English and French versions of the Convention are authentic.

European Court of Human Rights
Council of Europe
67075 Strasbourg cedex
France
www.echr.coe.int

Contents

Convention for the Protection of Human Rights and Fundamental Freedoms 5

Protocol 33

Protocol No. 4 36

Protocol No. 6 40

Protocol No. 7 44

Protocol No. 12 50

Protocol No. 13 54

Protocol No. 16 58

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,

Have agreed as follows:

ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I
RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (a) the lawful detention of a person after conviction by a competent court;

   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4TH DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

APPLEBY v UNITED KINGDOM

(Environmental campaigners prevented from distributing leaflets in privately owned shopping centre)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.44306/98

(The *President*, Judge Pellonpää; *Judges* Bratza, Palm, Stráznická, Maruste, Pavlovschi, Garlicki)

(2003) 37 E.H.R.R. 38

May 6, 2003

H1 The first three applicants had established an environmental group, Washington First Forum (the fourth applicant), to campaign against a plan to build on the only public playing field near Washington town centre. They set about collecting signatures for a petition to persuade the council to reject the project. They tried to set up stands in the Galleries, a privately owned shopping mall in Washington. However, they were prevented from doing so by security guards employed by the company which owned the Galleries. Although the manager of one of the shops in the mall allowed the applicants to set up stands in his store in March 1998, this permission was not granted the following month when they wished to collect signatures for a further petition. The manager of the Galleries informed the applicants that permission had been refused because the private owner took a strictly neutral stance on all political and religious issues. Relying on Arts 10 and 11 of the Convention, the applicants complained that they had been prevented from meeting in their town centre to share information and ideas about the proposed building plans. They also complained under Art.13 that they had no effective remedy under domestic law.

H2 **Held:**

(1) by six votes to one that there had been no violation of Art.10;

(2) by six votes to one that there had been no violation of Art.11;

(3) unanimously that there had been no violation of Art.13.

1. Freedom of assembly and association: positive obligation; fair balance; access to private property (Art.10).

H3 (a) The freedom of expression is one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere but may require positive measures of protection, even in the sphere of relations between individuals. [39]

H4 (b) In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the

community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [40]

H5 (c) The Government do not bear any direct responsibility for the restriction of the applicants' freedom of expression. No element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel (a private company) or that this was done with ministerial permission. The issue is whether the Government have failed in any positive obligation to protect the exercise of Convention rights from interference by the private owner of the shopping centre. [41]

H6 (d) The nature of the Convention right at stake is an important consideration. The applicants wanted to draw the attention of fellow citizens to their opposition to the plans to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to the debate about the exercise of local government powers. However, while freedom of expression is an important right it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1 [42]–[43].

H7 (e) Although United States cases illustrate an increasing trend in accommodating freedom of expression to privately owned property open to the public, the United States Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. It cannot be said that there is as yet any emerging consensus that could assist the examination of the case under Art.10. [46]

H8 (f) Despite the importance of freedom of expression, Art.10 does not bestow any freedom of forum for the exercise of the right. While demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even to all publicly owned property. However, where the bar on access to property has the effect of preventing any effective exercise of freedom of expression or the essence of the right is destroyed, the State may have a positive obligation to protect the enjoyment of Convention rights by regulating property rights. [47]

H9 (g) The restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the new town centre. It did not prevent them from obtaining individual permission from businesses or from distributing their leaflets on the paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means. Consequently, they cannot claim that the private company's refusal effectively prevented them from communicating their views to their fellow citizens and therefore exercising their freedom of expression in a meaningful manner. [48]

H10 (h) Balancing the rights in issue and having regard to the nature and scope of the restriction, the Government did not fail in any positive obligation to protect the

applicants' freedom of expression. Accordingly, there was no violation of Art.10. [49]–[50]

2. Freedom of association (Art.11).

H11 Largely identical considerations arise under Art.11. For the same reasons, there was no failure to protect the applicants' freedom of assembly. [52]

3. Right to an effective remedy: Human Rights Act 1998 (Art.13).

H12 (a) Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention. [56]

H13 (b) Since October 2, 2000 when the Human Rights Act 1998 took effect, the applicants could have raised their complaints before the domestic courts, which would have had a range of possible redress available to them. Accordingly, there is no breach of Art.13. [56]

H14 **The following cases are referred to in the Court's judgment:**

1. *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50.
2. *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123.
3. *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245.
4. *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49.
5. *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56.

H15 **The following domestic cases are referred to in the Court's judgment:**

6. *Batchelder v Allied Stores Int'l N.E.* 2d 590 (Mass. 1983).
7. *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
8. *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
9. *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
10. *Citizens for Ethical Gov't v Gwinnet Place Assoc.*, 392 S.E.2d 8 (Ga. 1990).
11. *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
12. *Committee for Cth of Canada v Canada* [1991] 1 SCR 139.
13. *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
14. *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
15. *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
16. *Harrison v Carswell*, 62 D.L.R. (3d) 68.
17. *Hudgens v Nlrb*, 424 US 507 (1976).
18. *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
19. *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
20. *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
21. *Lloyd Corp v Whiffen*, 849 P.2d 446, 453–54 (Or. 1993).
22. *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

23. *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
24. *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
25. *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
26. *State v Schmit* (1980) N.J. 423A 2d 615
27. *State v Shack*, 277 1.2d 369 (N.J. 1971).
28. *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
29. *State of North Carolina v Felmet*, 273 S.E.2d 708 N.C. 1981).
30. *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).
31. *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
32. *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins. Co*, 515 1.2d 1331 (Pa 1986).
33. *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).

THE FACTS

I. The circumstances of the case

10 The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington in Tyne and Wear, where the fourth applicant, an environmental group set up by the applicants, is also based.

11 The new town centre of Washington is known as the Galleries and is located within an area now owned by Postel Properties Limited ("Postel"), a private company. This town centre was originally built by the Washington Development Corporation ("the Corporation"), a body set up by the government of the United Kingdom pursuant to an Act of Parliament to build the "new" centre. The centre was sold to Postel on December 30, 1987.

12 The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in this vicinity. However, the freehold of the careers' office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on behalf of Northumbria Police Authority. There was a post office and the offices of the housing department, leased to the Council by Postel, within the Galleries.

13 In about September 1997, the Council gave outline planning permission to the City of Sunderland College ("the College") to build on part of the Princess Anne Park in Washington, known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the College's proposal and to persuade the Council not to grant the College permission to build on the field.

14 On or about March 14, 1998, the first applicant, together with her husband and son, set up two stands in the entrance of the shopping mall in the Galleries,

displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not allow the first applicant or her assistants to continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15 The manager of one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and collect signatures, albeit from a reduced number of persons. However this permission was not granted in April 1998 when the applicants wished to collect signatures for a further petition.

16 On April 10, 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries to ask for permission to set up a stall and to canvass views from the public either in the mall or in the adjacent car parks and offered to make a payment to be able to do so. On April 14, 1998 the manager of the Galleries replied and refused access. The letter stated:

> "... the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.
>
> The owner's stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.
>
> I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks".

17 On April 19, 1998, the third applicant wrote again to the manager of the Galleries asking him to reconsider his decision. The applicants have received no response to this letter.

18 The fourth applicant has continued to seek access to the public by setting up stalls by the side of the road on public footpaths and visiting the old town centre at Concord, which however is visited by a much smaller percentage of the residents of Washington.

19 The deadline for letters of representation to the Council regarding the building works was May 1, 1998. The applicants submitted the 3,200 letters of representation they had obtained on April 30, 1998.

20 The applicant has provided a list of organisations which have been allowed to carry out collections, set up stalls and displays within the Galleries, including the Salvation Army (collection before Christmas), local school choirs (carol singing and collection before Christmas), Stop Smoking Campaign (advertising display handing out nicotine patches), Blood Transfusion Service (blood collection), Royal British Legion (collection for Armistice Day), various photographers (advertising and taking photographs) and British Gas (staffed advertising display).

21 From January 31 to March 6, 2001, Sunderland Council ran a consultation campaign "Your Council, Your Choice" informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise under s.25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of "executive arrangements" and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as responding to the survey issued.

II. Relevant domestic law and practice

22 At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This covers commercial premises, such as shops, theatres and restaurants as well as private premises (for example there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person's ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23 In the case of *Cin Properties Ltd v Rawlins*,[1] where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the Centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of s.18(1) of the Highways Act 1971[2] which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue bye-laws regulating use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case law from North America concerning the applicants' arguments for the finding of some kind of public right:

> "Of more obvious relevance are two North American cases. In *Uston v Resorts International Inc* (1982) N.J. 445A.2D 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises—in that case a gaming casino—to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in *State v Schmid* (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.
>
> The case of *Harrison v Carswell* (1975) 62 D.L.R. (3d.) 68 in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and:

[1] *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
[2] Later replaced by s.35 of the Highways Act 1980.

'If it was necessary to categorise the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognising the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based'.

I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by s.18 of the Highways Act 1971 and s.35 of the Highways Act 1980. (*Harrison v Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.

I would allow this appeal . . . on the basis that CIN, had the right, subject only to the issue under s.20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre".

III. Cases from other jurisdictions

24 The parties have referred to case law from the United States and Canada.

United States

25 The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26 The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as "public fora" for the exercise of free speech rights.[3] In *Marsh v Alabama*,[4] the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centres, on the basis that there has to be "State action" (a degree of State involvement) for the amendment to apply.[5]

27 The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its

[3] *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
[4] *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).
[5] *e.g. Hudgens v Nlrb*, 424 US 507 (1976).

premises of leaflets unrelated to its own operations.[6] This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions.[7]

28 Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures.[8] Some cases found State obligations arising due to State involvement, for example, *Bock v Westminster Mall Co*[9] (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown v Beneda*[10] (where the shopping centre was owned by a public body, though leased to a private developer).

29 Other cases cited as indicating a right to reasonable access to property under State private law were *State v Shack*[11] where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v Resorts International*,[12] a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately owned property)[13]; *Streetwatch v National Railroad Passenger Corp*[14] concerning the ejection of homeless people from a railway station.

[6] *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
[7] *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
[8] *e.g. Batchelder v Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp v Whiffenl*, 849 P.2d 446, 453–54 (Or. 1993), *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
[9] *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
[10] *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
[11] *State v Shack*, 277 1.2d 369 (N.J. 1971).
[12] *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
[13] *ibid.* p.374.
[14] *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).

30 State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona[15]; Connecticut[16]; Georgia[17]; Michigan[18]; Minnesota[19]; North Carolina[20]; Ohio[21]; Pennsylvania[22]; South Carolina[23]; Washington[24]; Wisconsin.[25]

Canada

31 Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters.[26] After the Charter entered into force, a lower court held that the right to free speech applied in privately owned shopping centres.[27] However an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression.[28]

JUDGMENT

I. Alleged violation of Article 10 of the Convention

32 Article 10 of the Convention provides as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

A. The parties' submissions

1. The applicants

33 The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity

[15] *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
[16] *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
[17] *Citizens for Ethical Gov't v Gwinnet Place Assoc*, 392 S.E.2d 8 (Ga. 1990).
[18] *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).
[19] *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
[20] *State of North Carolina v Felmet*, 273 S.E.2d 708 (N.C. 1981).
[21] *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
[22] *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins Co*, 515 1.2d 1331 (Pa 1986).
[23] *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
[24] *South Center Joint Venture v National Democratic Policy Comm*, 780 P.2d 1282 (Wash. 1989).
[25] *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
[26] *Harrison v Carswell*, 62 D.L.R. (3d) 68.
[27] *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
[28] McLachlin J., *Committee for Cth of Canada v Canada* [1991] 1 SCR 139, p. 128.

that built the Galleries on public land and a minister who approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement which would have extended bye-law protection to access ways but did not do so.

34 The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to advocate a political proposal regarding the reorganisation of local government. The applicants however had been refused permission to use the Galleries for expression opposing local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas. They considered that no proper balance has been struck as protection was given to property owners who wielded an absolute discretion as to access to their land and no regard was given to individuals seeking to exercise their individual rights.

35 The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of application could be resolved by carefully drafted legislation. A definition of "quasi-public" land could be proposed that excluded, for example, theatres. They also referred to case law from other jurisdictions (in particular the United States) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

2. The Government

36 The Government submitted that at the relevant time the town centre was owned by a private company Postel and that it was Postel, in the exercise of its rights as property owner, which refused the applicants' permission to use the Galleries for their activities. They argued that the Government in those circumstances could not be regarded as bearing direct responsibility for any interference with the applicants' exercise of their rights. The fact that the local authority had previously owned the land was irrelevant.

37 In so far as the applicants claimed that the State's positive obligation to secure their rights is engaged, the Government acknowledged that positive obligations were capable of arising under Arts 10 and 11. However, such obligations did not arise in the present case having regard to a number of factors. The alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures on their

petition as a result. The burden imposed on the State by finding a positive obligation would also be a heavy one. Local authorities when selling land were not under any duty to enter into walkways agreements to render access areas subject to regulation by bye-law. The State's ability to comply by entering into such agreements when selling State-owned land would depend entirely on obtaining the co-operation of the private sector purchaser who might reasonably not want to allow any form of canvassing on his land and might feel that customers to commercial services would be deterred by political canvassers, religious activists, animal rights campaigners and so on.

38 Furthermore a fair balance had been struck between the competing interests in this case. The applicants in their view only looked at one side of the balancing exercise, whereas legitimate objections could be taken by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means to exercise those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or appear on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill defined concept of "quasi-public" land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the United States and Canada referred to by the applicants were not relevant as they dealt with different legal provisions and different factual situations, and in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land.

B. The Court's assessment

1. General principles

39 The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals,[29] where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also *Fuentes Bobo v Spain*,[30] concerning the obligation on the State to protect freedom of expression in the employment context.

40 In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the

[29] See *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49, paras [42]–[46].
[30] *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50, para.[38].

diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[31]

2. Application in the present case

41 In this case, the applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company, which owned the shopping centre. The Court does not find that the Government bear any direct responsibility for this restriction in the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the Government have failed in any positive obligation to protect the exercise of the applicants' Art.10 rights from interference by others, in this case, the owner of the Galleries.

42 The nature of the Convention right at stake is an important consideration.

43 The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.

44 The Court has noted the applicants' arguments and the references in the US cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45 The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

[31] See, among other authorities, *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56, and *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245, para.[116].

46 The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Art.10 of the Convention.

47 That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.[32]

48 In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign.[33] The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49 Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression.

50 Consequently, there has been no violation of Art.10 of the Convention.

[32] See *Marsh v Alabama*, cited at para.[26] above.
[33] See para.[21].

II. Alleged violation of Article 11 of the Convention

51 Article 11 of the Convention provides as relevant:

> "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 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".

52 The Court finds largely identical considerations arise under this provision as examined above under Art.10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and accordingly, no violation of Art.11 of the Convention.

III. Alleged violation of Article 13 of the Convention

53 Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] 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".

54 The applicants submitted that they have no remedy for the complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case law of the English courts indicated that the owner of a shopping centre can give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private body.

55 The Government accepted that, if contrary to their arguments, the State's positive obligations were engaged and that there was an unjustified interference under Arts 10 or 11, there was no remedy available to the applicants under domestic law.

56 The case law of the Convention institutions indicates, however, that Art.13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention.[34] In so far therefore as no remedy existed in domestic law prior to October 2, 2000 when the Human Rights Act 1998 took effect, the applicants' complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57 The Court finds in the circumstances no breach of Art.13 of the Convention in the present case.

[34] See the *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123, para.[86].

For these reasons, THE COURT

1. *Holds* by six votes to one that there has been no violation of Art.10 of the Convention;

2. *Holds* by six votes to one that there has been no violation of Art.11 of the Convention;

3. *Holds* unanimously that there has been no violation of Art.13 of the Convention.

Partly Dissenting Opinion of Judge Maruste

O-I1[35] To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Arts 10 and 11 were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

O-I2 The case raises the important issue of the State's positive obligations in a modern liberal State where many traditionally state owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the right balance between private and public interests?

O-I3 The new town centre was planned and built originally by a body set up by the government.[36] At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature several important public services like the public library, the social services office, the health centre and even the police station were also located in or adjacent to the centre. Through specific actions and decisions the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

O-I4 There is no doubt that the area in its functional nature and essence is a forum publicum or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber.[37] The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

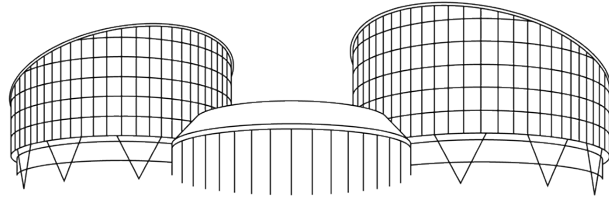
O-I5 Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups including local government[38] who had used the place for similar purposes without restrictions.

O-I6 The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local

[35] Paragraph numbers added by publisher.
[36] See para.[11].
[37] See para.[44].
[38] See paras [20] and [34].

government powers; in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.In these circumstances it is hard to agree with the Chamber's finding that the Government bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the property of a privately owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round—property rights prevailed over freedom of speech.

O-I7 Of course, it would clearly be too far reaching to say that no limitations can be put on the exercise of rights and freedoms on private grounds or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately owned forum publicum was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Arts 10 and 11.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MURAT VURAL v. TURKEY

(Application no. 9540/07)

JUDGMENT

STRASBOURG

21 October 2014

FINAL

21/01/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Murat Vural v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 September 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 9540/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Murat Vural (“the applicant”), on 16 February 2007.

2. The applicant was represented by Mr Hacı Ali Özhan, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that his imprisonment on account of having expressed his opinions, and his inability to vote as a convicted prisoner, had been in breach of his rights guaranteed by Article 10 of the Convention and Article 3 of Protocol No. 1.

4. On 20 September 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Ankara.

6. The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

7. In the early hours of 28 April 2005 the applicant went to a primary school in the town of Sincan and poured paint on a statue of Atatürk[1] which was situated in the school's garden. On the evening of the same day, he poured paint on a statue of Atatürk in the garden of another primary school.

8. On 6 May 2005 he did the same thing in the same two primary schools.

9. On 8 July 2005 the applicant poured paint on a statue of Atatürk in Sincan town centre.

10. On 12 September 2005 the applicant went to the same statue in Sincan town centre equipped with a tin of paint, paint thinner and a ladder. As he was about to open the tin of paint he was arrested by police officers and taken to a police station where he was questioned. In a statement taken from him on the same day the applicant was reported as having told the police officers that he had carried out the above-mentioned actions because he resented Atatürk and had expressed his resentment by pouring paint on the statues.

11. On the same day the applicant was brought before a prosecutor and then a judge, who ordered his detention on remand pending the opening of criminal proceedings against him. In his statement to the prosecutor the applicant maintained that he had carried out his actions to express his "lack of affection" for Atatürk.

12. In his indictment of 15 September 2005, lodged with the Sincan Criminal Court of First Instance (hereinafter "the trial court"), the Sincan prosecutor charged the applicant with the offence of contravening the Law on Offences Committed Against Atatürk (Law no. 5816; see "Relevant Domestic Law and Practice" below).

13. In the course of the trial the applicant admitted that he had poured paint on the statues. He told the trial court that he had completed his university studies and qualified as a teacher. However, he had been unemployed for a long time because his application to work as a teacher had not been accepted by the Ministry of Education. He had carried out his offences in order to protest against the Ministry's decision.

14. On 10 October 2005 the trial court found the applicant guilty as charged. Having regard to the fact that the offence was committed in a public place and on a number of occasions, the trial court sentenced him to three years' imprisonment instead of the minimum term of imprisonment applicable under Law no. 5816, which is one year. The fact that the offence had been committed in a public place also led the trial court to increase the sentence by half in accordance with section 2 of Law no. 5816. The trial court also considered that the applicant had committed the offence on five

1. Mustafa Kemal Atatürk is the founder and the first President of the Republic of Turkey.

separate occasions, and decided to multiply the sentence by five. The applicant was thus sentenced to a total prison term of twenty-two years and six months for his above-mentioned actions.

15. The applicant appealed. In his appeal he argued that, according to the provisions of the Criminal Code, only one sentence should have been imposed on him because, regardless of the fact that he had poured paint on the statues on five occasions, he had in fact only committed one offence and not multiple offences. In support of his argument, he submitted that his five actions had been carried out within a short span of time.

16. The applicant also pointed out that, instead of imposing on him the minimum one-year prison sentence provided for in Law no. 5816 in respect of each offence, the trial court had handed down a three-year sentence because it had had regard to the number of times he had poured paint on the statues. The trial court had then gone on to rely on the frequency of his actions when multiplying the sentence by five.

17. The applicant also challenged the trial court's reliance on section 2 of Law no. 5816 when increasing his sentence by half because the offence had been committed in a public place. He drew the Court of Cassation's attention to the fact that, by their nature, statues are placed in public places.

18. The applicant added that he had carried out his actions in order to express his "lack of affection" for Atatürk. As such, he had remained within the boundaries of his right to freedom of expression, which was guaranteed by Article 10 of the Convention. Thus, although it would have been reasonable to prosecute and punish him for damaging property, he had in fact been punished for expressing his opinions.

19. On 6 April 2006 the Court of Cassation rejected the applicant's argument that he had been expressing his opinion, but quashed the trial court's judgment on the ground of, *inter alia*, that court's failure to give adequate consideration to the possibility that the five separate incidents could form only one offence and not multiple offences. The Court of Cassation considered that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher. The case file was sent back to the trial court.

20. In its decision of 5 July 2006 the trial court agreed with the Court of Cassation's conclusion, and held that the applicant's actions had amounted to a single offence and not five offences. However, having regard, *inter alia*, to the "contradictory reasons" put forward by the applicant as justification for his actions, as well as "the effects of his actions on the public", the trial court concluded that the applicant's actions had amounted to "insults", and deemed it fit to sentence him to five years' imprisonment, which is the maximum allowed under Law no. 5816. The sentence was then increased by half because the acts had been committed in a public place. Furthermore, pursuant to Article 43 of the Criminal Code (see "Relevant Domestic Law and Practice" below), the sentence was further increased by three quarters.

The applicant was thus sentenced to a total of thirteen years, one month and fifteen days' imprisonment.

21. Furthermore, in its decision the trial court set out the restrictions under section 53 of the Criminal Code which were to be placed on the applicant on account of his conviction. Accordingly, until the execution of his sentence, the applicant was banned from, among other things, voting and taking part in elections, as well as from running associations, parties, trade unions and cooperatives (see "Relevant Domestic Law and Practice").

22. The applicant appealed and repeated his arguments under various provisions of the Convention. He maintained, in particular, that he had carried out his actions in order to express his "lack of affection" for Atatürk and had thus exercised his freedom of expression guaranteed in Article 10 of the Convention.

23. The appeal was dismissed by the Court of Cassation on 5 February 2007. No mention was made in the Court of Cassation's decision of the arguments raised by the applicant about his freedom of expression.

24. According to a document drawn up by the prosecutor on 16 April 2007 setting out the details of the applicant's prison sentence, the date of the applicant's release from prison was set as 22 October 2018, with a possibility of release on 7 June 2014 for good behaviour.

25. In the meantime, on 1 June 2005 the Law on the Execution of Prison Sentences and Other Security Measures (Law no. 5275) entered into force. This law sets out the circumstances in which prisoners can benefit from early release.

26. On 15 May 2007 the prosecutor responsible for the prison the applicant was serving his sentence in wrote to the trial court and asked for guidance in calculating the date of the applicant's possible early release. The prosecutor stated that, for offences committed before 1 June 2005, Law no. 647 was applicable and, for offences committed after that date, the new Law no. 5275 would be applicable. The applicant had carried out his actions both before and after that date.

27. On 16 May 2007 the trial court considered that the critical date was the date of the commission of the final act and thus the new law was applicable.

28. The applicant lodged an objection against that decision and argued that most of his actions had been carried out before 1 June 2005 and that therefore, when calculating his prison sentence, the old law should be taken into account. If his prison sentence were calculated in accordance with the new law, he would spend four more years in prison. That objection was rejected by the trial court on 18 June 2007 and the date of the applicant's possible release from prison was calculated in accordance with the document drawn up by the prosecutor on 16 April 2007 (see paragraph 24 above).

29. A request made by the applicant to the Ministry of Justice for his conviction to be quashed and another request to the Court of Cassation to rectify the judgment were rejected on 28 September 2007 and 28 December 2007 respectively.

30. On 11 June 2013 the applicant was released conditionally.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The Law on Offences Committed Against Atatürk (Law no. 5816, entry into force 31 July 1951) provides as follows:

> "Section 1: Anyone who publicly insults the memory of Atatürk or swears at him shall be liable to imprisonment for a term of between one and three years.
>
> Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years.
>
> Anyone who incites another to commit any of the above-mentioned offences shall be liable to the same punishment as the person committing the offence.
>
> Section 2: In cases where the offences mentioned in section 1 of this Law are committed by two or more persons, committed in public places or committed through the media the prison term shall be increased by half.
>
> If force is used in the commission of the offences mentioned in the second paragraph of section 1 of this Law, or an attempt is made to do so, the prison term shall be doubled.
>
> Section 3: The offences mentioned in this Law shall be prosecuted by public prosecutors of their own motion.
>
> Section 4: This Law shall enter into force on the date of its publication.
>
> Section 5: The Justice Minister shall oversee the enforcement of this Law."

32. Section 43 of the Criminal Code (Law no. 5237 of 2004), in so far as relevant, provides as follows:

> "(1) In circumstances where, in the course of the execution of a decision to commit a particular offence, an offence is committed against a person more than once and at different times, only one punishment shall be imposed [on the offender]. However, the punishment shall then be increased by between a quarter and three quarters ..."
>
> ..."

33. The relevant provisions of section 53 of the Criminal Code (Law no. 5237 of 2004) provide as follows:

> "(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the [convicted] person shall be deprived of the following [rights]:
>
> a) Undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;

b) Voting, standing for election and enjoying all other political rights;

c) Exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d) Chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e) Carrying out a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

(2) The person cannot enjoy the [above-mentioned] rights until the prison term to which he or she has been sentenced as a consequence of the commission of the offence has been served.

(3) The provisions above which relate to the exercise of custodial rights as a parent and duties as a guardian or a trustee shall not be applicable to a convicted person whose prison sentence is suspended or who is conditionally released from prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

(4) Sub-section 1 above shall not be applicable a person whose short-term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5) Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence ...

...”

34. For more information concerning the legislation applicable to the issue of voting in Turkey, see *Söyler v. Turkey* (no. 29411/07, §§ 12-19, 17 September 2013).

III. RELEVANT INTERNATIONAL MATERIALS

35. A description of the relevant international materials and comparative law on the issue of voting can be found in *Scoppola v. Italy (no. 3)* [GC] (no. 126/05, §§ 40-60, 22 May 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 10, 17 AND 18 OF THE CONVENTION

36. Relying on Article 10 of the Convention, the applicant complained that he had been punished for having expressed his opinions. He added that the punishment imposed on him had been excessive, disproportionate to the

offence in question, and incompatible with Articles 17 and 18 of the Convention.

37. The Government contested the applicant's arguments.

38. The Court deems it appropriate to examine the complaint solely from the standpoint of Article 10 of the Convention, which reads as follows:

> "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."

A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Applicability of Article 10 of the Convention and the existence of an interference

40. The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology[2], and to criticising the Kemalist ideology itself.

41. The Government considered that defiling Atatürk's statues was considered to be an act of vandalism with the element of insulting Atatürk's memory. By virtue of the nation's deep sense of respect and adoration for Atatürk, his memory was protected by law.

---

2. Kemalist ideology is the political ideology of Mustafa Kemal Atatürk, and is based on six main pillars of ideology; republicanism, nationalism, populism, secularism, statism and revolutionism.

42. In the opinion of the Government, it was not the expression of views that was punishable under the Law on Offences Committed Against Atatürk, but, rather, insulting Atatürk's memory or vandalising his statues. That law did not prevent individuals from criticising the personality or ideas of Atatürk or Kemalist policies. Vandalising Atatürk's statues was not a legitimate way of expressing views under Article 10 of the Convention.

43. Having regard to its intensity, the applicant's aggression against the statues had been qualified as vandalism and vandalism was a violent way of expressing hatred. Although the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other media without recourse to violence, he had chosen not to do so. Instead, in order to justify his acts of vandalism the applicant had sought legal protection before the national courts by invoking his right to freedom of expression. In the opinion of the Government, the applicant's unlawful actions had fallen outside the scope of freedom of expression guaranteed by Article 10 of the Convention.

44. The Court reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Indeed, a review of the Court's case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms.

45. For example, Article 10 of the Convention was held to include freedom of artistic expression – notably within the scope of freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133). It is noteworthy that in reaching that conclusion the Court noted that Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression (*ibid*., § 27).

46. The wearing or displaying of symbols has also been held to fall within the spectrum of forms of "expression" within the meaning of Article 10 of the Convention. For example, in its judgment in the case of *Vajnai v. Hungary* the Court accepted that the wearing of a red star in public as a symbol of the international workers' movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention

(no. 33629/06, §§ 6 and 47, ECHR 2008; see also *Fratanoló v. Hungary*, no. 29459/10, § 24, 3 November 2011). Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012).

47. The Court has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct. For example, in its judgment in the case of *Steel and Others v. the United Kingdom* (23 September 1998, §§ 90 and 92, *Reports of Judgments and Decisions* 1998-VII) the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities. In doing so it rejected the respondent Government's argument that the protest activities of the applicants had not been peaceful and that Article 10 of the Convention had thus not been applicable.

48. Similarly, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, § 28, ECHR 1999-VIII) holding a protest during which a fox hunt was disrupted by blowing a hunting horn and by engaging in hallooing was held to constitute an expression of opinion within the meaning of Article 10 of the Convention.

49. Referring to the above-mentioned judgments in the cases of *Steel and Others* and *Hashman and Harrup*, the Court reaffirmed in its decision in the case of *Lucas v. the United Kingdom* ((dec). no. 39013/02, 18 March 2003) that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. This case concerned an applicant who was arrested, detained and subsequently convicted of the offence of breach of the peace for having sat in a public road leading to a naval base in order to protest against the decision of the British Government to retain nuclear submarines.

50. In a similar vein, in its judgment in the case of *Tatár and Fáber v. Hungary* the Court considered that the public display for a short while of several items of clothing representing the "dirty laundry of the nation" amounted to a form of political expression. The Court referred to the applicants' actions as an "expressive interaction", and in rejecting the Government's argument that the impugned event had in fact constituted an assembly and thereby required scrutiny under Article 11 of the Convention, it held that the event had "constituted predominantly an expression" and had

thus fallen within the scope of Article 10 of the Convention (no. 26005/08 and 26160/08, §§ 29, 36 and 40, 12 June 2012).

51. The scope of "expression" was once again the subject matter of the Court's examination in the case of *Christian Democratic People's Party v. Moldova (no. 2)* which concerned a political party which had been prevented from holding a protest demonstration in a square because the Municipal Council had considered that during the meeting there would be calls to a war of aggression, ethnic hatred and public violence. The applicant Party's objection was rejected by the Court of Appeal, which held that the Municipal Council's decision had been justified because the leaflets disseminated by the applicant political party had contained such slogans as "Down with Voronin's totalitarian regime" and "Down with Putin's occupation regime". The Court of Appeal also recalled that during a previous demonstration organised by the applicant political party to protest against the presence of the Russian military in Transdniestria, the protesters had burned a picture of the President of the Russian Federation and a Russian flag. In its judgment the Court held that the applicant party's slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (no. 25196/04, §§ 9 and 27, 2 February 2010).

52. The examples referred to above show that all means of expression are included in the ambit of Article 10 of the Convention. The Court has repeatedly stressed that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *inter alia*, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive.

53. Moreover, the Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because, as stated above (see paragraph 44 above), Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *inter alia*, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression, and it thus rejects the Government's argument that "[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so" (see paragraph 43 above).

54. In light of its case-law the Court considers that, in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his "lack of affection" for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55. In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher (see paragraph 19 above).

56. In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant's conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted an interference with his rights enshrined in Article 10 § 1 of the Convention.

2. Compliance with Article 10 of the Convention

57. The applicant complained that his actions had been severely and disproportionately penalised and his right to freedom of expression had thus been breached.

58. The Government, beyond disputing the applicability of Article 10 of the Convention, did not seek to argue that the interference had been justified within the meaning of Article 10 of the Convention.

59. Interference with an applicant's rights enshrined in Article 10 § 1 of the Convention will be found to constitute a breach of Article 10 of the Convention unless it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

60. The Court observes that the restriction on the applicant's freedom of expression was based on the Law on Offences against Atatürk. As can be seen from its relevant provisions (see paragraph 31 above), it is sufficiently clear and meets the requirements of foreseeability. The Court is therefore satisfied that the interference was prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aim of protecting the reputation or rights of others (see *Odabaşı and Koçak v. Turkey*, no. 50959/99, § 18, 21 February 2006; see also *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, §§ 117, 130-131, 4 March 2014). It therefore remains to be determined whether the interference complained of was "necessary in a democratic society".

61. The Court reiterates that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

62. This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued (*ibid.*). As set forth in Article 10 of the Convention, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia*, *Zana v. Turkey*, 25 November 1997, § 51, *Reports* 1997-VII).

63. The Court has frequently held that "necessary" implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (*ibid.*).

64. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, *inter alia*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In this connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 66, ECHR 1999-IV).

65. The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (*Odabaşı and Koçak*, cited above, § 23), and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society.

66. Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see, *mutatis mutandis*, *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). While in the present case, the applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk.

67. Thus, having regard to the extreme harshness of the punishment imposed on the applicant, the Court deems it unnecessary to examine whether the reasons adduced for convicting and sentencing the applicant were sufficient to justify the interference with his right to freedom of expression (see *Başkaya and Okçuoğlu*, cited above, § 65). Nor does it deem it necessary to examine whether the applicant's expression of his resentment towards the figure of Atatürk or his criticism of Kemalist ideology amounted to an "insult", or whether the domestic authorities had any regard to the applicant's freedom of expression, which he had brought to their attention on a number of occasions (see paragraphs 18 and 20 above). It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question.

68. In the light of the foregoing, the Court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

69. Relying on Article 3 of Protocol No. 1 to the Convention the applicant complained about the ban which had been imposed on him by the domestic courts and which prevents him from voting. Article 3 of Protocol No. 1 to the Convention reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

70. The Government contested that argument.

A. Admissibility

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

72. The applicant complained that his conviction had not only resulted in his imprisonment, but had also prevented him from, *inter alia*, voting.

73. The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and did not contest that the applicant's right to vote had been restricted in the present case.

74. The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out (see *Söyler*, cited above, § 17), and submitted that the legitimate aim of the restriction was the applicant's rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a "blanket ban" because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence. Referring to the judgment in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who had committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.

75. In Turkey the constitutional provisions concerning the issue of prisoners' voting rights had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, offences committed intentionally were "stronger" in nature as they included the element of "intention".

76. The Court points out that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article (see *Hirst (no. 2)* [GC], cited above, §§ 58 and 82). These principles were subsequently reaffirmed by the Grand Chamber in the case of *Scoppola (no. 3)* (cited above, §§ 82-84, 96, 99 and 101-102). The Court also reiterates that Article 3 of Protocol No. 1 applies only to the election of the "legislature" (see *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)).

77. The Court observes that the applicant's conviction became final on 5 February 2007 and he was released from prison on licence on 11 June 2013. During that time he was not allowed to vote. Furthermore, in accordance with the applicable legislation, his disenfranchisement did not end when he was conditionally released from prison on 11 June 2013, but will continue until the date initially foreseen for his release, 22 October 2018 (see paragraph 24 above). Thus, between 5 February 2007 and 22 October 2018, that is, for a period of over eleven years, the applicant has been and will be unable to vote. The Court observes that two parliamentary elections were already held between 5 February 2007 and the date of the examination by the Court - on 22 July 2007 and 12 June 2011 - and the applicant was unable to vote in either of them.

78. In light of the above, the Court concludes that the applicant was directly affected by the measure foreseen in the national legislation which has already prevented him from voting on two occasions in the parliamentary elections.

79. The Court has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statute and that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside suspended sentences shorter than one year (see paragraph 33 above) – or the individual circumstances of those convicted. It has noted moreover that the Turkish legislation contains no express provisions categorising or specifying offences for which disenfranchisement is foreseen and that the automatic and indiscriminate application of this harsh measure in Turkey regarding a vitally important Convention right does not fall within any acceptable margin of appreciation (see *Söyler*, cited above, §§ 36-47).

80. Nothing in the present case allows the Court to reach a different conclusion. In the light of the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant's disenfranchisement.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. The applicant complained that, by imposing on him the maximum prison sentence applicable under domestic law and calculating his prison sentence on the basis of a new law (Law no. 5275), his rights under Articles 5, 6 and 7 of the Convention had been breached. The applicant further complained that Law no. 5816 was incompatible with Article 14 of the Convention because it gives the judge too wide a discretion to choose a prison sentence of between one year and five years. As a result, different courts handed down different sentences for the same offence. Finally, relying on Article 11 of the Convention, the applicant complained about the ban which was imposed on him by the domestic courts and which prevented him not only from voting and taking part in elections, but also from running associations, parties, trade unions and cooperatives.

82. Having regard to its conclusions under Article 10 of the Convention and Article 3 of Protocol No. 1 (see paragraphs 68 and 80 above), the Court considers it unnecessary to examine the admissibility and merits of these complaints.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

84. The applicant claimed 60,000 euros (EUR) in respect of pecuniary damage and EUR 65,000 in respect of non-pecuniary damage. In calculating his claim for pecuniary damage the applicant relied on the minimum wage and multiplied it by the total number of months he was sentenced to serve in prison.

85. The Government argued that the applicant's claims were excessive and unsupported by evidence.

86. Having regard to the applicant's failure to submit to the Court any documents showing his employment status, income and loss of income, the Court rejects the applicant's claim for pecuniary damage. On the other hand, it awards the applicant EUR 26,000 in respect of non-pecuniary damage.

B. Costs and expenses

87. The applicant also claimed EUR 50,000 for the costs and expenses incurred before the domestic courts and the Court.

88. The Government considered the claim for costs and expenses to be unsupported by any documentation.

89. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has not shown that he has actually incurred the costs claimed. In particular, he failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award in respect of the fees of his lawyer.

C. Default interest

90. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares,* unanimously, admissible the complaints under Article 10 of the Convention and Article 3 of Protocol No. 1 to the Convention;

2. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4. *Holds*, unanimously, that there is no need to examine the admissibility and merits of the complaints under Articles 5, 6, 7, 11 and 14 of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros), in respect of non-pecuniary damage, plus any tax that may be

chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Guido Raimondi
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó and joint separate opinion of Judges Nebojša Vučinić and Egidijus Kūris are annexed to this judgment.

G.R.A.
S.H.N.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I.

The applicant Murat Vural was convicted for pouring paint on a statue of Kemal Atatürk. He was sentenced to serve the statutory maximum of five years for the insult. The punishment was increased to a total of thirteen years, one month and fifteen days' imprisonment.

I fully agree with my colleagues that Article 10 of the European Convention of Human Rights was violated in this case. The reason given in the judgment is that, in the absence of violence, the impugned act is of insufficient gravity to justify the extreme harshness of the punishment. I agree that such punishment is *per se* unacceptable but, in my view, this limited consideration that concentrates on the extreme harshness of the punishment does not provide adequate protection for the freedom of expression. This shortcoming forces me to discuss the methodology that was applied in the case. It was the straightjacket of a "standard" proportionality analysis that hampered the full protection of free speech that is envisioned in the Convention.

A three-step "standard" proportionality analysis (the interference is prescribed by law, serves a legitimate aim, and is "proportionate to the legitimate aims pursued") is the hallmark of this Court's judgments in Article 8-11 cases[1].

I have reservations as to the use of that methodology in the present case, where the matter was decided on the grounds of the disproportionality of the punishment. I also find the "standard" proportionality approach inappropriate in all cases where a freedom is unconditionally restricted by legislation.

First, it is not clear what makes the punishment disproportionate. My gut feeling indicates that the sanction is disproportionate, but in regard to what and in which sense? Would a one-year mandatory sentence be proportionate? Is it really a matter of proportionality which concerns us? Second, by grounding the finding of a violation in the severity of the punishment, the Court diverts attention from the more fundamental issue, namely the permissibility of sanctioning an "insult to memory" at all. The present case concerns the Article 10 rights of the applicant, therefore the

1. In other contexts the Court uses a category-based approach. This is the approach in Article 3 cases, and to some extent even in the context of freedom of expression under Article 17, as certain categories of expression are deemed not worthy of protection because they are abusive, therefore belonging to a category that is impermissible and not protected.

Court should have considered the effect of the interference on the applicant's freedom of expression.

Proportionality of the punishment

What are the problems with a finding of a violation based on the excessive nature of the punishment? First, this Court, of all courts, cannot rely on a crude sense of justice (though all judicial decisions rendered in disregard of the sense of justice are open to criticism). This Court is concerned with the legitimacy of restrictions on human rights under the Convention and not with the appropriateness of sanctions measured on some mysterious scale. The Convention contains no prohibition on unusual punishment and we are not called upon to evaluate sentencing.

When judges and laymen talk about disproportionate punishment, they often compare the punishment imposed for a given crime with the punishment of another crime, or with the punishment of another person for a similar, comparable crime, or even with the moral seriousness of the crime in relation to the punishment[2].

In the present case there is no specific reason given as to *why* the punishment is grossly disproportionate. Where judicial intuition determines that a matter does not deserve further clarification, those who are not privy to the intuition remain puzzled. Would one year be acceptable, for example, because the statue had to be cleaned or repaired? The Court does not even provide a comparable reference, a *tertium comparationis*; for example, the fact that thirteen years is a sentence that is ordinarily imposed on murderers. Under that reasoning, the present conviction treats the attack on memory as if were an attack on human life, thus attributing equal weight to life and to the honouring of a deceased person's memory (where the comparator is harm to individuals or harm to the community).

Because the dictates of the sense of justice are satisfied and the talismanic word "disproportionate" is used, the judgment of the Court looks satisfactory. It is not. I share the feelings of my colleagues as to the gross inappropriateness of the sentence, but in an Article 10 case this is not the gist of the rights protection: the Court should look into the necessity of the interference in the light of its impact on the expression concerned.

---

2. In *Buitoni v Fonds d'Orientation* [1979] ECR 677, the European Court of Justice found a penalty for failing to report the use of a licence disproportionate because the penalty was the same as for the actual use of the licence. In *Buitoni* it was intuitively accepted that not reporting a crime and committing that crime could not be the same and did not deserve the same treatment. This is so obvious that it needs no further explanation.
I follow here Bernhard Schlink, *Proportionality (1)* and Aharon Barak, *Proportionality (2)* in M. Rosenfeld and A. Sajó: *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012.

The substantive issue: punishing specific content

The text of the Convention requires the Government to prove that an interference was necessary in a democratic society, and it is in the context of such necessity that the question of proportionality arises. The real issue in this case is not that an excessively severe punishment was imposed for an expressive act that did not cause serious damage, but that a whole class of expression (insults to Atatürk's memory) and related expressive acts are considered to be a crime *for their content*. The law that was applied singles out very specific content: all speech (including expressive action, as in the present case) that publicly insults the memory of Atatürk is punishable. The issue is not the protection of all public statues where harm to the statue has been caused by an expressive action. The issue, which is buried under the outrage of the excessive sentence, is the *singling out of specific speech content for punishment*. Law no. 5816 provides first and foremost that any "disrespect for Atatürk's memory" is to be punished by a prison sentence of between one and three years, the use of paint on a monument ("dirtying of a statue") raising the sentence to five years; the applicant was then given an *additional* eight years of punishment *for the aggravating circumstances*.

Of course, eight *additional* years for degrading a statue is excessive in view of the degree of harm caused by the act, but this Court is "only" called upon to see whether a limitation of freedom of expression is necessary in a democratic society.

I would argue that the problem can be better decided using a category-based analysis of the legislation, and even by an enhanced proportionality analysis of the means/end relationship of the legislation and the objective value of the intended aim, as is carried out, for example, in Canada and Germany. These approaches are superior to the Court's "standard", often narrowly case-related analysis because they are more convincing and, above all, offer a better, broader, and more equivalent protection to free speech against governmental abuse.

The legislature's predominant concerns in Law no. 5816 are with the content of the speech as opposed to its secondary effects; it expresses the legislature's disagreement with the message the act conveys. In the category-based approach of the United States First Amendment law, known as the "categorical approach"[3], this is plainly unconstitutional. So what is wrong with content discrimination? It is wrong because the Government disregard content-neutrality without compelling reasons. The requirement of content neutrality follows from the assumption that content-based restrictions ("content-discrimination") target specific messages, thus

---

3. See *Texas v. Johnson,* 491 U.S. 397 (1989). For the advantages of the categorical approach see below.

resulting in thought control, and "[such a restriction] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.[4]"

The shortcomings of the "standard" proportionality approach

The judgment operates within the straightjacket of the proportionality analysis; it is for this reason that the Court fails to make explicit the underlying ("structural") problem of Law no. 5816. I am aware of the advantages of the three mechanical prongs of the "standard" proportionality analysis. They offer considerable legal certainty; the approach also offers the advantages of economies of scale. This kind of manufacturing certainty is understandably attractive where a court has thousands of cases and where a court is called upon to give advice to judges reading our judgments in forty-seven different member States.

However, even within the proportionality analysis there are other methods, slightly more complex in nature than the three-pronged approach used by the Court. One may add other levels of scrutiny.

Among others, when determining a measure's quality as a means to reach a (legitimate) end, the search must begin at the abstract level of the legislation. This search is particularly demanding (and therefore efficient) if and when a court enters into a substantive analysis of the veracity of the allegation that a regulatory measure actually serves a purported end. Moreover, the importance of the end itself may be subject to judicial analysis. Using this approach in the Articles 8-11 context, the Court would have to review how important and genuine the references are to one or another aim recognised in the Convention as a ground for restricting a Convention right. Is the end genuine? Or instead, is it a bluff couched in terms of public interest that pretends to be beyond the reach of judicial scrutiny in the name of democratic legitimation of the legislature?

Moreover, is the chosen means narrowly tailored? Is it not the case that the criminal provision is over-broad, even considering the need for sensitivity protection?

Where, as in the present case, the argument is made that the sensitivities and deep feelings of a population are to be protected, a court could and should take a long look at the relationship of this allegation to the "rights of others". To accept that all interests "amount to rights of others" and claim that all these alleged rights are of equal weight to that of Convention human rights is extremely dangerous for human rights: not all rights are created as equal. Is there a right to have one's feelings and deeply held convictions left

---

4. *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991).

undisturbed? Are feelings to be protected from potential inconvenience as a matter of right? Further, even assuming that all alleged interests constitute rights (a position that I find untenable), is this alleged right *per se* sufficient to justify certain forms of Convention-rights restriction (especially blanket bans, which used to be highly suspect even for the Court, at least until very recently, in the freedom of expression context)? This same analysis may also be appropriate when addressing the specific circumstances of the case at a later stage of the analysis; something that is often done in the form of balancing, as if Convention rights and other interests were of equal importance!

It may well be that certain measures simply do not serve the purported end or at least that they are not the least restrictive possible. One should ask the question: is mandatory imprisonment the only available means to protect political memory?

Of course, even if in the abstract the rights-restrictive means are acceptable and rationally connected to the legitimate and genuine end, their application in the specific context (the conduct of the applicant) may be disproportionate, because there are *lesser rights-restrictive means* to achieve the end in the circumstances of the case. In other instances it can be said (sometimes using the language of balancing) that the restriction on a right as a means to an end is excessive because it undermines the very right which one values more than the end. It should be added, in this logic, that Convention human rights are of a specific value (being singled out as superior values in an international convention).

Going beyond the above-mentioned, more demanding forms of scrutiny within the proportionality methodology, freedom of expression cases are sometimes (even regularly in the United States) resolved using a *categorical* approach[5]. In principle, such an approach guarantees freedom of expression unequivocally and with more certainty than a case-by-case analysis, where the metrics of proportionality and balancing are not spelled out. The uncertainty that is inherent in the case-based proportionality analysis invites authorities to attempt to impose further restrictions. More importantly, it discourages speakers.

A court of human rights must go to the heart of this matter. In Turkey it is possible to imprison someone for an offence against the memory of Atatürk. I have no doubts that the Turkish nation has strong feelings of respect towards the founder of the modern Turkish State, and it is within the constitutional powers of the Turkish nation to express such feelings. I have full respect for these sentiments, but equally strong reservations as to the legal enforcement of sensitivities in matters of speech[6]. I understand that the

5. A categorical approach is used against applicants, but not against States, in the Article 17 context (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

form of the expression is problematic here but, as the judgment demonstrates, it falls within expressive conduct; the pouring of paint is a form of expression, disputable though it may be[7]. Destruction caused to a statue or other piece of art is an ordinary crime; to destroy Michelangelo's "Pieta" would indeed be a serious crime. But in the present case it was the expressed content that was the ground for the conviction: the object of the crime is clearly "the memory of Atatürk" and not the alleged vandalism, which of course might otherwise be subject to criminal sanctions. Moreover, I can envision the need for such a dramatic form of expression of political discontent in certain circumstances, a matter that did not have to be addressed in the present case. The Turkish courts never entered into a discussion of the appropriateness of the expressive act. In any event, all forms of expression of dislike of Atatürk and his memory, all the underlying discontent with the political system created by Atatürk and based on his political vision, are prohibited: this is the primary and fundamental issue.

I can envision situations where punishment for a similar offence is appropriate or even necessary in a democratic society, where insult to memory amounts to a call to violence or hatred against identifiable individuals, but that element is not required by the present law and no such danger is present in this case. It is the mere fact of the insult that is criminalised.

---

6. The Court accepted in *Otto-Preminger-Institut v. Austria* (20 September 1994, Series A no. 295-A) that protection against indignation caused by "offensive" speech was a legitimate aim within the concept of the rights of others, at least where the right was freedom of religion. *A, B and C v. Ireland* ([GC], no. 25579/05, § 232, ECHR 2010) goes beyond a Convention-right-related concern. Here it was not popular religious sensitivity that was to be protected and considered by the Court in a balancing exercise. The Court said that where the case raised sensitive moral or ethical issues, the margin of appreciation would be wider (but compared to what?), so the Court was technically not even compelled to go into genuine balancing (which it did anyway, in an Article 8 context). The Court concluded that "profound moral values" of the majority entered into the realm of legitimate aims of rights limitation, namely "protection of morals", hence the matter was to be treated under the necessity test. Both judgments resulted in strong dissents and criticism. Under this logic, if applied to freedom of expression, the argument might go like this: the "deep sense of respect and adoration" amounts to a profound moral value; therefore – as is common in the context of disparagement of national symbols – national unity or respect for the nation as such are foundational for public morals. History shows the speech-restrictive consequences of such authority-respecting (if not outright authoritarian) approaches.

7. I am not denying that the use of such a form of expression, although it clearly falls within the ambit of Article 10, may not be necessary in a democratic society in given circumstances. Furthermore, there are other legitimate aims that could make such a restriction proportionate. But the present law simply precludes such analysis. (For a similar problem see *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.)

The limited analysis, resulting from the standard proportionality test, precludes the consideration of the law's impact on all speech acts. It is for this reason that the Court did not have the opportunity to look into the real problem. However, the Convention and even our own methodology calls us to consider the impact of the restriction on freedom of expression. "It is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest.[8]" The Court has always accepted that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.[9]" The expressive act of the applicant, being political speech, should have triggered strict scrutiny, and the Government certainly failed to provide justification based on compelling reasons why they had to criminalise insults to memory. Given that the law is content-discriminatory, we do not have to look into the effects of a content-neutral law such as the criminalisation of the destruction of statues.

Where disrespect for the memory of a political figure is punished, this has a chilling effect on all speakers. The State has not shown any compelling interest for this restriction. I cannot see the reasonable purpose of such a measure in a democratic society, given that no democratic society can exist without free expression on political matters[10]. Even assuming that the deep feelings of the Turkish people will be hurt at the sight of the paint on the statue or on hearing disrespectful words, I cannot see how this can be a sufficient justification in a democratic society, where even disturbing political opinions are to be accepted.

This fundamental consideration is grievously absent in Turkish law when the mandatory sanction is one year in prison, let alone the thirteen years imposed on applicant. A law which enables, and even mandates, such interference is incompatible with the necessities of a democratic society. This Court should not shy away from considering the impermissibility of

---

8. See *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V.

9. See *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV.

10. The best part of this Court's Article 10 jurisprudence requires that a demanding scrutiny be applied to political speech, precisely because of the crucial importance of such expression for a democratic society. (See *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV, *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-V, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 92, ECHR 2009; citing: *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Wingrove*, cited above, § 58; and *Monnat v. Switzerland*, no. 73604/01, § 58, ECHR 2006-X). The present case is about political speech. Under this traditional approach of proportionality the measure is disproportionate not for the severity of the conviction but because of the insufficiency of the reasons justifying the interference.

the alleged purpose of legislation that seemingly fits into one of the (over) broad categories of permissible restriction (“rights of others”)[11].

Given the chilling effect of the sanction in Law no. 5816, I would have used a categorical approach: the criminal law is never appropriate as a means to protect other people’s political sensitivity, where the disrespect caused to a political figure does not amount to an actual (true) threat or call to violence. Such laws are simply not necessary in a democratic society (outside emergencies), being contrary to the fundamental assumptions of such a society based on free debate and exchange of ideas. The mere existence of content-prohibiting laws endangers and sometimes kills freedom of thought. It is fundamental for a democratic society that its citizens be treated as adults who accept, or learn to tolerate, even speech that they find offensive. This is the price to be paid for a free and democratic society.

A rather similar speech-protective result could have been achieved even within an enhanced proportionality analysis: the end, namely the protection of the alleged right of others, is such that it does not necessitate a prison sentence – not just in the present circumstances of a thirteen-year term, but also in general. In a proportionality analysis that looks first at the very law that is the source of an interference, one looks at the law as a means chosen and at the end served (the protection of alleged feelings). The means are excessive here in the light of the end, among other things because the end itself is problematic; the end in itself is simply not worth the inevitable sacrifice of freedom of expression resulting from the means chosen, but also from any less radical means. Alternatively, the present end is not legitimate; or, to the extent it might be legitimate for some, the means chosen are certainly not the least restrictive possible.

Following the “standard” methodology I have signed on to many judgments where the severity of punishment was held to be an important or the decisive element of the disproportionality finding. The underlying message in those cases was clear: it is inappropriate in a democratic and free society at the level of civility and “civilisation” that Europe hopes to have

---

11. To consider legislation as being compatible *in abstracto* with the grounds for restriction enumerated in paragraph 2 of Article 10 has in principle been recognised by the Court. This is how Sir Nicolas Bratza summarised the Court’s position: “Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court’s approach has tended to be different. In such a case, the Court’s focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question.” (Concurring opinion of Judge Bratza in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013).

achieved to use sanctions, especially criminal sanctions, for thought crime (and criminal sanctions in cases of reputational harm)[12]. But in those cases the Court did not find it appropriate to make express statements in this sense, probably as a result of its putative role related to Article 27 § 1 and Article 34 of the Convention, although pursuant to Article 19 the Court is called upon to ensure the observance of the engagements undertaken by the Parties; "engagements" that are of a general and structural nature. The Law at issue constitutes a blanket ban on the expression of specific political content for the sake of public sensitivities elevated to the status of a "right". In view of these engagements, content discrimination for the sake of the protection of the memory of a national hero by criminal law is incompatible with the Convention. In the present circumstances of extreme harshness, which will inevitably be repeated, this has to be made clear.

II.

The present judgment provides just satisfaction for the non-pecuniary damage suffered by the applicant. This is proportionate in the sense that it falls within the range of satisfaction provided in other similarly grave freedom of expression and disenfranchisement cases. (One may have doubts that such an amount is equitable in view of the seven years of unmerited suffering in prison). I accept that the amount follows our practice. But with all due respect, I cannot agree with my colleagues as regards pecuniary (material) damage, even if denial of an award on this ground is not uncommon in comparable cases. The applicant certainly suffered material damage (loss of income) because of his incarceration: there is a causal link with a loss of income. This loss is hard to quantify, but technical difficulties of calculation cannot negate the existence of a loss: the applicant was a qualified teacher, albeit unemployed before his conviction, who would have earned a living like any average person in his situation, had he not been incarcerated in violation of the Convention. The loss is thus quantifiable, either on the basis of the average income of a teacher in his position, or at least with regard to the minimum income of an employed person (using the unfair assumption that he could not have found a position in education). Moreover, because of the conviction, he will not be able to work again as a civil servant (it is even unlikely that, having been released on licence, he will find a position as a teacher in private education). To determine the loss

12. After all, this is the unequivocal message of those judgments which state that even a sanction of one euro (i.e. any sanction) might be disproportionate (see *Eon v. France*, no. 26118/10, 14 March 2013, and *Colombani and Others v. France*, no. 51279/99, ECHR 2002-V). For the *per se* inappropriateness of criminal sanctions for certain categories of expression, see, for example, *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII.

of future income is not rocket science and courts do use estimates in such circumstances, taking life expectancy into consideration. I have had the opportunity to express my reservations regarding the Court's parsimonious approach in matters of pecuniary damage, concerned as it is with the risk of "speculative" awards. The "gross injustice" suffered by the applicant in the present case forces me to reach the sad conclusion that the Court has departed from those standards of remedy that national courts and international law find to be a matter of course; and a matter of reason[13].

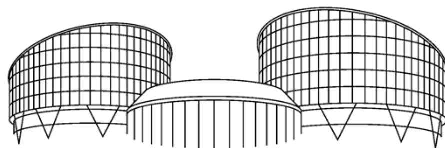
Finally, the Court should have applied the Gençel[14] clause: the case should be reopened and the continuing effects of the applicant's conviction, in particular his release on licence, must be remedied.

---

13. For a criticism of departure from international law in the property context see *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009, dissenting opinion of Judge Spielmann: "Through its judgment in this case the Court has departed from its settled case-law, a case-law that, moreover, is in conformity with the principles of international law on reparation, ... I refer to the principle of *restitutio in integrum*. This principle enshrines the obligation on a State that is guilty of a violation to make reparation for the consequences of the violation found." I voiced my discontent as regards a similarly parsimonious denial of just satisfaction in *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13 November 2008 (dissenting opinion of Judge Sajó).
14. *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003.

JOINT CONCURRING OPINION OF JUDGES VUČINIĆ AND KŪRIS

It is more than obvious that the situation examined in this case discloses certain fundamental issues related to the limits of freedom of expression and especially to their impact on the persons concerned. Like Judge Sajó, we also regret that these issues have been evaded in the judgment. Our approach to these issues in great part, but by no means in full, corresponds to that which is advanced in Judge Sajó's separate opinion.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF FRUMKIN v. RUSSIA

(Application no. 74568/12)

JUDGMENT

STRASBOURG

5 January 2016

FINAL

06/06/2016

This judgment has become final under Article 44 § 2 of the Convention.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Frumkin v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President*,
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda, *judges*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 8 December 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 74568/12) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Yevgeniy Vladimirovich Frumkin ("the applicant"), on 9 November 2012.

2. The applicant was represented by lawyers of the Memorial Human Rights Centre and the European Human Rights Advocacy Centre (EHRAC), non-governmental organisations with offices in Moscow and London. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged a violation of his rights to peaceful assembly, freedom of expression and liberty. He also alleged that the administrative proceedings before the domestic courts had fallen short of the guarantees of a fair hearing.

4. On 28 August 2014 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Moscow.

6. On 6 May 2012 the applicant was arrested during the dispersal of a political rally at Bolotnaya Square in Moscow. He was detained at the police station for at least thirty-six hours pending administrative proceedings in which he was found guilty of failure to obey lawful police orders, an offence under Article 19.3 of the Code of Administrative Offences, and sentenced to fifteen days' administrative detention. The parties' submissions on the circumstances surrounding the public assembly and its dispersal are set out in part A, and the specific facts relating to the applicant are set out in part B below.

A. The public assembly of 6 May 2012

1. The planning of the assembly

7. On 23 April 2012 five individuals (Mr I. Bakirov, Mr S. Davidis, Ms Y. Lukyanova, Ms N. Mityushkina and Mr S. Udaltsov) submitted notice of a public demonstration to the mayor of Moscow. The march, with an estimated 5,000 participants, was to begin at 4 p.m. on 6 May 2012 from Triumfalnaya Square, followed by a meeting at Manezhnaya Square, which was to end at 8 p.m. The aim of the demonstration was "to protest against abuses and falsifications in the course of the elections to the State Duma and of the President of the Russian Federation, and to demand fair elections, respect for human rights, the rule of law and the international obligations of the Russian Federation".

8. On 26 April 2012 the Head of the Moscow Department of Regional Security, Mr A. Mayorov, informed the organisers that the requested route could not be allocated because of preparations for the Victory Day parade on 9 May 2012. They proposed that the organisers hold the march between Luzhniki Street and Frunzenskaya Embankment.

9. On 27 April 2012 the organisers declined the proposal and requested an alternative route from Kaluzhskaya Square, down Bolshaya Yakimanka Street and Bolshaya Polyanka Street, followed by a meeting at Bolotnaya Square. The march was to begin at 4 p.m., and the meeting was to finish by 7.30 p.m. The number of participants was indicated as 5,000.

10. On 3 May 2012 the Moscow Department of Regional Security approved the alternative route, having noted that the organisers had provided a detailed plan of the proposed events.

11. On 3 May 2012 the Moscow Department of Regional Security informed the Chief of the Moscow Department of the Interior, Mr V. Kolokoltsev, that a different group of organisers had submitted notification of another public event – a meeting at Manezhnaya Square – which the Moscow authorities had rejected. The organisers of that event had expressed their intention to proceed in defiance of the ban and to occupy the square from 6 to 10 May 2012, ready to resist the police if necessary. The

Department of the Interior was therefore requested to safeguard public order in Moscow.

12. At 8 p.m. on 4 May 2012 the First Deputy Head of the Moscow Department of Regional Security, Mr V. Oleynik, held a working meeting with the organisers of the demonstration at Bolotnaya Square, at which they discussed the security issues. The Deputy Chief of the Public Order Directorate of the Moscow Department of the Interior, Police Colonel D. Deynichenko, took part in the meeting. The organisers stated at the meeting that the turnout could significantly exceed the expected 5,000 participants. They were warned that exceeding the number originally declared would be unacceptable. According to the applicant, during that meeting the organisers and the authorities agreed that, since there was insufficient time for an on-the-spot reconnaissance, which would otherwise have been carried out, the assembly layout and the security arrangements would be identical to the previous public event organised by the same group of opposition activists on 4 February 2012. On that occasion, the march had proceeded down Yakimanka Street, followed by a meeting at Bolotnaya Square, and the venue of the meeting had included the park at Bolotnaya Square (in some documents referred to as "Repin Park") and the Bolotnaya Embankment.

13. On the same day the deputy mayor of Moscow, Mr A. Gorbenko, instructed the Tsentralnyy district prefect to assist the organisers in maintaining public order and security during the event. He ordered the Moscow Department of Regional Security to inform the organisers that their assembly notice had been accepted and to monitor its implementation. Other public agencies were assigned the duties of street cleaning, traffic control and ensuring the presence of ambulances at the site of the assembly.

14. On 5 May 2012 the Moscow Department of Regional Security requested the Moscow City Prosecutor's Office to issue a warning to the organisers against exceeding the notified number of participants and against erecting camping tents at the meeting venue, an intention allegedly expressed by the organisers at the working meeting. The Moscow Department of Regional Security also referred to information found on the Internet that the demonstrators would go to Manezhnaya Square after the meeting. On the same day the Tsentralnyy district prosecutor's office issued the relevant warning to two of the organisers, Mr Davidis and Mr Udaltsov.

15. On the same day the Moscow Department of the Interior published on its website the official information concerning the forthcoming demonstration on 6 May 2012, including a map. The map indicated the route of the march, the traffic restrictions and an access plan to Bolotnaya Square; it delineated the area allotted to the meeting, which included the park at Bolotnaya Square. Access to the meeting was marked through the park.

16. On the same day the Police Chief of the Moscow Department of the Interior, Police Major-General V. Golovanov, adopted a plan for safeguarding public order in Moscow on 6 May 2012 (“the security plan”). The ninety-nine-page security plan was an internal document which had not been disclosed to the public or to the organisers. In view of the forthcoming authorised demonstration at Bolotnaya Square and anticipated attempts by other opposition groups to hold unauthorised public gatherings, it provided for security measures in Moscow city centre and set up operational headquarters to implement them.

17. Thirty-two high-ranking police officers, including eight major-generals, two military commanders and one emergency-relief official, were appointed to the operational headquarters. The Deputy Police Chief of the Moscow Department of the Interior, Police Major-General V. Kozlov, was appointed as head of the operational headquarters; the Chief of the Special-Purpose Operational Centre of the Moscow Department of the Interior, Police Major-General V. Khaustov, and the Deputy Chief of the Public Order Directorate of the Moscow Department of the Interior, Police Colonel Deynichenko, were appointed as deputy heads of the operational headquarters.

18. The security plan provided for an 8,094-strong crowd-control taskforce, comprising police and military, to police the designated security areas and to prevent unauthorised public gatherings and terrorist attacks. The main contingent was the police squad charged with cordon and riot-control duties in accordance with a structured and detailed action plan for each operational unit. Furthermore, it provided for a 785-strong police unit assigned to operational posts across the city centre, with responsibility for apprehending offenders, escorting them to police stations and drawing up administrative-offence reports. They were instructed, in particular, to prepare templates for the administrative-offence reports and to have at least forty printed copies of them at every police station. The security plan also provided for a 350-strong police unit for intercepting and apprehending organisers and instigators of unauthorised gatherings. The squad had to be equipped with full protection gear and police batons. Each unit had to ensure effective radio communication within the chain of command. They were instructed to keep loudspeakers, metal detectors, handcuffs, fire extinguishers and wire clippers in the police vehicles.

19. The security plan set out in detail the allocation and deployment of police vehicles, police buses, interception and monitoring vehicles and equipment, dog-handling teams, fire-fighting and rescue equipment, ambulances and a helicopter. It also made provision for a 1,815-strong reserve unit equipped with gas masks, aerosol grenades (*Дрейф*), flash grenades (*Заря-2*), bang grenades (*Факел* and *Факел-С*), a 40-mm hand-held grenade launcher (*Гвоздь 6Г-30*), and a 43-mm hand-held grenade launcher (*ГМ-94*); tubeless pistols (*ПБ-4СП*) with 23-mm rubber bullets

and propelling cartridges, and rifles (*KC-23*). Two water-cannon vehicles were ordered to be on standby, ready to be used against persistent offenders.

20. All units were instructed to be vigilant and thorough in detecting and eliminating security threats and to be polite and tactful in their conduct *vis-à-vis* citizens, engaging in lawful dialogue with them without responding to provocations. If faced with an unauthorised gathering, they were instructed to give a warning through a loudspeaker, to arrest the most active participants and to record video-footage of those incidents. The police chiefs were instructed to place plain-clothes officers among the protesters in order to monitor the threat of violence and terrorist attacks within the crowd and to take measures, where appropriate, to prevent and mitigate the damage and to pursue the perpetrators.

21. The Chief of the Tsentralnyy district of Moscow Department of the Interior, Police Major-General V. Paukov, was required, among other tasks, to prepare, together with the organisers, the text of the public announcement to be made if the situation deteriorated. The head of the press communication service of the Moscow Department of the Interior, Internal Service Lieutenant-Colonel Y. Alekseyeva, was in charge of communication with the press. The head of the Department for Liaison with Civil Society of the Moscow Department of the Interior, Internal Service Colonel V. Biryukov, had to ensure "coordination with the representatives of public organisations and also coordination and information flow with other services of the Moscow Department of the Interior".

22. The units assigned to police the march and the meeting belonged to "Zone no. 8" (Kaluzhskaya Square, Bolotnaya Square and the adjacent territory). The zone commander was the Chief of the Riot Police of the Moscow Department of the Interior, Police Colonel P. Smirnov, with nine high-ranking police officers (Police Colonels P. Saprykin, Y. Zdorenko, A. Kuznetsov, V. Yermakov, A. Kasatkin, A. Dvoynos, Police Lieutenant-Colonel A. Tsukernik, Police Captain R. Bautdinov and Internal Service Lieutenant-Colonel D. Bystrikov) as his deputies.

23. The units assigned to Zone no. 8 comprised 2,400 riot police officers, of whom 1,158 were on duty at Bolotnaya Square. They were instructed, in particular, to search the demonstrators to prevent them from taking camping tents to the site of the meeting and to obstruct access to Bolshoy Kamennyy Bridge, diverting the marchers to Bolotnaya Embankment, the site of the meeting. The adjacent park at Bolotnaya Square had to be cordoned off, and the only entrance to Bolotnaya Embankment – from Malyy Kamennyy Bridge – had to be equipped with fourteen metal detectors, which were to be removed just before the march approached the site of the meeting. An exception was made for the organisers and the technical staff, who were allowed access behind the stage through two additional metal detectors. Further arrangements were made for access of the press.

24. Lastly, the command of Zone no. 8, in particular Police Colonels Smirnov and Saprykin, were under orders to meet the organisers in person at the beginning of the event to remind them of their responsibilities and to have them sign an undertaking. The organisers would undertake to ensure the lawful and safe conduct of the event, and to refrain from any calls for forced change of the constitutional order and from hate speech and propaganda in favour of violence or war. They would also undertake to be present at the venue until the end of the assembly and the departure of the participants. A video-recording of the briefing and the signing of the undertaking had to be made.

2. Dispersal of the meeting at Bolotnaya Square

25. At approximately 1.30 p.m. on 6 May 2012 the organisers were allowed access to Bolotnaya Square to set up the stage and sound equipment. The police searched the vehicles delivering the equipment and seized three tents found amid the gear. They arrested several people for bringing the tents, and the installation of the equipment was delayed. During that time communication between the organisers setting up the stage and those leading the march was sporadic.

26. At the beginning of the march, Police Colonel A. Makhonin met the organisers at Kaluzhskaya Square to clarify any outstanding organisational matters and to have them sign the undertaking to ensure public order during the demonstration. He specifically asked Mr Udaltsov to ensure that no tents were placed on Bolotnaya Square and that the participants complied with the limits on the place and time allocated for the assembly. The organisers gave their assurances on those issues and signed the undertaking.

27. The march began at 4.30 p.m. at Kaluzhskaya Square. It proceeded down Yakimanka Street peacefully and without disruption. The turnout exceeded expectations, but there is no consensus as to the exact numbers. The official estimate was that there were 8,000 participants, whereas the organisers considered that there had been about 25,000. The media reported different numbers, some significantly exceeding the above estimates.

28. At aproximately 5 p.m. the march approached Bolotnaya Square. The leaders found that the layout of the meeting and the placement of the police cordon did not correspond to what they had anticipated. Unlike on 4 February 2012, the park at Bolotnaya Square was excluded from the meeting venue, which was limited to Bolotnaya Embankment. The cordon of riot police in full protection gear barred access to the park and continued along the whole perimeter of the meeting area, channelling the demonstration to Bolotnaya Embankment. Further down the embankment there was a row of metal detectors at the entrance to the meeting venue. By that time the stage had been erected at the far end of Bolotnaya Embankment and a considerable number of people had already accumulated in front of it.

29. Faced with the police cordon and unable to access the park, the leaders of the march – Mr Udaltsov, Mr A. Navalnyy, Mr B. Nemtsov and Mr I. Yashin – stopped and demanded that the police open access to the park. According to the protesters, they were taken aback by the alteration of the expected layout and were unwilling to turn towards Bolotnaya Embankment; they therefore demanded that the police officers at the cordon move the cordon back to allow sufficient space for the protesters to pass and to assemble for the meeting. According to the official version, the protesters were not interested in proceeding to the meeting venue; they stopped because they had either intended to break the cordon in order to proceed towards Bolshoy Kamennyy Bridge and then to the Kremlin, or to stir up the crowd to incite disorder. It is common ground that the cordon officers did not enter into any discussion with the protest leaders and no senior officer was delegated to negotiate. After around fifteen minutes of attempting to engage with the cordon officers, at 5.16 p.m. the four leaders announced that they were going on a "sit-down strike" and sat on the ground. The people behind them stopped, although some people continued to go past them towards the stage. The leaders of the sit-in called on other demonstrators to follow their example and sit down, but only a few of their entourage did so (between approximately twenty and fifty people in total).

30. Between 5.20 p.m. and 5.45 p.m. two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, contacted unidentified senior police officers to negotiate the enlargement of the restricted area by moving the police cordon behind the park along the lines expected by the organisers. At the same time Mr V. Lukin, the Ombudsman of the Russian Federation, at the request of Police Colonel Biryukov, attempted to convince the leaders of the sit-in to resume the procession and to head towards the meeting venue at Bolotnaya Embankment, where the stage had been set up. During that time no senior police officers or municipal officials came to the site of the sit-down protest, and there was no direct communication between the authorities and the leaders of the sit-in.

31. At 5.40 p.m. one of the meeting participants announced from the stage that the leaders were calling on the demonstrators to support their protest. Some people waiting in front of the stage headed back to Malyy Kamennyy Bridge, either to support the sit-down protest or to leave the meeting. The area in front of the stage almost emptied.

32. At 5.43 p.m. the media reported that Mr Udaltsov had demanded that the protesters be given airtime on Russia's main television channels, that the presidential inauguration of Mr Putin be cancelled and that new elections be called.

33. At 5.50 p.m. the crowd around the sit-down protest built up, which caused some congestion, and the leaders abandoned the protest and headed towards the stage, followed by the crowd.

34. At 5.55 p.m. the media reported that the police authorities were regarding the strike as a provocation of mass disorder and were considering prosecuting those responsible for it.

35. At the same time a commotion arose near the police cordon at the place vacated by the sit-down protest, and the police cordon was broken in several places. A crowd of around a hundred people spilled over to the empty space beyond the cordon. Within seconds the police restored the cordon, which was reinforced by additional riot police. Those who found themselves outside the cordon wandered around, uncertain what to do next. Several people were apprehended, others were pushed back inside the cordon, and some continued to loiter outside or walked towards the park. The police cordon began to push the crowd into the restricted area and advanced by several metres, pressing it inwards.

36. At 6 p.m. Police Colonel Makhonin told Ms Mityushkina to make an announcement from the stage that the meeting was over. She did so, but apparently her message was not heard by most of the demonstrators or the media reporters broadcasting from the spot. The live television footage provided by the parties contained no mention of her announcement.

37. At the same time a Molotov cocktail was launched from the crowd at the corner of Malyy Kamennyy Bridge over the restored police cordon. It landed outside the cordon and the trousers of a passer-by caught fire. The fire was promptly extinguished by the police.

38. At 6.15 p.m., at the same corner of Malyy Kamennyy Bridge, the riot police began breaking into the demonstration to split the crowd. Running in tight formations, they pushed the crowd apart, arrested some people, confronted others and formed new cordons to isolate sections of the crowd. Some protesters held up metal barriers and aligned them so as to resist the police, threw various objects at the police, shouted and chanted “Shame!” and other slogans, and whenever the police apprehended anyone from among the protesters, they attempted to pull them back. The police applied combat techniques and used truncheons.

39. At 6.20 p.m. Mr Udaltsov climbed onto the stage at the opposite end of the square to address the meeting. At that time many people were assembled in front of the stage, but, as it turned out, the sound equipment had been disconnected. Mr Udaltsov took a loudspeaker and shouted:

> “Dear friends! Unfortunately we have no proper sound, but we will not give up; we are not going away because our comrades have been arrested, because tomorrow is the inauguration of an illegitimate president. We shall begin an indefinite protest action. Do you agree? We shall not leave until our comrades have been released, until the inauguration has been cancelled and until we are given airtime on the central television channels. Do you agree? We are the power here! Dear friends, [if] we came out in December [2011] and in March [2012], it was not to put up with the stolen elections, ... it was not to see the chief crook and thief on the throne. Today we have no choice – stay here or hand over the country to crooks and thieves for another six years. I consider that we must not leave today. We must not leave!”

40. At this point, at 6.21 p.m., several police officers arrested Mr Udaltsov and took him away. Mr Navalnyy attempted to go up onto the stage, but he was also arrested at the stairs and taken away. As he was pushed out by the police officers he turned to the crowd shouting "Nobody leave!"

41. At 6.25 p.m. the police arrested Mr Nemtsov, who had also attempted to address people from the stage.

42. Meanwhile, at the Malyy Kamennyy Bridge the police continued dividing the crowd and began pushing some sections away from the venue. Through the loudspeakers they requested that the participants leave for the metro station. The dispersal continued for at least another hour until the venue was fully cleared of all protesters.

3. The reports of the events of 6 May 2012 and the investigation of the "mass disorder" case

43. On 6 May 2012 Police Colonel Deynichenko drew up a report summarising the security measures taken on that day in Moscow. The report stated that the march, in which around 8,000 people had participated, had begun at 4.15 p.m. and had followed the route to Bolotnaya Square. It listed the groups and organisations represented, the number of participants in each group, the number and colours of their flags and the number and content of their banners. It further stated as follows.

> "... at 5.04 p.m. the organised procession ... arrived at the [cordon] and expressed the intention to proceed straight to Bolshoy Kamennyy Bridge and [to cross it] to Borovitskaya Square. The police ... ordered them to proceed to Bolotnaya Square, the venue of the meeting. However, the leaders at the head of the procession – [Mr Udaltsov, Mr Nemtsov and Mr Navalnyy] – ... called on the marchers through the loudspeaker not to move. Together with some thirty protesters they sat on the ground. Another group of around twenty, called by [their leaders], followed suit. The police ... repeatedly warned them against holding an unauthorised public gathering and required them to proceed to the venue of the meeting or to leave. Besides that, two State Duma deputies, Gennady Gudkov and Dmitry Gudkov, the Ombudsman of the Russian Federation, Vladimir Lukin, and a member of the Civic Chamber, Nikolay Svanidze, talked to them, but those sitting on the ground did not react and continued chanting slogans ... From 5.58 p.m. to 7 p.m. persons on Malyy Kamennyy Bridge and Bolotnaya Embankment made attempts to break the cordon, and threw empty glass bottles, fireworks, chunks of tarmac and portable metal barriers at the police officers. From 5 p.m. to 6 p.m. music was playing on the stage ... At 5.20 p.m. ... a deputy of the Vologda Regional Duma called on the participants to head to the Malyy Kamennyy Bridge to support those sitting on the ground ... At 6 p.m. one of the organisers, Ms Mityushkina ..., went on the stage and declared the meeting over. At 6.20 p.m. Mr Udaltsov went on the stage and called on the people to take part in an indefinite protest action.
>
> At 7 p.m. a group of around twenty individuals including Ms Mityushkina ... attempted to put up three one-person camping tents on Bolotnaya Embankment.
>
> ...

> From 6 p.m. to 9 p.m. necessary measures were taken to push the citizens away from Malyy Kamennyy Bridge, Bolotnaya Embankment and Bolotnaya Street and to arrest those who resisted the most ..., during which twenty-eight police officers and military servicemen [sustained injuries] of various gravity, four of whom have been hospitalised.
>
> In total, 656 people were detained in Moscow to prevent public disorder and unauthorised demonstrations ...
>
> ...
>
> The total number of troops deployed for public order and security duties in Moscow was 12,759 servicemen, including 7,609 police officers, 100 traffic police officers, 4,650 military servicemen and 400 members of voluntary brigades.
>
> As a result of the measures taken by the Moscow Department of the Interior, the tasks of maintaining public order and security were fully carried out, and no emergency incidents were allowed to occur."

44. On the same day the Investigative Committee of the Russian Federation opened a criminal investigation into suspected offences of mass disorder and violent acts against the police (Article 212 § 2 and Article 318 § 1 of the Criminal Code).

45. On 28 May 2012 an investigation was also launched into the criminal offence of organising mass disorder (Article 212 § 1 of the Criminal Code). The two criminal cases were joined on the same day.

46. On 22 June 2012 the Investigative Committee set up a group of twenty-seven investigators and put them in charge of the criminal file concerning the events of 6 May 2012.

47. On an unspecified date, two human-rights activists filed a request with the Investigative Committee to open a criminal investigation into the conduct of the police in the same events; they complained, in particular, of the suppression of a lawful public assembly. Another petition was filed, also on an unspecified date, by forty-four human rights activists and members of non-governmental organisations (NGOs), calling for the curbing of repression against those who had been arrested and prosecuted in relation to the events of 6 May 2012 and denying that mass riots had taken place at Bolotnaya Square.

48. Following an enquiry from the Investigative Committee regarding publication of the maps of the assembly of 6 May 2012, on 13 August 2012 the Moscow Department of the Interior replied as follows.

> "... [O]n 5 May 2012 the Moscow Department of the Interior published on its official website ... a notice on 'Safeguarding public order in Moscow during the public events on 6 May'. The notice included information on the route, the map of traffic restrictions and information concerning the location of the socio-political events, which a large number of participants were expected to attend, the security measures and the warning against any unlawful acts during the events.
>
> The decision to publish this notice was taken by the head of the Department on Liaison with the Mass Media of the Moscow Department of the Interior with the aim

of ensuring the security of citizens and media representatives planning to take part in the event.

The pictures contained in the notice were schematic and showed the approximate route of the [march] as well as the reference place of the meeting – 'Bolotnaya Square' – indicated in the 'Plan for Safeguarding Public Order in Moscow on 6 May 2012'.

On 4 May 2012 a working meeting took place at the Moscow Department of Regional Security with participants from among [the organisers and the Department of the Interior], where they discussed the arrangements for the march ..., the placement of metal detectors, the stage set-up and other organisational matters.

