Neutral Citation Number: [2023] EWCA Crim 919

Case No: 202301572 A3 & 202301577 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BASILDON
His Honour Judge Collery KC
42MR1939422

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2023

Before :

LADY JUSTICE CARR
MRS JUSTICE CUTTS
and
MRS JUSTICE THORNTON

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Between :

(1) MORGAN TROWLAND **(2) MARCUS DECKER**	**Appellants**
- and –	
REX	**Respondent**

- -
- -

Danny Friedman KC and Jacob Bindman (instructed by **Birds Solicitors**) for the **First Appellant**
Danny Friedman KC and Rebecca Martin (instructed by **Hodge Jones & Allen**) for the **Second Appellant**
Tom Little KC and Adam King (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date : 26 July 2023

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Approved Judgment

This judgment was handed down remotely at 2pm on Monday 31 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr :

Introduction

1. In the early hours of 17 October 2022 Mr Morgan Trowland, who is now 40 years old, and Mr Marcus Decker, who is now 34 years old, scaled the Queen Elizabeth II bridge on the M25 carriageway. They hoisted a "Just Stop Oil" banner across the bridge, and suspended themselves in hammocks. There they remained until arrested some 36 hours later. The bridge was closed for about 40 hours as a result of the protest, causing extreme disruption to many members of the public. Both men ("the protesters") were repeat protest offenders on bail at the time.

2. The protesters were charged with the offence of intentionally or recklessly causing a public nuisance contrary to s. 78(1) of the Police, Crime, Sentencing and Courts Act 2022. On 4 April 2023 they were convicted following a seven-day trial before HHJ Collery KC ("the judge") and a jury in Basildon Crown Court. On 21 April 2023 the judge sentenced Mr Trowland to three years' imprisonment, and Mr Decker to two years and seven months' imprisonment.

3. The protesters seek leave to appeal against sentence, which applications have been referred to the full Court by the Registrar. It is said that their sentences were manifestly excessive and otherwise a disproportionate interference with their rights of freedom of expression and assembly under Articles 10 and 11 of the European Convention on Human Rights ("Article 10", "Article 11", "ECHR"), and so unlawful contrary to s. 6 of the Human Rights Act 1988.

4. We grant leave and proceed to consider the merits of each appeal on a full basis.

The facts

5. At around 3.45am on 17 October 2022 the protesters were dropped off by car on the carriageway of the M25 on the Queen Elizabeth II bridge, which forms the southbound carriageway of the M25 at the Dartford-Thurrock River crossing. It is the only fixed road crossing of the Thames east of Greater London and is the busiest estuarial crossing in the United Kingdom. The bridge carries four lanes of southbound traffic and serves not just local and commuter traffic moving between Essex and Kent but is also important as a main route for freight traffic moving to the Channel crossing.

6. Pedestrians are not permitted on the bridge. There is no footpath and there was signage saying clearly "Pedestrians not permitted". This is all as provided for in s. 23(1) of the Dartford-Thurrock Crossing Act 1988; by s. 23(5) it is an offence for pedestrians to be on the bridge.

7. The protesters crossed two low fences at the roadsides and climbed up the supporting cable stays on opposite sides of the bridge until, after about three hours, they reached a height of approximately 60 metres. Police arrived shortly after the commencement of the climb, but the protesters were substantially non-communicative, indicating only that this was a protest and they were not seeking to harm themselves.

8. Each protester carried a rucksack, and was equipped with a hammock and enough food and water to cover a period of days. Once ascended, they threw cables across the gap

between them and hoisted a banner between two of the bridge's central support towers bearing the slogan "Just Stop Oil". "Just Stop Oil" is a non-violent civil resistance group demanding that the United Kingdom government stop licensing all new oil, gas and coal projects. The protesters then descended some 5 metres and set up cross wires between the towers, from which they suspended their hammocks.

9. Traffic over the bridge was stopped using a rolling roadblock. Other than two central lanes which were kept open whilst the protesters were climbing in order to allow accumulated traffic to continue over (and so empty) the bridge, the bridge was closed to traffic from about 4am on 17 October to 8.15pm on 18 October 2022, that is to say, for about 40 hours. A divert system was put in place for southbound traffic, using two of the four tunnels crossing the Dartford river; but there remained severe delays, both north and southbound, as detailed below.

10. From the bridge Mr Trowland conducted a series of Zoom and telephone conferences with various members of the national media. Text messages between him and his event planner/media contact indicated that he contemplated staying on beyond the next day, but the view was taken that they had reached their media audience to an extent which meant that Mr Trowland was content to negotiate his descent. (Neither protester could come down off the bridge without some kind of police assistance.)

11. At around 5.15pm on 18 October, the police decided to use a cherry picker crane to approach the protesters. The protesters surrendered to arrest and were brought down. The Highways Agency removed the crosswires and the banners and conducted safety checks. The bridge was reopened at around 9.15pm.

The consequences of the public nuisance and victim personal statements

12. Data from the National Highways System based on the Strategic Road Network revealed the following. As a result of the protest, a minimum of 564,942 vehicles were delayed, with a minimum period of delay of 60,547 hours. At 8.30am on 17 October, there was a queue of over eight miles long at junction 4 of the M25, south of the bridge, and a seven-mile queue north of the bridge. The delay for vehicles at this time was in the order of two hours. In rough terms, the economic impact of this disruption was valued at around £917,000. There was also very considerable disruption caused on roads that were not part of the Strategic Road Network.

