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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Hehir
01MP1331023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2025

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE BRYAN
and
MR JUSTICE CHAMBERLAIN

- -

Between :

Chiara Sarti	**Appellant**
- and -	
Rex	**Respondent**
(First Appeal)	
Daniel Hall	**Appellant**
- and -	
Rex	**Respondent**
(Second Appeal)	
Phoebe Plummer	**Appellant**
- and -	
Rex	**Respondent**
(Third Appeal)	

- -
- -

Adrian Waterman KC and Raj Chada (instructed by **Hodge, Jones & Allen**) for the **Appellants**
David Perry KC and Ben Lloyd (instructed by **The Crown Prosecution Service**) for the **Respondent**

Judgment Approved by the court for handing down

Hearing date : 12 December 2024

- -

APPROVED JUDGMENT

This judgment was handed down in Court 4 at 10.00am on Thursday 6 December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Lady Carr of Walton-on-the-Hill, CJ :

Introduction

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

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

3. The applicants seek leave to appeal against their convictions on two grounds. The first is that the judge erred in concluding that the ingredients of the s. 7 offence were sufficient in themselves to ensure that any conviction will be compatible with Articles 10 and 11 ECHR. The second, which arises only if the first succeeds, is that the judge erred in concluding that he could decide the issue of proportionality himself and in concluding that the convictions were proportionate interferences with the applicants' Article 10 and 11 rights. The Registrar referred the applications to the full court. We grant leave.

The facts in outline

4. At 10.36am on 15 November 2023, members of the public informed the police that activists were protesting on Earl's Court Road in West London. The appellants and 61

others had gathered outside Earl's Court Underground station and proceeded to walk down the road towards the junction with Cathcart Road. Both Earl's Court Road and Cathcart Road are designated as A roads.

5. The police attended and noted that the protesters were walking very slowly in a procession large enough to block the entire carriageway. Police officers observed significant disruption and frustration amongst motorists. Warnings given to the protesters to leave the road went unheeded. The appellants were walking towards the rear of the procession when they were arrested between 10.56 and 10.58am.

6. A compilation of footage of the demonstration recorded by a police officer was available to the Crown Court. We have also seen it. It begins at 11.07am, after all three appellants had been arrested. A group in high-visibility jackets can be seen walking slowly, taking up the whole width of Cromwell Road, holding up banners with the slogan "Just Stop Oil". There are around 50 protesters, some are holding banners, others distributing leaflets. Some have an orchestrating function and give instructions as to direction and speed. Police officers are walking backwards towards the junction of Cromwell Road and Old Brompton Road. Several members of the public and protesters are seen filming the protest using smartphones and professional camera equipment. Two lorries are visible in the medium distance, with a line of cars in front of and behind them. A police inspector can be heard shouting that it would be "greatly appreciated" if the protesters could leave the road, before warning them that they are committing offences under s.7 POA 2023, and that if they do not leave the road, they could face arrest. Drivers are heard sounding their horns loudly and are closing in on the last row of protesters.

7. Having crossed the A3218/Old Brompton Road, the protesters are followed by a lorry and a National Express coach. Other cars and an unmarked coach avoid the protesters by

turning into Old Brompton Road. A protester is arrested. The police inspector repeats instructions to the protesters to leave the road and again warns them that they are committing offences for which they could face arrest. He asks them to leave the road and carry on the protest on the footpath. He says that they are causing disruption to the local community. An elderly JSO protester, holding a banner, retorts: "not as much disruption as climate change does".

8. On the side of the protest, a delivery driver is seen attempting to carry out his work. He remonstrates with two women members of JSO, who do not appear to be participating in the slow march, and who do not respond. The police inspector approaches him asking if the protest is disrupting his daily life and slowing him down. The driver says, "it is" and "I had to go all the way around". The police inspector says that the police are making "positive arrests". A helicopter can be heard circling above the protest.

9. A woman can be heard arguing about the obstruction with a woman protester. The protester can be seen continuing to talk to the woman and other members of the public out of earshot of the camera.

10. Some protesters can be seen moving into and blocking the junction of Redcliffe Gardens and Redcliffe Square, as the march travels past. A male member of the public can be seen shouting and pointing at the protest, referring to the traffic being backed up. Two National Express coaches can be seen trailing behind the protesters.

11. Two further protesters lie down in the street and are arrested. A police officer can be heard remonstrating with someone who has called officers "dogs" saying, "there's no need for that".