After the meeting ... the [Moscow Department of the Interior] prepared a [security plan] and map providing for the park at Bolotnaya Square to be cordoned off with metal barriers [and] for the participants in the meeting to be accommodated on the road at the Bolotnaya Embankment.

Given that the agreement on the route of the demonstration and the meeting venue had been reached at the above-mentioned working meeting at 9 p.m. on 4 May 2012, the [security plan] and the security maps were prepared at extremely short notice (during the night of 4-5 May 2012 and the day of 5 May 2012), to be approved afterwards, on 5 May 2012, by senior officials at the Moscow Department of the Interior.

The Department of the Interior did not discuss the security maps and [security plan] with the organisers. Those documents were not published as they were for internal use, showing the placement of the police forces ... and setting out their tasks."

49. On an unspecified date, eight prominent international NGOs set up an international expert commission to evaluate the events at Bolotnaya Square on 6 May 2012 ("the Expert Commission"). The Expert Commission comprised six international experts whose objective was to provide an independent fact-finding and legal assessment of the circumstances in which the demonstration at Bolotnaya Square had been dispersed. In 2013 the Expert Commission produced a fifty-three-page report containing the chronology and an assessment of the events of 6 May 2012. It identified the sources used for the report as follows.

"The work of the Commission was based on the following materials:

– evidence from the official investigation, reports and statements made by the relevant authorities and any other official information available on the case;

– information from public investigations and observations gathered by human rights defenders, journalists and others; and

– reports by observers and journalists, witness testimony and video materials.

...

In order to provide an objective and complete picture of the events, the Commission developed a questionnaire that it distributed to the city administration of Moscow, the Investigative Committee of the Russian Federation, police authorities in Moscow, the Ombudsman of the Russian Federation and event organisers. Unfortunately the Commission did not receive replies from the city administration, police authorities or Investigative Committee. As a result, the analysis contained in this report is based on

information from open sources, including materials presented by the event organisers, observers and non-governmental organisations, materials from public investigations and information provided by defence attorneys engaged in the so-called 'Bolotnaya case'. These materials include eyewitnesses' testimony, videos from the media and private actors, documents and some open data regarding the Bolotnaya criminal case. The experts analysed more than 50 hours of video-records and 200 documents related to the Bolotnaya events. In addition, they met organisers, participants and observers of the events and attended several court hearings of the Bolotnaya case."

50. Concerning the way the assembly of 6 May 2012 had been organised, the Expert Commission noted the following.

"... the Moscow Department of Regional Security announced on [4 May 2012] that the event would follow a similar route [to the] previous rally on [4 February 2012]. Participants were to assemble at Kaluzhskaya Square, set off at 4:00pm along Bolshaya Yakimanka and Bolshaya Polyanka for a rally in Bolotnaya Square, and disperse at 7:30pm The official notification of approval was issued on [4 May 2012] – just two days before the beginning of the event.

That same day, the Moscow Department of the Russian Ministry of [the] Interior published a plan on its website indicating that all of Bolotnaya Square, including the public gardens, would be given over to the rally, while the Bolshoy Kamenny Bridge would be closed to vehicles but would remain open to pedestrians. This was the same procedure [the] authorities [had] adopted for the two previous rallies on Bolotnaya Square on [10 December 2011] and [4 February 2012].

...

On the evening of [5 May 2012], [the] police cordoned off the public gardens at Bolotnaya Square. According to Colonel Yuri Zdorenko, who was responsible for security at the location, this was done 'in order to prevent the participants from setting up camp and from [carrying out] other [illegal] acts.' [The] authorities received information [that] the protesters might attempt to establish a protest camp at the site, causing them to decide that the rally should be confined to only the Bolotnaya waterfront area – a much smaller area than had been originally allocated for the assembly.

...

The police did not, however, inform the organisers of the changes they had decided upon, and they only became aware of the police-imposed changes to the event when they arrived at the site on the afternoon of [6 May 2012].

The City Council did not [send] out a written announcement that a special representative from the city authorities would be present at the event, nor did the chairman of the Moscow local department of the Ministry of [the Interior], Vladimir Kolokoltsev, issue any special orders on sending a special representative of the Ministry to the event.

...

The organizers requested twelve hours to set up a stage and sound equipment for the rally; however, on the morning of [6 May 2012], the authorities only allocated six hours of advance access. Furthermore, at 1:30pm, the police did not allow vehicles with stage equipment onto the site until they had been searched. The searches revealed a small number of tents, and [the] authorities detained a number of people as a result.

The police finally allowed the truck with the stage equipment onto Bolotnaya Square at 250pm, just 70 minutes before the march was due to begin."

51. As regards the circumstances in which the assembly was dispersed, the Expert Commission's report stated as follows.

> "As the march approached Bolotnaya Square, [the] demonstrators found that a police cordon [was blocking off most] of the square, leaving only a narrow stretch along the waterfront for the rally. The police established a triple cordon of officers on Bolshoy Kammeny Bridge, which prevented any movement in the direction of the Kremlin. The first cordon was positioned close to the junction of Maly Kamenny Bridge and the Bolotnaya waterfront. Students from the Police College and officers of the Patrol Guard Service (without any protective equipment) made up this line. Behind them were two rows of OMON [riot police], a line of voluntary citizen patrol ('*druzhinniki*'), and another cordon of OMON. A number of water cannons were visible between the second and third cordons.
>
> [The report contained two photographs comparing the police cordon on 4 February 2012, a thin line of police officers without protection gear, and the one on 6 May 2012, multiple ranks of riot police with full protection gear backed up by heavy vehicles.]
>
> The police cordons, which blocked off movement in the direction of the Kremlin, created a bottleneck that slowed the march's progress to such an extent that it came to a virtual stop as demonstrators attempted to cross the bridge. Moreover, just beyond Luzhkov Bridge, the marchers had to go through a second set of metal detectors, where progress was very slow since there were only 14 detectors.
>
> ...
>
> By 5:15pm, the majority of the march was immobile. A number of leaders, including Sergey Udaltsov, Alexey Navalnyy and Ilya Yashin, encouraged demonstrators to sit down on the road in front of the 'Udarnik' cinema facing the police cordon to protest [against] the inability of the march to continue and to demand that they be given access to the originally allocated space for the rally on Bolotnaya Square. An estimated 50-200 people joined the sit-down protest. The leaders stressed the need to maintain a peaceful protest and appealed to demonstrators to remain calm. Participants chanted, 'We will not go away' and 'Police together with the people'. The leaders attempted to address the crowds using loudspeakers, but those behind the sit-down protest could not hear or see events as they transpired. The sit-down protest did not completely block the road, but it did restrict the movement of those approaching the police lines and the bottleneck caused by the police cordon. As a result, the crowd grew denser as more demonstrators arrived from Bolshaya Yakimanka Street.
>
> ...
>
> At 5:42pm, the [chief of the Moscow Department of the Interior] issued a statement:
>
> > 'The organizers of the rally and other participants refuse to proceed to the agreed place of the rally (to Bolotnaya Square). They [have] stopped on the roadway near the 'Udarnik' theatre. Some of them [have] sat on the ground and thus blocked the movement of the column. Despite repeated warnings on the part of the police to proceed to the place of the rally, they won't move thereby creating a real threat of a jam and trauma for participants. An inquiry commission is working on the spot to document their actions related to appeals to commit mass public disorder with a view to further consider the issue of instituting criminal proceedings.'

Some demonstrators appeared to become frustrated with standing and waiting and began to walk away. Some tried to pass through the police cordon to leave the area, but the police refused to let them through. Instead, they were directed to go back through the crowd to Bolshaya Polyanka Street, even though this was practically impossible.

The police used loud speakers to inform demonstrators of the rally location. They asked participants to pass directly to Bolotnaya Square and not stop at the bridge, despite the fact that the major part of the square was closed to demonstrators. They announced that all actions on the bridge could be considered illegal. However, given the poor quality of the sound equipment, only those nearest the police could hear this information; the majority of protesters did not hear the police instructions.

...

From the moment difficulties first arose for demonstrators attempting to cross Maly Kammeny Bridge, demonstrators made repeated attempts to negotiate with the police over moving their cordons to allow protesters onto Bolotnaya Square.

Dmitry Oreshkin, a member of the Presidential Human Rights Council, and Member of Parliament Gennady Gudkov tried to talk to [the] police authorities at around 5:30pm, but there was no response. Shortly after participants broke through the police cordon at 6:20pm, a group of human rights activists spoke to Colonel Birukov, head of the [Moscow Department of the Interior]'s press centre. At 7:00pm, MP Ilya Ponomarev tried to stop violence during the clashes on the embankment by speaking to the authorities, but he did not get a positive response.

Many of those involved in organising the event stated that they tried to engage with [the] police throughout the day to ensure the event took place in a peaceful manner.

Nadezhda Mityushkina: 'I tried unsuccessfully to find the responsible people in the Ministry of [the Interior] in order to solve [the] organizational problems. I knew whom to contact in case we needed help when issues arose... Only at 6:00-6:30pm did a police officer approach me. I knew from previous demonstrations that he was a senior officer responsible for communication with event organisers ... and he told me that the authorities had suspended the demonstration. As one of the rally organizers, he told me to announce from the stage that the event was over, which I did following our conversation.'

Igor Bakirov: 'A police officer in a colonel's uniform contacted me only once, and I showed him the documents [confirming] my credentials as an event organiser. Later clashes with the police erupted, I couldn't find anyone with whom to communicate and cooperate.'

Sergey Davidis: 'I personally did not meet nor have time to get into contact with the authorities regarding the fences set up around the perimeter of the rally. I assumed some other organizers had already spoken to the authorities regarding this issue or were speaking with them at that time. There was no one to contact and nothing to talk about. I only saw the OMON officers who behaved aggressively and were not predisposed to get into a conversation.'

...

At 5:55pm, as people tried to move through the narrow gap between the police cordon and the waterfront to reach Bolotnaya Square, the police line moved two steps forward, further pressing the crowd. This in turn generated a counter response from the crowd, and protesters began pushing back. In several places, the police cordon broke, and a few dozen people found themselves in the empty space behind the first

police line. It is impossible to determine whether the [breaking of the cordon] was the result of conscious action by sections of the crowd or if the police cordon simply broke due to the pressure from such a large number of people.

Some of those who made it past the police lines were young men, but there were also many elderly citizens and others who did not resemble street fighters. Those who found themselves behind the police cordon did not act in an aggressive manner but appeared to move towards the entrance to the Bolotnaya [park], the supposed rally point.

Different demonstrators reacted very differently to the breaking of the police line. Some tried to move away, others called for people to break the cordon, while some tried to restrain the crowd from [trampling on] those who were still taking part in the sit-down protest. As pressure and tension grew, the sit-down protesters stood up rather than risk being trampled. There was a high degree of confusion, and people were not clear on what was happening.

...

Just after the [breaking of the police cordon] at approximately at 6:00pm, a single Molotov cocktail was thrown from the crowd. It landed behind the police ranks and ignited the trousers of ... a 74-year-old demonstrator who had passed through the cordon. The police used their fire extinguishers to put out the fire. This was the only such incident recorded during the day ...

...

Soon after the cordons were broken, the authorities began to detain those who remained behind the police lines, taking them to special holding areas. The police also arrested some protesters at the front of the crowd who had not tried to break through the cordon. The police cordon was fully restored after about four minutes. ...

...

At 6:10pm, Sergey Udaltsov, Alexey Navalnyy and Boris Nemtsov managed to walk from the Udarnik cinema to the stage at the waterfront followed by a large number of people. A police cordon blocked access to the stage, but they were allowed through. As they tried to start the rally, the police intervened. ...

... OMON officers then detained Sergey Udaltsov on stage and shortly afterwards detained Boris Nemtsov and Alexey Navalnyy as well. By 6:50pm, the organizers began to disassemble the stage.

...

In the two hours between 6pm and 8pm, the demonstration was marked by two distinct types of activity. For much of the time, demonstrators and the police stood face to face without much happening. These moments were interspersed with periods when the police advanced and the crowd moved back. There does not appear to have been any clear reason for the police decision to advance other than to divide the crowd up into smaller sections. More than anything, the police advances served to raise tensions and provoke some members of the crowd to push back. There is little evidence that demonstrators initiated the violence. Rather, they appear to have become aggressive only in response to the authorities' advances.

During these interchanges some protesters threw objects at the police, and the police used their batons freely. The crowd threw plastic bottles, shoes and umbrellas ...

...

At around 6:20pm, the police announced that the rally was cancelled and asked protesters to disperse. Police used a loudspeaker to state, ‘Dear citizens, we earnestly ask you not to disturb public order! Otherwise, in accordance with the law, we will have to use force! Please, leave here, and do not stop. Go to the metro.’ Although the police used a loudspeaker, the announcement was not loud enough to reach the majority of the crowd. It is likely that only those nearest to the loudspeakers could have heard the call to disperse.

There was confusion over the police demands because at the same time ... Colonel Birukov, head of the Moscow [Department of the Interior]’s press service, told a group of human rights defenders (including Vladimir Lukin, Dmitri Oreshkin, Victor Davydov and Nikolai Svanidze) that the demonstrators could continue to Bolotnaya Square to take part in the rally.

...

By 6:30pm the crowd at the corner of Maly Kamenny Bridge and the waterfront was cut in two. Those on Maly Kamenny Bridge were pushed in the direction of Bolshaya Polyanka Street, while those on the waterfront were cut off from both Bolshoy and Maly Kamenny Bridges.

...

Around 6:54pm, the police cordon that acted as a barrier along the waterfront near the Luzhkov Bridge was removed, and demonstrators were able to move freely along the Bolotnaya waterfront. Approximately 15 minutes later, some 200 police officers in protective equipment who had formed a cordon at the Luzhkov Bridge began pushing protesters in the direction of Lavrushinsky Lane, which runs from Bolotnaya Square to the Tretyakovskaya metro station. At the same time, police began to push people back along the Bolotnaya waterfront from the Luzhkov Bridge towards the Udarnik cinema. Those who remained on the waterfront linked arms in passive resistance. The police pushed forward, divided the crowd and began to detain demonstrators.

...

At around 7:47pm ... authorities created a corridor to allow demonstrators to leave the Bolotnaya area.

...

At 7:53pm a group of OMON officers appeared from the bushes of Bolotnaya Gardens and divided those demonstrators that remained on the square. Those on one side were able to move towards Malyy Kamennyy Bridge, while those on the other remain[ed] totally blocked between the police lines.

...

At 8:08pm the last groups of people slowly left the waterfront along a corridor formed by the policemen. The police also began to move people away from the Kadashevskaya waterfront on the other side of the Obvodnoy Channel. Some people were detained, while others were pushed along Bolshaya Polyanka Street in the direction of the Lavrushinsky Lane.

Between 9:00 and 10:00pm around two thousand demonstrators moved along Bolshaya Ordynka Street chanting slogans ... and the OMON officers began to detain people and actively disperse the column.”

52. On 20 March 2013 the Zamoskvoretskiy branch of the Investigative Committee dismissed ten individual complaints and two official enquiries

made in relation to the matter, one by Mr I. Ponomarev, a deputy of the State Duma, and another one by Mr A. Babushkin, President of the Public Supervisory Committee of Moscow. The complaints and enquiries concerned the allegedly unlawful acts of the police in dispersing the rally on 6 May 2012, including excessive use of force and arbitrary arrests. The Investigative Committee interviewed one of the ten individuals who had lodged the complaints and four police officers deployed in the cordon around Bolotnaya Square, including squadron and regiment commanders. They stated, in particular, that they had been acting under orders to maintain public safety and to identify and arrest the most active instigators of unrest; only those resisting the demands of the police had been arrested and no force had been used unnecessarily. The police officers stated that when the police had had to intervene, they had used combat manoeuvres and truncheons but not tear gas or other exceptional means of restraint. Squadron Commander S. explained that he had been deployed in the sector adjacent to the stage and that there had been no incidents or disorder in that sector; no one had been arrested. The decision listed thirteen other internal inquiries carried out following individual complaints and medical reports; in six cases the allegations of abuse had been found to be unsubstantiated and in seven cases the police conduct had been found to be lawful. As regards the substance of the complaints at hand, the Investigative Committee found as follows.

> "... having crossed Malyy Kamennyy Bridge, the column leaders stopped. Many participants in the march bypassed the organisers and proceeded to Bolotnaya Square towards the stage ... When the march participants had filled nearly all of Bolotnaya Embankment, limited by the police cordon on one side and by the stage on the other side, the organisers were still at the point between Malyy Kamennyy Bridge, Bolotnaya Square, [the park] and the Udarnik cinema ...
>
> At this time the organisers demanded that the police officers let them pass through to the Kremlin. The police told them that they would not let anyone pass through to the Kremlin because the event was authorised to take place at Bolotnaya Square, where the stage had been specially set up, and they were told to proceed. After that, the organisers decided to call a sit-down protest and called upon those present to disobey the lawful orders of the police. After that, the meeting participants congregated opposite the Udarnik cinema, where after a while they attempted to break the cordon, which [the police] did not manage to prevent. Therefore the police began arresting those who had been most actively involved in breaking the cordon; they were put in a police van and then taken to police stations in Moscow. After the confrontation had been localised, the police officers slightly dispersed the crowd, having apprehended the most active perpetrators. From the very beginning of the sit-down protest the police requested the participants through loudspeakers to proceed to the stage, not to act on provocation and not to commit unlawful acts, but these requests had no effect and therefore [it was clear that] the breaking of the cordon had been organised. In suppressing it the police officers acted in coordination and concert. They did not use force or special means of restraint. However, the work of the officers charged with apprehending offenders did involve the use of force and special means of restraint, in so far as necessary, against persons putting up resistance.

Later on, in the area of Malyy Kamennyy Bridge and at the [park] corner some localised confrontations took place ... force and special means of restraint were used. All those detained at Bolotnaya Square were taken to the police stations ... Administrative offence reports were then submitted to the Justices of the Peace for consideration on the merits.

...

In accordance with Article 42 of the Criminal Code, any acts of a public official connected with the use of his or her official powers which have caused damage to interests protected by law may not be classified as a criminal offence if they were committed pursuant to a binding order or instruction.

...

After the organisers had decided to call a sit-down protest ... [they] provoked mass disorder, during which the participants threw various objects at the police, thus causing injuries to some of them. Because of this turn of events the police officers detained those participating in the mass disorder with justifiable use of force, and by special means of restraint against those who resisted.

...

In view of the foregoing, the institution of criminal proceedings against the police officers ... is refused for the absence of *corpus delicti*."

53. On 24 May 2013 the first criminal case against twelve individuals suspected of participation in mass disorder was transferred to the Zamoskvoretskiy District Court of Moscow for the determination of criminal charges ("the first Bolotnaya case").

54. On 2 December 2013 Mr Navalnyy gave testimony as a witness in the first Bolotnaya case. He testified, in particular, as follows.

"The political organisers and the formal organisers, we all had a clear idea ... and the Moscow mayor's office confirmed that the march would follow the same route as the one that had taken place on 4 February 2012. Bolotnaya Square is a traditional place for holding various opposition events. We all had a clear understanding what the route would be, where the stage would be, what the layout would be. We came there at that time for a rather traditional, customary event, the scenario of which was well-known to everybody ... two days beforehand the maps showing where people would assemble and the route of the march were published on the official [news] website RiaNovosti; they are still posted there. The map was published on the [police] website 'Petrovka, 38' and this map is still posted there. Not only the organisers, but the participants too, they knew where they were going ... When we approached the venue of the meeting ... we saw that the map showing where people would assemble on the square had been essentially altered. It was quite different from the map of 4 February [2012], and, above all, different from the document which had been agreed with the Moscow mayor's office and had been published on the website[s] RiaNovosti and 'Petrovka, 38' ... [according to which] people were to assemble on Bolotnaya Embankment as well as in the park at Bolotnaya Square. However, when we came we saw that the park at Bolotnaya Square, taking up approximately 80% of the square, was barred and cordoned off ... since [the cordon] did not correspond [to the map] the column stopped. The event organisers and the people who came just waited for this question to be resolved, for the police to remove the wrong cordon, for the police chiefs to reply as to what had changed, why the approved meeting was not being conducted according to the scenario that had been approved ... I had previously

[organised events] ... Somebody had taken the map and changed the location of the meeting. This had practically never happened before ... to show visually that we were not going anywhere, we sat on the ground ... the first line of [the police] cordon was composed of 20-year-old conscripts, and with a thousand people pressing on it the cordon broke. It could only break. This led to an uncontrollable situation, as several policemen were walking and trying to say something through megaphones – impossible to tell what they were saying. Some activists passing by were also speaking through megaphones – impossible to tell what they were saying. No authorities were present on the spot. And [it was] impossible to understand who was in command. So all of that caused the rupture of the police cordon. People started spreading across that spot ...Then I tried to walk over to the stage to try and explain to the gathering what was going on, using the amplifiers. I did not know then that the police had already cut off the amplifiers.

[Question to the witness] Did anybody try to negotiate with the participants of the sit-down protest?

Attempts were made, as far as was possible in the circumstances ... everybody had stopped because we all wanted to understand where the representatives from the mayor's office were, where the appropriate representative of the Department of the Interior was. All the [high-ranking] police officers were asked, but they only shrugged. Nobody could understand what was going on. The State Duma deputies present on the spot tried to act as negotiators, but ... they said that nobody wanted to come up to us. We could see some police officers resembling chiefs, at a distance ... but it was impossible to get to them ... it was impossible to reach the [police] command. Nobody would come to us. Nobody could negotiate despite everyone's wish to do so.

... [W]hen I was in the detention facility I lodged a complaint concerning the hindrance of a peaceful public event. This complaint was with the Moscow Department of the Interior. I have set out the arguments [as to why] I considered that there had been ample evidence that the officials of the Moscow Department of the Interior had deliberately provoked the crowd to panic so that [they] could later make claims regarding mass disorder."

55. On the same day Mr Davidis gave testimony as a witness in the first Bolotnaya case. He testified, in particular, as follows.

"The negotiations with the [mayor's office] were very difficult this time ... I had been the organiser of most events from 25 December 2011. It was always possible to meet the deadline, to find a compromise, [but not this time]. ... It was [only] on 4 [May 2012] that we received the written agreement. On the same day the working meeting took place ... Usually, everything is decided no later than five days before the event. This time there was practically twenty-four hours' notice. We could not even bring the vehicles carrying the stage to the square before 1 p.m. [on 6 May 2012]. We were put under very harsh conditions ... we only had three hours to put up the stage ... At the [working meeting] technical issues were discussed, but for the previous events we held, as a matter of practice, [there was] an on-site reconnaissance: the representatives of the organisers [together with] the representatives of the police ... would visit the site, walk through the route and determine where the barriers would be put, the stage, the lavatories, so that there was no ambiguity in understanding how the event would unfold. This time, because [the working meeting] was on 4 [May 2012], and the event was on 6 [May 2012], it was already clear at the working meeting that we wouldn't have time for an on-site reconnaissance; therefore at Mr Deynichenko's suggestion it was stated that in organising the event we would follow the example of

the assembly held on 4 February [2012]. Then, it was also a march from Kaluzhskaya Square and a meeting at Bolotnaya Square. The only thing that was noted was that this time the stage would be a bit closer to the park at Bolotnaya Square, at the corner of the square, because originally it had been declared that there would be 5,000 participants. We had a feeling that people were disappointed, somehow low-spirited, and that not many would come. When we realised that there would be more people I told Mr Oleynik [the First Deputy Director of the Regional Security Department], but he told us that it was unacceptable. But it was clear that we could not do anything about it. We warned that there would be significantly more participants ... When we called Mr Deynichenko the following day he told [us] that he had had a map drawn up by the Department of the Interior, and that Mr Udaltsov could come during the day to see it to clarify any issues. During the day he postponed the meeting several times and then he no longer answered the phone. Therefore it was not possible to see or discuss the map.

[Question to the witness] Was the closure of the park discussed at the working meeting, or later?

No, of course not. The event of 4 February [2012] had been organised so that the meeting was held at Bolotnaya Square. Bolotnaya Square is an area comprising the park and Bolotnaya Embankment. It was supposed that people would ... turn [like before] towards the park. It was said that everything except the position of the stage, which would be 20 metres further forward, would be the same as [the last] time; this was expressly spelled out. We were guided by it.

[Question to the witness] With whom was it discussed that the positioning of the security forces would be the same? [What are their] names?

This was spelled out at the big working meeting at the office of Mr Oleynik and in his presence. Since we realised that we had no time for an on-the-spot reconnaissance, Mr Deynichenko suggested that we follow the same route as the last time as we were already familiar with it.

...

... Nadezhda Mityushkina called me several times and complained that they were having trouble bringing in the equipment ... that they could not find anyone in charge. Usually it is the police representative who is responsible for the event, separately for the march and for the meeting. When I crossed [to] the area allocated to the march, even before passing through the metal detectors, Colonel Makhonin, who is traditionally in charge of the march, called me. We met. I gave him a written undertaking not to breach the law ... I told him that [two members of staff] had been arrested [at the stage area] ... he promised to release them ...

[Question to the witness] What exactly did Colonel Makhonin say? The areas allocated to the march and to the meeting, were they determined in front of the camera?

No we did not discuss that ...

... at the turning [from Malyy Kamennyy Bridge] the procession came to a standstill ... some people sat on the ground ... those who sat down had justifiably asked for more room. I could not push through to get there. I learned that both [State Duma deputies] were conducting negotiations; I thought that it was probably going to settle this situation ... at a certain point Ms Mityushkina called me and said that the police were demanding to terminate the event. I explained ... that if [the police] considered that there had been breaches, they had to give us time to remedy these defects, they could

not end the event at once. I called Mr Udaltsov ... and said that we were coming, [that there was] no need to end anything. Actually, when I reached the corner the sit-in protest had already ended. The organisers who had participated in the sit-in protest and [other] people were trying to approach the stage ...

...

The official website of the Moscow [Department of the] Interior published the map on which it was shown, just as agreed [and] just as on 4 February 2012, [that] the border [of the meeting venue] was outlined at the far end of the park and not the near one ... all agreements were breached.

[Question to the witness] During the working meeting on 4 [May 2012] or at the beginning of the [march], did the Department of the Interior warn you regarding any preparations for provocations, breach of public order, the campsite?

No, there were no such talks with the police.

...

[Question to the witness] If one has a badge, does it help in principle for talking to the police?

No, it does not make any difference. I personally called Mr Deynichenko and asked him to take measures. There was no communication with the police. The police officers did not answer the phone calls. [I] did not manage to find anyone in charge of the police.

...

[Question to the witness] When, according to the rules, ... should the appointments be made to coordinate ... on the part of the organisers and the mayor's office?

The law does not expressly say [when] ... we received no documents from the [Moscow authorities] or the Department of the Interior. We had no information as to who was responsible.

[Question to the witness] That means that at the beginning and during the event you did not know the names of those in charge?

Except for the officer in charge of the march, Colonel Makhonin.

...

[Question to the witness] When the emergency occurred, who did you try calling at the Department of the Interior ...?

By then I was no longer trying to call anyone. I had heard that [the two State Duma deputies] were holding negotiations. I called Mr Udaltsov to tell him that they were trying to terminate the meeting, but he told me that they were already heading to the stage, that they had ended the sit-in protest.

...

[Question to the witness] Why did the police announce that the event was banned?

I cannot explain why such a decision was taken. They themselves impeded the conduct of the event and then they ended it by themselves ...

...

[Question to the witness] The reason why [the event was] terminated was the sit-down protest?

As I understood from Ms Mityushkina, yes.

[Question to the witness] How did the police make their demands? Through loudspeakers?

I would not say that it was some sort of large-scale [announcement]. It was more through physical force. But some demands were made via megaphones, there were no other means.”

56. On 5 December 2013 Mr Nemtsov gave testimony as a witness in the first Bolotnaya case. He testified, in particular, as follows.

“... I was not one of the organisers of the event, but I was well informed of the way it had been authorised. On the website of the Moscow Department of the Interior a map was posted showing the location of the police [cordon] and the access points. The map was in the public domain and one could see that the park of Bolotnaya Square should have been open. But it turned out to be closed. Moreover, we openly announced on the Internet, and it was reported in the media, that the route would be exactly the same as on 4 February 2012 ... On 4 February 2012 there was an authorised event ... all of [Bolotnaya] Square was open, no cordons on Bolshoy Kamennyy Bridge. We easily turned into the square, there had been no scuffles ... we were sure that on 6 May 2012 it would be exactly the same picture ... but the police had deceived us, blocked Bolotnaya Square, having left a very narrow passage for the demonstrators. We understood that it would be hard to pass through this bottleneck. We stopped, and to show the police that we were not going to storm the Kremlin and the [Bolshoy] Kamennyy Bridge we sat on the ground ... Mr Gudkov [the State Duma deputy], ... offered to be an intermediary in the negotiations between the protesters and the police ... we waited, all was peaceful ... he several times attempted to negotiate but this came to nothing. It became clear that ... the crowd were about to panic. We got up. And an awful scuffle began ... I was moving [to the stage] ... when I arrived there I saw a strange scene for an authorised event. The microphones had all been switched off, Mr Navalnyy and Mr Udaltsov had been arrested just before me. The police never act like that at authorised events. I took a megaphone and addressed the people. I did not speak for long. Within a few minutes the police apprehended me. ...

[Question to the witness] Why, as you say, were the police particularly aggressive?

The demonstration took place just one day before Mr Putin’s inauguration. Naturally, the police had received very strict orders. Naturally, they were paranoid about ‘Maidan’. The fact that they had treacherously breached the agreement and closed off the square proves that there were political orders. I was particularly surprised at Mr Gorbenko, the deputy mayor, with whom Mr Gudkov was negotiating. He is a reasonable man, but here he was like a zombie, he would not negotiate with Mr Gudkov. This was strange ... he did not want to talk like a human being. ...

[Question to the witness] Did you know of the intention to set up tents, or about the breaking of the cordon?

No, I did not know about it then.

...

We demanded only that [the authorities] implement what had been agreed with [the organisers].”

57. On 18 December 2013 Ms N. Mirza, the head of the Ombudsman's secretariat, gave testimony as a witness in the first Bolotnaya case. She testified, in particular, as follows.

> "... [on 6 May 2012] I was present as an observer ... unlike the usual events held at Bolotnaya Square, [this time] the park was cordoned off ... when we passed the metal detectors ... Mr Biryukov called and asked us to return urgently because ... at Malyy Kamennyy Bridge ... [protesters] had sat down on the ground ... [The Ombudsman] tried to persuade these people to stand up and to go and conduct the meeting ... At this time the [second] riot police cordon, which had stood between Bolshoy Kamennyy Bridge and Malyy Kamennyy Bridge, apparently approached the crowd, therefore the pressure built up from both sides ... I tried to leave the congested area ... showed my observer's badge ... but the riot police would not listen to me, laughed slightly and continued to press, without reacting. This somewhat surprised me because we were there at the request of the Moscow Department of the Interior.
>
> ...
>
> Usually there was no such multi-layered defence. Bolshoy Kamennyy Bridge was blocked as if it was warfare, beyond what was required, as we thought ... among the protesters we saw several people in masks, and we reported that to the police, [as] that was unusual. The mood of the Department of the Interior was also unusual, and so was the mood of the riot police. A police chief from the Moscow Department of the Interior, Mr Biryukov, told me, for example, that he could do nothing, that he was not in charge of the riot police and that the riot police reported to the [federal] police, and this was also unusual to us. I spoke to the deputy mayor ... and saw how upset he was, and his very presence there was also [a rare occasion].
>
> ...
>
> As I was later told by Mr Biryukov from the Department of the Interior, [the protesters had sat down on the ground] because the passage had been narrowed down. The passage had indeed been narrowed down; I can confirm that. I saw that the passage was much narrower than usual, and there were metal detectors which were not supposed to be there.
>
> ...
>
> Mr Biryukov was in charge on behalf of the Moscow Department of the Interior – this is absolutely certain because he is always in charge of such events. His name, his function and his telephone number were written on our badges so that he could be contacted if any questions or doubts arose. As to the [representative of the mayor's office], [I am not sure].
>
> [Question to the witness] You have explained about the cordon. Why was it not possible, for example, to move it [back] so as to prevent a scuffle?
>
> Mr Biryukov is a very constructive person and he knows his job, but he could not explain to me why he could not influence the riot police.
>
> ... [the deputy mayor also] told me that he could not do anything, it was said to me personally. That was when the breaking of the cordon occurred. [The Ombudsman] and our staff, together with a few other people, walked out through [the gap] ...
>
> [Question to the witness] Did you receive any information while at the cordon? Perhaps you heard from the police officers of the official termination of the public event?

> No.
>
> ... After the cordon had already been broken, when the arrests had begun, [then] they were telling us through a megaphone to disperse, that the meeting was over, I heard it."

58. On 23 December 2013 Mr N. Svanidze, a member of the Civic Chamber of the Russian Federation, gave testimony as a witness in the first Bolotnaya case. He testified, in particular, as follows.

> "... [on 6 May 2012] I was present as an observer ... [when] everybody headed towards the narrow bottleneck at the embankment ... it created a jam. Several dozen people sat on the ground, and the cordon moved towards them ... I asked 'Why won't they open up the passage?', but Viktor Aleksandrovich [Biryukov] kept turning his face away and would not answer when told that the passage had to be opened. I understood that there was no point talking to him; he was not in command.
>
> ...
>
> [Question to the witness] Did [the Ombudsman] or anyone else attempt to negotiate the widening of the passage?
>
> We could not do anything. We requested it, [Ms Mirza] requested it and I think that [the Ombudsman] did too, but nothing was done. The passage was not widened.
>
> ...
>
> [Question to the witness] Were there any calls to move towards the Kremlin?
>
> No.
>
> ...
>
> [Question to the witness] During your presence at the event did you know on what location the meeting had been authorised?
>
> Yes, I was convinced that [it was] Bolotnaya Square and the park at Bolotnaya Square."

59. On the same day Mr Vasilyev, a staff member at the Ombudsman's office, gave testimony as a witness in the first Bolotnaya case. He testified, in particular, as follows.

> "... [on 6 May 2012] I was present as an observer ... on that day we gathered at the press centre of the Department of the Interior, we were given maps, instructions on how to behave, the list of public observers ...
>
> ... the Ombudsman asked [the protesters sitting on the ground] why they were not going to the meeting venue. I could not hear the answer, they got up and headed on, after that, congestion occurred ... [the Ombudsman] began looking for the officer responsible for the cordon. There was [the chief press officer] Mr Biryukov there, [the Ombudsman] told him: 'Let's move the cordon back so that people can pass' [but] Mr Biryukov told him that it was outside his powers. [The Ombudsman] asked in whose powers it was; he replied 'I don't know'. At that moment the police began breaking the crowd up ..."

60. On 21 February 2014 the Zamoskvoretskiy District Court of Moscow delivered a judgment in the first Bolotnaya case. It found eight individuals guilty of participation in mass disorder and of violent acts

against police officers during the public assembly on 6 May 2012. They received prison sentences of between two and a half and four years; one of them was released on parole. Three co-defendants had previously been pardoned under the Amnesty Act and a fourth had his case disjoined from the main proceedings.

61. On 22 May 2014 the Zamoskvoretskiy branch of the Investigative Committee dismissed five complaints by individuals who had sustained injuries on 6 May 2012, allegedly through the excessive use of force by the police. The complaints had originally been a part of the criminal investigation file concerning the mass disorder, but were subsequently disjoined from it. During the investigation of the mass-disorder case, confrontations were conducted between those who had lodged complaints (in the capacity of the accused in the criminal case) and the police officers accused of violence (in the capacity of victims in the criminal case). The relevant parts of the decision read as follows.

> “... In suppressing attempts to break the police cordon, the police officers acted in coordination and concert, without applying physical force or special means of restraint; however, the work of the officers charged with apprehending offenders did involve physical force and special means of restraint, in so far as necessary [to restrain] those resisting.
>
> After the crowd of protesters had calmed down and thinned out a little, the police officers began to tighten the cordon, [and] by doing so encouraged citizens to proceed to the stage. At the same time many participants in the meeting who did not want to go there began to return to Bolshaya Yakimanka Street in Moscow. The police also accompanied them.
>
> Later, in the area of Malyy Kamennyy Bridge and at the corner of the park [at Bolotnaya Square] confrontations took place between the provocateurs, the persons calling for defiance and the persons displaying such defiance. During the apprehension of those persons force was used by the police because of their resistance, and in a number of cases, special means of restraint were also used for apprehending the most active instigators. ...
>
> ...
>
> ... Because of such a turn of events the police officers justifiably used physical force to apprehend the participants in the mass disorder, and also special means of restraint in relation to some of them who attempted to resist.”

62. On 20 June 2014 the Moscow City Court upheld the judgment of 21 February 2014, having slightly reduced the prison sentences for two of the defendants.

63. On 24 July 2014 the Moscow City Court found Mr Udaltsov and Mr Razvozzhayev guilty of organising mass disorder on 6 May 2012. The judgment contained the following findings.

> “The witness Mr Deynichenko testified that on 4 May 2012 he had taken part in a working meeting at the Moscow Department of Regional Security... as a follow-up to the meeting a draft security plan was prepared, and all necessary agreements were reached with the organisers concerning the order of the march and meeting, the

movement of the procession, the stage set-up, access to the meeting venue, barriers and the exit from the stage; the [organisers] had agreed on that. The question of using the park at Bolotnaya Square was not raised because the declared number of participants was 5,000, whereas over 20,000 people could be accommodated in the open area of the square and the embankment, and [the organisers] had known that in advance. It had been discussed with them how the cordon would be placed from Malyy Kamennyy Bridge to the park of Bolotnaya Square, so the organisers knew of the cordon in advance. The placement of the cordon was indicated in the [security plan]. This document was for internal use and access to it was only given to the police; the location of the forces could be changed in an emergency by the operational headquarters. The organisers did not insist on an on-the-spot visit; such visits are held at the initiative of the organisers, which had not been requested because they had known the route ... and the meeting venue. ... [The witness Mr Deynichenko] had known that at the beginning of the march the event organisers, including Mr Udaltsov, had discussed between them that they were not going to turn towards the meeting venue but would stop and try to break the cordon to proceed to Bolshoy Kamennyy Bridge.

...

[T]he witness N. Sharapov testified that Mr Udaltsov had known the route of the march and had not raised a question regarding opening up the park at Bolotnaya Square. Moreover, the park was a nature reserve with narrow lanes ... the park had been opened up previously [for a public event], as an exception, on only one occasion, on 4 February 2012, but then it was winter, it was snowing and the declared number of participants had significantly exceeded 5,000. No such exception was made for 6 May 2012.

...

... according to the statement of the Moscow City Security Department, ... the meeting venue at Bolotnaya Embankment could accommodate 26,660 people ...

...

The fact that no map of the assembly route or the placement of the police had been produced at the working meeting of 4 May 2012, that these questions had not been expressly discussed, ... that the event organisers present at the working meeting had not been shown any maps, was confirmed by them.

...

... the court concludes that no official map had been adopted with the organisers and, in the court's opinion, [the published map] had been based on Mr Udaltsov's own interview with journalists ...

...

Therefore the map presented by the defence has no official character, its provenance is unknown and therefore unreliable and it does not reflect the true route of the demonstration and the placement of the police forces on 6 May 2012.

The witness Mr Makhonin testified that on 5 May 2012 he received the [security plan] ... Before the start of the march he personally met the event organisers Mr Udaltsov, Ms Mityushkina [and] Mr Davidis and, in the presence of the press and with the use of video-recordings, explained to them the order of the meeting and the march, warned against the breach of public order during the conduct of the event, and stressed the need to inform him personally of any possible provocations by calling the

telephone number known to the organisers. He asked Mr Udaltsov regarding the intention to proceed towards the Kremlin and to cause mass disorder because the police had received information concerning it from undercover sources; Mr Udaltsov had assured him that there would be no breaches of order at the event and that they had no intention to approach the Kremlin ... He [Mr Makhonin] arrived at Bolotnaya Square after the mass disorder had already begun ... After the mass disorder began he tried calling Mr Udaltsov on the phone but there was no reply. Mr Udaltsov did not call him ... Other event organisers had not asked him to move the cordon. Given the circumstances, Ms Mityushkina, at his request, announced the end of the meeting, and the police opened additional exits for those willing to leave. In addition to that, the police repeated through a loudspeaker the announcement of the end of the meeting ...

... [The] witness Y. Zdorenko ... testified that ... following information received [from undercover sources] concerning the possible setting-up of a camp site, at around 9 p.m. on 5 May 2012 he arrived at Bolotnaya Square and organised a search of the area including the park. The park was cordoned off and guarded ... if necessary, at the decision of the operational headquarters, the venue allocated for the meeting could have been significantly extended by opening up the park [at Bolotnaya Square]. However, there had been no need for that given that there were no more than 2,500-3,000 persons on Bolotnaya Square ... [others being stopped at] Malyy Kamennyy Bridge.

...

The witness A. Zharkov testified that ...while the stage was being set up he had seen an unknown man smuggling four camping tents in rubbish bins.

...

The witness M. Volondina testified that ... before the beginning of the march, police information came through from undercover sources that the event organisers intended to encircle the Kremlin holding hands to prevent the inauguration of the Russian President.

The witness M. Zubarev testified that ... he had been [officially] filming ... while Police Officer Makhonin ... explained the order ... and warned the organisers ... and asked Mr Udaltsov to inform him of any possible provocations. Mr Udaltsov stated that they would act lawfully and that he had requested the police to stop any unwanted persons from joining the public event ...

The witness Y. Vanyukhin testified that on 6 May 2012 ... at around 6 p.m. Mr Udaltsov, while on the way to the stage, told people around him that they were going to set up camp ...

... the witness Ms Mirza testified that ... Police Officer Biryukov had asked her and [the Ombudsman] to come to Malyy Kamennyy Bridge where some of the protesters, including Mr Nemtsov and Mr Udaltsov, had not turned right towards the stage but had gone straight to the cordon, where they had begun a sit-in protest on the pretext that access to the park of Bolotnaya Square had been closed and cordoned off ... While [the Ombudsman] was talking to those sitting on the ground they remained silent and did not reply but would not stand up.

The witness Mr Babushkin testified that ... after the first confrontations between the protesters and the police had begun, the latter announced through a loudspeaker that the meeting was cancelled and invited citizens to leave.

The witness Mr Ponomarev testified that ... the police cordon had been placed differently from [the cordon placed for] a similar march on 4 February 2012 ... he

proposed to Mr Udaltsov that the cordon be pushed back so that the police would go back a few steps and widen access to Bolotnaya Square, and the latter replied that he would figure it out when they reached the cordon ... he knew that Mr G. Gudkov was negotiating with the police regarding moving the cordon, which had now been reinforced by riot police.

... the witnesses Mr Yashin and Mr Nemtsov testified that ... during the steering committee meeting the question of setting up tents during the public event had not been discussed ... while [Mr G. Gudkov] and [Mr D. Gudkov] were negotiating with the police ... the crowd built up [and] suddenly the police began moving forward, the protesters resisted and the cordon broke ...

The witness Mr G. Gudkov [deputy of the State Duma] testified that ... at the request of the organisers, who had told him that they would not go anywhere and would remain sitting until the police moved the cordon back and opened up access to the park at Bolotnaya Square, he had taken part in the negotiations with the police on that matter. He had reached an agreement with the officers of the Moscow Department of the Interior that the cordon would be moved back, but the organisers who had filed the notice [of the event] should have signed the necessary documents. However, those who had called for a sit-in, including Mr Udaltsov, refused [to stand up] to go to the offices of the Moscow Department of the Interior to sign the necessary documents, although he (Mr Gudkov) had proposed several times that they should do so ...

... the witness Mr D. Gudkov [deputy of the State Duma] testified that ... together with Mr G. Gudkov he had conducted negotiations with the police ... an agreement had been reached that the cordon at the Malyy Kamennyy Bridge would be moved back and access to the park would be opened up, but at that point some young men in hoodies among the protesters began first to push citizens onto the cordon provoking the [same] response, after that the cordon broke, the [police] began the arrests and mass disorder ensued.

...

... the court [rejects] the testimonies to the effect that it was the police who had begun moving towards the protesters who were peacefully sitting on the ground and thus provoked the breaking of the cordon ... [and finds] that it was the protesters, and not the police ... who began pushing against the cordon, causing the crowd to panic, which eventually led to the breaking of the cordon and the ensuing mass disorder.

...

The court takes into account the testimony of Mr Davidis that ... at around 6 p.m. Ms Mityushkina, who was responsible for the stage, informed him of the demand of the police that she announce, as an event organiser, that it was terminated. He passed this information on to Mr Udaltsov by phone, [and he] replied that they were standing up and heading towards the stage ... he knew that on 6 May 2012 [some] citizens had brought several tents to Bolotnaya Square, but Mr Udaltsov had not informed him of the need to put up tents during the public event.

...

The court takes into account the testimony of Mr Bakirov ..., one of the [formal] event organisers ..., that nobody had informed him of the need to put up tents during the public event.

...

[The court examined] the video-recording ... of the conversation between Mr Makhonin and Mr Udaltsov during which the latter assured Mr Makhonin that they would conduct the event in accordance with the authorisation, he would not call on people to stay in Bolotnaya Square and if problems occurred he would maintain contact with the police.

...

... [the court examined another video-recording] in which Mr Makhonin and Mr Udaltsov discussed the arrangements. Mr Makhonin showed Mr Udaltsov where the metal detectors would be placed; after that they agreed to meet at 3 p.m. ... and exchanged telephone numbers ...

...

According to [expert witnesses Ms N. and Ms M.], the borders of Bolotnaya Square in Moscow are delimited by Vodootvodnyy Canal, Serafimovich Street, Sofiyskaya Embankment and Faleyevskiy passage, and the [park] forms a part of Bolotnaya Square. During public events at Bolotnaya Square the park is always cordoned off and is not used as a passageway for citizens.

These testimonies are fully corroborated by the reply of the head of the Yakimanka district municipality of Moscow of 27 July 2012 and the map indicating the borders of Bolotnaya Square.

...

[The court finds] that the location of the sit-in ... was outside the venue approved by the Moscow authorities for the public event ...

...

The organisation of mass disorder may take the form of incitement and controlling the crowd’s actions, directing it to act in breach of the law, or putting forward various demands to the authorities’ representatives. This activity may take different forms, in particular the planning and preparation of such actions, the selection of groups of people to provoke and fuel mass disorder, incitement to commit it, by filing petitions and creating slogans, announcing calls and appeals capable of electrifying the crowd and causing it to feel appalled, influencing people’s attitudes by disseminating leaflets, using mass media, meetings and various forms of agitation, in developing a plan of crowd activity taking into account people’s moods and accumulated grievances, or guiding the crowd directly to commit mass disorder.

... this offence is considered accomplished as soon as at least one of the actions enumerated under Article 212 § 1 of the Criminal Code has been carried out ...

... the criminal offence of organisation of mass disorder is considered accomplished when organisational activity has been carried out and does not depend on the occurrence or non-occurrence of harmful consequences.

...

There are no grounds to consider the closure of access to the park of Bolotnaya Square and the placement of a guiding police cordon at the foot of Malyy Kamennyy Bridge to be a provocation ... since it was only to indicate the direction and it did not obstruct access to the meeting venue at Bolotnaya Square.

... the reinforcement of the cordon ... was necessary in the circumstances ... to prevent it from breaking ... but the police [cordon] did not advance towards the protesters.

It is therefore fully proven that the mass disorder organised by Mr Udaltsov [and others] ... led to the destabilisation of public order and peace in a public place during the conduct of a public event, put a large number of people in danger, including those who had come to fulfil their constitutional right to congregate in peaceful marches and meetings, and led to considerable psychological tension in the vicinity of Bolotnaya Square in Moscow, accompanied by violence against the police ... and the destruction of property ...”

64. The Moscow City Court sentenced Mr Udaltsov and Mr Razvozzhayev to four and a half years’ imprisonment. On 18 March 2015 the Supreme Court of the Russian Federation upheld the judgment of 24 July 2014, with a number of amendments.

65. On 18 August 2014 the Zamoskvoretskiy District Court of Moscow examined another “Bolotnaya” case and found four individuals guilty of participating in mass disorder and committing violent acts against police officers during the demonstration on 6 May 2012. They received prison sentences of between two and a half and three and a half years; one of them was released on parole. That judgment was upheld by the Moscow City Court on 27 November 2014.

B. The applicant’s arrest, detention and conviction for an administrative offence

66. On 6 May 2012 the applicant arrived at Bolotnaya Square at around 6 p.m. to take part in the meeting. He stood in front of the stage on Bolotnaya Embankment, within the area designated as the meeting venue.

67. According to the applicant, between 6 p.m. and 7 p.m. the area around him remained peaceful, although there was general confusion. He claimed that he had not heard any announcement of the termination of the meeting; he had heard the police orders made through a megaphone to disperse, but in the general commotion he was unable to leave immediately and remained within the authorised meeting area until 7 p.m., when he was arbitrarily arrested by the police dispersing the demonstration. The applicant denied that he had received any warning or orders before being arrested. The police apprehended him and took him to a police van, where he waited for an hour before it left Bolotnaya Square for the police station. According to the applicant, there was no traffic at Bolotnaya Square at the time of his arrest; it was still suspended.

68. According to the Government, the applicant was arrested at 8.30 p.m. at Bolotnaya Square because he was obstructing the traffic and had disregarded the police order to move away.

69. At 9.30 p.m. the applicant was taken to the Krasnoselskiy district police station in Moscow. At the police station an on-duty officer drew up a statement on an administrative offence (*протокол об административном правонарушении*) on the basis of a report (*рапорт*) by Police Officer Y.,

who had allegedly arrested the applicant. Y.'s report contained the following handwritten statement:

> "I [Y.] report that on 6 May 2012 at 9.30 p.m., at 5/16 Bolotnaya Square, together with Police Lieutenant [A.], I arrested Mr Frumkin."

70. The rest of the report was a printed template stating as follows.

> "... who, acting in a group of citizens, took part in an authorised meeting, went out onto the road and thus obstructed the traffic. [He] did not react to the multiple demands of the police to vacate the road ..., thereby disobeying a lawful order of the police, who were fulfilling their service duty of maintaining public order and ensuring safety. He thereby committed an administrative offence under Article 19.3 § 1 of the Code of Administrative Offences."

71. The statement on the administrative offence contained an identical text, but indicated that the applicant had been arrested at 8.30 p.m. The applicant was charged with obstructing traffic and disobeying lawful police orders, an offence under Article 19.3 of the Code of Administrative Offences. His administrative detention was ordered with reference to Article 27.3 of the Code of Administrative Offences (*протокол об административном задержании*). The "reasons" section of the order remained blank.

72. At 2 p.m. on 7 May 2012 the applicant was taken to court, but his case was not examined. Having spent the day in a transit van without food or drink, at 11.55 p.m. he was taken back to the cell at the Krasnoselskiy district police station. A new order for the applicant's administrative detention was issued, indicating that he had been detained "for the purpose of drawing up the administrative material".

73. At 8 a.m. on 8 May 2012 the applicant was brought before the Justice of the Peace of circuit no. 100 of the Yakimanka district, who examined the charges. The applicant requested that the case be adjourned on the grounds that he was unfit to stand trial after the detention; he also requested that the hearing be opened to the public and that two police officers be examined as witnesses. Those requests were rejected in order to expedite the proceedings. A further request for the examination of several eyewitnesses was partly refused and partly granted. Three witnesses for the defence were examined.

74. On the basis of the report written by Police Officer Y., the court established that at 8.30 p.m. on 6 May 2012 the applicant had been walking along the road at Bolotnaya Square and obstructing the traffic, and that he had then disobeyed lawful police orders to vacate the venue. The Justice of the Peace rejected as unreliable two eyewitnesses' testimonies to the effect that the police had not given the applicant any orders or warnings before arresting him. The applicant was found guilty of disobeying lawful police orders, and was sentenced under Article 19.3 of the Code of Administrative Offences to fifteen days' administrative detention.

75. On 11 May 2012 the Zamoskvoretskiy District Court of Moscow examined an appeal lodged by the applicant. At the applicant's request the court examined Ms S. as a witness. She testified that at 7.46 p.m. on 6 May 2012 she had been looking for her son when she saw the applicant in a police van and spoke to him. She also testified that at 9.03 p.m. she had been at Bolotnaya Square; the site had been fully cordoned off and the traffic had not resumed. The court rejected the applicant's argument that the police report and the police statement were inconsistent as regards the time of his arrest and found that the correct interpretation of those documents was that the time of arrest had been 8.30 p.m. and the detention at the police station 9.30 p.m. The court dismissed the video-recording submitted by the applicant on the ground that it did not contain the date and the time of the incident, but found that the applicant's guilt had been proved by other evidence. It upheld the first-instance judgment.

76. On 11 January 2013 the Deputy President of the Moscow City Court examined the applicant's administrative case in supervisory-review proceedings and upheld the earlier judicial decisions.

II. RELEVANT DOMESTIC LAW

77. The Federal Law on assemblies, meetings, demonstrations, marches and pickets (no. FZ-54 of 19 June 2004 – "the Public Events Act") provided as follows at the material time.

Section 7
Notification of a public event

"Notification of a public event (except for a gathering or solo picketing) shall be filed by its organiser in writing with the executive body of the subject [constituent entity] of the Russian Federation or the municipal authorities no earlier than fifteen days and no later than ten days prior to the scheduled date of the event. ..."

Section 8
Venue for holding a public event

"A public event may be held at any venue suitable for the purposes of the event, provided that it does not create a risk of the collapse of buildings or structures or any other threats to the safety of the participants in the public event. ..."

Section 12
Obligations of the executive body of the subject of the Russian Federation or the municipal authorities

"1. Upon receipt of the notification of a public event, the executive body of the subject of the Russian Federation or the municipal authorities shall:

...

(iii) depending on the form of the public event and the number of participants, appoint an authorised representative to assist the event organisers in conducting the

event in accordance with the law. The authorised representative shall be formally appointed by a written decision which shall be sent to the event organiser prior to the scheduled date of the event;

(iv) inform the organiser of the public event of the maximum capacity of the territory (venue) where the public event is to be held;

(v) ensure, within its competence and jointly with the organiser of the public event and the authorised representative of the Ministry of the Interior, public order and the safety of citizens during the public event and, if necessary, provide them with urgent medical aid;

...

2. If the information contained in the text of the notification of a public event and other data give grounds to suppose that the aims of the planned event and the way in which it will be conducted do not comply with the Constitution of the Russian Federation and/or are in breach of prohibitions established by the legislation of the Russian Federation concerning administrative offences or the criminal legislation of the Russian Federation, the executive body of the subject of the Russian Federation or the municipal authorities shall immediately notify the organiser of the public event by issuing a reasoned written warning that the organiser, as well as other participants in the public event, may be held duly liable in the event of such non-compliance or breach.”

Section 13
Rights and obligations of the representative of the executive body of the subject of the Russian Federation or the municipal authorities

“1. The representative of the executive body of the subject of the Russian Federation or the municipal authorities shall have the right:

(i) to require the organiser of a public event to comply with the conditions for holding the event;

(ii) to decide on the suspension or termination of the public event following the procedure and on the grounds set out in this Federal Law.

2. The representative of the executive body of the subject of the Russian Federation or the municipal authorities must:

(i) be present at the public event;

(ii) assist the event organiser in the conduct of the public event;

(iii) ensure, jointly with the organiser of the public event and the authorised representative of the Ministry of the Interior, public order and the safety of citizens, as well as compliance with the law, during the event.”

Section 14
Rights and obligations of the authorised representative of the Ministry of the Interior

“1. On a proposal by the executive body of the subject of the Russian Federation or the municipal authorities, the chief of the department of the interior in charge of the territory (venue) where the public event is intended to be held must appoint an authorised representative of the Ministry of the Interior to assist the event organiser in maintaining public order and the safety of citizens. The representative shall be formally appointed by a written decision of the chief of the department of the interior.

2. The authorised representative of the Ministry of the Interior shall have the right:

(i) to require the organiser of a public event to announce the closure of access to the event to citizens and to take his or her own action to prevent citizens from accessing the venue if the maximum capacity of the territory (venue) is exceeded;

(ii) to require the organiser of and the participants in the public event to comply with the conditions for holding the event;

(iii) at the request of the event organiser, to remove any citizens disobeying the organiser's lawful orders.

3. The authorised representative of the Ministry of the Interior must:

(i) facilitate the conduct of the public event;

(ii) ensure, jointly with the organiser of the public event and the executive body of the subject of the Russian Federation or the municipal authorities, public order and the safety of citizens and compliance with the law, during the public event."

Section 15
Grounds and procedure for suspension of a public event

"1. If during the holding of a public event there occurs, through the fault of the participants, a breach of lawful order which does not entail a risk to the life or health of the participants, the representative of the executive body of the subject of the Russian Federation or the municipal authorities may require the event organiser to remedy the breach alone or jointly with the authorised representative of the Ministry of the Interior.

2. In the event of non-compliance with the requirement referred to in subsection 1 above, the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities may suspend the public event for a time determined by him or her in order to remedy the breach. Upon rectification of the breach, the public event may be continued as agreed between the organiser and the respective representative.

3. If the breach has not been remedied upon the expiry of the time-limit set by the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities, the public event shall be terminated in accordance with section 17 of this Federal Law."

Section 16
Grounds for termination of a public event

"A public event may be terminated on the following grounds:

(i) if the event has created a real danger for the life and health of citizens, as well as for the possessions of individuals or legal persons;

(ii) if the participants in the public event have committed unlawful acts and the organisers have deliberately breached the provisions of this Federal Law relating to the conditions for holding the event;

..."

Section 17
Procedure for termination of a public event

"1. In the event that a decision to terminate a public event is taken, the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities shall:

(i) order the event organiser to terminate the public event, giving the justification for its termination, and within twenty-four hours issue this order in writing and serve it on the event organiser;

(ii) determine a time-limit for compliance with the order to terminate the public event;

(iii) in the event of non-compliance with the order to terminate the public event by the organiser, address the participants in the public event directly and allow additional time for compliance with the order to terminate it.

2. In the event of non-compliance with the order to terminate a public event, the police shall take all necessary measures to terminate the event, acting in accordance with the legislation of the Russian Federation.

3. The procedure for termination of a public event provided for in subsection 1 above shall not apply if mass disorder, riots, arson attacks or other emergency situations occur. In these situations the termination of a public event shall be carried out in accordance with the legislation of the Russian Federation.

..."

78. The Criminal Code of the Russian Federation provides as follows.

Article 212
Mass disorder

"1. The organisation of mass disorder accompanied by violence, riots, arson, destruction of property, use of firearms, explosives and explosive devices, as well as by armed resistance to a public official, shall be punishable by four to ten years' deprivation of liberty.

2. Participation in mass disorder as provided for in paragraph 1 of this Article shall be punishable by three to eight years' deprivation of liberty.

3. The instigation of mass disorder provided for in paragraph 1 of this Article, or the instigation of participation in it, or the instigation of violence against citizens shall be punishable by restriction of liberty for up to two years, or community work for up to two years, or deprivation of liberty for the same term."

Article 318
Use of violence against a public official

"1. The use of violence not endangering life or health, or the threat to use such violence, against a public official or his or her relatives in connection with the performance of his or her duties shall be punishable by a fine of up to 200,000 Russian roubles (RUB) or the equivalent of the convicted person's wages for eighteen months, or community work for up to five years ... or up to five years' deprivation of liberty ..."

79. The relevant provisions of the Code of Administrative Offences of 30 December 2001 at the material time read as follows.

Article 19.3
Refusal to obey a lawful order of a police officer ...

"Failure to obey a lawful order or demand of a police officer ... in connection with the performance of the officer's official duties relating to maintaining public order and security, or impeding the officer's performance of his or her official duties, shall be punishable by a fine of between RUB 500 and RUB 1,000 or by administrative detention for up to fifteen days.

..."

Article 20.2
Breaches of the established procedure for the organisation or conduct of public gatherings, meetings, demonstrations, marches or pickets

"1. Breaches of the established procedure for the organisation of public gatherings, meetings, demonstrations, marches or pickets shall be punishable by an administrative fine of between ten and twenty times the minimum wage, payable by the organisers.

2. Breaches of the established procedure for the conduct of public gatherings, meetings, demonstrations, marches or pickets shall be punishable by an administrative fine of between RUB 1,000 and RUB 2,000 for the organisers, and between RUB 500 and RUB 1,000 for the participants."

Article 27.2
Escorting of individuals

"1. The escorting or the transfer by force of an individual for the purpose of drawing up an administrative-offence report, if this cannot be done at the place where the offence was discovered and if the drawing up of a report is mandatory, shall be carried out:

(i) by the police ...

...

2. The escort operation shall be carried out as quickly as possible.

3. The escort operation shall be recorded in an escort-operation report, an administrative-offence report or an administrative-detention report. The escorted person shall be given a copy of the escort-operation report if he or she so requests."

Article 27.3
Administrative detention

"1. Administrative detention or short-term restriction of an individual's liberty may be applied in exceptional cases if this is necessary for the prompt and proper examination of the alleged administrative offence or to secure the enforcement of any penalty imposed by a judgment concerning an administrative offence. ...

...

3. Where the detained person so requests, his or her family, the administrative department at the person's place of work or study and his or her defence counsel shall be informed of his or her whereabouts.

...

5. The detained person shall have his or her rights and obligations under this Code explained to him or her, and a corresponding entry shall be made in the administrative-arrest report.”

Article 27.4
Administrative-detention report

“1. Administrative detention shall be recorded in a report ...

2. ... If he or she so requests, the detained person shall be given a copy of the administrative-detention report.”

Article 27.5
Duration of administrative detention

“1. The duration of administrative detention shall not exceed three hours, except in the cases set out in paragraphs 2 and 3 of this Article.

2. Persons subject to administrative proceedings concerning offences involving unlawful crossing of the Russian border ... may be subject to administrative detention for up to forty-eight hours.

3. Persons subject to administrative proceedings concerning offences punishable, among other administrative sanctions, by administrative detention may be subject to administrative detention for up to forty-eight hours.

4. The term of the administrative detention shall be calculated from the time when [a person] escorted in accordance with Article 27.2 is taken [to the police station] or, in respect of a person in a state of alcoholic intoxication, from the time of his sobering up.”

III. RELEVANT INTERNATIONAL MATERIAL

80. The Guidelines on Freedom of Peaceful Assembly adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010) provide as follows (footnotes omitted).

“Section A – guidelines on freedom of peaceful assembly

1. Freedom of Peaceful Assembly

...

Only peaceful assemblies are protected

An assembly should be deemed peaceful if its organisers have professed peaceful intentions and the conduct of the assembly is non-violent. The term ‘peaceful’ should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties.

...

5. Implementing Freedom of Peaceful Assembly Legislation

5.1 Pre-event planning with law enforcement officials

Wherever possible, and especially in the case of large assemblies or assemblies on controversial issues, it is recommended that the organiser discuss with the law enforcement officials the security and public safety measures that are put in place prior to the event. Such discussions might, for example, cover the deployment of law enforcement personnel, stewarding arrangements, and particular concerns relating to the policing operation.

...

5.3 A human rights approach to policing assemblies

The policing of assemblies must be guided by the human rights principles of legality, necessity, proportionality and non-discrimination and must adhere to applicable human rights standards. In particular, the State has a positive duty to take reasonable and appropriate measures to enable peaceful assemblies to take place without participants fearing physical violence. Law enforcement officials must also protect participants of a peaceful assembly from any person or group (including agents provocateurs and counter-demonstrators) that attempts to disrupt or inhibit it in any way.

5.4 The use of negotiation and/or mediation to de-escalate conflict

If a standoff or other dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution. Such dialogue – whilst not always successful – can serve as a preventive tool helping to avoid the escalation of conflict, the imposition of arbitrary or unnecessary restrictions, or recourse to the use of force.

...

Section B – Explanatory Notes

...

15. ... For the purposes of the Guidelines, an *assembly* means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.

...

18. The question of at what point an assembly can no longer be regarded as a *temporary* presence (thus exceeding the degree of tolerance presumptively to be afforded by the authorities towards all peaceful assemblies) must be assessed in the individual circumstances of each case. ... Where an assembly causes little or no inconvenience to others then the authorities should adopt a commensurately less stringent test of temporariness ... the term ‘temporary’ should not preclude the erection of protest camps or other non-permanent constructions.

...

‘Peaceful’ and ‘non-peaceful’ assemblies

25. *’Peaceful’ assemblies:* Only ‘peaceful’ assembly is protected by the right to freedom of assembly. ...

26. The term ‘peaceful’ should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties. Thus, by way of example, assemblies involving purely passive resistance should be characterized as ‘peaceful’ ...

...

28. If this fundamental criterion of ‘peacefulness’ is met, it triggers the positive obligations entailed by the right to freedom of peaceful assembly on the part of the State authorities ... It should be noted that assemblies that survive this initial test (thus, *prima facie*, deserving protection) may still legitimately be restricted on public order or other legitimate grounds ...

...

Legality

38. To aid certainty, any prior restrictions should be formalised in writing and communicated to the organiser of the event within a reasonable timeframe (see further paragraph 135 below). Furthermore, the relevant authorities must ensure that any restrictions imposed during an event are in full conformity with the law and consistent with established jurisprudence. Finally, the imposition, after an assembly, of sanctions and penalties which are not prescribed by law is not permitted.

...

Content-based restrictions

...

95. Whether behaviour constitutes the intentional incitement of violence is inevitably a question which must be assessed on the particular circumstances. Some difficulty arises where the message concerns unlawful activity, or where it could be construed as inciting others to commit non-violent but unlawful action. Expressing support for unlawful activity can, in many cases, be distinguished from disorderly conduct, and should not therefore face restriction on public order grounds. The touchstone must again be the existence of an imminent threat of violence.

96. ... resort to [hate] speech by participants in an assembly does not of itself necessarily justify the dispersal of the event, and law enforcement officials should take measures (such as arrest) only against the particular individuals involved (either during or after the event).

...

Restrictions imposed during an assembly

108. The role of the police or other law enforcement personnel during an assembly will often be to enforce any prior restrictions imposed in writing by the regulatory body. No additional restrictions should be imposed by law enforcement personnel unless absolutely necessary in light of demonstrably changed circumstances. On occasion, however, the situation on the ground may deteriorate (participants, for example, might begin using or inciting imminent violence), and the authorities may have to impose further measures to ensure that other relevant interests are adequately safeguarded. In the same way that reasons must be adduced to demonstrate the need for prior restrictions, any restrictions imposed in the course of an assembly must be equally rigorously justified. Mere suspicions will not suffice, and the reasons must be both relevant and sufficient. In such circumstances, it will be appropriate for other civil authorities (such as an Ombudsman’s office) to have an oversight role in relation to the policing operation, and law enforcement personnel should be accountable to an independent body. Furthermore ... unduly broad discretionary powers afforded to law enforcement officials may breach the principle of legality given the potential for arbitrariness. The detention of participants during an assembly (on grounds of their committing administrative, criminal or other offences) should meet a high threshold

given the right to liberty and security of person and the fact that interferences with freedom of assembly are inevitably time sensitive. Detention should be used only in the most pressing situations when failure to detain would result in the commission of serious criminal offences.

...

Decision-making and review process

132. The regulatory authority ... should fairly and objectively assess all available information to determine whether the organisers and participants of a notified assembly are likely to conduct the event in a peaceful manner, and to ascertain the probable impact of the event on the rights and freedoms of other non-participant stakeholders. In doing so, it may be necessary to facilitate meetings with the event organiser and other interested parties.

133. The regulatory authority should also ensure that any relevant concerns raised are communicated to the event organiser, and the organiser should be offered an opportunity to respond to any concerns raised. This is especially important if these concerns might later be cited as the basis for imposing restrictions on the event. Providing the organiser with such information allows them the opportunity to address the concerns, thus diminishing the potential for disorder and helping foster a cooperative, rather than confrontational, relationship between the organisers and the authorities.

134. Assembly organisers, the designated regulatory authorities, law enforcement officials, and other parties whose rights might be affected by an assembly, should make every effort to reach mutual agreement on the time, place and manner of an assembly. If, however, agreement is not possible and no obvious resolution emerges, negotiation or mediated dialogue may help reach a mutually agreeable accommodation in advance of the notified date of the assembly. Genuine dialogue between relevant parties can often yield a more satisfactory outcome for everyone involved than formal recourse to the law. The facilitation of negotiations or mediated dialogue can usually best be performed by individuals or organisations not affiliated with either the State or the organiser. The presence of parties' legal representatives may also assist in facilitating discussions between the assembly organiser and law enforcement authorities. Such dialogue is usually most successful in establishing trust between parties if it is begun at the earliest possible opportunity. Whilst not always successful, it serves as a preventive tool helping to avoid the escalation of conflict or the imposition of arbitrary or unnecessary restrictions.

135. Any restrictions placed on an assembly should be communicated in writing to the event organiser with a brief explanation of the reason for each restriction (noting that such explanation must correspond with the permissible grounds enshrined in human rights law and as interpreted by the relevant courts). The burden of proof should be on the regulatory authority to show that the restrictions imposed are reasonable in the circumstances. Such decisions should also be communicated to the organiser within a reasonable timeframe – *i.e.* sufficiently far in advance of the date of a proposed event to allow the decision to be judicially appealed to an independent tribunal or court before the notified date of the event.

136. The regulatory authority should publish its decisions so that the public has access to reliable information about events taking place in the public domain. This might be done, for example, by posting decisions on a dedicated web-site.

...

6. Policing Public Assemblies

...

147. Governments must ensure that law enforcement officials receive adequate training in the policing of public assemblies. Training should equip law enforcement agencies to act in a manner that avoids escalation of violence and minimises conflict, and should include 'soft skills' such as negotiation and mediation. ...

...

149. **Law enforcement agencies should be proactive in engaging with assembly organizers:** [o]fficers should seek to send clear messages that inform crowd expectations and reduce the potential for conflict escalation ... Furthermore, there should be a nominated point of contact within the law enforcement agency whom protesters can contact before or during an assembly. These contact details should be widely advertised.

150. **The policing operation should be characterized by a policy of 'no surprises':** [l]aw enforcement officers should allow time for people in a crowd to respond as individuals to the situation they face, including any warnings or directions given to them.

...

157. **Using mediation or negotiation to de-escalate tensions during an assembly:** [i]f a standoff or dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution.

...

159. **Law enforcement officials should differentiate between peaceful and non-peaceful participants:** [n]either isolated incidents of sporadic violence, nor the violent acts of some participants in the course of a demonstration, are themselves sufficient grounds to impose sweeping restrictions on peaceful participants in an assembly. Law enforcement officials should not therefore treat a crowd as homogenous if detaining participants or (as a last resort) forcefully dispersing an assembly.

164. **Policing peaceful assemblies that turn into non-peaceful assemblies:** [a]ssemblies can change from being peaceful to non-peaceful and thus forfeit the protection afforded under human rights law ... Such an assembly may thus be terminated in a proportionate manner. However, the use of violence by a small number of participants in an assembly (including the use of inciting language) does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly, and any intervention should aim to deal with the particular individuals involved rather than dispersing the entire event.

165. **Dispersal of assemblies:** [s]o long as assemblies remain peaceful, they should not be dispersed by law enforcement officials. Indeed, dispersal of assemblies should be a measure of last resort and should be governed by prospective rules informed by international standards. These rules need not be elaborated in legislation, but should be expressed in domestic law enforcement guidelines, and legislation should require that such guidelines be developed. Guidelines should specify the circumstances that warrant dispersal, and who is entitled to make dispersal orders (for example, only police officers of a specified rank and above).

166. Dispersal should not occur unless law enforcement officials have taken all reasonable measures to facilitate and protect the assembly from harm (including, for example, quieting hostile onlookers who threaten violence), and unless there is an imminent threat of violence.

167. Dispersal should not therefore result where a small number of participants in an assembly act in a violent manner. In such instances, action should be taken against those particular individuals. Similarly, if 'agents provocateurs' infiltrate an otherwise peaceful assembly, the authorities should take appropriate action to remove the 'agents provocateurs' rather than terminating or dispersing the assembly, or declaring it to be unlawful ...

168. If dispersal is deemed necessary, the assembly organiser and participants should be clearly and audibly informed prior to any intervention by law enforcement personnel. Participants should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

81. The applicant alleged a violation of his right to peaceful assembly. He complained in particular of disruptive security measures implemented at the site of the meeting at Bolotnaya Square, the early termination of the assembly, and his own arrest followed by his conviction for an administrative offence. He relied on Article 11 of the Convention, which reads as follows:

> "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."

A. Admissibility

82. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

83. The Government contended that the authorities had acted lawfully and reasonably in the preparation of the public assembly of 6 May 2012, both during the event and in assessing the need and the means to disperse it at the point when it ceased to be peaceful. They pointed out that the Moscow authorities and the event organisers had worked out the terms of the public assembly in their written exchange and in person at the working meeting on 4 May 2012. However, the police had suspected the protesters of intending to act in breach of the agreed terms, and on 5 May 2012 the prosecutor's office had issued the organisers with a warning to that effect. At the same time, the police had developed a detailed security plan providing for the necessary security measures (see paragraphs 16 et seq. above).

84. The Government further alleged that the disorder at Bolotnaya Square had occurred when some of the organisers and participants had refused to follow the agreed plan and had attempted to march outside the agreed area. They had disregarded the police instructions to proceed to the designated venue at Bolotnaya Embankment, even though the venue had been accessible, and had sat on the ground, causing scuffles and disorder. According to the Government, two State Duma deputies, the Ombudsman of the Russian Federation and a member of the Civic Chamber of the Russian Federation had supported the police's demands and tried to convince the protesters to follow the route, to no avail. Then, at 6 p.m. one of the organisers, acting at the request of the police, had announced the early termination of the meeting; from 5.58 p.m. to 7 p.m. some of the protesters had attempted to break the police cordon and had thrown various objects at the police. From 6 p.m. to 9 p.m. the police had gradually forced the protesters to leave and had arrested those who put up the most active resistance. The Government submitted that the intervention of the police had been justified since the assembly had ceased to be "peaceful" within the meaning of Article 11 of the Convention. In dispersing the protesters, the police had not resorted to excessive force: only police truncheons had been used; only the most aggressive perpetrators had been targeted; and no tear gas or smoke bombs had been deployed.

85. The Government further asserted that the circumstances in issue had been the subject of a large-scale domestic inquiry, which had resulted in the prosecution and criminal conviction of the organisers for mass disorder (see paragraph 63 above) and of a number of other individuals for committing violent acts against the police (see paragraphs 53-60 and 65 above). In addition, the Government referred to two decisions refusing to open a

criminal investigation into alleged police brutality (see paragraphs 52 and 61 above). They submitted that overall the establishment of the facts and their assessment by the domestic investigative and judicial authorities had been thorough and correct.

86. As regards the particular circumstances of the case, the Government alleged that the applicant had incurred sanctions for failing to obey police orders to leave the site of the public assembly at the end of the authorised meeting. They maintained that he had been arrested at 8.30 p.m. and taken to the police station, where he had been detained pending the administrative proceedings and subsequently convicted of failure to comply with a lawful police order, an offence under Article 19.3 of the Code of Administrative Offences.

87. The Government argued that the charges brought against the applicant had stemmed from a specific act of disobedience committed after the dispersal of the rally, and in any event after the expiry of the authorised time slot, rather than from his disagreement with the decision to terminate the assembly prematurely. They contended that there had been no interference with the exercise of the applicant's right to peaceful assembly and that in any event the penalty imposed on him, fifteen days' detention, had not been disproportionate because he had previously been convicted of a similar offence.

88. The Government concluded that both the general measures taken in relation to the assembly as a whole and the individual measures taken against the applicant personally had been justified under Article 11 § 2 of the Convention. They submitted that the measures in question had complied with domestic law, had been necessary "for the prevention of disorder or crime" and "for the protection of the rights and freedoms of others" and had remained strictly proportionate.

(b) The applicant

89. The applicant maintained that he had been prevented from taking part in an authorised public assembly. Firstly, he argued that the heavy-handed crowd-control measures had caused tension between the protesters and the police, resulting in some isolated confrontations which had been used as a pretext for terminating and dispersing the meeting. Secondly, he argued that the termination of the meeting had not been clearly announced and that, owing to the general confusion, he had remained at the site of the meeting until his arrest. He contested having committed the act of disobedience imputed to him.

90. As regards the general measures, the applicant pointed out, firstly, that the restrictions set out in the police security plan were not aimed at ensuring the peaceful conduct of the assembly, but at limiting and suppressing it. Secondly, he argued that the authorities had unilaterally altered the original meeting layout without informing the organisers or the

public. He contended that the restriction of the area had had no purpose other than to prevent the possibility of tents being erected in the park. Rather than serving to prevent public disorder, that restriction had created a bottleneck at the entrance to the meeting venue and had caused tension resulting in a spontaneous sit-in by a small number of participants, including the organisers. Furthermore, as the tension had built up, the authorities had failed to communicate with the organisers and to facilitate peaceful cooperation.

91. The applicant further alleged that the authorities had failed to inform effectively the demonstrators of the termination of the meeting and of the order to disperse. He had been unaware of the decision to end the assembly and it had not been obvious to him, since he had not seen any clashes. He pointed out that under domestic law, the police were required to suspend the assembly first and to give the organisers time to remedy any breach before they could terminate it. In any event, he denied that the assembly had ceased to be peaceful, despite numerous incidents of confrontation with the police. No confrontations had taken place within the authorised perimeter in front of the stage. Overall, he argued that the response by the police had been uncoordinated and disproportionate and that it had had the effect of escalating the confrontation rather than defusing it. The immense number of police officers and extensive crowd-control resources deployed at the site of the assembly should have allowed the authorities to ensure the peaceful continuation of the meeting, but they had chosen to terminate it instead. The applicant relied on the expert report (see paragraphs 49 et seq. above) in support of his allegations.

92. As regards his own arrest, the applicant claimed that he had been a peaceful participant in an authorised public assembly. He submitted that he had been arrested at 7 p.m., still within the hours of the authorised assembly, contrary to the Government's claim, as the police had been clearing the scene of the rally after its early termination; prior to his arrest the police had given him no warning and no order which he could have disobeyed; he had not been obstructing the traffic since it was still suspended for the assembly, and had not been committing any objectionable acts. He maintained that he had been arrested merely for his presence at the site of the rally as a means of discouraging him and others from participating in opposition rallies. He further complained that the domestic courts had taken no account of his arguments and exonerating evidence and had imposed the most severe penalty possible. Overall, he contested his arrest and the ensuing conviction as unlawful, lacking a legitimate aim and not necessary in a democratic society, and thus in violation of Article 11 of the Convention.

2. *The Court's assessment*

(a) General principles

93. The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation (see *Barraco v. France*, no. 31684/05, § 42, 5 March 2009). It is, in any event, for the Court to give a final ruling on the restriction's compatibility with the Convention and this is to be done by assessing the circumstances of a particular case (see *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, ECHR 2001-X, and *Galstyan v. Armenia*, no. 26986/03, § 114, 15 November 2007).

94. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after establishing that it pursued a "legitimate aim", whether it answered a "pressing social need" and in particular whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (see *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001; *Ashughyan v. Armenia*, no. 33268/03, § 89, 17 July 2008; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008; *Barraco*, cited above, § 42; and *Kasparov and Others v. Russia*, no. 21613/07, § 86, 3 October 2013). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Rai and Evans v. the United Kingdom* (dec.), nos. 26258/07 and 26255/07, 17 November 2009, and *Gün and Others v. Turkey*, no. 8029/07, § 75, 18 June 2013; see also *Gerger v. Turkey* [GC], no. 24919/94, § 46, 8 July 1999, and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 47, *Reports of Judgments and Decisions* 1998-I).

95. The protection of opinions and the freedom to express them, as secured by Article 10, is one of the objectives of freedom of assembly as enshrined in Article 11. A balance must always be struck between the legitimate aims listed in Article 11 § 2 and the right to free expression of opinions by word, gesture or even silence by persons assembled on the

streets or in other public places (see *Ezelin v. France*, 26 April 1991, §§ 37 and 52, Series A no. 202; *Barraco*, cited above, § 27; *Fáber v. Hungary*, no. 40721/08, § 41, 24 July 2012; and *Taranenko v. Russia*, no. 19554/05, § 65, 15 May 2014).

96. The Contracting States must refrain from applying unreasonable indirect restrictions upon the right to assemble peacefully. In addition, there may be positive obligations to secure the effective enjoyment of this right (see *Oya Ataman v. Turkey*, no. 74552/01, § 36, ECHR 2006-XIV). The States have a duty to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, although they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 251, ECHR 2011; see also *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 34, Series A no. 139; *Oya Ataman*, cited above, § 35; and *Protopapa v. Turkey*, no. 16084/90, § 108, 24 February 2009). It is incumbent on the State, in particular, to take the appropriate preventive security measures to guarantee the smooth conduct of a public event, such as ensuring the presence of first-aid services at the site of demonstrations and regulating traffic so as to minimise its disruption (see *Oya Ataman*, cited above, § 39, and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, §§ 158-60, ECHR 2015).

97. It is important for the public authorities, moreover, to show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Oya Ataman*, cited above, §§ 37 and 39). The limits of tolerance expected towards an unlawful assembly depend on the specific circumstances, including the duration and the extent of public disturbance caused by it, and whether its participants had been given sufficient opportunity to manifest their views (see *Cisse v. France*, no. 51346/99, §§ 51-52, ECHR 2002-III; *Éva Molnár v. Hungary*, no. 10346/05, §§ 42-43, 7 October 2008; *Navalnyy and Yashin v. Russia*, no. 76204/11, §§ 63-64, 4 December 2014; and *Kudrevičius and Others*, cited above, §§ 155-57 and 176-77).

