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A rollercoaster ride? Article 10 and 11 ‘defences’ in aggravated trespass, public nuisance and contempt prosecutions

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Conv --- Abstract

In a series of recent judgments, the higher courts have considered the relevance of Articles 10 and 11 of sch. 1 of the Human Rights Act 1998 in prosecutions of people engaging in public protest activities. Some cases have been prosecutions for abusive speech or criminal damage, but many have involved laws which criminalise protestors’ incursions into and subsequent actions on publicly and/or privately owned land. The thematic question pervading this litigation is whether a court hearing such a case can lawfully convict a defendant without having first conducted an individuated, fact-specific evaluation of whether conviction would be compliant with Articles 10 and/or 11. This paper evaluates the leading judgments on this question, and suggests that there is both an unfortunate degree of internal incoherence in the responses offered by domestic courts and a similarly unfortunate tendency in some judgments to misread or misrepresent the relevant case law of the European Court of Human Rights.

Introduction [A heading]

It is not difficult to regard the approach taken both by the current government (as of June 2024) and His Majesty's loyal opposition towards climate change as profoundly disappointing, and to have considerable admiration for Greta Thunberg's constant willingness to face arrest and prosecution for staging protests against the environmental ineptitude or indifference of many western governments, while simultaneously having very little sympathy for the public protest initiative undertaken by a Mr James Brown – a visually impaired man whose previous entrée into the public eye was as a medal winner at the 1984 paralympics - in October 2019. As part of an Extinction Rebellion protest about what Mr Brown considered to be governmental failures to address climate change with sufficient rigour, Mr Brown – having bought a ticket on a British Airways flight from London City airport – garnered publicity for his cause by supergluing himself to the roof of his plane.¹ The obvious consequence of his action was serious disruption to the airport's operation. The less – but not much less - obvious possibility, fortunately unrealised, was that such disruption might pose a safety threat to planes and passengers due to land at the airport. Mr Brown was subsequently charged with the common law offence of public nuisance. At trial in Southwark Crown Court in July 2021, he was found guilty and sentenced to 12 months imprisonment.

Mr Brown has found himself, alongside inter alia a Mr Cucuirean and Ms Ziegler, playing a significant part in the ongoing development of our law concerning the role played by Human Rights Act 1998 principles (primarily Articles 10 and 11 of sch. 1) in providing defences to persons charged with criminal offences because of their protest activities² on publicly or privately owned (by someone other than the protestors) land. The question pervading this doctrinal debate is which of the many and varied criminal offences that could be targeted at such behaviour would (a) require that a trial court hearing such a case could not lawfully convict a defendant without having first conducted an individuated, fact-specific evaluation of whether a conviction would be compliant with Articles 10 and/or 11; or (b) which offences can be assumed invariably to satisfy Articles 10 and 11 because of their intrinsic characteristics so that no explicit consideration of those Articles is required. It is perhaps surprising that it has taken 20 years for this question to arrive at the forefront of Human Rights Act debate. But the courts do latterly seem to be making up for lost time.

Mr Brown had perhaps anticipated that – once unglued from the plane – he would be charged, as many protestors recently have, with aggravated trespass, an offence currently contained in s.68 of the Criminal Justice and Public Order Act 1994, for which the maximum penalty was a three months sentence and/or a level 4 fine:

¹ On that metric, Mr Brown certainly succeeded. His protest prompted substantial media coverage in the United Kingdom and overseas. See for example [James Brown: Former Paralympian convicted of causing public nuisance after gluing himself to British Airways plane | UK News | Sky News](#); [Climate protester lies on plane in disruption at London City airport \(cnbc.com\)](#); [Extinction Rebellion protester glues himself to British Airways plane | news.com.au — Australia's leading news site](#); [Extinction Rebellion – Paralympic athlete glues himself to a British Airways jet at London City airport as arrests top 1,000 – The Sun](#) | [The Sun: Security to be reviewed at London airport after climate activist climbs on plane](#) | [The Times of Israel](#). The airport protest was part of a co-ordinated action by Extinction Rebellion in several western countries; see [Commuters Drag Climate Activists From London Trains - The New York Times \(nytimes.com\)](#).

² The analysis offered here is limited to protest on matters regarded in European and domestic jurisprudence as 'core' political speech, which prima facie falls within the protective spheres of Articles 10 and 11.

“1. A person commits the offence of aggravated trespass if he trespasses on land and in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land does there anything which is intended by him to have the effect – (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity. (b) of obstructing that activity or – (c) of disrupting that activity.

2. Activity on any occasion on the part of a person or persons on land is “lawful” for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.”³

But as things turned out, Mr Brown was prosecuted for public nuisance, an offence triable either way, and which if tried on indictment could be punished with an unlimited period of imprisonment and/or an unlimited fine. We return to Mr Brown’s journey through the criminal courts below. Before doing so, it is necessary to backtrack into the appellate courts’ recent treatment of the inter-relationship between trespass (in both its civil law form and its aggravated criminal law cousin), public nuisance, public protest and Articles 10 and 11.

Does trespass raise Article 10 and 11 issues? *Richardson v Director of Public Prosecutions* [A heading]

While it is in principle possible that a protest on a public highway could amount to trespass and so fall within s.68,⁴ prosecutions for this offence are targeted at incursions into land over which the public does not have presumed rights of passage, such as, in 2011, a shop called Ahava in London’s Covent Garden.

Mr Richardson and several colleagues marched into Ahava, pinned themselves together using a heavy concrete tube and refused to leave. Their avowed intention was to stop – at least temporarily – the shop from trading, in protest against Ahava’s marketing of products sourced from illegally occupied Israeli territories on the West Bank. The occupation forced the shop to close for the rest of the day.⁵ The defendants were subsequently convicted under s.68 in April 2011 at a London magistrates court, a conviction upheld in the High Court in March 2012.⁶

³ This version of s.68 was created by s.59(2) of the Anti-Social Behaviour Act 2003. S.68 featured in Part V of the original Act as a provision directed primarily at the perceived problem of New Age Travellers who trespassed en masse to hold ‘raves’. For a personalised account to the Act’s initial implementation see D. Lynskey, “The fight for the right to party” *The Guardian*, Saturday (No. 134) 20 April 2024. The 2003 amendment, promoted by the second Blair government, extended s.68 by removing the original proviso that the trespass take place in the ‘open air’. The amendment was a minor part of a much broader anti-social behaviour initiative presaged in the 2003 White Paper, *Respect and Responsibility - Taking a Stand against Anti-Social Behaviour* (Cm 5778).

⁴ Cf. the House of Lords’ judgment in *Director Public Prosecutions v Jones* [1999] 2 A.C. 240, 269 per Lord Hope:

“In *Clerk & Lindsell, The Law of Torts*, 17th ed. (1995), para. 17-41 the current state of the law as to the question of use is summarised in these terms:

‘The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser.’”

