IN THE HIGH COURT OF JUSTICE **Claim no.: 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)
& PERSONS UNKNOWN **Defendants**

SKELETON ARGUMENT OF THE FIRST DEFENDANT
FOR HEARING ON 05.07.24

Essential reading: Skeleton arguments, Pleadings, Witness statement of First Defendant

Reading time: 3h

INTRODUCTION

1. The First Defendant has been participating in a protest encampment established on the Jubilee Campus at the University of Nottingham since approximately 10.05.24 ("The Protest Camp").

2. The claim for possession brought by the Claimant is disputed on the following grounds:
   i) The First Defendant has an express and/or implied licence to enter and remain on the Occupied Land which has not been validly revoked and is not a trespasser on the Occupied Land ("Licence Defence").

ii) The Claimant has failed to comply with its duties and obligations under statute, public law and its own policies ("Public Law Defence").

iii) The granting of the possession order sought constitutes a disproportionate interference with the First Defendant's rights under Articles 10 and 11 ECHR ("Human Rights Defence").

3. The present claim is brought under CPR Part 55. Therefore if the Court is satisfied that the claim is "genuinely disputed on grounds which appear to be substantial" the matter must proceed to trial.

FACTUAL BACKGROUND

4. The Protest Camp is part of a series of nationwide protests at universities across the UK, held in solidarity with the protests at universities in North America and elsewhere. It aims to show support for the people of Gaza during the ongoing war in Gaza.

5. The protest relates to the war in Gaza, the significant loss of life due to the war, and the war crimes committed in the territory of Gaza. The First Defendant has engaged in this protest in order to encourage the University of Nottingham, other academic institutions, organisations and the Government not to be complicit in the loss of life in Gaza, and the commission of war crimes through the development and supply of arms and military equipment, academic research and collaboration with Israel. The campaign also seeks the divestment from all arms companies and other companies complicit in the Israeli occupation of Palestine.

6. The Protest Camp is positioned in the vicinity of the Advanced Manufacturing Building, where the University conducts research for arms companies which forms part of the subject matter of the protest. The location of the camp also increases its visibility to students and staff using the campus and nearby facilities.

7. The encampment itself symbolises the many thousands of displaced Palestinians. It also has a symbolic resonance with other university protest camps relating to Palestine.

8. In addition to the symbolic importance of the encampment, the protest camp has facilitated speeches, rallies, education, cultural and creative activities and other peaceful events. The Camp has a library tent and a schedule of open talks. Students often use the main marquee as a study space. The Camp holds vigils which are inclusive to people of all faiths and people of no faith.

9. The number of persons occupying the camp varies from day-to-day according to activities planned and the hours of day. There are considerably fewer persons remaining overnight than the numbers which attend events in the day. There are currently around 10-15 tents. There have been no issues relating to overcrowding.

10. The Protest Camp has not caused any substantial disruption, disturbance or harm.

LICENCE TO ENTER AND REMAIN ON LAND

11. The First Defendant (and all students of the University) has an express and/or implied licence to enter and remain on the Land (including the Occupied Land) for the purpose of education, studying (whether inside or outside campus buildings), reading, attending and organising events (whether or not subject to prior approval by the Claimant), engaging in activities including protesting, campaigning, debating and engaging with the wider student population.

12. The scope of the licence must be interpreted in accordance with the Claimant's policies in relation to free speech on campus and the First Defendant relies on the matters set out below.

13. The activities of the First Defendant have not exceeded the terms of the licence to enter and remain on the Occupied Land.

14. Further, the Claimant may only validly revoke a licence to enter or remain on the Occupied Land in accordance with all duties under statute, policy and common law which it has not done so in the present case. The First Defendant again relies on maters set out below.

15. The First Defendant therefore did not enter the land as a trespasser and any licence to remain on the land has not been validly revoked.