98. On the other hand, where demonstrators engage in acts of violence, interferences with the right to freedom of assembly are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others (see *Giuliani and Gaggio*, cited above, § 251). The guarantees of Article 11 of the Convention do not apply to assemblies where the organisers and participants have violent intentions, incite to violence or otherwise deny the foundations of a "democratic society" (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*,

nos. 29221/95 and 29225/95, § 77, ECHR 2001-IX; *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, no. 44079/98, § 99, 20 October 2005; *Sergey Kuznetsov v. Russia*, no. 10877/04, § 45, 23 October 2008; *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 80, 21 October 2010; *Fáber*, cited above, § 37; and *Gün and Others*, cited above, § 70). The burden of proving the violent intentions of the organisers of a demonstration lies with the authorities (see *Christian Democratic People's Party v. Moldova (no. 2)*, no. 25196/04, § 23, 2 February 2010).

99. In any event, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour (see *Ezelin*, cited above, § 53; *Ziliberberg v. Moldova* (dec.), no. 61821/00, 4 May 2004; and *Primov and Others v. Russia*, no. 17391/06, § 155, 12 June 2014). Even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of Article 11 § 1 of the Convention, but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that Article (see *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 103, ECHR 2011).

(b) Application of these principles in the present case

100. The applicant alleged a violation of his right to freedom of peaceful assembly, referring to the measures taken as regards the assembly in general and the specific measures taken against him personally. He alleged that the crowd-control measures implemented by the police at Bolotnaya Square had in effect provoked a confrontation between the protesters and the police, and that the police had then used the incident as a pretext for the early termination of the meeting and its dispersal. He claimed, moreover, that the authorities had intended from the outset to suppress the rally in order to discourage street protest and political dissent. He argued that his own arrest at the site of the rally, his pre-trial detention and the ensuing conviction for an administrative offence had been arbitrary and unnecessary.

101. The Court observes that, although the first part of the applicant's allegations concerns a somewhat general situation, it is clear that those general events have directly affected the applicant's individual state of affairs and his rights guaranteed by Article 11 of the Convention. He arrived at the site of the public event with the intention of taking part in the meeting; however, this became impossible because the meeting was disrupted and then cancelled, and the main speakers were arrested. This complaint is distinct from the grievances concerning the applicant's own subsequent arrest and detention, also lodged under Article 11 of the

Convention. The Court has thus identified two issues in the applicant's complaints and it will consider each of them separately.

(i) Obligation to ensure the peaceful conduct of the assembly

102. The Court observes that applying security measures in the course of a public assembly constitutes, on the one hand, a restriction on the exercise of the right to freedom of assembly, but, on the other hand, it is also a part of the authorities' positive obligations to ensure the peaceful conduct of the assembly and the safety of all citizens (see the case-law cited in paragraph 96 above). It will begin its analysis with the question whether the authorities took all reasonable measures to ensure that the meeting at Bolotnaya Square was conducted peacefully. The Court observes that the parties have agreed on the main circumstances of the stand-off between the assembly leaders and the police at Malyy Kamennyy Bridge, followed by a violent confrontation, the termination of the meeting and its dispersal. They agree on the timeline and the sequence of events as established by the domestic courts, but differ as to the perception of those events, any causal links between them and their legal interpretation. They disagree in particular on whether the authorised venue layout was altered, whether the authorities' conduct caused, or at least compounded, the onset of the confrontations, and whether the scale of the disorder justified the termination of the event and its dispersal by the police.

103. According to the official version, on 6 May 2012 mass disorder took place at Bolotnaya Square. The Government contended that on that day the assembly leaders had intended to take the march outside the designated area, to set up a protest campsite and, possibly, to hold an unauthorised assembly near the Kremlin. When they were barred by the police cordon, the organisers called for a sit-in and encouraged assaults on the police cordon. In those circumstances the police had no choice but to terminate the assembly, which had already been irrevocably disrupted, and to restrain the active offenders.

104. The assembly leaders, on the contrary, accused the authorities of having framed the demonstration so that a confrontation would become inevitable and so that a peaceful rally could be portrayed as an aggressive mob warranting a resolute crackdown. They denied that it had been their original intention to go outside the designated meeting area; conversely, the sit-in was a reaction to the authorities' unilateral change of the meeting layout. The protesters sat on the ground in an attempt to negotiate a passage through the park at Bolotnaya Square, which they considered to be a part of the agreed meeting venue, but the authorities showed no willingness to negotiate or even to communicate with them. From this point of view, the ensuing breaking of the cordon and confrontations were a consequence of the authorities' uncooperative conduct. In any event, the applicant contended that despite some isolated rowdy incidents, the assembly had

generally remained peaceful and there had been no cause for terminating or dispersing it.

105. It appears from the materials submitted in this case that safeguarding public order on 6 May 2012 was an elaborate security operation. The Court observes in particular that the security plan provided for a complex array of security measures to be taken in the whole of Moscow on that day, of which a significant part was devoted to the public assembly at Bolotnaya Square (see paragraphs 16 et seq. above). The unprecedented scale of the police presence and of the equipment deployed for this event was noted in the media reports referred to by the parties, by the Expert Commission and by the witnesses in the criminal proceedings (see paragraphs 51 and 57 above).

106. It is common ground that the enhanced security was due to anticipated unauthorised street protests. The authorities had closely monitored the activities of the opposition leaders in the period preceding 6 May 2012 by accessing open sources and by means of secret surveillance. They had suspected the opposition activists of plotting a popular uprising, starting with unlawful public assemblies and setting up campsites supposedly inspired by the "Occupy" movement and similar to the "Maidan" protest in Ukraine (see the testimonies of Mr Deynichenko, Mr Zdorenko, Mr Makhonin and Ms Volondina, paragraph 63 above). It was for fear of such a campsite being erected in the park of Bolotnaya Square that the police had decided to obstruct access to it, restricting the assembly venue to the embankment, where tents could not easily be set up.

107. The Court notes that although Article 11 of the Convention does not guarantee a right to set up camp at a location of one's choice, such temporary installations may in certain circumstances constitute a form of political expression, restrictions on which must comply with the requirements of Article 10 § 2 of the Convention (see, for examples of other forms of expression of opinion, *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports* 1998-VII; *Drieman and Others v. Norway* (dec.), no. 33678/96, 4 May 2000; and *Taranenko*, cited above, §§ 70-71). It reiterates that, in any event, in this context Article 10 of the Convention is to be regarded as a *lex generalis* in relation to Article 11, a *lex specialis*, and the complaint under Article 11 must in these circumstances be considered in the light of Article 10 (see *Ezelin*, cited above, §§ 35 and 37). The Court will take this into account when assessing the proportionality of the measures taken in response to the threat posed by the assembly's suspected hidden agenda (see paragraph 139 below).

108. Before deciding on the role of undeclared goals, whether on the part of the organisers or the authorities, the Court will comment on the formal reasons for the decisions taken when the assembly was being organised. On the face of it, the decision to close the park to the rally does not appear in itself hostile or underhand *vis-à-vis* the organisers, given that

the embankment was large enough to accommodate the assembly, even with a significant margin for exceeding the expected number of participants. According to the statement of the Moscow Regional Department of Security (see paragraph 63 above), the maximum capacity of the Bolotnaya Embankment was around 26,000 people. It was therefore large enough not only for the originally declared 5,000 participants, or the officially recorded turnout of 8,000, but even for the organisers' retrospective estimate of 25,000. However, the organisers objected not only to the lack of access to the park, but, above all, to the discovery of a last-minute alteration of the venue layout, which allegedly led to a misunderstanding and the disruption of the assembly.

109. The organisers, the municipal authorities and the police had discussed the layout of the assembly venue during the working meeting of 4 May 2012. The assembly organisers claimed that it had been expressly agreed at the working meeting to replicate on 6 May 2012 the route and the format of the assembly that had taken place on 4 February 2012. Their testimonies to that effect have been neither confirmed nor denied by the officials who were present at the working meeting. When cross-examined, Mr Deynichenko and Mr Sharapov stated that the inclusion of the park had not been requested or discussed. Assuming that the latter was true and no express agreement had been reached as regards the park, the Court nevertheless considers that it was not entirely unreasonable on the part of the organisers to perceive it as having been included by default. Firstly, the official boundary of Bolotnaya Square comprised the park, as confirmed by the expert witnesses N. and M., as well as the head of Yakimanka district municipality of Moscow. Secondly, the park had been included in the meeting venue on the previous occasion, a fact admitted by the official sources, in particular the witness Mr Sharapov (see the testimonies of all the aforementioned witnesses quoted in paragraph 63 above).

110. It is common ground that no map was produced at the working meeting and no on-the-spot reconnaissance was carried out because of the time constraints. After the working meeting, the police developed the security plan and drew up their own map, which excluded the park. It is not clear whether their map was based on their perception of the discussion at the working meeting, or whether they decided on the park's closure afterwards, taking into account the expected number of participants and the potential public-order issues. In any event, both the security plan and the maps used by the police forces remained police internal documents and were not shared with the organisers (see the Moscow Department of the Interior's reply to the Investigative Committee, paragraph 48 above, and the Moscow City Court judgment in Mr Udaltsov's and Mr Razvozzhayev's case, paragraph 63 above).

111. At the same time, a different map of the assembly venue was published on the police's official website and included the park. The

provenance of the map might have been unofficial, as established by the Moscow City Court, but even if it was based on the information submitted by the organisers and not by the police's own services, its publication by the police press office implied some sort of official endorsement (see paragraphs 48 and 63 above). Moreover, the fact that the map had been in the public domain for at least twenty-four hours before the assembly allowed the officers responsible for the security of the meeting to spot any errors and to inform the organisers and the public accordingly. Given the high priority attached to policing this event and the thoroughness with which the security forces followed up every piece of information concerning the protest activity, it was unlikely that the published map had inadvertently escaped their attention.

112. In view of the foregoing, the Court concludes that there was at least a tacit, if not an express, agreement that the park at Bolotnaya Square would form part of the meeting venue on 6 May 2012.

113. With this finding in mind, the Court turns to the next contested point: the significance of the sit-in at Malyy Kamennyy Bridge. The Court will examine the reasons for its occurrence, the extent to which it disrupted the assembly and the authorities' conduct in this situation.

114. The Court observes that during the domestic proceedings two conflicting explanations were given for the sit-in. The assembly leaders and participants maintained that it was a reaction to the unexpected change of the venue layout and an attempt to negotiate a passage through the park. This reason is in principle consistent with the Court's finding that the placement of the police cordon was different from that expected by the assembly organisers (see paragraph 112 above).

115. However, certain police officials maintained that the sit-in leaders had demanded access to Bolshoy Kamennyy Bridge towards the Kremlin, an ultimatum that could not be granted (see Mr Deynichenko's report of 6 May 2012, paragraph 43 above, and his testimony, paragraph 63 above; and the decision of the Investigative Committee of 20 March 2013, paragraph 52 above). It is impossible to establish whether any such request was indeed expressed because no witnesses other than the police heard it. On the other hand, a number of witnesses unrelated to the conflicting parties confirmed that the sit-in leaders had demanded that the police move the cordon back so as to allow access to the park. The independent observers from the Ombudsman's office who had been involved in the negotiations explained that the protesters, faced with the narrowed-down passage, had demanded that it be widened. Moreover, they named the police official, Colonel Biryukov, to whom the Ombudsman had passed on that demand (see the testimonies of Ms Mirza and Mr Vasilyev, paragraphs 57 and 59 above). Likewise, the assembly observer from the Civic Chamber of the Russian Federation testified that no calls to move towards the Kremlin had been made (see the testimony of Mr Svanidze, paragraph 58 above). Similar

testimonies were also given by the two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, who had also attempted to mediate in the conflict; they specified that the sit-in leaders had insisted on the cordon being moved back and had asked for access to the park.

116. On the basis of this evidence, the Court finds that the sit-in leaders requested that the park be opened up for the assembly and that they made that request known to the police.

117. As to the nature of the sit-in and the degree of disturbance it caused, the Court notes the following. It appears from the video-footage submitted by the parties, and it is confirmed by the witness accounts, that the sit-in narrowed the passage to Bolotnaya Square even further and that it caused some confusion and impatience among the demonstrators aspiring to reach the meeting venue. Nevertheless, the same sources made it clear that with only twenty to fifty people sitting on the ground, the sit-in remained localised and left sufficient space for those wishing to pass. It is beyond doubt that the sit-in was strictly peaceful. However, it required the authorities' intervention – and those taking part in it openly invited it – since the cordon could not be moved without the authorities' consent and relevant orders. The question therefore arises whether at this stage the authorities took all reasonable steps to preserve the assembly's peaceful character.

118. Having received the request to move the cordon back, the police commanders had to accept or reject it, or seek a compromise solution. It is not for the Court to indicate the most appropriate manoeuvre for the police cordon in the circumstances. The fact that the police were exercising caution against the park being taken over by a campsite, or that they were unwilling to allow the protesters to proceed in the direction of the Kremlin, or both, might have justified the refusal to allow access to the park, given that in any event the assembly had sufficient space for a meeting. Crucially, whatever course of action the police deemed correct, they had to engage with the sit-in leaders in order to communicate their position openly, clearly and promptly.

119. The stand-off near the cordon lasted for around forty-five to fifty minutes, a considerable period of time. From approximately 5 p.m. to 5.15 p.m. the organisers were addressing the police officers forming the cordon, but it appears that there were no senior police officers among them competent to discuss those issues; the senior officers were apparently watching the event from some distance behind the cordon. The negotiators became involved at around 5.15 p.m. and the talks continued until at least 5.45 p.m. The police chose first to contact the protest leaders through an intermediary, the Ombudsman, who had to tell them to stand up and go towards the stage. He passed on the message and returned to the police the protesters' demand to open the passage to the park. It is unclear whether, after that initial exchange, the police replied to the protesters and, if so,

whether the Ombudsman managed to transmit the reply. However, at the same time two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, were in concurrent negotiations and had allegedly reached an agreement that the cordon could in principle be moved.

120. It appears that the mediators had some high-ranking interlocutors on the police side. The Ombudsman was talking to Colonel Biryukov. According to the security plan, on 6 May 2012 he was responsible for "coordination with the representatives of public organisations and also coordination and information flow with other services of the Moscow Department of the Interior" (see paragraph 21 above). However, Colonel Biryukov told the Ombudsman that the decision regarding the police cordon was outside his powers (see the testimonies of Ms Mirza and Mr Vasiliev, paragraphs 57 and 59 above). The deputies, Mr G. Gudkov and Mr D. Gudkov, had apparently spoken to Mr Gorbenko, the deputy mayor; they did not identify the police officers to whom they had also spoken, but they claimed to have achieved a different result from the Ombudsman.

121. The documents available in the case file do not disclose the identity of the official who took the decision as regards the cordon, or what the decision actually was. According to the security plan, the relevant segment of the cordon belonged to Zone no. 8 under the command of Police Colonel Smirnov with nine officers as his deputies (listed in paragraph 22 above). However, it is not clear whether he had the authority to negotiate with the assembly organisers or to alter the position of the cordon specified in the security plan. Police Colonel Deynichenko was in charge of the overall command of the security operation; on 4 May 2012 he took part in the working meeting, and on 6 May 2012, after the assembly, he drew up a report on the implementation of the security plan. However, there is no information as to whether he was involved in the negotiations with the sit-in leaders or whether he gave any orders concerning the cordon.

122. The Court notes that another official, Colonel Makhonin, played an active role in policing the event. Before the march he met the assembly organisers for a final briefing, gave them instructions and had them sign a formal undertaking against any breach of public order. He also indicated to the organisers that he was their emergency contact and instructed them to call him for any outstanding public-order issues.

123. It is unknown whether Mr Udaltsov tried to call Colonel Makhonin during the stand-off. Likewise, the Court is unable to verify the testimony of Mr Davidis to the effect that he tried to call Mr Deynichenko. The domestic courts did not rule on those points, and no relevant evidence has been presented to the Court. In any event, the senior police officers had ample opportunity to contact the organisers by telephone and to approach personally the sit-in participants by simply walking a few metres. Mr Makhonin, for his part, testified that he had not tried to call Mr Udaltsov until he arrived at Bolotnaya Square "after the mass disorder had already

begun” (see paragraph 63 above). Given that the first incident occurred a few minutes after the sit-in had ended, this means that he did not call Mr Udaltsov during the sit-in and was away from Bolotnaya Square while it lasted. At 6 p.m. he appeared in the stage area, where he instructed Ms Mityushkina to end the assembly (see paragraphs 131 et seq. below).

124. It is noteworthy that Mr Makhonin’s official function in relation to the assembly at Bolotnaya Square has not been specified. His name did not appear on the security plan among hundreds of named police officials personally responsible for various tasks, including checking the bins, apprehending offenders, video-recording and press relations. He was not a member of the operational headquarters either. According to the security plan, it was Colonel Smirnov’s and Colonel Saprykin’s task to personally meet the organisers before the beginning of the march in order to brief them and to have them sign the undertakings (see paragraph 24 above), although in practice it was Colonel Makhonin who did this.

125. It is also peculiar that the security plan did not assign an officer to liaise with the assembly organisers, although it specifically designated officers for liaising with civil-society organisations and with the press (see paragraph 21 above). As it happened, Colonel Makhonin exercised some operational functions in relation to the assembly organisers, but without knowing the limits of his mandate it is impossible to tell whether he had the authority to decide on the cordon manoeuvre or to negotiate with the sit-in leaders.

126. The Court has found above that the march leaders were taken by surprise because of the substantial restriction of space for the meeting, since the police cordon at Malyy Kamennyy Bridge excluded a significant part of the venue as originally agreed. Faced with that situation, instead of proceeding to the space available in front of the stage, they began a sit-in, which made the congestion worse (see paragraphs 114 and 117 above). In the Court’s view, the controversy concerning the placement of the police cordon could reasonably have been dealt with had the competent officials been prepared to come forward in order to communicate with the assembly organisers and to discuss the placement of the cordon with them. Their involvement could have alleviated the tensions caused by the unexpected change of the venue layout and could have helped avoid the stand-off and the consequent discontent on the part of the protesters.

127. The Court’s findings in the foregoing paragraphs lead to the conclusion that the police authorities had not provided for a reliable channel of communication with the organisers before the assembly. This omission is striking, given the general thoroughness of the security preparations for anticipated acts of defiance on the part of the assembly leaders. Furthermore, the authorities failed to respond to the real-time developments in a constructive manner. In the first fifteen minutes after the march’s arrival at Malyy Kamennyy Bridge, no official took any interest in talking

to the march leaders showing signs of distress in front of the police cordon. Eventually, when the sit-in began, they sent the Ombudsman with a message to the leaders to stand up and move on, which did not answer the protesters' concerns. Whether or not the senior police officers beyond the cordon had initially understood the demands of the sit-in leaders, there was nothing preventing them from immediately clarifying the issue and from giving them a clear answer.

128. In the light of the foregoing, the Court finds that in the present case the authorities made insufficient efforts to communicate with the assembly organisers to resolve the tension caused by the confusion regarding the venue layout. The failure to take simple and obvious steps at the first signs of the conflict allowed it to escalate, leading to the disruption of the previously peaceful assembly.

129. The Court has already referred to the Venice Commission's Guidelines on Freedom of Peaceful Assembly, which recommends negotiation or mediated dialogue if a stand-off or other dispute arises during the course of an assembly as a way of avoiding the escalation of conflict (see Guideline 5.4, paragraph 80 above). It considers, however, that it is unnecessary to define the standard required in relation to the Guidelines or otherwise. The Court considers that from any point of view the authorities in this case did not comply with even the minimum requirements in their duty to communicate with the assembly leaders, which was an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved.

130. The authorities have thus failed to discharge their positive obligation in respect of the conduct of the assembly at Bolotnaya Square. There has accordingly been a violation of Article 11 of the Convention on that account.

(ii) Termination of the assembly and the applicant's arrest, detention and charges

131. At the end of the negotiations the position of the police cordon remained unchanged; it was only reinforced by the riot police. The subsequent events developed simultaneously on two opposite sides of Bolotnaya Square. Congestion occurred at Malyy Kamennyy Bridge at 5.50 p.m., at which point the protesters ended the sit-in and left for the stage. At 5.55 p.m. the pressure of the crowd caused the cordon to break, but it was quickly restored without the use of force, and in the next few minutes protesters from among the crowd began tossing various objects at the police cordon, including a Molotov cocktail. At the same time, at 6 p.m., at the far end of Bolotnaya Square Ms Mityushkina, acting on the instructions of Colonel Makhonin, announced from the stage that the meeting was over. In the next fifteen minutes several confrontations took place between the protesters and the police at Malyy Kamennyy Bridge

until, at 6.15 p.m., the police began expansive action to disperse the crowd there.

132. The Government did not specify whether it was Colonel Makhonin who took the decision to terminate the assembly or whether he was following orders. It is also unclear exactly what prompted that decision, although some witnesses suggested that it was because of the sit-in. The fact that at 5.55 p.m. the authorities were threatening the assembly leaders with criminal sanctions corroborates that hypothesis (see paragraph 34 above). It is clear, in any event, that at 6 p.m. when the announcement was made, the crowd had built up, and there had been squeezing and pushing and isolated incidents of small-scale aggression at the cordon at Malyy Kamennyy Bridge, but no widespread disorder or intensive fighting.

133. It does not appear that the assembly was suspended before being terminated, as required by section 15.3 of the Public Events Act. According to the authorities, at that stage it was justified to announce an emergency termination under section 17.3, which curtails the termination procedure in the event of mass disorder. The Court considers that, irrespective of whether the domestic requirements for "mass disorder" had been met, the tensions were still localised at Malyy Kamennyy Bridge while the rest of the venue remained calm. The authorities have not shown that, prior to declaring the whole meeting over, they had attempted to separate the turbulent sector and target the problems there, so as to enable the meeting to continue in the sector of the stage where the situation remained peaceful. The Court is therefore not convinced that the termination of the meeting at Bolotnaya Square was inevitable.

134. However, even assuming that the decision to terminate the assembly was taken because of a real and imminent risk that violence would spread and intensify, and that the authorities acted within the margin of appreciation which is to be allowed in such circumstances, that decision could have been implemented in different ways and using various methods. Given the diversity in the circumstances of the individual protesters, in particular the degree of their involvement or non-involvement in clashes and the wide range of consequences faced by them, it is impossible to give a general assessment of the police conduct in dispersing the assembly at Bolotnaya Square. For this reason, the Court will abstain from analysing the manner in which the police dispersed the protesters at Malyy Kamennyy Bridge, as it falls outside the scope of the applicant's case. The Court will examine the actions taken against the applicant personally, and in doing so it will take into account the general situation in his immediate vicinity, that is, the area in front of the stage inside the designated meeting area at Bolotnaya Embankment.

135. It follows from the parties' submissions, corroborated by video and documentary evidence, that the area within the cordoned perimeter of the meeting venue at Bolotnaya Embankment remained strictly peaceful for the

whole duration, even during the disorder outside that perimeter, at Malyy Kamennyy Bridge. It appears that during the sit-in the area in question was nearly empty, and that when the protest leaders abandoned the sit-in, some people then followed them towards the stage, although many had already left the meeting.

136. After the arrest of Mr Udaltsov, Mr Navalnyy and Mr Nemtsov at the stage, a considerable number of people continued to congregate in that area. The police addressed them through megaphones, ordering them to vacate the area, but many of them refused to leave and “linked arms in passive resistance” (see paragraph 51 above). Given the benign character of their protests, the police did not use force against those protesters to the same extent as they did at Malyy Kamennyy Bridge. For the most part, the police were steadily pressing them out towards the exits and selectively arresting some individuals.

137. The Court refers to the principles reiterated in paragraph 99 above which extend the protection of Article 11 to peaceful participants in an assembly tarnished by isolated acts of violence committed by other participants. In the present case, the Court finds that the applicant remained within the perimeter of the cordoned meeting venue and that his behaviour remained, by all accounts, strictly peaceful. Moreover, it does not appear from any submissions that he was among those who manifested even “passive resistance”.

138. It is in dispute between the parties whether the applicant was arrested before or shortly after the time slot originally authorised for the assembly, and the Court will address this controversy in the context of Article 6 of the Convention ... For the purposes of its analysis under Article 11, it is sufficient to note that, even if the applicant was on the wrong side of the time-limit, measures taken after an assembly has ended fall, as a general rule, within the scope of Article 11 of the Convention as long as there is a link between the exercise of the freedom of peaceful assembly by the applicant and the measures taken against him (see *Ezelin*, cited above, § 41, and *Navalnyy and Yashin*, cited above, § 52). Accordingly, in the circumstances of this case, even after the assembly was officially terminated, the guarantees of Article 11 continued to apply in respect of the applicant, notwithstanding the clashes at Malyy Kamennyy Bridge. It follows that any measures taken against him in the given situation had to have complied with the law, pursued a legitimate aim and been necessary in a democratic society within the meaning of Article 11 § 2 of the Convention.

139. The Court is mindful of the authorities’ admission that all the security measures taken, in particular the crackdown on those charged with offences committed on 6 May on Bolotnaya Square, were motivated by the “fear of Maidan” – the enhanced security was specifically aimed at preventing illegal campsites from being set up. At the same time, the Court

observes, and the Government have insisted on this point, that the applicant was not arrested and punished for breaching the rules on public assemblies. Even if his presence at the meeting venue after its termination were to be considered a manifestation of his objection to the early termination of the assembly, that was not the offence with which he was charged. According to the domestic courts and the Government's submissions, he was arrested, detained and sentenced to fifteen days' imprisonment because he was obstructing traffic and disobeyed lawful police orders to stop doing so.

140. In this context, the severity of the measures applied against the applicant is entirely devoid of any justification. He was not accused of violent acts, or even of "passive resistance" in protest against the termination of the assembly. His motives for walking on the road and obstructing the traffic are left unexplained by the domestic judgments; the applicant's explanation that there was no traffic and that he was simply not quick enough to leave the venue in the general confusion has not been contested or ruled out. Therefore, even assuming that the applicant's arrest, pre-trial detention and administrative sentence complied with domestic law and pursued one of the legitimate aims enumerated in Article 11 § 2 of the Convention – presumably, public safety – the measures taken against him were grossly disproportionate to the aim pursued. There was no "pressing social need" to arrest the applicant and to escort him to the police station. There was especially no need to sentence him to a prison term, albeit a short one.

141. It must be stressed, moreover, that the arrest, detention and ensuing administrative conviction of the applicant could not have failed to have the effect of discouraging him and others from participating in protest rallies or indeed from engaging actively in opposition politics. Undoubtedly, those measures also had a serious potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. The chilling effect of those sanctions was further amplified by the large number of arrests made on that day, which attracted broad media coverage.

142. There has accordingly been a violation of Article 11 of the Convention on account of the applicant's arrest, pre-trial detention and administrative penalty.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

143. The applicant further complained that his arrest and pre-trial detention pending the administrative proceedings had been arbitrary and unlawful. Article 5 § 1 of the Convention provides, in so far as relevant, as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

144. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

145. The Government contended that after the authorised public assembly had been terminated the applicant had stayed on at Bolotnaya Square; he had walked on the road obstructing the traffic, and had disobeyed the police officers' order to stop doing so. According to the Government, the applicant had been escorted to the police station, where he had been issued with a statement on the administrative offence provided for by Article 19.3 of the Code of Administrative Offences. The Government contended that the legal grounds for the arrest had been Article 27.2 of the Code of Administrative Offences, which empowered the police to escort individuals, that is, to take them to the police station in order to draw up an administrative offence report. The Government stated that the applicant had been in police custody since his arrest at 9.30 p.m. on 6 May 2012 until

8 a.m. on 8 May 2012. They explained that the length of the applicant's detention had been calculated from 9.30 p.m. on 6 May 2012, the time when he was taken to the Krasnoselskiy District police station, and argued that the term of his pre-trial detention had not exceeded the statutory limit of forty-eight hours. Overall, the Government submitted that the applicant's deprivation of liberty had complied with domestic law and that all requisite formalities, such as issuing a lawful detention order, had been fulfilled.

(b) The applicant

146. The applicant contested the Government's submissions and alleged that it had not been necessary either to arrest him or to detain him at the police station after the police report and the statement on the administrative offence had been drawn up. Moreover, there had been no legal grounds to remand him in custody pending the hearing before the Justice of the Peace.

2. The Court's assessment

147. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 of the Convention essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. Furthermore, the list of exceptions to the right to liberty secured in Article 5 § 1 of the Convention is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports* 1997-IV).

148. The Court has noted above that the applicant was arrested for walking on the road and obstructing the traffic, although it remains unclear whether it has been alleged that he was doing so within or after the period for which the traffic had been suspended, and whether there actually was any traffic (see paragraph 140 above; see also paragraph 164 below). It appears that the police were in haste to disperse the remaining demonstrators from Bolotnaya Square after the early termination of the rally, and since the applicant had not yet left they decided to arrest him. Even if the preceding disorder at Malyy Kamenny bridge may explain, if not justify, their zealousness in pursuing the peaceful protesters lingering at the site, and even accepting that the situation might not have allowed the relevant documents to be drawn up on the spot, there is no explanation, let alone justification, for the applicant's ensuing detention at the police station.

149. It has not been disputed that from the time of his arrest, at the latest at 8.30 p.m. on 6 May 2012, until his transfer to court at 8 a.m. on 8 May 2012 the applicant was deprived of his liberty within the meaning of Article 5 § 1 of the Convention. The Government submitted that his arrest and detention had the purpose of bringing him before the competent legal authority on suspicion of having committed an administrative offence and thus fell within the ambit of Article 5 § 1 (c) of the Convention. The Court notes that the duration of administrative detention should not as a general rule exceed three hours, which is an indication of the period of time the law regards as reasonable and sufficient for drawing up an administrative offence report. Once the administrative offence report had been drawn up at 9.30 p.m., the objective of escorting the applicant to the Krasnoselskiy District police station had been met and he could have been discharged.

150. However, the applicant was not released on that day and was formally remanded in custody to secure his attendance at the hearing before the Justice of the Peace. The Government argued that the term of the applicant's detention remained within the forty-eight-hour time-limit provided for by Article 27.5 § 3 of the Code of Administrative Offences. However, neither the Government nor any other domestic authorities have provided any justification as required by Article 27.3 of the Code, namely that it was an "exceptional case" or that it was "necessary for the prompt and proper examination of the alleged administrative offence". In the absence of any explicit reasons given by the authorities for not releasing the applicant, the Court considers that his thirty-six-hour detention pending trial was unjustified and arbitrary.

151. In view of the foregoing, the Court finds a breach of the applicant's right to liberty on account of the lack of reasons and legal grounds for remanding him in custody pending the hearing of his case by the Justice of the Peace.

152. Accordingly, there has been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

153. The applicant complained of a violation of the right to a fair and public hearing in the administrative proceedings against him. He relied on Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention, which provides, in so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(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 ...”

A. Admissibility

154. The Court reiterates that in order to determine whether an offence qualifies as “criminal” for the purposes of Article 6 the Convention, it is necessary to ascertain whether or not the provision defining the offence belongs, in the legal system of the respondent State, to the criminal law; the “very nature of the offence” and the degree of severity of the penalty risked must then be considered (see *Menesheva v. Russia*, no. 59261/00, § 95, ECHR 2006-III). Deprivation of liberty imposed as punishment for an offence belongs in general to the criminal sphere, unless by its nature, duration or manner of execution it is not appreciably detrimental (see *Engel and Others v. the Netherlands*, 8 June 1976, §§ 82-83, Series A no. 22, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 69-130, ECHR 2003-X).

155. In the present case, the Government disagreed that Article 6 was applicable to the proceedings in question. However, the applicant in the present case was convicted of an offence which was punishable by detention, the purpose of the sanction being purely punitive. Moreover, he served a fifteen-day prison term as a result of his conviction. The Court has previously found that the offence set out in Article 19.3 of the Code of the Administrative Offences had to be classified as “criminal” for the purposes of the Convention in view of the gravity of the sanction and its purely punitive purpose (see *Malofeyeva v. Russia*, no. 36673/04, §§ 99-101, 30 May 2013; *Nemtsov v. Russia*, no. 1774/11, § 83, 31 July 2014; and *Navalnyy and Yashin*, cited above, § 78). The Court sees no reason to reach a different conclusion in the present case and considers that the proceedings in this case fall to be examined under the criminal limb of Article 6.

156. The Court also considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. Thus, it should be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The Government

157. The Government maintained that the proceedings in the applicant's administrative case had complied with Article 6 of the Convention. They argued that the applicant had been given a fair opportunity to state his case, to obtain the attendance of three witnesses on his behalf and to present other evidence. The applicant had been given an opportunity to lodge written requests and he had availed himself of that right. The Government accepted that neither the police officers who had arrested the applicant and had drawn up the police report nor the officer who had issued the statement on the administrative offence had been called as witnesses. However, they pointed out that those officers could have been summoned to the court hearing if doubts or questions had arisen.

(b) The applicant

158. The applicant maintained that he had not been given a fair hearing in the determination of the charge against him. He complained that the court had refused to accept the video recordings of his arrest as evidence and to call and examine the police officers as witnesses. Furthermore, the court had not observed the principle of equality of arms in that it had rejected the testimonies of all the defence witnesses while giving weight to the written police report and the statement on the administrative offence. In addition, the applicant complained that the hearing had not been open to the public, that his right to mount a defence had been violated and that the hearing had not been adjourned following his request to allow him to prepare for it. He claimed that having spent about thirty-six hours in detention and in transit between the police station and court, he had been unfit to stand trial on 8 May 2012 and to defend himself effectively.

2. *The Court's assessment*

(a) General principles

159. Although the admissibility of evidence is primarily governed by the rules of domestic law, it remains the task of the Court to ascertain whether the proceedings, considered as a whole, were fair as required by Article 6 § 1 of the Convention (see *Delta v. France*, 19 December 1990, § 35, Series A no. 191, and *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). In the context of the taking of evidence, the Court has required that an applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his

opponent" (see *Bulut v. Austria*, 22 February 1996, § 47, *Reports* 1996-II, and *Kasparov and Others*, cited above, §§ 58-65).

160. The Court has previously held that in circumstances where the applicant's conviction was based primarily on the assumption of his being in a particular place at a particular time, the principle of equality of arms and, more generally, the right to a fair trial, imply that the applicant should be afforded a reasonable opportunity to challenge the assumption effectively (see *Popov v. Russia*, no. 26853/04, § 183, 13 July 2006, and *Polyakov v. Russia*, no. 77018/01, §§ 34-37, 29 January 2009).

161. The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 of the Convention is to evaluate the overall fairness of the criminal proceedings (see *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, with further references therein). Article 6 § 3 (d) of the Convention enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II, and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

162. It follows from the above-mentioned principle that there must be a good reason for the non-attendance of a witness. Furthermore, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 § 1 of the Convention (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 118-19, ECHR 2011, and *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 107 et seq., ECHR 2015).

(b) Application of these principles in the present case

163. The Court observes that the applicant's conviction for the administrative offence of disobeying lawful police orders was based on the following written documents: (i) the police report drawn up by two officers, Y. and A., whose orders the applicant had allegedly disobeyed and who had arrested him; the explanatory note by Y. reproducing the content of the police report; (iii) the statement on the administrative offence, which was produced at the police station by an on-duty officer on the basis of the

aforementioned police report and reiterating it word-by-word; (iv) the escorting order; and (v) the detention order of 6 May 2012. The Court observes that the police report was drawn up using a template and contained no individualised information except the applicant's name, the names and titles of the arresting officers and the time and place of the arrest. The report indicated that the applicant had been arrested at 9.30 p.m. for obstructing traffic, whereas the statement on the administrative offence indicated that he had been arrested at 8.30 p.m.

164. The applicant contested the accusations and contended that he had been arrested during the authorised time slot of the public assembly and that there had been no traffic there that he could possibly have obstructed. Three eyewitnesses confirmed his allegations; one of them had not been previously acquainted with the applicant and had no personal interest in the outcome of the administrative proceedings against him. Furthermore, the applicant had submitted a video recording, which the court rejected. Lastly, the court refused to call and examine the two police officers as witnesses, although there had been no impediment to its doing so, and the applicant was not given any other opportunity to confront them.

165. It follows that the only evidence against the applicant was not tested in the judicial proceedings. The courts based their judgment exclusively on standardised documents submitted by the police and refused to accept additional evidence or to call the police officers. The Court considers that given the dispute over the key facts underlying the charge, where the only evidence against the applicant came from the police officers who had played an active role in the contested events, it was indispensable for the domestic courts to exhaust every reasonable possibility of scrutinising their incriminating statements (see *Kasparov and Others*, cited above, § 64).

166. Moreover, the courts limited the scope of the administrative case to the applicant's alleged disobedience, having omitted to consider the "lawfulness" of the police order (see *Nemtsov*, cited above, § 93; *Navalnyy and Yashin*, cited above, § 84; and compare *Makhmudov v. Russia*, no. 35082/04, § 82, 26 July 2007). They thus punished the applicant for actions protected by the Convention without requiring the police to justify the interference with his right to freedom of assembly, which included a reasonable opportunity to disperse when such an order was given. The failure to do so ran contrary to the fundamental principles of criminal law, namely *in dubio pro reo* (see, *mutatis mutandis*, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146; *Lavents v. Latvia*, no. 58442/00, § 125, 28 November 2002; *Melich and Beck v. the Czech Republic*, no. 35450/04, § 49, 24 July 2008; and *Nemtsov*, cited above, § 92). The latter principles were applicable to the administrative proceedings against the applicant, which fell under the criminal limb of Article 6 of the Convention (see paragraph 155 above).

167. The foregoing considerations are sufficient to enable the Court to conclude that the administrative proceedings against the applicant, taken as a whole, were conducted in violation of his right to a fair hearing.

168. In view of these findings, the Court does not consider it necessary to address the remainder of the applicants' complaints under Article 6 §§ 1 and 3 (d) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

169. Lastly, the applicant complained that the security measures taken in the context of the public assembly, his arrest, detention and the administrative charges against him had pursued the aim of undermining his right to freedom of assembly and freedom of expression, and had been applied for political ends. He complained of a violation of Article 18 of the Convention, which reads as follows:

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

170. In their submissions under this head the parties reiterated their arguments as regards the alleged interference with the right to freedom of assembly, the reasons for the applicant's deprivation of liberty and the guarantees of a fair hearing in the administrative proceedings.

171. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

172. The Court has already found that the applicant was arrested, detained and convicted of an administrative offence arbitrarily and that this had the effect of preventing and discouraging him and others from participating in protest rallies and engaging actively in opposition politics (see paragraph 141 above).

173. In the light of the above, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 18 of the Convention.

V. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

174. The applicant further complained of the conditions of his detention at the Krasnoselskiy District police station and the lack of effective domestic remedies in respect of this complaint. He referred to Articles 3 and 13 of the Convention, which provide as follows:

Article 3 (prohibition of torture)

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13 (right to an effective remedy)

> "Everyone whose rights and freedoms as set forth in [the] 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."

175. The Government contested this part of the application as having been lodged out of time. They pointed out that the applicant's pre-trial detention at the Krasnoselskiy District police station had ended on 8 May 2012, and there had been no domestic proceedings in relation to this matter. His application to the Court had been lodged on 9 November 2012, that is, more than six months after the end of the detention in the conditions complained of.

176. Article 35 § 1 of the Convention permits the Court to deal with a matter only if the application is lodged within six months of the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant. In cases featuring a continuing situation, the six-month period runs from the cessation of that situation (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 72, 10 January 2012, with further references).

177. Since the Russian legal system offers no effective remedy in respect of complaints about conditions of pre-trial detention, conditions of transport between the remand prison and the courthouse and conditions of detention in the courthouse (see *Ananyev and Others*, cited above, § 119; *Romanova v. Russia*, no. 23215/02, § 84, 11 October 2011; and *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, § 104, 12 February 2009), the six-month period should be calculated from the end of the situation complained of.

178. The Court notes that the applicant's pre-trial detention ended on 8 May 2012. Following his conviction on that day he was placed in a different detention facility, which ended the situation complained of. He brought his complaint under Articles 3 and 13 of the Convention on 9 November 2012. It has therefore been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention (see *Grishin v. Russia*, no. 30983/02, § 83, 15 November 2007).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

179. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

180. The applicant requested the Court to award him compensation in respect of non-pecuniary damage, leaving its amount to the Court's discretion.

181. The Government considered that if the Court were to find a violation of the Convention in the present case, this finding would constitute in itself sufficient just satisfaction. They stated that any award to be made by the Court should in any event take into account the applicant's individual circumstances, in particular the length of his deprivation of liberty and the gravity of the penalty.

182. The Court has found a violation of Articles 11, 6 and 5 of the Convention, and it considers that, in these circumstances, the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, it awards the applicant 25,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

183. The applicant also claimed 2,805.28 pounds sterling (GBP) (approximately EUR 4,000) and EUR 3,300, inclusive of VAT, for the costs and expenses incurred before the Court. He submitted detailed invoices indicating the lawyers' and the translators' fees, the hourly rates and the time billed for the preparation of his observations and other procedural documents in this case.

184. The Government submitted that the applicant had not produced a legal-services agreement and that it had not been necessary to retain three legal counsel in this case.

185. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, which was of a certain complexity, the Court has found a breach of the Convention on several counts. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 7,000, plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses. This sum is to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into the representatives' bank account in the United Kingdom, as identified by the applicant.

C. Default interest

186. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Articles 5, 6, 11 and 18 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 11 of the Convention on account of the authorities' failure to ensure the peaceful conduct of the assembly at Bolotnaya Square;

3. *Holds* that there has been a violation of Article 11 of the Convention on account of the applicant's arrest, pre-trial detention and administrative sentence;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

5. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

6. *Holds* that there is no need to examine the remainder of the complaints under Article 6 of the Convention;

7. *Holds* that there is no need to examine the complaint under Article 18 of the Convention;

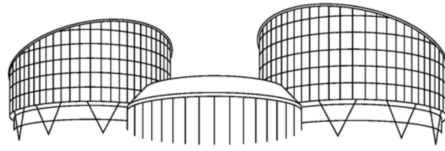
8. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
      (ii) EUR 7,000 (seven thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into his representatives' bank account in the United Kingdom;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Luis López Guerra
Registrar	President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF LASHMANKIN AND OTHERS v. RUSSIA

(Applications nos. 57818/09 and 14 others - see appended list)

JUDGMENT

STRASBOURG

7 February 2017

FINAL

29/05/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

PROCEDURE 4

THE FACTS 5

I. THE CIRCUMSTANCES OF THE CASE 5

A. Application no. 57818/09 Lashmankin v. Russia 5

B. Application no. 51169/10 Nepomnyashchiy v. Russia 6

1. Notification of a "picket" in the Northern Administrative District of Moscow 6

2. Notification of a "picket" in the Central Administrative District of Moscow 7

C. Application no. 4618/11 Ponomarev and Ikhlov v. Russia...........................8

D. Application no. 31040/11 Ponomarev and Others v. Russia 9

E. Application no. 19700/11 Yefremenkova and Others v. Russia 12

1. 2010 assemblies 12

2. 2011 assemblies 17

F. Application no. 55306/11 Kosinov and Others v. Russia 20

G. Application no. 7189/12 Zhidenkov and Others v. Russia 23

H. Applications nos. 47609/11, 59410/11, 16128/12, 16134/12, 20273/12, 51540/12 and 64243/12 Nagibin and Others v. Russia 25

1. "Picket" of 12 June 2009 25

2. Meetings between October 2009 and October 2010....................................27

3. Meeting of 31 October 2010..27

4. "Picket" of 31 December 2010 29

5. Meeting of 31 March 2011 30

6. Meeting of 31 July 2011 33

7. Meeting of 31 August 2011 35

8. Meetings in October and December 2011 36

9. Meeting of 31 January 2012 37

10. Meetings between March and August 2012 38

I. Application no. 37038/13 Tarasov v. Russia 39

II. RELEVANT DOMESTIC LAW 40

A. Freedom of peaceful assembly 40

B. Procedure for the conduct of public events...40

1. The procedure in force at the material time..40

2. The amendments introduced on 8 June 2012 45

3. Further amendments 46

4. Case-law of the Constitutional Court concerning the procedure for the conduct of public events 46

C. Civil proceedings 52

1. Before 15 September 2015 52

2. Since 15 September 2015 54

D. Liability for breaches committed in the course of public events 56
1. Domestic provisions before 8 June 2012 56
2. The amendments introduced on 8 June 2012 56
3. Examination of administrative charges 59
E. Administrative arrest 59

III. RELEVANT INTERNATIONAL AND COMPARATIVE MATERIAL 61
A. United Nations Organisation documents 61
B. Council of Europe documents 63
C. Other international documents 72
D. Comparative law material 79

THE LAW 82

I. JOINDER OF THE APPLICATIONS 82

II. ALLEGED VIOLATIONS OF ARTICLE 13 OF THE CONVENTION 82
A. Admissibility 82
B. Merits 82
1. Submissions by the parties 82
2. The Court’s assessment 86

III. ALLEGED VIOLATIONS OF ARTICLES 10, 11 AND 14 OF THE CONVENTION 92
A. Submissions by the parties 93
1. The applicants 93
2. The Government 102
B. The Court’s assessment 106
1. Admissibility 106
2. Merits 107

IV. ALLEGED VIOLATIONS OF ARTICLE 5 § 1 OF THE CONVENTION 132
A. Admissibility 132
B. Merits 133
1. Submissions by the parties 133
2. The Court’s assessment 134

V. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION 135
A. Application no. 31040/11 Ponomarev and Others v. Russia 135
1. Admissibility 136
2. Merits 136
B. Application no. 37038/13 Tarasov v. Russia 138

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION 139

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION 139

A. Damage 139

B. Costs and expenses 140

C. Default interest 141

OPERATIVE PART 142

APPENDIX 144

In the case of Lashmankin and Others v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 17 January 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in fifteen applications (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) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by twenty-three Russian nationals, whose names and dates of birth are listed in the Appendix, on various dates listed in the Appendix.

2. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights. Some of the applicants were represented by lawyers, whose names are listed in the Appendix.

3. The applicants complained, in particular, of a breach of their rights to freedom of expression and freedom of assembly and the lack of an effective remedy in that respect. Some of the applicants also alleged unlawful arrest, unfair judicial review proceedings, and discrimination on account of political opinion or sexual orientation.

4. On 22 January 2013 the above complaints were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Application no. 57818/09 Lashmankin v. Russia

5. On 19 January 2009 Mr Stanislav Markelov, a well-known human rights lawyer, and Ms Anastatsia Baburova, a journalist, were shot dead in Moscow.

6. The applicant and Mr A. decided to hold a commemoration "picket" ("*пикет*") near the Memorial to the Victims of Political Repression in Yuri Gagarin Park, Samara, on 31 January 2009. The location was symbolic, and was chosen by them to emphasise that, in their opinion, the murders of Mr Markelov and Ms Baburova were cases of politically motivated repression.

7. On 27 January 2009 the applicant and Mr A. notified the Samara Town Administration of the date, time, place and purposes of the "picket". The event was scheduled to take place from noon to 2 p.m. on 31 January 2009, with seven people expected to take part.

8. On the same day the Samara Town Administration sent a telegram and a letter to the applicant, refusing to approve the venue. The town administration noted that Yuri Gagarin Park was a popular place of recreation and many families would be walking there with their small children on Saturday, 31 January 2009. The "picket" might pose a danger to their health and life. They proposed that the organisers change the location and time of the event. They also warned the applicant and Mr A. that they might be held liable under Article 20.2 § 1 of the Administrative Offences Code for a breach of the established procedure for conducting public events. According to the Government, a copy of the Mayor's decree of 7 October 2007 listing the locations in Samara suitable for public events was attached to the letter. The Government did not submit a copy of the letter or the decree.

9. Given that the location and date were important to them, and fearing that holding the event at the chosen location without the authorities' approval might result in arrests and administrative proceedings against the participants, the applicant and Mr A. decided to cancel the seven-person "picket" they had planned. Instead, the applicant held a solo "picket", for which no notification was required.

10. On 12 February 2009 the applicant challenged the decision of 27 January 2009 before the Leninskiy District Court of Samara. He complained that the decision had amounted to a ban on the event, because the authorities had not proposed any alternative venue or time for it.

11. On 3 April 2009 the Leninskiy District Court rejected his complaint. It found that in its decision of 27 January 2009 the Samara authorities had merely proposed that the applicant should change the location and time of the event, rather than imposing a ban on it. That decision had therefore not violated the applicant's rights. It had also been lawful. On 3 June 2009 the Samara Regional Court upheld the judgment of 3 April 2009 on appeal, finding that it had been lawful, well reasoned and justified.

B. Application no. 51169/10 Nepomnyashchiy v. Russia

12. The applicant is a gay rights activist.

1. Notification of a "picket" in the Northern Administrative District of Moscow

13. On 13 August 2009 the applicant, together with Ms F. and Mr B., notified the Prefect of the Northern Administrative District of Moscow of their intention to hold a "picket" from 1 to 2 p.m. on 24 August 2009 in front of the Prefect's office on Timiryazev Street, which twenty-five people were expected to attend. The aim of the event was to call for the Prefect's resignation "in connection with his efforts to incite hatred and enmity towards various social groups, and his failure to comply with electoral laws".

14. On 17 August 2009 the Prefect of the Northern Administrative District of Moscow refused to approve the venue, noting that another public event was planned at the same location from 1 to 2 p.m. on 24 August 2009.

15. On 20 August 2009 the applicant, Ms F. and Mr B. lodged a new notification proposing to hold the event at any time between 10 a.m. and 7 p.m. on 24 or 25 August 2009. An official from the Prefect's office stamped the notification with a seal that bore the following inscription in red: "to be handed to the applicant personally".

16. According to the applicant, on 21 August 2009 he went to the Prefect's office to collect the decision. However, the official refused to hand over the decision, explaining that it had been dispatched by post. The applicant never received the letter and had to cancel the event.

17. On 26 August 2009 the applicant challenged the Prefect's refusal to approve the venue before the Koptevskiy District Court of Moscow.

18. On 30 October 2009 the Koptevskiy District Court rejected the applicant's complaints. It found that by his decision of 20 August 2009 the Prefect had agreed to the holding of the "picket" on 25 August 2009 from 1 p.m. to 2 p.m. That decision had been sent to the applicant by post. The letter had not been delivered because the applicant did not live at the indicated address. The applicant's argument that the stamp indicated that the decision was to be handed to him personally was unconvincing. As Russian law did not establish any procedure for notifying applicants of such

decisions, the Prefect's office had been entitled to choose any notification method, including sending the decision by post. The fact that the letter had not been delivered did not render the authorities' actions unlawful. Lastly, the court found that the applicant had not proved that the Prefect's office had refused to give him the decision when he had gone to collect it, although there is no evidence in the judgment that the Prefect's representative contested that matter.

19. The applicant appealed. He submitted, in particular, that the Prefect's office had at first informed him that the decision would be handed over to him personally, but had then refused to give it to him. The letter containing that decision had not arrived at the local post office until the day of the planned event. Even if he had received the letter, it would no longer have been possible to hold the event.

20. On 25 February 2010 the Moscow City Court upheld the judgment on appeal, finding that it had been lawful, well reasoned and justified.

2. Notification of a "picket" in the Central Administrative District of Moscow

21. On 13 August 2009 the applicant, together with Ms F. and Mr B., notified the Prefect of the Central Administrative District of Moscow of their intention to hold a "picket" from 1 to 2 p.m. on 24 August 2009 in Novopushkinskiy Park, with twenty-five people expected to take part. The aims of the event were the same as those of the "picket" in the Northern Administrative District of Moscow.

22. On the same day a deputy prefect of the Central Administrative District of Moscow informed the applicant that another public event was planned at the same location and time, and proposed that another venue be chosen.

23. On 20 August 2009 the applicant, Ms F. and Mr B. stated their readiness to accept another venue for their event, and proposed five alternative sites for the Prefect to choose from.

24. On the same day the deputy prefect refused to approve any of the locations proposed by the applicant, noting that the applicant, Ms F. and Mr B. were the organisers of another "picket" at the same time in the Northern Administrative District of Moscow.

25. On 26 August 2009 the applicant challenged that refusal before the Taganskiy District Court of Moscow. He submitted, in particular, that the deputy prefect's finding that he was the organiser of another "picket" on the same day in the Northern Administrative District of Moscow was incorrect, because the authorities had not agreed to that "picket".

26. On 2 November 2009 the Taganskiy District Court rejected his complaint. It found, in particular, that the proposal to change the location of the "picket" was lawful because a presentation of the new IKEA catalogue had been planned in Novopushkinskiy Park at the same time. The refusal to

agree to the “picket” at other venues had also been lawful because the applicant had submitted two notifications in respect of “pickets” at two different locations, in the Central and Northern Administrative Districts, to be held at the same time. Although the applicant had indeed been informed by the Prefect of the Northern Administrative District that he could not hold a “picket” at the proposed location, he could still have held a “picket” at another venue in the Northern Administrative District. Had he done so, it would have been impossible for him to organise a “picket” to be held in the Central Administrative District at the same time. The refusal to agree to the “picket” in the Central Administrative District had therefore been well reasoned.

27. The applicant appealed. He submitted, in particular, that domestic law made no provision for a public event to be banned on the ground that two notifications had been lodged by the same person. The refusal to approve the “picket” had therefore been unlawful. He had lodged two notifications with the aim of proposing alternative venues for the event. If both of them had been approved, he would have chosen one of the approved sites. He relied on Article 31 of the Constitution and Article 11 of the Convention.

28. On 6 April 2010 the Moscow City Court upheld the judgment of 2 November 2009 on appeal, finding that it had been lawful, well reasoned and justified.

C. Application no. 4618/11 Ponomarev and Ikhlov v. Russia

29. The two applicants are Mr Ponomarev (the first applicant) and Mr Ikhlov (the second applicant).

30. The applicants decided to commemorate the anniversary of the murder of Mr Stanislav Markelov and Ms Anastatsia Baburova (see paragraph 5 above).

31. On 24 December 2009 the first applicant, Ms A. and Mr S. notified the Moscow Government of their intention to hold a march and a meeting on 19 January 2010 in the centre of Moscow, which 400 people were expected to attend. The aims of the march and the meeting were as follows:

> “To commemorate the human rights lawyer Stanislav Markelov, the journalist Anastasia Baburova and other victims of ideological and political terror;
>
> To protest against politically and ideologically motivated murders, against racism, ethnic and religious hatred, and against recourse to chauvinism and xenophobia in politics and social life.”

32. The second applicant intended to attend the march and the meeting.

33. On 11 January 2010 the Moscow Security Department replied that, in accordance with the Public Events Act, the notification had to be submitted no earlier than fifteen days and no later than ten days before the

intended public event. As the organisers had submitted their notification outside that time-limit, they were not allowed to hold the march and the meeting.

34. On 13 January 2010 the applicants challenged the decision of 11 January 2010 before the Tverskoy District Court. They submitted that the date of the meeting and the march was very important for them because it was the anniversary of the murders. No other date would have the same impact. The time-limit for lodging a notification fell between 4 and 9 January 2010. However, because of the New Year and the Christmas holidays, the days from 1 to 10 January were officially non-working days, so it was not possible to lodge a notification within the time-limit established by law. The applicants had accordingly lodged the notification on 24 December 2009, that is fifteen working days before the intended march and meeting. Any other interpretation of the domestic law would mean that no public events could be held in the period from 10 to 21 January every year. They also argued that the Moscow Security Department had not observed the three-day time-limit for a reply established by the domestic law.

35. On 27 February 2010 the Tverskoy District Court rejected the applicants' complaints. It found that the decision of 11 January 2010 had been lawful. The applicants had not observed the time-limit for lodging a notification established by domestic law and were not therefore entitled to hold the march and the meeting. Moreover, given that they had later been allowed to hold a "picket" on the same day, their freedom of assembly had not been violated.

36. The applicants appealed. They reiterated their previous arguments and added that the "picket" approved by the authorities was not an adequate substitute for a meeting and a march. Firstly, the authorities had agreed to an event with 200 people attending instead of 400. And secondly, and more importantly, the use of sound amplifying equipment was not allowed during a "picket", which had prevented the organisers and participants from making public speeches.

37. On 10 June 2010 the Moscow City Court upheld the judgment of 27 February 2010 on appeal, finding that it had been lawful, well reasoned and justified.

D. Application no. 31040/11 Ponomarev and Others v. Russia

38. The three applicants are Mr Ponomarev (the first applicant), Mr Ikhlov (the second applicant) and Mr Udaltsov (the third applicant).

39. On 5 March 2010 the first and third applicants notified the Moscow Government of their intention to hold a march and a meeting on 20 March 2010. The aim was "to protest against violations of the civil and social rights of the residents of Moscow and the Moscow Region in the

spheres of town planning, land distribution, environmental conditions, housing and communal services, and judicial protection”. The march was scheduled to start at 2.30 p.m. at Tverskoy Boulevard, from where the participants were to march to Pushkin Square. The notification stated that the participants would cross Tverskaya Street by the underground passage. A meeting would be held at Pushkin Square from 3.30 to 5 p.m. It was expected that 300 people would take part in the march and the meeting. The second applicant intended to attend the meeting and the march.

40. The Moscow Government forwarded the notification to the Moscow Transport Department, which concluded on 10 March 2010 that the march was likely to cause traffic delays and disrupt public transport when it crossed Tverskaya Street. It was therefore necessary to change the route of the march. The Moscow Transport Department then forwarded the notification to the Moscow Security Department.

41. On 12 March 2010 a deputy head of the Moscow Security Department proposed that the applicants should cancel the march and hold a meeting at Bolotnaya Square in order to “avoid any interference with the normal functioning of the public utility services, the activities of commercial organisations, traffic or the interests of citizens not taking part in public events”.

42. On 15 March 2010 the first and third applicants asked the Moscow Security Department either to propose an alternative route for the march or to agree to hold the meeting in Pushkin Square, in which case they were ready to forgo the march. They argued that the Moscow Security Department had not advanced any reasons in support of their finding that the march and the meeting might interfere with traffic or the activities of commercial organisations. They also noted that two meetings had recently been held in Pushkin Square and had not caused any disruption.

43. The Moscow Security Department replied that the march and the meeting in Pushkin Square had not been given official approval, and warned the applicants that measures would be taken to prevent them from holding the events.

44. On 15 March 2010 the applicants challenged the decision of 12 March 2010 before the Tverskoy District Court of Moscow. They submitted that the Moscow Government had not observed the statutory time-limit of three days for giving a reply and had failed to propose an alternative venue for the march. The Moscow authorities had not put forward weighty reasons for their proposal to cancel the march and change the venue of the meeting. Neither the march nor the meeting would have interfered with the normal life of the city if held at the location chosen by the applicants, because no blocking off of traffic would have been necessary. They reiterated that two meetings had recently been held in Pushkin Square with official approval; they had gone ahead without any trouble or disruption of normal life for residents. The applicants asked for

an injunction for the Moscow Government to agree to the meeting and the march. They also requested that their complaint be examined before the planned meeting date.

45. According to the Government, the applicants' complaint, sent by post, was received by the District Court on 19 March 2010.

46. At about 3.30 p.m. on 20 March 2010 about 300 people, including the applicants, gathered in Pushkin Square. The police issued a warning, through loudspeakers, that the meeting was unlawful and that the participants should disperse. The meeting was then dispersed by force by the police and many of those present were arrested.

47. On 9 April 2010 the Tverskoy District Court rejected the applicants' complaints, finding that the decision of 12 March 2010 had been lawful. The text of the judgment did not contain any reply to the applicants' argument that the Moscow Government had not observed the statutory time-limit of three days for a reply.

48. On 23 September 2010 the Moscow City Court quashed the judgment of 9 April 2010 on appeal and allowed the applicants' complaints. It found that the District Court had not examined whether there existed a factual basis for the finding that the meeting and the march planned by the applicants would interfere with the normal life of the city. The Moscow Government had not submitted any evidence in support of that finding. The decision of 12 March 2010 had not therefore been well reasoned. At the same time, it was impossible to allow the request for an injunction to agree to the meeting and the march because the planned date had passed months ago.

49. On 20 October 2010 the Moscow Government lodged an application for supervisory review of the judgment of 23 September 2010. It argued that it had submitted evidence in support of the decision not to agree to the march and the meeting planned by the applicants, in the form of a letter from the Moscow Transport Department dated 10 March 2010 stating that the march might cause delays in public transport when it crossed Tverskaya Street. He further argued that it would be difficult for 300 participants to cross Tverskaya Street by the underground passage, which was always crowded with passers-by and street vendors. An alternative venue for the meeting had been proposed.

50. On 1 November 2010 the applicants submitted in reply that the march had been scheduled during a weekend, when vehicular and pedestrian traffic was insignificant. Crossing Tverskaya Street by the underground passage would therefore not have caused any inconvenience to passers-by or street vendors or their clients, or caused delays in public transport. In any event, traffic in the centre of Moscow was often blocked by the authorities to permit the staging of sports or cultural events.

51. On 12 November 2010 the Presidium of the Moscow City Court quashed the appeal judgment of 23 September 2010 and upheld the

judgment of 9 April 2010 rejecting the applicants' complaints. It found that the Moscow Government's refusal to agree to the march and the meeting had been lawful and well reasoned. It would have been impossible for the participants in the march to cross Tverskaya Street by the underground passage, which was always crowded with passers-by and street vendors. The participants would therefore have had to cross the road, thereby delaying public transport. To protect the interests of citizens who did not take part in public events, the Moscow Government had proposed an alternative venue for the meeting, at the same time requiring the organisers to cancel the march. That decision had not violated the applicants' rights.

52. According to the applicants, at the end of the hearing of 12 November 2010 only the operative part of the judgment had been read out by the bailiffs. The reasoned judgment had never been read out publicly and had been sent to the applicants by post on 16 March 2011. The applicants' account was disputed by the Government, who submitted that the entire text of the judgment had been read out publicly at the end of the hearing.

E. Application no. 19700/11 Yefremenkova and Others v. Russia

53. The four applicants are Ms Yefremenkova (the first applicant), Mr Milkov (the second applicant), Mr Gavrikov (the third applicant) and Mr Sheremetyev (the fourth applicant).

54. The applicants are gay human rights activists.

1. 2010 assemblies

(a) Notifications concerning a march, a meeting and "pickets" and the authorities' refusal to agree to them

(i) Notification of a march and a meeting

55. On 15 June 2010 the applicants notified the St Petersburg Security Department of their intention to hold a Gay Pride march and a subsequent meeting on 26 June 2010, the anniversary of the start of the gay rights movement in the United States of America ("the USA") on 26 June 1969. The march and the meeting were scheduled to take place in the centre of St Petersburg, with 500 to 600 people expected to attend. The aim was "to draw the attention of society to the violations of the rights of homosexuals, and the attention of society and the authorities to the widespread discrimination that exists against homosexuals and to homophobia, fascism and xenophobia".

56. On 17 June 2010 the St Petersburg Security Department refused to allow the meeting and the march. It noted that the route chosen by the applicants was a busy road with many parked cars, and construction work

was under way. The march might therefore obstruct road and pedestrian traffic and distract drivers, which might in turn cause road accidents. Moreover, another meeting had already been approved in the same place at the same time. Finally, the applicants' meeting was scheduled to take place in the vicinity of the Constitutional Court building. In accordance with section 8 of the Public Events Act it was prohibited to hold public events in the vicinity of court buildings. The Security Department proposed that the applicants change the venue of their march and meeting, and warned them that if they failed to obtain the authorities' approval for another venue they would not be entitled to organise the planned events.

57. On 18 June 2010 the applicants proposed two alternative venues for the march and subsequent meeting. They also informed the Security Department of their readiness to abandon the march and simply hold a meeting, and proposed a location for the meeting.

58. On 21 June 2010 the St Petersburg Security Department again refused to agree to the meeting and the march. It found that the venues chosen by the applicants were not suitable for the following reasons: one of the locations was not large enough to accommodate 600 people, and the participants would hinder access to a bus stop, a shop and a bicycle rental service. Moreover, "Youth Day" celebrations were planned in the nearby park. At another venue the march might obstruct the traffic and cause traffic jams on the road which government delegations and guests would be taking on 26 June 2010 to attend the celebrations of the 300th anniversary of the town of Tsarskoe Selo. Moreover, the march might hinder citizens' access to their homes or shops. Lastly, on the same day the end of the school year would be being celebrated by students on the nearby campus. The third location proposed by the applicants was not suitable either, because celebrations to mark the end of the school year would be held there too. The Security Department proposed that the applicants change the venue of the march and meeting.

59. The first applicant was informed about that decision on the evening of 22 June 2010 and received a copy of it on the morning of 23 June 2010.

60. On 23 June 2010 the applicants proposed three new alternative venues to the St Petersburg Security Department, for either a march and a meeting or a meeting only.

61. On the same day the St Petersburg Security Department refused to approve the meeting and the march for a third time. It found that the applicant's reply had been submitted outside the time-limit established by section 5 of the Public Events Act. That section provided that a reply to the authorities' proposal to change the location of the event should be submitted no later than three days before the intended event. Having missed that deadline, the applicants were not entitled to hold the meeting and the march on 26 June 2010.

(ii) Notifications of "pickets"

62. Despairing of obtaining official approval for a march and a meeting, on 22 June 2010 the applicants notified the Administrations of the Petrogradskiy, Tsentralniy, Moskovskiy and Vasileostrovskiy Districts of St Petersburg of their intention to hold a "picket" with the same aims on 26 June 2010. In each Administrative District a location was chosen to accommodate about forty participants.

63. On the same day the Petrogradskiy District Administration refused to agree to the "picket" because cultural and sports events were scheduled to be held at the location chosen by the applicants. Moreover, the applicants had not obtained the consent of the private sports complex in whose grounds the intended "picket" was to take place. The Moskovskiy District Administration refused to agree to the "picket" because a rock festival and a circus inauguration event were scheduled to take place at the location chosen by the applicants. The Vasileostrovskiy District Administration did not allow the "picket" because a film was scheduled to be shot in that district all day, including at the location selected by the applicants. Lastly, on 23 June 2010 the Tsentralniy District Administration also refused to agree to the "picket" because another (unspecified) event had already been approved at the same location and time as the applicants' event. Each District Administration proposed that the applicants change the location or time of their "picket".

(iii) Anti-gay meeting

64. On 26 June 2010 the Young Guard, the youth wing of the pro-government party United Russia, organised a meeting in support of "family and traditional family values". That meeting was approved by the authorities and was held at one of the locations which, when proposed by the applicants for their Gay Pride march, had been rejected as unsuitable by the St Petersburg Security Department's decision of 17 June 2010.

(b) Judicial review of the refusals to approve the meeting, the march and the "pickets"

(i) Judicial review of the refusals to approve the meeting and the march

65. On 24 June 2010 the first applicant challenged the St Petersburg Security Department's decisions of 17 and 21 June 2010 before the Smolninskiy District Court of St Petersburg. She complained that the Security Department had refused, for various reasons, to approve any of the venues proposed by the organisers for the march and the meeting. It was significant that the authorities alone were in possession of full and updated information about all construction work and other events planned in the city. That being so, the authorities themselves should have proposed a venue where the march and the meeting could take place. They had not, however,

made any such proposal, confining their decisions to rejecting all the numerous locations proposed by the organisers. The first applicant also complained of discrimination on account of sexual orientation.

66. The first hearing was scheduled for 2 July 2010.

67. On that day the first applicant submitted additional arguments in writing. She complained that the Security Department's decision of 23 June 2010 had been unlawful and had also not been well reasoned. She argued, firstly, that the applicants' reply to the Security Department's proposal to change the venue had been submitted within the three-day time-limit established by the Public Events Act. To be precise, it had been lodged on 23 June 2010, three days before the intended march, which was scheduled for 26 June 2010. Secondly, the applicants could not have replied earlier because they had not received the Security Department's decision of 21 June 2010, requiring them to change the venue, until 23 June 2010. The first applicant further submitted that the reasons advanced by the Security Department in its decisions of 17 and 21 June 2010 had not been sufficient. The Security Department had referred to certain inconveniences that might be caused by the march and the meeting, such as obstructing the traffic, or to other events planned in the city on the same day. However, under section 12 of the Public Events Act it was the authorities' responsibility to take steps to ensure that public order was respected and that public events could proceed smoothly, including by regulating or blocking traffic. She also referred to the Constitutional Court's decision of 2 April 2009 (see paragraphs 255 to 259 below), which held that neither logistical difficulties that might be encountered by the authorities, nor a certain level of disruption of the ordinary life of citizens, could serve as a valid reason for refusing to approve a public event.

68. On 13 July 2010 the Smolninskiy District Court rejected the first applicant's complaints. It found that the Security Department had provided reasons for its decisions of 17 and 21 June 2010 refusing to agree to the meeting and the march. Domestic law did not impose an obligation on an authority refusing to approve a location or time for a public event to propose an alternative location or time. As to the decision of 23 June 2010, the court found that it had also been lawful as the first applicant had missed the deadline for replying to the proposal to change the venue. She had not proved that she had been notified belatedly of the decision of 21 June 2010; the list of her incoming calls showing that she had indeed received a call from the Security Department late in the evening of 22 June 2010 could not serve as proof of the belated notification. Lastly, given that the Security Department had not banned the meeting and march planned by the first applicant, but had merely required her to change the venue, her freedom of assembly had not been breached.

69. On 30 August 2010 the St Petersburg City Court upheld the judgment on appeal, finding that it had been lawful, well reasoned and justified.

(ii) Judicial review of the refusals to approve the "pickets"

70. On different dates in August, September and November 2010 the first applicant challenged the refusals of the authorities of the Petrogradskiy, Tsentralniy, Moskovskiy and Vasileostrovskiy Districts of St Petersburg to allow the "pickets", arguing that the refusals had not been substantiated by weighty reasons and that the district authorities had not proposed alternative venues for the "pickets". She also complained of discrimination on account of sexual orientation.

71. On 6 October 2010 the Leninskiy District Court of St Petersburg held that the decision of 23 June 2010 of the Tsentralniy District Administration had been unlawful. It found that the other event to which the District Administration had referred in its decision was due to finish before the applicant's "picket" was due to begin. The authorities' refusal had not therefore been well reasoned. Further, relying on the Constitutional Court's decision of 2 April 2009, the District Court found that, when refusing to approve a venue chosen by the organisers, the district administration had an obligation to propose an alternative venue. No other venue had been proposed, however.

72. On 18 October 2010 the Petrogradskiy District Court of St Petersburg held that the Petrogradskiy District Administration's decision of 22 June 2010 had been unlawful. It found that the reasons advanced by the district authorities for their refusal to allow the "picket" at the location and time chosen by the applicants had been valid. In particular, it had been established that on 26 June 2010 the location in question was the meeting point for the departure of children to sports camps. An assembly in favour of homosexual rights "would not have furthered the development of their morals". By contrast, the requirement to obtain the consent of the private sports complex in the grounds of which the intended "picket" was to take place had no basis in domestic law. Nor could concerns for public order and the safety of the participants serve as a valid reason for the refusal to allow the event, because it was the joint responsibility of the authorities and the organisers to guarantee public order and the safety of all involved. At the same time, the district authorities had not proposed an alternative location or time for the "picket", which it was obliged to do pursuant to the Constitutional Court's decision of 2 April 2009. The failure to propose an alternative location or time had deprived the first applicant of any opportunity to have the event approved. Lastly, the District Court noted that it was no longer possible to remedy the violation of the first applicant's rights because the planned date had passed months earlier. On

25 November 2010 the St Petersburg City Court upheld that judgment on appeal.

73. On 24 November 2010 the Moskovskiy District Court of St Petersburg held that the decision of the Moskovskiy District Administration of 22 June 2010 had also been unlawful. Although the district authorities' refusal to approve the location and time of the "picket" chosen by the applicants had been well reasoned, the district authorities had not fulfilled their obligation to propose an alternative location or time for the event. The court ordered the District Administration to propose a suitable alternative location and time for the "picket". On 17 January 2011 the St Petersburg City Court upheld that judgment on appeal.

74. On 6 December 2010 the Vasileostrovskiy District Court of St Petersburg held that the decision of 22 June 2010 of the Vasileostrovskiy District Administration had also been unlawful. It found that the district authorities should have found out precisely at which locations the film shooting was scheduled to take place. Depending on that information, they should either have agreed to the "picket" being held at the location chosen by the applicants or have proposed an alternative location.

2. 2011 assemblies

(a) Vasileostrovskiy Administrative District of St Petersburg

75. On 10 June 2011 the second, third and fourth applicants and Mr T. notified the Vasileostrovskiy District Administration of their intention to hold a Gay Pride march and a meeting on 25 June 2011, which 100 people were expected to attend. The aim of the meeting and the march was "to draw the attention of society and the authorities to the violations of the rights of gays, lesbians, bisexual and transgender people and to the need to introduce a statutory prohibition on discrimination on account of sexual orientation or gender identity".

76. On 14 June 2011 the Vasileostrovskiy District Administration refused to agree to the march and the meeting. They found that the events would hinder the passage of pedestrians and vehicles and might also distract drivers, causing road accidents. Moreover, a guided tour of the district for children was planned on 25 June 2011 and the applicants' meeting would disrupt it. The district authorities proposed another location for the meeting and the march, and informed the applicants that the area would be closed to traffic for their convenience.

77. On 16 June 2011 the applicants replied that the venue proposed by the district administration was unsuitable, because it was located in an industrial area among factories and warehouses and was difficult to reach. They proposed an alternative venue for the two events, which they said was separated from the road by a five-to-fifteen-metre-wide row of trees, which ruled out any risk of road accidents or hindrance to traffic. They would not

be in the way of passers-by either, because there was a parallel pedestrian path which would remain free for passage. Lastly, the participants would cross the road at traffic lights, using a pedestrian crossing, which would make it unnecessary to close the area to traffic.

78. On 20 June 2011 the Vasileostrovskiy District Administration again refused to approve the venue chosen by the applicants, pointing out that work to install a temporary amusement park would be going on there. They also reiterated their arguments concerning the obstruction of traffic and the risk of road accidents. The district administration insisted that the applicants should organise the march and the meeting at the location proposed in the letter of 14 June 2011.

79. On 21 June 2011 the applicants agreed to hold the meeting and the march at the location proposed by the district authorities.

80. On the same day the Vasileostrovskiy District Administration refused to allow the march and the meeting at that location. The reason given was that the nearby power station was expecting a delivery of spare parts for boilers on 25 June 2011. The authorities proposed that the applicants choose another location for the march and the meeting.

81. On 12 September 2011 the third and fourth applicants challenged the Vasileostrovskiy District Administration's decisions of 14, 20 and 21 June 2011 before the Vasileostrovskiy District Court of St Petersburg. They submitted that the reasons given by the district authorities for refusing to allow the meeting and the march were not convincing. They also complained of discrimination on account of sexual orientation.

82. On 14 November 2011 the Vasileostrovskiy District Court allowed the applicants' complaints, finding that the Vasileostrovskiy District Administration's decisions had not been well reasoned. It was the authorities' and the organisers' joint responsibility to ensure public order and the safety of participants and passers-by during the meeting and march. In their letter of 16 June 2011 the applicants had set out the measures they intended to take to avoid accidents and disruption to traffic. The district authorities had disregarded those arguments and insisted that the march should take place at a location of their choosing. However, before proposing that location the district authorities had not checked whether the location was suitable and available. As a result, when the applicants agreed to the location, the district authorities had refused to approve it, on the ground that it was unavailable. That refusal had been unlawful. The court ordered that the district administration give the meeting and the march planned by the applicants their approval.

83. On 12 January 2012 St Petersburg City Court examined the case on appeal. It quashed the decision ordering the Vasileostrovskiy District Administration to allow the meeting and the march, as the date scheduled for the events had passed months before. It was therefore no longer possible to remedy the violation of the applicant's rights. The court upheld the

remainder of the judgment of 14 November 2011, finding that it had been lawful, well reasoned and justified.

(b) Admiralteyskiy Administrative District of St Petersburg

84. On 14 June 2011 the second, third and fourth applicants and Mr T. notified the St Petersburg Security Department of their intention to organise a Gay Pride march and a subsequent meeting on 25 June 2011 in the centre of St Petersburg, which 300 people were expected to attend. The aim of the meeting and march was the same as that of the events in the Vasileostrovskiy Administrative District.

85. On 15 June 2011 the St Petersburg Security Department refused to allow the meeting and the march, noting that along the route chosen by the applicants the pavement was narrow and the traffic heavy. The applicants' march might therefore obstruct traffic and pedestrians and distract drivers, causing accidents. The proposed meeting venue was not suitable either, because a rehearsal for the Youth Day festivities would be taking place there on 25 June 2011. There was also a children's playground nearby. The Security Department proposed that the applicants should hold the march and the meeting in the village of Novoselki, in the suburbs of St Petersburg.

86. On 20 June 2011 the applicants replied that the location proposed by the Security Department was unsuitable because it was located in a remote and sparsely populated village surrounded by a forest, 20 kilometres from the city centre. They proposed three alternative locations for the march and the meeting or for the meeting only and agreed to reduce the number of participants to 100 people.

87. On 21 June 2011 the St Petersburg Security Department again refused to approve the meeting and the march. A Harley Davidson motorbike parade was scheduled to take place at one of the proposed locations; the second location would be occupied by anti-drug campaigners; and the third location was not suitable because of landscaping work in progress there. The Security Department insisted that the applicants should hold the march in the village of Novoselki or propose another venue for approval.

88. On 12 September 2011 the third and fourth applicants challenged the St Petersburg Security Department's decisions of 14 and 21 June 2011 before the Smolnenskiy District Court of St Petersburg. They complained that the refusals to allow the meeting and the march had not been substantiated by sufficient reasons. In particular, the police could have taken measures to control the traffic and thereby prevent road accidents. As to the Youth Day rehearsals, the motorbike parade and the anti-drug campaign, the Security Department could have proposed another time for the meeting and the march which would not have clashed with those events. The landscaping work had not been scheduled to last the entire day, so it would have been possible to organise the meeting after it was finished. The applicants further

argued that any assembly in a public place inevitably caused a certain level of disruption to ordinary life. The public authorities and the population had to show a degree of tolerance towards peaceful assemblies in crowded places, because otherwise it would be impossible to hold an assembly at a time and location where it would draw public attention to social or political issues. Lastly, they submitted that the venue proposed by the Security Department was unsuitable because it was located in a sparsely populated area in the middle of a forest. It was therefore not the right venue to draw the attention of society and the authorities to the violation of homosexuals' rights, because there would be no representatives of the authorities or the general public present. The applicants also complained of discrimination on account of sexual orientation.

89. On 3 October 2011 the Smolnenskiy District Court rejected the applicants' complaints. The court held that domestic law did not impose any obligation on the authorities to submit evidence in support of their finding that the location chosen by the organisers was unsuitable. The reasons advanced by the authorities for refusing to approve a location were subjective and therefore not amenable to judicial review. It was significant that the St Petersburg Security Department had not banned the march and the meeting planned by the applicants. The proposal for a change of location had not breached the applicants' rights. The applicants' argument that the venue proposed by the Security Department was not suitable was unfounded.

90. On 12 January 2012 the St Petersburg City Court upheld the judgment on appeal, finding that it had been lawful, well reasoned and justified.

(c) The march on 25 June 2011

91. On 25 June 2011 the applicants participated in a Gay Pride march in the centre of St Petersburg. They were arrested and charged with the administrative offence of breaching the established procedure for the conduct of public events.

F. Application no. 55306/11 Kosinov and Others v. Russia

92. The five applicants are Mr Labudin (the first applicant), Mr Kosinov (the second applicant), Mr Khayrullin (the third applicant), Mr Grigoryev (the fourth applicant), and Mr Gorbunov (the fifth applicant).

93. On 28 April 2010 the first applicant, together with Mr O., notified the Kaliningrad Town Administration of their intention to hold a "picket" on 5 May 2010 from 5 to 6 p.m. on the pavement in front of the Kaliningrad Regional Interior Department headquarters. A hundred people were expected to attend. The aim of the event was to "support [President] Medvedyev's national policy directed at fighting corruption, reforming the

[police] system, detecting 'werewolves in epaulettes' ("*оборотни в погонах*")[1] and eradicating crime". The other applicants intended to join in the "picket".

94. On 30 April 2010 the Kaliningrad Town Administration refused to agree to the "picket". They referred to the risk of terrorist acts during the Victory Day celebrations on 9 May and the days immediately preceding them, and proposed that the "picket" be held on any day after 9 May 2010.

95. On 5 May 2010 the first applicant and Mr O. agreed to postpone the event. They notified the authorities that it would be held on 14 May 2010 at the same location.

96. On 7 May 2010 the Kaliningrad Town Administration again refused to allow the "picket". They pointed out that in recent times terrorist acts in the vicinity of police buildings, as well as other unlawful acts against police officers and members of the Federal Security Service, had become more frequent in Russia. Attempted terrorist acts had been committed by both professional terrorists and mentally unstable people. A "picket" in front of Department of the Interior headquarters might therefore be dangerous to the police and the participants. They proposed two alternative locations for the event.

97. On 11 May 2010 the first applicant and Mr O. replied that they considered the reasons given by the authorities for the change of venue unconvincing. No terrorist acts had ever been committed in the Kaliningrad Region. It was the responsibility of the police to prevent terrorist acts. They therefore insisted that the "picket" should take place in front of the Kaliningrad Regional Department of the Interior headquarters, but agreed to hold it across the road from the headquarters. They requested that the police take increased security measures to ensure the safety of the participants.

98. On 12 May 2010 the Kaliningrad Town Administration refused yet again to allow the "picket". They noted that there was heavy traffic at the proposed location and maintained that the "picket" would block the passage of pedestrians. Moreover, given the risk of terrorist acts in the vicinity of buildings occupied by law-enforcement authorities, it would be impossible to ensure the safety of the event. They insisted that the "picket" should be held at one of the locations proposed by the authorities in their letter of 7 May 2010.

