Neutral Citation Number: [2022] EWCA Crim 1259

Case No: 202201151 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON A REFERENCE ARISING FROM A PROSECUTION IN THE CROWN COURT AT BRISTOL
His Honour Judge Blair KC
T20210063

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2022

Before:

THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE
and
MR JUSTICE SAINI

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ATTORNEY GENERAL'S REFERENCE ON A POINT OF LAW
No. 1 of 2022
(pursuant to section 36 of the Criminal Justice Act 1972)

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Tom Little KC and **Victoria Ailes** appear on behalf of **The Attorney General**
Clare Montgomery KC and **Blinne Ní Ghrálaigh** (instructed by **Hodge, Jones and Allen**) appear on behalf of **The Acquitted Person and Rhian Graham**
Louis Mably KC appears as **Advocate to the Court**
Jude Bunting KC and **Owen Greenhall** provided written submissions on behalf of **Liberty**

Hearing Dates: 29 and 30 June 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 noon on 28 September 2022.

The Lord Burnett of Maldon CJ:

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 Bristol Crown Court 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 on Human Rights ("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 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.

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 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.

The Questions in the Reference

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 DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin), 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 on Human Rights ('the Convention')?
>
> **Question 2**
>
> 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**
>
> 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.

6. The statue was about 2.5m high placed on top of a stone pedestal nearly 1m high which stood on a large, carved, octagonal stone base with plaques about 2.5m high. The top of the statue was thus about 6m 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.

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.

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 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 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 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 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 *DPP 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 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 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 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 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 [69] of *Ziegler* where Lord Hamblen and Lord Stephens summarised Strasbourg jurisprudence on conduct by protestors which falls outside the protection of the Convention. Article 11 only protects peaceful protest. By reference to *Kudrevičius v. Lithuania* (2016) 62 EHRR at [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 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* (App No. 17391/06) at [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 and 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 *Zeigler* at [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 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 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, 672 G-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 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 (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 advanced by the Attorney General and the questions of law we are asked to consider.

Criminal Damage

22. The Criminal Damage Act 1971 Act followed the report of the Law Commission LC29 Criminal Law: Report on Offences of Damage to Property (1970). 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).

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.
>
> (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 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(1) and 1(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 10 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 originally 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* [1990] Crim LR 48 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] EWCA Crim 2381 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 Criminal Damage 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.

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:

> "(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"

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 Strasbourg jurisprudence as it evolves over time: no more, but certainly no less": Lord Bingham of Cornhill at [20]

33. In *R (Al-Skeini) v. Secretary of State for Defence* [2008] AC 153 at [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 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".

34. In *R (AB) v. Secretary of State for Justice* [2022] AC 487 Lord Reed restated these principles at [54] to [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 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 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"

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.
>
> 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"

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.
>
> 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".

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.
>
> 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."

DPP 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 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.* In *DPP v. Cuciurean* [2022] EWHC 736 (Admin); [2022] 3 WLR 446 the Divisional Court rejected a similar submission, holding that the decision of the Supreme Court did not lay down any such broad principle, being concerned solely with section 137 of the Highways 1980 Act: 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 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 *Zeigler* were argued in the Supreme Court in *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* on 19 and 20 July 2022. Judgments are awaited. We mention this only to put down the marker that whatever we may say or decide regarding the reach of *Zeigler* 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 wrong. We adhere to the conclusion at [89(1)] that *Zeigler* "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 purposes of the Convention with the consequence, if that is right, that a proportionality exercise was necessarily called for.

DPP v. Cuciurean

44. The main issue in *Cuciurean* was whether proof of the ingredients of the statutory offence of aggravated trespass without more 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 (Liberty Intervening)* [2013] 1 WLR 3617 dealt specifically with aggravated trespass and directly supported the prosecution's submission: see *Cuciurean* at [54] to [56].

46. *James v Director of Public Prosecutions* [2016] 1 WLR 2118 distinguished between two categories of offence. First, offences 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. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado": Ouseley J at [35] relying on *Bauer* as deciding that aggravated trespass was an example of such an offence. See also *Cuciurean* at [58]). *James* at [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 DPP* [2002] EWHC 1564 (Admin); *Hammond v. DPP* [2004] EWHC 69 (Admin). 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 [38] to [43] and *Cuciurean* at [57] to [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* [2012] 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* [2022] 1 Cr. App. R. 18 at [37]).

49. In *Cuciurean* the Divisional Court placed offences under section 137 of the Highways Act in the second category: [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 [65]. We do not consider that there is anything 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 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. DPP* [2008] 1 WLR 276 at [18]). If section 3 does not enable a statutory offence to be interpreted compatibly with the Convention, then the question of a declaration of incompatibility under section 4 of the 1998 Act might arise: [69] to [72] at an appellate stage.

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 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 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 [59] to [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*. 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* (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 was necessary in a democratic society: [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 and the need for any restrictions established convincingly: [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: [102] to [105]. Nevertheless, the Court concluded that the prohibition was a proportionate measure. There was no violation of article 10: [113] to [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: [106]

    ii) The Strasbourg Court attaches particular importance to the quality of the parliamentary and judicial review of the necessity of a measure: [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: [108]

    iv) The more convincing the justifications for a general measure, the less importance will be given to its impact in particular cases: [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: [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: [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 ([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: [115] to [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 explained how the proportionality of a general measure enacted by Parliament should be assessed in the context of this country's constitutional principles: [163] to [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 additional background information on the "mischief" or social problem at which the legislation is aimed and thus its underlying rationale: [173] to [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 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: [175] to [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: [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: [179] to [181]

60. Then at [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 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 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 appropriate respect to the will of Parliament as expressed in the legislation*." (emphasis added)

61. Lord Reed 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 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 reasons supporting a finding of incompatibility"

62. Accordingly, when a general measure is contained in legislation predating 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 *Perincek v. Switzerland* (2016) 63 EHRR 6 at [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: [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 [102] to [106] the Court restated general principles on the protection of freedom of expression, as summarised in *Animal Defenders*. At [198] to [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 [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: [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 will generally be required, unless that would be inconsistent with the statutory language governing the offence.