12. As the group progresses south on Redcliffe Gardens, the police inspector again walks towards the group shouting at them to get out of the road, repeating that they could face arrest under s. 7 POA 2023, and that they are welcome to continue the protest on the pavement.

13. The police officers then proceed to put in place a cordon across the width of the road. At around 11.33am, the police inspector briefs officers about arrests. Behind him, other police officers are already making arrests. The protesters then approach the cordon and breach it. The police officers tell the protesters to "stay back, get back". Protesters are then seen to go limp, and sit or lie on the ground, whilst horns are being sounded in the background. An order for police officers to start arresting protesters is given, and several arrests are made. A long line of traffic trailing down the length of Redcliffe Gardens is visible in the background.

14. At 11.46am (1 hour and 10 minutes since the first 999 call was received by the police), the protest ends with Redcliffe Garden being opened for traffic at the junction with Cathcart Road. The remaining protesters are handcuffed and led to the pavement. Within a few minutes of the carriageway being opened, cars, vans and lorries, as well as two passenger coaches, can be seen driving past.

The trial

15. The trial at Southwark Crown Court began on 8 May 2024. Following the close of the prosecution case on 13 May 2024, the judge, having heard argument on the issue, ruled (i) that the question whether the conviction would amount to a proportionate interference with the appellants' rights under Articles 10 and 11 ECHR was for him and not the jury to determine; i(i) that the conviction of any of the appellants would not be incompatible

with their ECHR rights; and ii(i) that the "reasonable excuse" defence did not arise on the facts and would not be left to the jury.

16. The judge expanded on this decision in a written ruling dated 15 May 2024. He noted as follows:

    i) There was no definitive authority that proportionality cannot, in an appropriate case, be determined by the jury. *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 *(Abortion Services)* was of relevance. At [64] of his judgment in that case, Lord Reed had given "cogent reasons which would tend to militate against jury involvement, given the potential complexity of the issues and analysis involved";

    ii) Articles 10 and 11 ECHR were engaged. However, the alleged offending conduct ("serious disruption to road traffic in central London, affecting very many people'") fell outside the "core" of ECHR rights, applying the reasoning of the European Court of Human Rights in *Kudrevičius v Lithuania* (2015) 62 EHRR 34 *(Kudrevičius)*. In any event, the elements of the offence created by s. 7 POA 2023 were such as to guarantee that a conviction would be proportionate: Parliament had provided that the offence would apply only to interference with main roads (and the road here was one of London's principal traffic arteries); the prosecution had to prove significant delay had been caused (it had); and the maximum penalty (12 months' imprisonment) was low;

    iii) The POA 2023 had been enacted specifically to criminalise particular forms of protest; and it would be "remarkable" if Parliament had intended persons charged under it to be able to rely on the fact that they were protesting as a defence. The fact that the government had announced an intention to amend the POA 2023 to

exclude protest as a reasonable excuse (which the Appellants argued showed that protest was not currently so excluded) was irrelevant: the court's role was to construe the POA 2023 as it was. To allow the appellants' status as protesters to afford them a defence would be contrary to the analysis in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136 (see in particular Lord Hoffmann's speech at [81]-[94]), that analysis being of general application in protest cases: *R v Thacker* [2021] EWCA Crim 97; [2021] QB 644 at [100].

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

The legal framework

Articles 10, 11 and 17 ECHR

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

19. Article 17 provides:

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

The offence of wilfully obstructing the highway

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

21. *Abortion Services* concerned the compatibility with Articles 10 and 11 of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill. The Bill created safe access zones adjacent to facilities where abortion services were provided and made it an offence to do an act in such a zone with the intent to influence patients, accompanying persons and staff, or being reckless as to whether it would have that effect. Although the appeal was thus not concerned with an offence of obstructing a highway or delaying traffic, the court considered *Director of Public Prosecutions v Ziegler* [2021] UKHL 23; [2022] AC 408 (*Ziegler*), a case that did concern a s. 137 offence, and also *Cuciurean v Crown Prosecution Service* [2022] EWHC 736 (Admin); [2022] QB 888 *(Cuciurean)*, a case concerning s. 68 of the Criminal Justice and Public Order Act 1994 (s. 68).

