SCL SOCIETY OF CONSERVATIVE LAWYERS

HOW TO REFORM THE LAW ON DISRUPTIVE PROTEST

A RIGHT TO BE UNHINDERED AND THE RESTORATION OF COMMON LAW

Anthony Speaight KC and Oliver Sells KC

Foreword by Lord Sandhurst KC

About the authors

Anthony Speaight KC is past Chair of Research of the Society of Conservative Lawyers. He was a member of the Government Commission on a UK Bill of Rights (2011–12). He is a Bencher of Middle Temple.

Oliver Sells KC has practised at the criminal Bar for the last 50 years. He has sat as a Recorder at the Central Criminal Court for the past 20 years and sits on the Court of Common Council of the City of London. He is a Bencher of Inner Temple.

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FOREWORD

Anthony Speaight KC and Oliver Sells KC have produced a masterly analysis of the current law governing demonstrations in public places. They explain in simple terms the mess we are now in as a result of the controversial decision of the Supreme Court in *Ziegler* in 2022.

In a compelling paper, they demonstrate how the Supreme Court decision has resulted in the loss of the previous good balance between the scope for demonstrators to make a point and the rights of the public in general to go about their lives unhindered.

In short, the Supreme Court has gone much further to enable demonstrators to advance defences than any decision of the European Court of Human Rights required. That court has firmly stated that "physical conduct obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom is protected by Article 11 of the Convention". But in this country, it seems that is no longer the case. So, something has to be done.

The authors explain how the government's well intended Public Order Bill, shortly to be enacted, has not fully remedied the position. It has done nothing to alter the jurisprudential approach required by *Ziegler*. Where there is an issue whether the acts in question were "without lawful excuse" (or similar), Courts now have in most offences to resolve difficult issues of proportionality. This makes the task of the justices trying such cases immeasurably more complex and has the potential for converting a magistrates court in effect into a court exercising powers of judicial review, for which it is neither equipped nor empowered.

The authors propose a simple remedy in the form of legislation to be called "a Right to be Unhindered in Public Places Bill". This will have two elements –

First, to recognise a general right for members of the public to be unhindered in public places and to create a summary offence of "significantly violating" that right. There would be no defence that what was done was done "with reasonable excuse". But importantly, to preserve our ancient liberties, there would be a statutory defence of "peacefully imparting an opinion in such a way as not to cause distress annoyance or serious inconvenience to any other person."

Second, to restore the old position at common law today to offences which had hitherto worked well, it will enact that sections 3 and 6 of the Human Rights Act are to have no application to the interpretation and application of "reasonable excuse" and "lawful excuse" in a short list of specified public order offence provisions. This adopts the approach currently proposed in the Illegal Migration Bill recently introduced to Parliament. Helpfully, they attach a draft Bill setting this out.

I commend this paper and very much hope government picks up the ball which this gives it and puts things right without delay.

Lord Sandhurst KC
Chair of Research of the Society of Conservative Lawyers,
Member of the House of Lords

EXECUTIVE SUMMARY

There is a significant distinction between political protest by demonstrations and protest by disruption. The former is a hallmark of a liberal democracy. The latter seeks to dislocate normal civic life to attract attention or even to browbeat society at large. Extinction Rebellion and Stop the Oil are two movements recently to have adopted this latter course.

Such conduct cannot be accepted in a civilised society. Millions of people hold sincere views of wildly varying kinds. If it is permissible for one viewpoint to disrupt the community, then it must also be permissible for every other: there has to be the same law for those of every political opinion.

Yet our system of law has recently appeared ineffective at dealing with disruptive protest. The police have at times seemed powerless or disinclined to intervene. And when those responsible have been brought before a court there have sometimes been bewildering acquittals. Surprising acquittals have included:

- the protesters in *Ziegler* who blocked a road for 90 minutes by locking themselves to metal boxes;
- those who tore down the Colston statue in Bristol; and
- those who jostled Sir Iain Duncan Smith MP and his wife, after a traffic cone had been smacked on his head.

For many years our courts struck a good balance between the rights of free expression and assembly, on the one hand, and the rights of the public to be unhindered on the other. The offence most often involved was that under s.137 Highways Act 1980 which is committed,

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway ..."

The criterion which the courts evolved was whether an obstruction was reasonable. This remained the approach after the Human Rights Act ("HRA") until as recently as 2018.