13. There were 22 victim personal statements and six business impact statements before the judge at the time of sentencing. They were representative only: for each, there would be many more who could have given similar accounts. We have considered each of these statements individually and in detail, but summarise a sample of instances (of distress and disruption over and above the anxiety and stress of delay itself) as follows:

    i) Those who missed the funeral of a close friend or relative;

    ii) Those who missed a medical appointment or therapy, leading to continued pain and/or additional distress;

    iii) Those who lost wages and/or missed important client appointments;

    iv) Work projects, such as a housing project for vulnerable people, delayed;

v) Children left waiting unattended;

vi) Loss of revenue. By way of example only, one business lost around £14,000 (including VAT) due to deliveries being missed and orders not being fulfilled. Staff still had to be paid and reputational damage was caused. Another business lost around £25,000 due to being unable to complete deliveries. Another (printing) business lost £4,000 to £5,000 in revenue.

The protesters' previous convictions and personal circumstances

14. Mr Trowland was a civil engineer, with experience of bridge construction. He was of good character until 2019, when he started protest offending, initially for Extinction Rebellion and latterly for Just Stop Oil.

15. He had seven previous convictions all committed in the context of protests as set out below.

	Date of offence	Date of conviction	Offence	Facts	Plea	Sentence
1	18 April 2019	30 October 2019	Failing to comply with conditions imposed on public assembly s. 14(5) Public Order Act 1986	Extinction Rebellion Protest in Parliament Square. Fourth day of protests generally. Mr Trowland was sitting in the road with others. Police told him directly of s. 14 condition to disperse, or face arrest, and suggested he move to Marble Arch if he wanted to protest further. Given a two minute warning, then a further warning. Required to be carried on arrest.	Not Guilty	Conditional Discharge - 9 months
2	5 September 2020	17 May 2021	Wilfully obstructing highway s. 137(1) Highways Act 1980	Arrested on 5th Sep 2020 for obstructing Great Eastern Road, Waltham Cross, Hertfordshire, outside printworks owned by News International. Group of approximately 50 Extinction Rebellion protesters, using two lorries, a bamboo	PNC: "No plea taken"	Fine - £150

				structure, and tubes filled with cement, to block the road. Some had bedding, food and water.		
3	6 April 2022	15 February 23	Wilfully obstructing highway s. 137(1) Highways Act 1980	Present on top of a fuel tanker for 7 hours, which halted traffic on the Purfleet Bypass A1090.	Not known	Fine - £200
4	8 April 2022	21 November 2022 (30 March 2023 was due for sentence, but was at trial at Basildon Crown Court for the Dartford offence)	Wilfully obstructing highway s. 137(1) Highways Act 1980	On the highway (A1090 at Grays) in a group of approximately 50 others for approximately two hours, blocking traffic. Mr Trowland was seen gluing himself to the road.	Not known	Awaited
5	10 April 2022	17 March 2023	Aggravated Trespass s. 68(1) Criminal Justice and Public Order Act 1994	Arrested at Askews Farm Lane, Purfleet. (approximately 200 meters from A1090). He was found by police in a secure site attached to fuel pipes above a tanker fuelling area.	PNC: "no plea taken"	One day's detention at the courthouse
6	13 April 2022	11 July 2022	Wilfully obstructing highway s. 137(1) Highways Act 1980	Arrested on Purfleet Bypass A1090 for obstructing the highway. Mr Trowland climbed on top of a HGV lorry and displayed a "STOP THE OIL" banner. The lorry in fact contained a water	Guilty	Fine - £50

				treatment chemical rather than oil. This caused the lorry to be stationary blocking the road for approximately four hours.		
7	15 April 2022	24 March 2023	Wilfully obstructing highway s. 137(1) Highways Act 1980	Arrested at Askews Farm Lane, Purfleet (approximately 200 meters from A1090). Mr Trowland was found to be sitting on a man-made bamboo tripod in the road. He refused to come down when police appealed for him to do so. Heights team had to use specialist equipment to remove him safely.	Not known	Fine - £100

16. At the time of the index offending on 17 and 18 October 2022, Mr Trowland was on bail for offences 3, 4, 5 and 7 above.

17. Mr Decker was an experienced climber with two degrees who ran the family business, a music school. He had one previous conviction for aggravated trespass in 2019, for which he received a two-month conditional discharge, having pleaded guilty. He was on police bail at the time of the index offending for another protest-related offence under investigation.

18. There were multiple character references for each protester, and by the time of sentence they had each spent six months in custody on remand. They had not been in custody before (apart from one extra day spent by Mr Trowland in detention in a court house). Neither protester sought a pre-sentence report, and the judge did not consider such to be necessary. We agree that reports were not required.

The trial and sentence

19. The trial lasted seven days. Mr Trowland represented himself, after choosing to dispense with his trial counsel in the early stages of the trial. The prosecution called 12 members of the public to give oral evidence, alongside written evidence from other members of the public. Both protesters gave oral evidence.

20. At the conclusion of the evidence, the judge withdrew any defence of "reasonable excuse" (as provided for in s. 78(3)) from the jury. On 1 April 2023 he gave detailed written reasons for his decision. In short, the protesters' activities were carried out on a place from which the public were excluded and amounted to trespass. Article 10 (and

Article 11) did not provide unlimited freedom to exercise protest rights in any forum or location. The protesters had no right to be on the bridge, let alone 60 metres aloft. The defence was not available to them.

21. When it came to sentence, the judge summarised the facts briefly, emphasising that the circumstances had been "fully ventilated" at trial. He outlined the offending and its consequences. Amongst other things, "there was real anger caused". He referred to the extent of planning that preceded the offending. The protesters' plan had been to stay on the bridge until their demands were met by the government but Mr Trowland admitted that he knew that they would not do so in the timescale available. The judge went on:

> "By your actions you caused this very important road to be closed for 40 hours. This, of course, as you knew, obstructed many tens of thousands, indeed, hundreds of thousands of members of the public; some very significantly. Your obstruction continued over a significant period of time: that was your intention. Only then would there be massive disruption. Only then was it, in your assessments, newsworthy."