⁵ This episode had been part of a long running campaign which eventually led Ahava’s owners to conclude that keeping the Covent Garden store running was not economically viable; [Ahava London flagship to close over demonstrations - Jewish Telegraphic Agency \(jta.org\)](#); [Ahava finally closes its doors in London - The Jewish Chronicle \(thejc.com\)](#)

⁶ *Nero v Director of Public Prosecutions* [2012] EHC 1238 (Admin).

The *Richardson* judgment in the Supreme Court,⁷ handed down on 5 February 2014, is a puzzling opinion. Argument focused solely on whether the defendants could avail themselves of the s.68(2) defence on the basis, inter alia, that the shopkeeper was selling merchandise sourced from the Israeli occupied territories on the West Bank, that doing so contravened various provisions of international law, and that the shopkeeper was therefore not engaging in a lawful activity for s.68(2) purposes. Perhaps the only surprise occasioned by the Court's rejection of that argument is that it granted permission for it to be heard in the first place. The puzzle arises because of the very low profile – in effect no profile – that the judgment granted to Articles 10 and 11:

“3. By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences”.

In concluding that any reference to Articles 10 and/or 11 was “misplaced”, the Supreme Court was conflating two distinct Article 10 and/or 11 matters, each of which – to varying degrees – suggests that what was actually “misplaced” here is any proper engagement with or portrayal of relevant ECtHR and domestic authority. The first, not in issue in *Richardson*, was whether the Convention imposed a positive obligation on a member State to create any form of Article 10 or 11 defence within the *civil law* regulating trespass when a domestic court is hearing an action between private sector individuals or entities. The second, which was in issue, is to what extent a member State's lawmaking autonomy when creating *criminal laws* which punish trespass is conditioned by Article 10 and/or 11 considerations.⁸

‘Misplacing’ relevant authority? *Appleby v United Kingdom* and *Mayor of London v Hall* **[B heading]**

That first question was addressed by the European Court 10 years previously in *Appleby v United Kingdom*.⁹ The applicants in *Appleby* had been denied permission by the owners of a ‘private’¹⁰ shopping mall to set up stalls in the mall to hand out leaflets and organise a petition protesting about the local council's land development plans. The (rather optimistic) proposition which the applicants put before the Court was that Articles 10 and/or 11 required that domestic

⁷ [2014] UKSC 8; [2014] A.C. 635.

⁸ For present purposes, the possibility of a defendant being fined or jailed for contempt of court for non-compliance with an order made in a civil action is treated as a criminal law matter.

⁹ (2003) 37 E.H.R.R. 38. The ECtHR report does not record any domestic litigation, and none can be found on westlaw.

¹⁰ The ‘....’ allude to the fact – not considered significant by the ECtHR – that the shopping centre was previously owned by a local council and had been ‘privatised’ by sale in one lot to the new owner. For a critique of the Court's failure to engage with that issue see M. Sanderson, “Free speech in public places: the privatisation of human rights in *Appleby v UK*” (2004) *Kings Law Journal* 159.

law contain some provision for such denials of access to be challenged on the basis that they amounted to a disproportionate interference with an applicant's Article 10 and/or 11 entitlements. There was no criminal law question in issue.

The Court concluded in *Appleby* that there would be few circumstances in which such a positive obligation might arise.

47. ...[T]he Court is not persuaded that [Article 10] requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.....

The point may sound rather trite, but in telling us that it is only in very unusual circumstances that such an obligation *might* arise, the Court is obviously saying that it is not promulgating an iron clad rule that the positive obligation can *never* arise. A necessary practical consequence of that doctrinal position is that a trial court would have to address that issue in an individuated fashion. It may be that often the justification for allowing an interference with Article 10 and/or 11 rights will be so obvious that any such individuated inquiry may be very quickly conducted and concluded.¹¹ But it is still – even if cursory in form and substance - required. Relatedly, the fact there may be occasions when such a positive obligation arises even in respect of privately owned land must mean that the owner's Article 1 First Protocol rights do not per se trump the protestor's Article 10 and/or 11 entitlements: they are a factor to weigh (and they may often weight very heavily) in the balance.¹²

The Supreme Court's assertion in *Richardson* that civil trespass laws are "unchallengeably proportionate" from an Article 10 and/or 11 perspective is not consistent with *Appleby*. *Appleby* was evidently not even put in argument in *Richardson*. Indeed, if the Appeal Cases report is correct, not even one ECtHR authority was offered to the Court.¹³

The *Appleby* omission is the more surprising when one considers the Court of Appeal's 2010 judgment in *Mayor of London v Hall*.¹⁴ In *Hall*, the Mayor claimed possession of Parliament Square and injunctive relief against further trespass by various members of the so-called 'Democracy Village' – and separately the redoubtable Mr Brian Haw¹⁵ – which had been encamped there for some months in protest against the Iraq war. For present purposes, the significance of Lord Neuberger's opinion (for a unanimous court) lies primarily in his observations at paras 42-43:

42...[W]hen freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered.....

43. Given, therefore, that articles 10 and 11 are in play, it seems to me that the decision on the balancing, or proportionality, issue is ultimately one for the court.....Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and

¹¹ The ECtHR clearly conducted such an evaluation in *Appleby*, at para 48 of the judgment.

¹² For an insightful discussion see E. Lees, "Actions for possession in the context of political protest: the role of Article 1, Protocol 1 and horizontal effect" (2013) 3 Conv. 211.

¹³ [2014] A.C. 635, 636.

¹⁴ [2010] EWCA Civ 1817; [2011] 1 W.L.R. 504.

¹⁵ [Brian Haw obituary | Anti-war movement | The Guardian](#)

critically on the reasons put forward for curtailing anyone's desire to express their beliefs - above all their political beliefs—in public.¹⁶

It is undoubtedly correct to characterise *Hall* as indicating there will be few occasions when such a balancing exercise would be resolved in the protestor's favour in a trespass action; but that per se negates the conclusion that the matter is “unchallengeable”. *Hall* was not considered, cited nor argued in *Richardson*.

S.68 imposes – as *Richardson* recognised – an ‘additional sanction’ on the protesting trespasser. She is not just *prevented* from expressing her views as she would wish; she is also *punished* for having done so. S.68 impinges more significantly on Article 10 and/or 11 rights than does a civil action in trespass; which in turn impinges more significantly on Article 10 and 11 rights than the absence of any domestic law entitlement to ‘trespass’ in order to carry out protest activities. That can credibly be taken to infer that the need “to focus very sharply and critically” on the claimed justification for the interference is even more acute than in a civil trespass case.

One might therefore wonder what was basis for Supreme Court's conclusion in *Richardson* that Article 10 and/or 11 also had no relevance in this ‘additional sanction’ scenario. The basis could not have been ECtHR authority, since - as noted above – no European case law was considered in *Richardson*.