Then in *DPP v Ziegler* (2021) the Supreme Court:

(a) held that the criterion should not be reasonableness but a 9-question public law test of whether a conviction would be a proportionate interference with an individual's rights under Convention articles 10 and 11;

(b) said this was required by the court's duty under s.6 HRA (which section had never previously been suggested to be relevant in this context); and

(c) stated,

> "... there must be an assessment of the facts <u>in each individual case</u> to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'."

This led to defendants in prosecutions arising out of disruptive protests contending that they were afforded a defence by virtue of the fact that they were proportionately exercising their Convention rights. Such defences sometimes led to unexpected acquittals; and often involved time-consuming, complex and difficult trials in magistrates courts.

Despite the extensive citation in *Ziegler* of Strasbourg cases, there is no case in which the UK has been held in contravention of the Convention in respect of protest situations and no case which suggests that the Strasbourg court would have considered there to have been a contravention if the Ziegler defendants had been convicted.

In late 2022, the Supreme Court had the opportunity to reconsider *Ziegler* in *re Abortion Services (Northern Ireland) Bill*. Whilst the court held that proportionality did not have to be considered by the trial court in every individual case, the court did not overrule *Ziegler*. The court left unaltered the replacement of reasonableness as the criterion by proportionality; upheld the emphasis on s.6 HRA; encouraged imaginative statutory interpretations by the use of s.3 HRA; clouded the useful distinction which had been drawn in earlier cases between offences which included an element such as "without reasonable excuse" and others; and left

unclear the procedure by which proportionality questions are to be decided by courts.

Parliament has legislated twice in the last year. But neither the Police, Crime, Sentencing and Courts Act 2022 nor the anticipated[1] Public Order Act 2023 helps much. Neither overrules *Ziegler*. Indeed, by introducing "reasonable excuse" defences they are likely actually to make the running of Convention defences easier.

In summary, the state of the law is unsatisfactory, since:

(1) The law has abandoned what for years had been a good balance, based on the criterion of reasonableness, between scope for demonstrators and the rights of the public in general to go about their lives unhindered.

(2) The law is unduly complex for application by juries and lay magistrates. Owing to the difficulties in being sure what the Supreme Court has decided, it is also uncertain.

(3) The apparent belief of senior English judges that Strasbourg case-law requires this state of the law is erroneous.

Conversations with magistrates in March 2023, suggest that their courts still feel the shadow of *Ziegler*.

Accordingly, the Government should now introduce effective legislation:

(a) to declare a right for the general public to be unhindered in public places, and a summary offence of violating that right;

(b) to restore the previous balance achieved by the common law by enacting that ss.3 and 6 HRA have no application to the offences relevant to disruptive protests.

This is the only proposal which would achieve the overruling of *Ziegler*.

A draft Right to be Unhindered Bill is appended.

[1] At the time of writing the Public Order Bill has not quite completed its final stage.

INTRODUCTION

In April 2023, the Public Order Bill awaited royal assent. This completes the passage of an enactment, which left the Commons as long ago as last June. It was the second exercise in Home Office legislation within a year seeking to address disruptive protests. Unfortunately, the 2023 Act, like the Police, Crime, Sentencing and Courts Act 2022, fails to resolve the problem of what might be called "Convention acquittals", that is defences made possible by the Supreme Court decision in *Ziegler*. Realising this, the new Home Office ministerial team attempted a partial improvement of the 2023 Act in the House of Lords but were narrowly defeated in the voting. This paper presents a constructive proposal to answer the "Convention acquittal" problem and to overrule *Ziegler*.

The phenomenon of disruptive protest

On 31st October 2018 a group calling itself Extinction Rebellion held an assembly on Parliament Square in London to announce a "Declaration of Rebellion against the UK Government". To launch its campaign protesters closed five central London bridges, whilst others super-glued themselves to the gates of Buckingham Palace. In 2019 this movement organised human blockades to cause traffic chaos at various locations in central London; others glued themselves to the ground outside the London Stock Exchange and on the roof of a train. The police seemed powerless or disinclined or both promptly to arrest and remove those involved. In April 2022, the movement carried out a week of disruption, again using human chains to close four bridges in London and organising sit-downs to close Oxford Street and Regent Street. Their published demands included that the Government "be led by a Citizens' Assembly on Climate and Ecological Justice".