16. Whether or not the Claimant has validly brought any licence to an end is a matter to be determined after trial.

PUBLIC LAW DEFENCE

Legal Framework

17. An occupier may raise as a defence to possession proceedings any argument which might, in principle, be deployed in an application for judicial review seeking to challenge the decision to seek possession (*Wandsworth LBC v Winder* [1984] UKHL 2).

18. The Claimant is obliged to act in accordance with the following policies and legal obligations.

19. Section 43 of the Education (No 2) Act 1986 states:

> 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.

20. Similarly, Section A1 of the Higher Education and Research Act 2017 (as inserted by the Higher Education (Freedom of Speech) Act 2023) states:

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, 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.

…

(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;

21. Whilst not yet in force, the above is relevant for the interpretation of the Claimant's policies made in anticipation of its application.

22. The Claimant has a governance policy entitled "Free Speech and Academic Freedom at the University of Nottingham" approved by the University Senate on 08.06.21 and reviewed and updated in March 2024[1] ("the Free Speech Policy") which states:

> "Free Speech and Academic Freedom at the University of Nottingham
>
> Freedom of speech and the free exchange of ideas are central to the University of Nottingham's mission of advancing truth, knowledge, and understanding. Pursuit of these aims requires free and open enquiry within the law, including the airing of ideas or perspectives which may be unpopular or cause offence. This is especially important given that many ideas which were previously regarded as deeply controversial or offensive are now widely accepted. Thus, a commitment to freedom of speech must apply to challenging or unpopular ideas as well as ideas about which there is broad consensus."
>
> "The University commits to protecting and promoting free speech and academic freedom so that students and staff can become acquainted with new information and ideas and with diverse viewpoints. The University provides an inclusive and supportive environment that encourages civil and peaceful debate, one in which students and staff can challenge their own and others' beliefs and opinions and scrutinise these on their merits. This commitment reflects the University's core values of inclusivity, ambition, openness, fairness, and respect, and it is consistent with its legal responsibility to protect and promote free speech and academic freedom as detailed in the Higher Education (Freedom of Speech) Act 2023."
>
> "Promoting Free Speech and supporting people
>
> …Freedom of expression applies to all who wish to seek, receive, or impart information and ideas of all kinds, and includes the right to protest peacefully; protest is itself a legitimate expression of freedom of speech.
>
> In seeking to protect the freedom of speech of its staff and students, the University will take appropriate measures, in accordance with the terms

[1] https://www.nottingham.ac.uk/governance/free-speech-and-academic-freedom.aspx

of this statement, to assist staff and students whose freedom of speech is threatened. We prioritise the wellbeing of our staff and students and provide a range of services designed to support them whilst working and studying at the University."

…

"Civil Debate within the law

…These commitments inform all of the University of Nottingham's specific policies that have implications for the freedom of speech and academic freedom. Whilst it is recognised that it can be difficult in practice to balance competing rights and obligations, this statement provides a framework for any decision-making on behalf of the University that may have implications for the freedom of speech, which should always take into account relevant domestic and international standards.

23. The Free Speech Policy must be considered by all decision-makers within the University when taking decisions that impact on free speech and take advice from the Registrar or other relevant officers as appropriate.

Submissions

24. The Claimant has failed to comply with the duties and policies above in the present case.

25. The Claimant has failed to properly engage with Protest Camp and the First Defendant as required by the Free Speech Policy and its express acceptance in that policy of the right to peacefully protest.

26. Further, the Claimant has failed to consider properly, or at all, the principles enunciated in the Free Speech Policy when making decisions in relation to the Protest Camp.

27. The above policies and statutory duties incorporate an obligation by the Claimant to act in accordance with Articles 10 and 11 ECHR in its decision making, in relation to which the First Defendant relies on the matters set out at paragraphs [0 - 57] of this Defence below.

28. Insofar as the Claimant relies on alleged breaches of University Discipline in support of proceedings which seek to evict the First Defendant from University Premises the present proceedings usurp the proper function of the University's own disciplinary proceedings and associated policies.