99. According to the Government, on the same day the first applicant was informed by telephone that he could come to the Administration headquarters to collect the Administration's decision. According to the applicants, the first applicant received the decision of 12 May 2010 on 14 May 2010 in the afternoon. He therefore had no time to inform the participants that the event had not been given official approval.

1. A popular nickname for corrupt policemen

100. Shortly before the beginning of the “picket”, which was scheduled to start at 5 p.m. on 14 May 2010, the first applicant was summoned to appear at the Kaliningrad Town Administration offices at 5 p.m. At the same time he was warned that if he went anywhere near the Kaliningrad Regional Interior Department headquarters he would immediately be arrested. The first applicant went to the Town Administration offices at the appointed time to discuss the organisation of the “picket”.

101. Meanwhile, at about 5 p.m. the third, fourth and fifth applicants went to the Kaliningrad Regional Interior Department headquarters as planned, where they were immediately arrested and taken to the Tsentralniy District police station, where they were held until the next morning.

102. The first applicant was later charged with organising an unlawful public event, an offence under Article 20.2 § 1 of the Administrative Offences Code. The third, fourth and fifth applicants were charged with disobeying a lawful order of the police to stop an unauthorised “picket”, and with breaching the established procedure for conducting public events, offences under Articles 19.3 § 1 and 20.2 § 2 respectively of the Administrative Offences Code.

103. By judgments of 25 and 28 June and 9, 12 and 13 July 2010 a Justice of the Peace of the 2nd Court Circuit of the Tsentralniy District of Kaliningrad discontinued the administrative proceedings against the applicants for lack of evidence of an offence. The Justice of the Peace found that the “picket” had not in fact taken place. There had been no mass gathering of people, waving of placards, public speeches or voicing of demands on issues related to political, economic, social or cultural life in the country or issues related to foreign policy. Although several people, unaware of the fact that the “picket” had not been approved, had indeed approached the Kaliningrad Regional Interior Department headquarters, they had been immediately arrested by the police. The applicants had not therefore organised or participated in an unauthorised public event and had not committed an offence under Article 20.2 §§ 1 and 2 of the Administrative Offences Code. Accordingly, the order of the police to stop an unauthorised picket and to leave the vicinity of the Kaliningrad Regional Interior Department headquarters had been unlawful and had breached the applicants’ freedom of movement. The applicants could not therefore be considered as having disobeyed a lawful order of the police and were not guilty of an offence under Article 19.3 § 1 of the Administrative Offences Code.

104. On 26 July 2010 the applicants challenged the Kaliningrad Town Administration’s refusals to allow the “picket” before the Tsentralniy District Court of Kaliningrad.

105. On 22 December 2010 the Tsentralniy District Court held that the Kaliningrad Town Administration’s refusals to agree to the “picket” had been lawful. The administration had found that the applicants’ “picket”

might block the passage of vehicles and pedestrians and cause road accidents. It was also established that the Kaliningrad Regional Interior Department had warned the local authorities about the risk of terrorist acts and recommended that public events should not be authorised, especially at times when the police were busy ensuring public order at festive celebrations. The town administration had no legal obligation to verify that information.

106. On 23 March 2011 the Kaliningrad Regional Court upheld the judgment on appeal, finding that it had been lawful, well-reasoned and justified.

G. Application no. 7189/12 Zhidenkov and Others v. Russia

107. The four applicants are Mr Zhidenkov (the first applicant), Mr Zuyev (the second applicant), Ms Maryasina (the third applicant), and Mr Feldman (the fourth applicant).

108. On 5 March 2011 the second and third applicants notified the Kaliningrad Town Administration of their intention to hold a meeting on 20 March 2011 at Victory Square in the centre of Kaliningrad, which 500 people were expected to attend. The aim of the meeting was to protest against a police state and demand the resignation of Prime Minister Putin.

109. On 9 March 2011 the Kaliningrad Town Administration refused to allow the meeting, explaining that on 20 March 2011 Victory Square was to be cleaned after the winter. They proposed that the meeting be held in a park in a residential district.

110. On 10 March 2011 the third applicant replied that the location proposed by the administration was unsuitable because it was too far from the town centre and lacked visibility. She suggested two alternative venues in the town centre for the meeting.

111. On 11 March 2011 the Kaliningrad Town Administration replied that spring cleaning and refurbishment work was scheduled at both of the locations suggested by the third applicant, and insisted that the meeting should be held in the park proposed by the authorities in their letter of 9 March 2011.

112. On 14 March 2011 the third applicant reiterated that the location proposed by the administration was unsuitable. She then proposed holding a “picket” instead of a meeting and reducing the number of participants to fifty. She suggested two possible locations for the “picket”: Victory Square and another location in the town centre.

113. On 17 March 2011 the Kaliningrad Town Administration refused to agree to the “picket”, reiterating that Victory Square was being cleaned and explaining that landscaping work was being carried out at the other location suggested by the third applicant. They again insisted that the “picket” should be held in the park mentioned in their letter of 9 March 2011.

114. On the same day the third applicant reiterated her argument that the park was unsuitable and proposed yet another location for the "picket". That proposal was not examined by the Kaliningrad Town Administration until 21 March 2011, when they again insisted that the "picket" should be held in the park they had proposed.

115. On 20 March 2011 the applicants went to Victory Square and saw that no cleaning or other work was in progress there. They therefore decided to organise a "gathering" ("*собрание*") of about twenty people to protest against what they described as a police state. The gathering lasted for about an hour. According to the Government, the police issued a warning that the gathering was unlawful and required the participants to disperse. According to the applicants, no warning was given to the participants. The gathering was eventually dispersed by force.

116. On the same day the applicants were charged with breach of the established procedure for conducting public events, an offence under Article 20.2 § 2 of the Administrative Offences Code.

117. By judgments of 21, 25 and 26 April 2011 the Justice of the Peace of the 2nd Court Circuit of the Tsentralniy District of Kaliningrad found the applicants guilty as charged. She found that they had taken part in a gathering which had not received official approval from the authorities. Their argument that no approval was required for gatherings had no basis in domestic law. Section 7 of the Public Events Act provided that all events, except "gatherings" and "pickets" involving only one participant, required prior approval by the authorities (see paragraph 226 below). As the gathering of 20 March 2011 had involved more than one participant, the authorities' approval had been required. However, the Kaliningrad Town Administration had refused to approve a meeting or a "picket" planned by the applicants, and no notification of a gathering had been submitted by them. The gathering of 20 March 2011 had therefore been unlawful. The Justice of the Peace ordered the first, second and fourth applicants to pay a fine of 500 Russian roubles (RUB, about 12 euros (EUR)) each, and the third applicant to pay a fine of RUB 1,000 (about EUR 24). The Justice of the Peace also warned the applicants that if they failed to pay the fines within thirty days they might be charged with non-payment of an administrative fine, an offence under Article 20.25 of the Administrative Offences Code, punishable with either a doubling of the fine or up to fifteen days' administrative arrest.

118. The applicants appealed. They submitted that the Justice of the Peace had incorrectly interpreted section 7 of the Public Events Act. It was impossible to hold "a gathering involving one person", as the Public Events Act defined a "gathering" as "an assembly of citizens" (see paragraph 219 below). It was therefore logical that the phrase "involving one person" referred to "pickets" only and did not concern "gatherings". They were therefore not required to notify the authorities about the gathering.

119. By judgments of 20, 22 and 27 June and 6 July 2011 the Tsentralniy District Court of Kaliningrad upheld the judgments of 21, 25 and 26 April 2011 on appeal, finding that they had been lawful, well reasoned and justified.

120. On 27 October 2011 the Tsentralniy District Court of Kaliningrad found that the Kaliningrad Town Administration's refusals to agree to the meeting and the "picket" had been lawful and well reasoned. On 18 January 2012 the Kaliningrad Regional Court upheld the judgment on appeal.

H. Applications nos. 47609/11, 59410/11, 16128/12, 16134/12, 20273/12, 51540/12 and 64243/12 Nagibin and Others v. Russia

121. The four applicants are Mr Nagibin (the first applicant), Mr Yelizarov (the second applicant), Mr Batyy (the third applicant) and Ms Moshiyan (the fourth applicant).

122. The applicants are supporters of the "Strategy-31" movement. "Strategy-31" is a series of civic protests in support of the right to peaceful assembly guaranteed by Article 31 of the Russian Constitution. The protests are held on the 31st of every month with thirty-one days, in Moscow and about twenty other Russian cities, such as St Petersburg, Arkhangelsk, Vladivostok, Yekaterinburg, Kemerovo and Irkutsk.

123. "Strategy-31" was initiated by Mr E. Limonov, founder of the National Bolshevik Party and one of the leaders of The Other Russia, a coalition of opposition movements. It was subsequently supported by many prominent Russian human rights organisations, including the Moscow Helsinki Group, the Memorial Human Rights Centre, and other public and political movements and associations.

124. The applicants are the leaders of the Rostov-on-Don section of the movement.

1. "Picket" of 12 June 2009

125. On 2 June 2009 the first and third applicants notified the Rostov-on-Don Town Administration of their intention to organise a "picket" from 7 to 9 p.m. on 12 June 2009 (Russia Day, a national holiday) in the centre of Rostov-on-Don, near the Lenin monument in front of the Rostov-on-Don Town Administration headquarters. About thirty people were expected to attend. The aim of the event was to protest against the ineffective economic policies of the Prime Minister, Mr Putin, and the resulting increase in unemployment, as well as against violations of press freedom, persecution of political prisoners, lack of independence of the judiciary, and lack of free elections and political pluralism. They intended to collect signatures in support of a petition calling on Mr Putin to resign.

126. On 4 June 2009 the Rostov-on-Don Town Administration refused to agree to the “picket” on the grounds that festivities would be taking place at the location chosen by the applicants. It further reasoned:

> “Your picket and your slogan ‘Russia against Putin’ might trigger a hostile reaction from the many supporters of one of the leaders of the Russian State and fuel unrest that might jeopardise the safety and health of the participants in the picket.”

127. The town administration further noted that there were reasons to believe that some of the participants in the meeting might commit breaches of public order, as had already happened at meetings held by other organisers. They therefore proposed that the applicants hold their “picket” near the Sports Centre.

128. On 8 June 2009 the first and third applicants agreed to hold the event near the Sports Centre. According to the applicants, they had accepted the authorities’ proposal because a rock concert had been scheduled near the Sports Centre at the same time, which would attract large numbers of people and thereby make their protest visible.

129. On the same day the Rostov-on-Don Town Administration refused to agree to the “picket”, noting that a rock concert was scheduled to take place in the Sports Centre. The area round the Sports Centre would therefore be occupied by the spectators and their cars. The authorities therefore proposed that the applicants hold their event from 3.30 to 5.30 p.m. According to the applicants, they were informed of that decision on 10 June 2009.

130. The applicants decided to cancel the “picket” because at that time the area near the Sports Centre would be deserted and few people could reasonably be expected to see it. Moreover, given that only two days remained before the planned event, the applicants had insufficient time to inform the participants and the mass media about the change of time.

131. The third applicant held a solo “picket” instead. Twenty minutes after the start of the solo “picket” he was arrested and taken to a police station.

132. On 3 September 2009 the first and third applicants challenged the Rostov-on-Don Town Administration’s decisions of 4 and 8 June 2009 before the Sovetskiy District Court of Rostov-on-Don.

133. On 25 September 2009 the Sovetskiy District Court of Rostov-on-Don rejected their complaints, finding that the Rostov-on-Don Town Administration’s decisions had been lawful. By not replying to the authorities’ proposal of 8 June 2009 the applicants had failed to fulfil their obligation to cooperate with the town administration. Moreover, the applicants had not proved that their rights had been breached by the Administration’s decisions. On 19 November 2009 the Rostov Regional Court upheld that judgment on appeal, finding that it had been lawful, well reasoned and justified.

2. Meetings between October 2009 and October 2010

134. The applicants notified the Rostov-on-Don Town Administration of their intention to hold meetings in the centre of Rostov-on-Don, near the Lenin monument, on 31 October 2009, 31 March, 31 May, 31 July and 31 August 2010.

135. The Rostov-on-Don Town Administration refused to allow the meetings, giving the following reasons. The meeting of 31 October 2009 was not possible, because another event was planned at the same venue and time, and all other central locations were also occupied. As to the meeting of 31 March 2010, the town administration referred to heavy pedestrian traffic round the Lenin monument and the inconvenience the meeting would cause to the citizens. The meetings of 31 May and 31 August 2010 were not agreed to because "pickets" organised by the Young Guard, the youth wing of the pro-government party United Russia, were scheduled to take place near the Lenin monument on those same days. The meeting of 31 July 2010 was not approved because a gathering of members of the Liberal Democratic Party of Russia was planned at the same location and time.

3. Meeting of 31 October 2010

136. On 18 October 2010 the first and second applicants notified the Rostov-on-Don Town Administration of their intention to hold a meeting from 6 to 7 p.m. on 31 October 2010 in the centre of Rostov-on-Don, near the Lenin monument, which fifty people were expected to attend.

137. On 19 October 2010 the Rostov-on-Don Town Administration refused to allow the meeting. They noted that another event was scheduled to take place at the same location and time. It therefore proposed that the applicants hold their meeting near the Sports Centre.

138. On 23 October 2010 the first applicant replied that the venue proposed by the Town Administration was unsuitable because it was located in a deserted area far from the town centre. He notified the town administration that they would like to take part in the other event near the Lenin monument, and asked for information about its aims and the names of the organisers.

139. On 28 October 2010 the Rostov-on-Don Town Administration replied that it was not possible to hold two public events at the same location, because the applicants' meeting might disrupt the other event. They warned the applicants that if they held a meeting near the Lenin monument they might be charged with organising an unlawful public event.

140. At 6 p.m. on 31 October 2010 the applicants and other persons went to the Lenin monument, where a public event organised by the Young Guard, the youth wing of the pro-government party United Russia, was in progress. By 6.30 the Young Guard's event was over.

141. According to the Government, the police issued a warning to those people who remained near the Lenin monument that their continuing meeting was unlawful and required the participants to disperse. The meeting was then dispersed by force by the police.

142. At about 6.45 the second and third applicants were arrested near the Lenin monument and taken to the Leninskiy District police station; they arrived there at 8.30 p.m. At the police station administrative arrest reports and administrative offence reports were drawn up. The administrative offence reports mentioned that the second and third applicants were charged with disobeying a lawful order of the police, an offence under Article 19.3 § 1 of the Administrative Offences Code. The second applicant was also charged with breach of the established procedure for the conduct of public events, an offence under Article 20.2 § 2 of the Administrative Offences Code. Afterwards the applicants were placed in a police cell, where they remained until 10.20 a.m. the next day.

143. On 1 November 2010 the Justice of the Peace of the 9th Court Circuit of the Pervomayskiy District of Rostov-on-Don found, by two separate judgments, the second applicant guilty of offences under Articles 19.3 § 1 and 20.2 § 2 of the Administrative Offences Code. He found that the second applicant had taken part in an unauthorised public event and had refused to obey an order by the police to follow them to a police station. He ordered the second applicant to pay a fine of RUB 2,000 (about EUR 47). By judgments of 24 November and 14 December 2010 the Pervomayskiy District Court upheld the judgments of 1 November 2010 on appeal.

144. On 1 November 2010 the Justice of the Peace of the 2nd Court Circuit of the Leninskiy District of Rostov-on-Don also found the third applicant guilty of an offence under Article 19.3 § 1 of the Administrative Offences Code, in that he had attempted to prevent the police from arresting the organisers of the unlawful public event, in particular by grabbing the police officers by their uniforms and screaming. The third applicant was ordered to pay a fine of RUB 500 (about EUR 12). The third applicant appealed. He complained, in particular, that his arrest and detention had been unlawful. On 16 December 2010 the Leninskiy District Court of Rostov-on-Don upheld the judgment of 1 November 2010 on appeal. It found, in particular, that the third applicant's arrest and detention had been lawful under Article 27.5 of the Administrative Offences Code.

145. On 17 May 2011 the Pervomayskiy District Court of Rostov-on-Don found that the Rostov-on-Don Town Administration's refusals to approve the meeting planned by the applicants had been unlawful. Only ten people had been expected to attend the Young Guard event, while the applicant's meeting had been attended by fifty people. There was sufficient space to accommodate both events near the Lenin monument. Moreover, the events overlapped in time only for half an hour, from 6 to 6.30 p.m. The Rostov-on-Don Town Administration's argument

that it was not possible to hold the two events at the same location was therefore unconvincing. Moreover, the location near the Sports Centre proposed by the Town Administration was indeed isolated and would not therefore permit the applicants' meeting to attain its purposes. The District Court ordered the Town Administration to approve a meeting near the Lenin monument on a date to be chosen by the applicants.

146. On 14 July 2011 the Rostov Regional Court upheld the judgment on appeal. It however overturned the order to approve a meeting on a date to be chosen by the applicants, finding that such an order was contrary to the principle of separation of powers between the judicial and the executive. The District Court had thus unduly interfered with the executive's discretion to approve public events provided by law.

4. "Picket" of 31 December 2010

147. On 16 December 2010 the first applicant notified the Rostov-on-Don Town Administration of his intention to organise a "picket" on the theme "Russia against Putin", from 6 to 7 p.m. on 31 December 2010 in the centre of Rostov-on-Don, near the Lenin monument, which fifty people were expected to attend.

148. On 17 December 2010 the Rostov-on-Don Town Administration refused to agree to the "picket", on the following grounds:

> "The theme of the public event you plan to hold, "Russia against Putin", aspires to create ... a negative image of a State official of the Russian Federation you allege is unpopular in Russia.
>
> This allegation is false and misleading for the population, as it contradicts the results of many all-Russia opinion polls according to which V. V. Putin inspires confidence in at least a majority of the polled citizens of the country.
>
> A picket with such a title would therefore amount to an action the sole purpose of which is to harm another person, which is contrary to Article 10 of the Civil Code of the Russian Federation".

149. The town administration further added that the New Year tree had been put in place and the New Year fair was scheduled to take place at the location chosen by the applicant. The "picket" might thus interfere with the New Year celebrations and inconvenience the merchants.

150. On 24 December 2010 the first applicant agreed to change the theme of the event, notified the administration that it would be called "Strategy 31" and asked them to give it their approval.

151. On 27 December 2010 the Rostov-on-Don Town Administration refused to allow the "picket". They found that by modifying the title the organisers had changed the purpose of the event, so a new notification should have been submitted. They also reiterated that no public events were possible near the Lenin monument until 14 January 2011 because of the

New Year tree installed there and the New Year celebrations scheduled to take place nearby.

152. On 29 December 2010 the first applicant challenged the decisions of 17 and 27 December 2010 before the Pervomayskiy District Court of Rostov-on-Don.

153. On 31 December 2010 the Pervomayskiy District Court of Rostov-on-Don found that the decision of 17 December 2010 had been lawful and had not violated the applicant's rights. The sole purpose of a public event entitled "Russia against Putin" was to harm another person. By contrast, the decision of 27 December 2010 had been unlawful. The requirement to submit a new notification had no basis in domestic law. Moreover, no celebrations were scheduled to take place near the Lenin monument from 6 p.m. to 7 p. m. on 31 December 2010. The finding that the "picket" might hinder the New Year celebrations had therefore been unsubstantiated. No other valid reasons for the refusal to allow the "picket" had been given.

154. At 6 p.m. that same day the first applicant and some other people gathered near the Lenin monument. They were surrounded by many policemen, whose number considerably exceeded their own.

155. At about 6.30 p.m. the police gave the first applicant a written warning which, referring to the decision of 27 December 2010 by the Rostov-on-Don Town Administration, stated that the "picket" was unlawful and that the organisers might be therefore held liable for extremist activities. The first applicant showed the police the court judgment of 31 December 2010 by which the decision of 27 December 2010 had been overturned. The police replied that the judgment was not yet final and warned the participants that they would be arrested if they started to chant slogans or wave banners. The protesters were forced to end the "picket".

156. On 11 January 2011 the first applicant appealed against the judgment of 31 December 2010. He argued that the town administration's decision of 17 December 2010 had violated his freedom of expression by prohibiting him from criticising Prime Minister Putin. The town administration also appealed, arguing that its decision of 27 December 2010 had been lawful, as the "picket" could have caused the New Year tree to be knocked over and created a fire hazard.

157. On 28 February 2011 the Rostov Regional Court upheld the judgment of 31 December 2010 on appeal, finding that it had been lawful, well reasoned and justified.

5. Meeting of 31 March 2011

158. On 16 March 2010 the second and fourth applicants notified the Rostov-on-Don Town Administration of their intention to organise a meeting from 6 p.m. to 7.30 p. m. on 31 March 2010 in the centre of

Rostov-on-Don, near the Lenin monument, which fifty people were expected to attend.

159. On 18 March 2010 the Rostov-on-Don Town Administration refused to allow the meeting, because pedestrian traffic in the area was dense in the evening and the applicants' meeting might cause inconvenient disruptions. They proposed that the applicants hold their meeting near the Sports Centre.

160. On 22 March 2010 the second and fourth applicants replied that the proposed venue was unsuitable because it was located in a deserted place far from the town centre. They asked the authorities how many participants they could bring together without obstructing pedestrian traffic near the Lenin monument.

161. On 25 March 2010 the Rostov-on-Don Town Administration declined to engage in dialogue on the question of freedom of assembly.

162. The first, second and fourth applicants challenged the Rostov-on-Don Town Administration's decision of 18 March 2010 before the Sovetskiy District Court of Rostov-on-Don.

163. On 27 July 2010 the Sovetskiy District Court of Rostov-on-Don rejected their complaint, finding that the decision of 18 March 2010 had been lawful.

164. On 6 September 2010 the Rostov Regional Court quashed the judgment of 27 July 2010 and remitted the case for fresh examination before the Sovetskiy District Court.

165. On 7 October 2010 the Rostov-on-Don Town Administration argued that the area around the Lenin monument was one of the most crowded places in the town. In the rush hour 30 to 70 people per minute passed by the Lenin monument. Some of them might be distracted by the applicants' meeting, thereby hindering the passage of other pedestrians. Moreover, the applicants had distributed leaflets calling on the town's population to take part in the meeting. The possibility could not be ruled out, therefore, that more than fifty people would attend the meeting. That might have created a danger for public safety. By contrast, the venue near the Sports Centre was larger and could therefore accommodate more participants without disrupting pedestrian traffic or jeopardising public safety.

166. On 3 November 2010 the Sovetskiy District Court allowed the second and fourth applicants' complaints, finding that the decision of 18 March 2010 had been unlawful. The Rostov-on-Don Town Administration had not provided valid reasons for its proposal that the meeting venue should be changed. Moreover, they had failed to refute the applicants' argument that the proposed location near the Sports Centre would not serve the purposes of the meeting. The court ordered the Rostov-on-Don Town Administration to allow a meeting of fifty people near the Lenin monument from 6 p.m. to 7.30 p.m. on the 31st of the first

month with thirty-one days following the entry into force of the judgment. The court rejected the first applicant's complaints, however, finding that he had no standing to complain to a court because he had not signed the notification of 16 March 2010. His intention to participate in the meeting was irrelevant. It also rejected the applicants' complaints about discrimination on the basis of political opinion. The fact that other meetings had been allowed at the same location was not sufficient to prove discrimination against the applicants.

167. On 20 January 2011 the Rostov Regional Court upheld the judgment on appeal.

168. On 22 February 2011 the applicants received a writ of execution.

169. On 16 March 2011 the applicants notified the Rostov-on-Don Town Administration of their intention to hold a meeting from 6 p.m. to 7.30 p.m. on 31 March 2011 in the centre of Rostov-on-Don, near the Lenin monument, to be attended by fifty people. They enclosed the writ of execution.

170. On 18 March 2011 the Rostov-on-Don Town Administration approved the meeting.

171. On 30 March 2011 the Interior Department of the Rostov Region, referring to the threat of terrorist or extremist acts, ordered the police to enclose the location near the Lenin monument with metal barriers, with two entry checkpoints. It further ordered that the participants in the meeting be searched with the aid of metal detectors.

172. On 31 March 2011 the police gave a written warning to the fourth applicant. It stated, in particular, that the meeting venue would be closed off with barriers. All participants would be searched at the entry checkpoints. If a person refused to be searched, he or she would not be allowed to enter the enclosed area. As the approved number of participants was fifty people, only fifty people would be allowed to enter. If more than fifty people tried to attend the meeting, the police would not let them in.

173. According to the applicants, the location near the Lenin monument was often used for meetings and other public events, but it was never fenced off on such occasions, and the entry of participants or passers-by was never restricted.

174. When the participants arrived at the Lenin monument at 6 p.m. they saw that the location had been fenced off with metal barriers. It is visible on the photographs of the event submitted by the applicants that police buses were parked along the barriers so that passers-by could not see what was going on in the enclosed area. Moreover, all passers-by were diverted by the police to another road. About 200 police officers were present. Although the enclosed area measured about 3,000 sq. m, only fifty people were allowed to enter and attend the meeting, after being searched at an entry checkpoint. According to the applicants, many would-be participants were not let in.

175. The first, third and fourth applicants complained to the Pervomayskiy District Court, claiming that the police had acted unlawfully and violated their freedom of assembly. In particular, the police were not entitled to limit the number of participants at the meeting. The venue near the Lenin monument could easily accommodate up to 800 people and the town administration had itself previously organised public events there with more than 100 participants. There was therefore no justification for limiting the number of participants to fifty people. Fencing the area off with metal barriers, blocking it with police buses, diverting the passers-by to other roads, searching the participants and not letting some of them in, had all also been unlawful and unjustified. The security measures taken by the police had made the meeting invisible to the public and thereby deprived it of its purpose. The reference by the police to the risk of terrorist attacks was unsubstantiated. There was no evidence that such a risk was higher on 31 March 2011 than on any other day. On 5 April 2011, for example, just five days later, an official public event had been held near the Lenin monument and the area had not been fenced off.

176. On 28 July 2011 the Pervomayskiy District Court rejected the applicants' complaints. It found that the number of participants had been determined by the applicants themselves and had then been approved by a final judgment. The police had merely enforced that judgment, acting in accordance with the writ of execution. The enclosing of the venue had been justified by security considerations. The court also found that the first and third applicants had no standing to complain to a court, as they had not been parties to the judicial proceedings which had ended with the judgment of 20 January 2011 and had not been mentioned in the writ of execution. The fact that in the notification of 16 March 2011 they were listed as organisers of the meeting of 31 March 2011 was irrelevant.

177. On 22 September 2011 the Rostov Regional Court upheld the judgment on appeal, finding that it had been lawful, well reasoned and justified.

6. Meeting of 31 July 2011

178. At 9.04 a.m. on 18 July 2011 the first, third and fourth applicants notified the Rostov-on-Don Town Administration of their intention to hold a meeting from 6 to 8 p.m. on 31 July 2011 near the Lenin monument in front of the Rostov-on-Don Town Administration building in the town centre. One hundred people were expected to attend. They specified that if that venue was already occupied they would agree to hold the meeting in front of the cinema fifty metres from the Lenin monument. The aim of the meeting was to protest against the violations by the town administration of the freedom of assembly guaranteed by Article 31 of the Russian Constitution, and against fraudulent practices in the elections to the State Duma.

179. On 20 July 2011 the Rostov-on-Don Town Administration refused to approve the meeting, stating that notification of another public event at the same location had already been submitted. The holding of two meetings at the same location might create tension and conflict. The authorities proposed that the applicants hold their meeting near the Public Library.

180. On 21 July 2011 the applicants replied that the Public Library was not a suitable venue, because it was too far away from the Town Administration, which was the target of their protest meeting. Moreover, the area in front of the Public Library was occupied by a large flowerbed and could not accommodate such a large meeting. It appears that they did not receive any reply.

181. On the same day, 21 July 2011, the applicants challenged the town administration's decision of 20 July 2011 before the Pervomayskiy District Court of Rostov-on-Don, repeating the arguments stated in their letter of 21 July 2011 and adding that they had submitted their notification on the first day submissions were open, four minutes after the opening of the town administration offices. It was impossible for anyone else to have submitted a notification before them. As to the possible tensions with the people attending the other meeting, the applicants noted that on 31 May 2011 two meetings, each attended by a hundred people, had been held simultaneously near the Lenin monument without any trouble or incidents.

182. On 28 July 2011 the Pervomayskiy District Court found that the Rostov-on-Don Town Administration's decision of 20 July 2011 had been unlawful. Firstly, the authorities had not proved that it was impossible to hold the two events simultaneously. A series of "pickets" organised by the Young Guard, the youth wing of the United Russia party, from 10 a.m. to 8 p.m. every day from 1 July to 15 August 2011, had been allowed by the town administration. There was however no information as to whether the "pickets" had been held as announced, that is for ten hours every day for a month and a half. In any event, according to the notification, the Young Guard's "pickets" involved no more than twenty participants, while 100 people were to attend the applicants' meeting. The venue near the Lenin monument had sufficient capacity to accommodate both events, especially taking into account that the applicants were willing to hold the event in front of the cinema, some distance from the Lenin monument. Secondly, the court found that the area outside the Public Library proposed by the town authorities, was not large enough to accommodate all the participants in the applicants' meeting. A copy of that judgment was made available to the applicants on 2 August 2011.

183. On 31 July 2011 the applicants held a meeting near the Lenin monument, in spite of obstruction from the authorities and the police.

184. On 29 August 2011 the Rostov Regional Court quashed the judgment of 28 July 2011 and rejected the applicants' complaint. It found that the Rostov-on-Don Town Administration's decision of 20 July 2011

had been lawful and well reasoned. As another public event had been scheduled at the same time and place as that chosen by the applicants, the town administration had proposed using the area outside the Public Library. This was a busy location in the town centre. The applicants had not explained how the flowerbeds would prevent them from gathering there.

7. Meeting of 31 August 2011

185. At 9.07 a.m. on 16 August 2011 the first and fourth applicants notified the Rostov-on-Don Town Administration of their intention to hold meetings from 6 to 8 p.m. on 31 August, 31 October and 31 December 2011, and 31 January and 31 March 2012, in the centre of Rostov-on-Don, near the Lenin monument, which one hundred people were expected to attend. They specified that the location near the Town Administration and the dates were important to them, and stated that if that location was occupied they would agree to hold the meetings in front of the cinema fifty metres from the Lenin monument. The aim of the meetings was to protest against violations by the town administration of the freedom of assembly guaranteed by Article 31 of the Russian Constitution, and against fraudulent practices in the elections to the State Duma.

186. On 18 August 2011 the Rostov-on-Don Town Administration refused to approve the meetings. Regarding the meeting of 31 August 2011, they noted that notification of another public event at the same location had already been submitted. The holding of two meetings at the same location might create tension and conflict. They therefore proposed that the applicants' meeting be held near the Public Library. As to the remaining meetings, the Town Administration found that the applicants had submitted the notifications too early, outside the time-limits established by the law.

187. On 19 August 2011 the first and fourth applicants replied that the venue outside the Public Library was unsuitable because it was too far away from the town administration, which was the target of their protest meeting. It was also not large enough to accommodate a meeting of 100 people. It appears that they did not receive any reply.

188. The applicants then challenged the town administration's refusal to approve the meeting of 31 August 2011 before the Pervomayskiy District Court of Rostov-on-Don, repeating the arguments stated in their letter of 19 August 2011 and adding that they had submitted their notification on the first day submissions were open, nine minutes after the opening of the town administration offices. It was impossible for anyone else to have submitted a notification before them. As to the possible tensions with the people attending the other meeting, the applicants noted that on 31 May 2011 two meetings, each attended by 100 people, had been held simultaneously near the Lenin monument without any trouble or incident. Finally, they complained that between October 2009 and July 2011 they had submitted

eleven notifications, all of which had been rejected by the Rostov-on-Don Town Administration for various reasons.

189. On 26 August 2011 the Pervomayskiy District Court of Rostov-on-Don rejected their complaints and found that the Rostov-on-Don authorities' decision of 18 August 2011 had been lawful and well reasoned. Another person had notified the authorities of his intention to conduct a public opinion poll on 31 August 2011 at the same place and time. It was impossible to hold two public events simultaneously at the same place as altercations might arise between the participants. The alternative venue proposed by the authorities was a busy square in the town centre. It was large enough to accommodate the meeting and would serve the required purpose.

190. On 29 September 2011 the Rostov Regional Court upheld the judgment on appeal, finding it lawful, well reasoned and justified.

191. Meanwhile, also before the Pervomayskiy District Court, the applicants challenged the refusal to approve the meetings of 31 October and 31 December 2011 and 31 January and 31 March 2012. They complained that they had been subjected to discrimination on account of their political views. The Mayor of Rostov-on-Don was a member of the United Russia party. Events organised by that party or its youth wing had always been allowed to proceed. The Rostov-on-Don Town Administration had approved a series of "pickets", to be held every day from 1 July to 15 August 2011, for a total of 460 hours, despite the fact that the notification had been submitted by the Young Guard outside the statutory time-limit. A similar notification submitted by the applicants concerning a series of "pickets" with a total duration of twenty hours, however, had been rejected by the town administration.

192. On 12 September 2011 the Pervomayskiy District Court rejected the applicants' complaints as unsubstantiated. It found that the applicants' notification was different from that submitted by the Young Guard, which concerned a single public event that lasted many days and was therefore allowed by law, while the applicants' notification concerned a series of separate "pickets", each of which required a separate notification to be submitted within the legal time-limit. The applicants had not observed that time-limit. There was therefore no evidence of discrimination on account of political opinion. It was also significant that the applicants were not members of any political party.

193. On 20 October 2011 the Rostov Regional Court upheld that judgment on appeal, finding it lawful, well reasoned and justified.

8. Meetings in October and December 2011

194. In October and December 2011 the applicants notified the Rostov-on-Don Town Administration of their intention to hold meetings on 31 October and 31 December 2011 near the Lenin monument in the town

centre. The authorities agreed to the meeting on 31 October, but not to the one on 31 December, because a New Year tree had been installed near the Lenin monument.

9. Meeting of 31 January 2012

195. At 9.10 a.m. on 16 January 2012 the first applicant notified the Rostov-on-Don Town Administration of his intention to hold a meeting from 6 to 8 p.m. on 31 January 2012 in the centre of Rostov-on-Don, near the Lenin monument, which 150 people were expected to attend. He specified that the location and time were important to him, but if the location was already occupied he would agree to hold the meeting in front of the cinema, fifty metres from the Lenin monument. The aim of the meeting was to protest against violations by the Town Administration of the freedom of assembly guaranteed by Article 31 of the Russian Constitution, and against fraudulent practices in the elections to the State Duma.

196. On 18 January 2012 the Rostov-on-Don Town Administration refused to approve the meeting, because notification of a public event at the same location had already been submitted by someone else. The holding of two public events at the same location might create tension and conflict. They therefore proposed that the applicants' meeting be held near the Public Library.

197. On 19 January 2012 the first applicant replied that the location near the Public Library was unsuitable and that it was important for him to hold the meeting in front of the Town Administration. He also stated that he had been the first to enter the town administration building on the morning of the first day of the time-limit. No one could have submitted a notification before him.

198. Having received no reply, on 25 January 2012 the first applicant challenged the Rostov-on-Don Town Administration decision of 18 January 2012 before the Pervomayskiy District Court, repeating the arguments set out in his letter of 19 January 2012. He also asked the court to examine the video recordings of the town administration building's entrance cameras, which would prove that he had been the first to enter the building and submit a notification.

199. On 27 January 2012 a deputy head of the Rostov-on-Don Town Administration informed the first applicant that the entrance cameras had been switched off from 8.30 to 9.30 a.m. on 16 January 2012 for technical reasons.

200. On 30 January 2012 the Pervomayskiy District Court rejected the first applicant's complaints. It found that Mr B. had submitted his notification before the first applicant had, at 9 a.m. As it was impossible to hold two public events at the same location, the town administration had agreed to Mr B.'s event and proposed an alternative venue to the first applicant. That venue was in a busy area of the town centre and therefore

suited the purposes of the meeting. The decision of 18 January 2012 had therefore been lawful and well reasoned.

201. On 31 January 2012 the first applicant appealed. He submitted, in particular, that the town administration had not proved that Mr B. had lodged his notification before him. His request for the entry camera recording had been refused. He asserted that he had been the first to enter the administrative building on the morning of 16 January 2012 and to get an entry pass. He had not seen Mr B. at the reception. If Mr B., a member of the pro-government United Russia party, had been allowed to enter without an entry pass, that in itself showed discrimination on account of political opinion. He further submitted that Mr B.'s event, the purpose of which was to inform the population about various youth organisations in the region, was not a public event within the meaning of the Public Events Act and therefore did not require any notification or agreement. According to the applicant, it was possible for him to hold his meeting in front of the cinema at the same time as Mr B.'s information event near the Lenin monument. Referring to the Constitutional Court's decision of 2 April 2009, he requested that his appeal be examined before the date of the intended meeting.

202. On 31 January 2012 the first applicant went to the Lenin monument at 6 p.m. and remained there for an hour. The location remained empty. Neither Mr B. nor anyone else was there to hold the information event approved by the town administration.

203. On 22 March 2012 the Rostov-on-Don Regional Court upheld the judgment of 30 January 2012 on appeal, finding that it had been lawful, well reasoned and justified.

10. Meetings between March and August 2012

204. The applicants notified the Rostov-on-Don Town Administration of their intention to hold meetings on 31 March, 31 May, 31 July and 31 August 2012.

205. The Rostov-on-Don Town Administration refused to give the meetings their approval, giving the following reasons. The meetings of 31 March and 31 July 2012 were not approved because public events organised by the Young Guard were scheduled to take place near the Lenin monument on the same days. The notification of the meeting of 31 May 2012 was not examined. The meeting of 31 August 2012 was not approved because celebrations of the start of the school year were to take place near the Lenin monument.

I. Application no. 37038/13 Tarasov v. Russia

206. On 10 December 2012 the State Duma adopted at first reading a draft law which, in particular, prohibited adoption of children of Russian nationality by US citizens.

207. On 17 December 2012 the official daily newspaper *Rossiyskaya Gazeta* announced that the second reading was scheduled for 19 December 2012.

208. According to the applicant, he read on various online social networks that many people intended to stage solo "pickets" on 19 December 2012 in front of the State Duma to express their opposition to the draft law. The format of solo "pickets" was chosen because there was no longer time to observe the minimum statutory three-day notification period for other types of public events.

209. The applicant decided to hold his own solo "picket", and at around 9.15 a.m. positioned himself, holding a banner, in the vicinity of the State Duma at some distance from other protesters.

210. According to the applicant, he was arrested by the police several minutes later and brought in a police van to the nearby police station. At 10.30 a.m. the police drew up a report stating that the applicant had been escorted to the police station so that a report on an administrative offence could be drawn up. An arrest report, drawn up at the same time, stated that the applicant had arrived at the police station at 10.30 a.m. The applicant made a handwritten note on both reports that he was in fact arrested at 9.30 a.m., when he was put into the police van.

211. At the police station the applicant was charged with participating in a public event held without prior notification, in breach of Article 20.2 § 2 of the Code of Administrative Offences. The report on the administrative offence indicates that the offence was committed at 10 a.m. The applicant made a handwritten statement that he could not have committed an offence at that time because he had been in the police van since about 9.30 a.m.

212. The applicant was released at 1.20 p.m.

213. On 15 January 2013 the justice of the peace of 369 Court Circuit of the Tverskoy District of Moscow convicted the applicant as charged and sentenced him to a fine of RUB 20,000 (about EUR 495). The justice of the peace found it established, on the basis of police reports, that the applicant had taken part in a "picket" involving fifty people. That "picket" had been unlawful, because no notification had been submitted by the organisers, as required by Russian law. The applicant had waved a banner, thereby attracting the attention of passers-by and journalists assembled for the occasion. He had not complied with the police order to stop picketing.

214. In his appeal statement the applicant complained, in particular, that his arrest had been unlawful.

215. On 20 February 2013 the Tverskoy District Court of Moscow upheld the judgment on appeal.

II. RELEVANT DOMESTIC LAW

A. Freedom of peaceful assembly

216. The Constitution guarantees the right to freedom of peaceful assembly and the right to hold gatherings, meetings, demonstrations, marches and "pickets" (Article 31).

217. Pursuant to Plenary Supreme Court Ruling no. 21 of 27 June 2013, the Convention and its Protocols, as interpreted by the European Court of Human Rights in its final judgments, are to be applied by Russian courts (points 1 and 2). Any restrictions on human rights and freedoms must be prescribed by federal law, pursue a legitimate aim (for example, ensuring public safety, protecting morality and morals, or rights and freedoms of others) and be necessary in a democratic society, that is to say, proportionate to the legitimate aim (point 5). Courts are instructed to provide justification for any restrictions on human rights and freedoms by relying on established facts. Restrictions on human rights and freedoms are permissible only if there are relevant and sufficient reasons to justify them and if there is a balance between the interests of the individual whose rights are restricted and the interests of other individuals, the State and society (point 8).

B. Procedure for the conduct of public events

1. The procedure in force at the material time

218. The Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets, no. FZ-54 of 19 June 2004 ("the Public Events Act"), provides that a public event is an open, peaceful event accessible to all, organised at the initiative of citizens of the Russian Federation, political parties, other public associations, or religious associations. The aims of a public event are to express or develop opinions freely and to voice demands on issues related to political, economic, social or cultural life in the country, as well as issues related to foreign policy (section 2 paragraph 1).

219. The Public Events Act provides for the following types of public events: a gathering (*собрание*): that is, an assembly of citizens in a specially designated or arranged location for the purpose of collective discussion of socially important issues; a meeting (*митинг*): that is, a mass assembly of citizens at a certain location with the aim of publicly expressing an opinion on topical, mainly social or political issues; a demonstration (*демонстрация*): that is, an organised expression of public opinion by a

group of citizens with the use, while advancing, of placards, banners and other means of visual expression; a march (*шествие*): that is, a procession of citizens along a predetermined route with the aim of attracting attention to certain problems; a "picket" (*пикетирование*): that is, a form of public expression of opinion that does not involve movement or the use of loudspeaker equipment, where one or more citizens with placards, banners and other means of visual expression station themselves near the target object of the "picket" (section 2, paragraphs 2-6).

220. A notification of a public event is a document by which the competent authority is informed, in accordance with the procedure established by this Act, that a public event will be held, so that the competent authority may take measures to ensure safety and public order during the event (section 2 paragraph 7).

221. A public event may be organised by a Russian citizen or a group of citizens who have reached the age of eighteen (sixteen for meetings and gatherings), as well as by political parties, other public associations, religious associations, or their regional or local branches. A person who has been declared legally incapable by a court or who is serving a sentence of imprisonment, as well as political parties, other public associations, religious associations or their regional or local branches which have been dissolved or the activities of which have been suspended or banned in accordance with a procedure prescribed by law may not organise a public event (section 5 paragraphs 1 and 2).

222. A public event may be held in any convenient location, provided that it does not create a risk of building collapse or any other risks to the safety of the participants. The access of participants to certain locations may be banned or restricted in the circumstances specified by federal laws (section 8 paragraph 1).

223. Public events in the following locations are prohibited:

1) in the immediate vicinity of dangerous production facilities or other facilities subject to special technical safety regulations;

2) on flyovers, in the immediate vicinity of railway lines (including railway stations), oil, gas or petroleum pipelines, or high-voltage electricity lines;

3) in the immediate vicinity of the residences of the President of the Russian Federation, court buildings or detention facilities;

4) in a frontier zone, unless permission is given by the competent border authorities (section 8 paragraph 2).

224. The procedure for holding public events in the vicinity of historic or cultural monuments is determined by the regional executive authorities, with due regard to the particular features of such sites and the requirements of this Act (section 8 paragraph 3). The procedure for holding public events in the Kremlin, Red Square and the Alexandrovsky Gardens is established by the President of the Russian Federation (section 8 paragraph 4).

225. The perimeter of the zones in the immediate vicinity of buildings or other constructions is to be determined by a decision of the regional or municipal executive authorities issued in accordance with the land and urban planning legislation on the basis of the land or urban planning register (section 3 paragraph 9).

226. No earlier than fifteen days and no later than ten days before the intended public event, its organisers must notify the competent regional or municipal authorities of the date, time, location or itinerary and purposes of the event, its type, the expected number of participants, and the names of the organisers. A notification in respect of a "picket" involving several persons must be submitted no later than three days before the intended "picket" or, if the end of the time-limit falls on a Sunday or a public holiday, no later than four days before the intended "picket". No notification is required for "gatherings" and "pickets" involving one person (section 5 paragraph 4 (1) and section 7 paragraphs 1 and 3).

227. From the moment of submitting a notification the organisers and other citizens are entitled to campaign to attract people to take part in the public event, including through communicating to the public its location, time and aims, as well as other relevant information (section 10 paragraph 1).

228. Upon receipt of such notification the competent regional or municipal authorities must:

1) confirm receipt of the notification;

2) provide the organisers of the event, within three days of receiving the notification (or, in case of a "picket" involving several persons, if the notification is submitted less than five days before the intended "picket", on the day of receipt of such notification), with well-reasoned ("*обоснованный*") proposals for changing the location and/or time of the event, or for amending the purposes, type or other arrangements if they are incompatible with the requirements of this Act;

3) appoint a representative whose duty it is to help the organisers of the public event to conduct it in compliance with the requirements of this Act;

4) inform the organisers of the public event about the maximum capacity of the chosen location in terms of attendance;

5) ensure, in cooperation with the organisers of the public event and representatives of the competent law-enforcement agencies, the protection of public order and citizens' security, as well as the provision of emergency medical aid if necessary;

6) inform the State and municipal agencies concerned about the issues raised by the participants in the public event;

7) inform the federal guard services about the intended public event, if it is to take place on a route or in any place of permanent or temporary

presence of a State official requiring a special guard (section 12 paragraph 1).

229. If the information contained in the notification or other factors give reason to believe that the aims of the public event or the manner of its conduct are contrary to the Constitution, the Criminal Code or the Administrative Offences Code, the competent regional or municipal authority must warn the organisers in writing that they may be held liable for any unlawful actions, in accordance with the procedure prescribed by law (section 12 paragraph 2).

230. No later than three days before the intended date of the public event the organisers of a public event must inform the authorities in writing whether or not they accept the authorities' proposals for changing the location and/or time of the public event (section 5 paragraph 4 (2)).

231. The organisers of a public event are entitled to hold meetings, demonstrations, marches or "pickets" at the location and time indicated in the notification or agreed upon after consultation ("*изменены в результате согласования*") with the competent regional or municipal authorities (section 5 paragraph 3 (1)). They have no right to hold a public event if the notification was submitted outside the time-limits established by this Act, or if the new location and time of the public event have not been agreed upon ("*не были согласованы*") following a well-reasoned proposal for their change by the competent regional or municipal authorities (section 5 paragraph 5).

232. The organisers must comply with all the elements of the public event as indicated in the notification or agreed upon after a proposal from the competent regional or municipal authorities to change its location, time or manner of conduct (section 5 paragraph 4 (3)).

233. The organisers must secure respect for public order by the participants and must comply with all lawful instructions given by the representatives of the competent regional or municipal authorities and of the local police department in this respect. If the participants commit unlawful acts the organisers must suspend or terminate the public event. The organisers must ensure that the number of participants does not exceed the maximum capacity of the location. They must ensure the preservation of green areas, buildings, equipment, furniture and other objects situated at the location of the public event. They must also ensure that the participants do not cover their faces. Finally, they must transmit to the participants the requirements set down by the representatives of the competent regional or municipal authorities to suspend or terminate the public event (section 5 paragraph 4 (4) to (11)).

234. The participants in the public event must:

1) comply with lawful orders of the organisers of the public event, representatives of the competent regional or municipal authorities, and law-enforcement officials;

2) maintain public order and follow the schedule of the public event (section 6 paragraph 3).

235. Representatives of the competent regional or municipal authorities and of the local police department must attend the public event and assist the organisers in securing public order and the safety of the participants and others present (sections 13 paragraph 2 and 14 paragraph 3). The representative of the local police department may order the organisers to stop admitting citizens to the public event, or stop them himself if the maximum capacity of the venue is exceeded (section 14 paragraph 2 (1)).

236. In the performance of their duties and with the aim of ensuring public safety and public order at public events the police are empowered to search citizens and their belongings, if necessary using technical equipment, at the entry to buildings, territories or public areas where public events are held. If a citizen refuses to undergo a police search, the police may refuse to let him or her enter the building, territory or public area in question (section 13 § 1 (18) of the Police Act no. 3-FZ of 7 February 2011).

237. If participants in a public event commit a breach of public order which creates no danger to life or health, the representative of the competent regional or municipal authorities may require the organisers to take measures to stop that breach. If that requirement is not complied with, the representative of the competent regional or municipal authorities may suspend the public event for a specified period necessary to stop the breach. After the breach has been stopped the public event may be resumed. If the breach has not been stopped by the end of the specified period, the public event is terminated in accordance with the procedure set out in section 17 of this Act (section 15).

238. A public event may be terminated on the following grounds:

1) if it creates a genuine risk to people's lives or health or the property of persons or legal entities;

2) if the participants have committed unlawful acts or if the organisers have wilfully breached the procedure for the conduct of public events established by this Act;

3) if the organisers do not fulfil their obligations set out in section 5 paragraph 4 of the Act (see paragraphs 226, 230, 232 and 233) (section 16).

239. If the representative of the competent regional or municipal authorities decides to terminate the public event, he gives an order to that effect to the organisers, explains the reasons for his decision, and sets out the time by which his order must be complied with. He must, within twenty-four hours, prepare a written decision and serve it on the organisers. If the organisers fail to comply with the order, he addresses the participants with the same requirement and allows additional time for compliance. If the participants do not comply, the police may take measures to disperse the public event (section 17 paragraphs 1 and 2).

240. The procedure described above may be dispensed with in the event of mass riots, mob violence, arson, or other situations requiring urgent action (section 17 paragraph 3).

241. Failure to obey lawful orders of the police or resistance to the police is punishable by law (section 17 paragraph 4).

242. Decisions, actions or inaction by authorities or officials which violate freedom of assembly may be appealed against before a court in accordance with the procedure established by Russian law (section 19).

2. The amendments introduced on 8 June 2012

243. On 8 June 2012 the Public Events Act was amended (Law no. 65-FZ). The amendments are as follows.

244. Those who are prohibited from being organisers of public events: a person whose criminal record is not spent after a conviction for a criminal offence against the constitutional foundations of government, State security, national security or public order; a person who has been found guilty more than once within one year of hindering a lawful public event, disobeying a lawful order or demand of a police officer, disorderly conduct, a breach of the established procedure for the conduct of public events, public display of Nazi symbols, blocking of transport communications or distribution of extremist materials (administrative offences under Articles 5.38, 19.3, 20.1-3, 20.18 and 20.29 of the Administrative Offences Code) until the time his administrative offence record is expunged (section 5 paragraph 2 (1.1)).

245. The regional authorities must designate, by 31 December 2012, suitable locations where public events may be held without prior notification. When designating such locations, the regional authorities must ensure, in particular, that they are in keeping with the aims of public events and are accessible by public transport. In the event that several public events are planned at the same specially designated location at the same time, the regional or municipal authority decides in which order the events will take place, taking into account the order in which the notifications were submitted (section 8 paragraphs 1.1 and 1.2)

246. After the special locations have been designated, all public events must, as a rule, take place there. A public event at another location requires prior approval ("*согласование*") of the competent regional or municipal authority. Approval may be refused only if the person who has submitted the notification is not entitled to be an organiser of a public event or if it is prohibited to hold public events at the location chosen by the organisers (sections 8 paragraph 2.1 and 12 paragraph 3).

247. A list of places where public events are prohibited may be established by regional laws in addition to the list established in section 8 paragraph 2 of this Act. A location may be included in such a list if a public event there could, for example, interfere with the normal functioning of public utility services, transport, social or communications

services, or hinder the passage of pedestrians or vehicles or the access of citizens to residential buildings, transport or social facilities (section 8 paragraph 2.2).

248. The competent regional or municipal authority may refuse approval of a public event if the person who has submitted a notification is not entitled to be an organiser of a public event or if it is prohibited to hold public events at the location chosen by the organisers (section 12 paragraph 3).

249. Section 10 paragraph 1 (see paragraph 227 above) was also amended. The amended provision allows the organisers to campaign for participation in the public event only from the moment the public event is approved by the competent regional or municipal authorities.

250. The organisers of the public event must take measures to avoid exceeding the number of participants indicated in the notification if this might create a threat to public order or public safety, the safety of those attending the public event or others, or a risk of damage to property (section 5 paragraph 4 (7.1)).

251. The organisers of the public event may be held civilly liable for the damage caused by the participants if they have not fulfilled the obligations set out in section 5 paragraph 4 (see paragraphs 226, 230, 232, 233 and 250 above) (section 5 paragraph 6).

3. Further amendments

252. On 28 December 2013 a new section 15.3 was added to Law no. 149-FZ on Information, Information Technologies and Protection of Information ("the Information Act"). It provides that competent authorities may take measures to restrict access to information disseminated through telecommunication networks, including the Internet, and containing calls to participate in a public event held in breach of the established procedure.

4. Case-law of the Constitutional Court concerning the procedure for the conduct of public events

(a) Decision of 29 May 2007 no. 428-O-O

253. On 29 May 2007 the Constitutional Court declared inadmissible an application by Mr Shaklein, who submitted that section 8 § 2 (3) of the Public Events Act which prohibited holding a public event in the vicinity of court buildings was incompatible with Article 31 of the Constitution because it unduly restricted freedom of assembly. The Constitutional Court found that the aim of the restriction was to protect the independence of the judiciary and to prevent pressure on judges. The restriction was therefore justified and did not breach citizens' constitutional rights.

(b) Decision of 17 July 2007 no. 573-O-O

254. On 17 July 2007 the Constitutional Court examined an application by the Ombudsman, who submitted that the Public Events Act was not sufficiently foreseeable in its application, because it did not clearly determine the perimeter of the zones in which holding of public events was prohibited in accordance with its section 8 § 2. The Constitutional Court held at the outset that the prohibition on holding public events at those locations was justified by security considerations and the special legal regime applying at those locations. It further found that the perimeter was to be determined by a decision of the regional or municipal executive authorities issued in accordance with the land and urban planning legislation on the basis of the land or urban planning register. Such decisions had to be objectively justified by the aim of ensuring the normal functioning of public utility services situated on the territory concerned. In the absence of a decision by the executive or municipal authorities determining the perimeter of the zone where holding of public events was prohibited, public events at that location could not be considered unlawful and their participants could not be brought to liability.

(c) Decision of 2 April 2009 no. 484-O-П

255. On 2 April 2009 the Constitutional Court examined an application by Mr Lashmankin and others, who submitted, in particular, that section 5 paragraph 5 of the Public Events Act, which prohibited holding a public event if its location and time had not been approved by the competent regional or municipal authorities, was incompatible with Article 31 of the Constitution.

256. The Constitutional Court found that both the Constitution and the European Convention on Human Rights provided for restrictions on freedom of assembly in certain cases. Section 5 paragraph 5 of the Public Events Act did not give the executive the power to ban a public event. It only permitted the executive to make reasoned proposals as to the location or time of the public event. It required the executive to give weighty reasons for their proposals. Such reasons might include the need to preserve the normal, uninterrupted functioning of vital public utilities or transport services, to protect public order or the safety of citizens (both the participants in the public event and any other persons present at the location during the public event), or other similar reasons. It was impossible, however, to make an exhaustive list of permissible reasons, as this would have the effect of unjustifiably restricting the executive’s discretion.

257. The Constitutional Court further held that the authorities’ refusal to agree to a public event could not be justified by logistical or other similar reasons. The fact that a public event might cause inconvenience was not sufficient to justify a proposal to change the location or time. The authorities had to show that public order considerations made it impossible

to hold the public event. The term "agreed upon" contained in section 5 paragraph 5 of the Public Events Act meant that in such circumstances the authorities had an obligation to propose for discussion with the organisers of the public event a location and time compatible with the public event's purposes and its social and political significance. In particular, it should be taken into account that for a public event to fulfil its purposes some feedback (including via the media) between the participants in a public event and the targets of its message was necessary. The organisers, in their turn, were also required to make an effort to reach agreement with the executive.

258. If it proved impossible to reach an agreement, the organisers were entitled to defend their rights and interests in court. The courts should be required to examine their complaints as quickly as possible, and in any event before the intended public event, otherwise the judicial proceedings would be deprived of any meaning.

259. The Constitutional Court concluded that the provisions challenged by the complainants were clear and compatible with the Constitution.

(d) Decision of 1 June 2010 no. 705-O-O

260. On 1 June 2010 the Constitutional Court examined an application by Mr Kosyakin, who submitted, in particular, that sections 5 paragraph 5 and 12 paragraph 1 (2) of the Public Events Act, which permitted the authorities to propose a change of location and/or time for the public event and prohibited holding a public event if its location and time had not been approved by the authorities, was incompatible with Article 31 of the Constitution.

261. The Constitutional Court reiterated its findings relating to section 5 paragraph 5 of the Public Events Act, as stated in the Ruling of 2 April 2009, and found that the same findings were also applicable to section 12 paragraph 1 (2) of the Act.

(e) Judgment of 18 May 2012 no. 12-П

262. On 18 May 2012 the Constitutional Court examined an application by Mr Katkov, who submitted, in particular, that the provisions of the Public Events Act which required the organiser to indicate in the notification the number of participants in the public event and to ensure that the number of participants indicated was not exceeded (sections 5 paragraph 4 (3) and 7 paragraph 3) was incompatible with Article 31 of the Constitution.

263. The Constitutional Court found that the contested provisions were compatible with the Constitution and that the requirement to indicate in the notification the expected number of participants was reasonable. The authorities had to know how many people would take part in the assembly in order to assess whether the location was large enough to hold them all

and to decide what measures should be taken to protect public order and the safety of those attending and others present. Given that under section 5 paragraph 4 (3) the organisers had an obligation to ensure that all the elements indicated in the notification were complied with, and they had to adopt a balanced, considered and responsible approach when indicating the expected number of participants, taking into account the social importance of the issues to be discussed during the public event.

264. The Constitutional Court further noted that the Public Events Act did not establish a maximum number of participants in public events. Accordingly, the fact that the number of participants exceeded either the number indicated in the notification or the maximum capacity of the location could not serve, on its own, as a basis for liability for a breach of the established procedure for the conduct of public events under Article 20.2 § 2 of the Administrative Offences Code. Such a liability could be imposed only if it had been established that the organiser had been directly responsible for the excessive number of participants and, in addition, that this had created a real danger to public order, public safety or the safety of those attending the public event or others present.

(f) Judgment of 14 February 2013 no. 4-П

265. On 14 February 2013 the Constitutional Court examined an application by Mr Savenko and others, who submitted that Law no. 65-FZ of 8 June 2012 amending the Public Events Act was incompatible with the Constitution.

266. As regards the ban on organising a public event for a person whose criminal record was not spent after a conviction for certain criminal offences or who had been found guilty more than once within a year of certain administrative offences, the Constitutional Court found that special requirements imposed on organisers were justified by the high risk of breaches of public order during public events. The ban targeted those whose previous behaviour gave reasons to doubt their ability to hold a peaceful public event in accordance with the procedure prescribed by law. It served the aim of preventing breaches of public order and ensuring the safety of public events. The contested ban concerned only physical persons and did not apply to political parties, public or religious associations, because section 5 paragraph 2 of the Public Events Act explicitly stated that only those political parties, public or religious associations which had been dissolved or the activities of which had been suspended or banned in accordance with the procedure prescribed by law were prohibited from being an organiser of public events. Further, the individuals concerned were not banned from participating in public events organised by others, but were only banned from organising such events. The ban was imposed only in those cases where a person had been found guilty of an administrative offence more than once within a year or if he had been convicted at least

once of certain criminal offences. The ban was limited in time and was terminated as soon as the criminal or administrative offence record was expunged. The ban was therefore proportionate to the legitimate aim pursued.

267. As regards the provision that the organisers were allowed to campaign for participation in the public event only from the moment the public event was approved by the competent regional or municipal authorities, the Constitutional Court reiterated its position set out in its Ruling of 2 April 2009 that the notification and agreement procedure established by the Public Events Act was compatible with the Constitution. The law prohibited any campaigning for participation before the location and time of the public event had been approved by the competent authorities, because in the absence of such approval the time and location were not final. Any calls to participate in a public event before the location and time were approved could therefore mislead citizens. At the same time, the organisers were not prevented from informing prospective participants about the aims, type, location, time and estimated number of participants in the public event even before it was approved by the authorities. They were only prohibited from campaigning, that is from making calls for participation. Such a prohibition was therefore justified. The Court further held that that finding did not remove the obligation on the legislator to amend the legal provisions governing the time-limits for examining organisers' judicial complaints about the refusal to approve the time or location of a public event so that they were examined before the intended public event.

268. The Constitutional Court further found that the imposition of civil liability on organisers for damage caused by participants was incompatible with the Constitution. It held that civil liability should be imposed on the person who had caused the damage. Organisers should not be held liable for actions by others. The contested legal provision unduly restricted freedom of assembly because it put the prospective organiser before the choice of either assuming civil liability for any damage caused during the public event or renouncing organising public events. The provision was therefore incompatible with the Constitution.

269. As regards the designation of special locations where public events might be held without prior notification, the Constitutional Court held that the aim of the special locations was to create additional facilities for public events, including without prior notification. The designation of such special locations did not prevent organisers from choosing other locations. At the same time the law did not require that such locations be created in every municipality, thereby creating inequalities between citizens on account of their place of residence. The contested legal provision was therefore incompatible with the Constitution in so far as it did not ensure equal access to special locations for all citizens and had to be amended.

(g) Judgment of 13 May 2014 no. 14-П

270. On 13 May 2014 the Constitutional Court examined an application by Mr Yakimov, who claimed that section 7 § 1 of the Public Events Act was incompatible with the Constitution because it prevented a public event from being held in those cases where the time-limit for notification fell on a public holiday.

271. The Constitutional Court held that the aim of public events was to influence the authorities' decisions either directly or indirectly by changing public opinion. It was therefore very important for organisers to be able to choose, within the limits provided by law, the type, time and location of public event which would best correspond to its aims. The type, time and location of a public event could be therefore changed only through a consultation process involving the organisers and the competent public authorities.

272. The date of a public event might be very important with regard to its aims, for example if the event was dedicated to a certain memorable date or an anniversary of a certain event. The absence of a realistic opportunity to hold a public event on that date would be incompatible with the Constitution. It was significant that the Constitution did not contain any restrictions on the dates of public events. Such restrictions could however be set out by law in the public interest. Nor could logistical or organisational constraints experienced by public authorities be allowed to justify restricting citizens' rights.

273. The aim of the notification procedure provided by law was to inform the authorities in timely fashion about the type, location and time of a public event, its organisers and the number of participants, so that the authorities could take all necessary measures to ensure the safety of both those attending and others. The establishment of the time-limits within which such a notification had to be made fell within the legislator's discretionary competence. The time-limit was set by section 7 § 1 of the Public Events Act at no earlier than fifteen days and no later than ten days before the intended public event. The Public Events Act did not contain any special rules for those cases where the time-limit fell on public holidays, except for "pickets" involving several people, in respect of which the Public Events Act explicitly provided, in section 7 § 1, for an extended time-limit if the end of the normal three-day time-limit fell on a Sunday or a public holiday. No such exceptions were however provided in respect of other types of public event. At the same time, it was possible that the entire notification time-limit – no earlier than fifteen days and no later than ten days before the intended public event – could fall on public holidays. For example, the New Year and Christmas holidays lasted from 1 to 8 or 9 January each year.

274. It followed that, in the absence of special rules either in federal or regional law clearly determining the procedure to be followed in cases

where the notification time-limit fell on public holidays, it was *de facto* impossible to hold some types of public event in the days following public holidays in January. The creation, following the 2012 amendments to the Public Events Act, of locations where public events could be held without prior notification, could not be considered a commensurate alternative to holding a public event at the location chosen by the organisers. For example, such specially designated locations were not suitable for marches.

275. The Constitutional Court concluded that section 7 § 1 of the Public Events Act was incompatible with the Constitution, and that it was necessary to amend it to clarify the procedure to be followed in cases where the notification time-limit fell on a public holiday. In the meantime, the organisers of public events should be given the opportunity to lodge a notification on the last working day before the public holidays or, if that was impossible, the reception and examination of notifications should be done during the public holidays.

C. Civil proceedings

1. Before 15 September 2015

(a) Time-limits for the examination of complaints about decisions, acts or omissions of State and municipal authorities and officials

276. Until 15 September 2015 the procedure for examining complaints about decisions, acts or omissions of State and municipal authorities and officials was governed by Chapter 25 of the Code of Civil Procedure (the CCP), and the Judicial Review Act (Law no. 4866-1 of 27 April 1993 on judicial review of decisions and acts violating citizens' rights and freedoms).

277. Chapter 25 of the CCP and the Judicial Review Act both provided that a citizen might lodge a complaint before a court about an act or decision by any State or municipal authority or official if he considered that the act or decision had violated his rights and freedoms (Article 254 of the CCP and section 1 of the Judicial Review Act). The complaint might concern any decision, act or omission which had violated the citizen's rights or freedoms, had impeded the exercise of rights or freedoms, or had imposed a duty or liability on him (Article 255 of the CCP and section 2 of the Judicial Review Act).

278. The complaint had to be lodged with a court of general jurisdiction within three months of the date on which the complainant had learnt of the breach of his rights. The time-limit might be extended for valid reasons (Article 254 of the CCP and sections 4 and 5 of the Judicial Review Act). The complaint had to be examined within ten days (Article 257 of the CCP).

279. The court might suspend the decision complained against pending judicial proceedings (Article 254 § 4). In accordance with Ruling no. 2 of

10 February 2009 of the Plenary Supreme Court of the Russian Federation, the court might suspend the decision complained against, at the request of the complainant or of its own motion, at any stage of the proceedings. A suspension was ordered if the material in the case file and the complainant's submissions revealed that it might prevent possible negative consequences for the complainant (point 19).

280. When examining the case the court had to ascertain: whether the complainant had complied with the time-limit for lodging a complaint and whether the contested decision, act or omission was lawful and justified (point 22 of Supreme Court Ruling no. 2). In particular, the court had to examine: (a) whether the State or municipal authority or official had competence to make the contested decision or to perform the contested act or omission. If the law conferred discretionary powers on the State or municipal authority or official, the court had no competence to examine the reasonableness ("*целесообразность*") of their decisions, acts or omissions; (b) whether the procedure prescribed by law had been complied with. Only serious breaches of procedure could render the contested decision, act or omission unlawful; (c) whether the contents of the contested decision, act or omission met the requirements of law. The contested decision, act or omission was to be declared unlawful if one of the above conditions had not been complied with (point 25).

281. The burden of proof as to the lawfulness of the contested decision, act or omission lay with the authority or official concerned. The complainant however had to prove that his rights and freedoms had been breached by the contested decision, act or omission (section 6 of the Judicial Review Act and point 20 of Supreme Court Ruling no. 2).

282. The court allowed the complaint if it had been established that the contested decision, act or omission breached the complainant's rights or freedoms and was unlawful (point 28 of the Supreme Court Ruling no. 2). In that case it issued a decision overturning the contested decision or act and requiring the authority or official to remedy in full the breach of the citizen's rights. He or she might then claim compensation in respect of pecuniary and non-pecuniary damage in separate civil proceedings (Article 258 § 1 of the CCP and section 7 of the Judicial Review Act). The court might determine the time-limit for remedying the violation and/or the specific steps which needed to be taken to remedy the violation in full (paragraph 28 of Supreme Court Ruling no. 2).

283. The court rejected the complaint if it found that the challenged act or decision had been taken by a competent authority or official, was lawful, and did not breach the citizen's rights (Article 258 § 4 of the CCP).

284. A party to the proceedings might lodge an appeal with a higher court within ten days of the date when the first-instance decision was taken (Article 338 of the CCP). A statement of appeal had to be submitted to the first-instance court (Article 337 § 2 and 321 § 2). The CCP contained no

time-limit within which the first-instance court should send the statement of appeal and the case file to the appeal court. The appeal court had to decide the appeal within two months of receipt (Article 348 §§ 1 and 2). Shorter time-limits might be set by federal law for certain categories of cases (Article 348 § 4). The appeal decision entered into force on the day it was delivered (Article 367).

285. The legal provisions governing appeal proceedings were amended with effect from 1 January 2012. The amended CCP provided that a party to the proceedings might lodge an appeal with a higher court within a month of the date the first-instance decision was taken (Article 321 § 2 of the 2012 version of the CCP). A statement of appeal had to be submitted to the first-instance court (Article 321 § 1). The appeal court had to decide the appeal within two months of receipt, or three months if the appeal was examined by the Supreme Court. Shorter time-limits might be set by federal law for certain categories of case (Article 327 § 2). The appeal decision entered into force on the day of its delivery (Article 329 § 5).

(b) Enforcement of court judgments

286. A writ of execution was issued by the court after the decision had entered into force, except in cases where immediate enforcement had been ordered and the writ of execution was issued immediately after the first-instance decision was taken (Article 428 § 1of the CCP).

287. Immediate enforcement had to be ordered in respect of alimony payments, salary arrears, reinstatement in employment, and registration of a citizen on the electoral roll (Article 211). A court might, at the request of a party, order immediate enforcement in other cases where, owing to exceptional circumstances, a delay in enforcement might result in considerable damage or impossibility of enforcement. The issue of immediate enforcement might be examined simultaneously with the main complaint. An immediate enforcement order might be appealed against, but with no suspensive effect on the immediate enforcement (Article 212).

288. A judicial decision allowing a complaint and requiring the authority or official to remedy the breach of the citizen's rights was to be dispatched to the head of the authority concerned, to the official concerned, or to their superiors, within three days of its entry into force (Article 258 § 2 of the CCP). The Judicial Review Act required that the judicial decision be dispatched within ten days of its entry into force (section 8). The court and the complainant had to be notified of the enforcement of the decision no later than one month after its receipt (Article 258 § 3 of the CCP and section 8 of the Judicial Review Act).

2. Since 15 September 2015

289. On 15 September 2015 Chapter 25 of the CCP and the Judicial Review Act were repealed and replaced by the Code of Administrative

Procedure (Law no. 21-FZ of 8 March 2015, hereafter “the CAP”), which entered into force on that date. Confirming in substance the majority of the provisions of Chapter 25 of the CCP and the Judicial Review Act, the CAP amended some of them.

290. In particular, the CAP has established special rules and time-limits for lodging and examining complaints against the authorities’ decisions concerning the change of location or time of a public event, of its purposes, type, or other arrangements.

291. The CAP provides that such complaints must be lodged with a court within ten days of the date on which the complainant learnt of the breach of his rights (Article 219 § 4).

292. Such complaints must be examined by courts within ten days. If the complaint is lodged before the planned date of the public event, it must be examined at the latest on the eve of that date. If the complaint is lodged on the day of the public event, it must be examined on the same day. If the last day of the time-limit falls at the weekend or on a public holiday, it must be examined on that day if the complaint has not been, or could not have been, examined earlier (Article 226 § 4). A reasoned judicial decision must be prepared as soon as possible on the same day and immediately served on the complainant (Article 227 §§ 4 and 6).

293. The judicial decision is subject to immediate enforcement (Article 227 § 8).

294. If an appeal has been lodged against the first-instance decision before the planned date of the public event, it must be examined at the latest on the eve of that date (Article 305 § 3).

295. When examining the case, the court must review the lawfulness of the contested decision, act or omission (Article 226 § 8). In particular, the court must examine: (1) whether the complainant’s rights and freedoms have been breached; (2) whether the complainant has complied with the time-limit for lodging the complaint; (3) whether the following legal requirements have been met: as regards the State or municipal authority’s or official’s competence to make the contested decision or to perform the contested act or omission; as regards the procedure prescribed by law for adopting the contested decision or performing the contested act or omission and as regards the grounds for the contested decision, act or omission if such grounds are prescribed by law; and (4) whether the contents of the contested decision, act or omission met the requirements of law (Article 226 § 9).

296. The burden of proof as to the lawfulness of the contested decision, act or omission lies with the authority or official concerned. The complainant however has to prove that his rights and freedoms have been breached by the contested decision, act or omission and that he has complied with the time-limit for lodging the complaint (Article 226 § 11).

297. The court allows the complaint if it has been established that the contested decision, act or omission is unlawful and breaches the complainant's rights or freedoms. In that case it requires the authority or official to remedy the breach of the citizen's rights or to stop hindering such rights (Article 227 § 2). When necessary the court determines the specific steps which need to be taken to remedy the violation and sets out a time-limit (Article 227 § 3).

D. Liability for breaches committed in the course of public events

1. Domestic provisions before 8 June 2012

298. Until 8 June 2012 a breach of the established procedure for the conduct of public events was punishable by a fine of RUB 1,000 to 2,000 for the organisers of the event, and from RUB 500 to 1,000 for the participants (Article 20.2 §§ 1 and 2 of the Administrative Offences Code).

299. Refusal to obey a lawful order or demand of a police officer is punishable by an administrative fine of RUB 500 to 1,000 or up to fifteen days' administrative detention (Article 19.3 of the Code).

300. Non-payment of an administrative fine is punishable with a doubled fine or up to fifteen days' administrative detention (Article 20.25 of the Code).

2. The amendments introduced on 8 June 2012

301. Law no. 65-FZ of 8 June 2012 increased the maximum amount of a fine which may be imposed for an administrative offence. Article 3.5 § 1 of the Administrative Offences Code, as amended on 8 June 2012, provides that the maximum fine is RUB 5,000 for a citizen and RUB 50,000 for a public official, except for offences committed in the course of public events (Articles 5.38, 29.2, 20.2.2 and 20.18 of the Code), where the maximum fine is RUB 300,000 for a citizen and RUB 600,000 for a public official.

302. Article 20.2 of the Administrative Offences Code was also amended (Law no. 65-FZ). The amended Article 20.2 provides that a breach of the established procedure for the conduct of public events committed by an organiser is punishable by a fine of RUB 10,000 to 20,000 or up to forty hours of community work if the organiser is a natural person, by a fine of RUB 15,000 to 30,000 if the organiser is a public official, and by a fine of RUB 50,000 to 100,000 if the organiser is a legal person. The holding of a public event without notification is punishable by a fine of RUB 20,000 to 30,000 or up to fifty hours of community work if the organiser is a natural person, by a fine of RUB 20,000 to 40,000 if the organiser is a public official, and by a fine of RUB 70,000 to 200,000 if the organiser is a legal person. A breach by an organiser of the established procedure for the conduct of public events which causes the obstruction of pedestrian or road

traffic or leads to the maximum capacity of the venue being exceeded is punishable by a fine of RUB 30,000 to 50,000 or up to 100 hours of community work if the organiser is a natural person, by a fine of RUB 50,000 to 100,000 if the organiser is a public official, and by a fine of RUB 250,000 to 500,000 if the organiser is a legal person. A breach by an organiser of the established procedure for the conduct of public events which causes damage to someone's health or property, provided that it does not amount to a criminal offence, is punishable by a fine of RUB 100,000 to 300,000 or up to 200 hours of community work if the organiser is a natural person, by a fine of RUB 200,000 to 600,000 if the organiser is a public official, and by a fine of RUB 400,000 to 1,000,000 if the organiser is a legal person. A breach of the established procedure for the conduct of public events committed by a participant is punishable by a fine of RUB 10,000 to 20,000 or up to forty hours of community work. A breach by a participant of the established procedure for the conduct of public events which causes damage to someone's health or property, provided that it does not amount to a criminal offence, is punishable by a fine of RUB 150,000 to 300,000 or up to 200 hours of community work.

303. Law no. 65-FZ of 8 June 2012 also amended Article 4.5 of the Code by increasing the limitation period for the offence under Article 20.2 from two months to one year.

304. A new administrative offence was introduced. The organising of a mass gathering of people in public places not amounting to a public event, public calls to participate in such a mass gathering, or participation in such a mass gathering which results in a breach of public order or sanitary norms, disrupts the normal functioning of systems of life-support or communications, damages green areas, obstructs pedestrian or road traffic, or hinders citizens' access to residential buildings or transport or social infrastructure, is punishable by a fine of RUB 10,000 to 20,000 or up to fifty hours' community work for natural persons, a fine of RUB 50,000 to 100,000 for public officials, or a fine of RUB 200,000 to 300,000 for legal persons. The above acts, if they cause damage to someone's health or property, provided that they do not amount to a criminal offence, are punishable by a fine of RUB 150,000 to 300,000 or up to 200 hours community work for natural persons, a fine of RUB 300,000 to 600,000 for public officials, and a fine of RUB 500,000 to 1,000,000 for legal persons (Article 20.2.2 of the Code).

305. The Constitutional Court in its judgment of 14 February 2013 (see 265 above) examined whether the above amendments were compatible with the Constitution. The Constitutional Court held that the legislator had a wide discretion in establishing the amounts of fines to be imposed for administrative offences. The increasing of maximum fines to RUB 300,000 for a citizen and RUB 600,000 for a public official for offences committed in the course of public events was justified by the serious nature of such

offences, which infringed public order and undermined public safety. Moreover, in individual cases fines were imposed by the courts taking into account all the circumstances of the case, so that the maximum fines were applied only if a lower fine would not have the necessary preventive effect on the offender and other persons. The Constitutional Court concluded that the increase in the maximum fines was compatible with the Constitution. At the same time, as regards the establishment of minimum fines, the Constitutional Court noted that the minimum fine for a breach of the established procedure for the conduct of public events (RUB 10,000) was higher than the maximum fine for any other administrative offence (RUB 5,000). It also observed that for certain persons even the minimum fine could exceed their monthly income. Given that the judges could not impose a fine below the minimum set out in the Code, they were therefore prevented from taking into account the circumstances of the case and the offender's personal situation. The minimum fines set out by Articles 20.2 and 20.2.2 of the Administrative Offences Code were therefore incompatible with the Constitution and had to be amended. Further, the Constitutional Court observed that offences related to public events were the only administrative offences which could be punishable by community work. That might be interpreted as a means of suppressing dissenting views and political activity and was therefore incompatible with the Constitution and had to be amended. At the same time, the Constitutional Court held that the increasing of the limitation period for a breach of the established procedure for the conduct of public events from two months to one year was compatible with the Constitution. An increased limitation period of one year was not limited to offences committed during public events. It also applied to some other administrative offences, such as tax offences, electoral offences, and some others. In the case of offences related to public events, the increased limitation period was justified by the difficulty of investigating such offences, which were usually committed during mass gatherings of people.

306. Further, as regards the obligation on the organiser to take measures to avoid exceeding the number of participants indicated in the notification (see paragraph 250 above), and the fact that the failure to fulfil that obligation constituted an administrative offence, the Constitutional Court reiterated its position set out in its judgment of 18 May 2012 that the authorities had to know how many people would take part in the public event in order to assess whether the location was large enough to hold them all and to decide what measures should be taken to protect public order and the safety of the participants and others present. The obligation on the organiser to take measures to avoid exceeding the number of participants indicated in the notification therefore pursued the aim of protecting public order and safety. At the same time, even if the number of participants exceeded the number indicated in the notification, that fact alone could not

serve as a basis for imposing liability on the organisers. Such liability could be imposed only if the organiser had been directly responsible, through his actions or inaction, for an excessive number of participants, and only then if this might create a threat to public order or public safety, the safety of the participants in the public event or others, or a risk of damage to property. In assessing the organisers' fault, it was necessary to take into account the reaction of the authorities responsible for maintaining public order during the public event, in particular whether they had requested the organisers to take measures to limit the access of citizens to the public event. The contested legal provisions were therefore compatible with the Constitution. Finally, as regards the provision that the organiser could be held responsible for an administrative offence if damage to someone's health or property had been caused by participants in the public event, the Constitutional Court held that the organiser could be held responsible only if there was a causal link between the breach of the established procedure for the conduct of public events by the organiser and the damage to health and property, and if the organiser's fault was established in that connection. That provision was therefore compatible with the Constitution.

3. Examination of administrative charges

307. Until 1 January 2013 charges under Article 20.2 of the Code of Administrative Procedure were to be determined at first instance by a justice of the peace (Article 23.1 § 3 as in force until 1 January 2013). Since 1 January 2013 these charges are to be determined at first instance by a district court of general jurisdiction (Article 23.1 § 3 as in force since 1 January 2013).

E. Administrative arrest

308. A police officer may escort an individual to a police station by force or administratively arrest him for the following purposes: to stop an administrative offence; to identify the offender; to draw up a report on an administrative offence if it is impossible to do so at the place where the offence was detected; to ensure prompt and proper examination of the administrative case; and to secure the enforcement of any penalty to be imposed (Article 27.1 § 1 (1) and (2) of the Administrative Offences Code).

309. A police officer may escort an individual to a police station by force for the purpose of drawing up a report on an administrative offence if it is impossible to do so at the place where the offence was detected. The individual must be released as soon as possible. The police officer must draw up a report stating that the individual was taken to the police station, or mention that fact in the report on the administrative offence. The individual concerned must be given a copy of that report (Article 27.2 §§ 1 (1), 2 and 3 of the Code).

310. In exceptional cases a police officer may arrest an individual for a short period if this is necessary for the prompt and proper examination of the administrative case and to secure the enforcement of any penalty to be imposed (Article 27.3 § 1 of the Code). The duration of such administrative arrest must not normally exceed three hours. Administrative arrest for a longer period, not exceeding forty-eight hours, is permissible only for those subject to administrative proceedings concerning an offence punishable by administrative detention or offences involving unlawful crossing of the Russian border. This term starts to run from the moment when the person is escorted to the police station in accordance with Article 27.2 of the Code (Article 27.5 of the Code). The arresting officer must draw up an "administrative arrest report" (Article 27.4 of the Code).