The *Richardson* principle in aggravated trespass and contempt prosecutions [B heading]

The High Court's (2013) judgment in *Bauer v Director of Public Prosecutions*¹⁷ - also a s.68 prosecution - was cited by Mr Richardson's counsel, though apparently not on the Article 10 or 11 issue.¹⁸ That is readily understandable, given that at paras 37-39 of *Bauer* the court announced that the various elements of s.68 per se guaranteed the compatibility of a conviction with Articles 10 and 11, so no need would ever arise for a trial court to address that issue as a separate element. Moses J concluded that conviction would be – to borrow *Richardson*'s terminology – “unchallengeably proportionate”:

“38 It seems to me that it will maintain and protect the rights enshrined in articles 10 and 11 of the Convention, in the context of peaceful protests, to focus on the question whether those participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass....”.

However in those three paragraphs the *Bauer* Court engaged with just one ECtHR authority, *Ezelin v France*,¹⁹ a judgment which provides no support at all for the proposition expressed in para 38. *Ezelin* was not a criminal law case. It concerned the imposition of an essentially symbolic reprimand by the French Bar Council on an avocat who participated in a peaceful demonstration. Its relevance to s.68 is at best tangential, but more significantly the ECtHR's methodology bluntly contradicts *Bauer*'s ‘no need for individuated consideration’ assertion:

¹⁶ *Appleby* was not cited in the judgment, but was put in argument ([2010] 1 W.L.R. 504, 507) and Lord Neuberger's comments here are consistent with the ECtHR's opinion.

¹⁷ [2013] EWHC 634 (Admin); [2013] 1 W.L.R. 3617; (Moses and Kenneth Parker JJ). Mr Bauer was one of over 100 ‘UK Uncut’ protestors who had in effect invaded and occupied Fortnum and Mason's department store in a protest against tax avoidance.

¹⁸ [2014] A.C. 635, 637F.

¹⁹ (1992) 14 E.H.R.R. 362.

“51. The Court has examined the disciplinary sanction in question in the light of the case as a whole in order to determine in particular whether it was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance”.

‘In the light of the case as a whole’, even the trivial sanction imposed contravened Articles 10 and 11.

Notwithstanding the – to put it charitably – imaginative use made of *Ezelin* in *Bauer*, *Bauer* was applied by the High Court in 2015 in *James v Director of Public Prosecutions*²⁰ to sustain the conclusion that a conviction under s.14(5) of the Public Order Act 1986 – failure to comply with a condition imposed by a police officer as to the conduct of a public assembly – did not require individuated Article 10 and/or 11 consideration:

“35 There are other Criminal Justice and Public Order Act 1994 offences of which *Bauer*’s case [2013] 1 WLR 3617 is an example where, as the court held, once the specific ingredients of the offence have been proved, the conduct of the accused has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado”.

Ousley J’s leading judgment did not offer any ECtHR authority to support this assertion.

Neither *James* nor *Bauer* took note of the “focus very sharply and critically” point made by Lord Neuberger in *Hall*; although since *Hall* was not even cited by defence counsel in either case that is an understandable omission.

The inconsistent directions of travel in this area of the law were then underlined when the Court of Appeal re-entered the arena in January 2020 in *Cuadrilla Bowland Ltd v Persons Unknown*.²¹ Cuadrilla was licenced by the government to undertake exploratory fracking works at various sites in the north of England. Its operations had been significantly obstructed by protestors against fracking; many had been arrested and charged with assorted public order offences, and the site was frequently attended by a large (and costly) police presence. Cuadrilla had successfully sought injunctive relief in 2018 in a trespass action against several named defendants and ‘persons unknown’. In this litigation, Cuadrilla was seeking to have some defendants committed for contempt for not complying with the injunction. Its application before the High Court in September 2019 was successful and custodial sentences (some suspended and one immediate) were imposed. The basis for the subsequent appeal was that the committal judge had not accepted the defendants’ submissions that Articles 10 and 11 were relevant factors to consider in deciding what sanctions to impose if the contempt was established.

The *Cuadrilla* court did engage a little with ECtHR authority. Its primary focus centred on *Kudrevicius v Lithuania*,²² a case the Court of Appeal felt “reiterated the clear and constant jurisprudence of the European Court of Human Rights on this point”.²³ That “clear and constant jurisprudence” in the Court of Appeal’s view required that imposing criminal sanctions on political protest activities would require individuated consideration at trial as to whether the sanction imposed was compatible with Articles 10 and/or 11, even in circumstances when (as in *Kudrevicius*) the protest caused severe disruption to the public at large and such disruption had been the explicit intention of the protestors rather than an unexpected side effect of their

²⁰ [2015] EWHC 3296 (Admin); [2016] 1 W.L.R. 2118; (Davies LJ and Ouseley J). James was among a group of protestors who brought traffic outside the Royal Court of Justice to a standstill by constantly walking back and forth over the nearby zebra crossing, and who refused to move their protest onto the pavement when asked to do so by the police.

²¹ [2020] EWCA Civ 9; [2020] 4 W.L.R. 29; (Underhill, David Richards, Leggat LJJ).

²² (2015) 62 E.H.R.R. 34.

²³ [2020] 4 W.L.R. 29, para 44.

action. The Court of Appeal considered this principle as applicable to contempt proceedings for breach of an injunction as it was to a criminal prosecution *de novo*, even if – as here - the trial court had given proper weight to Articles 10 and 11 in issuing the original injunction - and the committal judge therefore erred in law in not expressly taking Articles 10 and 11 into account.

That was – in terms of principle – a victory for the defendants. The judgment was also a practical success for one defendant, whose initial two month immediate committal was varied to a 28 day suspended sentence. In respect of the other defendants, the Court of Appeal considered that even when Articles 10 and/or 11 were weighed in the balance, the 28 day suspended sentences initially imposed were appropriate.

That final observation is important insofar as it underlines the (one would think) obvious point that an individuated consideration of Article 10 and/or 11 issues in public protest cases – whether in the context of a civil trespass action or a subsequent contempt hearing – does not preclude liability, including imprisonment, even for protestors who have not engaged in any violent (to people or property) activities.

From the perspectives of the protestor and the aggrieved landowner (in a civil trespass action) or prosecuting authority (in a s.68 prosecution) the significance of what we might call the ‘individuated consideration’ versus ‘compatible *per se*’ argument is more subtle than that, lying in the aggregation of several discrete but inter-related policy considerations.

‘Individuated consideration’ of Articles 10 and/or 11 sets a harder task for the claimant and/or prosecutor. There are prosaic practical implications: the point will have to be raised in pleadings; evidence will have to be marshalled on matters relevant to an Article 10 and/or 11 evaluation; defendants’ evidence on the point will have to be responded to and overborne in the mind of the judge and/or the jury. The issue also has an obvious symbolic dimension in terms of how the litigation is framed: the case becomes as much about ‘human rights’ as about ‘trespass’, a characterisation which might credibly be thought to make a judge or jury consider more carefully the propriety of a guilty verdict or finding for a claimant. This is essentially the point Neuberger LJ was making in *Hall*.²⁴

In all those respects, the individuated consideration principle might also be regarded as likely to have a ‘chilling effect’ on a claimant or prosecutor’s inclination to begin litigation. As a corollary of that consequence, individuated consideration may have a ‘warming effect’ on people’s willingness to engage in protest activities.