Ziegler

22. In *Ziegler*, the appellants were protesters against the arms trade. They obstructed a highway for approximately 90 minutes by lying in the middle of a road leading to an arms fair at the Excel Centre in East London, locked on to specially constructed boxes. They were charged with wilfully obstructing the highway contrary to s. 137. In the Supreme Court, it was common ground that, in deciding whether there was a "lawful excuse" for the purposes of the s. 137 offence, the court had to ask itself a series of questions: "(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11? (2) If so, is there an interference by a public authority with that right? (3) If there is an interference, is it 'prescribed by law'? (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others? (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?" This last question involved asking a series of sub-questions: "(1) Is the aim sufficiently important to justify interference with a fundamental right? (2) Is there a rational connection between the means chosen and the aim in view? (3) Are there less restrictive alternative means available to achieve that aim? (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?" The last of these questions was in practice likely to be crucial.

23. Lords Hamblen and Stephens undertook a review of the case law of the European Court of Human Rights ("the Strasbourg Court") dealing with deliberate obstruction with a more than *de minimis* impact and concluded that it was not possible to say that a conviction for obstruction of that sort would always be a proportionate interference with Articles 10 and 11: [70]. Lady Arden agreed: [114] and [115]. Lord Sales and Lord Hodge dissented in part but would have remitted the case to the magistrates to re-assess proportionality, so must have concluded that a conviction for the offence could in

principle amount to a disproportionate interference with the protesters' Article 10 and 11 rights.

Cuciurean

24. In *Cuciurean* the appellant had dug and occupied a tunnel on land being used for the construction of the HS2 high speed railway. He was charged with aggravated trespass contrary to s. 68. In the magistrates' court, he was acquitted on the basis that, following *Ziegler*, the prosecution had not proved that a conviction would be a proportionate interference with his Article 10 and 11 rights. The prosecution appealed by case stated. The Divisional Court allowed the appeal on the basis that, if the elements of the offence were established, a conviction would be *ipso facto* proportionate, so there was no need for a consideration of proportionality on the face of the individual case.

25. Lord Burnett CJ (giving the judgment of the Court) noted that, in *James v DPP* [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118 *("James")*, the Divisional Court had divided public order offences into two categories: first, offences whose ingredients include a requirement for the prosecution to prove that the defendant's conduct was not reasonable (where the prosecution must prove that the restriction on the defendant's Convention rights is proportionate); and second, those where once the specific ingredients are proved, the conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights (where the necessary balance for proportionality was struck by the offence ingredients themselves). In *James*, it had been said that offences of obstructing the highway fell into the first category, whereas the offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly fell into the second.

26. The Scottish offence of breach of the peace had been held to fall into the second category (*Gifford v HM Advocate* 2011 SCCR 751) as had the offence of public nuisance *R v Brown (James Hugh)* [2022] 1 Cr App R 18. On the reasoning in *Ziegler*, the offence of wilfully obstructing the highway contrary to s. 137 HA 1980 fell into the first category. This meant that the Supreme Court did not have to consider the second category at all. Accordingly, Lord Burnett said at [67]: "it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage Articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights". The offence in s. 68 fell into the second category. Once the ingredients of the offence were proved, a conviction would *ipso facto* be proportionate.

Abortion Services

27. Lord Reed's judgment in *Abortion Services*, with which the other members of the Supreme Court agreed, contains that court's most recent analysis of the approach to proportionality in protest cases. The court's key conclusions were as follows:

    i) The Divisional Court in *Ziegler* had embarked on the exercise of interpreting s. 137 as requiring an individualised proportionality assessment without considering whether the established interpretation would be compatible with the Convention: [23];

    ii) On the Divisional Court's approach, the district judge or magistrates would have to apply a "complex legal test": [24];

iii) On appeal to the Supreme Court in *Ziegler*, it had been agreed between the parties that "the availability of the defence of lawful excuse, in a case raising issues under articles 10 or 11, depends on a proportionality assessment carried out in accordance with the approach set out by the Divisional Court". However, "[a]s that question is not in issue in the present case, we make no comment upon it": [26];

iv) When Lords Hamblen and Stephens concluded that there could be a lawful excuse for the purposes of s. 137 where protesters had engaged in physically obstructive conduct where the obstruction prevented or was capable of preventing other highway users from passing along the highway, "*Jones* was neither cited nor referred to": [27];

v) If s. 137 is interpreted as it was in *Ziegler* (noting the interpretation was not in issue in the Supreme Court), one might expect that the proportionality of an interference with Articles 9, 10 or 11 would usually require a fact-specific inquiry relating to the evaluation of the circumstances of the individual case. But the proposition that an individualised proportionality assessment is required in every case is mistaken. Questions of proportionality are often decided as a matter of general principle: [28]-[29];