311. On 16 June 2009 the Constitutional Court, in its judgment no. 9-П, found that Articles 27.1 and 27.3 of the Administrative Offences Code were compatible with the Constitution. It held that administrative arrest could be ordered only for the purposes provided by Article 5 § 1 (c) of the Convention. The arresting officer had to comply with all substantive and procedural statutory requirements. The court performing judicial review had to establish compliance with the procedure prescribed by law and whether administrative arrest was justified, in particular whether it was necessary and reasonable in the circumstances and whether there was sufficient factual basis for a reasonable suspicion against the arrested person. Administrative arrest would be lawful only if it was necessary and proportionate to the purposes provided by the Constitution and the Convention. It would be unlawful if it was ordered without sufficient justification, in an arbitrary manner, or in abuse of power.

312. On 17 January 2012 the Constitutional Court, in its decision no. 149-O-O, held that the main purpose of escorting a person to a police station under Article 27.2 of the Administrative Offences Code was to help draw up a report on an administrative offence if it was impossible to do so at the place where the offence was detected. The offender should not be escorted to a police station if he or she had documents permitting his or her identity to be established and if the situation (including the weather) was suitable for drawing up the report on the administrative offence on the spot. Thus, an offender could be escorted to a police station under Article 27.2 of the Administrative Offences Code only when such a measure was necessary in the circumstances and justified. The Administrative Offences Code did not set up any time-limit within which the offender was to be escorted to a police station, because it was impossible to predict all the circumstances that might influence the length of the transfer, such as the distance from the police station, the availability of transport, traffic conditions, weather conditions, the offender's state of health, and others. The offender was however to be brought to the police station without any undue delay and in the shortest possible time.

III. RELEVANT INTERNATIONAL AND COMPARATIVE MATERIAL

A. United Nations Organisation documents

313. The Report of the Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012 (A/HRC/20/27) describes best practices that promote and protect, in particular, the right to freedom of peaceful assembly. It reads as follows:

> “28. The Special Rapporteur believes that the exercise of fundamental freedoms should not be subject to previous authorization by the authorities ..., but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place ... Prior notification should ideally be required only for large meetings or meetings which may disrupt road traffic ...
>
> 29. Should the organizers fail to notify the authorities, the assembly should not be dissolved automatically ... and the organizers should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment. This is all the more relevant in the case of spontaneous assemblies where the organizers are unable to comply with the requisite notification requirements, or where there is no existing or identifiable organizer. In this context, the Special Rapporteur holds as best practice legislation allowing the holding of spontaneous assemblies, which should be exempted from prior notification ...
>
> 30. In the case of simultaneous assemblies at the same place and time, the Special Rapporteur considers it good practice to allow, protect and facilitate all events, whenever possible. In the case of counter-demonstrations, which aim at expressing discontent with the message of other assemblies, such demonstrations should take place, but should not dissuade participants of the other assemblies from exercising their right to freedom of peaceful assembly. In this respect, the role of law enforcement authorities in protecting and facilitating the events is crucial ...
>
> 37. The Special Rapporteur is opposed to the practice of ‘kettling’ (or containment) whereby demonstrators are surrounded by law enforcement officials and not allowed to leave ...
>
> 39. States also have a negative obligation not to unduly interfere with the right to peaceful assembly. The Special Rapporteur holds as best practice ‘laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and provide for the possibility of other less intrusive restrictions ... Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities’.
>
> 40. As mentioned earlier, any restrictions imposed must be necessary and proportionate to the aim pursued ... In addition, [assemblies] must be facilitated within “sight and sound” of its object and target audience, and “organizers of peaceful assemblies should not be coerced to follow the authorities’ suggestions if these would

undermine the essence of their right to freedom of peaceful assembly”. In this connection, he warns against the practice whereby authorities allow a demonstration to take place, but only on the outskirts of the city or in a specific square, where its impact will be muted.

41. The Special Rapporteur further concurs with the assessment of the ODIHR Panel of Experts that ‘the free flow of traffic should not automatically take precedence over freedom of peaceful assembly”. In this regard, the Inter-American Commission on Human Rights has indicated that ‘the competent institutions of the State have a duty to design operating plans and procedures that will facilitate the exercise of the right of assembly ... [including] rerouting pedestrian and vehicular traffic in a certain area’. Furthermore, the Special Rapporteur points to a decision of the Spanish Constitutional Court which stated that ‘in a democratic society, the urban space is not only an area for circulation, but also for participation’.

42. The Special Rapporteur stresses the importance of the regulatory authorities providing assembly organizers with “timely and fulsome reasons for the imposition of any restrictions, and the possibility of an expedited appeal procedure”. The organizers should be able to appeal before an independent and impartial court, which should take a decision promptly. In several States, the regulatory authority has the obligation to justify its decision (e.g. Senegal and Spain). In Bulgaria, the organizer of an assembly may file an appeal within three days of receipt of a decision banning an assembly; the competent administrative court shall then rule on the ban within 24 hours, and the decision of the court shall be announced immediately and is final. Similarly, in Estonia, a complaint may be filed with an administrative court, which is required to make a decision within the same or next day ...”

314. On 26 April 2012 the Human Rights Committee adopted its views in the case of *Chebotareva v. Russia* (CCPR/C/104/D/1866/2009, communication no. 1866/2009). The case concerned the authorities’ refusal to allow “pickets” to mark the anniversary of the murder of Anna Politkovskaya and to protest against political repression in the country. The authorities proposed another venue for the “pickets” on the ground that they were planning to celebrate Teachers’ Day at the venue chosen by the applicant. The applicant did not accept that venue, arguing that because of its remoteness from the city centre the purpose of the “picket” would be thwarted. She proposed an alternative location, which was not approved by the authorities, who referred to public safety concerns because of the heavy vehicle and pedestrian traffic in the area. The Human Rights Committee found that the applicant’s right to freedom of assembly under Article 21 of the International Covenant on Civil and Political Rights had been violated, since she had been arbitrarily prevented from holding a peaceful assembly. The State party had not demonstrated to the Committee’s satisfaction that the prevention of the holding of the “pickets” in question had been necessary for the purpose of protecting the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The reasons advanced by the authorities were in fact mere pretexts given in order to reject the applicant’s request.

B. Council of Europe documents

315. The document entitled "The Compilation of Venice Commission Opinions Concerning Freedom of Assembly", issued by the European Commission for Democracy through Law (the Venice Commission) on 1 July 2014 (CDL-PI(2014)0003), reads as follows:

"2.1. Spontaneous assemblies

"... The Venice Commission and OSCE/ODIHR wish to stress that the ability to respond peacefully and immediately (spontaneously) to some occurrence, incident, other assembly, or speech is an essential element of freedom of assembly. Spontaneous events should be regarded as an expectable feature of a healthy democracy. As such the authorities should protect and facilitate any spontaneous assembly so long as it is peaceful in nature ... Spontaneous assemblies by definition are not notified in advance since they generally arise in response to some occurrence which could not have been reasonably anticipated ... in order for an assembly to be genuinely a 'spontaneous' one, there must be a close temporal relationship between the event ('phenomenon or happening') which stimulates the assembly and the assembly itself ... Whether an assembly is 'spontaneous' or 'urgent' will depend on its own facts. In principle, so long as an assembly is peaceful in nature it should be permitted ... The definition would benefit from stating the essence of a spontaneous assembly as being one which cannot be notified and which would not achieve its aim if it were to adhere to notification requirements ... The Venice Commission agrees, in general, that provision for a timeframe for the notification of public events may be helpful as it enables the authorities to take reasonable and appropriate measures in order to guarantee their smooth conduct. It recalls however that there may be cases in which a public event is organised as an urgent or spontaneous response to an unpredicted event, in which case it may not be possible to respect the ordinary timeframe for notification. Spontaneous and urgent assemblies are protected by Article 11 ECHR ...

2.3. Simultaneous assemblies

The Guidelines explicitly provide that where notification is given for two or more assemblies at the same place and time, they should all be permitted and facilitated as much as possible, notwithstanding who submitted the notification first and how close to each other they plan to gather. This owes also to the fact that all persons and groups have an equal right to be present in public places to express their views ... as the OSCE/ODIHR – Venice Commission Guidelines point out, 'related simultaneous assemblies should be facilitated so that they occur within sight and sound of their target insofar as this does not physically interfere with the other assembly'. A prohibition on conducting public events in the place and time of another public event would be a disproportionate response, unless there is a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers ...

4.1. Legitimate grounds for restrictions - Content-based restrictions

... Restrictions on public assemblies should not be based upon the content of the message they seek to communicate. It is especially unacceptable if the interference with the right to freedom of assembly could be justified simply on the basis of the authorities´ own view of the merits of a particular protest. Any restrictions on the message of any content expressed should face heightened scrutiny and must only be imposed if there is an imminent threat of violence ...

4.2. Restrictions on Place, Time and Manner of holding Assemblies

Location is one of the key aspects of freedom of assembly. The privilege of the organiser to decide which location fits best for the purpose of the assembly is part of the very essence of freedom of assembly. Assemblies in public spaces should not have to give way to more routine uses of the space, as it has long been recognised that use of public space for an assembly is just as much a legitimate use as any other. Moreover, the purpose of an assembly is often closely linked to a certain location and freedom of assembly includes the right of the assembly to take place within 'sight and sound' of its target object ...

Blanket restrictions such as a ban on assemblies in specified locations are in principle problematic since they are not in line with the principle of proportionality which requires that the least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference ...

Proper restrictions on the use of public places are based on whether the assembly will actually interfere with or disrupt the designated use of a location. ... The mere possibility of an assembly causing inconvenience does not provide a justification for prohibiting it ...

The only legitimate restriction on location of an assembly is on site of hazardous areas and facilities which are closed to the public ...

It is therefore recommended that the blanket ban on assemblies in the vicinity of government institutions and courts be deleted, and the management of security risks be left to the relevant law enforcement bodies ...

... the Venice Commission stresses that it is the privilege of the organiser to decide which location fits best, as in order to have a meaningful impact, demonstrations often need to be conducted in certain specific areas in order to attract attention ('Apellwirkung', as it is called in German). Respect for the autonomy of the organizer in deciding on the place of the event should be the norm. The State has a duty to facilitate and protect peaceful assembly ...

Whilst the right to counter-demonstrate does not extend to inhibiting the right of others to demonstrate, an 'imminent danger of a clash' should not necessarily be a reason for prohibiting one of the assemblies from taking place at the same time and in the same vicinity. Emphasis should be placed on the state's duty to protect and facilitate each event and the state should make available adequate policing resources to facilitate both to the extent possible within sight and sound of one another ...

4.3. Designation by the State authorities of assembly locations

... As already mentioned above, all public spaces should be open and available for the purpose of holding assemblies and so, official designation of sites suitable for assemblies inevitably limits the number of public places that may be used for an assembly as it excludes locations that are suitable for assemblies, simply because they have not been designated. The only legitimate restriction on location of an assembly is on site of hazardous areas and facilities which are closed to the public.

5. NOTIFICATION OF ASSEMBLIES

... the notification procedure is for the purpose of providing information to the authorities to enable the facilitation of the right to assemble, rather than creating a system where permission must be sought to conduct an assembly. This emphasizes that the freedom to assemble should be enjoyed by all, and anything not expressly forbidden in law should be presumed to be permissible ... Any regime of prior

notification must not be such as to frustrate the intention of the organisers to hold a peaceful assembly, and thus indirectly restrict their rights (for instance, by providing for too detailed and complicated requirements, and/or too onerous procedural conditions) ...

It is recommended that the length and conditions for the notification procedure be reasonable in relation to both the authorities and organizers and participants. [Domestic law] should also allow for adequate time in order that judicial review may take place, if needed before the scheduled assembly date ...

5.1 Length of the notification period

... Time limits should be so set that the decision of the executive body and the decision of the court at first instance can be delivered in time to allow the assembly to take place on the original intended date should the court find in favour of the organisers ... [The time limits'] length and conditions should be reasonable not only in relation to the authorities but also allowing for a judicial review to take place before the scheduled assembly date. Omissions in the notification should be easily rectifiable without causing unnecessary delay of the assembly ...

5.3 Regulatory authority and decision-making

... It is recommended in addition that a co-operative process between the organizer and the authority be established in order to give the organizer the possibility to improve the framework of the assembly ... It is necessary that the decision-making and review process is fair and transparent ... The organizer of an assembly should not be compelled or coerced either to accept whatever alternative(s) the authorities propose or to negotiate with the authorities about key aspects, particularly the time or place, of a planned assembly. To require otherwise would undermine the very essence of the right to freedom of peaceful assembly ...

6. REVIEW AND APPEAL

... the Venice Commission recalls that the right to an effective remedy entails a right to appeal the substance of any restrictions or prohibitions on an assembly. Appeals should be decided by courts in a prompt and timely manner so that any revisions to the authorities' decision can be implemented without further detriment to the applicant's rights. In addition, [domestic law] should establish clearly the remedies available to organisers in cases of improperly prohibited or dispersed assemblies. The prompt and thorough investigation of any suspected unlawful use of force by the police during assemblies, including dispersal of the assemblies, should also be ensured ...

The procedure of review of decisions to ban an assembly should be established in such manner so as to ensure that a decision on the legality of the ban on the assembly is made available to organisers before the planned date of the assembly. Considering the narrow schedule this can be achieved best by allowing for temporary injunctions ... In addition, the Venice Commission underlines that it is crucial not only that the court may genuinely review the decision of the public authorities, but also that it may do so before the assembly takes place, or else that a system of relief via court injunctions be available ...

7. ASSEMBLY TERMINATION AND DISPERSAL

... the termination and dispersal of assemblies should be a measure of last resort ... The reasons for suspension, ban or termination of an assembly should be narrowed down to a threat to public safety or danger of imminent violence. Furthermore, dispersal should not occur unless law enforcement officials have taken all reasonable

measures to facilitate and to protect the assembly from harm and unless there is an imminent threat of violence ...

... the assembly should not be prohibited or dispersed simply because an individual or group commit acts of violence and any such measures should only be taken against those particular individuals who violate public order or commit or instigate unlawful actions ... An isolated outbreak of violence should be dealt with by way of subsequent arrest and prosecution and not by termination of the assembly or dispersal of the crowd ...

11. LIABILITY OF PARTICIPANTS

... the imposition of sanctions (such as prosecution) after an event may sometimes be more appropriate than the imposition of restrictions prior to, or during, an assembly'. ...j 'as with prior restraints, the principle of proportionality also applies to liability arising after the event. Any penalties specified in the law should therefore allow for the imposition of minor sanctions where the offence concerned is of a minor nature ...

12. POLICING ASSEMBLIES

... 12.2 Responsibilities of the law enforcement bodies

... If an assembly is prohibited according to the law and the organisers refuse to follow the legal constraints, the law enforcement bodies should manage the assembly in such a way as to ensure the maintenance of public order. If appropriate, the organizers (or other individuals) may be prosecuted at a later stage. This is preferable to requiring the police to attempt to 'terminate' the assembly, with the risk of use of force and violence. It is especially important when an assembly is unlawful but peaceful, i.e. where participants do not engage in acts of violence. In such a case, it is important for the authorities to exercise tolerance as any level of forceful intervention may be disproportionate ...

In addition, the provisions according to which law enforcement officials can limit the number of participants to an assembly in view of the capacity of the place, which is a rather subjective assessment, are not admissible under international standards. Moreover, carrying out body searches, the inspection of items in their possession and not admitting participants to the place of assembly should not be permitted except where there is evidence that these measures are necessary to prevent serious disorder ... They should only be permissible pursuant to previous notice to organizers plus a court order following a court hearing on the lawful character of such measures given the particular circumstances and a demonstration of the necessity of such action. The burden of proof should be on the authorities ...

The prompt and thorough investigation of any suspected unlawful use of force by the police during assemblies, including dispersal of the assemblies, should also be ensured ..."

316. The Opinion of the Venice Commission on the Federal Law no. 54-FZ of 19 June 2004 On Assemblies, Meetings, Demonstrations, Marches and Picketing of the Russian Federation, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), states as follows:

"... B. The notification procedure

... 21. The Venice Commission stresses that, while the Assembly Law formally does not empower the executive authorities not to accept a notification or to prohibit a

public event, it does empower them to alter the format originally envisaged by the organiser ... One of [the permissible] aims is the 'need to maintain a normal and smooth operation of vital utilities and transport infrastructures': which is practically impossible in case of large or moving demonstrations. It has further been conceded and is indeed explicitly set out in Article 5.5 of the Assembly Law that if the organisers disagree with the local authorities' motivated proposal to change the format of the public event, the latter is *de facto* prohibited. Therefore, in the Venice Commission's view, since the permission is rarely given, the notification or notice, in substance, amounts to a substitute for a request of a previous permission, to an 'authorization procedure *de facto*'.

22. While the terms 'proposal', 'suggestion' and 'agreement' in particular create an impression of non-directive instruments and while the Constitutional Court refers to a procedure of reconciliation of differing interests, there is no specification in the law as to how this should take place. Due to this kind of regulation, there is a high risk that in practice reconciliation does not take place. Thus, if the organizer fails to accept the authorities' proposal, the public event is simply not authorised. The organizer is thus often left with the choice of either giving up the public event (which will then be *de facto* prohibited) or accepting to hold it in a manner which may not correspond to the original intent. The need to choose only between these two options is not compatible with Article 11 ECHR. This regulation of the notification procedure in the Assembly Act therefore calls for the following comments from the Venice Commission.

23. The alteration of the place of the assembly by the authorities means that events cannot be held in places chosen by the organizer within sight and sound of their targeted audiences or at a place with a special meaning for the purpose of the assembly. The Venice Commission recalls that respect for the autonomy of the organizer in deciding on the place of the event should be the norm. The Constitutional Court has rightly specified that the newly proposed time and place must correspond to the social and political objectives of the event, and this requirement provides some safeguard against depriving the proposed public event of any impact. But even assuming that the alternative proposals do comply with this principle, it must be underlined that in principle the organisers should be permitted to choose the venue and the format of the assembly without interference. The Venice Commission agrees with the Institute of Legislation and Comparative Law that 'organisers, while implementing their right to determine the place and time of the event should, in turn, endeavour to reach an agreement on the basis of a balance of interests' and indeed the Commission has recently pointed out the benefits to the organiser, if he/she is willing to cooperate with the authorities, thus preventing 'the imposition of further restrictions (and even the termination of the entire assembly, if this is proportionate in the circumstances)'. However, this is only true where the changes in the format are caused by *compelling* reasons as required by Article 11 § 2 ECHR. In all other cases, the authorities should respect the organisers' autonomy in the choice of the format of the public assembly. In this respect, the Guidelines clearly state: 'An assembly organizer should not be compelled or coerced either to accept whatever alternative(s) the authorities propose, or to negotiate with the authorities about key aspects (particularly the time or place) of a planned assembly. To require otherwise would undermine the very essence of the right to freedom of peaceful assembly.'

24. As concerns *de facto* prohibitions to hold public events, it must be remembered that 'in order to be 'necessary in a democratic society' the limitation of the freedom must correspond to a pressing social need, be proportionate (i.e. there must be a rational connection between public policy objective and the means employed to achieve it and there must be a fair balance between the demands of the general

community and the requirements of the protection of an individual's fundamental rights), and the justification for the limitation must be relevant and sufficient.' Use of public space for an assembly is just as much a legitimate use as any other. Restrictions are only permitted where an assembly will actually disrupt unduly and a mere possibility of an assembly causing inconvenience does not justify its prohibition. Indeed, inconvenience to designated institutions or to the public, including interference with traffic, should not be as such a sufficient basis for prohibition.

25. The Venice Commission agrees with the Russian Constitutional Court that the Assembly Law needs to leave some discretion to the executive authorities ... In the opinion of the Commission, however, the Assembly Law confers too broad discretion and fails to indicate in clear terms that interferences by the executive authorities with the organisers' right to determine the format of the public even must always comply with the fundamental principles of 'presumption in favour of holding assemblies', 'proportionality' and 'non-discrimination'. Under the current law, for example, the executive authorities are empowered to transform a moving event into a static event in order to prevent mere traffic perturbations, which is not in conformity with Article 11 ECHR. As the Assembly Law itself confers on the executive authorities too broad a discretion and fails to set out the essential principles within which such discretion must be exercised, there is a high risk that judicial review may not lead to a reversal of decisions even if they are based on grounds not justified by Article 11 § 2 ECHR.

26. The Venice Commission welcomes the possibility for the organisers to apply to the courts to seek reversal of the municipal authorities' decision (Article 19 of the Assembly Act). The Venice Commission recalls that one of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the ECHR). The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, as judicial control offers the best guarantees of independence, impartiality and a proper procedure. The Constitutional Court of the Russian Federation has clarified that courts must review the legality of the decisions of the executive authorities.

27. In addition, the Venice Commission underlines that it is crucial not only that the court may genuinely review the decision of the public authorities, but also that it may do so before the assembly takes place, or else that a system of relief via court injunctions be available.

28. The Venice Commission has found information about the appeal process in the Communication submitted by the Russian authorities to the Committee of Ministers of the Council of Europe in relation to the Alekseyev case. According to these submissions, appeals against the decisions of the municipal authorities are examined within ten days (the common time-limit is two months). Within a further ten days, the appeal judgments may be appealed to the Court of Cassation; if there is no appeal on points of law, the appellate decision becomes final and may be immediately enforced.

29. The Venice Commission notes that it is unlikely that the appeal procedure may be completed in time before the date proposed by the notification for the public event and there does not seem to be provision for an injunction enabling the organiser to proceed with the public event pending the appeals.

30. In conclusion as regards the procedure for notification of public events as set out in the Assembly Law, the Venice Commission considers that this procedure is in substance a request for permission. Furthermore, the Assembly Law confers too broad discretion on the executive authorities to restrict assemblies, for instance by giving them the power to alter the format of the public event for aims (in particular the need

to preserve the normal and smooth circulation of traffic and people) which go beyond the legitimate aims contained in Article 11 ECHR. The Law fails to indicate explicitly that such discretion must be exercised with due respect for the essential principles of ‘presumption in favour of holding assemblies’, ‘proportionality’ and ‘nondiscrimination’. Judicial review is potentially rendered ineffective because the courts do not have the power to reverse decisions which are within the broad discretion of the executive authorities and they cannot complete review in time before the proposed date of the public event to preserve its original timeframe. As a consequence, in the opinion of the Venice Commission the Assembly Law does not sufficiently safeguard against the risks of an excessive use of discretionary power or even arbitrariness or abuse. Risks of an overbroad use of discretionary powers in order to suppress assemblies can always arise and therefore any assembly law must aim at reducing them as far as possible.

31. The Assembly Law should secure the autonomy of the assembly, fostering co-operation on a voluntary basis only. If an agreement cannot be reached, a prohibition may only be considered if it is justified in itself and not due to the failure of cooperation, i.e. of not reaching an agreement. The executive authorities may only propose to the organiser to change the place and time under Article 12.2 of the Assembly Law, but their decision should necessarily be motivated on the grounds of concrete and direct threats and dangers to public safety (including to the safety of citizens, both participants in the public event and passers-by) and to national security. Other kinds of reasoning should be excluded.

C. Blanket rules

32. The Assembly Law contains several so-called blanket prohibitions, that is, absolute prohibitions that do not allow for any exception. Blanket rules will often be disproportionate because no consideration may be given to exceptional cases which should be treated differently ...

33. Art 5.5 of the Assembly Law states in terms that the promoter shall not have a right to hold an event when notice was not filed in due time. This rule is disproportionate: as a blanket rule, it does not permit any exceptional circumstances of a particular case to be taken into consideration.

34. A list of excluded premises is supplied in Articles 8.2 and 3 Assembly Act. The Institute of Legislation and Comparative Law has indicated to the Venice Commission that the concerned buildings have a strategic purpose and their exclusion is designed to protect the safety of participants in the public event as well as other citizens (Article 8.2.1), to protect the special constitutional status of the President, to avoid pressure on court trials and for security reasons (8.2.3). The Venice Commission agrees with the Institute that it may be necessary and legitimate to prevent a public event from taking place on the premises listed in Article 8.2. However, such a decision should be taken in view of each specific case and according to the criteria indicated by the European Court of Human Rights (notably when it is necessary in a democratic society). Not all assemblies (of all sizes, for example) may be considered to endanger court buildings, or monuments of history and culture. The term “territories directly adjacent” (Article 8.2.3) is overly broad and calls for narrow interpretation. Rather than listing premises on which public events are always prohibited or are dependent on a procedure determined by the President of the Russian Republic (see Article 8.4 Assembly Act), general criteria in the Assembly Act should set out in what circumstances and to what extent an assembly might pose a threat to the listed buildings or to the function carried out in them. Such criteria could then be applied to specific cases when an assembly is proposed. These criteria should be laid

down in the Assembly Act itself in order to give adequate guidelines for implementing decrees. The same suggestions must be made in relation to Article 8.2.3.1 Assembly Act (concerning regulations on the procedure for holding public events at transport infrastructure sites).

35. Article 9 prohibits assemblies taking place between 11 p.m. and 7 a.m. This is a restriction of the right to freely choose the time of an assembly. According to the Institute of Legislation and comparative Law, this general restriction pursues the aims of protecting public order and the tranquillity of citizens. The Venice Commission stresses however that the subject/goal of the assembly may justify holding a specific assembly after 11 p.m. or one that lasts for more than a single day. Decisions should be taken by the executive authorities in each single case with due respect for the principle of proportionality.

D. Spontaneous assemblies, urgent assemblies, simultaneous assemblies and counter demonstrations

36. The absolute terms of Article 7.1 in relation to the notification period of 10-15 days entail that there is no possibility to hold an assembly at shorter notice ...

37. The Venice Commission agrees, in general, that provision for a timeframe for the notification of public events may be helpful as it enables the authorities to take reasonable and appropriate measures in order to guarantee their smooth conduct. It recalls however that there may be cases in which a public event is organised as an urgent or spontaneous response to an unpredicted event, in which case it may not be possible to respect the ordinary timeframe for notification. Spontaneous and urgent assemblies are protected by Article 11 ECHR: indeed the ECtHR has stated that "a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly". Assemblies which carry a message that would be weakened if the legally established notification period were adhered to, especially if assemblies take place as an immediate response to an actual event, require protection as well. Such spontaneous assemblies, including counter demonstrations are required by ECHR to be facilitated by the authorities, even if they do not meet the normal notification requirement, as long as they are peaceful in nature.

38. As regards simultaneous demonstrations, the Commission understands from the Institute of Legislation and Comparative Law that simultaneous and counter demonstrations are generally considered to be a danger to safety and order and, as such, they are not allowed in the sense that the competent executive authorities change the format of an event if it is scheduled to take place at the same time and place as a previously notified one. Some regional and local legislation expressly empowers the executive authorities to do so.

39. The Commission underlines in this respect that where notification is given for more than one assembly at the same place and time, they should be facilitated as far as possible. It is a disproportionate response not to allow more than one assembly at a time as a blanket rule. It is only where it would be impossible to manage both events together using adequate policing and stewarding that it would be permissible to restrict or even move one of them. A policy described as 'separate and divide' where the same place is sought by several organisers is not permissible. Similar considerations apply for counter demonstrations.

40. The Commission delegation was told that the previous organisation of other events, especially cultural events to be held at the venue and on the day of the notified

public assembly, regularly entailed the proposal by the municipal authorities to alter the format of the latter. Since such other events are not covered by the time limitation for a notification the organizer of an assembly has to comply with (Article 7 Assembly Law), it violates the freedom of assembly if the assembly cannot take place solely due to the fact that someone else wants to use the place for another kind of event at the same time, who is not bound by the same timeframe-restriction as the organizer of an assembly. Public spaces should be available to all and other events like cultural events should not have automatic priority. The constitutional protection to conduct cultural or similar events is not superior to the constitutional protection of the freedom of assembly ...

E. Suspension or termination of public events

43. [The Assembly Law provides that] a public event may be suspended (and subsequently terminated) in case of ‘violation of law and order’ by the participants (Article 15). It can also be terminated in case of ‘deliberate violation’ by the organiser of the provisions on the procedure for holding a public event (Article 16.2).

44. These provisions appear too rigid. Not all violations of the law should lead to the suspension and termination of the public event, which should be measures of last resort. Reasons for suspension and termination should be narrowed to public safety or a danger of imminent violence (see Article 16.1 of the Assembly Law) ...

IV. Conclusions

... 49. The main results of the analysis of the Assembly Law by the Venice Commission with regard to Article 11 ECHR can be summarised as follows:

- It is recommended that the presumption in favour of holding assemblies and the principles of proportionality and non-discrimination be expressly included in the Assembly Law;

- the regime of prior notification under Article 5.5, 7 and 12 Assembly Act should be revised; the co-operation between the organisers and the authorities in Article 12 Assembly Act should be settled on a voluntary basis respecting the assemblies’ autonomy and without depriving the organisers of the right to hold an assembly on the ground of a failure to agree on any changes to the format of an assembly or to comply with the timeframe for notification of the public event; the power of the executive authorities to alter the format of a public event should be expressly limited to cases where there are compelling reasons to do so (Article 11.2 ECHR), with due respect for the principles of proportionality and non-discrimination and the presumption in favour of assemblies;

- the right to appeal decisions before a court (Article 19 Assembly Act) is welcomed; it should be provided that a court decision will be delivered before the planned date of the assembly, for instance via the availability of court injunctions;

- spontaneous assemblies and urgent assemblies as well as simultaneous and counter demonstrations should be allowed as long as they are peaceful and do not pose direct threats of violence or serious danger to public safety;

- the grounds for restrictions of assemblies should be narrowed to allow application of the principle of proportionality in order to bring them in line with Article 11.2 ECHR and reasons for suspension and termination of assemblies should be limited to public safety or a danger of imminent violence;

- the obligations of the organisers in Article 5.4 Assembly Act should be reduced; their responsibility to uphold public order should be restricted to the exercise of due care;

- the blanket restrictions on the time and places of public events should be narrowed."

C. Other international documents

317. The 2010 Guidelines on Freedom of Peaceful Assembly (CDL-AD(2010)020), prepared by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) in consultation with the European Commission for Democracy though Law (the Venice Commission) of the Council of Europe, read as follows:

"Section A – guidelines on freedom of peaceful assembly

... 2. Guiding Principles

2.1 Presumption in favour of holding assemblies.

As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation. Anything not expressly forbidden in law should be presumed to be permissible and those wishing to assemble should not be required to obtain permission to do so. A presumption in favour of the freedom should be clearly and explicitly established in law ...

2.4 Proportionality

Any restrictions imposed on freedom of assembly must be proportional. The least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference. The principle of proportionality requires that authorities do not routinely impose restrictions which would fundamentally alter the character of an event, such as relocating assemblies to less central areas of a city. A blanket application of legal restrictions tends to be over-inclusive and will thus fail the proportionality test because no consideration has been given to the specific circumstances of the case ...

3. Restrictions on Freedom of Assembly

3.1 Legitimate grounds for restriction

The legitimate grounds for restriction are prescribed in international and regional human rights instruments. These should not be supplemented by additional grounds in domestic legislation.

3.2 Public space

Assemblies are as much a legitimate use of public space as commercial activity and the movement of vehicular and pedestrian traffic. This must be acknowledged when considering the necessity of any restrictions.

3.3 Content-based restrictions

Assemblies are held for a common expressive purpose and thus aim to convey a message. Restrictions on the visual or audible content of any message should face a high threshold and should only be imposed if there is an imminent threat of violence.

3.4 Time, Place and Manner’ restrictions

A wide spectrum of possible restrictions, which do not interfere with the message communicated, is available to the regulatory authority. Reasonable alternatives should be offered if any restrictions are imposed on the time, place or manner of an assembly.

3.5 ‘Sight and Sound’

Public assemblies are held to convey a message to a particular target person, group or organisation. Therefore, as a general rule, assemblies should be facilitated within ‘sight and sound’ of their target audience.

4. Procedural Issues

4.1 Notification

... The notification process should not be onerous or bureaucratic. The period of notice should not be unnecessarily lengthy, but should still allow adequate time prior to the notified date of the assembly for the relevant State authorities to plan and prepare for the event in satisfaction of their positive obligations, and for the completion of an expeditious appeal to (and ruling by) a court should any restrictions be challenged ...

4.2 Spontaneous assemblies

Where legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable. Such an exception would only apply in circumstances where the legally established deadline cannot be met. The authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature.

4.3 Simultaneous assemblies

Where two or more unrelated assemblies are notified for the same place and time, each should be facilitated as best as possible. Prohibition of public assemblies solely on the basis that they are due to take place at the same time and location of another public assembly will likely be a disproportionate response where both can be reasonably accommodated. The principle of non-discrimination further requires that assemblies in comparable circumstances do not face differential levels of restriction.

4.4 Counter-demonstrations

Counter-demonstrations are a particular form of simultaneous assembly in which the participants wish to express their disagreement with the views expressed at another assembly. The right to counter-demonstrate does not extend to inhibiting the right of others to demonstrate. Indeed demonstrators should respect the right of others to demonstrate as well. Emphasis should be placed on the State’s duty to protect and facilitate each event where counter-demonstrations are organised or occur, and the State should make available adequate policing resources to facilitate such related simultaneous assemblies, to the extent possible, within ‘sight and sound’ of one another ...

4.6 Review and Appeal

The right to an effective remedy entails a right to appeal the substance of any restrictions or prohibitions on an assembly ... Appeals should take place in a prompt and timely manner so that any revisions to the authorities’ decision can be implemented without further detriment to the applicant’s rights. A final ruling, or at least relief through an injunction, should therefore be given prior to the notified date of the assembly ...

Section B – Explanatory Notes

... 3. Guiding Principles

...

State's duty to protect peaceful assembly

... 33. The State's duty to protect peaceful assembly is of particular significance where the persons holding, or attempting to hold, the assembly are espousing a view which is unpopular, as this may increase the likelihood of hostile opposition. However, potential disorder arising from hostility directed against those participating in a peaceful assembly must not be used to justify the imposition of restrictions on the peaceful assembly. In addition, the State's positive duty to protect peaceful assemblies also extends to simultaneous opposition assemblies (often known as counter-demonstrations). The State should therefore make available adequate policing resources to facilitate demonstrations and related simultaneous assemblies within 'sight and sound' of one another ...

Legality

35. ... The incorporation of clear definitions in domestic legislation is vital to ensuring that the law remains easy to understand and apply, and that regulation does not encroach upon activities that ought not to be regulated. Definitions, therefore, should neither be too elaborate nor too broad ...

37. ... legislative provisions that confer discretionary powers on the regulatory authorities should be narrowly framed and should contain an exhaustive list of the grounds for restricting assemblies (see paragraph 69 below). Clear guidelines or criteria should also be established to govern the exercise of such powers and limit the potential for arbitrary interpretation ...

Proportionality

... 43. ... the blanket application of legal restrictions – for example, banning all demonstrations during certain times, or from particular locations or public places which are suitable for holding assemblies – tend to be over-inclusive and will thus fail the proportionality test because no consideration has been given to the specific circumstances of each case. Legislative provisions which limit the holding of assemblies only to certain specified sites or routes (whether in central or remote locations) seriously undermine the communicative purpose of freedom of assembly, and should thus be regarded as a *prima facie* violation of the right. Similarly, the regulation of assemblies in residential areas, or of assemblies at night time, should be handled on a case-by-case basis rather than being specified as a prohibited category of assemblies.

44. The time, place, and manner of individual public assemblies can however, be regulated to prevent them from unreasonably interfering with the rights and freedoms of other people (see chapter 4 below). This reflects the need for a proper balance to be struck between the rights of persons to express their views by means of assembly, and the interest of not imposing unnecessary burdens on the rights of non-participants.

45. If, having regard to the relevant factors, the authorities have a proper basis for concluding that restrictions should be imposed on the time or place of an assembly (rather than merely the manner in which the event is conducted), a suitable alternative time or place should be made available. Any alternative must be such that the message which the protest seeks to convey is still capable of being effectively communicated

to those to whom it is directed – in other words, within ‘sight and sound’ of the target audience ...

Good administration and transparent decision-making

... 65. Laws relating to freedom of assembly should outline a clear procedure for interaction between event organisers and the regulatory authorities. This should set out appropriate time limits working backwards from the date of the proposed event, and should allow adequate time for each stage in the regulatory process ...

4. Restrictions on Freedom of Assembly

...

Legitimate grounds for restriction

... Public Order

71. The inherent imprecision of this term must not be exploited to justify the prohibition or dispersal of peaceful assemblies. Neither a hypothetical risk of public disorder, nor the presence of a hostile audience are legitimate grounds for prohibiting a peaceful assembly. Prior restrictions imposed on the basis of the possibility of minor incidents of violence are likely to be disproportionate, and any isolated outbreak of violence should be dealt with by way of subsequent arrest and prosecution rather than prior restraint ...

72. An assembly which the organisers intend to be peaceful may still legitimately be restricted on public order grounds in certain circumstances. Such restrictions should only be imposed when there is evidence that participants will themselves use or incite imminent, lawless and disorderly action and such action is likely to occur. This approach is designed to extend protection to controversial speech and political criticism, even where this might engender a hostile reaction from others ...

The Protection of the Rights and Freedoms of Others

80. The regulatory authority has a duty to strike a proper balance between the important freedom to peacefully assemble and the competing rights of those who live, work, shop, trade and carry on business in the locality affected by an assembly. That balance should ensure that other activities taking place in the same space may also proceed if they themselves do not impose unreasonable burdens. Temporary disruption of vehicular or pedestrian traffic is not, of itself, a reason to impose restrictions on an assembly. Nor is *opposition* to an assembly of itself sufficient to justify prior limitations. Given the need for tolerance in a democratic society, a high threshold will need to be overcome before it can be established that a public assembly will unreasonably infringe upon the rights and freedoms of others. This is particularly so given that freedom of assembly, by definition, constitutes only a temporary interference with these other rights ...

Types of restriction

... ‘Time, Place and Manner’ restrictions

99. The types of restriction that might be imposed on an assembly relate to its ‘time, place, and manner’ ... These can be in relation to changes to the time or place of an event, or the manner in which the event is conducted. An example of ‘manner’ restrictions might relate to the use of sound amplification equipment, or lighting and visual effects. In this case, regulation may be appropriate because of the location or time of day for which the assembly is proposed.

100. The regulatory authority must not impose restrictions simply to pre-empt possible disorder or interferences with the rights of others. The fact that restrictions can be imposed during an event (and not only before it takes place) enables the authorities to avoid imposing onerous prior restrictions and to ensure that restrictions correspond with and reflect the situation as it develops. This, however, in no way implies that the authorities can evade their obligations in relation to good administration (see paragraphs 61-67 above) by simply regulating freedom of assembly by administrative fiat. Furthermore, (as discussed at paragraphs 134 and 157 below) the use of negotiation and/or mediation can help resolve disputes around assemblies by enabling law enforcement authorities and the event organiser to reach agreement about any necessary limitations.

'Sight and Sound'

101. Given that there are often a limited number of ways to effectively communicate a particular message, the scope of any restrictions must be precisely defined. In situations where restrictions are imposed, these should strictly adhere to the principle of proportionality and should always aim to facilitate the assembly within 'sight and sound' of its object or target audience (see above at paragraphs 33 and 45, and paragraph 123 below).

Restrictions imposed prior to an assembly ('prior restraints')

102. These are restrictions on freedom of assembly either enshrined in legislation or imposed by the regulatory authority prior to the notified date of the event. Such restrictions should be concisely drafted so as to provide clarity for both those who have to follow them (assembly organisers and participants), and those tasked with enforcing them (the police or other law enforcement personnel). They can take the form of 'time, place and manner' restrictions or outright prohibitions. However, blanket legislative provisions, which ban assemblies at specific times or in particular locations, require much greater justification than restrictions on individual assemblies. Given the impossibility of having regard to the specific circumstance of each particular case, the incorporation of such blanket provisions in legislation (and their application) may be disproportionate unless a pressing social need can be demonstrated ...

103. An assembly organiser should not be compelled or coerced either to accept whatever alternative(s) the authorities propose, or to negotiate with the authorities about key aspects (particularly the time or place) of a planned assembly. To require otherwise would undermine the very essence of the right to freedom of peaceful assembly ...

Restrictions imposed during an assembly

108. ... as noted above at paragraphs 37 and 91, unduly broad discretionary powers afforded to law enforcement officials may breach the principle of legality given the potential for arbitrariness. The detention of participants during an assembly (on grounds of their committing administrative, criminal or other offences) should meet a high threshold given the right to liberty and security of person and the fact that interferences with freedom of assembly are inevitably time sensitive. Detention should be used only in the most pressing situations when failure to detain would result in the commission of serious criminal offences.

Sanctions and penalties imposed after an assembly

109. The imposition of sanctions (such as prosecution) after an event may sometimes be more appropriate than the imposition of restrictions prior to, or during, an assembly ... Any isolated outbreak of violence should be dealt with by way of subsequent prosecution or other disciplinary action rather than prior restraint ... As with prior restraints, the principle of proportionality also applies to liability arising after the event. Any penalties specified in the law should therefore allow for the imposition of minor sanctions where the offence concerned is of a minor nature ...

5. Procedural Issues

Advance notification

... 115. It is good practice to require notification only when a substantial number of participants are expected, or not to require prior notification at all for certain types of assembly. Some jurisdictions do not impose a notice requirement for small assemblies (see the extracts from the laws in Moldova and Poland below), or where no significant disruption of others is reasonably anticipated by the organiser (such as might require the redirection of traffic). Furthermore, individual demonstrators should not be required to provide advance notification to the authorities of their intention to demonstrate. Where a lone demonstrator is joined by another or others, then the event should be treated as a spontaneous assembly (see paragraphs 126-131 below) ...

116. ... While laws may legitimately specify a minimum period of advance notification prior to an assembly, any outer time limit should not preclude the advance planning of large scale assemblies. When a certain time limit is set forth by the law, it should be only indicative ...

121. If more people than anticipated by the organiser gather at a notified assembly, the relevant law enforcement agencies should facilitate the assembly so long as the participants remain peaceful (see also ‘defences’ at paragraphs 110-12 above).

Simultaneous assemblies

122. All persons and groups have an equal right to be present in public places to express their views. Where two or more assemblies are notified for the same place and time, the events should be facilitated together if they can be accommodated. If this is not possible (due, for example, to lack of space) the parties should be encouraged to engage in dialogue to find a mutually satisfactory resolution. Where such a resolution cannot be found, the authorities may seek to resolve the issue by adopting a random method of allocating the events to particular locations, so long as this does not discriminate between different groups. This may, for example, be a ‘first come, first served’ rule, although abuse of such a rule (where an assembly is deliberately notified early to block access to other events) should not be allowed ... A prohibition on conducting public events in the same place and at the same time of another public event where they can both be reasonably accommodated is likely to be a disproportionate response ...

Decision-making and review process

... 134. Assembly organisers, the designated regulatory authorities, law enforcement officials, and other parties whose rights might be affected by an assembly, should make every effort to reach mutual agreement on the time, place and manner of an assembly. If, however, agreement is not possible and no obvious resolution emerges, negotiation or mediated dialogue may help reach a mutually agreeable accommodation in advance of the notified date of the assembly. Genuine dialogue between relevant parties can often yield a more satisfactory outcome for everyone

involved than formal recourse to the law. The facilitation of negotiations or mediated dialogue can usually best be performed by individuals or organisations not affiliated with either the State or the organiser. The presence of parties' legal representatives may also assist in facilitating discussions between the assembly organiser and law enforcement authorities. Such dialogue is usually most successful in establishing trust between parties if it is begun at the earliest possible opportunity. Whilst not always successful, it serves as a preventive tool helping to avoid the escalation of conflict or the imposition of arbitrary or unnecessary restrictions.

135. Any restrictions placed on an assembly should be communicated in writing to the event organiser with a brief explanation of the reason for each restriction (noting that such explanation must correspond with the permissible grounds enshrined in human rights law and as interpreted by the relevant courts). The burden of proof should be on the regulatory authority to show that the restrictions imposed are reasonable in the circumstances. Such decisions should also be communicated to the organiser within a reasonable timeframe – *i.e.* sufficiently far in advance of the date of a proposed event to allow the decision to be judicially appealed to an independent tribunal or court before the notified date of the event ...

138. Ultimately, the assembly organisers should be able to appeal the decision of the regulatory authority to an independent court or tribunal. This should be a *de novo* review, empowered to quash the contested decision and to remit the case for a new ruling. The burden of proof and justification should remain on the regulatory authorities. Any such review must also be prompt so that the case is heard and the court ruling published before the planned assembly date (see also paragraph 66 above). This makes it possible, for example, to hold the assembly if the court invalidates the restrictions. To expedite this process, the courts should be required to give priority to appeals concerning restrictions on assemblies. The law may also provide for the option of granting organisers injunctory relief. That is, in the case that a court is unable to hand down a final decision prior to the planned assembly, it should have the power to issue a preliminary injunction. The issuance of an injunction by the court in the absence of the possibility of a final ruling must necessarily be based on the court's weighing of the consequences of its issuance ...

139. The parties and the reviewing body should have access to the evidence on which the regulatory authority based its initial decision (such as relevant police reports, risk assessments, or other concerns or objections raised). Only then can the proportionality of the restrictions imposed be fully assessed. If such access is refused by the authorities, the parties should be able to obtain an expeditious judicial review of the decision to withhold the evidence. The disclosure of information enhances accessibility and transparency, and the prospects for the co-operative and early resolution of any contested issues ...

Part II - Implementing Freedom of Peaceful Assembly Legislation

... 154. Intrusive anticipatory measures should not be used: Unless a clear and present danger of imminent violence actually exists, law enforcement officials should not intervene to stop, search and/or detain protesters *en route* to an assembly.

155. Powers to intervene should not always be used: The existence of police (or other law enforcement) powers to intervene, disperse an assembly, or use force does not mean that such powers should always be exercised. Where an assembly occurs in violation of applicable laws, but is otherwise peaceful, non-intervention or active facilitation may sometimes be the best way to ensure a peaceful outcome. In many cases, dispersal of an event may create more law enforcement problems than its accommodation and facilitation, and over-zealous or heavy-handed policing is likely

to significantly undermine police-community relationships. Furthermore, the policing costs of protecting freedom of assembly and other fundamental rights are likely to be significantly less than the costs of policing disorder borne of repression. Post-event prosecution for violation of the law remains an option ...

163. Facilitating peaceful assemblies which do not comply with the requisite preconditions or which substantially deviate from the terms of notification: If the organiser fails or refuses to comply with any requisite preconditions for the holding of an assembly (including valid notice requirements, and necessary and proportionate restrictions based on legally prescribed grounds), they might face prosecution ... Such assemblies should still be accommodated by law enforcement authorities as far as is possible. If a small assembly is scheduled to take place and, on the day of the event, it turns into a significantly larger assembly because of an unexpectedly high turnout, the assembly should be accommodated by law enforcement authorities and should be treated as being lawful so long as it remains peaceful. As stated in Basic Standard 4 of Amnesty International's *Ten Basic Human Rights Standards for Law Enforcement Officials*, law enforcement personnel should '[a]void using force when policing unlawful but non-violent assemblies.' ...

165. Dispersal of assemblies: So long as assemblies remain peaceful, they should not be dispersed by law enforcement officials. Indeed, dispersal of assemblies should be a measure of last resort and should be governed by prospective rules informed by international standards. These rules need not be elaborated in legislation, but should be expressed in domestic law enforcement guidelines, and legislation should require that such guidelines be developed. Guidelines should specify the circumstances that warrant dispersal, and who is entitled to make dispersal orders (for example, only police officers of a specified rank and above).

166. Dispersal should not occur unless law enforcement officials have taken all reasonable measures to facilitate and protect the assembly from harm (including, for example, quieting hostile onlookers who threaten violence), and unless there is an imminent threat of violence ...

168. If dispersal is deemed necessary, the assembly organiser and participants should be clearly and audibly informed prior to any intervention by law enforcement personnel. Participants should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further. Third parties (such as monitors, journalists, and photographers) may also be asked to disperse, but they should not be prevented from observing and recording the policing operation ..."

D. Comparative law material

318. The Court conducted a comparative study of the legislation of twenty-seven member States of the Council of Europe (Austria, Azerbaijan, Belgium, Bosnia and Herzegovina (Canton of Sarajevo), Estonia, Finland, France, the former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Monaco, Montenegro, the Netherlands, Poland, Romania, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom (England and Wales).).

319. The comparative study suggests that a majority of the States provide for a notification procedure for public assemblies. In the United Kingdom notification is required for marches and processions only, while static assemblies are exempt from that requirement. In Latvia, it is not necessary to submit a notification for assemblies that have not been announced to the general public and that do not cause any hindrance to traffic. In Azerbaijan, Germany, Greece and the United Kingdom spontaneous assemblies are exempt from the notification requirement. One State (the former Yugoslav Republic of Macedonia) does not require any notification, but the organisers may notify the authorities if they wish. Only four States (Lichtenstein, Slovenia, Sweden and Switzerland) provide for an authorisation procedure for certain types of public assemblies that are likely to cause increased hindrances to everyday life.

320. There are varied approaches to the deadline for lodging a notification or an authorisation request, ranging from ten days (Latvia and Spain) to several hours (Finland and Estonia) before the beginning of the assembly. The majority of the State provides that the notification is to be lodged no later than two or three days before the assembly. Only four States establish a time-limit before which the notification is considered premature (four months in Latvia, thirty days in Poland and Spain and fifteen days in France).

321. All States except Ukraine impose certain restrictions on the location, date or time of an assembly. Some States (Germany, Greece) however emphasise that the choice of the location and time of the assembly is the right of the organisers. Restrictions may be set out in law or be imposed by the administrative authorities on a case by case basis. In ten States (Azerbaijan, Bosnia and Herzegovina, Estonia, the former Yugoslav Republic of Macedonia, Greece, Latvia, Montenegro, Romania, Serbia, and Turkey) the domestic law provides for a prohibition to hold public events at certain locations, for example in the vicinity of some governmental or military buildings, detention facilities, dangerous areas, such as mines, railways or construction sites, in the vicinity of hospitals or kindergartens, etc. Time or date restrictions may be found in the domestic law of six States (Azerbaijan, Greece, Lichtenstein, Monaco, Romania and Serbia).

322. A majority of the States however do not provide for any statutory restrictions on the location, date or time of the assembly. Instead they allow the authorities to impose such restrictions on a case by case basis (all States except Bosnia and Herzegovina, Latvia, the former Yugoslav Republic of Macedonia, Monaco, Serbia, and Ukraine which do not provide for a possibility to impose case-by-case restrictions). The most common grounds for case-by-case restrictions relate to the protection of public order and safety (Belgium, Estonia, France, the former Yugoslav Republic of Macedonia, Greece, Latvia, Monaco, the Netherlands, Poland, Slovenia, Spain and Sweden), of public health (Austria, Estonia, the Netherlands,

Poland and Serbia), environment (Finland and the former Yugoslav Republic of Macedonia), and the rights of others (Poland, Serbia and Spain), maintenance of fluid traffic (Finland, Hungary, Latvia, the Netherlands, Serbia, Slovakia, Sweden and Turkey) or prevention of a possible conflict with another assembly (Azerbaijan, Estonia, Finland, Latvia and Poland). In the majority of the States the authorities' discretion to impose such restrictions is limited by law. Thus, in many States these restrictions are subject to the condition of proportionality (for example Austria, Azerbaijan, Belgium, France, Germany, Lichtenstein, Sweden and Switzerland), due justification (Hungary), risk of serious danger (Estonia, Greece, Poland), of material damage (Belgium), of serious damage (the United Kingdom) or unreasonable inconvenience (Finland).

323. Twenty out of twenty-seven States provide for domestic remedies to challenge the restrictions imposed by the authorities which allow obtaining an enforceable decision prior to the date of the planned assembly. States use various methods to ensure that the complaint is examined before the planned date of the assembly. The most common method is a very short statutory time-limit for examining a complaint against the restrictions (for example in Azerbaijan, Bosnia and Herzegovina, Estonia, France, Hungary, Latvia, Montenegro and Spain), often accompanied by a deadline for announcing restriction to the organisers so that they have time to use the remedies (for example in Azerbaijan, Bosnia and Herzegovina, Hungary, Slovenia) and/or immediate enforcement of the first-instance decision on the complaint (for example in Bosnia and Herzegovina, Estonia, Finland, Hungary, Latvia and Spain). In some States the complainant may apply for an interim measure, such as a suspension of the restrictions order pending the examination of the case (for example in Belgium, Finland, Germany, Italy, Lichtenstein, Monaco, the Netherlands, Slovenia, Sweden and Switzerland).

324. In thirteen States the failure to give a prior notification of an assembly or to comply with the restrictions imposed on the assembly's location or time is a sufficient ground in itself for dispersing an assembly (Azerbaijan, Belgium, Bosnia and Herzegovina, Estonia, Germany, Greece, Hungary, Latvia, Montenegro, the Netherlands, Serbia, Turkey, and Ukraine). In all other States under survey additional grounds are necessary to justify a dispersal, such as a threat to public order, danger to the safety of people, to property or environment, commission of violent or criminal acts, anti-social behaviour of the participants, or serious disturbance of traffic). In two States the domestic law requires that any dispersal should satisfy the requirement of proportionality (Lichtenstein and Switzerland), while in one State (Sweden) dispersal is permissible only if other steps taken to stop the disorder have proved ineffective.

THE LAW

I. JOINDER OF THE APPLICATIONS

325. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their factual and legal similarities.

II. ALLEGED VIOLATIONS OF ARTICLE 13 OF THE CONVENTION

326. The applicants complained under Article 13 of the Convention in conjunction with Article 11 of the Convention that they did not have an effective remedy against the alleged violations of their freedom of assembly. They alleged in particular that they had not had at their disposal any procedure which would have allowed them to obtain an enforceable decision prior to the date of the planned public event. Article 13 of the Convention reads:

> "Everyone whose rights and freedoms as set forth in [the] 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."

A. Admissibility

327. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants

328. The applicants submitted that under Russian law the organisers had to notify the competent authorities no earlier than fifteen days before the intended public event. The authorities had three days to propose a change of the location, time or manner of conduct of a public event. If the organisers submitted objections or proposed alternative locations or time, the authorities had again three days to reply to the organisers. Given that the complaint against the authorities' decision proposing a change of the location, time or manner of conduct of a public event had to be examined within ten days and that that time-limit was rarely observed in practice owing to the heavy case-load of Russian courts, such complaints were in most cases examined only after the intended date of the public event.

Exceptions were rare and could be explained by a lighter case-load of a particular judge. That situation was due to the fact that Russian law did not impose an obligation on the courts to examine such complaints before the planned date of the public event. Although the Constitutional Court in its decision of 2 April 2009 had indeed found that the courts should be required to examine the complaints before the intended public event (see paragraph 258 above), the legislative amendments to that effect had still not been adopted. The Constitutional Court had itself noted that omission in its judgment of 14 February 2013 and had urged the legislator to amend the domestic law (see paragraph 267 above). Furthermore, there was no evidence that the Constitutional Court's instructions were followed by the courts in their everyday practice. The Government had not provided any statistical information as to the length of the judicial examination of such cases or any other proof of their allegation that in most cases such complaints were examined before the date of the planned public event (see paragraph 336 below). The facts of the present case provided an ample body of evidence that showed that examination of such complaints was often longer than ten days, and was rarely terminated before the date of the planned public event.

329. Even if the court examined and allowed the complaint before the planned date of the public event, the judicial decision was not immediately enforceable, as confirmed by the facts of the present case (see, for example, paragraph 155 above). It became enforceable only after the expiry of the ten-day time-limit for appeal (one-month time-limit since 1 January 2012) or, if an appeal was lodged, after the appeal decision was issued, that is in any case after the planned date of the public event. In such cases, even if the complaint was allowed, it was no longer possible for the courts to provide a remedy by ordering that the authorities approve the public event.

330. The applicants further submitted that there was no possibility to apply for an injunction enabling the organiser to proceed with the public event pending the examination of his judicial complaint. The possibility of suspending the decision complained against provided for by Russian law was ineffective. Firstly, any such suspension did not amount to an approval of the public event. In the absence of such approval the public event would remain unlawful. Secondly, the applicants argued that the domestic courts were unwilling to apply provisional measures to disputes concerning the freedom of assembly on the ground that such provisional measures would have the effect of prejudging the outcome of the dispute. The applicants produced a copy of the decision of 5 September 2013 by the Voroshilovskiy District Court of Rostov-on-Don on a complaint against the refusal to approve a public event, rejecting the application for interim measures on the ground that the requested interim measure was identical to the merits of the complaint.

331. As regards the possibility of applying for immediate enforcement, it was an extraordinary measure which entirely depended on the judge's discretion and was ordered only in a small number of cases relating to the freedom of assembly. Indeed, the Government had been able to submit only eight examples of cases relating to freedom of assembly in which immediate enforcement had been ordered (see paragraph 339 below), although they had full access to the entire case-law of Russian courts. By contrast, the applicants referred to three judicial decisions where the requests for immediate enforcement had been rejected by courts. They argued that the examples provided by the Government were insufficient to prove the existence of an established practice of ordering immediate enforcement in freedom-of-assembly cases. In the absence of a clear requirement to enforce judicial decisions in such cases immediately, as for example in electoral disputes (see paragraph 287 above), the mechanism of immediate enforcement could not be considered effective.

332. Accordingly, the statutory time-limits for notification about a public event and those for judicial review of the authorities' proposal to change its location or time did not allow for an enforceable judicial decision to be taken before the intended date of the public event.

333. The applicants further argued that a judicial complaint under Chapter 25 of the CCP was allowed only if the authorities' refusal to approve the location, time or manner of conduct of a public event had been issued in breach of the domestic law. No other grounds for allowing the complaint were envisaged by Russian law. It was therefore impossible to challenge the authorities' decision on such grounds as, for example, that the location proposed by the authorities was incompatible with the purposes of the public event.

334. The applicants concluded that they did not have an effective remedy in respect of their complaints under Articles 10 and 11. They added that the new Code of Administrative Procedure which had entered into force in September 2015 (see paragraphs 289 et seq.) did not remedy that situation, because the procedure established by it still did not permit a final judgment to be obtained sufficiently in advance of the scheduled public event to allow for its preparation.

(b) The Government

335. The Government submitted that the organisers had to notify the competent authorities no earlier than fifteen days and no later than ten days before the intended public event. The notification time-limit gave sufficient time to the authorities to propose changing the time or location of the public event or to give a warning to the organisers about possible liability if the aims of the public event or any other envisaged arrangements were incompatible with Russian law. At the same time, it permitted the holding

of public events in response to topical current affairs. The extension of the notification time-limit would restrict such possibility.

336. The Government further submitted that any actions or inactions of the authorities restricting the freedom of assembly could be challenged before a court in accordance with the procedure established by Chapter 25 of the CCP (see paragraphs 276 to 283 above). The domestic law established a shortened ten-day time-limit for the examination of such complaints (see paragraph 278 above), as compared to the general two-month time-limit for civil claims. Further shortening of that time-limit might undermine the quality of the judicial review. The appeal had to be examined within two months (see paragraphs 284 and 285 above). Despite the absence of any statistical information on the issue, it was possible to affirm that if the organisers of a public event submitted their complaint without delay it was examined promptly, in most cases before the date of the planned public event. The average examination time was three to ten days for a first-instance complaint, and twelve to twenty-three days for appeal. The Government referred to the Constitutional Court's instructions that such complaints had to be examined as quickly as possible, in any event before the intended public event, for the judicial proceedings not to be deprived of all meaning (see paragraph 258 above).

337. The Government argued that belated examination of complaints was often caused by the organisers themselves. For example, as regards application no. 31040/11, although the applicants had received the authorities' proposal to cancel the march and change the location of the meeting of 20 March 2010 on 12 March 2010, they sent their complaint to the court by post only on 15 March 2010. The Convention did not oblige States to provide a perfectly functioning postal system (see *Foley v. the United Kingdom* (dec.), no. 39197/98, 11 September 2001). It was a well-known fact that Russian postal service was overburdened and that there were serious delays in delivery of correspondence. However, instead of bringing the complaint directly to the court's registry, the applicants had chosen to take the risk of sending it by post. The complaint had been delivered to the court on Friday 19 March 2010, which had prevented the court from examining it before the planned date of the public event. The delay in the examination of the complaint had therefore been attributable to the applicants.

338. The Government further submitted that Chapter 25 of the CCP provided for the possibility of suspending the decision complained against pending judicial proceedings, at the request of the complainant or of the court's own motion (see paragraph 279 above). However, according to available information, no requests for suspension were lodged by the complainants in cases relating to freedom of assembly during the period from January 2011 until the present.

339. The courts allowed complaints if it found that the authorities' actions were unlawful and breached the complainant's rights. Judicial decisions entered into force either on the expiry of the time-limit for appeal (ten days until 1 January 2012 and a month after that date) if no appeal was lodged, or on the day of the delivery of the appeal judgment (see paragraphs 284 and 285 above). However, it was possible for the complainant to request immediate enforcement of the first-instance decision if the appeal could not be examined before the planned public event (see paragraph 287 above). The domestic law did not prohibit the use of the immediate enforcement procedure in cases concerning freedom of assembly. The Government submitted copies of eight judicial decisions ordering immediate enforcement in cases where the authorities' proposals to change the location of the public event were challenged.

340. The Government concluded from the above that if the organisers of the public event did not agree with the authorities' proposal to change the location or time of the public event, they had an effective remedy before the courts allowing them to obtain an enforceable decision before the planned date of the public event. To illustrate the effectiveness of that remedy, the Government referred to five judicial decisions in which the organisers' complaints had been allowed, in three of which immediate enforcement had been ordered. The Government did not submit copies of those judicial decisions.

341. Lastly, the Government submitted that in March 2013 the President proposed a draft Code of Administrative Procedure, which had since been adopted and had entered into force (see paragraphs 289 to 294 above). The draft Code provided that complaints against the authorities' decisions concerning change of location or time of public events, and of their purposes, type or other arrangements, were to be examined by courts within ten days. If the complaint was lodged before the planned date of the public event, it had to be examined by the eve of that date at the latest. If the complaint was lodged on the day of the public event, it had to be examined on the same day. If the last day of the time-limit fell at a weekend or on a public holiday, it was to be examined on that day if the complaint had not been, or could not have been, examined earlier. If the appeal was lodged before the planned date of the public event, it had to be examined by the eve of that date at the latest.

2. The Court's assessment

342. The Court reiterates that Article 13 guarantees the availability at national level of a remedy in respect of grievances which can be regarded as arguable in terms of the Convention (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 96, ECHR 2000-XI). It has not been disputed between the parties that the applicants had an arguable claim under

Articles 10 and 11 within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

343. Such a remedy must allow the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they discharge their obligations in this respect (see *Hasan and Chaush,* loc. cit.).

344. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by Article 13 must be "effective" in practice as well as in law, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157 and 158, ECHR 2000-XI, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 96, 10 January 2012).

345. In the area of complaints about restrictions on the freedom of assembly imposed before the date of an intended assembly – such as, for example, a refusal of prior authorisation where such authorisation is required – the Court has already observed that the notion of an effective remedy implies the possibility of obtaining a final decision concerning such restrictions before the time at which the assembly is intended to take place. A *post-hoc* remedy cannot provide adequate redress in respect of Article 11 of the Convention. It is therefore important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act (see *Baczkowski and Others v. Poland*, no. 1543/06, §§ 81-83, 3 May 2007).

346. The Court has already found that Russian laws provided for time-limits for the organisers to give notice of a public event. In contrast, the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the public event. The Court has therefore found that the judicial remedy available to the organisers of public events, which was of a *post-hoc* character, could not provide adequate redress in respect of the alleged violations of the Convention (see *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, § 99, 21 October 2010).

347. Indeed, the Court notes that Chapter 25 of the CCP and the Judicial Review Act, in force at the material time, did not require the courts to examine the judicial review complaint against the authorities' refusal to approve the location, time or manner of conduct of a public event before the planned day of the event. Nor did the time-limit for lodging a notification and examining judicial review complaints ensure an enforceable decision before the planned day of the public event, for the following reasons.

348. Firstly, the organisers have to notify the competent authorities no earlier than fifteen days before the intended public event; a notification lodged before that time-limit is considered premature (see paragraphs 226 and 231 above). That requirement establishes a very tight time-frame within which any proposals to change the place, time or manner of conduct of a public event are to be made by the authorities, debated with the organisers and eventually examined on judicial review. The relevant comparative material demonstrates that only a small minority of European countries establish a time-limit before which a notification is considered premature and that in those countries where such a time-limit exists it is usually considerably longer than fifteen days (see paragraph 320 above).

349. Secondly, Russian law provides that after receiving a notification the authorities have three days to propose a change of the location, time or manner of conduct of a public event (see paragraph 228 above). The present cases demonstrate that this time-limit is not always observed (see, for example, paragraphs 14, 41, 76 and 109 above, where the authorities made their proposals between four and seven days after receiving the notification) without any negative consequences for the validity of the belated proposal (see, in particular, paragraph 47 above). The authorities' failure to observe the time-limit further shortens the already limited time available to the organisers to apply for a remedy.

350. Thirdly, at the material time the complaint against the authorities' refusal to approve the location, time or manner of conduct of a public event was to be examined by a court within ten days (see paragraph 278 above). The Court is not convinced by the Government's assertion, not supported by any documents or statistical data, that the ten-day time-limit was routinely observed and that in most cases the complaints were examined before the date of the planned event (see paragraph 336 above). As demonstrated by the facts of the present cases, the ten-day time-limit was rarely complied with: in the majority of the cases it took the competent District Court between two weeks and seven months to examine the complaint. Indeed, the complaints relating to freedom of assembly were not considered to be urgent, and did not have any priority over other cases, which, combined with the heavy case-load of the Russian courts, resulted in recurrent delays in their examination. The Court reiterates in this connection that a heavy case-load cannot serve as a justification for delays in judicial proceedings (see, *mutatis mutandis*, *Klein v. Germany*, no. 33379/96, §§ 42 and 43, 27 July 2000).

351. As a result of the aggregated factors described above, even if the organisers of a public event lodged a notification on the first day of the fifteen-day notification time-limit and then lodged a judicial review complaint immediately after receiving the authorities' proposal to change its location, time or manner of conduct, there was no guarantee that their judicial review complaint would be decided before the planned date of the

event. It is significant that the Constitutional Court in its rulings of 2 April 2009 and 14 February 2013 required the legislator to amend the legal provisions governing the time-limits for examining organisers' complaints against refusals to approve the time or location of a public event, so that they were examined before the planned date of the event (see paragraphs 258 and 267 above). It was not until 8 March 2015 that the relevant provisions were amended with the effect from 15 September 2015 (see paragraphs 289 to 294 above), long after the facts of the present cases.

352. Further, the Court observes that even if a District Court examined the complaint before the planned date of the public event, the judicial decision became enforceable only after the expiry of the ten-day time-limit for appeal (a one-month time-limit since 1 January 2012) or, if an appeal was lodged, after the appeal decision was issued (see paragraphs 284 to 286 above). One of the present applications provides a telling example of a situation where the judgment issued before the planned date of the public event and finding that the authorities' refusal to approve it had been unlawful did not permit the organisers to hold their event because it was not yet enforceable (see paragraphs 153 to 155 above).

353. The Court takes note of the Government's argument that the domestic law in force at the material time provided for the possibility of applying for immediate enforcement of a District Court judgment (see paragraph 287 above). It reiterates that it is for the Government to illustrate the practical effectiveness of the remedy with examples from the case-law of the domestic courts (see *Ananyev and Others,* cited above, § 110). The Government submitted copies of eight judicial decisions ordering immediate enforcement in cases where the authorities' proposals to change the location of the public event were challenged (see paragraph 339 above). This is not enough, in the Court's view, to show the existence of settled domestic practice. The Court is therefore not convinced of the practical effectiveness of an application for immediate enforcement (see, for similar reasoning, *Ananyev and Others,* loc. cit.).

354. Further, as regards the possibility of suspending the decision complained against pending the judicial proceedings (see paragraph 279 above), the Government themselves admitted that such a suspension had never been ordered in cases relating to freedom of assembly (see paragraph 341 above). Nor did the Government explain what redress could have been afforded to the organisers by suspending a decision refusing to approve the location, time or manner of conduct of a public event. Such a suspension did not amount to an approval of the location, time or manner of conduct chosen by the organisers, and did not therefore give the public event the presumption of legality.

355. The Court notes that, since the facts prompting the present applications arose, on 15 September 2015, a new Code of Administrative Procedure entered into force. It provides, in particular, that complaints

against the authorities' decisions concerning changes to the purposes, location, type or manner of conduct of a public event are to be examined by the District Court, and if possible any appeal is also to be examined, before the planned date of the event. The judicial decision is subject to immediate enforcement (see paragraphs 289 to 294 above). The Court notes that these developments in the domestic law, welcome as they are, occurred after the events at issue in the present cases.

356. The Court will further examine the applicants' additional argument that the scope of judicial review was limited to examining the lawfulness of the proposal to change the location, time or manner of conduct of a public event (see paragraph 333 above). Indeed, in accordance with Chapter 25 of the CCP and the Judicial Review Act, in force at the material time, the sole relevant issue before the domestic courts was whether the contested refusal to approve the location, time or manner of conduct of a public event was lawful (see paragraphs 281 to 283 above). It is clear from the Supreme Court's interpretation of the relevant provisions that "lawfulness" was understood as compliance with the rules of competence, procedure and contents (see paragraph 280 above). It is significant that the Supreme Court expressly stated that the courts had no competence to assess the reasonableness of the authorities' acts or decisions made within their discretionary powers (ibid.). It follows that the courts were not required by law to examine the issues of "proportionality" and "necessity in a democratic society", in particular whether the contested decision answered a pressing social need and was proportionate to any legitimate aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 11 of the Convention (see paragraph 412 below).

357. The Court observes that the present case demonstrates that in practice the domestic courts occasionally go beyond the issues of lawfulness and examine whether the authorities' refusal to approve the location, time or manner of conduct of a public event was "well-reasoned" (see, for example, paragraphs 48, 51, 71, 72, 82, 145, 153, 166, 184, 189, 200 above). That practice is apparently rooted in the requirement contained in the Public Events Act that any proposal to change the time, location or manner of conduct of a public event must be "well-reasoned" (see paragraph 228 above) and in the Constitutional Court's explanation that the authorities must give "weighty reasons" for their proposals (see paragraph 256 and 257 above). The Court however notes that this practice is fragmentary and that courts often limit their examination to the issues of lawfulness (see, for example, paragraphs 11, 26, 35, 68, 89, 105, 133 above).

358. In any event, the analysis of the judicial decisions made in the present case reveals that, even in those cases where the Russian courts examined the question whether the refusal to approve the location, time or manner of conduct of a public event had been well reasoned, they failed to recognise that the cases involved a conflict between the right to freedom of

assembly and other legitimate interests and to perform a balancing exercise. The balance appeared to be set in favour of protection of other interests, such as rights and freedoms of non-participants, in a way that made it difficult to turn the balance in favour of the freedom of assembly. The Court concludes that in practice Russian courts did not apply standards which were in conformity with the principles embodied in Article 11 and did not apply the "proportionality" and "necessity" tests. The Court has already found on a number of occasions, albeit in the context of Article 8, that a judicial review remedy incapable of examining the issue of proportionality does not meet the requirements of Article 13 of the Convention (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI; *Peck v. the United Kingdom*, no. 44647/98, §§ 105-07, ECHR 2003-I; and *Keegan v. the United Kingdom*, no. 28867/03, §§ 40-43, ECHR 2006-X).

359. The Court takes note of the Supreme Court's Ruling of 27 June 2013, stating that any restrictions on human rights and freedoms must be prescribed by federal law, pursue a legitimate aim and be necessary in a democratic society, that is to say, proportionate to the legitimate aim (see paragraph 217 above). The Court welcomes these instructions, but notes that they were issued after the events at issue in the present cases. It will have to wait for an opportunity to examine the practice of the Russian courts after that Ruling to assess how these instructions are be applied in practice. The Court also notes that the new Code of Administrative Procedure which entered into force on 15 September 2015 reproduced in substance the provisions of Chapter 25 of the CCP and the Judicial Review Act. According to the new Code of Administrative Procedure the lawfulness of the contested decision or act – understood in the sense of compliance with the rules of competence, procedure and contents – remains the sole relevant issue examined on judicial review (see paragraphs 295 to 297 above).

360. To sum up, the Court considers that the applicants did not have at their disposal an effective remedy which would allow an enforceable judicial decision to be obtained on the authorities' refusal to approve the location, time or manner of conduct of a public event before its planned date. Moreover, the scope of judicial review was limited to examining the lawfulness of the proposal to change the location, time or manner of conduct of a public event, and did not include any assessment of its "necessity" and "proportionality". In these circumstances, the Court does not need to consider the applicants' complaints relating to the individual circumstances of each case.

361. There has therefore been a violation of Article 13 of the Convention in conjunction with Article 11 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLES 10, 11 AND 14 OF THE CONVENTION

362. The applicants complained that the restrictions imposed by the authorities on the location, time or manner of conduct of public events breached their right to freedom of expression and to peaceful assembly, guaranteed by Articles 10 and 11 of the Convention respectively. Some of the applicants also complained under Article 14 of the Convention taken in conjunction with Articles 10 and 11 that they had been discriminated against on the grounds of their political opinion or sexual orientation.

These Articles read as follows:

Article 10

"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

"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 14

"The enjoyment of the rights and freedoms set forth in [the] 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."

363. At the outset, the Court notes that in relation to the same facts the applicants rely on two separate Convention provisions: Article 10 and Article 11 of the Convention, both taken alone and in conjunction with Article 14. In the Court's opinion, in the circumstances of the present case,

Article 10 is to be regarded as a *lex generalis* in relation to Article 11, a *lex specialis* (see *Ezelin v. France*, 26 April 1991, § 35, Series A no. 202, and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 91, ECHR 2015). The thrust of the applicants' complaints is that the authorities imposed various restrictions on holding of peaceful assemblies thereby preventing them from expressing their views *together with other demonstrators.* The Court therefore finds that the applicants' complaint should be examined under Article 11, taken alone and in conjunction with Article 14 (see *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 101, ECHR 2011 (extracts); *Galstyan v. Armenia*, no. 26986/03, §§ 95-96, 15 November 2007; and *Primov and Others v. Russia*, no. 17391/06, § 91, 12 June 2014).

364. That being said, the Court notes that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case. Indeed, the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention (see *Ezelin*, cited above, § 37; *Djavit An v. Turkey*, no. 20652/92, § 39, ECHR 2003-III; and *Barraco v. France*, no. 31684/05, § 29, 5 March 2009). In the sphere of political debate the guarantees of Articles 10 and 11 are often complementary, so Article 11, where appropriate, must be considered in the light of the Court's case-law on freedom of expression. The Court reiterates that the link between Article 10 and Article 11 is particularly relevant where the authorities have interfered with the right to freedom of peaceful assembly in reaction to the views held or statements made by participants in a demonstration or members of an association (see, for example, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 85, ECHR 2001-IX, and *Primov and Others*, cited above, § 92).

365. The Court will therefore examine the present case under Article 11, interpreted where appropriate in the light of Article 10, taken alone and in conjunction with Article 14.

A. Submissions by the parties

1. The applicants

366. The applicants submitted that an interference with the freedom of assembly did not need to amount to an outright ban, legal or *de facto*, but could consist in various other measures taken by the authorities (see *Singartiyski and Others v. Bulgaria*, no. 48284/07, § 43, 18 October 2011). The term "restrictions" in paragraph 2 of Article 11 should be interpreted as including measures taken before, during and after an assembly (see *Ezelin,* cited above, § 39). Although a requirement of prior notification did not as

such constitute an interference with the freedoms of expression and assembly, the situation was different where, as in Russia, the notification procedures were not limited to informing the authorities of the organisers' intention to hold an assembly, but allowed the authorities to impose restrictions on its location, time or manner of conduct. In Russia the organisers' right to hold a peaceful assembly was conditional on the authorities' approval of the chosen location, timing and manner of conduct. Failure to reach an agreement following the authorities' proposal to change the location, time or manner of conduct of a public event resulted in the organisers being prohibited from holding it. The domestic law gave the police powers to disperse public events which took place at a location or time or in a manner not approved by the authorities and to bring the organisers and participants to liability under Article 20.2 of the Administrative Offences Code. Prior restrictions imposed by the Russian authorities on the location, time or manner of conduct of a public assembly therefore constituted an interference with freedom of assembly (see *Berladir and Others v. Russia*, no. 34202/06, §§ 47-51, 10 July 2012).

367. In the applicants' opinion, the Public Events Act did not meet the Convention's "quality of law" requirements. In particular, the terms "a well-reasoned proposal for changing the location and/or time of the public event, or for amending its purposes, type or other arrangements" (see paragraph 228 above) and "the location and time agreed upon after consultation with competent regional or municipal authorities" (see paragraph 231 above) were not clearly defined, and gave the authorities wide discretion in amending the essential parameters of an assembly. Thus, the domestic law did not establish any criteria on the basis of which to assess whether the proposal for changing the location, time or other parameters of a public event was "well reasoned". Nor did it establish the criteria for assessing the suitability of the alternative locations proposed by the authorities.

368. The applicants further argued that Russian administrative and judicial practice interpreted the term "agreed upon" as "approved" or "authorised" by the competent authorities. The organisers had no right to hold a public event if its location and time had not been approved by the authorities. It followed that, although the domestic law formally established a notification procedure for public events, the prohibition on holding an event without the approval of the authorities, and the imposition of liability for the failure to comply with that prohibition, effectively turned it into an authorisation procedure.

369. The applicants referred to the 2012 report by the Russian Ombudsman which stated that the procedure for the approval of public events did not establish clearly the powers and obligations of the parties involved, thereby creating possibilities for abuse of the position of power by the authorities. The applicants stressed the importance of negotiation and

mediation to resolve disputes between the authorities and the organisers. Such negotiation and meditation procedures were however not provided by Russian law. In particular, Russian law did not provide for any mechanism to solve the disagreements between the authorities and the organisers as to the location, time and other parameters of a public event. As a rule, the authorities rejected any attempts at dialogue and turned down all objections or alternative proposals by the organisers, insisting that the public event should be held at the location and time and in the manner determined by the authorities. Thus, in some cases, the authorities had refused to approve an assembly even despite the organisers' active cooperation, such as agreeing to change the date or the location, in particular by proposing a number of alternative locations for their event (see paragraph 23, 57, 60, 62, 77, 79, 86, 95, 97, 112, 114 and 116 above). The organisers' refusal to accept the location proposed by the authorities resulted in a *de facto* prohibition of the event in question.

370. Relying on the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly (see paragraph 317 above), the applicants further submitted that restrictions on the location, time or manner of conduct of an assembly should not be imposed simply to pre-empt possible disorder or interferences with the rights of others. They should not undermine the very purpose of the assembly, for example by imposing a location that did not correspond to the assembly's purposes. According to the applicants, any demonstration in a public place inevitably caused a certain level of disruption to ordinary life, including disruption of traffic, and it was important for the public authorities to show a certain degree of tolerance towards peaceful gatherings. It was precisely the aim of the notification procedure to inform the authorities about the intended public event in advance so that they could take measures to regulate the traffic and any other measures necessary to avert safety and security risks. In sum, when imposing restrictions on the location, time, or manner of conduct of a public event the authorities should strictly apply the test of necessity and proportionality.

371. The Russian authorities, including the courts, never applied the necessity and proportionality tests when imposing restrictions on the location, time or manner of conduct of public events. Firstly, they had systematically refused to recognise that the location, time or manner of conduct were essential elements of public assemblies. The applicants argued, in particular, that the locations chosen by them had been crucially important, either because of their proximity to the target of their protest (for example, a town administration or the police headquarters) or because of their central location, which would allow them to reach a wide audience. They further argued that the alternative locations proposed by the authorities were unsuitable, because they were located either far from the State institutions targeted by the protest or on some occasions even in remote or isolated areas far from the town centre (see paragraphs 77, 110, 130, 138,

160, 180, 187 and 197 above). Those locations lacked visibility and would not have therefore permitted the applicants to draw attention to their message. The applicants disagreed with the Government's position that any location proposed by the authorities, no matter how remote or desolate, was suitable to ensure an effective exercise of the right to freedom of assembly and therefore had to be accepted by the organisers. In the applicants' opinion, a location would be suitable only if it permitted the assembly to achieve its aims. The locations proposed by the authorities had not satisfied that requirement. In some cases (see paragraphs 14, 22, 56 and 58 above) the authorities had not proposed any alternative locations at all, in breach of the domestic law.

372. Secondly, the domestic authorities had not advanced relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the applicants' assemblies. The reasons cited by the authorities had been mostly hypothetical and had not been based on a reasonable assessment of facts. For example, reference to public order considerations had been unconvincing in cases of public events that had involved low numbers of expected participants and had not therefore presented any danger to public order (see, for example, paragraph 131 above). Similarly, the authorities had not explained why it had been impossible to hold two events simultaneously at the same location, taking into account, for example, the number of participants, the size of the location, and the aims of the two events (see paragraphs 137, 139, 179, 186 and 196 above). In some cases the authorities' reference to circumstances allegedly preventing holding a public event at the location chosen by the applicants had turned out to be factually incorrect (see paragraphs 115, 153 and 202 above). In the applicants' opinion, this showed that the domestic authorities had sometimes resorted to pretexts to refuse approval, while the true aim of the restriction had been to hinder public expressions of criticism against the authorities. That aim could not be considered legitimate.

373. Thirdly, the facts of the present case showed that the authorities had not examined whether the legitimate aims of protecting public order and the rights of others could have been attained by other less restrictive means, in particular by employing the police to ensure public order, regulate traffic, prevent clashes, and so on.