Since the wind of recent case law was blowing both hot and cold over the public protest landscape, the scene was set in 2020 for Supreme Court to offer an authoritative resolution of this uncertainty.

Careless or confused? The Supreme Court judgment in *Ziegler* and its immediate aftermath [A heading]

The Human Rights Act cat was (perhaps) thrown among the public order law pigeons by the Supreme Court’s June 2021 judgment in *Director of Public Prosecutions v Ziegler and others*.²⁵ The *Ziegler* defendants had been prosecuted under the Highways Act 1980 s.137²⁶

²⁴ Fn. 15 above.

²⁵ [2021] UKSC 23; [2022] A.C. 408; (Lords Hodge, Sales, Hamblen, Stephens and Lady Arden) 25 June 2021.

²⁶ “Penalty for wilful obstruction.

(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale”.

following their blocking of the road outside the London Excel Centre in a protest against arms sales.

At trial the District Judge proceeded on the basis that the “without lawful excuse” proviso in s.137 provided an obvious entre for Article 10 and 11 considerations in the criminal trial, and further assumed that (a) it was for the defence to put such matters as it considered relevant into evidence; (b) for the court to make findings of fact on such evidence; and then (c) for the prosecution to persuade the court to the criminal standard that in the light of those facts a conviction would be compatible with Articles 10 and/or 11. The Supreme Court approved this approach, seemingly in terms applicable to *all* public protest prosecutions:

“59 Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate”.

The Court did not specify in terms that this principle was limited only to s.137 prosecutions. Nor did it do so by necessary implication by formally approving – nor indeed even mentioning – lower court judgments such as *Bauer* and *James* nor its own view of the “unchallengeably proportionate” nature of civil trespass law in *Richardson*. Since s.137 is triable only summarily, the reference in para 60 to ‘a jury’ is a clear indication that the scope of the principle was not intended to be s.137 specific. Taken at face value – and there is surely some merit in the proposition that readers can take linguistically unambiguous passages in Supreme Court judgments at face value – paras 59-60 seem to be a wholesale borrowing into the criminal law context of Lord Neuberger’s assertion in *Hall* and Leggat LJ’s echoing of that sentiment in *Cuadrilla*. But that proposition would apparently commend itself only to a legally naïve audience, as Mr Brown discovered in the Court of Appeal in January 2022.

Aggravated trespass or public nuisance: which crime to charge in public protest cases ? [A heading]

Mr Brown, we may recall, had been prosecuted for and convicted of, public nuisance. His 12 month gaol term was four times the maximum he could have received had the prosecution been brought under s.68.

The criminal offence of public nuisance has a long (if not terribly impressive) pedigree and has been variously defined over the years. In *R v Rimmington and Goldstein* in 2005,²⁷ the House of Lords suggested the then current formulation in *Archbold* (with the – unexplained – excision of the word “morals”) was authoritative:

“A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.”²⁸

²⁷ [2005] UKHL 63; [2006] 1 A.C. 459.

²⁸ Ibid, para 10. The quote is taken from *Archbold, Criminal Pleading, Evidence and Practice* (2005) para 31-40

The Court also endorsed the characterisation of the offence offered in Spencer's illuminating critique: "a rag bag of odds and ends which we should nowadays call 'public welfare offences'" ²⁹.

In paras 19-27 of his leading judgment, Lord Bingham undertook a survey of the case law which alighted on 13 cases. Not one of these involved land use related public protest activities.³⁰ The more extensive treatment offered in Spencer's article identified two such cases from the mid-1960s; *R v Clark*³¹ and *R v Moule*.³² Both defendants had taken part in protests co-ordinated by the Campaign for Nuclear Disarmament: Clark had been convicted of public nuisance for obstructing the highway;³³ Moule's conviction (also in relation to obstruction of the highway) was upheld without any meaningful consideration being given to freedom of expression issues.³⁴

Neither *Rimmington* nor *Goldstein* was remotely a public protest case. *Rimmington* had sent of hundreds of malicious letters and parcels; *Goldstein* had sent a package containing salt (as a joke to a friend) which split in a local mail sorting office, and was feared by mail workers to be anthrax powder. Neither case credibly raised an Article 10 issue. *Rimmington*'s relevance to Mr Brown's subsequent prosecution lies in its treatment of what might be portrayed as essentially a constitutional law question concerning normative legal hierarchies. The question was whether the government's power to prosecute under a common law offence was lawful when a statutory offence covered the same ground, in circumstances where the relevant statute did not expressly either preserve or restrict use of the common law sanction.

Lord Bingham noted that many behaviours that had in the (sometimes distant) past been prosecuted as public nuisance had subsequently been brought within specifically targeted statutory offences. From a defendant's perspective, those statutory crimes might be much less worrisome than public nuisance, in that they might have shorter limitation periods and/or they might contain specific defences and/or they might attract less severe sentences.

The appellants' contention was that such statutory initiatives impliedly precluded prosecution for public nuisance for the statutorily prescribed behaviour: the statutory offence was the only one which could be charged. Lord Bingham considered there was "considerable force" in this submission:

"30.....Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited.... It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of

²⁹ Ibid, para 6; quoting J. Spencer, "Public nuisance - a critical examination" [1989] Cambridge Law Journal 55, 59.

³⁰ There was one instance of public protest – by the Animal Liberation Front – which took the form of a mass phone call of various companies' switchboards with the intention of paralysing the companies' business operations; *R v Holliday and Lebouillier* [2005] 1 Cr. App. R. (S) 349.

³¹ [1964] 2 Q.B. 315.

³² [1964] Crim. L.R. 303.

³³ Clark's conviction was quashed in the High Court as the jury was not instructed to consider whether Clark's user of the highway had been reasonable, the inference being (the point is not made explicit in the report) that protest activities on political matters could be reasonable user.

³⁴ The cases were noted but not explored in Baroness Hale's opinion; [2006] 1 A.C. 459, para 59.

statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise”.

What might amount to a ‘good reason’ for rebutting this presumption was not something on which the Court elaborated. Nor did the House of Lords clarify if such a ‘good reason’ had existed in these two instances. For Mr Rimmington and Mr Goldstein, the question proved academic, as the Court concluded that their particular behaviours fell outwith the scope of the common law offence in any event.