22. The judge found that Mr Trowland plainly believed that he "knew better" than everyone else and "it did not matter if people suffered in consequence", so long as it allowed him to impart his message: in short, his attitude was "to hell with everyone else". The judge rejected Mr Trowland's apologies about the individual crises as "hollow" and self-serving. He noted that, whilst Mr Trowland was the main communicator, Mr Decker was the experienced climber and as important, on one view, to the enterprise.

23. The judged rehearsed the protesters' previous convictions, along with the fact that Mr Trowland was on bail and Mr Decker on police bail at the time of this offending. He found Mr Trowland to be a committed and active member of Just Stop Oil:

> "…It is plain from your evidence that you do not see the risks as having reduced and the court is really concerned that you will continue to engage in such action as you see fit, despite the indications in your evidence that you will not. History indicates you are unreliable in that regard. You have been repeatedly released on bail and continue to offend."

24. In terms of mitigation, the judge referred to the character references for each protester. The judge noted that both had stated that they did not intend to protest in this way in the future, but it was hard to assess if that was the reality. He saw no signs that they were any less committed to the causes that they espoused. Mr Trowland used the opportunity when giving evidence to set out at length the beliefs that motivated him.

25. Rehabilitation was noted as being an important aim in sentence, but not the only purpose. This was not a case, said the judge, where the obstruction caused equated with the sort of serious harm that is reflected in s. 78(1)(b)(i). A maximum sentence, however, of 10 years' imprisonment for the offence allowed for a range of sentences that were fact- specific and catered for the many different ways in which the offence could be committed.

26. The judge referred to the relevant sentencing regime and principles, commenting that the purposes of sentencing included not only reform and rehabilitation, but also punishment and the reduction of crime by deterrence, two matters which he had "very much in mind". He stated that he had regard to *R v Richard Roberts and others* [2018] EWCA Crim 2739; [2019] 1 WLR 2577 ("*Roberts*") and *R v James Hugh Brown* [2022] EWCA Crim 6; [2022] 1 Cr App R 18 ("*Brown*"). He had also seen the recent sentencing remarks of Garnham J in the case of *R v McKechnie and others* (unreported, 31 March 2023) (*"McKechnie*").

27. The judge identified that the disproportionate nature of the offending was an important issue. The protesters knew that government policy would not be changed that day and that their real aim was to "achieve maximum publicity by causing maximum disruption by means of a spectacular protest event".

28. He found both culpability and harm to be high. The statutory aggravating features were the protesters' relevant previous convictions and the fact that the offences were committed whilst on bail, which was regarded as being a serious aggravating feature. The custody threshold was passed in each case and sentences of imprisonment were justified even in the content of peaceful protests causing public nuisance. Deterrence was an important part of the sentence for both protesters.

29. For Mr Trowland, who took a leading role, the judge said that he used a "starting point" of four years' imprisonment which was reduced to three years to take account of the mitigation, primarily the fact that this was a matter of conscience for Mr Trowland.

30. For Mr Decker, who played an important role, the judge said he drew some distinction between his position and that of Mr Trowland, who was older and had a longer record of offending. He used a "starting point" of three years and six months' imprisonment which was reduced to two years and seven months' imprisonment to take account of his personal mitigation, again primarily because this was a matter of conscience.

Submissions on appeal

For the protesters

31. For the protesters, Mr Friedman KC's overarching submission is that the sentences were manifestly excessive and a disproportionate interference with the protesters' Article 10 and Article 11 rights. By the time of sentence, the protesters had served six months in custody; that period, the equivalent of a 12-month sentence, would itself have constituted the longest period of immediate custody ever imposed for non-violent protest. The protesters have now served some nine months in custody. It is accepted that some element of deterrence could legitimately play a role in the sentences imposed; the issue is their overall length.

32. The argument breaks down into five grounds of appeal as follows.

Ground 1: erroneous approach to sentencing

33. It is submitted that when a sanction constitutes an interference with a protected human right, the right cannot merely be treated as a "mitigating factor". However, the judge did exactly this when he took the starting points that he did. The correct approach,

reflected in domestic and ECHR case law, is that the sentence must be proportionate, that is to say, necessary in a democratic society and in accordance with ECHR case law. On this approach, and given the non-violent and conscientious nature of the protesters' actions, the starting point should have been a non-custodial sentence. The judge made no mention of the caution that attaches to imposing custodial sentences, let alone immediate custodial sentences, in this context.

Ground 2: sentence manifestly excessive

34. Regardless of the correctness of the approach, it is said that the sentences were "far too high". Under the umbrella of this general complaint, the following points are made:

    i) The sentences are the longest ever handed down in a case of non-violent protest in modern times. By imprisoning a person for civil disobedience, the court is effectively banning them from any form of political expression;

    ii) There is no sound basis for distinguishing from more lenient sentences to be found in domestic case law, including *Roberts* and *Brown*;

    iii) The sentences cannot be lawful under the Human Rights Act 1998, because they depart radically from the ECHR jurisprudence;

    iv) The judge double-counted the extensive planning, taking it into account both for culpability and for aggravating features.

Ground 3: failure to consider appropriate limb of offence

35. The judge accepted that this was not a case of "serious harm" for the purpose of s. 78(1)(b)(i) (as defined in s. 78(2)); the conviction fell under s. 78(1)(b)(ii). It is said that, despite this, the level of sentence did not reflect the less serious means by which the offence was committed. There should be a difference in approach to sentence under each limb, as recognised in *McKechnie*.

Ground 4: previous convictions and prospect of rehabilitation

36. In respect of both protesters, the judge took the existence of previous protest-related convictions into account as a "serious aggravating factor". However, it is said that, considering the lesser nature of their previous offending, their good character (as evidenced by the character references), and the moral difference between those who are civilly disobedient and other types of criminal, they were treated too harshly.