374. The applicants concluded from the above that, by refusing to approve the locations chosen by the organisers, the authorities had failed to strike a fair balance between the rights of those wishing to exercise their freedom of assembly and the legitimate aim of protecting public order or the rights of others who could have been temporarily inconvenienced by the assembly.

375. The applicants further argued that under Russian law, if a public event was held at a location, time or in a manner not approved by the authorities that event could be dispersed by the police and its organisers and

the participants brought to liability for an administrative offence of a breach of the established procedure for the conduct of public events. Under Russian law the recourse to forced dispersal was not limited to cases of violent assemblies or assemblies presenting danger to public order or public safety; the mere fact of unlawfulness of a public event was sufficient to legitimise its dispersal under the domestic law. The Court had however already found that the fact that the assembly was unlawful did not justify an infringement of freedom of assembly (see *Oya Ataman v. Turkey*, no. 74552/01, § 39, ECHR 2006-XIII). It was important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention was not to be deprived of its substance (see *Malofeyeva v. Russia,* no. 36673/04, § 136, 30 May 2013). In the applicants' opinion, the mere failure to comply with the restrictions on the location, time or manner of conduct of a public event imposed by the authorities did not justify its dispersal. Such dispersal could be justified only when it was applied as a measure of last resort where there was an imminent threat of violence and where other reasonable measures to facilitate and protect the assembly from harm (for example, by quieting violent individuals) had proved ineffective (they referred to §§ 165 and 166 of the OSCE/ODIHR Guidelines, cited in paragraph 317 above). A blanket use of dispersals for non-violent assemblies by the Russian authorities might not be considered "necessary in a democratic society".

376. Thus, the present case gave ample examples of situations where public events had been dispersed by force and some of the participants arrested despite the fact that they had been peaceful and no breaches of public order had been committed by the participants (see paragraphs 46, 115, 131, 141 and 210 above). The only reason for the dispersals had been the fact that the location, time or manner of conduct had not been approved by the authorities. The applicants considered that the dispersal of their public events had not been "necessary in a democratic society".

377. The applicants also referred to other defects of Russian legislation governing notification of public events. In particular, they submitted that the blanket statutory ban on holding public events at certain locations, such as in the immediate vicinity of court buildings or detention facilities, was incompatible with Article 11 because it prevented the domestic authorities, and ultimately the courts, from carrying out a proportionality exercise on a case-by-case basis. Blanket bans required stronger justification than individual restrictions. The Government however had not provided "relevant" and "sufficient" reasons for its blanket ban on holding events at certain locations. In particular, the applicants argued that it was sometimes essential to hold a public event near a court building, for example if its aim was to promote the independence of the judiciary (see, for example, *Kakabadze and Others v. Georgia*, no. 1484/07, 2 October 2012), or to criticise perceived dysfunctions in the judicial system (see, for example,

Sergey Kuznetsov v. Russia, no. 10877/04, 23 October 2008). The Court had found that the judiciary, as with all other public institutions, could not be immune from criticism, however shocking and unacceptable certain views or words might appear (see *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003). It was also significant in this connection that Russian law did not clearly establish on the basis of which criteria the perimeter of the zones in which public events were prohibited was to be determined. According to the Public Events Act the perimeter of such zones was to be determined by a decision of the regional or municipal executive authorities issued in accordance with the land and urban planning legislation on the basis of the land or urban planning register. However, the land and urban planning legislation did not give any definition of the term "in the immediate vicinity of". As a result, the determination of the perimeter of such zones was left to the complete discretion of the regional and municipal authorities. In practice, the perimeter of the zones was defined by the local authorities as a certain radius of, for example, 25, 50, 100 or 150 m.

378. The applicants also noted that the 2012 amendments to the Public Events Act gave regional legislatures powers to establish a list of places where holding of public events was prohibited, in addition to the list established by the Public Events Act. Many regions had adopted regional laws prohibiting holding of public events at such places as airports, railway and bus stations, seaports, markets and fairs, territories in the vicinity of medical or educational institutions, and religious or military buildings. In some regions, public events were prohibited in town centres where regional legislative, executive and judicial bodies were situated. These prohibitions applied only to public events within the meaning of the Public Events Act (see paragraph 218 above), and did not concern such mass gatherings as military parades, religious ceremonies, fairs, sports events or public celebrations. The applicants concluded that Russian law gave a very wide discretion in establishing blanket bans on holding public events at certain locations.

379. The applicants further submitted that there were no legal provisions establishing how a time-limit for lodging a notification was calculated in cases where the deadline fell at a weekend or on a public holiday. As a result, it was impossible to hold public assemblies during or immediately after the long winter holidays in January, which lasted at least one business week. Thus, some of the applicants (application no. 4618/11, see paragraphs 29 to 37 above) had been unable to hold a meeting and a march on 19 January 2010 because the time-limit for lodging a notification had fallen in its entirety on the New Year and Christmas holidays, which ran from 1 to 10 January. Nonetheless, the date of 19 January was very important to the applicants, because they had planned to hold a meeting and a march on the anniversary of the murder of two social activists, to commemorate their tragic deaths. The authorities had not explained to the applicants on which

dates a notification had to be lodged in order to comply with the statutory time-limit and be approved by the authorities. The refusal to approve the meeting and the march had not pursued any legitimate aim. It had been justified by purely logistical reasons and had not been therefore "necessary in a democratic society". The applicants conceded that they had eventually been able to hold a "picket" on 19 January 2010 because the notification time-limit for a "picket" was shorter than that required for a meeting or a march. However, a "picket" was not an adequate substitute for a meeting and a march. A "picket" differed from a meeting or a march by its aims and scale, because it involved fewer participants, attracted fewer journalists, and in the end had less social impact.

380. Nor did Russian law allow spontaneous assemblies. One applicant (application no. 37038/13, see paragraphs 206 to 215 above) argued that he had participated in a spontaneous public protest against a draft law prohibiting adoption of Russian children by United States nationals. The date of the examination of the draft law by the State Duma had been announced two days before. Given the minimum three-day notification period, there was no time to submit a notification. Those people who wanted to protest against the adoption of that law had had no other choice but to hold solo "pickets", which did not require prior notification. Although the protesters had positioned themselves at a distance of more than fifty metres from each other, the authorities had regarded the solo "pickets" as a single public event, had stopped it, arrested the participants, and fined them for participating in a public event held without prior notification, in breach of Article 20.2 § 2 of the Code of Administrative Offences.

381. Furthermore, the applicants complained that there were no legal provisions establishing how the authorities' decision agreeing to a public event or proposing a change of its location, time or manner of conduct should be communicated to the organisers. Thus, in one case (application no. 51169/10, see paragraphs 13 to 20 above) the authorities had sent a decision approving a "picket" by post. The applicant concerned argued that owing to the frequent delays in delivery of correspondence by Russian post, the authorities should have known that there was little chance that he would receive the letter before the planned date of the event and would have enough time to prepare for it. That letter had indeed arrived at the local post office only on the day of the "picket". Even if he had received it, it would no longer have been possible to hold the event. The applicant submitted that he had given the authorities his mobile telephone number and the mobile telephone numbers of two other organisers. Accordingly, the authorities had had all the necessary information enabling them to contact the organisers and inform them of the approval of the "picket". Instead of contacting them by telephone however, the authorities had preferred to send the decision by post, knowing that the letter would not reach them in time. Despite the

formal approval of the "picket", the applicant had therefore been deprived of a practical and realistic opportunity to hold it.

382. Some of the applicants also submitted that they had been discriminated against in the exercise of their freedom of assembly on account of their sexual orientation or political views. In particular, some applicants (application no. 19700/11) argued that the wording of the judicial decisions in their case (see paragraph 72 above) had clearly demonstrated that the only reason for the authorities' refusals to approve the public events organised by them had been their sexual orientation. The discriminatory motivation of the authorities had been further confirmed by the fact that they had agreed to an anti-gay protest on the same day, 26 June 2010, and at the location which, when proposed by the applicants, had been rejected by the authorities as unsuitable.

383. Other applicants (applications nos. 47609/11, 59410/11, 16128/12, 16134/12, 20273/12, 51540/12 and 64243/12) submitted that the manner in which all their notifications had been dealt with in the period from 2009 to 2012, as compared with the manner of dealing with notifications submitted by pro-government organisations in the same period, had revealed a pattern of discrimination on grounds of political opinion. During the aforementioned period the authorities had refused to approve seventeen out of eighteen notifications of assemblies near the town administration lodged by the applicants, while pro-government organisations had been regularly allowed to assemble at that location, including for forty-five consecutive days in July and August 2011. The Government had not provided any evidence that pro-government organisations had received any proposals from the authorities for the location to be changed.

384. The applicants referred to several specific examples of discriminatory attitudes on the part of the authorities. Firstly, in the applicants' opinion the Town Administration's decision of 4 June 2009 (see paragraph 126 above) was based on discriminatory grounds. By denying them the right to hold an event entitled "Russia against Putin" on the ground that it might trigger a hostile reaction from Mr Putin's supporters, the authorities had treated them less favourably than the pro-government associations. Given that the authorities had not provided any convincing justification, the applicants argued that the authorities' real aim had been to prevent them from expressing their opposition views, which had amounted to discrimination on grounds of political views. Secondly, by allowing the pro-government Young Guard to lodge a single notification for a series of "pickets", while at the same time denying that opportunity to the applicants (see paragraphs 185 to 193 above), the domestic authorities had treated the pro-government organisation more favourably than the applicants, without any justification. Thirdly, the applicants had lodged their notifications for the meetings of 31 July and 31 August 2011 and 31 January 2012 at the earliest opportunity, immediately after the opening of the Town

Administration (see paragraphs 178, 185 and 195 above). On all three occasions the applicants had not seen anyone enter the Town Administration building and submit a notification ahead of them. The Government had not disputed that the only way to submit a notification at 9 a.m. was to enter the Administration building before its opening hours without an entry pass. They had not disputed either that, unlike the applicants, members of pro-government organisations had been allowed to enter the Administration building without complying with the above entry formalities, and had therefore been able to lodge their notifications before anyone else. As a result of the less favourable treatment they received compared with pro-government organisations, the applicants' chances of having their notifications approved had been reduced. That difference in treatment had no objective or reasonable justification.

385. Lastly, as regards the enclosing of the location of the meeting of 31 March 2011 (see paragraphs 171 to 175 above), the limiting of the number of participants, and the institution of bodily searches, the applicants argued that the safety measures applied on that occasion had been much more severe than any security measures applied to public events organised at the same location by the public authorities or by pro-government organisations during the following two months (in particular on 5 and 23 April and 31 May 2011). Those measures had severely affected the applicants' capacity to share and communicate their political views, while the pro-government organisations had fully enjoyed the opportunity to interact with the passers-by and disseminate their ideas without any hindrance caused by unnecessary security measures. The authorities had not provided any justification for that difference in treatment. There had been no evidence of any changes in the security situation. The authorities had never argued that the terrorist threat was higher on 31 March 2011 than on the days when the other public events had been held. The difference in treatment to which the applicants had been subjected had therefore amounted to discrimination on the grounds of political views.

386. In the applicants' opinion the above examples showed that they had been consistently treated differently on the basis of their political opinion and that that difference in treatment had not been based on an objective and reasonable justification.

387. In conclusion, the applicants stated that there was a systemic problem relating to freedom of assembly in Russia. The difficulties encountered by the applicants had not been isolated incidents; they originated in a widespread administrative practice resulting from malfunctions in the domestic legislation described above (compare *Broniowski v. Poland* [GC], no. 31443/96, § 189, ECHR 2004-V, and *Burdov v. Russia (no. 2)*, no. 33509/04, § 131, ECHR 2009). Indeed, the lack of clarity of the domestic law and the disproportionate and unnecessary restrictions provided by it, coupled with the absence of an effective remedy,

had made possible its arbitrary and discriminatory application. As a result, restrictions on the time, location or manner of conduct were systematically imposed on peaceful assemblies if the message conveyed by them did not please the authorities. The large number of applications pending before the Court demonstrated the recurrent and persistent nature of the problem, which affected large numbers of people from all Russian regions (compare *Ananyev and Others,* cited above, §§ 185 and 195). The amendments introduced in 2012 had further aggravated the situation, in particular by providing that all public events were to be held at specially designated locations, and that other locations could be used in exceptional circumstances only.

2. The Government

388. The Government submitted that the notification procedure established by Russian law did not encroach upon the essence of the right under Article 11 of the Convention, because its purpose was to allow the authorities to take reasonable and appropriate measures to protect public order, to guarantee the smooth conduct of a public event, and to reconcile the right to freedom of assembly on the one hand, and, on the other hand, the rights and lawful interests (including the freedom of movement) of others (see, for example, *Bukta and Others v. Hungary*, no. 25691/04, § 35, ECHR 2007-III, and *Éva Molnár v. Hungary*, no. 10346/05, § 37, 7 October 2008). The requirement to notify the authorities about a public event and to obtain their agreement on its location and time did not therefore interfere with freedom of assembly.

389. The Government further submitted that Russian legal provisions governing public events met the “quality of law” requirement of Articles 10 § 2 and 11 § 2. In particular, the Public Events Act set up a clear time-limit for submitting a notification (see paragraph 226 above). Since the June 2012 amendments to the Act citizens could also hold public events in specially designated locations without submitting a notification (see paragraph 245 above). It was therefore possible for a public event to be held even in those cases where the notification time-limit could not for some reason be complied with.

390. Furthermore, domestic law established clear time-limits within which the authorities could submit proposals for changing the location or time of the public event, or for amending its purposes, type or other arrangements (see paragraph 228 above). If no such proposals were received by the organiser within the established time-limit, the public event was deemed to be approved by default.

391. Russian law did not indeed establish any procedure for notifying approval of a public event or a proposal to change its location, time or manner of conduct to its organisers. Any notification method, including delivery by post, was therefore lawful and acceptable. According to the

applicable regulations, all letters sent to an addressee within the same town were to be delivered within two days. By sending their decision by post, the authorities could therefore reasonably believe that the organisers would be notified in time. The applicants' argument that it would no longer be possible to hold a public event if the authorities' approval was received with a delay was unconvincing. According to the legal provisions then in force, the organisers were entitled to start campaigning for the public event from the moment the notification was lodged. They could therefore inform potential participants about the location, time and aims of the event before receiving the authorities' approval.

392. The Government further submitted that Russian law did not confer on the organisers any right to have the location and time of their public event approved by the authorities. The assessment of the risks of breaches of public order or rights of others and of security threats was within the discretionary powers of competent authorities. Referring to the decision of 2 April 2009 by the Constitutional Court (see paragraphs 255 to 259 above), they argued that the Public Events Act required the executive to give weighty reasons for their proposals to change the location or time of a public event. Such reasons might include the need to preserve the normal, uninterrupted functioning of vital public utility or transport services, to protect public order or the safety of citizens, or other similar reasons. It was impossible, however, to make an exhaustive list of permissible reasons, as this would have the effect of unjustifiably restricting the executive's discretion. The authorities also had to propose another location and time compatible with the public event's purposes and allowing the participants to bring their message to their target audience. The organisers, in their turn, were also required to make an effort to reach an agreement with the executive. If it proved impossible to reach an agreement, the organisers were entitled to defend their rights and interests in court. The courts had competence to assess whether the executive's decision was lawful and well reasoned, and whether the restriction on freedom of assembly was proportionate.

393. The Government submitted that in the present case each of the authorities' proposals to change the location, time or manner of conduct of a public event had been based on relevant and sufficient reasons. In particular, the authorities had referred to traffic constraints and risk of road accidents, construction works, other public events or celebrations at the locations chosen by the applicants, possible inconvenience to other people in the area, risk of breaches of public order, and others. The restrictions imposed on the applicants' freedom of assembly had therefore pursued the legitimate aims of protecting public order and the rights of others. The authorities had proposed alternative locations or time-slots to the applicants. Accordingly, the applicants had been afforded an opportunity to express their views in another venue chosen by the public authority. Despite the requirements of

the national law, the organisers had not been cooperative and had refused, without any valid reason, to accept the authorities' proposals (see *Berladir and Others,* cited above, §§ 56 and 60). The applicants' arguments that the locations chosen by them were crucially important and the locations proposed by the authorities unsuitable had been unconvincing because the change of location could not as such restrict the freedom of assembly. The domestic courts had found the authorities' actions lawful and justified.

394. There was no reason to believe that any of the authorities' decisions had been motivated by discriminatory attitudes. In particular, as regards the allegations of discrimination on grounds of political opinion (applications nos. 47609/11, 59410/11, 16128/12, 16134/12, 20273/12, 51540/12 and 64243/12), the Government submitted that the location chosen by the applicants was very popular with all political parties and public associations. Given that simultaneous holding of several public events at the same location was prohibited, the authorities approved the public event which had been notified first. The authorities had always applied a chronological approach, and had never been guided by any discriminatory attitudes. It was however logical that bigger associations more often succeeded in organising public events. Most of the public associations adopted cooperative attitudes and accepted the authorities' proposals to change the locations of events. By contrast, the applicants almost never agreed to such proposals, under the pretext that the location near the Lenin monument was the only suitable location owing to its proximity to the Town Administration.

395. As regards the specific situations cited by the applicants, the Government argued that the security measures applied during the meeting of 31 March 2011 had been determined taking into account all relevant information about the current security situation available to the law-enforcement authorities. The enclosing of the location and the bodily searches of the participants had been justified by the high risk of terrorist acts. Such measures were often taken during mass events. As regards the alleged difference in treatment of the notifications of a series of "pickets", the Government submitted that the notification lodged by the applicants had concerned a series of separate "pickets", each of which required a separate notification submitted within the statutory time-limit. By contrast, the notification submitted by the Young Guard had concerned a single public event lasting many days. The fact that the Young Guard had been allowed to hold their series of "pickets" while the applicants' notification had been rejected did not disclose any evidence of discrimination on account of political views. Lastly, as regards the meeting of 31 January 2012, the applicants had lodged their notification at 9.25 a.m. on 16 January 2012, while Mr B. had lodged his notification at 9 a.m. the same day. The applicable procedures did not require the Town Administration to establish how the people wishing to lodge a notification had entered the Town

Administration building. The reasons why one notification had been lodged before another had not been therefore taken into account by the Town Administration when deciding which of the public events to approve. There was therefore no evidence of discrimination on the grounds of political views.

396. The Government also submitted that since States had the right to require a notification for assemblies, they should be able to apply sanctions to those who participated in assemblies that did not comply with that requirement. The impossibility of imposing such sanctions would render illusory the power of the State to require notification (see *Ziliberberg v. Moldova* (dec.), no. 61821/00, 4 May 2004). Thus, the Court had found that the dispersal of a demonstration on the ground that the notification requirement had not been complied with and the arrest, prosecution and conviction of its organisers and participants was compatible with Articles 10 and 11 (see *Éva Molnár,* cited above; *Rai and Evans v. the United Kingdom* (dec.), nos. 26258/07 and 26255/07, 17 November 2009; and *Berladir and Others*, cited above). The Government concluded from the above that it was justified to disperse an unlawful public event. The applicants in the present case had acted unlawfully by holding public events without the authorities' approval. Dispersals of their public events had therefore been lawful and justified. The penalties imposed on them in the administrative offence proceedings had not been severe and had been therefore proportionate to the legitimate aims of protecting public order and the rights of others.

397. The Government argued that the only situation where the dispersal of an assembly because of the absence of the requisite prior notice had been found to amount to a disproportionate restriction on freedom of peaceful assembly concerned a spontaneous demonstration when an immediate response to a current event was warranted (see *Bukta and Others,* cited above, § 36). They disputed that the event held by the applicant of application no. 37038/13 could be qualified as genuinely spontaneous. They conceded that the date of the examination of the draft law had indeed been announced two days before, making it impossible to submit a notification within the statutory time-limit. They however stressed that on that date the State Duma had examined the draft law at second reading, while three readings were necessary for a law to be adopted. There had been sufficient time to organise a public event in accordance with the procedure prescribed by law before the third and final reading of the draft law by the State Duma. The facts of the present case had not therefore disclosed special circumstances such as would warrant an immediate demonstration as the only adequate response. The applicant had been therefore lawfully fined for participating in a public event held without prior notification. The amount of the fine had been reasonable.

398. The Government further submitted that the Public Events Act set up a list of locations where holding of public events was prohibited (see paragraph 223 above). That prohibition was justified by the special legal regime of those locations and the need to ensure their security. In particular, referring to the decision of 29 May 2007 by the Constitutional Court (see paragraph 253 above), the Government argued that the aim of the prohibition on holding public events in the vicinity of court buildings was to protect the independence of the judiciary and to prevent pressure on judges. The restriction was therefore justified, and did not breach citizens' constitutional rights. The acknowledged importance of freedom of expression did not require the automatic creation of rights of entry to private property, or even necessarily to all publicly owned property, provided that interested parties had an alternative opportunity to exercise their freedom of expression in a meaningful manner (see *Appleby and Others v. the United Kingdom*, no. 44306/98, §§ 47 and 48, ECHR 2003-VI).

399. The Government argued that the Public Events Act clearly indicated the authorities which had competence to determine the perimeter of the zones in which holding of public events was prohibited and the legal provisions and documents on the basis of which such a perimeter was to be determined (see paragraph 225 above). The Constitutional Court had held in its decision of 17 July 2007 (see paragraph 254 above) that such decisions had to be objectively justified by the aim of ensuring the normal functioning of public utility services situated on the territories concerned. An arbitrary determination of the perimeter of the zones in which holding of public events was prohibited was therefore excluded.

400. Lastly, the Government drew the Court's attention to the amendments to the Public Events Act introduced on 8 June 2012, which had imposed an obligation on the regional authorities to designate suitable locations where public events could be held without prior notification (see paragraph 245 above). Those amendments had further reinforced the citizens' freedom of assembly.

B. The Court's assessment

1. Admissibility

401. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. *Merits*

(a) Applicability of Article 11 of the Convention

402. The Court reiterates that the right to freedom of assembly covers both private meetings and meetings in public places, whether static or in the form of a procession; in addition, it can be exercised by individual participants and by the persons organising the gathering. The guarantees of Article 11 therefore apply to all gatherings except those where the organisers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society (see *Kudrevičius and Others,* cited above, §§ 91 and 92).

403. It has not been disputed that Article 11 of the Convention is applicable to the facts of the present case. Indeed, all the public events at issue in the present case were intended to be, and actually were, peaceful. None of them were intended to incite violence or rejected the foundations of a democratic society.

(b) Existence of an interference

404. The Court reiterates that interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards (see *Ezelin*, cited above, § 39; *Kasparov and Others v. Russia*, no. 21613/07, § 84, 3 October 2013; *Primov and Others*, cited above, § 93; and *Nemtsov v. Russia*, no. 1774/11, § 73, 31 July 2014). For instance, a prior ban can have a chilling effect on those who may intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally (see *Kasparov and Others*, cited above, § 84, with further references).

405. The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in paragraph 2 of Article 11 (see *Sáska v. Hungary*, no. 58050/08, § 21, 27 November 2012). The Court stresses in this connection that the organisers' autonomy in determining the assembly's location, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its

target object and at a time when the message may have the strongest impact (see *Süleyman Çelebi and Others v. Turkey*, nos. 37273/10 and 17 others, § 109, 24 May 2016; see also, for the same approach, § 40 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012, cited in paragraph 313 above; point 4.2 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014, cited in paragraph 315 above; and point 3.5 and § 101 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission, cited in paragraph 317 above). Accordingly, in cases where the time and place of the assembly are crucial to the participants, an order to change the time or the place may constitute an interference with their freedom of assembly, as does a prohibition on speeches, slogans or banners (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, §§ 79-80 and 108-09; *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, no. 44079/98, § 103, 20 October 2005; and *Disk and Kesk v. Turkey*, no. 38676/08, § 31, 27 November 2012).

406. The Court has already found in a case against Russia that the refusal to approve the location or time of an assembly amounted to an interference with the right to freedom of assembly. It has noted that although Russian law did not require an authorisation for public gatherings, a public event could not occur lawfully if the event organiser had not accepted a public authority's proposal for another venue and/or timing for the event. If the organiser still proceeded with the event as initially planned, it could be dispersed and its participants arrested and convicted of administrative offences (see *Berladir and Others*, cited above, §§ 47-51).

407. In the present case the competent authorities refused to approve the location, time or manner of conduct of public events planned by the applicants, and proposed alternative locations, times or manner of conduct. The applicants, considering that the authorities' proposals did not answer the purpose of their assembly, either cancelled the event altogether or decided to hold it as initially planned despite the risk of dispersal, arrest and prosecution. Some of them were indeed arrested and convicted of administrative offences, following the dispersal of their assembly. In one case the applicant was arrested and fined for participating in a public event which had not been notified to the authorities. He claimed that there was no longer time to submit a notification within the time-limit established by law because of the last-minute announcement of the date of the parliamentary examination of the draft law against which he wished to protest.

408. The Court concludes that there has been an interference with the applicants' right to freedom of peaceful assembly.

409. Such an interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2, and is "necessary in a democratic society" for the achievement

of the aim or aims in question (see *Kudrevičius and Others,* cited above, § 102).

(c) Justification for the interference

(i) General principles

410. The Court reiterates that the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to those concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Hasan and Chaush*, cited above, § 84, and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I, with further references). Also, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to interfere with the rights guaranteed by the Convention (see *Liu v. Russia*, no. 42086/05, § 56, 6 December 2007; *Gülmez v. Turkey*, no. 16330/02, § 49, 20 May 2008; *Vlasov v. Russia*, no. 78146/01, § 125, 12 June 2008; and, *mutatis mutandis*, *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009).

411. For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush,* loc. cit., and *Maestri,* loc. cit., with further references).

412. The general principles concerning the necessity of an interference with freedom of assembly have recently been summarised in the case of *Kudrevičius and Others* (cited above) as follows:

“(α) General

142. The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered “necessary in a democratic society” the Contracting States enjoy a certain but not unlimited margin of appreciation (see *Barraco*, cited above, § 42). It is, in any event, for the Court to give a final ruling on the restriction’s compatibility with the Convention and this is to be done by assessing the circumstances of a particular case (see *Rufi Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, ECHR 2001-X, and *Galstyan*, cited above, § 114).

143. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a “legitimate aim”, whether it answered a “pressing social need” and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient” (see *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001; *Ashughyan v. Armenia*, no. 33268/03, § 89, 17 July 2008; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008; *Barraco*, cited above, § 42; and *Kasparov and Others*, cited above, § 86). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Rai and Evans*, decision cited above, and *Gün and Others*, cited above, § 75; see also *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 47, Reports 1998-I, and *Gerger v. Turkey* [GC], no. 24919/94, § 46, 8 July 1999).

144. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in paragraph 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other (see *Rufi Osmani and Others*, decision cited above; *Skiba*, decision cited above; *Fáber*, cited above, § 41; and *Taranenko*, cited above, § 65).

145. Freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 86). Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it (see *Güneri and Others v. Turkey*, nos. 42853/98, 43609/98 and 44291/98, § 76, 12 July 2005; *Sergey Kuznetsov*, cited above § 45; *Alekseyev*, cited above, § 80; *Fáber*, cited above, § 37; *Gün and Others*, cited above, § 70; and *Taranenko*, cited above, § 67).

146. The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued (see *Öztürk v. Turkey* [GC], no. 22479/93, § 70, ECHR 1999-VI; *Rufi Osmani and Others*, decision cited above; and *Gün and Others*, cited above, § 82). Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification (see *Rai and Evans*, decision cited above). A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (see *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011), and notably to deprivation of liberty (see *Gün and Others*, cited above, § 83). Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (see *Taranenko*, cited above, § 87).

(β) The requirement of prior authorisation

147. It is not, in principle, contrary to the spirit of Article 11 if, for reasons of public order and national security a High Contracting Party requires that the holding of meetings be subject to authorisation (see *Oya Ataman*, cited above, § 37*; Bukta and Others v. Hungary*, no. 25691/04, § 35, ECHR 2007-III; *Balçık and Others v. Turkey*, no. 25/02, § 49, 29 November 2007; *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, § 42, 18 December 2007; *Éva Molnár*, cited above, § 35; *Karatepe and Others v. Turkey*, nos. 33112/04, 36110/04, 40190/04, 41469/04 and 41471/04, § 46, 7 April 2009; *Skiba*, decision cited above; *Çelik v. Turkey* (no. 3), no. 36487/07, § 90, 15 November 2012; and *Gün and Others*, cited above, §§ 73 and 80). Indeed, the Court has previously considered that notification, and even authorisation procedures, for a public event do not normally encroach upon the essence of the right under Article 11 of the Convention as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering (see *Sergey Kuznetsov*, cited above, § 42, and *Rai and Evans*, decision cited above). Organisers of public gatherings should abide by the rules governing that process by complying with the regulations in force (see *Primov and Others*, cited above, § 117).

148. Prior notification serves not only the aim of reconciling the right of assembly with the rights and lawful interests (including the freedom of movement) of others, but also the aim of preventing disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures appears to be common practice in member States when a public demonstration is to be organised (see *Éva Molnár*, cited above, § 37, and *Berladir and Others v. Russia*, no. 34202/06, § 42, 10 July 2012). However, regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly as protected by the Convention (see *Samüt Karabulut v. Turkey*, no. 16999/04, § 35, 27 January 2009, and *Berladir and Others*, cited above, § 39).

149. Since States have the right to require authorisation, they must be able to impose sanctions on those who participate in demonstrations that do not comply with such requirement (see *Ziliberberg*, decision cited above; *Rai and Evans*, decision cited above; *Berladir and Others*, cited above, § 41; and *Primov and Others*, cited above, § 118). At the same time, the freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act on such an occasion (see *Ezelin*, cited above, § 53; *Galstyan*, cited above, § 115; and *Barraco*, cited above, § 44). This is true also when the demonstration results in damage or other disorder (see *Taranenko*, cited above, § 88).

150. An unlawful situation, such as the staging of a demonstration without prior authorisation, does not necessarily justify an interference with a person's right to freedom of assembly (see *Cisse v. France*, no. 51346/99, § 50, ECHR 2002-III; *Oya Ataman*, cited above, § 39; *Barraco*, cited above, § 45; and *Skiba*, decision cited above). While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public demonstrations, since they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself (see *Primov and Others*, cited above, § 118). In particular, where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Oya Ataman*, cited above,

§ 42; *Bukta and Others*, cited above, § 37; *Nurettin Aldemir and Others*, cited above, § 46; *Ashughyan*, cited above, § 90; *Éva Molnár*, cited above, § 36; *Barraco*, cited above, § 43; *Berladir and Others*, cited above, § 38; *Fáber*, cited above, § 47; *İzci v. Turkey*, no. 42606/05, § 89, 23 July 2013; and *Kasparov and Others*, cited above, § 91).

151. The absence of prior authorisation and the ensuing "unlawfulness" of the action do not give carte blanche to the authorities; they are still restricted by the proportionality requirement of Article 11. Thus, it should be established why the demonstration was not authorised in the first place, what the public interest at stake was, and what risks were represented by the demonstration. The method used by the police for discouraging the protesters, containing them in a particular place or dispersing the demonstration is also an important factor in assessing the proportionality of the interference (see *Primov and Others*, cited above, § 119). Thus, the use by the police of pepper spray to disperse an authorised demonstration was found to be disproportionate, even though the Court acknowledged that the event could have disrupted the flow of traffic (see *Oya Ataman*, cited above, §§ 38-44).

152. In the case of *Bukta and Others* (cited above, §§ 35 and 36), the Court held that in special circumstances where a spontaneous demonstration might be justified, for example in response to a political event, to disperse that demonstration solely because of the absence of the requisite prior notice, without any illegal conduct on the part of the participants, might amount to a disproportionate restriction on their freedom of peaceful assembly.

153. The Court has also clarified that the principle established in the case of *Bukta and Others* cannot be extended to the point where the absence of prior notification of a spontaneous demonstration can never be a legitimate basis for crowd dispersal. The right to hold spontaneous demonstrations may override the obligation to give prior notification of public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete (see *Éva Molnár*, cited above, §§ 37-38, and *Skiba*, decision cited above).

154. Furthermore, it should be pointed out that even a lawfully authorised demonstration may be dispersed, for example when it turns into a riot (see *Primov and Others*, cited above, § 137).

(γ) Demonstrations and disruption to ordinary life

155. Any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic (see *Barraco*, cited above, § 43; *Disk and Kesk v. Turkey*, no. 38676/08, § 29, 27 November 2012; and *İzci*, cited above, § 89). This fact in itself does not justify an interference with the right to freedom of assembly (see *Berladir and Others*, cited above, § 38, and *Gün and Others*, cited above, § 74), as it is important for the public authorities to show a certain degree of tolerance (see *Ashughyan*, cited above, § 90). The appropriate "degree of tolerance" cannot be defined *in abstracto*: the Court must look at the particular circumstances of the case and particularly at the extent of the "disruption to ordinary life" (see *Primov and Others*, cited above, § 145). This being so, it is important for associations and others organising demonstrations, as actors in the democratic process, to abide by the rules governing that process by complying with the regulations in force (see *Oya Ataman*, cited above, § 38; *Balçık and Others*, cited above, § 49; *Éva Molnár*, cited above, § 41; *Barraco*, cited above, § 44; and *Skiba*, decision cited above).

156. The intentional failure by the organisers to abide by these rules and the structuring of a demonstration, or of part of it, in such a way as to cause disruption to ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances constitutes conduct which cannot enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters. On the contrary, the Court considers that the Contracting States enjoy a wide margin of appreciation in their assessment of the necessity in taking measures to restrict such conduct (see paragraph 97 above; see also, mutatis mutandis, *Drieman and Others*, decision cited above).

157. Restrictions on freedom of peaceful assembly in public places may serve to protect the rights of others with a view to preventing disorder and maintaining an orderly flow of traffic (see *Éva Molnár*, cited above, § 34). Since overcrowding during a public event is fraught with danger, it is not uncommon for State authorities in various countries to impose restrictions on the location, date, time, form or manner of conduct of a planned public gathering (see *Primov and Others*, cited above, § 130).

(δ) The State's positive obligations under Article 11 of the Convention

158. States must not only refrain from applying unreasonable indirect restrictions upon the right to assemble peacefully but also safeguard that right. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected (see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 37, 27 February 2007, and *Nemtsov*, cited above, § 72), there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Djavit An*, cited above, § 57; *Oya Ataman*, cited above, § 36; and *Gün and Others*, cited above, § 72).

159. The authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens (see *Oya Ataman*, cited above, § 35; *Makhmoudov v. Russia*, no. 35082/04, §§ 63-65, 26 July 2007; *Skiba*, decision cited above; and *Gün and Others*, cited above, § 69). However, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see *Protopapa v. Turkey*, no. 16084/90, § 108, 24 February 2009). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved (see *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 34, Series A no. 139, and *Fáber*, cited above, § 39).

160. In particular, the Court has stressed the importance of taking preventive security measures such as, for example, ensuring the presence of first-aid services at the site of demonstrations, in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature (*Oya Ataman*, cited above, § 39)."

(ii) Application to the present case

413. It has not been disputed by the parties that the refusal to approve the location, time or manner of conduct of the public events planned by the applicants, the dispersal of public events, the arrest of the organisers and participants and their prosecution for administrative offences had a basis in the domestic law, namely the Public Events Act and the Administrative Offences Code.

414. The applicants, however, complain that these provisions confer unduly wide discretion on the authorities in terms of proposing changes of location, time or manner of conduct of public events, and applying security measures during public events, dispersing public events in the event of the organisers' refusal to comply with the authorities' proposals, and arresting the organisers and participants of such events. They also complain of the general ban on holding public events at certain locations, of the alleged inflexibility of the statutory time-limit for notification of a public event, of the lack of a clear procedure for informing the organisers of the authorities' decision approving a public event, or refusing such approval and proposing a change of the location, time or manner of conduct. The Court will examine each of the above aspects in turn.

415. As a preliminary remark, the Court notes that it has already criticised the very similar legal framework existing in Azerbaijan as lacking foreseeability and precision and, as a result, allowing public assemblies to be arbitrarily banned or dispersed (see *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, § 55, 15 October 2015).

(α) The authorities' proposals to change the location, time or manner of conduct of the applicants' public events

416. All the applicants complained that the domestic law conferred an unduly wide discretion on the executive authorities to propose a change of the location, time or manner of conduct of public events which was not restricted by the requirements of proportionality or necessity in a democratic society or by effective judicial control.

417. The Court notes at the outset that the judgment of the national authorities in any particular case that there are valid reasons against holding a public assembly at a specific location is one which the Court is not well equipped to challenge (see *Berladir and Others*, cited above, § 59). It would have difficulties assessing locations in terms of their size, security, traffic density, closeness to the target audience, and so on. Indeed, a multitude of local factors are implicated in managing the locations, time, and manner of conduct of public assemblies. Hence, by contrast to content-based restrictions on freedom of assembly which should be subjected to the most serious scrutiny by this Court (see *Primov and Others*, cited above, § 135), in the sphere of restrictions on the location, time or manner of conduct of an assembly the Contracting States must be allowed a wider margin of appreciation. That margin of appreciation, although wide, is not unlimited and goes hand in hand with European supervision by the Court, whose task is to give a final ruling on whether the imposed restrictions were compatible with Article 10 or 11.

418. The Court reiterates that where a wide margin of appreciation is afforded to the national authorities, the procedural safeguards available to the individual will be especially material in determining whether the

respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by the Convention (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I; see also *Buckley v. the United Kingdom*, 25 September 1996, §§ 74-76, *Reports of Judgments and Decisions* 1996-IV; and *Liu v. Russia (no. 2)*, no. 29157/09, §§ 85 and 86, 26 July 2011).

419. The Public Events Act empowers the competent regional or municipal authorities to make "well-reasoned" ("*обоснованные*") proposals to the organisers for changes in the location, time or manner of conduct of a public event (see paragraph 228 above). However, the relevant law does not provide for any substantive criteria on the basis of which to determine whether the executive authorities' proposals are "well reasoned". In its common meaning "well reasoned" means no more than giving "valid" or "sound" reasons. There is no requirement that the proposal be considered "necessary in a democratic society", and therefore no requirement of any assessment of the proportionality of the measure.

420. It is true that the Constitutional Court has held that the authorities must give "weighty" reasons for such proposals and identified certain general principles by which they are to be guided when using this power. On the other hand, the Constitutional Court has also stressed that the executive's discretion in the matter may not be unjustifiably restricted (see paragraphs 256 and 257 above). In the Court's view, the safeguards provided by the Constitutional Court have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.

421. The present case demonstrates that the authorities refer to a wide variety of reasons to justify their proposals for a change to the location, time or manner of conduct of a public event. The reasons most frequently cited in the present case were: other public events scheduled at the same location and time (for more details see paragraph 422 below); risk of various disruptions to ordinary life, such as interference with vehicle or pedestrian traffic, with the normal functioning of public authorities or public utility services, with maintenance works in the vicinity, or more generally with the everyday life of residents, such as, for example, obstruction of access to parks or shops (for more details see paragraph 423 below); safety or national security considerations, such as for example a risk of terrorist attacks (for more details see paragraph 424 below); or negative attitudes of others to the views expressed at the public event and the consequent risk of violence (for more details see paragraphs 425 below). Although these reasons were undoubtedly relevant, the authorities did not have to show that they were sufficient to justify a restriction of the freedom of assembly, that

is to say that such a restriction was necessary in a democratic society and, in particular, proportionate to any legitimate aim pursued.

422. An analysis of the present case reveals, for example, that a mere reference to the fact that another public event had earlier been notified to take place at the location chosen by the organisers was considered by the authorities to be a valid reason for a proposal to change the location (see paragraphs 14, 22, 56, 58, 63, 76, 85, 87, 129, 135, 137, 149, 151, 179, 186, 196, and 205 above). The authorities did not examine whether, in view of the size of the venue and the expected number of participants, it might be feasible to hold the two events simultaneously. Nor did they ascertain whether there was a risk of clashes between the two events and, where such a risk existed, whether it could be managed by taking appropriate security measures. The Court considers that the refusal to approve the venue of a public assembly solely on the basis that it is due to take place at the same time and at the same location as another public event and in the absence of a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers, is a disproportionate interference with the freedom of assembly (see, in the same vein, § 30 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012, cited in paragraph 313 above; point 2.3 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014, cited in paragraph 315 above; and point 4.3 and § 122 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission, cited in paragraph 317 above).

423. Further, in a large number of cases the reasons advanced by the domestic authorities for their refusals to approve the location, time or manner of conduct of a public event related to different types of disruptions of ordinary life, such as, for example, interference with, or hindrance to, traffic (see paragraphs 40, 41, 56, 58, 76, 78, 85, 98, 135, 159 above), utility services (see paragraph 41 above), commercial activities (see paragraphs 41 and 80 above), everyday life of citizens (see paragraphs 8 and 58 above), and maintenance works (see paragraphs 56, 78, 87, 109, 111, 113 above). The Court reiterates in this connection that any assembly in a public place is likely to cause a certain level of disruption to ordinary life, and that this in itself does not justify an interference with the right to freedom of assembly, as it is important for the public authorities to show a certain degree of tolerance (see *Kudrevičius and Others,* §§ 155-57, cited in paragraph 412 above). In none of the present cases did the authorities argue that the organisers intentionally structured their public event in such a way as to cause disruption to ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances. Nor is there any evidence that the authorities considered ways of minimising disruption to ordinary life, for example by organising a temporary diversion of traffic on alternative

routes or by taking other similar measures, and at the same time accommodating the organisers' legitimate interest in assembling within sight and sound of their target audience.

424. Proposals to change the location, time or manner of conduct of an assembly were also quite often motivated by a reference to safety or national security considerations, such as a risk of terrorist attacks (see paragraphs 8, 94, 96, 98 above). It is significant that in their decisions the executive authorities did not rely on any evidence corroborating the existence of such risks or assess whether they were serious enough to justify a restriction of the freedom of assembly. Moreover, the present case shows that a reference to safety and national security risks was sometimes used selectively to restrict anti-government public assemblies, while during the same period of time pro-government assemblies and public festivities were allowed to proceed unhindered, the alleged terrorist risk notwithstanding (see paragraphs 105 and 171 to 175 above; see also, for the same reasoning, *Makhmudov v. Russia*, no. 35082/04, §§ 69-73, 26 July 2007).

425. As regards the reference to negative attitudes of others to the views expressed at the assembly and the consequent risk of violence also advanced by the Russian authorities on one occasion (see paragraph 126 above), the Court reiterates that the mere existence of a risk of clashes between the demonstrators and their opponents is insufficient as a justification for banning the event. If every possibility of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion. Participants in peaceful assemblies must be able to hold demonstrations without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully (*Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, §§ 32 and 34, Series A no. 139; *Barankevich v. Russia*, no. 10519/03, §§ 31 and 32, 26 July 2007; and *Fáber v. Hungary*, no. 40721/08, §§ 38-40, 24 July 2012). The Court therefore considers that a reference to negative attitudes of others towards the views expressed at a public assembly cannot serve as a justification either for a refusal to approve such an assembly or for a decision to banish it from the city centre to the outskirts. There is no indication that an evaluation of the resources necessary for neutralising the threat of clashes was part of the domestic authorities' decision-making process. Instead of considering measures which could have allowed the applicants' public event to proceed without disturbance, the authorities chose to relocate it out of the town centre to a remote and deserted location (see paragraphs 126 to 130 above).

426. Further, the Court observes that the Public Events Act does not require that the location or time proposed by the authorities as an alternative

to the location chosen by the organisers should be such that the message which they seek to convey is still capable of being communicated. Although the Constitutional Court held that the authorities should propose a location and time compatible with the assembly's purposes (see paragraph 257 above), an analysis of the present case reveals that the Constitutional Court's instructions were not complied with in practice. Indeed, on many occasions the authorities proposed locations outside the city centre, far from any government officers and with limited passage of people, that is not within sight and sound of the target audiences (see, for example, paragraphs 77, 86, 110, 130, 138, 160, 180, 187 and 197 above). The Court considers that the practice whereby the authorities allow an assembly to take place, but only at a location which is not within sight and sound of its target audience and where its impact will be muted, is incompatible with the requirements of Article 11 of the Convention (see, in the same vein, § 40 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012, cited in paragraph 313 above; point 4.2 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014, cited in paragraph 315 above; and point 3.5 and §§ 45 and 101 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission, cited in paragraph 317 above).

427. In view of the foregoing, the Court finds that in practice the competent authorities empowered to propose changes of location, time or manner of conduct of public events did not attach sufficient importance to freedom of assembly. The balance appears to be set in favour of protection of other interests, such as rights and freedoms of non-participants or avoidance of even minor disturbances to everyday life.

428. The Court takes note of the Government's argument that the exercise of the executive's powers to propose a change of the location, time or manner of conduct of a public event is subject to judicial review (see paragraph 392 above). It has however already found that at the material time the Russian legal system did not permit to obtain judicial review of the authorities' refusal to approve the location, time or manner of conduct of a public event before its planned date (see paragraphs 347 to 354 above). Moreover, the scope of judicial review was limited to examining the lawfulness of the proposal to change the location, time or manner of conduct of a public event, and did not include any assessment of its "necessity" and "proportionality" (see paragraphs 356 to 358 above). Indeed, the breadth of the executive's discretion is such that it is likely to be difficult if not impossible to prove that any proposal to change the location, time or manner of conduct of a public event is unlawful or not "well-reasoned" (see, for similar reasoning *Gillan and Quinton v. the United Kingdom*, no. 4158/05, §§ 80 and 86, ECHR 2010 (extracts)).

429. In the Court's view, there is a clear risk of arbitrariness in the grant of such broad and uncircumscribed discretion to the executive authorities. There is a risk that such a widely framed power could be misused against organisers of, and participants in, public assemblies in breach of Article 10 and/or 11 of the Convention (see, for similar reasoning, *Gillan and Quinton*, cited above, § 85). Indeed, the present case shows that the above powers are often used in an arbitrary and discriminatory way. It provides ample examples of situations where opposition groups, human rights defenders or gay rights activists were not allowed to assemble at a central location and were required to go to the outskirts of town on the ground that they might hinder traffic, interfere with the everyday life of citizens, or present a security risk, and were dispersed and arrested if they refused to comply, while pro-government public events were allowed to take place at the same location, traffic, everyday-life disturbances and security risks notwithstanding. The most telling example is the case of gay rights activists who proposed ten different locations in the town centre, all of which were rejected by the town authorities on various grounds, while an anti-gay public event was approved to take place at one of those same locations on the same day (see paragraphs 53 to 64 above). Another conspicuous example is the case of the supporters of the opposition "Strategy-31" movement who, between June 2009 and August 2012, lodged at least eighteen notifications of public events in the centre of Rostov-on-Don, only one of which was approved by the town authorities, while government supporters did not have any apparent difficulty in having their public events at the same locations approved by the town authorities (see paragraphs 121 to 205 above).

430. To sum up, the Court is mindful that in cases arising from individual applications its task is not normally to review the relevant law and practice *in abstracto*, but to examine the manner in which that legislation was applied to the applicant in the particular circumstances (see, among many others, *Sahin v. Germany* [GC], no. 30943/96, § 87, ECHR 2003-VIII, and *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015). The facts of the present case demonstrate the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive. Accordingly, the domestic legal provisions governing the power to propose a change of location, time or manner of conduct of public events do not meet the Convention "quality of law" requirements described in paragraphs 410 and 411 above.

(β) Prohibition of holding public events at certain locations

431. The applicants in one case (no. 19700/11) in addition complained that they had not been allowed to hold a public event at a location chosen by them because of a blanket statutory ban on holding public events in the vicinity of court buildings.

432. The Court observes that Russian law prohibits holding public events at certain locations, such as, among others, in the immediate vicinity of court buildings, detention facilities, the residences of the President of the Russian Federation, dangerous production facilities, railway lines and oil, gas or petroleum pipelines (see paragraph 223 above). Since 2012 the regional legislatures may designate other locations where public events are prohibited if a public event there can interfere with the normal functioning of public utility services, transport, social or communications services, or hinder the passage of pedestrians or vehicles or the access of citizens to residential buildings, transport or social facilities (see paragraphs 247 above). The Public Events Act does not define the term "in the immediate vicinity"; what is considered to be "in the immediate vicinity" is determined for each location by the local executive authorities.

433. The Court notes at the outset that the relevant comparative material demonstrates that only a minority of European countries establish statutory restrictions on holding public assemblies at certain locations which are normally publicly accessible, and none provides for a general ban on public assemblies near court buildings (see paragraphs 321 and 322 above). The UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association, the OSCE and the Venice Commission all recommend that blanket bans on assemblies in specific locations, such as in the vicinity of government institutions or courts, be avoided, since they tend to be over-inclusive and disproportionate, because no consideration can be given to the specific circumstances of each case (see § 39 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012, cited in paragraph 313 above; point 4.2 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014, cited in paragraph 315 above; and §§ 43 and 102 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission, cited in paragraph 317 above).

434. The Court reiterates 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 (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 106, ECHR 2013 (extracts)). However, a general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. In this connection, the authority must take into account the effect of a ban on demonstrations which do not by themselves constitute a danger to public order. Only if the disadvantage of such demonstrations being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope

in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of Article 11 § 2 of the Convention (see *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980).

435. According to the Government, the purpose of the ban on holding public events in the vicinity of the buildings and facilities mentioned in the Public Events Act is to ensure the security of these sensitive locations (see paragraph 398 above). The same purpose has been advanced by the Constitutional Court (see paragraph 254 above). The Court accepts that this purpose is relevant and in particular that the restriction in question pursues the aims of ensuring public safety and preventing disorder within the meaning of the second paragraph of Article 11.

436. Turning now to the proportionality of the general ban, the Court notes that there is no evidence that it has been the subject of an exacting parliamentary and judicial review. Neither the Government, nor the Constitutional Court in its ruling of 17 July 2007 (see paragraph 254 above), explained what security considerations justified it, except by vaguely referring to the "special legal regime" of the locations mentioned in the Public Events Act. Nor did the Constitutional Court explain why a general ban was a more feasible means of achieving the legitimate aim than a provision allowing case-by-case examination and targeting only those assemblies which presented a danger of disorder; or why the general ban could not be relaxed without a risk of abuse, significant uncertainty, discrimination or arbitrariness (compare *Animal Defenders International,* cited above, §§ 108 and 114-16). The Court is therefore not persuaded that the Government provided a convincing justification for the general ban in question.

437. Further, by contrast to the *Christians against Racism and Fascism* case (cited above), which concerned the prohibition for two months of all public processions in London, the restriction at issue in the present case is not limited in time, and applies to the entire territory of Russia and to all types of public events. Moreover, wide discretion is afforded to the local executive authorities in determining what is considered to be "in the immediate vicinity" of the locations specified in the Public Events Act. The general ban at issue is therefore not specifically circumscribed to address a precise risk to public safety or a precise risk of disorder with the minimum impairment of the right of assembly (compare *Animal Defenders International,* cited above, § 117).

438. Accordingly, the Court considers the Government have not convincingly shown that the general ban on holding public events at certain locations is proportionate to the legitimate aim of ensuring public safety and preventing disorder.

439. Relying on the Constitutional Court's ruling of 29 May 2007, the Government submitted, alternatively, that the prohibition on assemblies in

the immediate vicinity of court buildings in addition pursued the aim of protecting the independence of the judiciary and of preventing pressure on judges (see paragraph 253, and 398 above). The Court reiterates that exceptions to freedoms of association and assembly must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive (see *Sidiropoulos and Others v. Greece*, 10 July 1998, § 39, *Reports* 1998-IV, and *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, § 132, 14 June 2007). It notes that, unlike the second paragraph of Article 10, paragraph 2 of Article 11 does not allow restrictions whose aim is maintaining the authority and impartiality of the judiciary. The Court has already found, in the context of public assemblies in front of court buildings, that the judiciary cannot be immune from criticism, and that very strong reasons are required for justifying restrictions on assemblies the purpose of which is to criticise alleged dysfunctions of the judicial system (see *Sergey Kuznetsov*, cited above, § 47, and *Kakabadze and Others*, cited above, § 88).

440. That being said, the Court accepts that a ban on holding public events in the immediate vicinity of court buildings may serve a legitimate interest, namely that of protecting the judicial process in a specific case from outside influence, and thereby protecting the rights of others, namely the parties to judicial proceedings. The ban should however be tailored narrowly to achieve that interest. In Russia the prohibition on holding public events in the vicinity of court buildings is formulated in absolute terms. It is not limited to public assemblies held with the intention of obstructing or impeding the administration of justice. It prohibits all assemblies, including those unrelated to any judicial proceedings. For example, the applicants were not allowed to hold a Gay Pride event in the town centre, on the ground that the location they chose was in the vicinity of the Constitutional Court building (see paragraph 56 above). It is significant that the event at issue was unrelated to any case being examined by the Constitutional Court; its purpose was to mark the anniversary of the start of the gay rights movement back in the 1960s and to condemn homophobia and discrimination against homosexuals.

441. Taking into account the absolute nature of the ban, coupled with the local executive authorities' wide discretion in determining what is considered to be "in the immediate vicinity" of court buildings (see paragraph 437 above), the Court concludes that the general ban on holding public events in the vicinity of court buildings is so broadly drawn that it cannot be accepted as compatible with Article 11 § 2.

442. In view of the above, the Court considers that the Government have not adduced relevant and sufficient reasons to justify this general ban on holding public events at certain locations. The refusal (in application no. 19700/11) to approve the applicants' public event by sole reference to this ban, without any consideration to the specific circumstances of the case,

could not therefore be regarded as being necessary within the meaning of Article 11 § 2 of the Convention.

(γ) Operation of the time-limit for notification of public events

443. The Court will now turn to some applicants' complaints about the operation of the time-limit for notification of public events (applications nos. 4618/11 and 37038/13). Under Russian law the organisers have to notify the competent authorities no earlier than fifteen days and no later than ten days before the intended public event (no later than three days in case of a "picket"); they have no right to hold a public event if the notification was lodged outside these time-limits (see paragraphs 226 and 231 above). The above-mentioned applicants argued that the inflexibility of this time-limit deprived them of the possibility of holding a public event at a date chosen by them.

444. The Court reiterates in this connection that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such meetings. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. Freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless (see *Bączkowski and Others*, cited above, § 82).

445. It further reiterates that the purpose of the notification procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of assemblies. States have a wide margin of appreciation in establishing the modalities of the operation of the notification procedure, including notification time-limits, provided this is formulated with sufficient precision and does not represent a hidden obstacle to freedom of peaceful assembly as protected by the Convention (see *Kudrevičius and Others,* §§ 147 and 48, cited in paragraph 412 above).

446. The Court has already found in the case of *Primov and Others* that the legal provisions governing the time-limit for notifying a public event were not formulated with sufficient precision. In particular, it did not clarify whether the obligation to notify the authorities no earlier than fifteen days and no later than ten days before the public event meant that within that time-slot the notification was to be *sent* by the organisers or *received* by the administration. This ambiguity could be misleading for the organisers and result in the notification being rejected as lodged out of time (see *Primov and Others*, cited above, §§ 124 and 125).

447. Further, it emerges from the comparative law materials that there are varied approaches among the member States to time-limits for lodging a notification. It is however significant that only a small minority of European countries establish a time-limit before which a notification is considered premature and that in a majority of the States the time-limit after which a

notification can no longer be lodged is two or three days before the assembly (see paragraph 320 above). The characteristic features of the Russian notification system are that it provides for a very short time-slot during which it is possible to lodge a notification, and that the time-limit after which a notification can no longer be lodged is considerably further removed from the date of the assembly than in a majority of other States. The Court will examine the two characteristic features, and in particular how they were applied in the present case, in turn.

- Situations where the entire notification time-limit fell on a public holiday (application no. 4618/11)

448. As regards the first characteristic, the Court notes that the time-slot during which it is possible to lodge a notification is six days: no earlier than fifteen days and no later than ten days before the intended public event, except for "pickets", which may be notified three days before the planned date. The Constitutional Court found that that provision was incompatible with the Russian Constitution in so far as it prevented a public event from being held in those cases where the entire time-limit for notification fell on a public holiday (see paragraphs 270 to 275 above). Indeed, the inflexible application of this provision makes it impossible to hold a public event other than a "picket" during a number of days after the New Year and Christmas holidays in January each year.

449. It is true that it is usually possible to organise a "picket" during that period. However, the Court notes that a "picket" is a static public event employing only visual means of expression, such as banners or placards. Participants are prohibited from using sound amplifying equipment, which makes it impossible to make speeches. The only reason to justify why during several days in January each year the only type of public event available to organisers should be a static and silent one appears to be the operation of the statutory time-limit for lodging notifications. The Court reiterates that while rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public events, their enforcement cannot become an end in itself (see *Primov and Others*, cited above, § 118). It considers, in particular, that exceptions should be available where, in the circumstances of the case, a rigid application of notification time-limits can lead to an unnecessary interference with freedom of assembly.

450. The present case provides a telling illustration of an automatic and inflexible application of the notification time-limit. As a result of the particularity of the legal framework described above, the applicants were unable to hold a march and a meeting to commemorate the anniversary of the murders of a well-known human rights lawyer and a journalist on 19 January (see paragraphs 30 to 37 above). The Court accepts that the date of the event was crucial for its participants. Although the applicants were

able to hold a “picket” on that day, they had to content themselves with a static event instead of a march, and could not express themselves through public speeches. The authorities did not adduce relevant and sufficient reasons for the restrictions imposed on their freedom of assembly (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, §§ 108 and 109).

- *Spontaneous assemblies (application no. 37038/13)*

451. Turning now to the second particularity of the Russian notification system, the Court notes the unusually long, as compared to other States, ten-day period between the end of the notification time-limit and the planned date of the assembly. The only exception for this rule is a “picket”, which may be notified three days before the planned date.

452. The Court notes that the Public Events Act makes no allowance for special circumstances, where an immediate response to a current event is warranted in the form of a spontaneous assembly (see *Kudrevičius and Others,* §§ 152 and 153, cited in paragraph 412 above). Indeed, in such cases the delay caused by compliance with the ten-day notification time-limit may render that response obsolete. The possibility of holding a “picket” does not always constitute an adequate substitute solution. Firstly, as the Court has already found, a “picket” is a particular type of assembly, allowing for limited methods of expression only. Secondly, it must be notified three days before, which in some cases requiring an immediate reaction may be too long a delay.

453. Thus, the applicant in case no. 37038/13 wanted to protest against a draft law prohibiting the adoption of Russian children by US citizens. The date of the parliamentary examination of the draft law was announced two days before, making it impossible for the protesters to comply even with the shorter three-day notification time-limit for “pickets”, let alone with the normal ten-day time-limit for other types of public event (see paragraphs 206 to 215 above). The failure to inform the public sufficiently in advance of the date of the parliamentary examination of the draft law therefore left the protesters with the option of either foregoing their right to peaceful assembly altogether, or of exercising it in defiance of the administrative requirements.

454. The Court further notes that when convicting the applicant of participating in a public event held without prior notification, the domestic courts limited their assessment to establishing that the applicant had taken part in a “picket” which had not been notified within the statutory time-limit. They had not examined whether there were special circumstances calling for an immediate response to a current event in the form of a spontaneous assembly and justifying a derogation from the strict application of the notification time-limits. Indeed, the domestic legal provisions governing notification time-limits are formulated in rigid terms,

admitting of no exceptions and leaving no room for a balancing exercise conforming with the criteria laid down in the Court's case-law under Article 11 of the Convention.

455. In these circumstances, in the absence of a proper judicial review of these issues by the domestic authorities, the Court cannot speculate as to whether or not the facts of the instant case disclosed such special circumstances to which the only adequate response was an immediate assembly. The Government's argument that an immediate response was not warranted in the circumstances of the case (see paragraph 397 above) was not mentioned in any form in the domestic decisions and was cited for the first time in the proceedings before this Court.

- *Conclusion in respect of the application of the notification time-limit*

456. To sum up, the Government did not give any reasons why it should have been "necessary in a democratic society" to establish inflexible time-limits for notification of public events and not to make any exceptions to their application to take account of situations where it is impossible to comply with the time-limit, for example because of public holidays, in cases of justified spontaneous assemblies or in other cases (see, as an example, *Primov and Others*, cited above, §§ 121-28). In the light of the foregoing, the Court considers that the automatic and inflexible application of the notification time-limits in applications nos. 4618/11 and 37038/13 without any regard to the specific circumstances of each case amounted to an interference which was not justified under Article 11 § 2 of the Convention.

(δ) Procedure for informing the organisers about the authorities' decision in response to a notification of a public event

457. The Court will further examine the complaint raised by one of the applicants (application no. 51169/10) that he had been prevented from holding a public event because of the delay in communicating the authorities' decision approving it. It notes in this connection that Russian law does not establish any procedure for informing the organisers of the authorities' decision approving a public event or refusing such approval and proposing a change of the location, time or manner of conduct. As held by the Russian courts, the authorities have wide discretion to choose the means of communication with the organisers (see paragraph 18 above). It is not the Court's task to indicate the preferred ways of communicating with the organisers; the domestic authorities, which have the advantage of possessing direct knowledge of the situation, are better placed to assess the situation in the light of practical circumstances, such as the reliability or otherwise of the local postal service, the location of the parties, and the availability of technical equipment. However, given the very tight time-frame of the notification procedure, the Court considers that whatever the chosen method of communication, it should ensure that the organisers

are informed of the authorities' decision reasonably far in advance of the planned event, in such a way as to guarantee the right to freedom of assembly which is practical and effective, not theoretical or illusory. Indeed, if the organisers are not informed in timely fashion of the authorities' approval or the proposal to change the location, time or manner of conduct of the planned event, the organisers may have insufficient time to announce to the participants the approved time and location of the event, and may even have to abandon it (see, as an example of such a situation, *Primov and Others*, cited above, § 146).

458. Turning to the circumstances of the present case, the Court notes that the applicant was prevented from holding a public event because he had not received in time the authorities' decision approving one of the time-slots among those proposed by him (see paragraphs 15 to 20 above). The authorities chose to send the decision by post – which the Government themselves described as notoriously overburdened and prone to delivery delays (see paragraph 337 above) – three days before the planned event, thereby failing in their obligation to keep the organiser informed of the progress of his notification in timely fashion and in such a way as to guarantee the right to freedom of assembly which was practical and effective, not theoretical or illusory.

(ε) Dispersals of public events and arrests of the participants

459. Some applicants further complained about the dispersal of their events, and three applicants also complained about their arrests for participating in an unlawful public event (applications nos. 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 51540/12, and 37038/13).

460. The Court notes in this connection that the representative of the competent regional or municipal authorities present at the public event is empowered to order termination of that event if, among others, the organisers or participants have committed unlawful acts or have breached the procedure for the conduct of public events – for example by not submitting a notification or by failing to comply with the elements indicated in the notification or agreed upon after a proposal from the authorities to change its location, time or manner of conduct. If the event is not terminated as ordered, it may be dispersed by the police (see paragraphs 238 and 239 above). The police also have wide powers to escort to the police station or administratively arrest any person suspected of an administrative offence, including the offence of breaching the established procedure for the conduct of public events (see paragraphs 308 to 310 above).

461. It is significant that any breach of the procedure for the conduct of public events or any unlawful act by a participant, no matter how small or innocuous, may serve as a ground for the authorities' decision to terminate a public event. Similarly, the participants may be escorted to the police station

or administratively arrested in connection with an administrative offence of breaching the established procedure for the conduct of public events, which is widely formulated and covers any breach of procedure, even a minor one (see paragraphs 298 and 302 above). In particular, Russian law permits dispersal of a public event and arrest of the participants for the sole reason that no notification has been lodged or that the event is taking place at a location or time that has not been approved by the authorities, regardless of the existence of any disorder or of any real nuisance to the rights of others. The facts of the present case, as well as of other cases examined previously, show that the authorities display zero tolerance towards unlawful assemblies, even if they are peaceful, involve few participants and create only minimal or no disruption of ordinary life (see paragraphs 46, 91, 101, 115, 141, 142 and 210 above, see also *Malofeyeva*, cited above, §§ 137 and 140; *Kasparov and Others*, cited above, § 95; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 65, 4 December 2014; and *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, §§ 136, 171,175 and 179-83, 26 April 2016). In all the above cases the domestic authorities made no attempt to verify the extent of the risks posed by the protestors, or to verify whether it had been necessary to disperse them. Nor was there any noticeable assessment of whether the applicants' escort to the police station or administrative arrest had been necessary in the circumstances, as required by the Constitutional Court in its judgments of 16 June 2009 and 17 January 2012 (see paragraphs 311 and 312 above). Moreover, the dispersal and arrest of participants occurred within a very short time after the beginning of the assembly, showing the authorities' impatience to end the unlawful public event before the protesters had had sufficient time to express their position of protest and to draw the attention of the public to their concerns (see, for similar reasoning, *Oya Ataman*, cited above, § 41, and *Samüt Karabulut v. Turkey*, no. 16999/04, § 37, 27 January 2009; see also, by contrast, *Éva Molnár*, cited above, §§ 42 and 43, and *Nosov and Others v. Russia*, nos. 9117/04 and 10441/04, §§ 58-60, 20 February 2014).

462. The Court takes note of the Government's argument that since States had the right to require notification of assemblies they should be able to sanction those who participated in assemblies that did not comply with the requirement by dispersing or arresting them and by convicting them of administrative offences. It reiterates in this connection that enforcement of rules governing public assemblies, although important, cannot become an end in itself. In particular, where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Kudrevičius and Others,* §§ 150 and 151, cited in paragraph 412 above). The Court considers that the authorities could have attained

their goals by allowing the applicants to complete their protest and perhaps imposing a reasonable fine on the spot or later on (see *Novikova and Others,* cited above, § 175; see also *Taranenko v. Russia*, no. 19554/05, §§ 75 and 95, 15 May 2014 on the chilling effect that a disproportionately severe sanction may have on the sanctioned person and other persons taking part in protest actions).

463. In view of the above considerations, the Court finds that by ending the applicants' protests and taking some of them to the police station, the authorities failed to show the requisite degree of tolerance, in breach of the requirements of Article 11 § 2 of the Convention (as set out in the case of *Kudrevičius and Others,* §§ 150 and 151, cited in paragraph 412 above).

(ζ) Security measures taken by the police during public events

464. Lastly, three applicants (application no. 20273/12) also complained about unusually strict security measures taken during a meeting organised by them and which had allegedly impeded their ability to communicate their message to the public.

465. The Court reiterates that the domestic authorities have a positive obligation to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens. They have a wide margin of appreciation in the choice of the means to be used (see *Kudrevičius and Others,* §§ 158-60, cited in paragraph 412 above). That being said, the Court has already found that unusually long security checks of participants that had resulted in delaying a rally amounted to an unjustified interference with the applicants' freedom of assembly (see *Singartiyski and Others*, cited above, § 42). Thus, applying security measures in the course of a public assembly is, on one hand, a part of the authorities' positive obligations to ensure the peaceful conduct of the assembly and the safety of all citizens, but, on the other hand, it also constitutes a restriction on the exercise of the right to freedom of assembly (see *Frumkin v. Russia*, no. 74568/12, § 102, 5 January 2016).

466. Among the security measures available to the authorities policing public assemblies in Russia are searches of participants and their belongings at the entry to the public event (see paragraph 236 above), which logically leads to cordoning or fencing off the location to prevent the entry of those who have not yet been searched or who refuse to be searched. This provision is formulated in general terms and gives no indication of the circumstances in which the police may use the power conferred on them. In particular, there is no requirement that the security measures in question be considered "necessary in a democratic society", and therefore no requirement for any assessment of the proportionality of the measure. In the Court's view, there is a risk of arbitrariness in the grant of such a broad discretion to the police (see, for similar reasoning, *Singartiyski and Others,*

cited above, § 45; and, *mutatis mutandis*, *Gillan and Quinton,* cited above, §§ 80 and 85).

467. The facts of the present case illustrate how the police powers are used in practice. The police fenced off the location of an approved public event with metal barriers, parked buses along the barriers, diverted all passers-by to alternative roads, searched all the participants before letting them enter the fenced-off location, and closed the entry as soon as the number of participants reached the number indicated in the notification, that is fifty people (see paragraph 174 above). The Court agrees with the applicants that the combination of the above measures resulted in creating a shielded enclosure where a small group of people were allowed to express their protest surrounded by the police and hidden from public view. The participants' ability to communicate the message which they sought to convey was thereby seriously undermined and the impact of the assembly was significantly muted.

468. The Court observes that the only justification cited by the domestic authorities for the invasive security measures described above was a vague reference to possible terrorist or extremist acts. No evidence corroborating the reality and seriousness of the security risk referred to by the authorities or the necessity of reinforced security measures at the material time was produced or examined in the domestic judicial proceedings.

469. Examining the circumstances of the present case as a whole, the Court perceives strong and concordant indications militating against the authorities' allegation that public security considerations were the true reason for the security measures in question. If the authorities had indeed had sufficiently serious and credible information about a security risk, that information would have required reinforced security measures during all public events held at the time. However, as submitted by the applicant and not contradicted by the Government, no security measures were taken by the police during other public events held at the same period of time, including at an official public event held at the same location only five days after the applicants' meeting (see paragraphs 175 and 385 above). These elements – the lack of evidence capable of substantiating the reality and seriousness of the alleged security risk, viewed in the light of the fact that security measures had been adopted solely during the applicants' opposition meeting, whereas no such measures had been taken during the official public events – lead the Court to the conclusion that, in adopting the exceptionally drastic security measures during the applicants' meeting, the domestic authorities acted in an arbitrary and discriminatory manner (see, for similar reasoning, *Makhmudov,* cited above, §§ 69-73).

470. Lastly, as regards the police's decision to stop admitting new participants to the applicants' meeting, the Court observes that the Public Events Act permits the authorities to stop admission only if the maximum capacity of the venue is exceeded (see paragraph 235 above). That ground

was not however relied on in the domestic proceedings or in the proceedings before the Court. As claimed by the applicants, and not contested by the Government, the venue in question was able to accommodate up to 800 people. It is clear from the photographs submitted by the applicants that the venue was far from crowded and there was enough space to accommodate more participants. Indeed, the only ground relied on to stop admission of new participants was the fact that the number of participants mentioned in the notification had been reached. Neither the Government nor the domestic courts relied on any legal provision allowing the authorities to stop admitting participants to a public event on that ground. The court is therefore not convinced that that measure was in accordance with the law.

(η) Conclusion

471. The Court finds that in each application the authorities did not give relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the applicants' public events. These proposals were based on legal provisions which did not provide for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive and which did not therefore meet the Convention "quality of law" requirements.

472. The Court finds, in addition, that the refusal to approve the public event in application no. 19700/11 by reference to the general ban on holding public events in the vicinity of court buildings could not be regarded as being "necessary in a democratic society" because the general ban lacked convincing justification and was so broadly drawn that it could not be accepted as compatible with Article 11 § 2.

473. Also, the automatic and inflexible application of the time-limits for notification of public events in applications nos. 4618/11 and 37038/13 - without taking into account that it was impossible to comply with the time-limit because of public holidays or spontaneous nature of the event respectively – was not justified under Article 11 § 2.

474. Further, in application no. 51169/10 the authorities failed in their obligation to ensure that the official decision taken in response to a notification reached the applicants reasonably in advance of the planned event, in such a way as to guarantee the right to freedom of assembly which was practical and effective, not theoretical or illusory.

475. By dispersing the applicants' public events and by arresting three of them in applications nos. 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 51540/12 and 37038/13, the authorities failed to show the requisite degree of tolerance towards peaceful, albeit unlawful, assemblies, in breach of the requirements of Article 11 § 2.

476. Lastly, in adopting the exceptionally drastic security measures during the public event in application no. 20273/12, the domestic authorities acted in an arbitrary and discriminatory manner.

477. In view of the above considerations, the Court finds that the interferences with the applicants' freedom of assembly were based on legal provisions which did not meet the Convention's "quality of law" requirements, and were moreover not "necessary in a democratic society". There has therefore been a violation of Article 11 of the Convention interpreted in the light of Article 10 of the Convention in each application.

478. Having regard to this finding, and in the light of the reasoning that has led to this conclusion (see, in particular, paragraphs 424, 429, 430 and 469 above), the Court considers that it is not necessary to examine separately the applicants' complaint under Article 14 of the Convention taken in conjunction with Articles 10 and 11.

IV. ALLEGED VIOLATIONS OF ARTICLE 5 § 1 OF THE CONVENTION

479. Three of the applicants complained that their arrest had been arbitrary and unlawful. They relied on Article 5 § 1, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

480. The Court notes that this complaint, raised by two applicants in applications nos. 47609/11 and 51540/12 and by the applicant in application no. 37038/13, is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Submissions by the parties*

(a) Applications no. 47609/11 Yelizarov v. Russia and no. 51540/12 Batyy v. Russia

481. Two applicants (Mr Yelizarov and Mr Batyy) submitted that the domestic authorities had never explained why it had been impossible to draw up a report on the administrative offence on the spot without escorting them to the police station. They had not been violent. No violent or otherwise dangerous incidents had occurred during the public event, which was entirely peaceful. They were therefore escorted to the police station in breach of the requirements of Article 27.2 of the Code of Administrative Offences (see paragraph 309 above).

482. Nor had the authorities demonstrated the existence of any exceptional circumstances justifying the applicants' administrative arrest under Article 27.3 of the Code of Administrative Offences (see paragraph 310 above). In particular, they had not shown that the arrest had been necessary for the prompt and proper examination of the case or to secure the enforcement of any penalty to be imposed, as required by that Article, or proportionate to the purposes provided by the Constitution and the Convention, as required by the Constitutional Court in its judgment of 16 June 2009 (see paragraph 311 above). There had been nothing "exceptional" in the applicants' situation to justify their administrative arrest and overnight detention at the police station. They had been charged with a non-violent offence, and there had been no risk of absconding or interfering with the proceedings. The authorities had not explained why their situation was different from that of other participants in the same event who had not been arrested. The fact that the applicants were eventually sentenced to relatively small fines showed that their detention pending trial was manifestly disproportionate to the gravity of the imputed offence.

483. The Government submitted that Mr Yelizarov's and Mr Batyy's arrest had been lawful. They had breached the established procedure for the conduct of public events and had disobeyed a lawful order by the police. They had been escorted to the police station and arrested for the purpose of stopping the above administrative offences in accordance with Articles 27.1, 27.2 and 27.3 of the Code of Administrative Offences (see paragraphs 308 to 310 above). In particular, they had been charged with an administrative offence punishable by up to fifteen days' administrative detention and could therefore be lawfully arrested pending the administrative offence proceedings for up to forty-eight hours.

(b) Application no. 37038/13 Tarasov v. Russia

484. The applicant submitted that his detention had not been recorded. The police had not made an administrative arrest report. Nor had they mentioned in the report of the administrative offence that he had been escorted to the police station. His arrest had therefore been unlawful. Moreover, given that he had not committed any offence, his arrest had not had any legitimate purpose under Article 5 § 1.

485. The Government submitted that the applicant had been escorted to the police station and then administratively arrested for the legitimate purpose of drawing up a report on the administrative offence. While Russian law did not establish a maximum length of time for escort to a police station, administrative arrest was limited to three hours. That requirement had been respected in the applicant's case, as his administrative arrest had not exceeded three hours: from 10.30 a.m. to 1.20 p.m. All procedural requirements prescribed by law had therefore been respected.

2. The Court's assessment

486. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent individuals from being deprived of their liberty in an arbitrary fashion. Furthermore, the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports* 1997-IV).

487. It has not been disputed that Mr Yelizarov and Mr Batyy were deprived of their liberty within the meaning of Article 5 § 1 of the Convention from 6.45 p.m. on 31 October to 10.20 a.m. on 1 November 2010 (see paragraph 142 above). As regards Mr Tarasov, the time he was initially put into the police van is disputed by the parties. It is however clear from the documents in the case file that he was deprived of his liberty at least from 10 a.m. until 1.20 p.m. on 19 December 2012 (see paragraphs 210 to 212 above).

488. The Court observes that Mr Tarasov was first escorted to the police station in accordance with Article 27.2 of the Code of Administrative Offences (see paragraph 309 above) and then, once at the police station, administratively arrested in accordance with Article 27.3 of the Code of Administrative Offences (see paragraph 310 above). There is no evidence in

the case file that the escorting procedure under Article 27.2 was applied to Mr Yelizarov or Mr Batyy. It follows from the available documents that they were administratively arrested in accordance with Article 27.3.

489. As regards the escorting procedure, the police report stated that Mr Tarasov had been escorted to the police station for the purpose of drawing up an administrative offence report. Article 27.2 of the Code of Administrative Offences provides that a suspected offender could be escorted to a police station for the purpose of drawing up an administrative offence report only if such a report could not be drawn up at the place where the offence had been discovered. The Government have not argued that in the applicant's case this was impossible, and no obstacles to drawing up the report on the spot may be discerned from the documents in the case file (see, for similar reasoning, *Navalnyy and Yashin,* cited above, §§ 68 and 93).

490. As regards Mr Tarasov's, Mr Yelizarov's and Mr Batyy's administrative arrest, neither the Government nor any other domestic authorities have provided any justification as required by Article 27.3 of the Code, namely that it was an "exceptional case" or that it was "necessary for the prompt and proper examination of the administrative case and to secure the enforcement of any penalty to be imposed". In the absence of any explicit reasons given by the authorities for arresting the applicants, the Court considers that their administrative arrest was unlawful (see, for similar reasoning, *Frumkin*, cited above, § 150).

491. For these reasons the Court is not satisfied that the escorting of Mr Tarasov to the police station and Mr Tarasov's, Mr Yelizarov's and Mr Batyy's administrative arrest complied with Russian law so as to be "lawful" within the meaning of Article 5 § 1.

492. It follows that there has been a violation of Article 5 § 1 in respect of Mr Yelizarov, Mr Batyy and Mr Tarasov.

V. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

A. Application no. 31040/11 Ponomarev and Others v. Russia

493. The applicants complained that the quashing of the judgment of 23 September 2010 by way of supervisory review had violated their "right to court" and that the supervisory-review judgment of 12 November 2010 had not been pronounced publicly. They relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

1. Admissibility

494. The Court has on several occasions already found that Article 6 was applicable under its civil head to domestic proceedings concerning the rights to freedom of assembly or association (see, for example, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, §§ 34-36, ECHR 2000-X; *Kuznetsov and Others v. Russia*, no. 184/02, §§ 79-85, 11 January 2007; and *Sakellaropoulos v. Greece* (dec.), no. 38110/08, 6 January 2011). It does not see any reason to depart from that finding in the present case.

495. The Court further notes that the applicants' complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Submissions by the parties

496. The applicants submitted that the quashing of the judgment in their favour by way of a supervisory-review procedure had violated their "right to court" guaranteed by Article 6 § 1 of the Convention. There had been no fundamental defect in the proceedings. The fact that the Presidium disagreed with the assessment made by the lower courts had not been, in itself, an exceptional circumstance warranting the quashing of a binding and enforceable judgment and reopening of the proceedings.

497. The applicants further submitted that the reasoned judgment of 12 November 2010 had not been pronounced publicly. At the end of the hearing only the operative part had been read out by the bailiffs. The reasoned judgment had not been read out publicly and had been sent to the applicants by post. It had not been published on the Moscow City Court's official website or made publicly available in any other form.

498. The Government conceded that, in accordance with the Court's established case-law, the quashing of a binding and enforceable judgment by way of supervisory-review proceedings could constitute a violation of an applicant's "right to court" guaranteed by Article 6 § 1 of the Convention. However, the Court had found that in certain cases the quashing of a binding and enforceable judicial decision could be justified for correction of fundamental defects and when made necessary by circumstances of a substantial and compelling character (see *Protsenko v. Russia*, no. 13151/04, §§ 25-34, 31 July 2008, and *Tishkevich v. Russia*, no. 2202/05, §§ 25 and 26, 4 December 2008). In the present case, the quashing of the judgment of 23 September 2010 had been justified for correction of a clear misbalance between private and public interests.

499. As regards the public pronouncement of 12 November 2010, the Government submitted that the applicants had been notified of the date of

the hearing and had attended. The judgment had been pronounced publicly in the courtroom. There was no information about the applicants' presence in the courtroom at that moment.

(b) The Court's assessment

500. The Court reiterates that for the sake of legal certainty, a principle which is enshrined in Article 6, final judgments should in principle be left intact. The principle of legal certainty insists that no party is entitled to seek reopening of proceedings merely for the purpose of a rehearing and a fresh decision in the case. Higher courts' power to quash or alter binding and enforceable judicial decisions should be exercised for correction of fundamental defects. The mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, §§ 51 and 52, ECHR 2003-IX, and *Kot v. Russia*, no. 20887/03, §§ 23 and 24, 18 January 2007).

501. The Court further reiterates that it has frequently found violations of the principle of legal certainty and of the right to a court in supervisory-review proceedings, both before 2003, as governed by the 1964 Code of Civil Procedure, and from 2003 to 2008, as governed by the 2002 Code of Civil Procedure (see, among many other authorities, *Ryabykh*, cited above, §§ 51–56; *Volkova v. Russia*, no. 48758/99, §§ 34-36, 5 April 2005; *Roseltrans v. Russia*, no. 60974/00, §§ 27 and 28, 21 July 2005; *Kot*, cited above, §§ 21-30; *Bodrov v. Russia*, no. 17472/04, §§ 29-32, 12 February 2009; and *Lenchenkov and Others v. Russia*, nos. 16076/06, 42096/06, 44466/06 and 25182/07, §§ 20-24, 21 October 2010).