***R v Brown* – at trial and in the Court of Appeal [B heading]**

Given the clear terms of Lord Bingham’s judgment, Mr Brown unsurprisingly invoked *Rimmington* at trial to assert that he should be prosecuted under s.68 and not for public nuisance. That assertion ran into some difficulty given the Court of Appeal’s 2017 judgment in *R v Stockli*.³⁵ Mr Stockli was not a political protestor, but an organiser of a rave qua trespasser in a disused fire brigade building. Mr Stockli had identified various statutory offences (all with modest maximum penalties) which he claimed covered his actions and so made a public nuisance prosecution improper. The Court of Appeal,³⁶ imaginatively perhaps, read *Rimmington* as an abuse of process case – even though that term does not appear in any of their Lordships’ judgments.³⁷ Lord Bingham’s analysis in *Rimmington* is couched in public law rather than criminal law terms; for the prosecution to invoke public nuisance rather than a more precisely drawn statutory offence is presumptively unlawful, and it would be for the prosecution to rebut that presumption by demonstrating that there are – as he put it – “good reason for doing otherwise”.³⁸

The abuse of process categorisation of *Rimmington* sets a defendant a very high bar to surmount; requiring in essence that she prove that she has been denied a fair trial or that the integrity of the criminal justice system has been compromised. Mr Stockli failed on this point:

“48.... We emphasise that the court should be slow to interfere with a prosecutorial decision taken in good faith where there is no suggestion that the defendants could not receive a fair trial..... As the authorities referred to above demonstrate, an abuse of process arises when the integrity of the justice system is under threat, not merely where good practice is not followed, serious though that may be”.

The Court of Appeal also concluded that a ‘good reason’ in the *Rimmington* sense would be that the available penalties under a statutory regime would not sufficiently reflect the gravity of the conduct prosecuted, and this would seemingly be a matter for the subjective opinion of the trial judge. The Court also suggested that the *Rimmington* principle would only be arguable in circumstances where the relevant statutory offence “‘precisely caught’ the criminal conduct being alleged”.³⁹ There was therefore no basis not to allow a public nuisance prosecution in Mr Stockli’s case.

The trial judge in *Brown* followed the *Stockli* rationale(s) in dismissing the assertion that s.68 rather than public nuisance was the appropriate offence, this notwithstanding that here – unlike in *Stockli* – the statutory offence (very) ‘precisely caught’ Mr Brown’s behaviour and that

³⁵ [2017] EWCA Crim 1410; [2018] 1 W.L.R. 5609.

³⁶ Burnett LJ, Carr and Cheena Grubb JJ.

³⁷ Ibid, paras 34-37.

³⁸ [2006] 1 A.C. 459, para 30.

³⁹ Ibid, para 45 citing *R v Dady* [2013] EWHC 475 (QB); [2013] Lloyds REP DFC 300, at para 21. *Dady* was not a public nuisance case, but a conspiracy to defraud prosecution.

behaviour conveyed a clear political message and so entered Article 10 and 11 territory. He could see no basis for an abuse of process claim to succeed, and considered that the very seriously disruptive effect of Mr Brown's behaviour could not adequately be punished under s.68.

Mr Brown, his 12 month sentence in prospect, raised various grounds of appeal.⁴⁰ His main argument, rooted in *Rimmington*, was that his prosecution should have been under s.68 and not for public nuisance. The argument was framed primarily in terms of 'abuse of process'. It was no more successful here than in *Stockli*, on which authority the Court of Appeal principally relied; (presumably because Lord Burnett authored both opinions):

"20. On the facts with which we are concerned in this appeal, we are satisfied that the judge was not only entitled but was right to conclude that there was good reason for the prosecution to be brought under the common law. The real gravamen of the offending in this case was the serious disruption to the rights of members of the public to use City Airport and the disruptive knock-on effect of delaying flights or causing them to be cancelled. This went well beyond an offence of trespass, even aggravated trespass; and it affected many members of the public, not only the passengers on one flight.

21. Although there was an element of trespass in the appellant's conduct, that was not the true or full extent of his offending. The statutory definition of aggravated trespass in section 68(1) of the 1994 Act does not require there to be any adverse effect on a section of the public or serious disruption to activities. It suffices that a person is a trespasser on land and that he has the intention to do one of the proscribed things, for example to obstruct another person's lawful activity. As in *Stockli* (see para. 45) the statutory offence did not reflect the gravamen of the offending. It was far from being a precise fit".

The court also 'clarified' *Ziegler's* significance in public protest prosecutions. Mr Brown asserted that *Ziegler* required the court in an 'abuse of process' action relating to public protest activities to pay specific attention to Article 10 and/or 11 considerations in deciding whether or not a public nuisance prosecution rather than proceeding under a relevant statutory offence was proportionate:

"29....The exact ramifications of the decision of [*Ziegler*] will call for exploration in other cases where they arise directly in any of three jurisdictions of the United Kingdom and possibly by the Supreme Court once more. The decision appears to have been misunderstood by some as immunising peaceful protesters from arrest and from the operation of the criminal law in broad circumstances, which on any view it does not".

And in particular, the Court of Appeal concluded, *Ziegler's* ostensibly broad statement about Article 10 and/or 11 had no relevance to the current issue.

Burnett LCJ prefaced his comment in para 29 with the observation that: "We shall say little more about *Ziegler* in this case". Shortly afterwards, he took the opportunity to say a great deal more.

***Ziegler* does not mean what it says: *Director of Public Prosecutions v Cuciurean* [B heading]**

Mr Cuciurean⁴¹ was being prosecuted under s.68 for trespassing onto government-owned land where construction was taking place for the HS2 rail project. With a nice sense of irony, Mr

⁴⁰ [2022] EWCA Crim 6; [2022] 1 Cr. App. R. 18; (Lord Burnett, Singh LJ and Goss J); 14 January 2022. For comment see U. Azmeh, "Public nuisance: R v Brown (James Hugh)" (2022) 9 Crim. L.R. 779.

⁴¹ [2022] EWHC 736; [2022] Q.B. 888; 30 March 2022 (Lord Burnett CJ; Holgate J).

Cucuerian had tunnelled his way underground and significantly disrupted the contractor's ability to carry out scheduled works.

At trial in September 2021, Mr Cucuerian asserted that *Ziegler* had (sub silentio) overruled *Bauer*, so that the court could not convict him under s.68 unless it was satisfied after explicit and individuated consideration of Article 10 and/or 11 issues that a conviction would be compatible with those provisions. It seems that prosecuting counsel did not seriously challenge that assertion, which was consequently accepted as correct by the trial judge. Not does it seem that the prosecution made much attempt to persuade the court that a conviction would be Article 10 and/or 11 compatible. The District Judge then concluded that while the core ingredients of a s.68 offence had been made out, the prosecution had not surmounted the additional hurdle of convincing him that a conviction would be consistent with Articles 10 and/or 11.