37. Further, the judge was wrong to dismiss the protesters' express commitment not to offend again. The shock of being remanded cannot be underestimated, and it was wrong to elide commitment to the cause with an intention to offend again.

Ground 5: deterrence

38. The judge emphasised throughout the importance of deterrence and the reduction of crime. Broadly, it is said that his over-reliance on deterrence risks having a "chilling effect" on freedom of expression. In particular, the judge did not take into account the deterrent effect of the period already spent on remand. The protesters had never been in custody before, and the judge failed to explain why the period already served was

not a sufficient deterrent. Further, a custodial sentence always inherently involves some degree of deterrence (see *R v Sidhu* [2019] EWCA Crim 1034; [2019] 2 Cr App R (S) 34 at [32]).

39. In addition, the judge suggested that there would be need to deter further "novel" protests. However, novelty does not always equate to massive disruption; although the protests from Just Stop Oil garner great media attention, they rarely cause massive disruption.

For the respondent

40. Mr Little KC for the respondent submits that the sentences imposed were entirely justified. This was a very serious example of an offence of intentionally causing public nuisance. The custody threshold was passed and the judge was entitled to conclude that he saw no signs that the protesters were now any less committed to the cause. There is no marked difference in the approach in this jurisdiction and in Strasbourg to the correct approach to sentencing in the context of non-violent protest. This was a case of high culpability with a number of aggravating features, and the judge was entitled to pass a sentence that reflected an element of deterrence. It was accepted that, in the absence of the need for deterrent, the sentences "would be likely to be regarded as [manifestly excessive]".

Discussion

41. We divide our analysis below into three sections:

    i) Relevant legal background and general principles;

    ii) Alleged errors of principle in the sentencing exercise;

    iii) Whether the sentences were manifestly excessive/disproportionate.

Relevant legal background and general principles

42. The statutory offence of public nuisance was introduced in Part 3 of the Police, Crime, Sentencing and Courts Act 2022. Part 3 contains a number of provisions placing limitations on protests which impact directly or indirectly on the rights, freedoms and movements of protesters. S. 78, which came into force on 28 June 2022, enacted a new offence of intentionally or recklessly causing public nuisance and (by s. 78(6)) abolished the common law offence of public nuisance. It was introduced in the context of increasing non-violent protest offending by organisations such as Extinction Rebellion and Insulate Britain.

43. It reflected the recommendations of the Law Commission in its *Report on Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Comm no. 358) (24 June 2015) ("the LCR"). That report stated that "[s]tatutes containing criminal offences provide a clear statement from Parliament that the conduct is forbidden" (see [3.78]); "[i]t is in general desirable that the criminal law should be contained in statute as this gives potential offenders clear notice of what conduct is forbidden and what the consequences will be" (see [3.32]).

44. S. 78(1) provides:

> "78. Intentionally or recklessly causing a public nuisance
>
> (1) A person commits an offence if —
>
> (a) the person—
>
> (i) does an act, or
>
> (ii) omits to do an act that they are required to do by any enactment or rule of law,
>
> (b) the person's act or omission—
>
> (i) creates a risk of, or causes, serious harm to the public or a section of the public, or
>
> (ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
>
> (c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
>
> (2) In subsection (1)(b)(i) "serious harm" means—
>
> (a) death, personal injury or disease,
>
> (b) loss of, or damage to property, or
>
> (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.
>
> (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for an act or omission mentioned in paragraph (a) of that subsection."

45. A person guilty of an offence under s. 78(1) is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, to a fine or to both (see s. 78(4)).

46. By s. 78 Parliament thus introduced a new offence which covers (intentional or reckless) non-violent protest (for which there is no reasonable excuse). Three points deserve emphasis. First, s. 78(1)(c) introduces a fault element (of intention or recklessness), which the common law offence did not require. The LCR commented that: "[i]t is unjust that defendants should be exposed to such a serious sanction unless there is equally serious fault on their part" (see [3.53]). Secondly, s. 78(1)(b)(ii) makes it a criminal offence if a person "obstructs the public or a section of the public in the exercise or enjoyment or a right that may be exercised or enjoyed by the public at large". There is no qualification that the act of obstruction must be serious or significant before

it becomes a criminal offence. Thirdly, custodial sentences of up to 10 years can be warranted.

47. There is no definitive Sentencing Council Guideline specific to the offence (nor for any obvious analogous offence). The court thus takes into account the statutory maximum and any relevant sentencing judgments of this court. We have not been shown any appellate judgments addressing the sentencing regime for the statutory offence of public nuisance, although there are appellate judgments arising out of sentences for the old common law offence. They are considered below, in particular *Roberts* and *Brown*, where the relevant Strasbourg jurisprudence was also examined.

48. The seriousness of the offence is to be assessed by considering the culpability of the offender and the harm caused by the offending (see s. 63 of the Sentencing Act 2020). The court must also consider which of the five purposes of sentencing identified in s. 57 of the Sentencing Act 2020, namely punishment, reduction of crime (including its reduction by deterrence), reform and rehabilitation, public protection and the making of reparation, it is seeking to achieve through the sentence that is to be imposed. Once a provisional sentence is arrived at, the court takes into account relevant aggravating and mitigating features. Other considerations, such as totality, may be engaged under the stepped approach set out in the Sentencing Council's *General Guideline: Overarching Principles*. Custodial sentences must be what is, in the opinion of the court, the shortest term commensurate with the seriousness of the offence (see s. 231(2) of the Sentencing Act 2020).