502. As regards the supervisory-review procedure under the Code of Civil Procedure in force from 2008 to 2012, the Court has found that, despite certain amendments introduced in 2008, there remained many of the defects identified in the previous versions of that supervisory-review procedure (see *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009). The Court has however recently held that, despite these defects, the possibility cannot be excluded that the operation of the amended supervisory-review procedure in practice could, under certain circumstances, be consonant with the requirements of Article 6 of the Convention. The Court considered that the issue to be addressed by it was not whether the amended 2008 supervisory-review procedure was compatible as such with the Convention, but whether the procedure, as applied in the circumstances of particular cases, resulted in a violation of the requirement of legal certainty (see *Trapeznikov and Others v. Russia*, nos. 5623/09, 12460/09, 33656/09 and 20758/10, §§ 34 and 35, 5 April 2016).

503. Turning to the circumstances of the present case (see paragraphs 49 to 51 above) the Court notes that the supervisory-review application was

lodged by a party to the proceedings and initiated within the statutory time-limit and after they had availed themselves of an appeal before a second-instance court. The Court, however, is not persuaded that these elements are of crucial importance for its analysis (see, among many others, *Kot*, cited above, §§ 12-13 and 28).

504. The Court further notes that the judgment of 23 September 2010 in the applicants' favour was set aside on the ground that the City Court had incorrectly established the facts of the case. The Court reiterates that the incorrect application of domestic law or establishment of the facts do not on their own constitute a fundamental defect within the meaning of its case-law, and do not justify a departure from the principle of legal certainty (see, amongst many other authorities, *Luchkina v. Russia*, no. 3548/04, § 19, 10 April 2008).

505. Having regard to these considerations, the Court finds that, by granting the Moscow Government's request to set aside the judgment of 23 September 2010, the Presidium of the Moscow City Court infringed the principle of legal certainty and the applicants' "right to court" under Article 6 § 1 of the Convention. There has accordingly been a violation of that Article.

506. In view of that finding, it is not necessary to examine separately the applicants' complaint that the supervisory-review judgment was not pronounced publicly.

B. Application no. 37038/13 Tarasov v. Russia

507. The applicant complained that he had been convicted by courts which were not "established by law". He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

508. The applicant complained that the charges against him, which he argued to be criminal within the meaning of Article 6, had been examined by a justice of the peace instead of by a district court as provided by the domestic law (see paragraph 307 above). His case had not therefore been examined by a tribunal established by law. The applicant conceded that he had not raised this issue before the first-instance court or on appeal. He argued however that the domestic courts, which were not bound by the parties' arguments, should have examined the jurisdiction issue of their own motion.

509. The Government submitted, firstly, that the applicant had not raised the jurisdiction issue before the first-instance or appeal courts. He had not therefore exhausted domestic remedies. Secondly, the Government submitted that Article 6 was not applicable to the contested proceedings,

because the applicant had been charged with an administrative rather than a criminal offence.

510. The Court notes that the applicant did not raise the issue of the justice of the peace's lack of jurisdiction to examine his case, either before the justice of the peace herself or on appeal. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

511. Lastly, the Court has examined the other complaints submitted by the applicants and, having regard to all the material in its possession and in so far as the complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the applications must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

512. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

513. All applicants except one (Mr Lashmankin) claimed each between 5,000 and 60,000 euros (EUR) in respect of non-pecuniary damage. One applicant (Mr Tarasov) also claimed 20,000 Russian roubles (RUB, about EUR 450) in respect of pecuniary damage, representing the fine he had paid.

514. The Government submitted that the claims for non-pecuniary damage were excessive. As regards the claim for pecuniary damage, they submitted that the fine had been lawfully imposed on Mr Tarasov for an administrative offence.

515. The Court considers that there is a direct causal link between the violation of Article 11 found and the fine Mr Tarasov had paid following his conviction for the administrative offence (see, for similar reasoning, *Novikova and Others,* cited above, § 232). The Court therefore awards Mr Tarasov EUR 450 in respect of pecuniary damage, plus any tax that may be chargeable.

516. The Court observes that it has found violations of Articles 11 and 13 in respect of all the applicants. It has also found violations of

Article 5 in respect of Mr Yelisarov, Mr Batyy and Mr Tarasov. Lastly, it has found a violation of Article 6 in respect of Mr Pononarev, Mr Ikhlov and Mr Udaltsov. Having regard to the nature of the violations found in respect of each applicant and to the principle *ne ultra petitum,* the Court awards the following amounts in respect of non-pecuniary damage, plus any tax that may be chargeable:

Mr Nepomnyashiy: EUR 7,500;
Mr Ponomarev: EUR 7,500;
Mr Ikhlov: EUR 7,500;
Mr Udaltsov: EUR 7,500;
Ms Yefremenkova: EUR 5,000;
Mr Milkov: EUR 7,500;
Mr Gavrikov: EUR 7,500;
Mr Sheremetyev: EUR 7,500;
Mr Kosinov: EUR 7,500;
Mr Labudin: EUR 7,500;
Mr Khayrullin: EUR 7,500;
Mr Grigoryev: EUR 7,500;
Mr Gorbunov: EUR 7,500;
Mr Zhidenkov: EUR 5,000;
Mr Zuyev: EUR 5,000;
Ms Maryasina: EUR 5,000;
Mr Feldman: EUR 5,000;
Mr Yelizarov: EUR 10,000;
Mr Nagibin: EUR 7,500;
Ms Moshiyan: EUR 7,500;
Mr Batyy: EUR 10,000;
Mr Tarasov: EUR 10,000.

B. Costs and expenses

517. Mr Ponomorev, Mr Ikhlov and Mr Udaltsov claimed EUR 4,000 for their representation by Mr Shukhardin before the domestic courts and the Court. They asked for the award to be paid directly to Mr Shukhardin's bank account. The Government submitted that the claims were unsubstantiated, because no legal fee agreement or payment receipts were presented by the applicants to confirm that the costs had really been incurred.

518. Relying on a legal fee agreement and the lawyer's time-sheets, Mr Gavrikov claimed EUR 7,930 for representation by Mr Bartenev. The Government submitted that the amount claimed was excessive.

519. Relying on bills and invoices, Mr Nagibin, Ms Moshiyan, Mr Batyy and Mr Yelizarov claimed RUB 73,535 for translation fees, 1,313.84 pounds sterling for proofreading fees, and RUB 2,776 for postal expenses.

The Government submitted that the claims were excessive. Moreover, the translation and proofreading invoices were addressed to the applicants' representative's law firm rather than to the applicants themselves.

520. Relying on legal fee agreements and invoices, Mr Tarasov claimed EUR 315 for legal representation in the domestic proceedings, EUR 8,500 for legal representation before the Court, and EUR 32 for postal expenses. The applicant asked that his legal fees for representation before the Court be paid directly into the bank account of his representative Mr Terekhov. The Government submitted that the amounts claimed were excessive, that the claim for legal fees incurred in the domestic proceedings was unrelated to the present case, and that the postal bills did not mention the addressee.

521. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. As regards the Government's argument that Mr Ponomorev, Mr Ikhlov, and Mr Udaltsov had not produced a legal fee agreement between them and their representative Mr Shukhardin, the Court has already found in a similar situation that, given that Russian legislation provides that a contract on consulting services may be concluded in an oral form (Article 153 read in conjunction with Article 779 of the Civil Code of the Russian Federation), and irrespective of the fact that the applicant had not yet paid the legal fees, they were real from the standpoint of the Convention (see *Fadeyeva v. Russia*, no. 55723/00, § 147, ECHR 2005-IV). The Court does not see any reason to depart from this finding in the present case.

522. Regard being had to the above criteria and the documents in its possession, the Court considers it reasonable to award the following amounts:

- Mr Ponomorev, Mr Ikhlov and Mr Udaltsov: EUR 3,800, to be payable to the bank account of their representative Mr Shukhardin;
- Mr Gavrikov: EUR 7,500, plus any taxes that may be chargeable to the applicant;
- Mr Nagibin, Ms Moshiyan, Mr Batyy and Mr Yelizarov: EUR 3,000, plus any taxes that may be chargeable to the applicants;
- Mr Tarasov: EUR 300, plus any taxes that may be chargeable to the applicant; and EUR 8,500 payable to the bank account of his representative Mr Terekhov.

C. Default interest

523. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints about the alleged breach of the applicants' rights to freedom of expression and freedom of assembly, the lack of an effective remedy in that respect and the alleged discrimination on account of political opinion or sexual orientation, the alleged unlawfulness of Mr Yelisarov's, Mr Batyy's and Mr Tarasov's arrest and the quashing of the judgment in Mr Pononarev's, Me Ikhlov's and Mr Udaltsov's favour by way of supervisory review admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been a violation of Article 13 of the Convention in respect of each applicant;

4. *Holds* that there has been a violation of Article 11 of the Convention in respect of each applicant;

5. *Holds* that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Articles 10 and 11 of the Convention;

6. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of Mr Yelisarov, Mr Batyy and Mr Tarasov;

7. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the quashing of the judgment in Mr Pononarev's, Mr Ikhlov's and Mr Udaltsov's favour by way of supervisory review;

8. *Holds*
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 450 (four hundred and fifty euros), plus any tax that may be chargeable, to Mr Tarasov in respect of pecuniary damage;
(ii) the following amounts, plus any tax that may be chargeable, in respect of non-pecuniary damage:
- Mr Nepomnyashiy: EUR 7,500 (seven thousand five hundred euros);
- Mr Ponomarev: EUR 7,500 (seven thousand five hundred euros);
- Mr Ikhlov: EUR 7,500 (seven thousand five hundred euros);

- Mr Udaltsov: EUR 7,500 (seven thousand five hundred euros);
- Ms Yefremenkova: EUR 5,000 (five thousand euros);
- Mr Milkov: EUR 7,500 (seven thousand five hundred euros);
- Mr Gavrikov: EUR 7,500 (seven thousand five hundred euros);
- Mr Sheremetyev: EUR 7,500 (seven thousand five hundred euros);
- Mr Kosinov: EUR 7,500 (seven thousand five hundred euros);
- Mr Labudin: EUR 7,500 (seven thousand five hundred euros);
- Mr Khayrullin: EUR 7,500 (seven thousand five hundred euros);
- Mr Grigoryev: EUR 7,500 (seven thousand five hundred euros);
- Mr Gorbunov: EUR 7,500 (seven thousand five hundred euros);
- Mr Zhidenkov: EUR 5,000 (five thousand euros);
- Mr Zuyev: EUR 5,000 (five thousand euros);
- Ms Maryasina: EUR 5,000 (five thousand euros);
- Mr Feldman: EUR 5,000 (five thousand euros);
- Mr Yelizarov: EUR 10,000 (ten thousand euros);
- Mr Nagibin: EUR 7,500 (seven thousand five hundred euros);
- Ms Moshiyan: EUR 7,500 (seven thousand five hundred euros);
- Mr Batyy: EUR 10,000 (ten thousand euros);
- Mr Tarasov: EUR 10,000 (ten thousand euros);

(iii) the following amounts, plus any tax that may be chargeable to the applicants, in respect of costs and expenses:

- Mr Ponomorev, Mr Ikhlov and Mr Udaltsov jointly: EUR 3,800 (three thousand eight hundred euros), to be payable to the bank account of their representative Mr Shukhardin;
- Mr Gavrikov: EUR 7,500 (seven thousand five hundred euros);
- Mr Nagibin, Ms Moshiyan, Mr Batyy and Mr Yelizarov jointly: EUR 3,000 (three thousand euros);
- Mr Tarasov: EUR 300 (three hundred euros), plus EUR 8,500 (eight thousand five hundred euros) payable to the bank account of his representative Mr Terekhov;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Luis López Guerra President

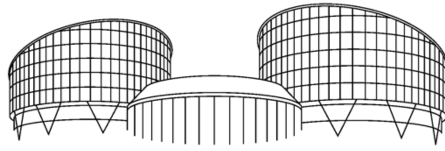
APPENDIX

No.	Application no.	Date of introduction	Applicant's name Year of birth Place of residence	Representative
1.	57818/09	5 October 2009	Mr Aleksandr Vladimirovich Lashmankin 1973 Samara	
2.	51169/10	24 August 2010	Mr Kirill Sergeyevich Nepomnyashchiy 1981 The Krasnoyarsk Region	
3.	4618/11	8 December 2010	Mr Lev Aleksandrovich Ponomarev 1941 Moscow Mr Yevgeniy Vitalyevich Ikhlov 1959 Moscow	Mr V. Shukhardin, lawyer practising in Moscow
4.	19700/11	25 February 2011	Ms Mariya Vladimirovna Yefremenkova 1980 St Petersburg Mr Dmitriy Aleksandrovich Milkov 1983 The Nizhniy Novgorod Region Mr Yuriy Alekseyevich Gavrikov 1975 The Leningrad Region Mr Aleksandr Sergeyevich Sheremetyev 08/07/1990 St Petersburg	Mr D. Bartenev, lawyer practising in St Petersburg

No.	Application no.	Date of introduction	Applicant's name Year of birth Place of residence	Representative
5.	31040/11	11 May 2011	Mr Lev Aleksandrovich Ponomarev 1941 Moscow Mr Yevgeniy Vitalyevich Ikhlov 1959 Moscow Mr Sergey Stanislavovich Udaltsov 1977 Moscow	Mr V. Shukhardin, lawyer practising in Moscow
6.	47609/11	13 June 2011	Mr Grigoriy Aleksandrovich Yelizarov 1983 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
7.	55306/11	14 June 2011	Mr Dmitriy Aleksandrovich Kosinov 1974 Kaliningrad Mr Yevgeniy Nikolayevich Labudin 1962 Kaliningrad Mr Vadim Vilyevich Khayrullin 1972 Kaliningrad Mr Yakov Aleksandrovich Grigoryev 1984 The Kaliningrad Region Mr Viktor Aleksandrovich Gorbunov 1961 Kaliningrad	

No.	Application no.	Date of introduction	Applicant's name Year of birth Place of residence	Representative
8.	59410/11	27 August 2011	Mr Pavel Nikolayevich Nagibin 1971 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
9.	7189/12	7 December 2011	Mr Aleksandr Viktorovich Zhidenkov 1955 The Kaliningrad region Mr Petr Ivanovich Zuyev 1946 The Kaliningrad region Ms Anna Nikolayevna Maryasina 1970 The Kaliningrad region Mr Mikhail Valeryevich Feldman 1971 The Kaliningrad region	
10.	16128/12	28 February 2012	Mr Pavel Nikolayevich Nagibin 1971 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
11.	16134/12	28 February 2012	Ms Siranush Khachaturovna Moshiyan 1963 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
12.	20273/12	20 March 2012	Mr Boris Vadimovich Batyy 1961 Rostov-on-Don Mr Pavel Nikolayevich Nagibin 1971 Rostov-on-Don Ms Siranush Khachaturovna Moshiyan 1963 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow

No.	Application no.	Date of introduction	Applicant's name Year of birth Place of residence	Representative
13.	51540/12	19 May 2010	Mr Boris Vadimovich Batyy 1961 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
14.	64243/12	21 September 2012	Mr Pavel Nikolayevich Nagibin 1971 Rostov-on-Don	Ms M. Issaeva, lawyer practising in Moscow
15.	37038/13	20 May 2013	Mr Igor Aleksandrovich Tarasov 1980 Moscow	Mr K. Terekhov, lawyer practising in Moscow



THIRD SECTION

CASE OF MARIYA ALEKHINA AND OTHERS v. RUSSIA

(Application no. 38004/12)

JUDGMENT

STRASBOURG

17 July 2018

FINAL

03/12/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mariya Alekhina and Others v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Helena Jäderblom, *President,*
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking,
María Elósegui, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 26 June 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38004/12) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Russian nationals, Ms Mariya Vladimirovna Alekhina, Ms Nadezhda Andreyevna Tolokonnikova and Ms Yekaterina Stanislavovna Samutsevich (“the applicants”), on 19 June 2012.

2. The applicants were initially represented by Ms V. Volkova, Mr N. Polozov and Mr M. Feygin, lawyers practising in Moscow, and subsequently by Ms I. Khrunova, a lawyer practising in Kazan, Mr D. Gaynutdinov, a lawyer practising in Moscow, and, until February 2015, Mr Y. Grozev, who was then a lawyer practising in Bulgaria. The Russian Government (“the Government”) were initially represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicants alleged, in particular, that there had been breaches of Articles 3, 5 § 3 and 6 of the Convention in the course of their criminal prosecution for their performance in Christ the Saviour Cathedral in Moscow on 21 February 2012 and that their conviction for that performance and the subsequent declaration of videos of their performances as “extremist” had been in breach of Article 10.

4. On 2 December 2013 the complaints under Articles 3, 5 § 3, 6 and 10 were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Ms Mariya Vladimirovna Alekhina, was born in 1988. The second applicant, Ms Nadezhda Andreyevna Tolokonnikova, was born in 1989. The third applicant, Ms Yekaterina Stanislavovna Samutsevich, was born in 1982. The applicants live in Moscow.

A. Background of the case

6. The three applicants are members of a Russian feminist punk band, Pussy Riot. The applicants founded Pussy Riot in late 2011. The group carried out a series of impromptu performances of their songs *Release the Cobblestones*, *Kropotkin Vodka*, *Death to Prison, Freedom to Protest* and *Putin Wet Himself* in various public areas in Moscow, such as a subway station, the roof of a tram, on top of a booth and in a shop window.

7. According to the applicants, their actions were a response to the ongoing political process in Russia and the highly critical opinion which representatives of the Russian Orthodox Church, including its leader Patriarch Kirill, had expressed about large-scale street protests in Moscow and many other Russian cities against the results of the parliamentary elections of December 2011. They were also protesting against the participation of Vladimir Putin in the presidential election that was due in early March 2012.

8. The applicants argued that their songs contained "clear and strongly worded political messages critical of the government and expressing support for feminism, the rights of minorities and the ongoing political protests". The group performed in disguise, with its members wearing brightly coloured balaclavas and dresses, in various public places selected to enhance their message.

9. Following a performance of *Release the Cobblestones* in October 2011, several Pussy Riot members, including the second and third applicants, were arrested and fined under Article 20.2 of the Code of Administrative Offences for organising and holding an unauthorised assembly. On 14 December 2011 three members of the group performed on the roof of a building at temporary detention facility no. 1 in Moscow. The performance was allegedly held in support of protesters who had been arrested and placed in that facility for taking part in street protests in Moscow on 5 December 2011. The band performed *Death to Prison, Freedom to Protest* and hung a banner saying "Freedom to Protest" on it from the roof of the building. No attempt to arrest the band was made. A video of the performance was published on the Internet.

10. On 20 January 2012 eight members of the band held a performance entitled *Riot in Russia* at Moscow's Red Square. The group sang a song called *Putin Wet Himself*. All eight members of the band were arrested and fined under Article 20.2 of the Code of Administrative Offences, the same as before.

11. In response to the public support and endorsement provided by Patriarch Kirill to Mr Putin, members of Pussy Riot wrote a protest song called *Punk Prayer – Virgin Mary, Drive Putin Away*. A translation of the lyrics is as follows:

> "Virgin Mary, Mother of God, drive Putin away
> Drive Putin away, drive Putin away
> Black robe, golden epaulettes
> Parishioners crawl to bow
> The phantom of liberty is in heaven
> Gay pride sent to Siberia in chains
> The head of the KGB, their chief saint,
> Leads protesters to prison under escort
> So as not to offend His Holiness
> Women must give birth and love
> Shit, shit, holy shit!
> Shit, shit, holy shit!
> Virgin Mary, Mother of God, become a feminist
> Become a feminist, become a feminist
> The Church's praise of rotten dictators
> The cross-bearer procession of black limousines
> A teacher-preacher will meet you at school
> Go to class - bring him cash!
> Patriarch Gundyaev believes in Putin
> Bitch, better believe in God instead
> The girdle of the Virgin can't replace rallies
> Mary, Mother of God, is with us in protest!
> Virgin Mary, Mother of God, drive Putin away
> Drive Putin away, drive Putin away."

12. On 18 February 2012 a performance of the song was carried out at the Epiphany Cathedral in the district of Yelokhovo in Moscow. The applicants and two other members of the band wearing brightly coloured balaclavas and dresses entered the cathedral, set up an amplifier, a microphone and a lamp for better lighting and performed the song while dancing. The performance was recorded on video. No complaint to the police was made in relation to that performance.

B. Performance in Moscow's Christ the Saviour Cathedral

13. On 21 February 2012 five members of the band, including the three applicants, attempted to perform *Punk Prayer – Virgin Mary, Drive Putin Away* from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, although a number of persons were inside the Cathedral.

The band had invited journalists and media to the performance to gain publicity. The attempt was unsuccessful as cathedral guards quickly forced the band out, with the performance only lasting slightly over a minute.

14. The events unfolded as follows. The five members of the band, dressed in overcoats and carrying bags or backpacks, stepped over a low railing and ran up to the podium in front of the altar (the soleas). After reaching the steps, the band removed their coats, showing their characteristic brightly coloured dresses underneath. They also put on coloured balaclavas. They placed their bags on the floor and started taking things out of them. At that moment the video recorded someone calling out for security and a security guard then ran up the steps to the band. The band member dressed in white, the third applicant, pulled a guitar from her bag and tried to put the strap over her shoulder. Another guard ran up to the second applicant and started pulling her away. Moments later the band started singing the song without any musical accompaniment. The guard let go of the second applicant and grabbed the third applicant by the arm, including her guitar, at the same time calling on his radio for help. The radio fell out of his hand but he did not let go of the third applicant and pushed her down the steps. While the third applicant was being pushed away by the guard, three of the other band members continued singing and dancing without music. Words such as “holy shit”, “congregation” and “in heaven” were audible on the video recording. At the same time the second applicant was trying to set up a microphone and a music player. She managed to turn the player on and music started playing. A uniformed security guard grabbed the player and took it away. At the same time four band members, including the first two applicants, continued singing and dancing on the podium, kicking their legs in the air and throwing their arms around. Two cathedral employees grabbed the first applicant and another band member dressed in pink. She ran away from the security guard, while the second applicant kneeled down and started making the sign of the cross and praying. The band continued singing, kneeled down and started crossing themselves and praying.

15. Cathedral staff members escorted the band away from the altar. The video-recording showed that the last band member left the altar one minute and thirty-five seconds after the beginning of the performance. The guards accompanied the band to the exit of the cathedral, making no attempt to stop them or the journalists from leaving.

16. A video containing footage of the band’s performances of the song, both at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral, was uploaded to YouTube.

C. Criminal proceedings against the applicants

1. *Institution of criminal proceedings*

17. On 21 February 2012 a deputy director general of private security company Kolokol-A, Mr O., complained to the head of the Khamovniki district police in Moscow of “a violation of public order” by a group of unidentified people in Christ the Saviour Cathedral. Mr O. stated that at 11.20 a.m. that day unidentified individuals had screamed and danced on “the premises of the cathedral”, thus “insulting the feelings of members of the church”. The individuals had not responded to reprimands by churchgoers, clergymen or guards.

18. A similar complaint was lodged three days later by the acting director of the Christ the Saviour Cathedral Fund, Mr P. He called the applicants’ conduct disorderly, extremist and insulting to Orthodox churchgoers and the Russian Orthodox Church. Mr P. also stated that the band’s actions had been aimed at stirring up religious intolerance and hatred. Printouts of photographs of the band’s performances and the full lyrics of *Punk Prayer – Virgin Mary, Drive Putin Away*, downloaded from the group’s website, were attached to the complaint.

19. On 24 February 2012 the police instituted criminal proceedings. Cathedral staff members and guards were questioned. They stated that their religious feelings had been offended by the incident and that they could identify three of the band members as they had taken off their balaclavas during the performance.

2. *Detention matters*

20. On 3 March 2012 the second applicant was arrested. The first applicant was apprehended the following day. They were charged with the aggravated offence of hooliganism motivated by religious hatred.

The third applicant was also stopped by the police in the street and taken in for questioning on 3 March 2012. She had no identification documents and did not provide her real name, instead identifying herself as Ms Irina Vladimirovna Loktina. Her mobile telephone and a computer flash drive were seized and she was released after the interview.

21. On 5 March 2012 the Taganskiy District Court of Moscow issued separate detention orders to remand the first two applicants in custody until 24 April 2012. In terms of the circumstances precluding the application of a less stringent measure to the applicants, the court cited the gravity of the charges, the severity of the penalty they faced, the “cynicism and insolence of the crime” the applicants were charged with, their choice not to live at their places of permanent residence, their lack of permanent “legal” sources of income, the first applicant’s failure to care for her child and the second

applicant's right to move to and reside in Canada. It also cited the fact that certain members of Pussy Riot were still unidentified or on the run.

22. The detention orders became final on 14 March 2012, when the Moscow City Court upheld them on appeal, fully endorsing the District Court's reasoning.

23. The third applicant was placed in custody on 16 March 2012 by the Taganskiy District Court after finally being identified by the police and charged with the same criminal offence as the first two applicants. The District Court found that the risks of the third applicant absconding, reoffending and perverting the course of justice warranted her detention. Those risks were linked by the court to the following considerations: the gravity of the charges, the severity of the penalty she faced, her unwillingness to identify other members of the band, her lack of a permanent legal source of income, and her use of an assumed identity while communicating with the police on previous occasions. The decision was upheld on appeal by the Moscow City Court on 28 March 2012.

24. By three separate detention orders issued on 19 April 2012 the Taganskiy District Court further extended the applicants' detention until 24 June 2012. Citing the grounds it had used to substantiate the need for the applicants' placement in custody, the District Court concluded that no new circumstances warranting their release had come to light. It also noted the first applicant's blanket refusal to confess to the offence with which she had been charged or to any other act prohibited by the Russian Criminal Code. It also stated that the applicants' arrests had only been possible due to searches conducted by the Russian police as it had not been possible to find them at their places of permanent residence.

25. On 20 June 2012 the Taganskiy District Court once again extended the applicants' detention, citing the same reasons as in the previous detention orders. On 9 July 2012 the Moscow City Court agreed that it was necessary to continue holding the applicants in custody.

26. In a pre-trial hearing on 20 July 2012 the Khamovnicheskiy District Court of Moscow allowed an application by a prosecutor for a further extension of the applicants' detention, finding that the circumstances which had initially called for their being held on remand had not changed. The applicants were to remain in custody until 12 January 2013. The District Court dismissed the arguments the applicants put forward pertaining to their family situation (the first two applicants had young children), the fragile health of the second applicant, the fact that the three applicants had registered their places of residence in Moscow and that the criminal proceedings against them were already at a very advanced stage. The court also refused to accept personal written sureties given by fifty-seven individuals, including famous Russian actors, writers, film producers, journalists, businessmen, singers and politicians.

27. On 22 August 2012 the Moscow City Court upheld the detention order of 20 July 2012, considering it lawful and well-founded.

3. Pre-trial investigation and trial

28. In the meantime, investigators ordered expert opinions to determine whether the video-recording including the performance of *Punk Prayer – Virgin Mary, Drive Putin Away* downloaded from the Internet was motivated by religious hatred, whether the performance of the song at the cathedral could therefore amount to incitement of religious hatred, and whether it had been an attack on the religious feelings of Orthodox believers. In the first two reports, commissioned by a State expert bureau and issued on 2 April and 14 May 2012 respectively, five experts answered in the negative to those questions. In particular, the experts concluded that the applicants' actions on 21 February 2012 at Christ the Saviour Cathedral had not contained any signs of a call or an intention to incite religious hatred or enmity. The experts concluded that the applicants had not been violent or aggressive, had not called for violence in respect of any social or religious group and had not targeted or insulted any religious group.

29. A third expert opinion subsequently requested by the investigators from directly appointed individual experts produced an entirely different response. In a report issued on 23 May 2012 three experts – a professor from the Gorky Institute of World Literature, a professor at the Moscow City Psychological Pedagogical University, and the President of a regional NGO, the Institute of State Confessional Relations and Law – concluded that the performance and video had been motivated by religious hatred, in particular hatred and enmity towards Orthodox believers, and had insulted the religious feelings of such believers.

30. On 20 July 2012 the three applicants were committed to stand trial before the Khamovnicheskiy District Court. The trial was closely followed by national and international media.

31. The trial court dismissed numerous complaints by the applicants related to the negative impact of security measures in place at the courthouse on their right to communicate freely with counsel and to prepare their defence. In particular, in applications to the trial court of 23 July 2012 for time for a confidential meeting with their lawyers, they stated that confidential communication was impossible because of the presence of police officers and court ushers around the dock. The applicants raised the issue again in a similar application on 24 July 2012, which was repeated at a hearing on 30 July 2012.

32. The applicants provided the following description of the hearings. Throughout the trial they were held in an enclosed dock with glass walls and a tight-fitting door, which was commonly known as an "aquarium". There was insufficient ventilation inside the glass dock and it was hard to breathe, given the high summer temperatures. A desk for the applicants'

lawyers was installed in front of the dock. There was always high security around the dock, which at times included seven armed police officers and a guard dog. Colour photographs of the courtroom submitted by the applicants show police officers and court ushers surrounding the dock, either behind or close to the defence lawyers' desk. Some photographs show female police officers positioned between the lawyers' desk and the glass dock containing the applicants. The applicants had to use a small window measuring 15 x 60 cm to communicate with their lawyers, which they had to bend down to use as it was only a metre off the ground. The applicants had to take turns to speak to their lawyers as the window was too small for all three to use it simultaneously. According to the applicants, confidential communication with their defence team was impossible as a police officer always stood nearby monitoring their conversations and any documents which were passed between them. Furthermore, a dog was present in the courtroom, which was at times particularly disturbing as it had barked during the hearings and behaved restlessly.

33. According to the applicants, it was virtually impossible to communicate with their lawyers outside the courtroom as they were taken back to the detention facility at night, when it was too late to be allowed visitors.

34. The lawyers applied several times to the District Court for permission to hold confidential meetings with the applicants. The lawyers and applicants also sought an adjournment of the hearings to give the defence an opportunity to consult their clients in private, either in the courthouse or in the detention facility, but those requests were fruitless.

35. Similarly, the court dismissed applications to call the experts who had issued the three expert reports or to call additional experts, including art historians and specialists in the fields of contemporary art and religious studies, who could have provided opinions on the nature of the performance on 21 February 2012. The defence's challenges to the third expert report issued on 23 May 2012 were also unsuccessful.

4. *Conditions of transport to and from the trial hearings*

(a) The applicants' account

36. According to the applicants, when there were hearings they were transported from the detention facility to court in a prison van: they were usually transported in a small vehicle when being taken to the courthouse in the morning and in a bigger one when being taken back to the detention facility in the evening. The bigger van consisted of two long sections so men and women could be transported separately. The vans had two or three compartments separated by metal partitions, each designed to accommodate one inmate. The common area of the vans was equipped with benches, while the roof was so low detainees could not stand up. The space in the

common compartment of the smaller van was no more than 2 sq. m and was designed for four people, while the space in the bigger van was approximately 5 sq. m.

37. According to the applicants, they were transported in single-person compartments to their custody hearings and in common compartments later on. Most of the time the vans were overcrowded, with detainees sitting directly against each other, with squashed up legs and shoulders. The bigger vans transported between thirty and forty detainees, making a number of stops at various Moscow facilities to pick up detainees. The vans were sometimes so full that there was no place to sit. Smoking was not prohibited but many detainees did do so. The second and third applicant had severe headaches as a result of the conditions of transport.

38. The temperature in Moscow at the time of the trial was as high as 30°C, while inside the vans it reached 40°C. The natural ventilation in the single-person compartments was insufficient and the system of forced ventilation was rarely switched on. When it was switched on, it was only for a very short time because of the noise it made and so it was hardly ever used. A fan was switched on during the summer but did not make the conditions of the cramped space any more bearable.

39. The journey to the courthouse usually took two to three hours, but could sometimes last as long as five hours. Detainees were not allowed to use the toilet unless the police van drove past the Moscow City Court, where inmates were allowed to relieve themselves.

40. On the days of court hearings the applicants were woken up at 5 or 6 a.m. to carry out the necessary procedures for leaving the facility and were only taken back to the detention facility late at night. The applicants missed mealtimes at the detention facility because of such early departures and late returns.

41. On leaving the detention facility in the morning they received a lunch box containing four packets of dry biscuits (for a total of eight each), two packets of dry cereal, one packet of dry soup and two tea bags. However, it was impossible to use the soup and tea bags as hot water was only made available to them five minutes before they were taken out of their cells to the courtroom, which was not enough time to eat.

42. The applicants were forbidden to have drinking water with them during the hearings: requests for short breaks to drink some water and use the toilet were regularly refused, which caused them physical suffering.

43. On 1 August 2012 an ambulance was called twice to the court because the applicants became dizzy and had headaches owing to a lack of food, water, rest and sleep. They were both times found fit for trial.

(b) The Government's account

44. The Government provided the following information concerning the vehicles in which the applicants had been transported to and from the courthouse:

Vehicle	Area and number of compartments	Number of places
KAMAZ-4308-AZ	2 common compartments 2 single-occupancy compartments	32
GAZ-326041-AZ	1 common compartment 3 single compartments	7
GAZ-2705-ZA	2 common compartments (1.35 sq.m each) 1 single compartment (0.375 sq.m)	9
GAZ-3221-AZ	2 common compartments (1.44 sq.m each) 1 single compartment (0.49 sq.m)	9
GAZ-3309-AZ	2 common compartments 1 single compartment (total area 9.12 sq.m)	25
KAMAZ-OTC-577489-AZ	2 common compartments (4.2 sq.m each) 2 single compartments (0.4 sq.m each)	32
KAVZ-3976-AZ	1 common compartment (5 places) 6 single compartments (total area 6.3 sq.m)	11

45. It appears from the information provided by the Government that between 20 July and 17 August 2012 the applicants were transported between Moscow's SIZO-6 remand prison and the Khamovnicheskiy District Court twice a day for fifteen days. The trips lasted between thirty-five minutes and one hour and twenty minutes. The trips back from the court lasted between twenty minutes and four hours and twenty minutes.

46. According to the Government, the daytime temperature in Moscow in July and August 2012 only reached 30°C on 7 August 2012 and that, furthermore, the mornings and evenings, when the applicants were transported, were cooler than the temperature at midday. All the vehicles underwent a technical check and were cleaned before departure. They were also disinfected once a week. The passenger compartment had natural ventilation through windows and ventilation panes. The vehicles were also equipped with a system of forced ventilation. The passenger compartment had artificial lighting in the roof. The Government provided photographs of

the vehicles and extracts from the vehicle logs to corroborate their assertion that the number of passengers never exceeded the upper limit on places given in the table in paragraph 44 above. People transported in such vehicles could use toilets in courthouses that were on the vehicles' route.

47. The Government submitted that the area at the Khamovnicheskiy District Court where the applicants had been held before the hearings and during breaks consisted of six cells equipped with benches and forced ventilation. A kettle had also been available to them. The Government provided reports by the officers on duty at the Khamovnicheskiy District Court on the dates of the applicants' hearings to corroborate their statement that the applicants had always been provided with a lunch box and boiling water when being transported to court.

5. Conviction and appeal

48. On 17 August 2012 the Khamovnicheskiy District Court found the three applicants guilty under Article 213 § 2 of the Russian Criminal Code of hooliganism for reasons of religious hatred and enmity and for reasons of hatred towards a particular social group. It found that they had committed the crime in a group, acting with premeditation and in concert, and sentenced each of them to two years' imprisonment. The trial court held that the applicants' choice of venue and their apparent disregard for the cathedral's rules of conduct had demonstrated their enmity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended. While also taking into account the video-recording of the song *Punk Prayer – Virgin Mary, Drive Putin Away*, the District Court rejected the applicants' arguments that their performance had been politically rather than religiously motivated. It stated that the applicants had not made any political statements during their performance on 21 February 2012.

49. The District Court based its findings on the testimony of a number of witnesses, including the cathedral employees and churchgoers present during the performance on 21 February 2012 and others who, while not witnesses to the actual performance, had watched the video of *Punk Prayer – Virgin Mary, Drive Putin Away* on the Internet or had been present at the applicants' performance at the Epiphany Cathedral in Yelokhovo (see paragraph 12 above). The witnesses provided a description of the events on 21 February 2012 or of the video and attested to having been insulted by the applicants' actions. In addition, the District Court referred to statements by representatives of various religions about the insulting nature of the applicants' performance.

50. The District Court also relied on the expert report issued on 23 May 2012, rejecting the first two expert reports for the following reasons:

> "... [the expert reports issued on 2 April and 14 May 2012] cannot be used by the court as the basis for conviction as those reports were received in violation of the

> criminal procedural law as they relate to an examination of the circumstances of the case in light of the provisions of Article 282 of the Russian Criminal Code – incitement to hatred, enmity or disparagement, as can be seen from the questions put [to the experts] and the answers given by them.
>
> Moreover, the expert opinions do not fulfil the requirements of Articles 201 and 204 of the Russian Code of Criminal Procedure. The reports lack any reference to the methods used during the examinations. The experts also exceeded the limits of the questions put before them; they gave answers to questions which were not mentioned in the [investigators'] decisions ordering the expert examinations. The reports do not provide a linguistic and psychological analysis of the lyrics of the song performed in Christ the Saviour Cathedral, and the experts did not carry out a sentiment analysis and psychological assessment of the song's lyrics in relation to the place where the crime had been committed (an Orthodox church). [The experts] examined the lyrics of the song selectively. Given the lack of a linguistic and psychological analysis of the lyrics of the song performed in Christ the Saviour Cathedral, the experts made an unfounded and poorly reasoned conclusion, which runs counter to the testimony of the eyewitnesses, the victims of the crime, who expressed an extremely negative view of the events in Christ the Saviour Cathedral and of the video-recording."

51. On the other hand, the District Court found the expert report of 23 May 2012 to be "detailed, well founded and scientifically reasoned". The experts' conclusions were seen by the court as substantiated and not open to dispute, given that the information received from the experts corresponded to the information received from other sources, such as the victims and the witness statements. The court also stressed that it would not call the experts or authorise an additional expert examination as it had no doubts about the conclusions made in the report in question.

52. The District Court's main reasons for finding that the applicants had committed hooliganism motivated by religious hatred were as follows:

> "The court cannot accept the defence's argument that the defendants' actions were not motivated by religious hatred and enmity or hatred against a social group.
>
> The court finds that the defendants' actions were motivated by religious hatred for the following reasons.
>
> The defendants present themselves as supporters of feminism, a movement for equality between women and men.
>
> ...
>
> At the present time people belonging to the feminist movement fight for equality of the sexes in political, family and sexual relations. Belonging to the feminist movement is not unlawful and is not a criminal offence in the Russian Federation. A number of religions, such as the Orthodox Church, Catholicism and Islam, have a religious, dogmatic basis incompatible with the ideas of feminism. And while feminism is not a religious theory, its adherents interfere with various areas of social relations such as morality, rules of decency, family relations, sexual relations, including those of a non-traditional nature, which were historically constructed on the basis of religious views.
>
> In the modern world, relations between nations and nationalities and between different religions must be built on the principles of mutual respect and equality. The idea that one is superior and the others inferior, that a different ideology, social group

or religion are unacceptable, gives grounds for mutual enmity, hatred and personal conflicts.

The defendants' hatred and enmity were demonstrated in the court hearings, as was seen from their reactions, emotions and responses in the course of the examination of the victims and witnesses.

...

It can be seen from the statements of the victims, witnesses, defendants and the material evidence that Pussy Riot's performances are carried out by way of a sudden appearance by the group [in public places] with the band dressed in brightly coloured clothes and wearing balaclavas to cover [their] faces. Members of the group make brusque movements with their heads, arms and legs, accompanying them with obscene language and other words of an insulting nature. That behaviour does not respect the canons of the Orthodox Church, irrespective of whether it takes place in a cathedral or outside its walls. Representatives of other religions and people who do not consider themselves believers also find such behaviour unacceptable. Pussy Riot's 'performances' outside religious buildings, although containing signs of clear disrespect for society motivated by religious hatred and enmity and hatred of a specific social group, are not associated with a specific object and therefore amount to a violation of moral standards or an offence. However, placing such a performance within an Orthodox cathedral changes the object of the crime. It represents in that case a mixture of relations between people, rules of conduct established by legal acts, morality, customs, traditions which guarantee a socially tranquil environment and the protection of individuals in various spheres of their lives, as well as the proper functioning of the State and public institutions. Violating the internal regulations of Christ the Saviour Cathedral was merely a way of showing disrespect for society, motivated by religious hatred and enmity and hatred towards a social group.

The court concludes that [the applicants'] actions ... offend and insult the feelings of a large group of people in the present case in view of their connection with religion, [their actions] incite feelings of hatred and enmity and therefore violate the constitutional basis of the State.

[The applicants'] intention to incite religious hatred and enmity and hatred towards a specific social group in view of its connection with religion, in public, is confirmed by the following facts.

A so-called 'punk prayer' was carried out in a public place – Christ the Saviour Cathedral. [The applicants] knowingly envisaged a negative response to that performance on the part of society as they had prepared bright, open dresses and balaclavas in advance and on 21 February 2012 publicly and in an organised group carried out their actions, which were motivated by religious hatred and enmity and hatred towards a social group in view of its connection with religion.

...

Given the particular circumstances of the criminal offence, its nature, the division of the roles, the actions of the accomplices, the time, place and method of committing the offence of hooliganism, that is to say a gross violation of public order committed by a group of people acting in premeditated fashion and in concert, and which demonstrated an explicit lack of respect for society motivated by religious hatred and enmity and hatred towards a social group, the court is convinced that [the applicants] were correctly charged with the [offence] and that their guilt in committing [it] has been proven during the trial.

> [The applicants'] actions are an obvious and gross violation of generally accepted standards and rules of conduct, given the content of their actions and the place where they were carried out. The defendants violated the generally accepted rules and standards of conduct accepted as the basis of public order in Christ the Saviour Cathedral. The use of offensive language in public in the vicinity of Orthodox icons and objects of worship can only be characterised as a violation of public order, given the place where those actions were carried out. In fact, there was mockery and humiliation of the people present in the Cathedral, a violation of social tranquillity, unauthorised and wilful entry into the cathedral's ambon and soleas, accompanied by intentional, stubborn and a lengthy period of disobedience to the reprimands and orders of the guards and churchgoers.
>
> ...
>
> The court dismisses [the applicants'] arguments that they had no intention to incite religious hatred or enmity or to offend the dignity of a group of people because of their religious beliefs, as those arguments were refuted by the evidence in the case. ...
>
> Although the members of Pussy Riot cite political motives for their actions, arguing that they have a positive attitude to the Orthodox religion and that their performance was directed against the uniting of Church and State, their words are refuted by their actions, lyrics and articles found [in the course of the investigation].
>
> The defendants' arguments that their actions in the cathedral were not motivated by hatred or enmity towards Orthodox churchgoers and Christianity, but were governed by political considerations, are also unsubstantiated because, as can be seen from the victims' statements, no political claims were made and no names of political leaders were mentioned during the defendants' acts of disorder in the Cathedral."

53. Citing the results of psychological expert examinations commissioned by investigators, the District Court noted that the three applicants suffered from mixed personality disorders, which did not affect their understanding of the criminal nature of the act they had carried out in the cathedral and did not call for psychiatric treatment. The psychiatric diagnosis was made on the basis of the applicants' active social position, their reliance on their personal experience when taking decisions, their determination to defend social values, the "peculiarity" of their interests, their stubbornness in defending their opinion, their confidence and their disregard for social rules and standards.

54. As regards the punishment to be imposed on the applicants, the District Court ruled as follows:

> "Taking into account the gravity and social danger of the offence, the circumstances in which it was committed, the object and reasons for committing the offence, and [the applicants'] attitude towards their acts, the court believes that the goals of punishment, such as the restoration of social justice, the correction of people who have been convicted and the prevention of the commission of new offences, can only be achieved by sentencing them to prison and their serving the sentence ..."

55. The two-year prison sentence was to be calculated from the date of arrest of each of the applicants, that is from 3, 4 and 15 March 2012 respectively.

56. On 28 August 2012 the applicants' lawyers lodged an appeal on behalf of the three applicants and on 30 August 2012 the first applicant submitted an additional statement to her appeal. She stated, in particular, that throughout the trial she and the other accused had not been able to have confidential consultations with their lawyers.

57. On 10 October 2012, the Moscow City Court decided on the appeals by upholding the judgment of 17 August 2012 as far as it concerned the first two applicants, but amended it in respect of the third applicant. Given the third applicant's "role in the criminal offence [and] her attitude towards the events [of 21 February 2012]", the City Court suspended her sentence, gave her two years' probation and released her in the courtroom. The Moscow City Court did not address the issue of confidential consultations between the applicants and their lawyers.

6. The applicants' amnesty

58. On 23 December 2013 the first and second applicants were released from serving their sentence under a general amnesty issued by the Duma on 18 December 2013, the Amnesty on the Twentieth Anniversary of the Adoption of the Constitution of the Russian Federation.

59. On 9 January 2014 the third applicant was also amnestied.

7. Supervisory review proceedings

60. On 8 February 2013 the Ombudsman, on behalf of the second applicant, applied to the Presidium of the Moscow City Court for supervisory review of the conviction. He argued, in particular, that the applicants' actions had not amounted to hooliganism as they could not be regarded as inciting hatred or enmity. Breaches of the normal functioning of places of worship, insults to religious feelings or the profanation of religious objects were administrative offences punishable under Article 5.26 of the Code of Administrative Offences.

61. On 15 March 2013 Judge B. of the Moscow City Court refused to institute supervisory review proceedings.

62. In a letter of 28 May 2013 the President of the Moscow City Court refused to review the decision of 15 March 2013.

63. On 8 November 2013 the Ombudsman submitted an application for supervisory review to the Supreme Court. As well as the arguments set out in the previous application, he added that public criticism of officials, including heads of State, the government and the heads of religious communities, was a way of exercising the constitutional right to freedom of speech.

64. On unspecified date the first and second applicants' representatives also applied for supervisory review to the Supreme Court on their behalf. They argued, *inter alia*, that the applicants' actions had amounted to

political criticism, not incitement to hatred or enmity on religious grounds or towards any social group. Furthermore, they pointed to a number of alleged breaches of criminal procedure in the course of the trial.

65. On 10 December 2014 the Supreme Court instituted supervisory review proceedings upon the above applications.

66. On unspecified date the third applicant also applied for supervisory review of her conviction.

67. On 17 December 2014 the Supreme Court instituted supervisory review proceedings upon her application.

68. On an unspecified date the case was transferred to the Presidium of the Moscow City Court for supervisory review.

69. On 4 April 2014 the Presidium of the Moscow City Court reviewed the case. It upheld the findings that the applicants' actions had amounted to incitement to religious hatred or enmity and dismissed the arguments concerning breaches of criminal procedure at the trial. At the same time, it removed the reference to "hatred towards a particular social group" from the judgment as it had not been established which social group had been concerned. It reduced each applicant's sentence to one year and eleven months' imprisonment.

D. Proceedings concerning declaring video-recordings of the applicants' performances as "extremist"

70. The group uploaded a video of their performance of *Punk Prayer – Virgin Mary, Drive Putin Away* at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral to their website http://pussy-riot.livejournal.com. It was also republished by many websites.

71. On 26 September 2012 a State Duma member, Mr S., asked the Prosecutor General of the Russian Federation to study the video of the group's performance, to stop its dissemination and to ban the websites which had published it.

72. As a result of that assessment, on 2 November 2012 the Zamoskvoretskiy Inter-District Prosecutor applied to the Zamoskvoretskiy District Court of Moscow for a declaration that the Internet pages http://www.pussy-riot.livejournal.com/8459.html, http://www.pussy-riot.livejournal.com/5164.html, http://www.pussy-riot.livejournal.com/5763.html and http://pussy-riot.livejournal.com/5497.html were extremist. They contained text posted by Pussy Riot, photographs and videos of their performances, including videos for *Riot in Russia, Putin Wet Himself; Kropotkin Vodka*; *Death to Prison, Freedom to Protest; Release the Cobblestones* and *Punk Prayer – Virgin Mary, Drive Putin Away* (see paragraph 11 above and Appendix for lyrics). The prosecutor also sought to limit access to the material in question

by installing a filter to block the IP addresses of websites where the recordings had been published.

73. After learning of the prosecutor's application through the media, the third applicant lodged an application with the District Court on 12 November 2012, seeking to join the proceedings as an interested party. She argued that her rights as a member of Pussy Riot would be affected by any court decision in the case.

74. On 20 November 2012 the Zamoskvoretskiy District Court dismissed her application, finding as follows:

> " Having considered [the third applicant's] argument that a decision issued in response to the prosecutor's request could affect [her] rights and obligations, the court finds this argument unsubstantiated because the judgment of 17 August 2012 issued by the Khamovnicheskiy District Court in respect of the third applicant became final on 10 October 2012; [she] was found guilty by that judgment under Article 213 § 2 of the Russian Criminal Code of hooliganism committed in a group acting in premeditated fashion and in concert. That judgment can be appealed against by way of supervisory review in entirely different proceedings.
>
> [The third applicant's] argument that charges related to a criminal offence under Article 282 § 2 (c) of the Russian Criminal Code were severed from [the first] criminal case cannot, in the court's opinion, show that [her] rights and obligations would be influenced by the court's decision issued in respect of the prosecutor's request because there is no evidence that [she] took any part in disseminating the materials published on the Internet sites identified by the prosecutor [.] [T]here is no evidence that [she] owns those websites either.
>
> Therefore the court concludes that an eventual decision on the prosecutor's request for the materials to be declared extremist will not affect [the third applicant's] rights and obligations; and therefore there are no grounds for her to join the proceedings as an interested party."

75. On 28 November 2012 the third applicant appealed against that decision.

76. On 29 November 2012 the Zamoskvoretskiy District Court ruled that video content on http://pussy-riot.livejournal.com was extremist, namely the video-recordings of their performances of *Riot in Russia, Putin Wet Himself; Kropotkin Vodka*; *Death to Prison, Freedom to Protest; Release the Cobblestones* and *Punk Prayer – Virgin Mary, Drive Putin Away*. It also ordered that access to that material be limited by a filter on the website's IP address. Relying on sections 1, 12 and 13 of the Suppression of Extremism Act and section 10(1) and (6) of the Federal Law on Information, Information Technologies and the Protection of Information, the court gave the reasons for its decision and stated as follows:

> "According to section 1 of [the Suppression of Extremism Act], extremist activity is deemed to be constituted by, *inter alia*, the stirring up of social, racial, ethnic or religious discord; propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion; violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic

affiliation or attitude to religion; public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist material, and likewise the production or storage thereof with the aim of mass dissemination.

...

Results from monitoring the Internet and of a psychological linguistic expert examination performed by experts from the Federal Scientific Research University's 'Russian Institute for Cultural Research' state that the Internet sites http://www.pussy-riot.livejournal.com/8459.html, http://www.pussy-riot.livejournal.com/5164.html, http://www.pussy-riot.livejournal.com/5763.html and http://pussy-riot.livejournal.com/5497.html contain video materials of an extremist nature.

That conclusion is confirmed by report no. 55/13 of 26 March 2012 on the results of the psychological linguistic expert examination performed by experts from the Federal Scientific Research University's 'Russian Institute for Cultural Research'.

The court concludes that free access to video materials of an extremist nature may contribute to the incitement of hatred and enmity on national and religious grounds, and violates the rights of a specific group of individuals – the consumers of information services in the Russian Federation.

The court accepts the prosecutor's argument that the dissemination of material of an extremist nature disrupts social stability and creates a threat of damage to the life, health and dignity of individuals, to the personal security of an unidentified group of individuals and disrupts the basis of the constitutional order of the State. Accordingly, the aforementioned activities are against the public interests of the Russian Federation.

...

Taking the above-mentioned circumstances into account, the court finds that the prosecutor's application is substantiated and should be allowed in full."

77. The third applicant appealed against the decision of 29 November 2012.

78. On 14 December 2012 the Zamoskvoretskiy District Court rejected the third applicant's appeal against the decision of 20 November 2012 on the grounds that the Code of Civil Procedure did not provide for a possibility to appeal against a decision to deny an application to participate in proceedings.

79. On 30 January 2013 the Moscow City Court dismissed an appeal by the third applicant against the decision of 14 December 2012. It found that under the Code of Civil procedure no appeal lay against a court decision on an application to join proceedings as an interested party. It noted, furthermore, that the applicant would be able to restate her arguments in her appeal against the decision on the merits of the case.

80. On the same date the Moscow City Court left the third applicant's appeal against the decision of 29 November 2012 without examination. The appellate court stated, *inter alia*:

"... the subject in question was the extremist nature of the information placed in the Internet sources indicated by the prosecutor and the necessity to limit access to them[.] [A]t the same time, the question of [the third applicant's] rights and

obligations was not examined, the impugned decision did not limit her rights, and she was not a party to the proceedings begun upon the prosecutor's application.

Taking into account the foregoing, [the third applicant's] allegations contained in her appeal statement concerning alleged breaches of procedural rules on account of the failure to allow her to participate in proceedings which violated her rights and legal interests are unfounded and are based on an incorrect interpretation of the rules of procedural law.

Therefore ... [the third applicant] has no right to appeal against the above decision."

II. RELEVANT DOMESTIC LAW AND PRACTICE AND INTERNATIONAL MATERIALS

A. Relevant domestic law and practice

1. Constitution

81. Article 2 provides as follows:

"An individual, his rights and freedoms, shall be the supreme value. The recognition, observance and the protection of the rights and freedoms of an individual and citizen shall be an obligation of the State".

82. Article 14 states that The Russian Federation is a secular state and that no state or obligatory religion may be established (§ 1). "Religious associations shall be separate from the State and shall be equal before the law" (§ 2).

83. Article 17 states that human rights and freedoms are recognised and guaranteed according to the generally accepted principles and rules of international law and the Constitution (§ 1). "The basic rights and freedoms are inalienable and belong to every person from birth" (§ 2). However, the exercise of such rights and freedoms must not infringe upon the rights and freedoms of others (§ 3).

84. Under Article 19 § 2, the State guarantees equal human and civil rights and freedoms irrespective of gender, race, ethnicity, language, origin, property or employment status, place of residence, religion, convictions, membership of public associations, or any other circumstances. Any restrictions of rights on the grounds of social status, race, ethnicity, language or religion are prohibited.

85. Article 28 guarantees the right to freedom of conscience and religion to everyone.

86. Article 29 provides as follows:

"1. Freedom of thought and speech is guaranteed to everyone.

2. Propaganda or agitation arousing social, racial, ethnic or religious hatred and enmity and propaganda about social, racial, ethnic, religious or linguistic supremacy is prohibited.

3. Nobody can be forced to express [his or her] thoughts and opinions or to renounce them.

4. Everyone has the right to freely seek, receive, transmit, produce and disseminate information by any lawful means. The list of items which constitute State secrets shall be established by a federal law.

5. Freedom of the mass media is guaranteed. Censorship is forbidden."

2. Criminal Law

87. Article 213 of the Criminal Code, as in force at the material time, provided:

"1. Hooliganism, that is, a gross violation of public order manifested in clear contempt of society and committed:

a) with the use of weapons or articles used as weapons;

b) for reasons of political, ideological, racial, national or religious hatred or enmity or for reasons of hatred or enmity towards a particular social group –

shall be punishable by a fine of three hundred thousand to five hundred thousand roubles or an amount of wages or other income of the convicted person for a period of two to three years, or by obligatory labour for a term of up to four hundred and eighty hours, or by correctional labour for a term of one to two years, or by compulsory labour for a term of up to five years, or by deprivation of liberty for the same term.

2. The same offence committed by a group of persons by previous agreement, or by an organised group, or in connection with resistance to a representative of authority or to any other person who fulfils the duty of protecting the public order or suppressing a violation of public order –

shall be punishable by a fine of five hundred thousand to one million roubles or an amount of wages or other income of the convicted person for a period of three to four years, or by compulsory labour for a term of up to five years, or by deprivation of liberty for a term of up to seven years."

88. In Ruling no. 45 of 15 November 2007 On Judicial Practice in Criminal Cases Concerning Hooliganism and Other Offences, the Supreme Court stated in particular:

"A person manifests clear disrespect for society by a deliberate breach of the generally recognised norms and rules of conduct motivated by the culprit's wish to set himself in opposition to those around him, to demonstrate a disparaging attitude towards them."

3. Administrative Law

89. Article 5.26 of the Code of Administrative Offences, as in force until 29 June 2013, provided:

"1. Hindering the exercise of the right to freedom of conscience and freedom of religion, including acceptance of religious and other convictions and the refusal thereof, joining a religious association or leaving it –

shall be punishable by the imposition of an administrative fine of one hundred to three hundred roubles [and by the imposition of an administrative fine] on officials of three hundred to eight hundred roubles.

2. Insulting religious feelings or the profanation of objects of worship, signs and emblems relating to beliefs –

shall be punishable by the imposition of an administrative fine of five hundred to one thousand roubles."

4. Extremist Activity

(a) Suppression of Extremism Act

90. Section 1(1) of Federal Law no. 114-FZ on Combatting Extremist Activity of 25 July 2002 ("the Suppression of Extremism Act") defines "extremist activity/extremism" as follows:

"– a forcible change of the foundations of the constitutional system and violations of the integrity of the Russian Federation;

– the public justification of terrorism and other terrorist activity;

– the stirring up of social, racial, ethnic or religious discord;

– propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion;

– violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion;

– obstructing the exercise of citizens' electoral rights and rights to participate in a referendum or a violation of voting in secret, combined with violence or the threat of the use thereof;

– obstructing the lawful activities of state authorities, local authorities, electoral commissions, public and religious associations or other organisations, combined with violence or a threat of the use thereof;

– committing crimes for the motives set out in Article 63 § 1 (e) of the Criminal Code [crimes involving motives of political, ideological, racial, ethnic or religious hatred or enmity or involving motives of hate or enmity towards a social group];

– propaganda for and the public display of Nazi attributes or symbols or of attributes or symbols similar to Nazi attributes or symbols to the point of them becoming undistinguishable;

– public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist materials, and likewise the production or storage thereof with the aim of mass dissemination;

– making a public, knowingly false accusation against individuals holding a state office of the Russian Federation or a state office of a Russian Federation constituent entity of committing actions in the discharge of their official duties that are set down in the present Article and that constitute offences;

> – the organisation of and preparation for the aforementioned actions and inciting others to commit them;
>
> – funding the aforementioned actions or any assistance in organising, preparing or carrying them out, including the provision of training, printing and material/technical support, telephonic or other types of communication links or information services”.

91. Section 1(3) of the Act defines “extremist materials” as follows:

> “ ... documents intended for publication or information in other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity, including works by leaders of the National Socialist Workers’ Party of Germany, the Fascist Party of Italy, publications substantiating or justifying ethnic and/or racial superiority or justifying the practice of committing war crimes or other crimes aimed at the full or partial destruction of any ethnic, social, racial, national or religious group”.

92. Section 3 of the Act outlines the main areas of combatting extremist activity as follows:

> “– the taking of precautionary measures aimed at the prevention of extremist activity, including the detection and subsequent elimination of the causes and conditions conducive to carrying out extremist activity;
>
> – the detection, prevention and suppression of terrorist activity carried out by social and religious associations, other organisations and natural persons”.

93. Section 12 forbids the use of public communication networks for carrying out extremist activity:

> “The use of public communication networks to carry out extremist activity is prohibited. In the event of a public communication network being used to carry out extremist activity, measures provided for in the present Federal law shall be taken with due regard to the specific characteristics of the relations governed by Russian Federation legislation in the sphere of communications.”

94. Section 13 of the Act, as in force at the material time, provided for the following responsibility for the distribution of extremist materials:

> “The dissemination of extremist materials and the production and storage of such materials with the aim of their dissemination shall be prohibited on the territory of the Russian Federation ...
>
> Information materials shall be declared extremist by the federal court with jurisdiction over the location in which they were discovered or disseminated or in the location of the organisation producing such material on the basis of an application by a prosecutor or in proceedings in an administrative, civil or criminal case.
>
> A decision concerning confiscation shall be taken at the same time as the court decision declaring the information materials extremist.
>
> A copy of the court decision declaring the information materials extremist and which has entered into legal force shall be sent to the federal State registration authority.
>
> A federal list of extremist materials shall be posted on the ‘Internet’ worldwide computer network on the site of the federal State registration authority. That list shall also be published in the media.

A decision to include information materials in the federal list of extremist material can be appealed against in court under the procedure established by Russian Federation legislation."

(b) Federal Law on Information, Information Technologies and the Protection of Information

95. Section 10(1) and (6) of Federal Law no. 149-FZ on Information, Information Technologies and the Protection of Information of 27 July 2006, as in force at the material time, provided as follows:

"1. The distribution of information shall be carried out freely in the Russian Federation, observing the requirements established by the legislation of the Russian Federation.

...

6. The distribution of information directed towards propaganda for war, the stirring up of national, race or religious hatred and hostility and other information whose distribution is subject to criminal or administrative responsibility shall be banned."

(c) Constitutional Court

96. In Ruling no. 1053-O of 2 July 2013 the Constitutional Court ruled on a complaint lodged by K., who contested the constitutionality of section 1(1) and (3) and section 13(3) of the Suppression of Extremism Act. K. argued that the definitions of "extremist activity" and "extremist materials" were not precise enough and were therefore open to different interpretations and arbitrary application. K. also contested the power of the courts to order the confiscation of material, irrespective of whether the owner had committed an offence.

97. The Constitutional Court noted, firstly, that the provisions of section 1(1) and (3) of the Suppression of Extremism Act were based on the Constitution and could not therefore as such be in breach of constitutional rights. As regards the wording of the provisions, it further stated that laws had to be formulated precisely enough to enable people to adjust their conduct accordingly, but that did not rule out the use of generally accepted notions whose meaning should be clear either from the content of the law itself or with the help, *inter alia*, of judicial interpretation. In that regard the Constitutional Court referred to the Court's case-law (in particular, *Cantoni v. France*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, ECHR 2000-VII; *Achour v. France* [GC], no. 67335/01, ECHR 2006-IV; and *Huhtamäki v. Finland*, no. 54468/09, 6 March 2012).

98. The Constitutional Court stated that when applying section 1(1) and (3) of the Suppression of Extremism Act, courts had to determine, in view of the specific circumstances of each case, whether the activity or material in question ran counter to the constitutional prohibition on incitement to hatred or enmity or on propaganda relating to superiority on the grounds of

social position, race, ethnic origin, religion or language. At the same time, a restriction on freedom of thought and religion and on freedom of expression should not be taken solely on the grounds that the activity or information in question did not comply with traditional views and opinions or contradict moral and/or religious preferences. In that regard the Constitutional Court referred to the Court's case-law (in particular, *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24; *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A; and *Wingrove v. the United Kingdom*, 25 November 1996, *Reports* 1996-V).

99. As regards section 13(3), the Constitutional Court found that confiscation of information materials recognised as extremist on the basis of a judicial order was not related to any type of responsibility and did not constitute a punishment, but was a special measure employed by the State to combat extremism and was aimed at the prevention thereof.

100. The Constitutional Court thus held that the contested provisions could not be considered as unconstitutional and dismissed the complaint as inadmissible.

B. Relevant International Materials

1. Council of Europe

(a) Venice Commission

101. The European Commission for Democracy through Law (the Venice Commission) in its Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, adopted at its 76th Plenary Session held in Venice on 17-18 October 2008, CDL-AD(2008)026 (Report of the Venice Commission), stated that whereas incitement to religious hatred should be the object of criminal sanctions (§ 89), they were inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy (§ 92).

102. Opinion no. 660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation adopted by the Venice Commission at its 91st Plenary Session held in Venice on 15-16 June 2012, CDL-AD(2012)016-e (Opinion of the Venice Commission), contained, in particular, the following opinions and conclusions:

> "30. The Venice Commission notes that the definitions in Article 1 of the Law of the "basic notions" of "extremism" ("extremist activity/extremism", "extremist organisation' and "extremist materials") do not set down general characteristics of extremism as a concept. Instead, the Law lists a very diverse array of actions that are deemed to constitute "extremist activity" or "extremism". This should mean that, according to the Law, only activities defined in Article 1.1 are to be considered extremist activities or fall within the scope of extremism and that only organisations defined in Article 1.2 and materials defined in Article 1.3 should be deemed extremist.

31. The Commission however has strong reservations about the inclusion of certain activities under the list of “extremist” activities. Indeed, while some of the definitions in Article 1 refer to notions that are relatively well defined in other legislative acts of the Russian Federation, a number of other definitions listed in Article 1 are too broad, lack clarity and may open the way to different interpretations. In addition, while the definition of “extremism” provided by the Shanghai Convention, as well as the definitions of “terrorism” and “separatism”, all require violence as an essential element, certain of the activities defined as “extremist” in the Extremism Law seem not to require an element of violence (see further comments below).

...

35. Extremist activity under point 3 is defined in a less precise manner than in a previous version of the Law (2002). In the 2002 Law the conduct, in order to fall within the definition, had to be “associated with violence or calls to violence”. However the current definition (“stirring up of social, racial, ethnic or religious discord”) does not require violence as the reference to it has been removed. According to non-governmental reports, this has led in practice to severe anti extremism measures under the Extremism Law and/or the Criminal Code. The Venice Commission recalls that, as stated in its Report devoted to the relation between freedom of expression and freedom of religion, hate speech and incitement may not benefit from the protection afforded by Article 10 ECHR and justify criminal sanctions. The Commission notes that such a conduct is criminalized under Article 282 of the Russian Criminal Code and that, under Article 282.2, the use of violence or the threat of its use in committing this crime is an aggravating circumstance.

36. The Venice Commission is of the opinion that in order to qualify “stirring up of social, racial, ethnic or religious discord” as “extremist activity”, the definition should expressly require the element of violence. This would maintain a more consistent approach throughout the various definitions included in article 1.1, bring this definition in line with the Criminal Code, the Guidelines provided by the Plenum of the Supreme Court and more closely follow the general approach of the concept of “extremism” in the Shanghai Convention.

...

41. Extremist activity under point 5 brings together a collection of criteria, the combination of which may or may not be required before establishing that the Law applies to them. Clarification is required of what is intended here. If violating rights and freedoms “in connection with a personal’s social, racial, ethnic, religious or linguistic affiliation or attitude to religion”, in the absence of any violent element is an extremist activity, it is clearly a too broad category.

42. Similarly, under point 10 incitement to extremist activity is in itself an extremist activity. This provision is problematic to the extent that certain of the activities listed, as pointed out above, should not fall into the category of extremist activities at all.

...

47. [Article 1.3] defines extremist materials not only as documents which have been published but also as documents intended for publication or information, which call for extremist activity (to be understood, most probably, by reference to the definition of such an activity in Article 1.1) or which justify such activity...

...

49. Considering the broad and rather imprecise definition of “extremist documents” (Article1.3), the Venice Commission is concerned about the absence of any criteria and any indication in the Law on how documents may be classified as extremist and believes that this has the potential to open the way to arbitrariness and abuse. The Commission is aware from official sources, that the court decision is systematically based on prior expert review of the material under consideration and may be appealed against in court. It nonetheless considers that, in the absence of clear criteria in the Law, too wide a margin of appreciation and subjectivity is left both in terms of the assessment of the material and in relation to the corresponding judicial procedure. According to non-governmental sources, the Federal List of Extremist Materials has in recent years led to the adoption, in the Russian Federation, of disproportionate anti-extremist measures. Information on how this list is composed and amended would be necessary for the Commission to comment fully.

...

56. The Commission further notes that the Law does not provide for any procedure for the person to whom a warning is addressed to challenge the evidence of the Prosecutor-General upon which it is based at the point when the warning is given, though it is noted that article 6 of the Law provides that the warning may be appealed to a court. It also notes that, according to the law “On the public prosecutor’s service in the Russian Federation”, a warning about the unacceptability of breaking the law may be appealed against not only in court but also to a superior public prosecutor.

...

61. ... [I]n the Commission’s view the Law should be made more specific as to the procedures available in order to guarantee the effective enjoyment of the right to appeal both the warning/the notice issued, and the liquidation or suspension decision before an independent and impartial tribunal, as enshrined in Article 6 ECHR.

...

63. ... It is worrying at the same time that, as a result of the vagueness of the Law and of the wide margin of interpretation left to the enforcement authorities, undue pressure is exerted on civil society organisations, media outlets and individuals, which undoubtedly has a negative impact on the free and effective exercise of human rights and fundamental freedoms.

...

65. ...It is therefore essential, in order for the warnings and notices or any other anti-extremism measures to fully comply with the requirements of Articles 10 and 11 of the ECHR, to ensure that any restrictions that they may introduce to fundamental rights stem from a pressing social need, are proportionate within the meaning of the ECHR and are clearly defined by law. The relevant provisions of the Extremism Law should thus be amended accordingly.

...

73. The Venice Commission is aware of the challenges faced by the Russian authorities in their legitimate efforts to counter extremism and related threats. It recalls that, in its recent recommendation devoted to the fight against extremism, the Parliamentary Assembly of the Council of Europe expressed its concern over the challenge of fighting extremism and its most recent forms and encouraged the member States of the Council of Europe to take resolute action in this field, “while ensuring the strictest respect for human rights and the rule of law”.

74. However, the manner in which this aim is pursued in the Extremism Law is problematic. In the Commission's view, the Extremism Law, on account of its broad and imprecise wording, particularly insofar as the "basic notions" defined by the Law - such as the definition of "extremism", "extremist actions", "extremist organisations" or "extremist materials" – are concerned, gives too wide discretion in its interpretation and application, thus leading to arbitrariness.

75. In the view of the Venice Commission, the activities defined by the Law as extremist and enabling the authorities to issue preventive and corrective measures do not all contain an element of violence and are not all defined with sufficient precision to allow an individual to regulate his or her conduct or the activities of an organisation so as to avoid the application of such measures. Where definitions are lacking the necessary precision, a law such as the Extremism Law dealing with very sensitive rights and carrying potential dangers to individuals and NGOs can be interpreted in harmful ways. The assurances of the authorities that the negative effects would be avoided thanks to the guidelines of the Supreme Court, the interpretation of the Russian Institute for Legislation and Comparative Law or good faith are not sufficient to satisfy the relevant international requirements.

76. The specific instruments that the Law provides for in order to counter extremism – the written warnings and notices - and the related punitive measures (liquidation and/or ban on the activities of public religious or other organisations, closure of media outlets) raise problems in the light of the freedom of association and the freedom of expression as protected by the [European Convention on Human Rights] and need to be adequately amended.

77. The Venice Commission recalls that it is of crucial importance that, in a law such as the Extremism Law, which has the capacity of imposing severe restrictions on fundamental freedoms, a consistent and proportionate approach that avoids all arbitrariness be taken. As such, the Extremism Law has the capacity of imposing disproportionate restrictions of fundamental rights and freedoms as enshrined in the European Convention on Human Rights (in particular Articles 6, 9, 10 and 11) and infringe the principles of legality, necessity and proportionality. In the light of the above comments, the Venice Commission recommends that this fundamental shortcoming be addressed in relation to each of the definitions and instruments provided by the Law in order to bring them in line with the European Convention on Human Rights."

(b) ECRI General Policy Recommendation no. 15 on Combating Hate Speech

103. The relevant parts of General Policy Recommendation no. 15 on Combating Hate Speech adopted by the European Commission against Racism and Intolerance (the ECRI) on 8 December 2015 contains read as follows:

"Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

Recognising that hate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes;

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;

...

14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.

...

16. ...[T]he assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked): (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a "live" event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination)."

2. United Nations

(a) International Covenant on Civil and Political Rights

104. The relevant provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR) provide:

Article 19

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

(b) Human Rights Council

105. The relevant parts of the Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, A/HRC/2/3, of 20 September 2006 (HRC 2006 Report) read as follows:

"47. The Special Rapporteur notes that article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group ...

50. Domestic and regional judicial bodies - where they exist - have often laboured to strike the delicate balance between competing rights, which is particularly demanding when beliefs and freedom of religion are involved. In situations where there are two competing rights, regional bodies have often extended a margin of appreciation to national authorities and in cases of religious sensitivities, they have generally left a slightly wider margin of appreciation, although any decision to limit a particular human right must comply with the criteria of proportionality. At the global level, there is not sufficient common ground to provide for a margin of appreciation. At the global level, any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance."

106. The relevant parts of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 7 September 2012 read as follows:

"46. While some of the above concepts may overlap, the Special Rapporteur considers the following elements to be essential when determining whether an expression constitutes incitement to hatred: real and imminent danger of violence

resulting from the expression; intent of the speaker to incite discrimination, hostility or violence; and careful consideration by the judiciary of the context in which hatred was expressed, given that international law prohibits some forms of speech for their consequences, and not for their content as such, because what is deeply offensive in one community may not be so in another. Accordingly, any contextual assessment must include consideration of various factors, including the existence of patterns of tension between religious or racial communities, discrimination against the targeted group, the tone and content of the speech, the person inciting hatred and the means of disseminating the expression of hate. For example, a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website. Similarly, artistic expression should be considered with reference to its artistic value and context, given that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility.

47. Moreover, while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred, which would cross the seven-part threshold, should be criminalized."

(c) Human Rights Committee

107. The relevant parts of General Comment No. 34, Article 19: Freedoms of Opinion and Expression, of 12 September 2011 read as follows:

"22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated ...

46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities ...

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor

would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith ...

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3."

(d) Committee on the Elimination of Racial Discrimination

108. The relevant part of General Recommendation No. 35, Combating Racist Hate Speech, of 12 September 2011 reads as follows:

"20. The Committee observes with concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention [on the Elimination of All Forms of Racial Discrimination]. States parties should formulate restrictions on speech with sufficient precision, according to the standards in the Convention as elaborated in the present recommendation. The Committee stresses that measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition."

(e) Office of the High Commissioner for Human Rights

109. The joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of the Office of the High Commissioner for Human Rights (OHCHR) for the expert workshop on the prohibition of incitement to national, racial or religious hatred (Expert workshop on Europe, 9-10 February 2011, Vienna) referred to "objective criteria to prevent arbitrary application of national legal standards pertaining to incitement to racial or religious hatred", one of such criteria being the following:

"The public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized[.]"

110. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by the OHCHR, in 2011 ("the Rabat Plan") was adopted by experts in Rabat, Morocco, on 5 October 2012. The relevant parts of the Plan read as follows:

"15. ... [L]egislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with article 20 of the ICCPR. The broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of these laws. The terminology relating to offences on incitement to national, racial or religious hatred varies in the different countries and is increasingly rather vague while new categories of restrictions or limitations to freedom of

expression are being incorporated in national legislation. This contributes to the risk of a misinterpretation of article 20 of the ICCPR and an addition of limitations to freedom of expression not contained in article 19 of the ICCPR."

3. Other international materials

(a) The Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001 ("the Shanghai Convention")

111. Article 1 § 3 of the Shanghai Convention, ratified by the Russian Federation in October 2010, provides the following definition of "Extremism":

> "'Extremism' is an act aimed at seizing or keeping power through the use of violence or at violent change of the constitutional order of the State, as well as a violent encroachment on public security, including the organization, for the above purposes, of illegal armed formations or participation in them and that are subject to criminal prosecution in conformity with the national laws of the Parties."

(b) Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation

112. On 9 December 2008 the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information adopted a joint declaration which reads, in so far as relevant:

Defamation of Religions

> "The concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.
>
> Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.
>
> Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
>
> International organisations, including the United Nations General Assembly and Human Rights Council, should desist from the further adoption of statements supporting the idea of 'defamation of religions'.

Anti-Terrorism Legislation

> The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to

advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.

The criminalisation of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them). Vague notions such as providing communications support to terrorism or extremism, the 'glorification' or 'promotion' of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised.

The role of the media as a key vehicle for realising freedom of expression and for informing the public should be respected in anti-terrorism and anti-extremism laws. The public has a right to know about the perpetration of acts of terrorism, or attempts thereat, and the media should not be penalized for providing such information.

Normal rules on the protection of confidentiality of journalists' sources of information – including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means – should apply in the context of anti-terrorist actions as at other times."

(c) The Camden Principles

113. The non-governmental organisation ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19") prepared the Camden Principles on Freedom of Expression and Equality on the basis of discussions involving a group of high-level UN and other officials, civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009 ("the Camden Principles"). They read as follows in so far as relevant:

Principle 12: Incitement to hatred

"12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

i. The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.

ii. The term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group.

iii. The term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

...

> 12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.
>
> ...
>
> 12.5. States should review their legal framework to ensure that any hate speech regulations conform to the above.”

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

A. Date of application

114. The Government contested the date the present application was lodged. They argued that the introductory letter of 19 June 2012 sent by the applicants’ representatives, Ms Volkova, Mr Polozov and Mr Feygin, should not be taken into account as they had failed to provide the Court with all the necessary documents. At the same time, the Government pointed out that the introductory letter to the Court sent by Ms Khrunova on 19 October 2012 had only been on behalf of the third applicant and alleged that it had been the Court that had invited her to act on behalf of all three applicants. In view of the foregoing, they argued that compliance with the six-month time-limit should be examined in respect of each applicant separately.

115. The applicants stated that their representatives had sent the introductory letter of 19 June 2012 on their behalf in accordance with their instructions. The fact that they had later decided to refuse the assistance of those representatives and use different lawyers could not affect the validity of the introductory letter.

116. The Court notes that on 19 June 2012 it received an introductory letter concerning alleged violations of the applicants’ rights guaranteed by Articles 3, 5, 6 and 10 of the Convention on account of the criminal prosecution for the performance of 21 February 2012. The introductory letter was sent on behalf of the three applicants by their representatives Ms Volkova, Mr Polozov and Mr Feygin. Authority forms were enclosed with the letter.

117. On 21 August 2012 the Court received an application form of 16 August 2012 sent on behalf of the applicants by their representatives Ms Volkova, Mr Polozov and Mr Feygin. The above complaints were further detailed in the application form.

118. On 29 October 2012 the Court received an introductory letter sent on behalf of the third applicant by Ms Khrunova. In a letter of 31 October 2012 to Ms Khrunova the Court informed her that it had already registered

an application lodged on behalf of the three applicants and asked her to clarify whether she was going to represent them all or only the third applicant. In a letter of 12 December 2012 Ms Khrunova informed the Court that she was going to represent all three applicants. The applicants subsequently provided the Court with authority forms in respect of Ms Khrunova, Mr Y. Grozev and Mr D. Gaynutdinov, who made further submissions to the Court on their behalf. In particular, an additional application form of 6 February 2013 was submitted on behalf of the three applicants by Ms Khrunova and Mr Y. Grozev, which further detailed the complaints under Articles 3, 5, 6 and 10 of the Convention (see paragraph 116 above).

119. The Court observes that the fact that the applicants chose to change their representatives in the course of the proceedings has no bearing on the validity of the submissions made by the first set of representatives. Accordingly, the Court considers 19 June 2012 as the date of the lodging of the complaints under Articles 3, 5, 6 and 10 concerning the criminal prosecution for the performance of 21 February 2012 in respect of the three applicants, in compliance with Rule 47 § 5 of the Rules of Court as it stood at the material time.

120. At the same time, the Court notes that the first and second applicants, in an additional application form of 29 July 2013 submitted by Mr D. Gaynutdinov on their behalf, made a new complaint under Article 10 concerning banning the video-recordings of their performances available on the Internet. Accordingly, the Court considers 29 July 2013 as the date that complaint was lodged by the first and second applicants.

B. Legal representation

121. Having regard to the fact that on 14 June 2014 the third applicant withdrew the authority form in respect of Ms Khrunova and Mr Y. Grozev and herself submitted observations in reply to those of the Government, the latter contested the validity of the observations, having regard to Rule 36 § 2 of the Rules of Court, which provides:

> “Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise.”

122. The Court notes that on 24 September 2014 the President of the Section to which the case had been allocated granted the third applicant leave to represent herself in the proceeding before the Court, of which the Court informed the Government by letter on 29 September 2014. The Government’s objection is therefore dismissed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

123. The applicants complained that the conditions of their transportation to and from their court hearings and the treatment to which they had been subjected on the days of the hearings had been inhuman and degrading. They also complained that they had been kept in a glass dock in the courtroom under heavy security and in full view of the public, which amounted to humiliating conditions which were in breach of Article 3 of the Convention. That provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The Government's submissions

124. The Government contested the applicants' argument. They stated that the conditions of their transportation had been in full accordance with Article 33 of Federal Law no. 103-FZ of 15 July 1995 On the Detention of Those Suspected and Accused of Having Committed a Crime. There had been many people in and around the court on the dates of the hearings and some of them had had an aggressive attitude, either towards the applicants or the police, and specially trained dogs had been used during the applicants' transportation to prevent any attempts to disrupt the trial. The Government also pointed out that the applicants had made no complaints concerning either the conditions of their transportation or detention in the courthouse to the domestic authorities. In their view, any discomfort the applicants might have suffered had not attained the minimum level of severity under Article 3 (see *Kalashnikov v. Russia*, no. 47095/99, § 65, ECHR 2002-VI). Furthermore, they noted that the complaint concerning the use of handcuffs in the courtroom had been raised by the third applicant for the first time in her observations of 9 July 2014 (see paragraph 130 below) and should be declared inadmissible on account of a failure to comply with the six-month time-limit.

125. As regards the glass dock in which the applicants had been held during the hearings, the Government noted, firstly, that apart from complaining that the glass had prevented them from communicating freely with counsel, the applicants had failed to substantiate in what way the glass dock could be considered as cruel treatment. They further submitted that metal cages or their replacement, glass docks, had been in use in courts as a security measure for over twenty years and that anyone in pre-trial detention was routinely placed there. Participants in proceedings, including defendants and the public, were therefore used to such conditions and there

was nothing to support any assertion that the measure reflected any sort of prejudice against the applicants.