In February 2022, another movement called Just Stop Oil announced itself. In addition to holding conventional demonstrations, such as marches in several cities, it organised deliberately disruptive stunts. One was to prevent distribution for 12 hours by oil tankers from an oil terminal. It took just two of their supporters to succeed in closing the M25 Dartford crossing for two days and generate 6-mile long traffic jams by attaching themselves to the suspension bridge's infrastructure in hammocks. In November 2022, two dozen individuals caused traffic chaos at the Hammersmith flyover by gluing themselves to the tarmac of the A4: The *Evening Standard* reported that as the 18th consecutive day of disruption somewhere in London by demonstrators[2]. In February 2023, the police had to arrest not only five protesters who had closed Westminster Bridge, but also a member of the public who was so enraged that he resorted to self-help to try to clear the road. In March 2023, the City of London was subjected to two weeks of a campaign involving blocking streets and spraying paint: these happenings are now so common that they have ceased to attract press publicity.

These are just examples of a growing phenomenon of individuals with strongly held views seeking to publicise their aims, or even to browbeat society at large to accept them, by dislocating normal civic life. Too many voices suggest that such conduct is excusable or even praiseworthy. But neither the sincerity of beliefs, nor even their merits, can be allowed to excuse such conduct in a civilised society. The reason is simple. Millions of people hold sincere views of wildly varying kinds as to what should happen. If it is permissible for one viewpoint to disrupt the community, then it must also be permissible for every other: there has to be the same law for those of every political opinion. If sincerity of opinion were to be a justification – either morally or legally – for disrupting society, then community living would become impossible.

Thus, it is because of the value of the equal inherent dignity of every human person – which is the foundation of human rights – that disruptive protest has to be against the law in any truly civilised society.

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[2] The report is at www.standard.co.uk/news/london/just-stop-oil-protest-a4-barons-court-tube-underground-london-b1033383.html

The "Convention defence"

Although there have been some recent convictions of protesters, other cases, in which there have been surprising acquittals, have raised concerns about the ability of the justice system to respond to the wave of disruption.

Three recent public disruption cases have attracted particular notoriety (see Box):

■ June 2021 – in the much-discussed *Ziegler* case[3] the Supreme Court allowed an appeal by protesters who, wishing to close a road, attached themselves to heavy metal lock boxes. As result it took the police 90 minutes to remove them. They were prosecuted under the Highways Act 1980 s.137 which provides,

> "(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 ..." [emphasis added]

Their defence was that they were proportionately exercising their Convention rights of free expression and peaceful assembly under articles 10 or 11. The majority of the Supreme Court considered that the element in the offence of "without lawful excuse" required the prosecutor to prove to the high criminal standard that the defendants were not proportionately exercising their Convention rights. The reasoning in the judgments is discussed below.

■ January 2022 – four individuals, who admitted their role in pulling down the statute of Edward Colston in Bristol, were prosecuted under s.1 of the Criminal Damage Act, which reads,

> "A person who without lawful excuse destroys or damages any property .... shall be guilty of an offence." [emphasis added]

Colston was one of the great philanthropists of the late 17th century, who had accumulated a fortune from a wide range of trading activities. Amongst those activities was the transportation of slaves. In 1895 a bronze stature, which became a listed structure, was erected of him on a stone pedestal to mark his philanthropy, but in recent years there had been debate about removing it. No final decision had been taken as to its future when four individuals used ropes forcibly to pull it down; they then rolled it into the Bristol harbour. The defendants claimed they had a "lawful excuse" in that they had been exercising their Convention rights of free expression and assembly. The judge asked the jury to consider this; and having heard this direction, the jury acquitted.

■ October 2022 – Sir Iain Duncan Smith was accosted by a group of protesters outside the Conservative Party Conference. While a traffic cone was being smacked down on his head by a protester who could not with certainty be identified, he and wife were followed by defendants who admitted shouting "Tory scum". He feared for his wife, who found the experience "quite worrying". District Judge Goldspring found that the defendants' words were insulting and that this was their intention. With those finding all the ingredients of the offence under s.4A Public Order Act 1986 were seemingly present. Yet the magistrate acquitted the defendants saying that their conduct was "reasonable" in the context of Convention articles 10 and 11[4]. Although there appears to be no jurisprudential basis on which this decision could be justified, press reports suggest that the Crown Prosecution Service are not even taking the first step towards an appeal[5].

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[3] *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408.