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

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

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

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

i) The first question is whether Articles 9, 10 and/or 11 are engaged at all. Conduct will lie outside the protection of those Articles if it involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society, or if Article 17 applies. (This provides that the Convention does not confer any right on a person to engage in any activity or perform any act aimed at the destruction of

any of the rights and freedoms set out in the Convention or at their limitation to a greater extent than is provided in the Convention);

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

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

iv) But it is a mistake to assume that the presence of a reference to lawful or reasonable excuse necessarily means that a proportionality assessment in respect of Convention rights is appropriate. It may be that the offending conduct falls outside the protection of Articles 9, 10 and 11, with the consequence that no proportionality

assessment is required. This was the case in *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, [2023] KB 37 (where the protesters were acquitted on a charge of criminal damage to the statue of Edward Colston in Bristol). A similar analysis might apply to the defence of lawful excuse to the offence of making threats to kill in s. 16 of the Offences Against the Person Act 1861 (OAPA 1861);

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

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

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

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

Lord Reed added this:

> "In that case *[Kudrevičius]*, the obstruction of major roads, 'in blatant disregard of police orders and of the needs and rights of the road users' (para 174) was held to constitute reprehensible conduct, notwithstanding that no violence was involved. The behaviour in question in the present case also causes serious disruption to ordinary life and to the activities carried on by others, that is to say the patients and staff of the hospitals and clinics affected. The disruption is undoubtedly more serious than that caused by the normal exercise of the right of peaceful assembly in a public place."

The Public Order Act 2023

31. The POA 2023 was enacted after the decisions of the Supreme Court in *Ziegler* and *Abortion Services*. Part 1 contains a series of provisions relating to public order. Sections 1 and 2 contain offences of "locking on" and being equipped for locking on. The principal offence is committed where an act of attaching oneself to another person, an object or land causes or is capable of causing "serious disruption", and the defendant intends his act to have that consequence or is reckless as to whether it will have that consequence. Ss. 3 to 5 create offences relating to tunnelling. The principal offences are committed where the defendant creates or participates in the creation of a tunnel, or is present in

one, and in each case the individual's creation or presence in a tunnel causes or is capable of causing "serious disruption".

32. Sections 6 to 8 create offences involving works and infrastructure. S. 6 creates an offence of obstructing the undertaker or a person acting under his authority in carrying out major transport works or interfering with related apparatus. But it is a defence for the defendant to prove that they had a reasonable excuse.

33. Section 7 provides materially as follows:

> "(1) A person commits an offence if—
>
> (a) they do an act which interferes with the use or operation of any key national infrastructure in England and Wales, and
>
> (b) they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so.
>
> (2) It is a defence for a person charged with an offence under subsection (1) to prove that—
>
> (a) they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection, or
>
> (b) the act mentioned in paragraph (a) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.
>
> (3) A person who commits an offence under subsection (1) is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, to a fine or to both.
>
> (4) For the purposes of subsection (1) a person's act interferes with the use or operation of key national infrastructure if it prevents the infrastructure from being used or operated to any extent for any of its intended purposes.
>
> (5) The cases in which infrastructure is prevented from being used or operated for any of its intended purposes include where its use or operation for any of those purposes is significantly delayed.
>
> (6) In this section 'key national infrastructure' means—

(a) road transport infrastructure,

(b) rail infrastructure,

(c) air transport infrastructure,

(d) harbour infrastructure,

(e) downstream oil infrastructure,

(f) downstream gas infrastructure,

(g) onshore oil and gas exploration and production infrastructure,

(h) onshore electricity generation infrastructure, or

((i) newspaper printing infrastructure."

34. Sub-sections (7) to (9) confer powers on the Secretary of State to make regulations to add further types of infrastructure to the list to which the section applies.

35. Section 8 contains definitions of the various categories of key national infrastructure". S. 8(2) defines "road transport infrastructure" as:

> "(a) a special road within the meaning of the Highways Act 1980 (see section 329(1) of that Act), or
>
> (b) a road which, under the system for assigning identification numbers to roads administered by the Secretary of State or the Welsh Ministers, has for the time being been assigned a number prefixed by A or B."

36. Section 9 creates an offence of interference with access to or provision of abortion services in terms similar to those upheld as compatible with Convention rights in *Abortion Services*.