Six months later, a High Court bench headed by Burnett LCJ told us that this methodology was misconceived. *Bauer* remained 'good' law; (as did *James*). Properly construed, *Ziegler*'s requirement of individuated consideration – notwithstanding the expansive way the judgment was framed in paras 59-60 - applied only to s.137 prosecutions. To suggest that those sentiments were universally applicable in public protest actions was nonsense: "The passages in *Ziegler* upon which the Defendant relies have been wrenched completely out of context".⁴²

Cucuerian – unlike *Bauer*, *James* and *Richardson* - does present some considered engagement with ECtHR jurisprudence. *Appleby* and *Kudrevicius* re-appear, and some prominence is given to a case called *Animal Defenders v United Kingdom*.⁴³ That the treatment was well-considered is a less than self-evident proposition.

Appleby was invoked – wrenched not just 'completely' but preposterously out of context – as authority for the proposition that *Articles 10 and 11 were not even engaged* in circumstances where the protest occurred on someone else's land without the owner's permission;⁴⁴ a proposition that goes even further than the *Richardson* assertion that trespass laws were "unchallengeably proportionate" from an Article 10 and/or 11 interference perspective. *Kudrevicius* was deployed in a similarly surprising way.⁴⁵

Animal Defenders was used (fleetingly)⁴⁶ to support the assertion that the ECtHR was quite content to allow member States to enact criminal laws in public protest scenarios which imposed custodial sentences even if defendants had been convicted without any consideration being given by trial courts to Articles 10 and/or 11. Given the importance that the *Cucuerian* court attached to 'context' in respect of the reach of *Ziegler*, one might have expected it to be similarly rigorous in its treatment of *Animal Defenders*. But it very obviously was not.

Para 107 of *Animal Defenders* does tell us that the ECtHR has *examined* the necessity for general measures in respect of various political and social policy issues: it does not tell us that the Court has *approved* them:

"107. The necessity for a general measure has been examined by the Court in a variety of contexts such as economic and social policy⁴⁴ [*James v United Kingdom* (1986) 8 E.H.R.R. 123; *Mellacher v Austria* (1990) 12 E.H.R.R. 391; and *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28 at [123]; and welfare and pensions⁴⁵ [*Stec v United Kingdom* (2006) 43 E.H.R.R. 47; *Runkee v United Kingdom* (42949/98 and 53134/99) 10 May 2007; and *Carson v United Kingdom* (2010) 51 E.H.R.R. 13.]. It has also been examined in the context of electoral laws⁴⁶ [*Ždanoka v Latvia* (2007) 45 E.H.R.R. 17]; prisoner voting⁴⁷ [*Hirst v United Kingdom* (2006) 42 E.H.R.R. 41 ; and *Scoppola v Italy* (2013) 56 E.H.R.R. 19]; artificial insemination for prisoners⁴⁸ [*Dickson v United Kingdom* (2008) 46 E.H.R.R. 41 at [79]–[85]; the destruction of frozen embryos⁴⁹ [*Evans v United Kingdom* (2008) 46

⁴² [2022] Q.B. 88, para 68.

⁴³ (20013) 57 E.H.R.R. 21.

⁴⁴ [2022] Q.B. 888, paras 40-42.

⁴⁵ *Ibid*, paras 32-37.

⁴⁶ *Ibid*, para 71.

E.H.R.R. 34]; and assisted suicide⁵⁰ [*Pretty v United Kingdom* (2002) 35 E.H.R.R. 1] as well as in the context of a prohibition on religious advertising⁵¹ [*Murphy v Ireland* (2004) 38 E.H.R.R. 13].”

Of the 13 cases identified in para 107, only one (*Pretty*) dealt with the criminal law. None dealt with public protest. None dealt with trespass. Only one (*Murphy*) directly concerned freedom of expression. Much the most often invoked Convention provision was Article 1 of the First Protocol in the context of social welfare legislation. As to the relationship between ‘examination’ and ‘approval’ of those various general measures, the table below is instructive.

Table 1. ‘General measures’ in the cases cited at para 107 of *Animal Defenders*.

Case	Subject	Measure approved
<i>James</i>	Compulsory sale of leaseholds; Art 1 FP	Yes
<i>Mellacher</i>	Rent control of private sector residential housing; Art 1 FP.	Yes in part; No in part
<i>Hatton</i>	Increase in night flights at Heathrow; Art 8; Art 13	Yes in part; No in part
<i>Stec</i>	Differential treatment of men and women for pension purposes; Art 1 FP	Yes
<i>Runkee</i>	Non-eligibility of men for widows pension Art 14; Art 1 FP	Yes
<i>Carson</i>	Pension entitlements of ex-patriate Pensioners; Art 14; Art 1 FP	Yes
<i>Ždanoka</i>	Disqualification of former office holder in USSR from electoral candidacy; Art 3 FP	Yes – but only temporarily
<i>Hirst</i>	Voting rights for prisoners Art 3 FP	No
<i>Scoppola</i>	Voting rights for prisoners Art 3 FP	No
<i>Dickson</i>	Ban on artificial insemination for prisoners; Art 8	No
<i>Evans</i>	Destruction of frozen embryos at wish of either parent; Art 8	Yes
<i>Pretty</i>	Criminalisation of assisted suicide; Arts 2,3,8,9,14	Yes
<i>Murphy</i>	Ban on religious advertising on television and radio; Art 10	Yes

It may also be significant – if one is concerned with not ‘wrenching judgments out of context’ – that the particular ‘general measure’ in *Animal Defenders* was considered per se compatible with Article 10 largely for two inter-related reasons. The first was the unusually rigorous and non-partisan process of its production as a legislative instrument, over a period spanning several years, which incorporated careful examination of the proposed law’s compatibility with Article 10 in both parliamentary and non-parliamentary fora⁴⁷. The second was its very exacting evaluation from an Article 10 perspective by the domestic courts, a process which culminated in a Supreme Court judgment.⁴⁸ S.68 possesses neither quality.

Cucuerian manifestly made s.68 a more effective tool for prosecutors than a literal reading of *Ziegler* would suggest. Mr Cucuerian’s case (and perhaps Mr Brown’s as well) will one assumes be making their way towards the Supreme Court or the ECtHR at some point in 2025. But the individuated consideration versus per se compatible question has latterly received some further Supreme Court attention

***Ziegler* did not mean what it said. So what did it mean? The *Abortion Services* judgment** [A heading]

Despite *Cucuerian*’s manifest flaws, much of its analysis was endorsed by the Supreme Court in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill*.⁴⁹ The ratio of *Abortion Services* is limited to the conclusion that the provisions of a draft bill which would permit the designation of exclusion zones around healthcare facilities within which anti-abortion activists could not conduct protests would be per se compatible with Articles 10 and 11.