49. The (qualified) rights to freedom of expression and assembly under Articles 10 and 11 are relevant to sentence. Article 11 is generally seen as a more specific, or *lex specialis*, form of the right to freedom of expression in Article 10, and the two can be considered together. Particular caution is to be exercised in imposing a custodial sentence in non-violent protest cases. (See *Taranenko v Russia (App No 19554/05)* (2014) ECHR 485; 37 BHRC 285 at [87]; *Kudreivcius v Lithuania (App No 37553/05)* (2016) 62 EHRR 34; 40 BHRC 114 ("*Kudrevicius*") at [146]; *Roberts* at [43].) It may also be relevant if the views being expressed relate to important and substantive issues (see *DPP v Ziegler and others* [2021] UKSC 23; [2022] AC 408 ("*Ziegler*") at [72]), although we emphasise immediately below the limits of such consideration. 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. It is a flexible notion, which depends on fair and objective judicial assessment; there are no rigid rules to be applied. The inquiry requires consideration of the questions identified by the Divisional Court at [63] to [65] of its judgment in *DPP v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253 (cited by the Supreme Court at [16]).

50. It is no part of the judicial function to evaluate (or comment on) the validity or merit of the cause(s) in support of which a protest is made (see *Roberts* at [32]). However, a conscientious motive on the part of protesters may be a relevant consideration, in particular where the offender is a law-abiding citizen apart from their protest activities. In such cases, a lesser sanction may be appropriate: a sense of proportion on the part of the offender in avoiding excessive damage or inconvenience may be matched by a relatively benign approach to sentencing. The court may temper the sanction imposed because there is a realistic prospect that it will deter further law-breaking and encourage the offender to appreciate why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law is contrary

to the protestors' own moral convictions. However, the more disproportionate or extreme the action taken by the protester, the less obvious is the justification for reduced culpability and more lenient sentencing. (See *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136 ("*Jones*") at [89]; *Roberts* at [33] and [34]; *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 ("*Cuadrilla*") at [98] and [99]; *National Highways Ltd v Heyatawin and others* [2021] EWHC 3078 (QB); [2022] Env LR 17 at [50] to [53]; *Brown* at [66].)

51. Ultimately, whether or not a sentence of immediate custody for this type of offending is warranted, and if so what length of sentence is appropriate, will be highly fact-sensitive, set in the context of the relevant legislative and sentencing regime identified above.

52. Against this background, we turn to the substance of the appeal on the facts.

53. We comment at the outset that the judge was well-placed to sentence both protesters, amongst other things having heard and seen them in the witness box, and was well-placed to evaluate the evidence as a whole in order to make any necessary findings. He evidently used this advantage to good effect, and his sentencing remarks are to be commended as clear, measured and comprehensive.

Alleged errors of principle; grounds 1, 3, 4 and 5

54. Ground 1: we reject the submission that, given the indisputably non-violent and conscientious nature of the protesters' actions, the judge's starting point should have been a non-custodial sentence. This is essentially the argument that was made and rejected in *Roberts* at [31] to [43]. There are no bright lines in protest cases. Rather, whether or not a custodial sentence is justified turns on the individual facts. The judge was fully cognisant and took account of the caution to be exercised in imposing custodial sentences (and by extension lengthy custodial sentences) for this type of offending, by reference to the authorities set out above. Thus, for example, he stated in terms:

> "I take the view that the sentence of imprisonment [is] justified even in the context of peaceful protests causing public nuisance. This is a conclusion consistent with jurisprudence in both Strasbourg and in this country."

55. Where conscientious motive on the part of a protester is a relevant consideration for sentencing purposes, as submitted for the protesters and accepted by the respondent, it falls most logically to be factored into the assessment of culpability.

56. The judge does appear to have treated the protesters' conscientious motives primarily as a matter of mitigation (for which he applied 25% credit). This reflected the manner in which the issue was presented to him on behalf of the protesters at the time of sentencing (i.e. that this was a matter of mitigation). As set out above, we consider that, strictly speaking, these were matters more relevant to culpability. However, the judge elsewhere referred to the fact that the protesters' motives led him to reduce his assessment of their culpability; and, ultimately, we do not consider that any error in approach was material. What matters is whether the protesters' conscientious motives which caused them to exercise their rights of freedom of expression and assembly were

reflected properly in the ultimate sentences. As set out further below, we consider that they were.

57. Ground 3: equally, we reject the submission that there should be a different approach to sentencing under s. 78 depending on which limb of s. 78(1)(b) is engaged. There is no principled or logical basis for such a suggestion. S. 78 does not distinguish the sentencing maxima between the two limbs of offending. Similarly, there is no difference in approach by reference to whether or not the offence is caused intentionally or recklessly (for the purpose of s. 78(1)(c)). An offence under s. 78(1)(b)(i) may be more serious than an offence under s. 78(1)(b)(ii), but it does not follow that it will be. A judge sentencing under s. 78(1)(b)(ii) cannot ignore the damage actually caused or risked as a result of an obstruction. The decision in *McKechnie* does not suggest otherwise. Garnham J did state that it was "critical" that the conduct there created a risk of serious injury or death. But that is not the same as saying that the limb of the offence engaged is in itself "critical". He was simply explaining his decision that the custodial threshold had been passed for the defendants before him.

58. Ground 4: nor do we consider that the judge erred in his approach to the protesters' previous convictions and any prospect of rehabilitation. This is not, in truth, a submission that the judge erred in principle, but rather a challenge to the judge's evaluative findings on the facts. The judge did not ignore the prospect of rehabilitation; as recorded above, he referred expressly to it as "an important factor". But he concluded that there were no signs that the protesters were any less committed to the causes that they espoused, and referred to Mr Trowland's evidence in which he set out at length the beliefs that motivated him. The strength of the protesters' beliefs was on any view material to the question of rehabilitation. As was stated in *Roberts* at [47], when making a judgment about the risks of future offending, underlying motivations can be of great significance.