[4] See www.shropshirestar.com/news/uk-news/2022/11/15/protester-cleared-of-traffic-cone-attack-on-sir-iain-duncan-smith

[5] There is no ingredient of unreasonableness in the offence. A press report suggests that the CPS have asked the District Judge to state a case in respect of his acquittal on the ground of poor identification of the defendant accused of assaulting Iain Duncan Smith, but not to do so in respect of the acquittals for insulting words and behaviour, www.mirror.co.uk/news/politics/prosecutors-plan-re-open-case-29016871

These cases are the tip of an iceberg. Since 2021, similar defences inspired by the *Ziegler* decision have been run in numerous cases, usually in magistrates courts. Despite some decisions in senior courts which have rejected the most far-reaching theories as to what *Ziegler* decided, the authors of this paper have had recent discussions with London magistrates in which they have reported that Convention defences continue to be regularly heard in their courts; and that such trials have become time-consuming and difficult. By way of example, in March 2023 a London JP who sits at a court which has had many disruptive protest cases said,

> "*Ziegler* still casts its malign influence. Magistrates feel threatened by very experienced and very political counsel who make magistrates acutely aware of the risk of an appeal by case stated."

(By way of explanation case stated appeals involve considerable resources in time, and hence cost, for magistrates court in drafting the Case.) We have had also had recent conversations with senior London police officers who report that the shadow of *Ziegler* leaves the police nervous about how to intervene in street sit down protests. Greater London is the area in which most, although by no means all, the disruptive protests have occurred, with the City of London particularly affected. As we shall explain, magistrates and the police are correct to believe that some of the innovations in *Ziegler* remain the law.

The law before the Human Rights Act

In England and Wales the prohibition of anti-social disruption has traditionally been implemented by the laws against obstruction of the highway, criminal damage, public nuisance and the like. These laws as applied by the courts allowed ample scope for demonstrations or similar peaceful protest.

The law in respect of obstruction of the highway has been, and still is, of central importance in practice. S.137 of the Highways Act and its predecessor was described by Lord Reed, delivering the unanimous judgment of the Supreme Court in July 2022 in the case from Northern Ireland concerning abortion clinic safe zones, as having had a long and specific history of judicial consideration, in which the courts balanced demonstration and protest against the avoidance of untoward disruption to the public. He said,

> "In cases where the activity in question took the form of a protest or demonstration, common law rights of freedom of speech and freedom of assembly were treated as an important factor in the assessment of reasonable user"[6]. [emphasis added]

This outcome was achieved, Lord Reed said, by the court asking itself whether the activity being carried on was reasonable.

As an example of what he called "common law rights of freedom of speech and assembly", Lord Reed cited the case of *Hirst & Agu v Chief Constable of Yorkshire*[7], in which the Divisional Court quashed a conviction of protesters who were handing out leaflets and holding banners on a pavement outside a furrier's shop in a pedestrian precinct, without actually obstructing or inconveniencing any shopper. *Hirst & Agu* is interesting for its emphasis that demonstration must not be disruptive. Otton J began his judgment in *Hirst* by speaking of striking a balance,

> "The Courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other." [emphasis added]

Another example of the common law's capacity for adjusting to modern ideas of acceptable protest occurred on the eve of the coming into force of the Human Rights Act, when the House of Lords upheld the right under the common law of highways for a gathering of protesters near Stonehenge to stand holding banners on the verge of an A-road[8].

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[6] *Reference by the Attorney-General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 at [22].

[7] (1986) 85 Cr App R 143.

[8] *DPP v Jones (Margaret)* [1999] 2 AC 240.

Prior to the coming into force of the Human Rights Act we are not aware of any complaints from either judges or the general public that the law was striking an inappropriate balance between the right to demonstrate and the protection of the public from disruption.

The Human Rights Act and Convention rights

By art 10 of the European Convention on Human Rights:

> "1. Everyone has the right to freedom of expression….
>
> 2. The exercise of these freedoms .... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder ...." [emphasis added]

Art 11 is in broadly similar terms as to the right of freedom of assembly.

Two sections of the Human Rights Act 1998 ("HRA") are of particular relevance to the issues in this paper. One is s.3 which contains the enhanced interpretative obligation:

> "So far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights"

The other is s.6 which provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right"

A court is by virtue of s.6(3) included within the meaning of "public authority" for this purpose.

Despite a brief flirtation with an innovative approach, which was disavowed by the very judges who themselves first suggested it[9], the same approach continued to be taken after the coming into force of the Human Rights Act as had been taken before – namely to treat the critical question as whether conduct had been reasonable. The Convention rights of free expression and freedom of assembly were certainly important; but the common law had been infused with a sense of the very same rights, so this did not bring a different consideration into play.

One of the first highway cases to come before a higher court after the coming into force of the HRA was *Westminster City Council v Haw*[10]. It concerned a sole protester in Parliament Square, who had for 15 months spent 24 hours a day there displaying placards and photographs about the Government's policy on Iraq. The local Council sought an injunction to remove him.