29. The above failure to comply properly, or at all, with the Claimant's policies and legal duties vitiates the Claimant's decision to seek possession proceedings.

HUMAN RIGHTS ACT DEFENCE

Articles 10 and 11 ECHR

30. Articles 10 and 11 of the European Convention on Human Rights state:

> 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.

31. Articles 10 and 11 together protect the right to protest.

32. Jurisprudence demonstrates that the Court has proceeded on the basis that Universities are public bodies in relation to freedom of expression disputes: *Ben-Dor & Ors, R (on the application of) v University of Southa*mpton [2015] EWHC 2206.

33. As the European Court stated in *Murat Vural v Turkey* (App. no. 9540/07), the scope of Article 10 is determined by whether the conduct in question, seen from an objective point of view, as an expressive act:

> "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." (at [54])

34. Once an act is categorised as "*expressive*", it is only if it is violent, incites violence or has violent intentions that the conduct will be considered to fall outside the protection of Article 10. As the Supreme Court stated in *DPP v Ziegler & Ors*

[2021] UKSC 23 [2022] AC 408 at [69 (in the context of Article 11 but the same considerations apply)]:

> "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 *Kudrevicius*:
>
> > "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore <u>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</u>."

35. In Strasbourg caselaw, "rejecting the foundations of a democratic society" refers to an assembly which is "aimed at negating democratic principles" (*AG Ref (No 1 of 2022)* [2022] EWCA Crim 1259 at [83]).

36. It is important to distinguish between circumstances where Articles 10/11 are not engaged and circumstances in which the right is engaged but a restriction on that right is found to be proportionate. The former only occurs where an expressive act is not peaceful. Since Article 10 only protects the right to peaceful expression it does not apply where an act is violent or has violent intentions (see *In re Abortion Services (Safe Access Zones)(NI)Bill(SC(NI))* [2023] 2 WLR 33 at [54]). The submission that Articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing was politely described as "ambitious" in *Hicks v DPP* [2023] EWHC 1089 (Admin) at [46].

37. Importantly, disruption, even serious disruption intentionally caused, does not take an act outside of the scope of Article 10 ECHR. As the Supreme Court stated

in *Ziegler* "seriously disrupting the activities carried out by others… is not determinative of proportionality" (at [67]).

38. The acts in the following cases all fell within the scope of Article 10 ECHR[2]:

    i) *Tatár and Fáber v. Hungary* (no. 26005/08 and 26160/08, 12 June 2012, at [6-8], [36] and [41]): Hanging items of dirty clothing from a rope attached to a fence around the Parliament building to represent the "dirty laundry of the nation" amounted to a form of political expression within the scope of Article 10. Conviction and fine of 250 euros breached Article 10. The Court stated that: "*the imposition of an administrative sanction, however mild, on the authors of such expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech*" (at [41]).

    ii) *Murat Vural v. Turkey* (no. 9540/07, 21 October 2014, at [7-14], [20] and [52-56]): Pouring paint on statues of Ataturk was an expressive act performed as a protest against the political regime in Turkey at the time and was within scope of Article 10.

    iii) *Shvydka v. Ukraine* (no. 17888/12, 30 October 2014, at [6-13] and [37-42]): Detaching a ribbon from a wreath laid by the President of Ukraine at a monument to a famous Ukrainian poet on Independence Day was categorised as "damaging the wreath ribbon" but nonetheless fell within the scope of Article 10. A prosecution for 'petty hooliganism' and sentence to 10 days imprisonment breached Article 10.

    iv) *Maria Alekhina and Others v. Russia* (no. 38004/12, 17 July 2018, at [13-16] and [205-206]): The actions of the Pussy Riot punk band who attempted to perform a song from the altar of Moscow's Christ the Saviour Cathedral against Vladimir Putin and in response to the ongoing political process fell within Article 10.