The European Convention on Human Rights Memorandum

37. The Home Office produced a European Convention on Human Rights Memorandum (the ECHR Memorandum) to accompany the Bill which became the POA 2023. On the clauses which became ss. 7 and 8, it said this:

> "25. The 'reasonable excuse' defence will permit a fact-specific enquiry by a court, and enable consideration of the exercise of Convention rights. The clause is proportionate as the court will take into account the specific facts. Further, the offence will only be committed where the operation of key national infrastructure is interfered with. The normal operation of such infrastructure is vital for activities such as the distribution of essential goods, including food, fuel and medicines and interference can result in significant disruption to the lives of the general public.
>
> 26. The police and the Crown Prosecution Service must act compatibly with the Convention rights under section 6 of the HRA when making decisions around arrest, charge and prosecution and therefore must do so in a way that is compatible with an individual's human rights. The court must do the same when carrying out its functions."

What counts as "road transport infrastructure"

38. At the hearing, we indicated that it would be helpful to have more detail about the roads falling within the definition of "road transport infrastructure" in s. 7(6)(a) of the POA 2023. Both parties filed notes. What we say here draws on both of them.

39. As noted above, s. 8(2) defines "road transport infrastructure" as including two types of roads: (i) "special roads" and (ii) A and B roads.

40. Special roads include all roads which had that designation prior to the coming into force of the HA 1980 (by s. 16(1) of that Act) and any roads authorised as such by a scheme under s. 16(3). A motorway (which is a road on which certain types of traffic are prohibited) is a special road.

41. The Department of Transport issued *Guidance on road classification and the primary route network* on 13 March 2012. Under the heading "Roads classification", it provides relevantly as follows (omitting footnotes):

> "1.12 The system of roads classification is intended to direct motorists towards the most suitable routes for reaching their destination. It does this by identifying roads that are best suited for traffic.

> 1.13 All UK roads (excluding motorways) fall into the following 4 categories:
>
> - A roads – major roads intended to provide large-scale transport links within or between areas
> - B roads – roads intended to connect different areas, and to feed traffic between A roads and smaller roads on the network
> - classified unnumbered – smaller roads intended to connect together unclassified roads with A and B roads, and often linking a housing estate or a village to the rest of the network. Similar to 'minor roads' on an Ordnance Survey map and sometimes known unofficially as C roads
> - unclassified – local roads intended for local traffic. The vast majority (60%) of roads in the UK fall within this category
>
> 1.14 As originally conceived, these four classes form a hierarchy. Large volumes of traffic and traffic travelling long distances should be using higher classes of road; smaller amounts of traffic travelling at lower speeds over shorter distances should be using lower classes of road…"

42. Appendix A to the Guidance deals with terminology and explains some further terms. The Strategic Road Network (SRN) refers to "nationally significant roads used for the distribution of goods and services" and a "network for the travelling public". In legal terms, it includes those roads which are the responsibility of the Secretary of State for Transport and are managed by National Highways. Any road on the SRN is known as a trunk road. The Primary Road Network (PRN) includes the entirety of the SRN together with other roads used for transport on a regional or county level, or for feeding into the SRN for longer journeys. It includes some A roads, but no road classified lower than that.

Ground 1

Submissions for the appellants

43. Mr Waterman KC for the appellants emphasised that s. 7(2) of the POA 2023 provides for a defence of reasonable excuse. There is no express limit on the scope of that concept. The only sensible conclusion is that Parliament intended to provide a defence of

proportionate protest. Had it intended to exclude the question of proportionality, it could have: (i) limited "reasonable excuse" by expressly excluding exercise of the rights of freedom of speech and peaceful assembly from its scope; or (ii) stated expressly that the ingredients of the offence themselves strike the proportionality balance. The Secretary of State's statement under s. 19 of the HRA confirms that the Bill was compatible with the Convention. The European Convention on Human Rights Memorandum is only consistent with the view that it is the inclusion of the "reasonable excuse" defence which made it so.

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

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

Submissions for the Crown

46. Mr Perry KC for the Crown submitted that, in s. 7, the proportionality balance had been struck by Parliament through the legislative process. There was an obvious and pressing

social need for restrictions to be imposed to protect the use or operation of key national infrastructure. The s. 7 offence required proof of intention that or recklessness as to whether the act would interfere with key national infrastructure, so the position was *a fortiori* that in the *Abortion Services* case (where the offence was one of strict liability).