59. The judge was entitled to reject that the protesters' apologies were genuine and to take the view that they were inadequate and self-serving. The judge was concerned that they would continue to engage in their illegal activities despite their indications to the contrary. As he put it, "history indicate[d] that they were unreliable in that regard". They had been repeatedly released on bail and continued to offend. The fact that, in other domestic cases, undertakings by defendants not to offend have been accepted (see for example *Roberts* at [46] to [51] and *McKechnie* at [38]) is nothing to the point. This was pre-eminently a matter for the judge to assess.

60. As for the suggestion that the protesters' time in prison had had a salutary effect on them, the trial took place — and the protesters gave evidence — after they had spent six months in prison. The judge's assessment, referred to above, was made in that context. It cannot be said to be perverse.

61. As for the protesters' previous convictions, the judge was fully entitled to give weight to them and to consider them as serious aggravating factors. Whether the offences were summary or not, they were all protest offences, in Mr Trowland's case with no less than five being committed in the preceding months of 2022. In addition, both protesters were on bail at the time.

62. In short, there is no basis for appellate interference with the judge's approach to and findings in respect of the protesters' past convictions and prospects of rehabilitation.

63. Finally, it is right that the judge referred to the extensive planning involved in this offending both as relevant to culpability and (in passing) as an aggravating factor, but we cannot identify any impermissible double-counting in a manner which materially affected the overall outcomes.

64. Ground 5: it is common ground that deterrence (and punishment) are legitimate sentencing aims. What is suggested is that the judge placed undue weight on the role of deterrence in this sentencing exercise. This falls more conveniently to be addressed in the context of our more general consideration below of the overall length and proportionality of the sentences. But we do address at this stage the protesters' heavy reliance on *Cuadrilla* at [98] and [99]. There, in the context of a general discussion about civil disobedience, Leggatt LJ explained why, in a case where an act of civil disobedience constitutes a criminal offence which is so serious that it crosses the custody threshold, it will nonetheless often be appropriate to suspend the operation of sanction on condition of no further breach.

65. He gave three reasons, provided that certain conditions were met by the offending, namely that the offending involved public, non-violent, conscientious acts contrary to law, done with the aim of bringing about a change of law or policy. He stated that such an offender was morally different to ordinary law-breakers. Secondly, there was reason to expect that less severe punishment would be necessary to deter such a person from further law-breaking. Thirdly, part of the purpose of sanction was to engage in "dialogue" with the defendant; such dialogue was more likely to be more effective where restraint is shown in anticipation that the defendant will respond by desisting from further breaches.

66. These comments do not appear to us materially to advance the protesters' challenge. First, they are general in nature and always subordinate to the fact-sensitive exercise to be carried out in each case. Secondly, the direct aim of the protesters here was to cause maximum disruption (in order to deliver their message); a stand-out feature in this case is the lack of moderation on the part of the protesters. Thirdly, conscientious motivation/moral difference is already factored into the question of culpability, as identified above. Fourthly, as for deterrence, that is an area pre-eminently to be assessed on the facts, and in any event Leggatt LJ was addressing only deterrence to the offenders themselves, not the wider public, which may be a highly relevant consideration. Fifthly, whilst the social bargain or "dialogue" continued beyond the offending itself, the disproportionate nature of the protesters' actions remains highly relevant; and again the specific facts of each case, such as previous convictions and bail status, take precedence.

67. Further, on a point of detail, the protesters complain about the judge's statement when addressing Mr Trowland in his sentencing remarks as follows:

> "The real risk here is that if this worked and garnered media attention because of its scale and novelty, what will be the next novel protest to re-capture that interest? If novel is to be equated with massive disruption to the public, then attraction of that link needs to be broken. You have to be punished both for the chaos you caused and to deter others from seeking to copy you in that protest. Deterring you and others from actions that cause such a level of nuisance is an important aspect of this sentence."

68. It is argued that the judge incorrectly equated "novel protest" with "massive disruption". However, properly understood, the judge was not equating "novel protests" with protests that cause "massive disruption". (We note that elsewhere in his sentencing remarks he explicitly separated out offending that achieved "maximum attention" and "maximum disruption".) He was simply saying that, if causing maximum disruption is seen as an effective form of novel protest, such a view had to be dispelled.

69. That leaves what we consider to be the central question, namely whether or not the custodial terms of three years for Mr Trowland and two years and seven months for Mr Decker were, in the absence of any material error of principle on the part of the judge, nevertheless manifestly excessive.

Whether the sentences were manifestly excessive and/or disproportionate: ground 2

70. As set out above, the judge arrived at the custodial term of three years for Mr Trowland after taking four years' custody as a "starting point" which he then reduced to three years to take account of the available mitigation. For Mr Decker, he took a "starting point" of three years and six months' custody before reduction for mitigation.

71. As a side issue, we record that in both instances, the judge was technically incorrect to refer to "starting points" in the way that he did; a "starting point" is a term reserved in the sentencing context for a starting point in Sentencing Council Guidelines by reference to a particular category of offending, irrespective of plea or previous convictions. Starting points define the position within a category range from which to start calculating the provisional sentence before taking into account relevant aggravating and mitigating factors. Rather, the "starting points" adopted here were the terms considered by the judge to be appropriate after taking into account relevant aggravating factors. The error in terminology, however, was immaterial to the outcome of the judge's sentencing exercise.

72. The judge was entitled to find the protesters' culpability to be high, despite their conscientious motivation, not least given the extensive planning involved. There was an event planner working with the protesters; the bridge had been chosen as a spectacular protest site in order to attract media attention; another individual had dropped them off on the bridge and then called the police; Mr Trowland had sketched the bridge to work out how the plan could be executed; the date had been chosen by reference to the government's autumn agreement to increase gas and oil licences; Mr Trowland undertook media communications training in order that his message could be better communicated; both protesters practised climbing and throwing ropes between them to facilitate the erection of the banner and the hammocks; specific equipment had been purchased and they carried out a risk assessment; they took food and drink with them.