[2] The majority of the decisions are summarised in *Maria Alekhina and Others v. Russia* (no. 38004/12, 17 July 2018, at [204])

v) *Ibrahimov and Mammadov v. Azerbaijan* (Applications nos. 63571/16, 25 August 2020, at [10] and [166-167]): Spraying graffiti on a statute reading (in English) "F..k the system" and also (in Azerbaijani) "Happy slave day" (a play on words for "Happy flower day") fell within Article 10.

vi) *Olga Kudrina v Russia* (App No 34313/06, 6th April 2021) (cited in *AG Ref (No 1 of 2022* at [103]) the ECtHR considered a case in which a demonstrator abseiled out of a window at a privately owned hotel and hung a banner saying "Go away Putin" waved flares and threw firecrackers causing some damage

vii) *Genov and Sarbinska v Bulgaria (App No 52358/15*, 30 November 2021): Spray painting a monument to partisans with the words "Who? BCP-Shame! Who!" fell within Article 10 and the conviction was held to be disproportionate.

39. It is important to note that the manner and form of a protest may be an integral part of the message that is sought to be communicated. As Laws LJ stated in *R(Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23, regarding a protest camp:

> "… 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. " (at [37)

40. As Lord Neuberger stated in *Hall v Mayor of London* [2010] EWCA (Civ) 817 in relation to another protest encampment case:

> "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." (at [37])

41. The Supreme Court recently considered the application of Articles 10 and 11 ECHR in relation to obstructive protests in the case of DPP v *Ziegler* [2021] UKSC 23. Of particular note are the Supreme Court's findings that:
    i) "intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11" [70];
    ii) no restrictions may be placed on the enjoyment of Articles 10 and 11 rights "except "such as are prescribed by law and are necessary in a democratic society"" [57];
    iii) the "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" [59];
    iv) "deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality" [67];
    v) "both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality" [70];
    vi) however, "there should be a certain degree of tolerance to disruption to ordinary life, …caused by the exercise of the right to freedom of expression or freedom of peaceful assembly" [68];

42. The Supreme Court in *Ziegler* set out *"various factors applicable to the evaluation of proportionality"* at [72-78]. However, the Court underscored that *"it is important to recognise that not all of them will be relevant to every conceivable situation"* and that, moreover, *"the examination of the factors must be open textured without being given any pre-ordained weight"* [71]. The non-

exhaustive list of factors *"normally to be taken into account in an evaluation of proportionality"* [72], include:

i) the extent to which the continuation of the protest would breach domestic law [72] and [77];

ii) the importance of the precise location to the protesters [72], it being recognised 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"* (*Sáska v Hungary* (Application No 58050/08) at [21], as cited in *Ziegler* at [76];

iii) the duration of the protest [72];

iv) the degree to which the protesters occupy the land [72];

v) 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"* (*ibid.*);

vi) 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"* (*ibid.*);

vii) whether the protesters *"believed in the views they were expressing"* (*ibid.*);

viii) the availability of alternative routes to that obstructed [74];

ix) whether the obstruction was targeted at the object of the protest [75].

43. It cannot be properly argued that Articles 10 and 11 are not engaged in the present case, or that a possession order constitutes an interference with those rights. The only issue is the proportionality of interference.

University as Hybrid authority

44. Section 6 of the Human Rights Act 1998 states:

> 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.
>
> …

(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.

45. The distinction between core and hybrid authorities is familiar to the Court. In relation to hybrid authorities, in *London & Quadrant Housing Trust v Weaver, R. (On the application of)* [2009] EWCA Civ 587, the Court of Appeal set out the relevant factors to consider in determining whether a body is exercising functions of a public nature:

"(1) The purpose of section 6 of the 1998 Act 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 [2004] 1 AC 546* , para 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 para 160, Lord Hope, at para 52, Lord Hobhouse, at para 87, and Lord Scott, at para 129, were to the same effect. (Unfortunately, as Lord Mance pointed out in YL's case [2008] AC 95 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 the Aston Cantlow case, at paras 7–8. Moreover, this is only a guide since the phrase used in the Act is public function and not governmental function. *373

(3) In determining whether a body is a public authority, the courts should adopt what Lord Mance in YL's case described, at para 91, as a "factor-based approach". 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 the Aston Cantlow case, at para 12, "no single test of universal application". Lord Bingham in YL's case [2008] AC 95 observed, at para 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 section 6(3)(b) should be adopted: per Lord Nicholls in the Aston Cantlow case, at para 11, cited by Lord Bingham in YL's case, at para 4, and by Lord Mance, at para 91.