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

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

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

50. The High Court has held in a long line of cases that the provisions of the Public Order Act 1986 (POA 1986) contain the necessary balance between the right of freedom of

expression and the right of others not to be subjected to what is reprehensible and serious conduct. Peaceful protests are only criminalised where they cross the threshold beyond legitimate protest into serious disruption to ordinary life and the lawful activities of others. The s. 7 offence is no different.

Ground 1: discussion and analysis

The relevant domestic statutory regulation

51. Before considering of the specific terms of s. 7, it is instructive to have in mind where the new offence fits into the broad structure of domestic statutory regulation which delimits the common law right to protest, and does so in ways which have mostly been uncontentious. The purpose of this regulation is to protect those members of the public whose rights and freedoms are liable to be curtailed by protest.

52. Most obviously, protests must be non-violent and peaceful. Protesters who engage in violent or intimidatory or abusive conduct are likely to commit public order offences (under ss. 1 to 5 of the POA 1986) as well as, potentially, offences against the person. The fact that the conduct takes place as part of a protest affords no defence. By the same token, protesters who intentionally or recklessly cause damage to property will commit the offence of criminal damage. At least when the damage is inflicted in a violent or non-peaceful way, or where it is significant, the fact that it forms part of a protest provides no defence: see *Attorney General's Reference (No. 1 of 2022)* at [120] and [121].

53. In addition, there is location-specific regulation. The statutory offence of aggravated trespass (in s. 68) applies only to trespassers (i.e. those entering land without permission or who have exceeded the limits of that permission after entering). Similarly, s. 14A of the POA 1986 confers a power to prohibit trespassory assemblies which may result in

"serious disruption to the life of the community" or damage to important land or an important building or monument; and s. 14B makes it an offence to organise or take part in an assembly in breach of such a prohibition.

54. *Director of Public Prosecutions v Jones* [1999] 2 AC 240 (*Jones*), discussed by Lord Reed in *Abortion Services* at [22], establishes that a person who protests on a highway is not, *ipso facto*, exceeding the limits of his right to use it, because the right of access to the highway extends to "such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage" (see 255). This is another instance of the common law recognising the right to protest, provided that it does not curtail the rights of others. But this does not mean that protests would be lawful on *all* highways, even before the coming into force of s. 7, and even if they do not impede the right of others to use them. A pedestrian going on to a motorway, for example, would be committing an offence, even if his purpose was to protest. Special restrictions have always applied to motorways. Protests on motorways are liable to cause danger to other motorists and, because of the volume of traffic using them and their importance as road traffic arteries, to cause serious disruption to the lives of others.

55. Finally, but importantly, Part II of the POA 1986 deals with processions and assemblies. S. 11 imposes an obligation (subject to specified exceptions) to notify the police in advance of the date, time and proposed route of any public procession intended to demonstrate support for or opposition to the views or actions of any persons or body of persons, to publicise a cause or campaign, or to mark or commemorate an event. If a public procession is held, each of the organisers is guilty of an offence if the notice requirements are not satisfied or if the time, date or route differs from those specified. S. 12 confers power on the police, if certain trigger conditions are met, to give directions to

those organising or taking part in the procession. The trigger conditions include that the procession may result in "serious public disorder, serious damage to property or serious disruption to the life of the community". It is an offence to organise a public procession and fail to comply with a condition imposed under this section. S. 14 provides for the regulation of public assemblies.

56. This framework of statutory regulation is an important starting point in determining ground 1, for three reasons. First, it shows that the existing framework of statutory regulation generally applies to protests in cases where the protesters go beyond what is reasonable and start to have a significant adverse effect on the rights and freedoms of others. Secondly, it shows that the limits of what is reasonable, measured by reference to the extent of the disruption to the rights and freedoms of others, oftens depends critically on the location of the protest. Thirdly, the regime under Part II of the POA 1986, with its requirement for prior notification to the police and its powers to impose conditions, provides a mechanism for a calibrated balancing of the rights of protesters against those of the general public.

The proper interpretation of s. 7

57. It is important to begin by placing s. 7 in its statutory context, before considering whether, on its proper interpretation, a conviction for the offence will always be compatible with Articles 10 and 11 ECHR. Four features of the statutory language may be noted.