73. The reasons given by the judge for his finding of culpability were entirely sound: the choosing of a high profile target for maximum disruption; the extensive organisation and planning; the protesters' awareness that the road would be closed and disruption would be caused; that they stayed on the bridge for far longer than was proportionate; their choice to ignore the disruption and anger that would be caused to others; the fact that requests to come down were ignored, as were the risks to those who had to remove them from the bridge in the cherry picker. The protesters' motive was their concern about climate change but the action taken was totally disproportionate.

74. The Article 10 and Article 11 protections, whilst not removed, were significantly weakened on the facts. As set out above, the s. 78(3) defence of "reasonable excuse", which incorporates Article 10 and Article 11 protections, was not available to the protesters. The protest was taking place on land from which the public were excluded. The further away from the core Article 10 and 11 rights a protestor is, the less those rights merit an assessment of lower culpability or, putting it another way, a significant reduction in sentence (see *Kudrevicius* at [97]). In fact, by ascending the bridge, the protesters were committing a criminal offence under the Dartford-Thurrock Crossing Act 1988 (as set out above). This is relevant to an evaluation of whether the sentences were manifestly excessive and/or proportionate.

75. Further, the Article 10 and Article 11 protections were weakened by the fact that the disruption here was the central aim of the protesters' conduct, as opposed to a side-effect of the protest. Persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way a defendant desires. The distinction between protests which cause disruption as an inevitable side effect and protests which are deliberately intended to cause disruption is an important one. (See *Cuadrilla* at [43] and [94].)

76. The judge was also entitled to conclude that the obstruction was significant: indeed, in this case it was of the utmost seriousness. It affected the Strategic Road Network, a network that was essential to the growth, wellbeing and balance of the nation's economy. We have referred to the protest's striking effects in statistical terms above, together with the evidence from affected individuals and businesses. Hundreds of thousands of members of the public were affected, some very significantly. In short, the protest resulted in enormous practical and personal disruption, alongside damage to businesses and the economy and a need for the deployment of significant police and Highways Agency resource and assistance.

77. As for mitigation, as already identified above, the judge was entitled to take the view that the protesters' apologies rang hollow and to harbour real concern that they would continue to engage in such protest activities as they though fit, despite their evidence to the contrary. The judge was aware of the protesters' personal histories. We do not consider that any significant weight falls to be attached to character references in the context of this type of offending, which is typically committed by those of otherwise good character. As set out above, albeit that it was a matter more properly addressed in the context of culpability, the judge also took account of their conscientious motives, affording 25% credit in this regard. This was not only fair, but arguably generous to the protesters in circumstances where there was no sense of proportion in their activities. They did nothing to avoid excessive damage or inconvenience: on the contrary, their conduct was designed to (and did) cause extreme damage and inconvenience.

78. We do not consider that forensic examination of the sentencing results of other cases is of particular assistance. This case turns on its highly unusual and extreme facts. However, the protesters rely heavily on the fact that the sentences imposed by the judge are far longer than those imposed in any other public nuisance cases involving non-violent protest. They point in particular to the cases of *Roberts* and *Brown* as well as ECHR case law. In deference to their submissions, we address these cases briefly.

79. We deal first with the domestic cases:

i) In *Roberts*, the defendants were protesting against fracking. On 25 July 2017 a number of protestors climbed on the top of a convoy of lorries transporting specialist drilling equipment along the A583 for use on a new fracking site in Preston New Road. Traffic on the A583 was brought to a standstill and the road was blocked in both directions from around 8am to around 5pm the same day. The police then established a contraflow which enabled vehicles to negotiate the blockage, although traffic was still disrupted. One carriageway remained blocked for 3 ½ days, when the last protestor came down from the lorry. The protest caused substantial and widespread disruption. This court allowed appeals against sentences of 15 and 16 months' immediate imprisonment. Community orders would have been imposed, but in the light of time served, conditional discharges were imposed;

ii) In *Brown*, the defendant was a protestor with Extinction Rebellion and part of a group that staged a protest at London City Airport. On 10 October 2019 he climbed on top of an aeroplane and glued himself to the fuselage, such that he had to be removed by police using a cherry picker crane. He was on the plane for around one hour; the event was filmed by other climate change protestors who were causing further disruption in the airport. The subsequent delay and disruption resulted in the aeroplanes' four scheduled flights being cancelled (on which 339 passengers had been booked) and the passing taxi space had to be closed. Two aeroplanes had to be moved, and six flights of other aeroplanes were delayed. This resulted in passengers missing birthday celebrations, family events and business meetings. The airline was reported as paying out approximately £40,000 in customer compensation. His appeal against a sentence of 12 months' immediate imprisonment was allowed; whilst it was accepted that the custody threshold was passed, and there was little prospect of rehabilitation, this court ruled that a sentence of only six months' imprisonment was appropriate. That term was reduced to four months to take account of the difficulties that the defendant would encounter in custody due to his visual impairment.

80. We were also referred to the unreported case of *McKechnie*, which involved a brief interference with the British Grand Prix at Silverstone on 3 July 2022. The facts are not remotely comparable for present purposes.

81. Turning then to the ECHR cases:

i) In *Kudrevicius*, a group of farmers, members of the "Chamber of Agriculture" group, staged a series of protests against the fall in wholesale prices for agricultural goods and lack of government subsidies for their production. Permits were issued allowing the farmers to protest peacefully; however, in breach of these permits, the farmers drove tractors on to three major highways for around 48 hours, blocking the road and causing major traffic disruption. The five applicants who participated in the demonstration were found guilty of public order offences and given 60-day custodial sentences, suspended for one year, and ordered not to leave their places of residence for more than seven days during that period without the authorities' prior agreement. The Grand Chamber upheld the sentences. It noted that although there was an interference with the applicants' Article 10 and Article 11 rights, the interference was prescribed by law, pursued a legitimate aim, and was proportionate. The disruption was not at

the "core" of their Article 11 rights; it was not a side-effect of a meeting held in a public place, but intentional disruption to draw attention to problems in the agricultural sector;

ii) The case of *Taranenko*, to which we were also referred, involved a protest in a building used by Vladimir Putin. A sentence of 3 years' imprisonment, suspended for three years, was ruled to be a disproportionate interference with the applicant's Article 10 and 11 rights. The facts again are not comparable to the present case.