(5) In the *Aston Cantlow case [2004] 1 AC 546* Lord Nicholls said, at para 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's case. 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: YL's case [2008] AC 95 , per Lord Scott, at para 27 and Lord Neuberger, at para 141. As Lord Mance observed, at para 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, at para 165, that

"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."

(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's case, at para 101. However, Lord Neuberger thought, at para 167, that the "existence of a relatively 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, at para 167, that it will often be determinative.

(8) The third factor, where a body is to some extent taking the place of central government or local authorities, chimes with Lord Nicholls's *374 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's case, at para 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's case, at para 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, at para 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. " (at [35], emphasis added)

46. The determination of whether a specific action by a hybrid authority is done in the exercise of a public function therefore requires a factor-based approach to the circumstances of the case.

A1P1 Rights

47. Insofar as the Claimant seeks to rely on A1P1 rights in the present case, it is submitted that as a hybrid public authority exercising public functions the Claimant may not rely on these rights in the present claim and is confined to legal rights under domestic law.

48. The starting point is the case of *Aston Cantlow v Wallbank* [2003] UKHL 37; [2003] 3 W.L.R. 283 in which Lord Nicholls drew a distinction between core and hybrid public bodies and stated:

> 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 Convention rights. A core public authority seems inherently incapable of satisfying the 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

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.

…

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 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." (emphasis added)

49. The position of a hybrid authority when exercising public functions was further considered by the Court of Appeal in *YL v Birmingham City Council and others* [2007] EWCA Civ 26; [2007] EWCA Civ 27 [2008] Q.B. 1 by Buxton LJ:

"75. A particular difficulty has been seen in this connection in respect of the right of the care home to protect its own position, for instance by asserting its right to control its property under article 1 of the First Protocol. That difficulty arises as follows. When addressing the position of core public authorities, Lord Nicholls in the *Aston Cantlow case [2004] 1 AC 546* , at para 8 (a passage relied on by Mr Sales as in some way undermining the *Leonard Cheshire Foundation case [2002] 2 All ER 936*), pointed to the definition of "victim" in article 34 of the Convention: "any person, non-governmental organisation or group of individuals" (Lord Nicholls's emphasis). It therefore followed that a core public authority would be, or was likely to be, a body that was not a victim, and thus had no Convention rights of its own. But if that is so of core public authorities,

> it is very difficult to see why that is not so of hybrid public authorities in relation to the activities that confer on them their public status. True it is that in the Aston Cantlow case Lord Nicholls said, at para 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." But, with deference, that does not meet the objection in relation to those functions of the hybrid, in the present case the care of section 26 residents, that confer the status of a public authority. And it would therefore seem to follow that when making decisions of the sort indicated above the care home cannot take into account, under the rubric of the rights of others, its own Convention rights, because when discharging its public functions it has no such rights." (emphasis added)

50. The cases of *Aston Cantlow* and *YL* are therefore authority that where a party to litigation is either a core public authority or is exercising functions of a public nature for the purposes of s6(3)(b) HRA 1998 such a party cannot rely on its own Convention Rights either as a cause of action or to be weighed in the balance when assessing the proportionality of interference with the Convention Rights of another.

51. In *Attorney General's Reference Number 1 of 2022* [2022] EWCA Crim 1259 the Court of Appeal drew a distinction between public and private property in considering when a criminal conviction would be a proportionate interference with A10/11 rights. The Court reviewed Strasbourg jurisprudence and concluded that greater protection was provided for private property:

> "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" (at [102], emphasis added).