58. First, the offence in s. 7 applies where a person does an act which interferes with the use or operation of "key national infrastructure", intending the act to have that effect or reckless as to whether it will do so. The term "key national infrastructure" in the heading to s. 7 and in s. 7(1)(a), taken with the definition in s. 7(6) (as elaborated in s. 8), makes it clear that the intention was to specify categories of infrastructure regarded as essential

to national life. The list includes the infrastructure necessary for the transport of people and goods, the supply of fuel, electricity generation and newspaper printing. As Mr Perry submitted, the inclusion of newspaper printing infrastructure shows that the judgment about what is essential to national life had regard to the importance, in a democratic society, of the right to freedom of expression, which includes the right to receive and impart information. S. 7(6) lists the types of infrastructure interference with which is, in Parliament's view, particularly likely to have an adverse impact on the lives of other citizens or, to put the point in Convention terms, the "rights and freedoms of others".

59. Secondly, in line with this approach, the definition of "road transport infrastructure" in s. 8(2) also has the aim of identifying the roads where obstruction or delay is likely to have the greatest impact on the rights of the travelling public. The definition includes "special roads" (principally motorways) and A and B roads. On its face, this encompasses a large number of roads in and between towns and cities. It includes many of the roads on which protests have traditionally been held (for example, Whitehall, which is part of an A road). However, it does not include classified unnumbered roads or unclassified roads. The latter category alone was said in 2012 to make up 60% of all roads. We noted during the hearing that there may be some rural areas where an A or B road is the only road likely to be a suitable location for a protest, but in such areas the A or B road in question is also likely to be the only access to and from the locality for other members of the public. In general terms, in areas where there are fewer options for protesters, there are also likely to be fewer options for other members of the public. To achieve the certainty desirable for an offence-creating provision, it is necessary to define with precision the roads to which the offence applies. To adopt the language sometimes seen in the Convention case law, legal certainty demands a bright line. In drawing that line, Parliament provided that the offence would apply more widely than just on the Strategic

Road Network, or indeed the Primary Road Network. Nonetheless, the offence applies on a minority of roads.

60. Thirdly, on its face, the effect of s. 7(4) is to make the offence applicable in a very broad range of circumstances. A person's act interferes with key national infrastructure if it prevents the infrastructure from being used or operated "to any extent for any of its intended purposes". S. 7(5) explains that the cases in which infrastructure is prevented from being used or operated for any of its intended purposes "includes" where its use or operation for any of those purposes is significantly delayed. On one reading, it might be said that this identifies one case within s. 7(4) and does not limit the scope of the latter provision. However, particularly bearing in mind that these are offence-creating provisions, s. 7(4) should be read together with s. 7(5). The former deals with the case where the use or operation of infrastructure is to any extent *prevented* (for example, by destroying any part of it or putting it beyond use). The latter deals with the case where the use or operation of the infrastructure is *delayed.* In most protest cases, acts of the protester will delay, rather than prevent, the use of the road. Where the conduct involves delaying rather than preventing the use of relevant infrastructure, the effect of s. 7(5) is that only a "significant" delay will count.

61. This interpretation can be tested by asking whether it was Parliament's intention that a person who causes a minor and insignificant delay to the use or operation of key national infrastructure would be guilty of an offence. The inclusion of the word "significantly" in s. 7(5) indicates that the answer is "No".

62. Fourthly, the defences in s. 7(2) serve to exclude certain conduct which would otherwise fall within the scope of the offence. S.7(2)(b) excludes acts done wholly or mainly in furtherance of a trade dispute. Thus, one type of activity protected by Article 11 (lawful

industrial action) is not caught. S. 7(2)(a) provides for a more generally applicable defence. As Mr Waterman submitted, the words "reasonable excuse" are broad and have no express limitation. But, as Lord Reed pointed out in *Abortion Services* (at [58]), the same is true of the words "without lawful excuse" in s. 16 of the OAPA 1861 (which creates the offence of making threats to kill) and s. 1 of the Criminal Damage Act 1971. No-one would suggest that there could be a lawful excuse for a threat to kill merely because it was made as an act of protest; and it is now established there is no lawful excuse for criminal damage merely because it is done as part of a protest, at least where the damage is caused in a violent or non-peaceful manner or is significant: see *Attorney General's Reference (No. 1 of 2022)* at [120]and [121]. On the other hand, the language of s. 7(2) is plainly broad enough to encompass an assessment of proportionality if that is required by the Convention. Whether such an assessment is required depends on the next stage of the analysis.