Gray J, who found that the protester was obstructing the pavement, although not inconveniencing the public, considered the critical question to be reasonableness:

> "... in my judgment the existence of the right to freedom of expression conferred by Article 10 is a significant consideration when assessing the reasonableness of any obstruction to which the protest gives rise." [emphasis added]

The judge considered that the protester's conduct was not unreasonable and so declined the injunction.

Exactly the same criterion was used as recently as 2018 in the case of *Buchanan*[11], which was cited by Lord Reed as illustrative of this continuum of approach before and after the 1998 Act. In upholding the conviction of a sole protester who had held up traffic by standing in the road in Parliament Square, Hickinbottom LJ said that the art.10 and 11 rights,

> "... are a significant consideration when assessing the reasonableness of any activity on a highway." [emphasis added]

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[9] In *Dehal v CPS* [2005] EWHC 2154 (Admin) Moses J allowed an appeal, apparently on the basis that the prosecution always had to prove proportionately in addition to the ingredients of the offence; and in *Abdul v DPP* [2011] EWHC 247 (Admin) Gross LJ and Davis J appeared to approve just such defences. But in *Bauer v DPP* [2013] 1 WLR 3617. Moses LJ fully recanted what he had said in *Dehal*; and in *James v DPP* [2016] 1 WLR 2118. Davis LJ similarly recanted what he had said in *Abdul*.

[10] [2002] EWHC 2073 (QB).

[11] [2018] EWHC 1773.

An important case illustrating the continuity of approach was *James (Fiona) v DPP*[12] in which the Divisional Court spoke of "common law rights to freedom of speech and assembly". The court fully considered, and rejected, the contention that, in order to convict, a trial court must not only find the specific ingredients of the offence proved but must also find a conviction to be compatible with the defendant's Convention rights. The court held that the question whether the decision to prosecute was proportionate was "simply not an issue for the trial courts". The ways in which Convention rights came into play was in the assessment of statutory defences of reasonableness or of "without lawful ... excuse".

Ziegler

In *Ziegler*, as already mentioned, the defendants were charged with obstructing the highway. The District Judge acquitted them of all charges, holding that the prosecution had failed to prove that they had no "lawful excuse". The prosecution appealed by way of case stated to the High Court, where a Divisional Court presided over by Singh LJ allowed the appeal and directed convictions. The Supreme Court by a 3 to 2 majority allowed an appeal and restored the acquittals. The first successful ground of appeal to the Supreme Court was that the nature of an appeal by a prosecutor by case stated, which in broad principle lies only on a point of law, does not permit the overturning of an acquittal by reason of the High Court making a different assessment of proportionality: it is no part of this paper to criticise that part of the decision. But the majority also held that the District Judge had been entitled to hold that exercise of Convention rights justified the acquittals. Although there was a difference as to the result, the judgments in the Supreme Court expressly approved several of the important propositions in Singh LJ's judgment. Therefore, an evaluation of the decision in *Ziegler* must include consideration of the features of Singh LJ's judgment which were expressly or impliedly approved.

Upon analysis of those parts of the judgments, one may identify three crucial features in *Ziegler*.

The first was Singh LJ's holding that proportionality in the context of a prosecution under the Highways Act involved a multi-limb test of nine questions. These three paragraphs of Singh LJ's judgment were set out verbatim in the joint judgment of Lords Hamblen and Stephens; and Lord Sales, with whom Lord Hodge agreed, expressly said that he agreed with them[13]. The consequence was that the foundational question was not one of reasonableness, but of the 9-limb proportionality. Singh LJ did not shrink from this, going so far as expressly to criticise the passages in *Haw*, *James (Fiona)*, and *Buchanan*, in which reasonableness had been said to be the essential criterion[14]. Lord Sales openly recognised that the 9-limb test involved the importation of the test from public law.

The second feature is the elevation of s.6 HRA as important. Singh LJ said that s.6 was "the starting point" of a "correct analysis of the relationship" between the HRA and the Highways Act. Lord Sales repeatedly referred to s.6 HRA in discussing that relationship; Lords Hamblen and Stephens cited s.6 HRA near the beginning of their judgment, and then quoted with approval a passage in which Singh LJ said that it was s.6 HRA which required a court to consider the complex proportionality test[15]. The discernment of s.6 as of crucial bearing was novel. In the previous cases it was only s.3 HRA which had been seen as the mechanism by which Convention rights were brought into play in respect of the offence under the Highways Act[16]. The difference was significant. The s.3 mechanism (reading down) depended on finding words in an offence section which could be interpreted as involving consideration of Convention rights. By contrast, the relevance of s.6 (court's duty) opened up the idea that the trial court was obliged to find a way to achieve a Convention-compliant outcome irrespective of the presence of the wording in a

[12] [2016] 1 WLR 2118: see especially at [25], [28], and [34] to [37].