126. The Government also pointed out that the practice of placing defendants behind special barriers existed in several European countries, such as Armenia, Moldova and Finland. Furthermore, glass docks in particular were in use in Spain, Italy, France, Germany, Ukraine and in some courts in the United Kingdom and Canada. They noted that the Court had found in a number of judgments that the use of metal cages in courtrooms was incompatible with Article 3 (see, among others, *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, §§ 96-102, 27 January 2009; *Ashot Harutyunyan v. Armenia*, no. 34334/04, §§ 123-29, 15 June 2010; and *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, ECHR 2014 (extracts)), however, they were unaware of similar findings with respect to glass docks. In the Government's view, a glass dock, unlike handcuffs or other security measures, allowed the accused to choose a comfortable position or to move around inside the dock while feeling safe from possible attack by victims, which was particularly relevant in the applicants' case as many members of the public inside the courtroom had had a hostile and aggressive stance towards them. Furthermore, in contrast to *Ramishvili and Kokhreidze*, (cited above, § 100), the glass dock did not in the least either "humiliate the applicants in their own eyes" or "arouse in them feelings of fear, anguish and inferiority", which was corroborated by the fact that not only did the applicants not shy away from the public, but directly addressed them during the proceedings. Likewise, in contrast with *Ashot Harutyunyan*, (cited above, § 128), there was no evidence that the glass dock had had any "impact on [their] powers of concentration and mental alertness" either. The Government therefore argued that there had been no breach of Article 3 in those circumstances.

2. The applicants' submissions

127. The applicants submitted that both the conditions of their transportation to and from the courthouse and the conditions in which they had been kept during the hearings were standard practice in Russia and that there were no effective domestic remedies with respect to those complaints. They pointed out that the Government had not suggested any remedy that they might have had recourse to.

128. The applicants maintained their complaint concerning the conditions of their transportation and the conditions in which they had been kept in the courthouse on the days of their hearings. They pointed out that the duration of the journey given by the Government was not accurate because it only took into account the vehicle's passing through the remand prison's gates. However, after arrival they had often remained inside the vehicle for one and a half to two hours before being let out.

129. The applicants argued that the glass dock in which they had been paced during the hearings was not much different from a metal cage, which the Court had found incompatible with Article 3 (see *Svinarenko and Slyadnev*, cited above, § 138). They submitted, in particular, that the glass dock had been very small, which had significantly limited their movements inside it. Furthermore, the glass dock conveyed a message to an outside observer that individuals placed in it had to be locked up and were therefore dangerous criminals. That message had not only been reinforced by the small size of the dock and its position in the courtroom, but also by the high level of security and the guard dogs around it. The applicants contested the Government's submission that that had been necessary for their own safety. They argued that there had been no attempts to disrupt the trial and that the presence of such a high number of armed police officers, ushers and guard dogs had only served the purpose of intimidating them and their counsel, to debase them and, given that the trial had been closely followed by the media, to create a negative image of them as dangerous criminals in the eyes of the wide media audience which had followed the trial.

130. Furthermore, according to the applicants, their placement in the glass dock had made it significantly more complicated to communicate with their counsel as, in that respect, it was even more restricting than a metal cage. In the applicants' view, such a measure, as well as creating a negative image of them in the eyes of the media audience, had also undermined the presumption of innocence in their regard. The third applicant also submitted that despite being held in the glass dock, she had also been handcuffed for three hours during the reading out of the judgment. Her hands had become swollen and had ached. Given that the applicants had had no history of violent behaviour, the treatment in question had in their view attained the "minimum level of severity" for the purposes of Article 3.

B. Admissibility

131. The Court observes, firstly, that the third applicant's complaint about being handcuffed at the court hearing of 17 August 2012 was raised for the first time in her observations of 9 July 2014 submitted in reply to those of the Government, which is outside the six-month time-limit provided for by Article 35 § 1. Accordingly, that part of the application must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

132. The Court notes that the Government raised a plea of non-exhaustion with regard to the applicants' complaint about the conditions of their transportation to the court and their detention there. The Court observes that in *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, §§ 100-19, 10 January 2012), it found that the Russian legal system did not provide an effective remedy that could be used to prevent the

alleged violation or its continuation and provide applicants with adequate and sufficient redress in connection with a complaint about inadequate conditions of detention. The Government provided no evidence to enable the Court to reach a different conclusion in the present case. The Government's objection must therefore be dismissed.

133. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. *Conditions of transport to and from the trial hearings*

(a) General Principles

134. For a summary of the relevant general principles see *Idalov v. Russia* [GC], no. 5826/03, §§ 91-95, 22 May 2012.

(b) Application of those principles to the present case

135. The Court notes that it has relied in previous cases on the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the CPT"), which has considered that individual compartments measuring 0.4, 0.5 or even 0.8 square metres are unsuitable for transporting a person, no matter how short the journey (see *Khudoyorov v. Russia*, no. 6847/02, §§ 117-20, ECHR 2005-X (extracts), and *M.S. v. Russia*, no. 8589/08, § 76, 10 July 2014). It notes that the individual compartments in which the applicants were transported measured from 0.37 to 0.49 sq. m, whereas the common compartments allowed less than one sq. m per person.

136. The Court observes that the applicants had to endure those cramped conditions twice a day, on the way to and from the courthouse, and were transported in such conditions thirty times over one month of detention. As regards the duration of each journey, the Court observes that according to the copies of the time logs submitted by the Government the time in transit varied between thirty-five minutes and one hour twenty minutes on the way to the court and between twenty minutes and four hours and twenty minutes on the way back.

137. The Court notes that it has found a violation of Article 3 of the Convention in a number of cases against Russia on account of cramped conditions when applicants were being transported to and from court (see, for example, *Khudoyorov*, cited above, §§ 118-120; *Starokadomskiy v. Russia*, no. 42239/02, §§ 53-60, 31 July 2008; *Idalov*, cited above, §§ 103-08; and *M.S. v. Russia*, cited above, §§ 74-77). Having regard to the

material in its possession, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

138. The above considerations are sufficient to warrant the conclusion that the conditions of the applicants' transport to and from the trial hearings exceeded the minimum level of severity and amounted to inhuman and degrading treatment in breach of Article 3 of the Convention. In view of this finding the Court does not consider it necessary to examine other aspects of the applicants' complaint.

139. There has accordingly been a violation of Article 3 of the Convention in this respect.

2. *Treatment during the court hearings*

(a) General principles

140. As the Court has repeatedly stated, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

141. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). The public nature of the treatment may be a relevant or an aggravating factor in assessing whether it is "degrading" within the meaning of Article 3 (see, *inter alia*, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *Erdoğan Yağız v. Turkey*, no. 27473/02, § 37, 6 March 2007; and *Kummer v. the Czech Republic*, no. 32133/11, § 64, 25 July 2013).

142. In the context of courtroom security arrangements, the Court has stressed that the means chosen for ensuring order and security in those places must not involve measures of restraint which by virtue of their level of severity or by their very nature would bring them within the scope of Article 3 of the Convention, as there can be no justification for torture or inhuman or degrading treatment or punishment (see *Svinarenko and Slyadnev*, cited above, §127). It found, in particular, that confinement in a metal cage was contrary to Article 3, having regard to its objectively degrading nature (ibid., §§ 135-38).

143. The Court has also found that while the placement of defendants behind glass partitions or in glass cabins does not in and of itself involve an element of humiliation sufficient to reach the minimum level of severity,

that level may be attained if the circumstances of the applicants' confinement, taken as a whole, would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, § 125, 4 October 2016).

(b) Application of those principles in the present case

144. The Court has first to establish whether the confinement in a glass dock attained the minimum degree of severity to enable it to fall within the ambit of this provision.

145. The Court considers that glass docks do not have the harsh appearance of metal cages, in which merely being exposed to the public eye is capable of undermining the defendants' image and of arousing in them feelings of humiliation, helplessness, fear, anguish and inferiority. It also notes that glass installations are used in courtrooms in other member States (see *Svinarenko and Slyadnev*, cited above, § 76), although their designs vary from glass cubicles to glass partitions, and in the majority of States their use is reserved for high-security hearings (see *Yaroslav Belousov*, cited above, § 124). It appears from the Government's submissions that in Russia all defendants are systematically placed in a metal cage or a glass cabin as long as they are in custody.

146. The Court has to scrutinise the overall circumstances of the applicants' confinement in the glass dock to determine whether the conditions there reached, on the whole, the minimum level of severity required to characterise their treatment as degrading within the meaning of Article 3 of the Convention (see *Yaroslav Belousov*, cited above, § 125).

147. The Court has insufficient evidence that the glass dock did not allow the applicants adequate personal space. It notes, at the same time, that the dock was constantly surrounded by armed police officers and court ushers and that a guard dog was present next to it in the courtroom.

148. The Court takes note of the Government's argument that the glass dock was used as a security measure and that specially trained dogs were used during the applicants' transportation to and from the courthouse to prevent possible attempts to disrupt the hearing owing to the aggressive attitude of certain members of the public, either towards the applicants or the police. The Court observes, firstly, that no allegation was made by the Government that there was any reason to expect that the applicants would attempt to disrupt the hearing, or that the security measures had been put in place owing to their conduct. It also notes that in the photographs submitted by the applicants all the police officers and court ushers surrounding the dock, except one, stand facing the applicants. The Court considers this to constitute sufficient evidence of the fact that they were closely watching the applicants rather than monitoring the courtroom. In the Court's view, the

applicants must have felt intimidation and anxiety at being so closely observed throughout the hearings by armed police officers and court ushers, who, furthermore, separated them from their lawyers' desk on one side of the glass dock. The Court further observes that while the Government submitted that specially trained dogs were used to ensure security during the applicants' transportation, they provided no explanation for the dogs' presence in the courtroom.

149. The Court notes that the applicants' trial was closely followed by national and international media and they were permanently exposed to public view in a glass dock that was surrounded by armed police, with a guard dog next to it. The above elements are sufficient for the Court to conclude that the conditions in the courtroom at the Khamovnicheskiy District Court attained the minimum level of severity and amounted to degrading treatment in breach of Article 3 of the Convention.

150. There has accordingly been a violation of Article 3 of the Convention in this respect as well.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

151. The applicants complained that there were no valid reasons to warrant remanding them in custody, in breach of Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' submissions

1. The Government's submissions

152. The Government maintained that when deciding on the preventive measure to be applied to the applicants the domestic courts had carefully weighed all the relevant factors, including the applicants' personal characteristics, the gravity of the offences they had been charged with, their family situation, age and state of health. They had also examined the applicants' arguments and found them unconvincing. At the same time, the courts had agreed with the prosecuting authorities that if they had not been remanded in custody the applicants could have absconded from the trial, obstructed the proceedings or continued their criminal activity. In particular, the courts had taken into consideration the fact that the applicants had been charged with an offence committed by a group, while some of its members had not been identified. Furthermore, they had taken into consideration the fact that the first and second applicants had not lived at the address where

they were registered, while the third applicant had misled the investigation by at first having provided a false name. The courts had also taken account of a number of investigative measures that had still to be taken at the time. Therefore, the decisions to remand the applicants in custody and to extend their pre-trial detention had been well-grounded and had complied with Article 5 § 3.

2. The applicants' submissions

153. The applicants maintained their complaint. The third applicant submitted that she had initially given the investigator a false name on advice of her lawyer, who had misled her. However, it had turned out that the investigator had known who she was anyway. Therefore, in her view, her detention on the grounds that she had concealed her identity had been unfounded.

B. Admissibility

154. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

155. The Court notes that the first applicant was arrested on 4 March 2012, the second applicant on 3 March 2012 and the third applicant on 16 March 2012. On 17 August 2012 the Khamovnicheskiy District Court completed the trial and found them guilty. It follows that the period of the applicants' detention to be taken into consideration under Article 5 § 3 of the Convention amounted to five months and fourteen days, five months and fifteen days and five months and two days respectively.

156. The Court has already examined many applications against Russia raising similar complaints under Article 5 § 3 of the Convention. It has found a violation of that Article on the grounds that the domestic courts extended an applicant's detention by relying essentially on the gravity of the charges and using stereotyped formulae without addressing his or her specific situation or considering alternative preventive measures (see, among many other authorities, *Mamedova v. Russia*, no. 7064/05, 1 June 2006; *Pshevecherskiy v. Russia*, no. 28957/02, 24 May 2007; *Shukhardin v. Russia*, no. 65734/01, 28 June 2007; *Belov v. Russia*, no. 22053/02, 3 July 2008; *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009; *Logvinenko v. Russia*, no. 44511/04, 17 June 2010; and *Valeriy Samoylov v. Russia*, no. 57541/09, 24 January 2012).

157. The Court also notes that it has consistently found authorities' failure to justify even relatively short periods of detention, amounting, for example, to several months, to be in contravention of Article 5 § 3 (see, for example, *Belchev v. Bulgaria*, no. 39270/98, § 82, 8 April 2004, where the applicant's pre-trial detention lasted four months and fourteen days, and *Sarban v. Moldova*, no. 3456/05, §§ 95-104, 4 October 2005, where the applicant's pre-trial detention was slightly more than three months).

158. Having regard to the material in its possession, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Accordingly, the Court considers that by failing to address the specific facts or consider alternative preventive measures, the authorities extended the applicants' detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify the applicants' being remanded in custody for over five months.

159. There has accordingly been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

160. The applicants complained that their right to defend themselves effectively had been circumvented given that they were unable to communicate freely and privately with their lawyers during the trial. They also argued that they had been unable to effectively challenge the expert reports ordered by the investigators as the trial court had refused to call rebuttal experts or the experts who had drafted the reports. The applicants relied on Article 6 §§ 1 and 3 (c) and (d) of the Convention, which reads, in so far as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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;
>
> ..."

A. The parties' submissions

1. The Government's submissions

161. The Government argued that the applicants had fully used their right to have confidential consultations with counsel, as guaranteed by domestic law. All of them had had numerous meetings with their lawyers and neither the applicants nor their representatives had made any complaints in that regard. The Government provided a copy of the register of visits by the applicants' lawyers to the remand prison. They further pointed out that the applicants had likewise made no complaints to the trial court concerning the alleged impossibility to have confidential talks with their lawyers during the hearings. The State could also not be held accountable if the applicants had been unhappy with the quality of the legal assistance provided by counsel of their choice. In particular, the third applicant had filed a complaint to the Moscow Regional Bar Association concerning one of the lawyers that had represented her and had asked the court for time to find a different representative. The court had granted that request. The first and second applicants had also eventually refused the services of the lawyers who had represented them initially. The Government pointed out that only the first applicant had raised the issue of an alleged failure to secure her right to confidential meetings with her counsel on appeal. They argued therefore that the second and third applicants had failed to exhaust the available domestic remedies and that the complaint was manifestly ill-founded in respect of the first applicant.

162. The Government further argued that the trial court had acted within its discretionary powers when deciding on the applicants' request to exclude the expert report as evidence or to carry out another expert examination. The trial court had dismissed the applicants' application to question certain experts at the hearing as it had found that the questions were irrelevant for the proceedings. Furthermore, the applicants had not asked the court to order another expert examination by a different expert institution, nor had they sought to complement the list of questions put to the experts examined during the trial. The Government pointed out that the trial court had carefully studied all the expert opinions and had set out its assessment thereof in detail in the judgment. In their view therefore there had been no violation of Article 6 § 1 in that regard.

2. The applicants' submissions

163. The applicants submitted that they had raised all the complaints in question before the trial court and on appeal. They maintained their complaints concerning a violation of their rights under Article 6. They contended that the register of the applicants' lawyers' visits to the remand prison provided by the Government was misleading as it related to visits

before the trial. However, the relevant aspect of their complaint concerned their inability to communicate freely and privately with their lawyers during the trial, in particular, on account of the glass dock where they had been held during the hearings and because the timing of the hearings and the conditions of their transportation to and from court had left them exhausted.

B. Admissibility

164. As regards the plea of non-exhaustion raised by the Government with respect to the complaint concerning the lack of confidential consultations between the applicants and their lawyers during the trial, the Court notes that it was raised by the applicants before the trial court (see paragraph 31 above). Furthermore, it was raised by the first applicant in her appeal statement, where she submitted that none of the accused could have confidential consultations with their lawyers (see paragraph 55 above). However, it was not examined by the appeal court (see paragraph 57 above). In the light of the foregoing the Court does not see how there could have been a different outcome if the second and third applicants had raised the complaint on appeal. It therefore dismisses the Government's objection.

165. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

166. The Court notes that the applicants raised two distinct issues, relying on specific guarantees of Article 6 § 3 of the Convention as well as on the general right to a fair hearing provided for by Article 6 § 1. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports* 1997-III), each of the complaints should be examined under those two provisions taken together.

167. The Court will first examine the complaint under Article 6 § 3 (c) concerning the applicants' inability to communicate freely and privately with their lawyers during the trial. The applicants contended that the courtroom arrangement, involving a glass dock in which they sat throughout the trial, had not only constituted degrading treatment but had also hampered them in consulting their lawyers. The Court notes that in the present case the glass dock was a permanent courtroom installation, a place designated for defendants in criminal proceedings. In the applicants' case it was surrounded throughout the hearing by police officers and court ushers who kept the applicants under close observation. On one side, they also

separated the glass dock from the desk where the applicants' lawyers sat during the trial.

168. The Court reiterates that a measure of confinement in a courtroom may affect the fairness of a trial, as guaranteed by Article 6 of the Convention. In particular, it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance (see *Yaroslav Belousov*, cited above, § 149, and *Svinarenko and Slyadnev*, cited above, § 134, and the cases cited therein). It has stressed that an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010, with further references).

169. The Court is mindful of the security issues a criminal court hearing may involve, especially in a large-scale or sensitive case. It has previously emphasised the importance of courtroom order for a sober judicial examination, a prerequisite of a fair hearing (see *Ramishvili and Kokhreidze* cited above, § 131). However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her relations with lawyers should only be imposed in so far as is necessary, and should be proportionate to the risks in a specific case (see *Van Mechelen and Others*, cited above, § 58; *Sakhnovskiy*, cited above, § 102; and *Yaroslav Belousov*, cited above, § 150).

170. In the present case, the applicants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, that arrangement made it impossible for the applicants to have confidential exchanges with their legal counsel, to whom they could only speak through a small window measuring 15 x 60 cm, which was only a metre off the ground and which was in close proximity to the police officers and court ushers.

171. The Court considers that it is incumbent on the domestic courts to choose the most appropriate security arrangement for a given case, taking into account the interests of administration of justice, the appearance of the proceedings as fair, and the presumption of innocence; they must at the same time secure the rights of the accused to participate effectively in the proceedings and to receive practical and effective legal assistance (see *Yaroslav Belousov*, cited above, § 152). In the present case, the use of the security installation was not warranted by any specific security risks or courtroom order issues but was a matter of routine. The trial court did not seem to recognise the impact of the courtroom arrangements on the applicants' defence rights and did not take any measures to compensate for those limitations. Such circumstances prevailed for the duration of the

first-instance hearing, which lasted for over one month, and must have adversely affected the fairness of the proceedings as a whole.

172. It follows that the applicants' rights to participate effectively in the trial court proceedings and to receive practical and effective legal assistance were restricted and that those restrictions were neither necessary nor proportionate. The Court concludes that the criminal proceedings against the applicants were conducted in violation of Article 6 §§ 1 and 3 (c) of the Convention.

173. In view of that finding, the Court does not consider it necessary to address the remainder of the applicants' complaints under Article 6 §§ 1 and 3 (d) of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION ON ACCOUNT OF CRIMINAL PROSECUTION FOR THE PERFORMANCE OF 21 FEBRUARY 2012

174. The applicants complained that the institution of criminal proceedings against them, entailing their detention and conviction, for the performance of 21 February 2012 had amounted to a gross, unjustifiable and disproportionate interference with their freedom of expression, in breach of Article 10 of the Convention, which reads as follows:

> "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."

A. The parties' submissions

1. The Government's submissions

175. The Government contested that argument. They submitted, firstly, that the applicants had not been convicted of hooliganism for their expressing their opinions but because they had committed an offence punishable by the Criminal Code. The fact that while committing the offence the applicants had believed that they were expressing their views or had given a performance was not sufficient to conclude that the conviction had actually constituted an interference with their freedom of expression.

Any such interference had been of an indirect and secondary nature and had not fallen under the protection of Article 10. The Government referred in that regard to *Kosiek v. Germany* (28 August 1986, Series A no. 105) and *Glasenapp v. Germany* (28 August 1986, Series A no. 104).

176. The Government further argued that if the Court considered that there had been an interference with the applicants' right under Article 10 then it had been "in accordance with the law". In particular, Article 213 of the Criminal Code clearly set out what constituted hooliganism, which had been further elaborated by the Supreme Court in Ruling no. 45 of 15 November 2007 (see paragraph 88 above). The legislation in question was therefore clear and foreseeable. The applicants had been bound to realise that an Orthodox church was not a concert venue and that their actions would be liable to sanctions.

177. As regards the legitimate aim of the interference, the Government submitted that it had sought to protect Orthodox Christians' right to freedom of religion. As for the proportionality of the interference, in the Government's view it had been "necessary in a democratic society" in order to safeguard the rights guaranteed by Article 9 of the Convention. They referred in that regard to *Otto-Preminger-Institut* (cited above, §§ 47 and 49), where the Court had stated that "whoever exercises the rights and freedoms enshrined in the first paragraph of [Article 10] undertakes 'duties and responsibilities'. Amongst them ... an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs." The Government also endorsed the relevant part of the submissions of the Alliance Defending Freedom (see paragraphs 185-186 below).

178. The Government argued that the applicants' manifestly provocative behaviour in a place of religious worship, which, furthermore, was one of the symbols of the Russian Orthodox community and had been chosen specifically by the applicants to amplify the provocative nature of their actions, had targeted the Christians working in and visiting the cathedral as the audience, had undermined tolerance and could not be regarded as a normal exercise of Convention rights. Furthermore, the applicants had made a video of their performance and uploaded it to the Internet, where it had been viewed several thousand times a day, which had thereby made their performance even more public.

179. The Government emphasised that the applicants had not been punished for the ideas or opinions that they might have been seeking to impart, whether political or religious, but for the form in which that had been done. They stated that the Court should consider the context and not the content of their speech. In their view, the applicants' conduct could not "contribute to any form of public debate capable of furthering progress in human affairs" and had merely been a provocative act and a public

disturbance, which had constituted an unjustified encroachment on others' freedom of religion. They also pointed out that while Article 213 § 2 of the Criminal Code provided for imprisonment of up to seven years, the applicants had only been sentenced to two years in jail and that the third applicant had been exempted from serving her sentence.

180. The Government argued that in the given circumstances the State had been called upon to take measures in order to protect Article 9 rights and to punish those responsible for violating places of religious worship and expressing opinions incompatible with the exercise of those rights. Accordingly, in the Government's view there had been no violation of Article 10 in the present case.

2. The applicants' submissions

181. The applicants maintained that the criminal proceedings against them had constituted an interference with their right to freedom of expression as they had been prosecuted for their performance. In their view, the Government's argument to the contrary and, in particular the reference to *Kosiek* (cited above) was misconceived. They also argued that the cases of *Otto-Preminger-Institut* (cited above) and *İ.A. v. Turkey* (no. 42571/98, ECHR 2005-VIII) had concerned entirely different situations. In any event, in both those cases the punishment had been much milder than that imposed on the applicants, being a ban on showing the film in question in the former case and a fine in the latter. The applicants further argued that the domestic courts had failed either to recognise that their song had an explicit political message or to assess the proportionality of the interference. Furthermore, the conclusion that their actions had been motivated by religious hatred was arbitrary and based on an incomplete assessment of the evidence owing to the refusal of their applications for additional evidence and to question additional witnesses.

182. The applicants submitted that they had chosen Christ the Saviour Cathedral for their performance because the Patriarch of the Russian Orthodox Church had used that venue for a political speech. In particular, he had criticised demonstrations against President Putin in the cathedral and had announced that he supported him for a third term as President. The applicants pointed out that they had criticised public and religious officials in their song for the manner in which they exercised their official functions, and argued that political speech enjoyed the highest level of protection under the Convention as being of paramount importance in a democratic society.

183. The applicants further argued that the domestic courts' findings that their actions had been offensive to Orthodox believers had also been unsubstantiated because their performance had only lasted about a minute and a half and had been witnessed by about six people who had been working in the cathedral. The extremely short duration of the incident, the

fact that it had not interrupted any religious service and had been witnessed by a very limited number of people should have led to the incident being classified as an administrative offence rather than a criminal one. In the applicants' view, the courts' analysis had not in the main been built on the incident as such, but on the video of it that had been posted on the Internet, which had been seen one and a half million times in ten days. Finally, the applicants contended that sentencing them to one year and eleven months in jail had been grossly disproportionate.

B. Submissions by third-party interveners

1. Submissions from the Alliance Defending Freedom (ADF)

184. The ADF noted that there was growing intolerance against Christians throughout Council of Europe member States, which had been addressed by a number of international organisations, in particular by the Parliamentary Assembly of the Council of Europe in Resolution 1928 (2013) on Safeguarding Human Rights in Relation to Religion and Belief, and Protecting Religious Communities from Violence.

185. They further submitted that Christians, like any other group in society, did not have the right not to be offended. On the contrary, they had to be prepared to be "offended, shocked and disturbed" within the meaning of the Court's case-law (see *Handyside*, cited above, § 49). They argued, however, that Christians had the right to worship freely without fear of obscene, hostile or even violent protests taking place within their church buildings.

186. The ADF pointed out that when State authorities had to take action against activists who invaded a church and protested during a religious service they would necessarily be restricting those activists' freedom of speech. In the ADF's view, the Court should look at the context of events rather than the particular content of the speech when determining whether such a restriction had been proportionate. In that regard, the ADF referred to several cases where the Court had found a restriction on the manner and form of expression to be proportionate as long as the expression itself had not been prohibited from taking place (they referred, *inter alia*, to *Rai, Allmond and "Negotiate Now" v. The United Kingdom* (dec.), no. 25522/94, 6 April 1995, and *Barraco v. France*, no. 31684/05, 5 March 2009, both cases examined under Article 11). The ADF argued that a content-based approach to determining acceptable limitations on speech lacked clarity, was open to abuse and ran the risk of decisions being influenced by personal and political convictions rather than objective standards (they referred, *inter alia*, to *Féret v. Belgium*, no. 15615/07, 16 July 2009, and *Vejdeland v. Sweden*, no. 1813/07, 9 February 2012). At the same time, a context-based approach was preferable as it did not require an assessment of

whether the speech in question had been “insulting”, “hateful” or “disrespectful” and was therefore beyond the protection of Article 10, or whether it had been “offensive”, “shocking” or “disturbing” but had amounted to a fundamental right under the Convention.

2. Submissions by Amnesty International and Human Rights Watch

187. Amnesty International and Human Rights Watch (“the interveners”) noted that while freedom of expression was one of the foundations of a democratic society, States were permitted, and in certain circumstances, even obligated to restrict it in order to protect the rights of others. However, when applying such restrictions States had to choose to that end the least restrictive instrument, with criminal sanctions rarely meeting that requirement. In that regard, the interveners referred in particular to the Rabat Plan of Action and the Committee on the Elimination of Racial Discrimination General Recommendation no. 35: Combating Racist Hate Speech (see paragraphs 110 and 108 above).

188. The interveners argued that criminal sanctions should only be applied to offences that concerned advocacy of hatred that constituted incitement to violence, hostility or discrimination on the grounds of nationality, race, religion, ethnicity, gender or sexual orientation. Punitive laws should be formulated with sufficient precision and have a narrow scope of operation as otherwise they would have a chilling effect on other types of speech.

189. In so far as religious hatred might be at issue, the interveners’ view was that there should be a clear distinction between expression that constituted incitement to religious discrimination, hostility and violence on the one hand, and expression that criticised or even insulted religions in a manner that shocked or offended the religion’s adherents. They noted in that regard that States Parties to the ICCPR were required to prohibit the former, but were not permitted to punish the latter (see paragraph 104 above). It had therefore to be clearly defined what constituted the offence of incitement to religious discrimination, hostility and violence.

190. The interveners further observed that laws restricting freedom of expression in the interests of protecting religions or their adherents from offences such as blasphemy, religious insult and defamation were often vague, subject to abuse and punished expression that fell short of the threshold of advocacy of hatred and were therefore detrimental to other human rights. In that regard the interveners referred, in particular, to the Report of the Venice Commission, the Human Rights Committee’s General Comment no. 34 and the Rabat Plan of Action (see paragraphs 101, 107 and 110 above).

3. Submissions by ARTICLE 19

191. ARTICLE 19 sought to outline the context of the present case. They noted a number of domestic legal instruments, which they argued constituted impediments to political speech in Russia. Apart from the Suppression of Extremism Act (see paragraph 239 below), those included Article 282 of the Criminal Code prohibiting the incitement of hatred on the grounds, *inter alia*, of sex, race, nationality or religion which, according to ARTICLE 19, did not meet the standards of the Rabat Plan of Action (see paragraph 110 above) and was used to stifle voices critical of the Government. They likewise criticised Law no. 139-FZ on Amending the Federal Law on the Protection of Children from Information Harmful to their Health and Development, which had increased the executive authorities' power to block certain websites.

192. ARTICLE 19 also noted the following legal provisions passed after 2012 which, in their view, restricted freedom of expression. Firstly, it referred to Federal Law no. 433-FZ of 28 December 2013 on Amendments to the Criminal Code of the Russian Federation, which had added Article 280[1] to the Code, criminalising public incitement to actions aimed at breaching Russian territorial integrity. ARTICLE 19 noted that the provision did not specify that it only applied to calls for territorial changes by means of violent action. Secondly, it cited Federal Law no. 135-FZ of 29 June 2013 on an Amendment to Article 148 of the Criminal Code and Other Legislative Acts of the Russian Federation with the Aim to Counter Insults to the Religious Convictions and Feelings of Citizens, which had criminalised insulting religious feelings. Thirdly, it noted that libel, which had been decriminalised in 2011, had again been made a criminal offence by Federal Law no. 141-FZ of 28 July 2012 on Amendments to the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation. ARTICLE 19 referred to a number of convictions for libel under Article 128.1 where the statements at issue had been directed against State officials. Fourthly, it referred to Federal Law no. 190-FZ of 12 November 2012 on Amendments to the Criminal Code of the Russian Federation and Article 151 of the Code of Criminal Procedure of the Russian Federation. It had broadened the definition of the crime of "high treason" contained in Article 275 of the Criminal Code by including "assistance ... to a foreign State, an international or foreign organisation or their representatives in activity directed against the security of the Russian Federation". The definition of "espionage" contained in Article 276 of the Criminal Code had also been broadened to add international organisations to the list of entities cooperation with which could be considered as espionage.

193. Furthermore, ARTICLE 19 noted the following legal acts passed after 2012, which it submitted had restricted freedom of assembly and association. Firstly, it cited Federal Law no. 121-FZ of 20 July 2012 on

Amendments to Certain Legislative Acts of the Russian Federation in the Part Related to the Regulation of the Activity of Non-Commercial Organisations Acting as Foreign Agents, which required non-governmental organisations (NGOs) that received foreign funding and engaged in political activity to register as "foreign agents". Secondly, it referred to Federal Law no. 272-FZ of 28 December 2012 on Measures in respect of Persons Involved in a Breach of Fundamental Human Rights and Freedoms, Rights and the Freedoms of Nationals of the Russian Federation. Apart from imposing sanctions on a number of United States officials on account of violations of the human rights of Russian citizens and banning the adoption of Russian children by US nationals, the law had also banned Russian NGOs that either engaged in political activity and received funding from the United States or engaged in activities that threatened Russia's interests. Thirdly, it mentioned Federal law no. 65-FZ of 8 June 2010 on Amendments to the Code of Administrative Offences of the Russian Federation and the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing, which had introduced numerous restrictions on the right of assembly. In particular, entire categories of people had been forbidden to organise public events on account of having a criminal record or of having committed administrative offences; the law provided for broad liability for an organiser for possible damage caused during an event; maximum penalties for a breach of the law in question had been increased and a new administrative offence of organising the simultaneous presence and/or movement of citizens in public places which entailed a breach of public order had been introduced in Article 20.2.2 of the Code of Administrative Offences.

194. Finally, ARTICLE 19 submitted that the repression of civil society activists in Russia had increased significantly in 2012. They referred to a number of examples in 2012-13 where such activists had been subjected to physical attacks, administrative penalties for online publications, fabricated criminal charges and even kidnapping.

4. *The Government's comments on the third-party interventions*

195. The Government referred to their position stated in their observations concerning the applicants' complaint (see paragraphs 175 to 180 above).

C. Admissibility

196. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

D. Merits

1. General principles

197. According to the Court's well-established case-law, freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". Moreover, Article 10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204, and *Women On Waves and Others v. Portugal*, no. 31276/05, §§ 29 and 30, 3 February 2009).

198. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V).

199. In order for an interference to be justified under Article 10, it must be "prescribed by law", pursue one or more of the legitimate aims listed in the second paragraph of that provision and be "necessary in a democratic society" – that is to say, proportionate to the aim pursued (see, for example, *Steel and Others v. the United Kingdom*, 23 September 1998, § 89, *Reports* 1998-VII).

200. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V; *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII; and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI).

201. In assessing the proportionality of the interference, the nature and severity of the penalty imposed are among the factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Skałka v. Poland*, no. 43425/98, § 38, 27 May 2003).

2. Application of the above principles to the present case

(a) Existence of act of "expression"

202. The first question for the Court is whether the actions for which the applicants were prosecuted in criminal proceedings and subsequently imprisoned were covered by the notion of "expression" under Article 10 of the Convention.

203. The Court notes in that connection that it has examined various forms of expression to which Article 10 applies. In particular, it was held to include freedom of artistic expression – notably within the scope of freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on States not to encroach unduly on an author's freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133).

204. The Court has also held that opinions, apart from being capable of being expressed through the media of artistic work, can also be expressed through conduct. For example, it has considered that the public display of several items of dirty clothing for a short time near Parliament, which had been meant to represent the "dirty laundry of the nation", amounted to a form of political expression (see *Tatár and Fáber v. Hungary*, no. 26005/08 and 26160/08, § 36, 12 June 2012). Likewise, it has found that pouring paint on statues of Ataturk was an expressive act performed as a protest against the political regime at the time (see *Murat Vural v. Turkey*, no. 9540/07, §§ 54-56, 21 October 2014). Detaching a ribbon from a wreath laid by the President of Ukraine at a monument to a famous Ukrainian poet on Independence Day has also been regarded by the Court as a form of political expression (see *Shvydka v. Ukraine*, no. 17888/12, §§ 37-38, 30 October 2014).

205. In the case at hand, the applicants, members of a punk band, attempted to perform their song *Punk Prayer – Virgin Mary, Drive Putin Away* from the altar of Moscow's Christ the Saviour Cathedral as a response to the ongoing political process in Russia (see paragraphs 7-8 above). They invited journalists and the media to the performance to gain publicity.

206. For the Court, that action, described by the applicants as a "performance", constitutes a mix of conduct and verbal expression and amounts to a form of artistic and political expression covered by Article 10.

(b) Existence of an interference

207. Having regard to the foregoing, the Court considers that criminal proceedings against the applicants on account of the above actions, which

resulted in a prison sentence, amounted to an interference with their right to freedom of expression.

(c) Compliance with Article 10 of the Convention

(i) "Prescribed by law"

208. According to the Government, the interference was "in accordance with the law" as the applicants had been convicted of hooliganism under Article 213 of the Criminal Code, which was clear and foreseeable. The applicants contested the applicability of that provision to their actions.

209. Although there may be a question as to whether the interference was "prescribed by law" within the meaning of Article 10, the Court does not consider that, in the present case, it is called upon to examine whether Article 213 of the Criminal Code constituted adequate legal basis for the interference as, in its view, the applicants' grievances fall to be examined from the point of view of the proportionality of the interference. The Court therefore decides to leave the question open and will address the applicants' arguments below when examining whether the interference was "necessary in a democratic society".

(ii) Legitimate aim

210. Given that the applicants' performance took place in a cathedral, which is a place of religious worship, the Court considers that the interference can be seen as having pursued the legitimate aim of protecting the rights of others.

(iii) "Necessary in a democratic society"

211. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI) and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, *inter alia*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). Furthermore, the Court must examine with particular scrutiny cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (see *Taranenko v. Russia*, no. 19554/05, § 87, 15 May 2014).

212. It notes that the applicants wished to draw the attention of their fellow citizens and the Russian Orthodox Church to their disapproval of the political situation in Russia and the stance of Patriarch Kirill and some other clerics towards street protests in a number of Russian cities, which had been caused by recent parliamentary elections and the approaching presidential election (see paragraphs 7-8 above). Those were topics of public interest.

The applicants' actions addressed these topics and contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers. The Court reiterates in that connection that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest. It has been the Court's consistent approach to require very strong reasons for justifying restrictions on political debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII, and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV).

213. That being said, the Court reiterates that notwithstanding the acknowledged importance of freedom of expression, Article 10 does not bestow any freedom of forum for the exercise of that right. In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 47, ECHR 2003-VI, and *Taranenko*, cited above, § 78). Furthermore, the Court considers that holding an artistic performance or giving a political speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct.

214. In the present case the applicants' performance took place in Moscow's Christ the Saviour Cathedral. It can be considered as having violated the accepted rules of conduct in a place of religious worship. Therefore, the imposition of certain sanctions might in principle be justified by the demands of protecting the rights of others, although the Court notes that no proceedings were instituted against the applicants following their mock performance of the same song at the Epiphany Cathedral in the district of Yelokhovo in Moscow on 18 February 2012 in similar circumstances (see paragraph 12 above).

215. However, in the case at hand the applicants were subsequently charged with a criminal offence and sentenced to one year and eleven months in prison. The first and second applicants served approximately one year and nine months of that term before being amnestied while the third applicant served approximately seven months before her sentence was suspended. The Court notes that the applicants' actions did not disrupt any religious services, nor did they cause any injures to people inside the cathedral or any damage to church property. In those circumstances the Court finds that the punishment imposed on the applicants was very severe in relation to the actions in question. It will further examine whether the domestic courts put forward "relevant and sufficient" reasons to justify it.

216. The Court notes that the domestic courts convicted the applicants of hooliganism motivated by religious hatred and enmity, committed in a group acting with premeditation and in concert, under Article 213 § 2 of the Criminal Code. It is significant that the courts did not examine the lyrics of the song *Punk Prayer – Virgin Mary, Drive Putin Away* performed by the applicants, but based the conviction primarily on the applicants' particular conduct. The trial court emphasised the applicants' being "dressed in brightly coloured clothes and wearing balaclavas", making "brusque movements with their heads, arms and legs, accompanying them with obscene language and other words of an insulting nature" to find that such behaviour did not "respect the canons of the Orthodox Church", and that "representatives of other religions, and people who do not consider themselves believers, also [found] such behaviour unacceptable" (see paragraph 52 above). The trial court concluded that the applicants' actions had "offend[ed] and insult[ed] the feelings of a large group of people" and had been "motivated by religious hatred and enmity" (ibid.).

217. The Court reiterates that it has had regard to several factors in a number of cases concerning statements, verbal or non-verbal, alleged to have stirred up or justified violence, hatred or intolerance where it was called upon to decide whether the interferences with the exercise of the right to freedom of expression of the authors of such statements had been "necessary in a democratic society" in the light of the general principles formulated in its case-law.

218. One of them has been whether the statements were made against a tense political or social background; the presence of such a background has generally led the Court to accept that some form of interference with such statements was justified. Examples include the tense climate surrounding the armed clashes between the PKK (the Workers' Party of Kurdistan, an illegal armed organisation) and the Turkish security forces in south-east Turkey in the 1980s and 1990s (see *Zana v. Turkey*, 25 November 1997, §§ 57-60, *Reports* 1997-VII; *Sürek (no. 1)*, cited above, §§ 52 and 62; and *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, § 40, 8 July 1999); the atmosphere engendered by deadly prison riots in Turkey in December 2000 (see *Falakaoğlu and Saygılı v. Turkey*, nos. 22147/02 and 24972/03, § 33, 23 January 2007, and *Saygılı and Falakaoğlu v. Turkey (no. 2)*, no. 38991/02, § 28, 17 February 2009); problems relating to the integration of non-European immigrants in France, especially Muslims (see *Soulas and Others v. France*, no. 15948/03, §§ 38-39, 10 July 2008, and *Le Pen v. France* (dec.), no. 18788/09, 20 April 2010); and relations with national minorities in Lithuania shortly after the re-establishment of its independence in 1990 (see *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, § 78, 4 November 2008).

219. Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or

indirect call for violence or as a justification of violence, hatred or intolerance (see, among other authorities, *Incal v. Turkey*, 9 June 1998, § 50, *Reports* 1998-IV; *Sürek (no. 1)*, cited above, § 62; *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III; *Gündüz v. Turkey*, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; *Soulas and Others*, cited above, §§ 39-41 and 43; *Balsytė-Lideikienė*, cited above, §§ 79-80; *Féret*, cited above, §§ 69-73 and 78; *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, § 73, 12 June 2012; *Kasymakhunov and Saybatalov*, cited above, §§ 107-12; *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58, 24 July 2012; and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013). In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking entire ethnic, religious or other groups or casting them in a negative light (see *Seurot v. France* (dec.), no. 57383/00, 18 May 2004, *Soulas and Others*, cited above, §§ 40 and 43; and *Le Pen*, cited above, all of which concerned generalised negative statements about non-European immigrants in France, in particular Muslims; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI, which concerned statements linking all Muslims in the United Kingdom with the terrorist acts in the United States of America on 11 September 2001; *W.P. and Others v. Poland* (dec.), no. 42264/98, 2 September 2004; *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007; *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015, which concerned vehement anti-Semitic statements; *Féret*, cited above, § 71, which concerned statements portraying non-European immigrant communities in Belgium as criminally minded; *Hizb ut-Tahrir and Others*, § 73, and *Kasymakhunov and Saybatalov*, § 107, both cited above, which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and *Vejdeland and Others*, cited above, § 54, which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and Aids).

220. The Court has also paid attention to the manner in which statements were made, and their capacity – direct or indirect – to lead to harmful consequences. Examples include *Karataş v. Turkey* ([GC], no. 23168/94, §§ 51-52, ECHR 1999-IV), where the fact that the statements in question had been made through poetry rather than in the media led to the conclusion that the interference could not be justified by the special security context otherwise existing in the case; *Féret* (cited above, § 76), where the medium was electoral leaflets, which had enhanced the effect of the discriminatory and hateful message that they were conveying; *Gündüz* (cited above, §§ 43-44), which involved statements made in the course of a deliberately pluralistic televised debate, which had reduced their negative effect; *Fáber* (cited above, §§ 44-45), where the statement had consisted in the mere peaceful holding of a flag next to a rally, which had had a very limited effect, if any at all, on the course of the rally; *Vona* (cited above, §§ 64-69),

where the statement had involved military-style marches in villages with large Roma populations, which, given the historical context in Hungary, had carried sinister connotations; and *Vejdeland and Others* (cited above, § 56), where the statements had been made on leaflets left in the lockers of secondary school students.

221. In all of the above cases, it was the interplay between the various factors involved rather than any one of them taken in isolation that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 208, ECHR 2015 (extracts)).

222. In similar vein, the Court notes that the ECRI General Policy Recommendation no. 15 on Combating Hate Speech states that, when determining whether an expression constituted incitement to hatred, the following elements are essential for assessment of whether or not there is a risk of acts of violence, intimidation, hostility or discrimination: (i) "the context in which the hate speech concerned is being used"; (ii) "the capacity of the person using the hate speech to exercise influence over others"; (iii) "the nature and strength of the language used"; (iv) "the context of the specific remarks"; (v) "the medium used"; and (vi) "the nature of the audience" (see paragraph 103 above). It further notes that, with regard to artistic expression, Frank La Rue, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his Report of 7 September 2012 specifically noted that it "should be considered with reference to its artistic value and context, given that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility" (see paragraph 106 above).

223. The Court further observes that according to international standards for the protection of freedom of expression, restrictions on such freedom in the form of criminal sanctions are only acceptable in cases of incitement to hatred (see Report of the Venice Commission, paragraph 101 above; HRC Report 2006, paragraph 105 above; and the joint submission made at the OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred, paragraph 109 above).

224. In that regard the Court also takes note of the UN Human Rights Committee's General Comment No. 34, Article 19: Freedoms of Opinion and Expression, of 12 September 2011, which states in paragraph 48 that "[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [ICCPR], except in the specific circumstances envisaged in article 20, paragraph 2, of the [ICCPR]" (see paragraph 107 above).

225. The Court observes that in the case at hand the applicants were convicted of hooliganism motivated by religious hatred on account of the clothes and balaclavas they wore, their bodily movements and strong language. The Court accepts that as the conduct in question took place in a

cathedral it could have been found offensive by a number of people, which might include churchgoers, however, having regard to its case-law and the above-mentioned international standards for the protection of freedom of expression, it is unable to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement to religious hatred (see *Sürek (no. 1)*, cited above, § 62; *Féret*, cited above, § 78; and *Le Pen*, cited above).

226. In particular, the domestic courts stated that the applicants' manner of dress and behaviour had not respected the canons of the Orthodox Church, which might have appeared unacceptable to certain people (see paragraph 216 above), but no analysis was made of the context of their performance (see *Erbakan v. Turkey*, no. 59405/00, §§ 58-60, 6 July 2006). The domestic courts did not examine whether the applicants' actions could be interpreted as a call for violence or as a justification of violence, hatred or intolerance. Nor did they examine whether the actions in question could have led to harmful consequences (ibid., § 68).

227. The Court finds that the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers (see, *mutatis mutandis*, *Aydın Tatlav v. Turkey*, no. 50692/99, § 28, 2 May 2006). It reiterates that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see *Murat Vural*, cited above, § 66), and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; *Brasilier v. France*, no. 71343/01, § 43, 11 April 2006; *Morice v. France* [GC], no. 29369/10, § 176, ECHR 2015; and *Reichman v. France*, no. 50147/11, § 73, 12 July 2016).

228. The Court therefore concludes that certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution (see 214 paragraph above). However, the domestic courts failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and the sanctions were not proportionate to the legitimate aim pursued.

229. In view of the above, and bearing in mind the exceptional seriousness of the sanctions involved, the Court finds that the interference in question was not necessary in a democratic society.

230. There has therefore been a violation of Article 10 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION ON ACCOUNT OF BANNING VIDEO-RECORDINGS OF THE APPLICANTS' PERFORMANCES

231. The first two applicants complained that the Russian courts had violated their freedom of expression, as protected by Article 10 of the Convention, by declaring that the video materials available on the Internet were extremist and placing a ban on access to that material.

A. The parties' submissions

1. The Government's submissions

232. The Government pointed out that the complaint had been raised for the first time in the application form of 29 July 2013 on behalf of the first and second applicants, but not on behalf of the third applicant. They argued that it had been open to the applicants to appeal against the decision of the Zamoskvoretskiy District Court of 29 November 2012, but they had failed to do so. In support of their argument that that would have been an effective remedy, the Government provided a judgment on appeal delivered by the Moscow City Court on 26 September 2013 in unrelated proceedings which had concerned a decision to declare a certain book extremist. The author of the book, who was not a party to the proceedings, had appealed and his appeal statement had been examined by the court in the enclosed judgment. In the Government's view, any complaints made by the third applicant at the domestic level should not be taken into consideration for the purposes of the present complaint as she had not brought them before the Court.

233. The Government further argued that if the first and second applicants considered that they had had no effective domestic remedies against the decision of 29 November 2012, they should have lodged their application within six months of that date. However, it had not been lodged until 29 July 2013, that is, outside the six-month time-limit.

234. As regards the merits of the applicants' complaint, the Government conceded that declaring the applicants' video as extremist had constituted an interference with their rights under Article 10. However, the interference had been in accordance with the law, in particular section 1(1) and (3) and section 3 of the Suppression of Extremism Act, which the Constitutional Court had found to be accessible and foreseeable in Ruling no. 1053-O of 2 July 2013. At the same time, the interference had pursued the legitimate aim of protecting the morals and rights of others and had been necessary in a democratic society. With regard to the latter point the Government referred to the cases of *Handyside* (cited above); *Müller and Others* (cited above); *Wingrove* (cited above); and *Otto-Preminger-Institut* (cited above).

2. The applicants' submissions

235. The first and second applicants maintained their complaint. They submitted, firstly, that the Government's suggestion that there had been no appeal against the decision of 29 November 2012 was not true as the third applicant had appealed against it. However, by a decision of 30 January 2013 the Moscow City Court had left her appeal without examination on the grounds that she was not a party to the proceedings. In the first and second applicants' view, the third applicant, being in an identical position, had effectively exhausted the available domestic remedies on behalf of the whole group as a separate appeal by them would only have led to the same result. They also pointed out that they had never been officially informed of the proceedings in question as the domestic courts had considered that the rights of the authors of the videos had not been affected. Being in prison serving their sentence, they had also had no possibility to learn of the proceedings while they were underway. In their opinion, the matter of exhaustion was closely linked to the merits of the complaint.

236. The first and second applicant further argued that the applicable domestic legislation was too vague and the proceedings in their case had been flawed as they had not been able to participate in them. In their view the definitions of "extremism", "extremist activity" and "extremist materials" contained in the Suppression of Extremism Act were too broad. As regards the procedure involved, it neither provided for the participation of the authors of the materials in question, nor provided guarantees of the independence of the expert upon whose opinion the judicial decision in the case would be based. Hence, the procedure provided no safeguards against arbitrariness. The applicants also relied on the submissions by ARTICLE 19 concerning examples of political speech being declared extremist in 2012, although they had posed no threat to national security, public order or the rights of others (see paragraph 239 below). Finally, the applicants contended that their right to freedom of expression had been violated because the domestic courts had declared their performances, which had contained political speech protected by Article 10 of the Convention, as extremist.

B. Submissions of the third-party interveners

1. Submissions from Amnesty International and Human Rights Watch

237. The interveners noted that according to their research there had been a global increase in the adoption of laws against extremism. Those laws purported to combat criminal acts such as terrorism and other violent crimes, including those carried out ostensibly in the name of religion or on the basis of religious hatred. As with laws on incitement to religious hatred (see paragraph 190 above), the laws in question could, in the interveners' view, violate freedom of expression if they gave too broad a definition of

such terms as “extremism” or “extremist materials”, which might lead to their arbitrary application. Therefore, such laws should provide precise definitions of such terms so as to ensure legal certainty and compliance with the obligation of States to respect such fundamental rights as freedom of expression, the right to hold opinions and the freedom of association and assembly.

238. The interveners pointed out, in particular, that the Russian Suppression of Extremism Act qualified certain forms of defamation of public officials as “extremist” and allowed any politically or ideologically motivated offences to be classified as extremist. Therefore, non-governmental organisations or activists criticising Government policy, or which were perceived by the Government as being supporters of the political opposition, ran the risk of being targeted under the law. That issue had been discussed in 2009 by the UN Human Rights Council, in the light of which Russia had undertaken to review its legislation on extremism, which it had not done so far.

2. Submissions by ARTICLE 19

239. ARTICLE 19 submitted that the Suppression of Extremism Act had been criticised by the Venice Commission and the Council of Europe Parliamentary Assembly for failing to meet international human rights standards (see paragraphs 101 above and the Parliamentary Assembly’s Resolution 1896 (2012) on the Honouring of Obligations and Commitments by the Russian Federation of 2 October 2012). They also noted a number of instances where political speech had been classified as extremist under the law, although it had posed no threat to national security, public order or the rights of others. They referred, in particular, to (i) a Kaluga Regional Court decision of February 2012 declaring a painting by A.S., “The Sermon on the Mount”, from a cycle of works entitled “Mickey Mouse’s Travels through Art History”, as extremist; (ii) a criminal investigation instituted in April 2012 against M.E., a blogger and the director of the Karelian regional branch of the regional Youth Human Rights Group, on account of an article headlined “Karelia is Tired of Priests” in which he had denounced corruption in the Russian Orthodox Church; (iii) a criminal investigation instituted in October 2012 into the activities of the website orlec.ru in connection with material that the prosecutor had regarded as undermining the public image of local administrations and the authorities in general; and (iv) a decision by the District Court of Omsk of October 2012 to classify an article by Yu.A., a public figure and liberal academic, headlined “Is the Liberal Mission Possible in Russia Today?”, as extremist.

3. The Government's comments on the third-party interventions

240. The Government referred to their position stated in their observations concerning the applicants' complaint (see paragraph 234 above).

C. Admissibility

241. The Court notes at the outset that on 29 November 2012 the District Court issued an order banning a series of videos featuring performances in which all three applicants had played a part. The ban affected all of them in equal measure. However, at the time it was pronounced, only the third applicant was at liberty, while the first two applicants had been sent to serve custodial sentences to, respectively, the Perm Region and the Mordoviya Republic. According to the latter, they were not notified of the pending proceedings, which is not contested by the Government, and had no possibility to become aware of them until their completion (see paragraph 235 above). The Court reiterates in this connection that in the matter of domestic remedies it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *İlhan v. Turkey* [GC], no. 22277/93, § 59, ECHR 2000-VII).

242. The Court further notes that neither the Suppression of Extremism Act nor the applicable procedural rules made a provision for any form of notification to authors, publishers or owners of the material in respect of which a banning order was sought about the institution of such proceedings. Unlike the first and second applicants whose access to printed media and television was curtailed in custody, the third applicant immediately learned of the prosecutor's application from the news and sought to join them as an interested party (see paragraph 73 above). Her attempt proved to be unsuccessful. In its final decision refusing her application to join the proceedings, the Moscow City Court indicated that she should be able to raise her arguments in an appeal against the decision on the merits of the case (see paragraph 79 above).

243. Subsequently, the third applicant sought to have the ban overturned by filing substantive grounds of appeal against the District Court's order of 29 November 2012. The first and second applicants were still in custody and took no part in her endeavour. After the final decision denying the third applicant the right to appeal was issued on 30 January 2013 (see paragraph 80 above), she did not pursue her legal challenge by lodging an application with this Court while the first and second applicants did. They filed the complaint on 29 July 2013, that is to say, within six months of the rejection of the third applicant's substantive appeal but more than six months after

the banning order of 29 November 2012. It follows that, in the particular circumstances of the present case, the Court may only deal with the merits of the present complaint if the six-month time-limit were to be counted from the date of rejection of the third applicant's substantive appeal against the banning order.

244. The Court reiterates the relevant general principles: as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant. In any event, Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it would be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 136, ECHR 2012).

245. In the light of these principles, the Court will consider, first, whether the substantive appeal could be considered a remedy capable of providing adequate redress or whether the circumstances rendering this remedy ineffective should have been apparent from the outset. Secondly, the Court will address the Government's objections to the admissibility of the complaint by the first and second applicants who had not filed any appeals of their own.

246. On the issue whether the substantive appeal offered sufficient prospects of success so as not to be obviously futile, the Court notes that the prosecutor's application for a banning order was considered in accordance with the rules of civil procedure. Articles 42 and 43 of the Code of Civil Procedure established, in principle, the right of persons whose interests were affected by the proceedings to join them as interested parties. In raising the non-exhaustion objection against the first and second applicants, the Government cited the example of similar proceedings conducted under the Suppression of Extremism Act in which a Moscow court had accepted a substantive appeal from the author of the book which had been subject to a banning order (see paragraph 232 above). In the same vein, a court in the Krasnodar Region allowed a substantive appeal against the banning order submitted by two followers of a Chinese spiritual movement who had not been informed of the proceedings in which the foundational book of the movement had been pronounced extremist (see *Sinitsyn and Others v. Russia*, nos. 39879/12 and 5956/13, communicated on 30 August 2017). Likewise, the Krasnoyarsk Regional Court allowed a substantive appeal by

the Krasondar Muftiate against the order banning the book "The Tenth Word: The Resurrection and the Hereafter" as extremist (see *Yedinoe Dukhovnoye Upravleniye Musulman Krasnoyarskogo Kraya v. Russia*, no. 28621/11, communicated on 27 November 2013). The stance adopted by the Moscow City Court also appeared to indicate that the third applicant's substantive appeal would be considered on the merits (see paragraph 79 above). In light of these elements, the Court finds that the third applicant could reasonably and legitimately expect that the court would seriously examine her arguments in favour of setting aside the banning order. Neither she nor her counsel could have expected that on the same day the same City Court would reject her substantive appeal for a lack of *locus standi* (see paragraph 80 above). In these circumstances, where the third applicant made use of an existing remedy which was prima facie accessible and available but turned out to be ineffective, the six-month period would have started, in accordance with the Court's case-law cited above, on the date of the Moscow City Court's judgment rejecting her substantive appeal.

247. The Government argued that it was not sufficient that the third applicant had availed herself of that remedy. Since she was not the one who brought this complaint to the Court, the first and second applicants should have either complained within the six months of the banning order or made use of the same remedy independently of her. The Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism, taking realistic account of, in particular, the applicant's personal circumstances (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV). As noted above, the third applicant was the only one who was given a suspended sentence and retained her freedom. Unrestricted in her contacts with the outside world and her legal team, she took it upon herself to challenge the banning order in the proceedings which appeared to offer a prospect of success, at least in the initial stage. All three applicants being members of the same band whose recorded performances had been declared extremist, they were in the same situation in relation to the challenge to the banning order she had mounted. The Court sees no reason to assume that the proceedings would have taken any different course had they filed separate appeals against the banning order. It considers that the first and second applicant were not required to attempt the same remedy after the ineffectiveness of a substantive appeal had become apparent with the Moscow City Court's decision of 30 January 2013 (compare *Bagdonavicius and Others v. Russia*, no. 19841/06, § 62, 11 October 2016). The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them and the proceedings instituted by the third applicant had provided the Russian authorities with ample opportunity to remedy the violation alleged (see *Oliari and Others v. Italy*,

nos. 18766/11 and 36030/11, § 77, 21 July 2015). The fact that the third applicant chose not to pursue her application to the Court under this head is immaterial after the matter had already been dealt with at domestic level (see *M.S. v. Croatia*, no. 36337/10, § 69, 25 April 2013, and *Bilbija and Blažević v. Croatia*, no. 62870/13, § 94, 12 January 2016, in both cases it was not the applicant, but a member of their family who was not an applicant before the Court who had already pursued the same remedy without success, and also *D.H. and Others*, cited above, § 122, in which only five out of twelve applicants had lodged a constitutional complaint concerning the same grievance).

248. In sum, the Court finds that the rule of exhaustion of domestic remedies did not call for a repetition of proceedings, whether concurrently or consecutively to those issued by the third applicant. In the absence of any prior indication that the remedy would turn out to be inefficient, the Court finds that having lodged the application within the six months from the Moscow City Court's decision 30 January 2013, that is after their position in connection with the matter had been finally settled at domestic level, the first and second applicants complied with the requirements of Article 35 § 1.

249. The Court therefore dismisses the Government's objections and finds that the complaint is not belated. Since it is not manifestly ill-founded or inadmissible on any other grounds, it must therefore be declared admissible.

D. Merits

250. The applicable general principles are stated in paragraphs 197-201 above.

(a) Existence of an interference

251. The Court observes that the video materials in question contained recordings of Pussy Riot's performances, were owned by the group Pussy Riot of which the applicants were members, and were posted on internet pages managed by the group. It further notes that there is no dispute between the parties that declaring the video-recordings of the applicants' performances available on the Internet as "extremist" and banning them amounted to "interference by a public authority" with the first and second applicants' right to freedom of expression. Having regard to the general principles set out in paragraphs 197-201 above, the Court reiterates that such an interference will infringe the Convention unless it satisfies the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

(b) “Prescribed by law”

252. The Court notes that the domestic courts declared that the video materials in question were extremist under sections 1, 12 and 13 of the Suppression of Extremism Act and section 10(1) and (6) of the Federal Law on Information, Information Technologies and the Protection of Information (see paragraph 76 above). It observes, however, that whereas the provisions of the latter Law may have provided an additional legal basis for limiting access to those materials, it was the former Act that provided for the measures available to the authorities for combatting and punishing extremism. Accordingly, the Court considers that sections 1, 12 and 13 of the Suppression of Extremism Act constituted the statutory basis for the interference at issue.

253. The Court reiterates that the expression “prescribed by law” in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 52, ECHR 2001-VI; *Gawęda v. Poland*, no. 26229/95, § 39, ECHR 2002-II; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; and *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; and *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998-II).

254. One of the requirements flowing from the expression “prescribed by law” is foreseeability. Thus, a norm cannot be regarded as a “law” within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV; *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141; and *Delfi AS*, cited above, § 121).

255. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 142; and *Delfi AS*, cited above, § 122).

256. In the present case the parties' opinions differed as to whether the interference with the first and second applicants' freedom of expression was "prescribed by law". The applicants argued that the applicable domestic legislation was vague to the point of making the legal rule in question unforeseeable. In particular, the definitions of "extremism", "extremist activity" and "extremist materials" contained in the Suppression of Extremism Act were, in their view, too broad. The Government referred to Ruling no. 1053-O of 2 July 2013, where the Constitutional Court had refused to find section 1(1) and (3) and section 13(3) unconstitutional for allegedly lacking precision in the definitions of "extremist activity" and "extremist materials".

257. The Court notes that the Venice Commission expressed reservations in its Opinion about the inclusion of certain activities in the list of those that were "extremist", considering their definitions to be too broad, lacking clarity and open to different interpretations (see § 31 of the Opinion of the Venice Commission, paragraph 102 above). The Venice Commission also deplored the absence of "violence" as a qualifying element of "extremism" or "extremist activity" (see §§ 31, 35 and 36 of the Opinion of the Venice Commission, paragraph 102 above). Furthermore, it expressed concerns regarding the definition of "extremist materials", which it described as "broad and rather imprecise" (see § 49 of the Opinion of the Venice Commission, paragraph 102 above).

258. Although there may be a question as to whether the interference was "prescribed by law" within the meaning of Article 10, the Court does not consider that, in the present case, it is called upon to examine the corresponding provisions of the Suppression of Extremism Act as, in its view, the applicants' grievances fall to be examined from the point of view of the proportionality of the interference. The Court therefore decides to leave the question open and will address the applicants' arguments below when examining whether the interference was "necessary in a democratic society".

(c) Legitimate aim

259. Having regard to the Government's submissions (see paragraph 234 above), the Court accepts that the interference could be considered as having pursued the legitimate aims of protecting the morals and rights of others.

(d) Necessary in a democratic society

260. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see *Wingrove*, cited above, § 58, and *Seher Karataş v. Turkey*, no. 33179/96, § 37, 9 July 2002). Where the views expressed do not comprise incitements to violence – in other words, unless they advocate

recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in Article 10 § 2 (see *Dilipak v. Turkey*, no. 29680/05, § 62, 15 September 2015).

261. The Court notes that in its decision of 29 November 2012 to declare the video material in question as "extremist", the Zamoskvoretskiy District Court referred to four types of such actions listed in section 1(1) of the Suppression of Extremism Act: (1) "the stirring up of social, racial, ethnic or religious discord"; (2) "propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion"; (3) "violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion"; and (4) "public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist materials, and likewise the production or storage thereof with the aim of mass dissemination" (see paragraph 76 above). It subsequently relied on the results of report no. 55/13 of 26 March 2012 of the psychological linguistic expert examination performed by experts from the Federal Scientific Research University 'The Russian Institute for Cultural Research', according to which the video materials in question were of an extremist nature (see paragraph 76 above). In the Court's view, the domestic court's decision in the applicants' case was deficient for the following reasons.

262. In the first place, it is evident from the Zamoskvoretskiy District Court's decision that it was not the court which made the crucial legal findings at to the extremist nature of the video material but linguistic experts. The court failed to assess the expert report and merely endorsed the linguistic experts' conclusions. The relevant expert examination clearly went far beyond resolving merely language issues, such as, for instance, defining the meaning of particular words and expressions, and provided, in essence, a legal qualification of the video materials. The Court finds that situation unacceptable and stresses that all legal matters must be resolved exclusively by the courts (see *Dmitriyevskiy v. Russia*, no. 42168/06, § 113, 3 October 2017).

263. Secondly, the domestic court made no attempt to conduct its own analysis of the video materials in question. It did not specify which particular elements of the videos were problematic so as to bring them within the scope of the provisions of section 1(1) of the Suppression of Extremism Act it referred to in the decision (see *Kommersant Moldovy v. Moldova*, no. 41827/02, § 36, 9 January 2007, and *Terentyev v. Russia*, no. 25147/09, § 22, 26 January 2017). Moreover, the court did not so much

as quote the relevant parts of the expert report, referring only briefly to its overall findings. The virtual absence of reasoning by the domestic court makes it impossible for the Court to grasp the rationale behind the interference.

264. In the light of the lack of reasons given by the domestic court, the Court is not satisfied that it "applied standards which were in conformity with the principles embodied in Article 10" or based itself "on an acceptable assessment of the relevant facts" (see *Jersild*, cited above, § 31, and *Kommersant Moldovy*, cited above, § 38). The domestic court consequently failed to provide "relevant and sufficient" reasons for the interference in question.

265. Furthermore, the Court takes note of the first and second applicants' argument that the proceedings in the case at hand were flawed as they could not participate in them. In fact, the applicants were unable to contest the findings of the expert report relied upon by the domestic court as none of them were able to participate in the proceedings. Not only were they not even informed of the proceedings in question, but the application to join the proceedings lodged by the third applicant was dismissed at three levels of jurisdiction (see paragraphs 74, 78 and 79 above). Furthermore, it was precisely on the grounds that she was not a party to the proceedings that her appeal against the decision of 29 November 2012 was left without examination (see paragraph 80 above).

266. The Court observes that it was not a particular shortcoming in their case which meant that the applicants were unable to participate in the proceedings, but because of the state of the domestic law, which does not provide for concerned parties to participate in proceedings under the Suppression of Extremism Act. The Court notes that it has found a breach of Article 10 of the Convention in a number of cases in situations where under the domestic law an applicant was unable effectively to contest criminal charges brought against him, as he was either not allowed to adduce evidence of the truth of his statements, or to plead a defence of justification, or due to the special protection afforded to the party having the status of the victim in the criminal proceedings (see *Castells v. Spain*, 23 April 1992, § 48, Series A no. 236; *Colombani and Others v. France*, no. 51279/99, § 66, ECHR 2002-V; *Pakdemirli v. Turkey*, no. 35839/97, § 52, 22 February 2005; and *Otegi Mondragon v. Spain*, no. 2034/07, § 55, ECHR 2011). It further notes that it has likewise found a violation of Article 10 on account of a breach of equality of arms in civil defamation proceedings (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II).

267. The Court considers that similar considerations apply to proceedings instituted under the Suppression of Extremism Act. In the Court's view, a domestic court can never be in a position to provide "relevant and sufficient" reasons for an interference with the rights

guaranteed by Article 10 of the Convention without some form of judicial review based on a weighing up of the arguments put forward by the public authority against those of the interested party. Therefore, the proceedings instituted in order to recognise the first and second applicants' activity or materials belonging to them as "extremist", in which the domestic law did not allow their participation, thereby depriving them of any possibility to contest the allegations made by the public authority that brought the proceedings before the courts, cannot be found compatible with Article 10 of the Convention.

268. The foregoing considerations are sufficient to enable the Court to conclude that declaring that the applicants' video materials available on the Internet were extremist and placing a ban on access to them did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked. The interference was thus not "necessary in a democratic society".

269. Accordingly, there has been a violation of Article 10 of the Convention in respect of the first and second applicants.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

270. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

271. The first and second applicants claimed 120,000 euros (EUR) in respect of non-pecuniary damage. The third applicant claimed EUR 5,000. They submitted that they had suffered and were still suffering from anxiety and frustration on account of the numerous violations of their rights, including the inhuman and degrading treatment they had been subjected to, the uncertainty they had endured in pre-trial detention, the denial of a fair trial and the prison term they had served following their conviction.

272. The Government found the amounts claimed to be excessive and unfounded.

273. The Court considers that on account of the violations it has found the applicants sustained non-pecuniary damage that cannot be compensated for by the mere finding of a violation. Ruling on an equitable basis as required by Article 41 of the Convention, it awards the first and second applicants the amount of EUR 16,000 each and the third applicant the amount claimed in respect of non-pecuniary damage.

B. Costs and expenses

274. The first and second applicants also claimed also EUR 11,760 for the costs and expenses incurred before the Court. They submitted an agreement on legal services of 11 June 2014 concluded between the first applicant and Mr Grozev. The agreement contains a reference to their earlier agreement that Mr Grozev would represent the three applicants in the present case. According to the agreement, the first applicant undertook to pay for Mr Grozev's services at the hourly rate of EUR 120, with the final amount to be transferred to Mr Grozev's account if the application before the Court was successful. The applicants also provided an invoice for 98 hours of work by Mr Grozev at the rate of EUR 120 an hour, which includes studying the case material and preparing the application form and observations in reply to those of the Government.

275. The Government contested the applicants' claims for legal expenses. They argued that the reference to an "earlier agreement" should be deemed invalid as no such agreement had been provided to the Court. It argued that compensation should only be provided for costs and expenses incurred after the date of the agreement, that is 11 June 2014. In any event, they considered the amount claimed to be excessive.

276. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the amount claimed for the proceedings before the Court.

C. Default interest

277. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Article 3 about the conditions of the applicants' transportation and detention in the courthouse and their treatment during the court hearings, under Article 5 § 3, Article 6 and Article 10 about the applicants' criminal prosecution for the performance of 21 February 2012, and about declaring the video-recordings of their performances as "extremist" in

respect of the first two applicants, admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 3 of the Convention;

3. *Hold*, unanimously, that there has been a violation of Article 5 § 3 of the Convention;

4. *Holds*, unanimously, that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

5. *Holds*, unanimously, that there is no need to examine the complaint under Article 6 §§ 1 and 3 (d) of the Convention;

6. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention on account of the applicants' criminal prosecution;

7. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention in respect of the first and second applicants on account of declaring the video material available on the Internet as extremist and banning it;

8. *Holds*, unanimously,
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, to the first and second applicants each in respect of non-pecuniary damage;
(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, to the third applicant in respect of non-pecuniary damage;
(iii) EUR 11,760 (eleven thousand seven hundred and sixty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, unanimously, the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 17 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Elósegui is annexed to this judgment.

H.J.
J.S.P.

PARTLY DISSENTING OPINION OF JUDGE ELÓSEGUI

1. I agree with the majority that in the present case there has been a violation of Articles 5 § 3, 6 § 1 and 6 § 3, as well as a violation of Article 10 of the Convention on account of the fact that the video material available on the Internet was declared extremist and was banned.

2. However, I dissent with regard to the finding of a violation of Article 3 of the Convention on account of the special control measures adopted during the trial, and the finding of a violation of Article 10 on account of the applicants' criminal prosecution and punishment. As I will explain, I share the opinion that the applicants' conduct should not have been classified as criminal. But I consider that the Court should have emphasised that these facts could have been punished by means of an administrative or civil sanction.

3. Starting with the analysis of the violation of Article 3 of the Convention, I dissent from the conclusions of the majority in paragraphs 145, 148, 149 and 150. The applicants complain that during the trial their public image was tarnished and they felt humiliated. On this point the judgment states as follows (paragraph 149):

> "The Court notes that the applicants' trial was closely followed by national and international media and they were permanently exposed to public view in a glass dock that was surrounded by armed police, with a guard dog next to it."

4. According to the judgment in *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 111, ECHR 2012, one criterion by which to measure the interference with the right to private life is the previous conduct of the applicants in relation to the media. In the present case the applicants performed inside a church, inviting several media outlets to attend their performance. At several other previous events, the applicants had expressly sought publicity. The previous conduct of the applicants at several events had sought to interfere with private property, museums and shops in a disruptive manner. It was foreseeable that the applicants would take the opportunity of disturbing the court hearing if they were given the possibility. Hence, the authorities were fulfilling their legal obligations by taking special control measures during the proceedings in the courtroom, including the presence of a glass dock and of armed police.

5. As regards the feelings of humiliation, it is beyond dispute that this is a subjective concept which is undetermined from a legal point of view. However, the Court has used criteria such as previous behaviour, context and the applicants' circumstances to assess these feelings. In the present case the applicants exposed themselves voluntarily to publicity and even posted images on the Internet showing their faces and their naked bodies in public places.

6. In consequence, I subscribe to the statement of the judgment in paragraph 148, according to which:

> “The Court considers this to constitute sufficient evidence of the fact that they were closely watching the applicants rather than monitoring the courtroom.”

However, I do not arrive at the same conclusion, because the special kind of control of the courtroom was justified and proportionate to the risk of disturbance posed by the applicants. Thus, I do not consider that there has been a violation of Article 3 of the Convention.

7. The next major analysis in my dissenting opinion is related to the limits of Article 10 § 2 of the Convention, which provides:

> “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.”

As I have said above, I share the majority opinion that the applicants’ conduct should not have been classified as criminal. But I consider that the Court should have emphasised that these facts could have been punished by means of an administrative or civil sanction. In sum, I do not share completely the conclusion of paragraph 230, which states that there has been a violation of Article 10 of the Convention, because, in my view, Article 10 does not protect the invasion of churches and other religious buildings and property. In fact, as Judge Pinto de Albuquerque stated in his concurring opinion in *Krupko and Others v. Russia*, no. 26587/07, 26 June 2014, § 12:

> “... the State has a positive obligation to protect believers’ freedom of assembly, namely by ensuring that they and their places of worship are fully respected by State and non-State actors and when attacks against them occur, to investigate and punish them.”

8. In my view, the Court should have added to the sentence in paragraph 207 (“*Having regard to the foregoing, the Court considers that criminal proceedings against the applicants on account of the above actions, which resulted in a prison sentence, amounted to a disproportionate interference with their right to freedom of expression*”) some words to the effect that it might have been proportionate in the circumstances of the present case to apply an administrative or civil sanction to the applicants, taking into account the fact that they had invaded a church and that Christians have the right to worship freely without fear of obscene, hostile or even violent protest taking place within the church[1].

---

[1] United Nations General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, A/RES/36/55, 25 November 1981 (the 1981 UNGA Declaration), Article 6 (a); General Assembly Resolution 55/97, A/RES//55/97, 1 March 2001, paragraph 8.

9. Freedom of expression allows for political criticism, but it does not protect, as stated in paragraph 177 of the majority judgment:

> "... expressions that are gratuitously offensive to others and thus an infringement of their rights and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

According to the principle of proportionality, the aim of the applicants (to express their political criticism) does not justify the means that they used. The means used by the applicants to express their political beliefs were clearly disproportionate.

10. In paragraph 225 of the judgment, the majority should have taken into account the fact that Article 10 of the Convention does not protect a right to insult or to humiliate individuals. This obligation is a direct obligation for the State, but also an indirect obligation for all individuals according to the doctrine of the "horizontal effect" of fundamental rights (*Drittwirkung*), which is also applicable to Convention rights. Freedom of expression does not protect deliberate calumny or a discourse with the aim of provoking discrimination (see *Jersild v. Denmark*, 23 September 1994, Series A no. 298, and *Gündüz v. Turkey*, no. 35071/97, ECHR 2003-XI). Even value judgments of an offensive nature require a minimum of factual basis, otherwise they are considered excessive (see *Paturel v. France*, 54968/00, § 36, 22 December 2005)[2].

11. According to the Explanatory Memorandum to ECRI General Policy Recommendation No. 15 on Combating Hate Speech, the criteria by which to identify hate speech include the following:

> "... (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination) ..."

In the present case the Court accepted that, since the conduct in question took place in a cathedral, it could have been found offensive by a number of people. In my opinion, having regard to the international standards (including ECRI standards), the applicants' conduct cannot be seen as incitement to religious hatred, but it can be seen as "provocative" and directly involving "negative stereotyping" of Christian Orthodox believers. This is enough to harm the dignity of Orthodox believers by despising and insulting them as well as treating them as inferiors[3].

---

[2] See also Voorhoof, Dirk, "The European Convention on Human Rights: The Rights to Freedom of Expression and Information restricted by Duties and Responsibilities in a Democratic Society", available at https//biblio.urgent.be, on the subject of defamation without sufficient factual basis, p. 20.

[3] It is not a justification for invoking the principle of protection of critical ideas which offend, shock or disturb. See the Council of Europe's Compilation of Council of Europe Standards relating to the principles of freedom of thought, conscience and religion and links to other human rights, Strasbourg, Council of Europe, 2015, pp. 103-105.

12. I agree with the conclusion of the majority in paragraph 227:

> “The Court finds that the applicants’ actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers ...”

This is well-established case law, which the Court also invoked in the case of *Stomakhin v. Russia* (no. 52273/07, § 90, 9 May 2018):

> “In its assessment of the interference with freedom of expression in cases concerning expressions alleged to stir up or justify violence, hatred or intolerance, the Court takes into account a number of factors ... the context in which the impugned statements were published, their nature and wording, their potential to lead to harmful consequences and the reason adduced by Russian courts to justify the interference in question.”

However, I consider it necessary to emphasise that the conduct and the content of the song could have justified an administrative sanction or a finding of civil liability instead of a criminal penalty. According to the Explanatory Memorandum to ECRI General Policy Recommendation No. 15, mentioned above, the criminal law may be used only when no other, less restrictive measure would be effective, namely when speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it.

13. My conclusions are reinforced by the following two criteria set out in ECRI’s Explanatory Memorandum (cited above, § 16):

> “... (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a ‘live’ event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination) ...”

In the circumstances of this case, it could be concluded that the applicants’ actions had a large audience via the Internet because they recorded their performance and made it available on a digital platform. As stated in paragraph 16:

> “A video containing footage of the band’s performances of the song, both at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral, was uploaded to YouTube.”

The applicants also invited journalists to be present (see paragraph 13 of the judgment). All these circumstances warrant characterisation as unlawful conduct under civil or administrative law (see paragraph 89 of the judgment concerning the relevant Russian administrative law, namely Article 5.26 of the Code of Administrative Offences, as in force until 29 June 2013).

14. My conclusions are also strengthened by the Report of the United Nations High Commissioner for Human Rights on the prohibition of

incitement to national, racial or religious hatred, which includes the Rabat Action Plan[4]. It recommends that a clear distinction be made between:

> "(a) forms of expression that should constitute a criminal offence; (b) forms of expression that are not criminally punishable, but may justify a civil suit; and (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others.[5]"

In this sense, a test has been prepared consisting of six parts, in order to define a threshold that makes it possible to establish adequately what types of expression constitute a criminal offence: the context, the speaker, the speaker's intention, the content and form of the speech act, its scope and magnitude, and the possibility of damage occurring as well as its imminence[6].

15. I can agree with the majority finding in paragraph 228:

> "The Court therefore concludes that certain sanctions for the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution (see paragraph 214 above)."

Precisely on the basis of this argument I maintain that, although the domestic courts failed to adduce relevant and sufficient reasons to justify the criminal conviction and prison sentence imposed on the applicants, the latter's conduct goes beyond the scope of Article 10. In consequence, this conduct could have been punished by means of administrative or civil sanctions. Although "*in the concrete case the criminal conviction and prison sentence imposed were not proportionate to the legitimate aim pursued*", this is not a reason to consider that the applicant's conduct deserves protection under Article 10[7].

16. In conclusion, I do not agree that there has been a violation of Article 10 of the Convention, because Article 10 does not protect conduct consisting of invading churches and other religious buildings or property for political purposes, nor does it protect conduct comprising intimidation and hostility against Christian Orthodox believers.

---

[4] Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, which includes the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence, 5 October 2012.

[5] Ibid., § 12.

[6] The Rabat Plan of Action, § 29.

[7] Tulkens, F., "When to say is to do. Freedom of expression and hate speech in the case-law of European Court of Human Rights", European Court of Human Rights – European Judicial Training Network. Seminar on Human Rights for European Judicial Trainers, Strasbourg, 9 October 2012, pp. 1-15.

APPENDIX

Release the Cobblestones

“Egyptian air is good for your lungs
Turn Red Square into Tahrir
Spend the day with wild strong women
Look for a wrench on your balcony, release the cobblestones

It’s never too late to become a mistress
Batons at the ready, screaming louder and louder
Warm up your arm and leg muscles
The cop is licking you between your legs

Toilet bowls have been polished, chicks are in plainclothes
Zizek’s ghosts have been flushed down the drain
Khimki forest has been cleaned up, Chirikova got a ‘no pass’ to vote,
Feminists are sent on maternity leave.”

Kropotkin Vodka

“Occupy the city with a frying pan
Go out with a vacuum, get off on it
Police battalions seduce virgins
Naked cops rejoice at the new reforms.”

Death to Prison, Freedom to Protest

“The joyful science of occupying squares
The will to power, without these damn leaders
Direct action - the future of mankind!
LGBT, feminists, defend the nation!

Death to prison, freedom to protest

Make the cops serve freedom.
Protests bring on good weather
Occupy the square, carry out a peaceful takeover
Take away the guns from all the cops

Death to prison, freedom to protest

Fill the city, all the squares and streets.
There are many in Russia, put aside oysters
Open all the doors, take off the epaulettes
Taste the smell of freedom together with us

Death to prison, freedom to protest."

Putin Wet Himself

"A group of insurgents moves toward the Kremlin
Windows shatter at FSB headquarters
Bitches piss themselves behind red walls
Pussy Riot is here to abort the system
An attack at dawn? Don't mind if I do
When we are whipped for our freedom
The Mother of God will learn how to fight
Mary Magdalene the feminist will join the demonstration.

Riot in Russia – the charm of protest
Riot in Russia - Putin wet himself
Riot in Russia - we exist
Riot in Russia - riot, riot

Take to the streets
Occupy Red Square.
Show them your freedom
A citizen's anger

Dissatisfied with the culture of male hysteria
Gangster management devours the brain
Orthodox religion is a hard penis
Patients get a prescription of conformity

The regime is going to censor the dream
The time has come for a subversive clash
The pack of bitches from the sexist regime
Begs forgiveness from the phalanx of feminists

Riot in Russia – the charm of protest
Riot in Russia - Putin wet himself
Riot in Russia - we exist
Riot in Russia - riot, riot

Take to the streets
Occupy Red Square.
Show them your freedom
A citizen's rage."