63. Fifthly, whatever the answer to that question, it seems to us clear that those taking part in a public procession on a road to which s. 7 applies would be entitled to invoke the defence of lawful excuse in s. 7(2) if (i) the procession had been notified to the police in accordance with s. 11 of the POA 1986 and (ii) they complied with any conditions imposed on it under s. 12 of the POA 1986.

The relevance of Ziegler

64. As Lord Reed identified in *Abortion Services* at [26], by the time *Ziegler* came before the Supreme Court, it was common ground that, in deciding whether protesters had a "lawful excuse" for the purposes of s. 137, it was necessary for the magistrates to consider whether, on the facts of the particular case, a conviction would be a

proportionate interference with the protesters' Article 10 and 11 rights. So that question was not in issue before the Supreme Court.

65. But there was another question which *was* in issue, namely whether a conviction for deliberate obstruction with more than a *de minimis* impact could ever be a disproportionate interference with Article 11. To that question, the Supreme Court unanimously answered, "Yes": see Lords Hamblen and Stephens at [70] (based on a detailed review of the Strasbourg authorities), Lady Arden at [114] and [115] and Lord Sales and Lord Hodge at [121]. This necessarily meant that the ingredients of the s. 137 offence did not guarantee the proportionality of a conviction.

66. It follows that, if "lawful excuse" in s. 137 can be read as encompassing an individualised evaluation of the proportionality of a conviction, it should be. Since there is no real doubt that "lawful excuse" can encompass such an evaluation (and indeed [57] of Lord Reed's judgment in *Abortion Services* supports this), *Ziegler* remains binding authority on the construction of s. 137. If that construction is to be revisited (whether by reference to *Jones* and the other pre-HRA authorities on that provision or otherwise), that will have to be done by the Supreme Court.

67. The question before us, however, concerns the interpretation of a different statutory provision, namely s. 7.

The structured approach required by Abortion Services

68. *Abortion Services* makes clear that, in a protest case where Articles 9, 10 or 11 are relied upon by the defendant, the court is required to ask three questions:

    i) First, are the relevant Convention rights engaged? (They will not be so if the conduct involves violent intentions, or incites violence, or otherwise rejects the

foundations of a democratic society, or if Article 17 of the Convention applies) (see [54]);

ii) Secondly, do the ingredients of the offence strike the proportionality balance themselves? (see [55]);

iii) Thirdly, if not, is there a means by which proportionality can be ensured? (In the case of statutory offences, a defence of lawful or reasonable excuse may provide a route, if necessary with the help of s. 3 of the HRA) (see [56] and [57]).

The application of the structured approach to s. 7

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

70. As to the second question, it is common ground that the s. 7 offence is prescribed by law and pursues legitimate aims, namely the prevention of disorder or crime and the protection of the rights and freedoms of others. There was no real dispute that these aims are sufficiently important to justify the interference with a fundamental right. Conduct that causes significant delay on special roads or A or B roads has the potential to affect the public in large numbers. Those delayed can include emergency service personnel, as well as workers in other critical jobs and those delivering time-critical goods. Frustration

on the part of motorists can give rise to public disorder, even when the protesters themselves are non-violent. Preventing these effects supplies a proper reason in principle for limiting the important rights to freedom of expression and assembly; and there is a rational connection between the means chosen and the aim in view. This means that the first three questions in [63] of the Divisional Court's judgment in *Ziegler* are answered affirmatively.

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

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

73. In this respect, we do not consider that the analysis in *Ziegler* can simply be applied, *mutatis mutandis* to the s. 7 offence. This is because the s. 7 offence is materially narrower than the s. 137 offence in respect of the roads to which it applies. It therefore leaves protesters with a wider variety of ways in which to make their point lawfully. As with the s. 137 offence, it does not prevent protesters from protesting on public land which is not a highway, or at the side of the road. But, unlike the s. 137 offence, it also

does not prevent them from protesting on the majority of highways. Even on the roads to which s. 7 applies, on its proper construction (see [60] above), the offence is likely to be committed only where the protesters' acts *significantly* delay the use of the road by others, and where the protesters intend this effect or are reckless as to whether it will ensue.

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

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

76. That being so, and contrary to the (unexplained) view expressed in the ECHR Memorandum, once the ingredients of the s. 7 offence are made out, s. 7(2)(a) does not

require a court to consider whether a conviction would be a proportionate interference with the defendant's Article 10 or 11 rights. The judge was right in his conclusion to this effect, as he was right to conclude that the defence of reasonable excuse did not arise on the facts of this case.

77. Ground 1 therefore fails.

Conclusion

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