69. Paragraph [275] of the judgment reads:

> "When proposing the enactment of what would later become art.261bis(4) of the Criminal Code, the Swiss Government referred to the potential conflict between, on the one hand, the imposition of 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 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 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 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 [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 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: [276] to

[278]. Moreover, the prohibition was on expressing a view, rather 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.

73. Ms Montgomery also relies upon *Handzhiyski v. Bulgaria* (App. No. 10783/14; (2021) 73 ECHR 15) where the Strasbourg Court said this at [52] citing *Perincek*:

> "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 solely because the expression at issue was caught by a legal rule formulated in general terms".

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: [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.

75. Of more relevance for our purposes is the following passage at [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)

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. Paragraph [53] does not suggest that a fact specific assessment is always required before a conviction may result for an offence of that kind.

76. The Strasbourg Court decided that the applicant did not engage in any form of violence and did not physically harm the statue: [54]. At [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)

77. The distinction between the principles set out in [53] and [55] was repeated and applied in *Genov v. Bulgaria* (App No. 52358/15). 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 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.

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 form of a procession, and may be exercised by both the organisers of, and participants in, a gathering: *Kudrevičius* at [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* (App No. 31276/05) at [30]; *Alekhina v. Russia* (2019) 68 EHRR 14 at [197] and [202] to [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 [92].

83. Mr Little suggests that the protest in Bristol involved the rejection of 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* (App No. 35943/10) at [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 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 [94]; *Primov v. Russia* at [155]; *Ziegler* at [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 freedoms of expression and assembly must be interpreted narrowly (see e.g. *Kudrevičius* at [142] and *Navalny v. Russia* (2014) 68 EHRR 25 at [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 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 [97] and [101], [156] to [157] and [172] to [174]; *Ziegler* at [67]; *Cuciurean* at [36] to [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 [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 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 caselaw 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 submission is founded on a comment in *Taranenko v. Russia* (app. no. 19554/05) at [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 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 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* (App. No. 63571/16) 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 Strasbourg Court found violations of article 5 (arbitrary detention) and article 18 (improper use of restrictions permitted by the Convention). At [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: [165] to [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 … 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 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 *Murat Vural*, para. 55, and *Shvydka*, para 39 …). Instead of acting within the constraints of the law, the authorities chose to prosecute the applicants for drug-related crimes in relation to their actions. The Court considers that such interference with the applicant's freedom of expression was not only unlawful, but it was also grossly arbitrary and incompatible with 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 *Murat Vural v. Turkey* (App. No. 9540/07) 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 ([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: [55] and [56]. The court continued by noting that the applicant's complaint was that "his actions had been severely and disproportionately punished". At [60] the court found that the interference was

prescribed by law and pursued a legitimate aim. The question was one of proportionality. At [65] the court recognised the "iconic" status of Atatürk and the choice made by Parliament to criminalise insulting his memory. At [66] it noted the "extreme severity of the penalty" and said:

> " … In principle the court considers that peaceful and non-violent forms of expression should not be made the subject of 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 …
>
> 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 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* (App. No. 17888/12) concerned the applicant's conviction for "petty hooliganism". She had removed a ribbon from a wreath laid at a monument by the President Yanukovych bearing his name and title, to express her opposition to him: [5] to [8]. The wreath itself has not been damaged although the ribbon was. The Strasbourg Court treated her act as a form of "political expression" ([38]) and decided that a sentence of 10 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 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, the court said that the first question was whether the statue had been damaged: [75] to [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 applicants' act had "not affected the monument to a degree sufficient to consider that it damaged it": [78] to [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 paragraph [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 (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: [81] to [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 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 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 *Olga Kudrina v. Russia (*App. No. 34313/06). 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: [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: [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: [23].

105. The applicant was sentenced to three and a half 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: [47]. In the discussion that followed between [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 [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.

107. At [53] the Strasbourg Court dealt with the proportionality of the conviction:

> "The Court notes that the District Court condemned 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, 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 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), 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 [53] of the court's judgment are unequivocal.

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 Convention is lost (alternatively prosecution and conviction would always be proportionate for an offence of causing damage) when <u>any</u> 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. 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 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 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 SFO* [2009] 1 AC 756 at [30] to [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 161 at [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) 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*. He submits that the qualification in section 1 of the Criminal Damage Act 1971 (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 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 caselaw suggests that there would need to be a case-specific assessment of the 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 [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 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* and in *Cuciurean* 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 individual cases. That said, the circumstances in which such as 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 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 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 at [3] and [8] to [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 have acted under duress (*R v. Bianco* [2001] EWCA Crim 2516 at [15]); that the defendant might have a "reasonable excuse" (*R v. Nicholson* [2006] 1 WLR 2857 at [9]; *R v. G* [2010] 1 AC 43, 87D); or loss of self-control (*R v. Martin* [2017] EWCA Crim 1359 at [39]).

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 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 "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 [2] above) that the jury was concerned with a range of defences.