As in *Cucuerian*, *Animal Defenders* was invoked to justify the enactment of ‘general measures’ in that sense. This was buttressed with reference to a subsequent ECtHR judgment - *Pernicek v Switzerland*⁵⁰ - which ‘approved’ that principle in a criminal law context in respect of Articles 10 and 11. However that approval was given in limited terms: the ECtHR emphasised that a fact specific inquiry at trial would “normally” be required to sustain the compatibility of a criminal conviction with Article 10 and/or 11.⁵¹ In this particular case, the ECtHR found that the per se Swiss law in issue⁵² was not ‘abnormal’ in that sense, and concluded that the law breached Article 10. The Supreme Court in *Abortion Services* nonetheless appeared to read *Pernicek* as ‘normalising’ per se offences rather than according them exceptional status in the Article 10 and/or 11 context.

Any general guidance that *Abortion Services* might offer as to domestic public protest laws is at most obiter, but the Court clearly indicated that *Richardson, James and Bauer/Cucuerian* did not need to be revisited.⁵³ It also suggested that convictions for breach of the peace would be per se compatible with Articles 10 and/or 11.⁵⁴ The judgment can certainly be taken as an invitation to the lower courts to look for reasons to pull other public order offences within *Cucuerian*’s per se compatible boundaries.⁵⁵

⁴⁷ (2013) 57 E.H.R.R. 21, paras 114-115.

⁴⁸ Ibid, para 116. The Supreme Court judgment is at [2008] UKHL 15; [2008] 1 A.C. 1312.

⁴⁹ [2022] UKSC 32; [2023] A.C. 505.

⁵⁰ (2015) 63 E.H.R.R. 6 at para 272.

⁵¹ (2015) 63 E.H.R.R. 6 at para 272.

⁵² Which criminalised denial of the Armenian genocide perpetrated by the Turkish State.

⁵³ [2023] A.C. 505, paras 50, 47-48.

⁵⁴ Citing (at para 49) *Gifford v HM Advocate* [2011] S.C.C.R. 751.

⁵⁵ Conviction does not tell the whole Article 10 and/or 11 story. Questions as to Human Rights Act compatibility also arise at the sentencing stage of the process. Mr Brown, having failed to

Conclusions [A heading]

Protestors facing prosecutions for trespass-based actions have possibilities other than Articles 10 and/or 11 in seeking a defence against conviction. Most recently, the defendants in *Bailey v Director of Public Prosecutions*⁵⁶ successfully argued at trial that the trespass element of s.68 implicitly required a mens rea element of either intent or recklessness as to whether they were indeed trespassing. The defendants had mistakenly assumed that they were conducting their protest about animal welfare issues – which obstructed the activities of a dairy – on the public highway rather than on land which the dairy owned. The rationale for their defence was that absent a clear textual indication that no mens rea was required, s.68 should be construed on the basis that – since it was a criminal offence that attracted significant penalties – a mens rea proviso was implied.

Unhappily for the defendants, the Divisional Court held that argument was misconceived. It was evidently clear to the court that Parliament in enacting and subsequently amending s.68 had impliedly departed from this supposedly axiomatic constitutional presumption. The rationale for this conclusion was that since trespass as a tort did not require mens rea on the trespasser's part as to her presence on someone else's land, Parliament's deployment of the civil law concept as a foundational element of a criminal offence should be assumed to import its essential civil law characteristics into the criminal offence unless the Act's text provided expressly to the contrary. The court made this very confident assertion and then reached its similarly confident conclusion without troubling itself to engage with an intervening stage of actually examining s.68's legislative history, either in its original or (from 2003) amended formulation. The opposite conclusion would have done no violence either to constitutional principle or to s.68's text.

The impact of the contempt jurisdiction on protest activities has also received further analysis in the Court of Appeal's judgment in *R v Jordan*.⁵⁷ It is eminently credible that Mr Jordan's behaviour did not engage Articles 10 and 11 at all, or did so only at the outer rim of protected speech, since what he did was sit down in a small park behind the Inner London Crown Court and blast loud music through a megaphone towards the courtroom where several climate activist protestors were on trial. The noise was loud enough to interrupt proceedings, and the presiding judge seemingly thought the appropriate response was to have Mr Jordan arrested and put on trial that same afternoon for contempt in the face of the court. The court did take steps to ensure that Mr Jordan was provided with counsel for his trial – though one might

persuade the Court of Appeal that he be charged under s.68 rather than with public nuisance, nonetheless managed to secure a reduction in his sentence from 12 months to four, just a month longer than could have been imposed under s.68; (although this reduction seemingly had more to do with his disability than with any rights deriving from Articles 10 and/or 11). The Supreme Court in *Abortion Services* ([2023] A.C. 505, para 130) also attached some weight – how much is not clear – in reaching its 'per se compatible' conclusion to the fact that the proposed Act generally limited its penalties to a £500 fine; no custodial sentences were created for a first offence. Chow's recent critique of sentencing decisions in such cases suggests - not altogether convincingly – that there has been a conscious judicial embrace of sentence reduction where protest activity is motivated by legitimate political concerns; (P. Chow, "The change in judicial practice in cases concerning civil disobedience protests and its constitutional significance" (2023) 86 Modern Law Review 927).

⁵⁶ [2002] EWHC 3302 (Admin); [2023] 2 W.L.R. 1140.

⁵⁷ [2024] EWCA Crim 229; 12 March 2024 (Dame Victoria Sharp P. Warby LJ. Bourne J).

wonder at the adequacy of the preparation counsel could make for his client's case in the time available.

Counsel was certainly unable to save Mr Jordan from conviction. Having in effect subjected Mr Jordan to cross-examination from the bench, the judge concluded that the loud music had disrupted court proceedings, that Mr Jordan intended to disrupt court proceedings, that he lied in his evidence about his intention to do so, and that he was 'glib in the extreme' in his manner before the court. The contempt having been established, the judge sentenced Mr Jordan to 14 days imprisonment, which – after last minute representations from Mr Jordan's counsel – was suspended. The judge did not undertake an individuated Article 10 analysis, which *prima facie* would seem inconsistent with the Court of Appeal's decision in *Cuadrilla*.⁵⁸

Mr Jordan subsequently raised several grounds of appeal⁵⁹ in the Court of Appeal, at the forefront of which was the assertion – per *Cuadrilla* – that individuated Article 10 and/or 11 consideration would be required before a contempt conviction could be imposed. The court seemed doubtful that Mr Jordan's music could be regarded as expressive activity within Article 10, but even if were, the judge had not erred in not engaging with that issue. 'Contempt in the face of the court' – requiring as it did a judicial finding that the defendant's behaviour had caused a serious interference with the administration of justice – would be a *per se* compatible offence:

"73. In our judgment it is clear that contempt in the face of the court is an offence within the second of the three categories identified by the Supreme Court in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 [2023] AC 505 [55]: proof of the ingredients of the offence will, without more, be sufficient to render a "conviction" proportionate. It was therefore not incumbent on the judge to conduct any fact-specific proportionality assessment before concluding that contempt had been committed".