52. This explained the different degrees of protection to be afforded under the domestic criminal law to public and private property (at [116]). By necessary

implication, A1P1 rights are not to be considered when assessing the proportionality of interference with A10/11 in relation to property owned by a public authority.

Submissions

53. It is submitted that in seeking to evict the Protest Camp in the present claim the Claimant is exercising functions of a public nature and is therefore the act of a public authority for the purposes of the HRA 1998.
    i) The Claimant is subject to specific regulatory oversight.
    ii) There is specific statutory provision for the exercise of powers by the Claimant which engage with freedom of speech (Education (No 2) Act 1986 and Higher Education (Freedom of Speech) Act 2023).
    iii) There are general regulatory limitations on the Claimant's actions as a provider of higher education including the receipt of funding and the granting of degrees.
    iv) There is a public good in the provision of higher education, research and engagement on issues of public importance

54. At the very least, the submission that the Claimant is exercising public functions for the purpose of s6 HRA 1998 meets the test for this claim to proceed to trial under CPR 55.8.

55. The Claimant is accordingly required to act compatibly with the First Defendant's rights under Articles 10 and 11 ECHR. The court is similarly required to consider such rights in assessing the proportionality of granting relief in the present claim. Moreover, the Claimant cannot rely on A1P1 rights in the counter balance to this claim.

56. The granting of relief which brings the Protest Camp to an end is not necessary, it is not justified by any legitimate aim, any such aims are not sufficiently

important to outweigh the First Defendant's Article 10 and 11 Rights and there are less intrusive means to achieve any legitimate aims that may be relied on.

57. For the reasons above, the granting of relief which brings the Protest Camp to an end constitutes a disproportionate interference with the First Defendant's rights under Articles 10 and 11 ECHR.

58. The First Defendant relies on the following matters in the assessment of proportionality of any measures restricting or bringing the camp to an end (all these factors are cited in *DPP v Ziegler & Ors* [2022] AC 408 at [72-77]):

    i) The views giving rise to the protest relate to very important issues which many would see as being of considerable breadth, depth and relevance.

    ii) The protestors clearly believe in the views they are expressing.

    iii) The precise location is important to the protesters, it being recognised that the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly.

    iv) The duration of the protest is defined and is connected one of the objects of the protest, namely the ongoing war in Gaza.

    v) The degree to which the protesters occupy the University campus as whole is extremely limited.

    vi) The protest is clearly targeted at the object of the protest, namely the Advanced Manufacturing Building on the University campus.

    vii) The extent of the actual interference the protest causes to the rights of others is extremely limited or non-existent.

    viii) The extent of any obstruction is extremely limited or non-existent and in any event there are alternative means available to those affected by the protest disruption caused.

    ix) There is no danger to public order.

    x) There are no criminal offences alleged to arise from the Protest Camp.

59. In the present case the manner and form of the Protest Camp are clearly integral to the actual nature and quality of the protest and have acquired a symbolic force inseparable from the protester's message (*Secretary of State for Defence v Tabernacle* [2009] EWCA Civ 23 at [37]).

RELIEF SOUGHT

60. In any event, it is denied that a possession claim is an appropriate or proper form of relief in the present case. The Claimant does not seek the removal of all persons from the land, or even the removal of those students participating in the Protest Camp. In reality, the Claimant is concerned with the stopping the use of tents.

61. Where the Claimant seeks to regulate conduct on land, rather than the eviction of persons from the land, the appropriate form of relief is an injunction appropriately tailored to the facts of the case.

62. For the avoidance of doubt is it submitted that any injunctive relief granted should permit the continuation of the Protest Camp subject to whatever limitations, if any, on size or number the Court determines is strictly necessary.

CONCLUSION

63. It is submitted that the Claimant is not entitled to the relief sought in the form of a possession order or otherwise.

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01.07.24