82. We agree with the respondent that it can be dangerous to draw comparisons with sentencing outcomes in foreign jurisdictions with different sentencing regimes. For example, in *Kudrevicius* the relevant legislation imposed a maximum sentence of three years' custody for the offending in question. (Further, the offending took place as long ago as 2003.)

83. The protesters rely primarily on *Roberts* and *Brown.* There are inevitably differences between the facts and circumstances of those cases and the present, and those differences are material. First, the defendants in *Roberts* and *Brown* were convicted of the common law offence of public nuisance, for which sentence was at large, not for an offence under s. 78. In implementing s. 78 Parliament expressed its clear intention that stringent custodial sentences may be required for (intentional or reckless) non-violent protest offending for which there is no reasonable excuse. The 10-year maximum term provides sentencing context that was previously absent; it represented Parliament's assessment of the seriousness of the offending.

84. Beyond this:

i) The sheer scale of the disruption and damage in this case went far beyond that caused by the offending in *Roberts* and *Brown*;

ii) The Article 10 and Article 11 protections are significantly weakened on the facts of this case, a feature not obviously discussed in *Roberts* or *Brown*;

iii) The defendants in *Roberts* were all treated as being of previous good character. Mr Brown had one previous conviction for wilful obstruction of the highway some three years prior, but little or no weight appears to have been attached to that. Here the protesters' past convictions (and bail status) are highly relevant.

85. There is also a difference in terms of relevant considerations on deterrence. The legitimate sentencing aim of deterrence is mentioned in *Brown* as an "important factor in this type of case" (see [68]) but no more was said about it in terms. Likewise, in *Roberts*, the court referred to the "three aims of sentencing", including deterrence (see [32]), but again did not develop the issue further.

86. As set out above, the offending in *Roberts* and *Brown* occurred in 2017 and 2019 respectively. A court's perception of the strength of the need for deterrence can change over time. Specifically, as is common knowledge, supporters of organisations such as Just Stop Oil have staged increasingly well-orchestrated, disruptive and damaging protests. It can be said that the principle of deterrence is of both particular relevance

and importance in the context of a pressing social need to protect the public and to prevent social unrest arising from escalating illegal activity.

87. We draw together the analysis above to address the question of proportionality. The context is that the protesters were acting in exercise of rights in Article 10 and Article 11; there is an interference, prescribed by statute, by a public authority with those rights; the interference is in pursuit of a legitimate aim, namely in the interests of public safety, for the prevention of disorder or crime, and the protection of the rights of others. The final question is whether the interference is necessary in a democratic society to achieve that legitimate aim. The aims here are sufficiently important to justify interference, and there is a rational connection between the means chosen and the aims in view. We must then consider whether or not there are less restrictive alternative means to achieve those aims than the custodial sentences that were imposed, and whether those sentences strike a fair balance between the rights of the protesters and the general interest of the community, including the rights of others.

88. In our judgment, given the protesters' level of culpability, the location of the offending, the extent of human suffering, disruption and economic damage, the protesters' offending histories and the need for punishment and deterrence, the sentences imposed struck a fair balance and are not disproportionate. In reaching this conclusion, we have borne well in mind, amongst other things, the protesters' Article 10 and Article 11 rights, and the conscientious motives that lay behind their offending. Those rights fall to be balanced against the general interests of the community, including the economic well-being of the nation and the rights of members of the public to go about their daily lives safely and without illegal interference.

89. Although we have considered the question of proportionality independently, as we are bound to do, we are fortified in our decision by the judge's own assessment that custodial terms of three years for Mr Trowland, and two years and seven months for Mr Decker were proportionate. The judge was steeped not only in the relevant authorities but, perhaps most importantly, in the facts and evidence of the case, including the evidence of those members of the public affected and the oral testimonies of the protesters.

Conclusion

90. We conclude by acknowledging the long and honourable tradition of civil disobedience on conscientious grounds as described by Lord Hoffman in *Jones* at [89]. We also recognise that the sentences imposed go well beyond previous sentences imposed for this type of offending under the old common law offence. However, they reflect Parliament's will, as enacted in s. 78. As set out above, by s. 78 Parliament introduced a new fault-based public nuisance offence for what obviously will include non-violent protest behaviour, with a maximum sentence of 10 years' imprisonment. Further, the sentences meet the legitimate sentencing aim of deterrence for such offending in current times. The sentences should not be seen as having a "chilling effect" on the right to peaceful protest or to assembly more generally; deterrence and "chilling effect" are not the same. This protest was of a wholly different nature and scale to the many non-violent protests of conscientious activists up and down the country exercising their rights to freedom of expression and assembly on a daily basis.

91. We therefore dismiss the appeals. The judge made no material error of principle. His sentences of three years' imprisonment for Mr Trowland and two years and seven months' imprisonment for Mr Decker were severe. But we have concluded that they were not manifestly excessive; nor did they amount to a disproportionate interference with their rights of freedom of expression and assembly under Article 10 and Article 11 so as to be unlawful. This was very serious offending by repeat protest offenders who were trespassers (and on bail) at the time; whist the protest was non-violent as such, it had extreme consequences for many, many members of the public. Mr Trowland stated in his evidence that "the warning message is dependent on disruption". The grave consequences that we have described were not only inevitable, as the protesters would have known, they were precisely what the protesters intended and set out to achieve.