There is no reference to the contempt jurisdiction in para 55 of *Abortion Services*, nor indeed elsewhere in the judgment.⁶⁰ Nor was *Cuadrilla* considered at any point in the Court's (relatively cursory) treatment of the Article 10 and/or 11 question. That limitation of the '*per se* compatible' principle within the contempt jurisdiction to contempt in the face of the court would arguably leave *Jordan* consistent with *Cuadrilla*, if one reads *Cuadrilla* as limited solely to the question of committal for a breach of an order previously issued by a court; although unhappily in the paragraph entitled 'Summary of conclusions' the Court of Appeal applied the principle to contempt in its entirety: "75...(6) "the necessity and proportionality of the findings of contempt is sufficiently guaranteed by the law of contempt itself". That was perhaps an unfortunate slip of the judicial pen – much as it seems were paras 68-70 in *Ziegler*. That *Cuadrilla* could quite unproblematically have been applied in *Jordan* to reach a different conclusion on the Article 10 and/or 11 issue is perhaps a good indicator that we may be entering (ironically) a rather colder climate for the purposes of Human Rights Acts defence in public protest prosecutions.

The judicial weather remains, however, rather changeable. The Supreme Court's qualified approval in *Abortion Services* of *Cucuerian* et al – and its explicit reading down of *Ziegler* – can undoubtedly be seen as giving a green light to prosecuting authorities (and at the highest political level) to instigate actions in the expectation that they will receive a '*per se* compatible

⁵⁸ Many observers might consider that the '*proportionate*' response to this problem would have been for the judge to send a police officer to tell Mr Jordan to turn his music off and inform him that if he did not do so then he would be arrested and brought before the judge on a contempt charge. It does rather appear that Mr Jordan's '*contempt*' lay more in his attitude *qua* defendant before the judge than in playing his music in the park.

⁵⁹ All failed.

⁶⁰ *Cuadrilla* was not cited in the judgment nor it seems referred to by counsel.

with Article 10 and/or 11’ seal of court approval. But not all such expectations will prove legitimate.

The use of land made by Trudi Warner in March 2023 did not lead to her being prosecuted for obstructing a public highway under s.137, nor for aggravated trespass under s.68, nor for a failure to comply with a police officer’s instruction under s.14(5), nor even for public nuisance. The action against her was for criminal contempt.⁶¹

Ms Warner’s particular contribution to climate change protests was to stand on the pavement early in the morning on 27 March 2023 outside the Inner London Crown Court – where several protestors were being prosecuted – holding a cardboard sign which said ‘JURORS YOU HAVE AN ABSOLUTE RIGHT TO ACQUIT A DEFENDANT ACCORDING TO YOUR CONSCIENCE’. Ms Warner’s silent protest was inspired by the principle of ‘jury equity’ and especially by the plaque on display at Court 1 in the Old Bailey which celebrated the jury’s acquittal of William Penn and William Mead in 1670 despite a judicial direction to convict.⁶²

The then Solicitor-General evidently believed that Ms Warner should be punished for this action – and presumably that others should be deterred from replicating it – and so sought permission from the High Court to issue contempt proceedings. Permission was refused – in scathingly critical terms – by Saini J on 22 April 2024. In part this was because the Solicitor General’s case “significantly mischaracterise[d] the evidence”⁶³ in claiming that Ms Warner had confronted jurors on their way into court. Given that the entirety of the evidence was uninterrupted CCTV footage of the short period Ms Warner was outside the court, which footage showed she did not any point talk to or in any way try to attract the attention of passers-by, ‘mischaracterisation’ is a gentle way of portraying the integrity – or palpable lack thereof – of the prosecution case.

Warner provides the flipside to the Article 10 and/or 11 ‘individuated consideration’ versus ‘per se compatible’ debate. Saini J saw no need to engage with Article 10 and/or 11 issues because – even without addressing those questions – there was no reasonable basis on the facts for contempt proceedings to be initiated. The court’s subsequent (brief) treatment of Article 10 and/or 11 was therefore purely obiter, but the observations offered reinforce the suggestion that our law is in a rather muddled state. At para 44 we are told:

“Counsel were agreed that the Court has an obligation at each stage of a speech-based contempt case such as the present (including the permission stage) to address a defendant’s Article 10 ECHR rights. This is not the same as the question as to whether the ingredients of the offence are sufficient to take into account ECHR considerations, as considered in *R v Jordan* [2024] EWCA Crim 229 at [73], referring to *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 at [55]”.

Quite why this ‘is not the same question’ is unclear, as what Saini J then did was what Mr Jordan had asked the court to do in his case, namely to assume that the defendant’s Article 10 rights were engaged and ask himself if – had he been persuaded that the Solicitor General had marshalled a reasonable basis for being granted permission: “the commencement and

⁶¹ *HM Solicitor General v Trudi Warner* [2024] EWHC 918. Ms Warner’s account of the episode is at S. Laville, “‘It felt like an abuse of power’. Climate activist who faced jail for silent protest” *The Guardian* 24 April 2024, 13.

⁶² On the Penn prosecution see J. Phillips, “Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell’s Case” (1996) 4 *Minnesota Journal of Law and Inequality* 189; S. Weaver, “The Penn cases” (1929) 4 *Washington Law Review* 49.

The jury’s power to acquit in the face of clear evidence of guilt was most recently affirmed by the House of Lords in *R v Wang* ([2005] 2 Cr. App. R. 8; see especially paras 16-18.

⁶³ [2024] EWHC 918, para 36. See also para 42: “[T]he claim is based on a mischaracterisation of what Ms Warner did that morning...”.

continuation of these proceedings was Convention compliant”.⁶⁴ On the basis of a cursory evaluation of the particular circumstances – that the placard was political speech reciting a basic constitutional principle on a matter of serious public debate – Saini J concluded: “...[I]n my judgment, it has not been shown by the Solicitor General, even on an arguable basis, that the interference with Ms Warner’s Article 10(1) ECHR rights is necessary and proportionate...”.⁶⁵

Walker is a welcome departure from an emergent trend in judicial construction of the relationship between public protest actions and the criminal law. That trend seems to be (mis)informed by an exaggerated perception of the substantive significance that Articles 10 and 11 have in such circumstances. Properly construed, those provisions do not in any sense provide protestors – whatever the subject or location of their protest – with a get out of jail free card. What they provide is a pause for thought within judicial (and sometimes jury) decisionmaking processes, a pause within which the human rights dimension of a criminal prosecution comes squarely into view, with the consequential effect best put by Lord Neuberger in *Hall*, in terms which bear repetition:

“42...[W]hen freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered....

43...Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and critically on the reasons put forward for curtailing anyone’s desire to express their beliefs - above all their political beliefs—in public”.

⁶⁴ Ibid, para 45. If it had been ‘the same thing’ Saini J would not have been able to do what he did.

⁶⁵ [2010] 1 W.L.R. 504, para 46.