[13] Singh LJ [62] to [64], which was quoted verbatim in the Supreme Court at [16] and approved by Lord Sales at [124].

[14] Singh LJ at [84], [92] and [94], and Lord Sales at [127].

[15] Singh LJ at [59], [62] and Supreme Court at [12], [123], [124], [125] and [127].

[16] S.6 HRA is not mentioned at all in *Haw, James, or Buchanan*.

statutory offence which could justify it by even the most stretched interpretation of it.

The third feature is the statement in the judgment of Lords Hamblen and Stephens which has subsequently been seized on with alacrity by defendants:

> "... intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11 .... there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'."[17] [emphasis added]

Read together with the emphasis on s.6 HRA, this dictum was understood by many to mean that in every trial relating to a protest the prosecution must prove not only the specific ingredients of the offence but also that a conviction would be a Convention-compliant result. In other words, the dictum was used to support the argument that in every case arising out of any kind of protest the prosecution must prove not only the specific ingredients of the offence, but also, as an added ingredient, that a conviction would be necessary, or "proportionate", in a democratic society.

Convention defence madness

It was as if the Supreme Court had let a tiger out of a trap. A few months later the Lord Chief Justice lamented:

> "The [*Ziegler*] 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."

In late 2021 and early 2022, in courts all over the country, protester defendants were arguing that the effect of s.6 HRA was that the court must not convict if that would amount to an interference with their Convention rights[18] , irrespective of the ingredients of the charge they faced.

Within six months such an argument succeeded in the Court of Appeal of Northern Ireland. In *Lee Brown*[19] the defendant had been distributing leaflets for a far-right political party called Britain First. He was charged under an article of the Public Order (Northern Ireland) Order 1987 which creates an offence of distributing written material which is threatening, abusive or insulting intending to stir up hatred and if hatred is likely to be aroused. The Order creates no defence of lawful excuse or reasonableness. Those who care to read the extracts of the leaflet in the judgment will not be surprised that the trial court found them hateful and convicted.

On a case stated appeal, the Court of Appeal ruled that there could be a conviction only if all the ingredients of the offence are established and the conviction is compatible with art 10 of the Convention. The Court held that the burden was on the prosecution to prove this additional element. The Court's route to this additional hurdle for the prosecution commenced with sections 3 and 6 of the Human Rights Act and the observation that the court is a public authority and included citation of *Ziegler*. Keegan LCJ's judgment concluded by holding that a court trying this offence should ask itself two questions contained in the statutory wording of the offence, and then four more questions relating to proportionality.

The Lord Chief Justice's rearguard action

There followed a line of three cases which revealed Lord Burnett of Maldon LCJ to be in the forefront of seeking to restore a less radical approach.

In January 2022 he heard *R v Brown (James)*[20]. Brown was an Extinction Rebellion protester who succeeded in gluing himself to the roof of a commercial passenger aircraft as it waited to take

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[17] Supreme Court [70].

[18] See *Cuciurean* at [23] and *R v Brown (James)* [2022] EWCA Crim 6 at [26] for examples of such skeleton arguments.

[19] *Lee Brown v Public Prosecution Service for Northern Ireland* [2022] NICA 5. It may be argued that this decision can be explained as depending on the fact that the N Ireland statutory instrument had been made under devolved powers. But whilst that would render the Order to be an unlawful instrument if the offence contained was inherently incompatible with the Convention, it is hard to see the HRA alters the ingredients of an inherently innocuous offence criminalising hate speech.

[20] [2022] EWCA Crim 6 at [29].

off at London City Airport. His intention was found to have been to cause as much disruption as possible. In that he succeeded: the plane had to be taken out of commission for the rest of the day; four flights had to be cancelled involving 339 passengers; six further flights were delayed. He was convicted of the common law offence of public nuisance. The Court of Appeal said that *Ziegler* concerned an offence in which there was a defence of "lawful excuse" or reasonableness; that there was no such defence to common law public nuisance; and so, *Ziegler* had no direct application to a prosecution for public nuisance.

Two months later, *DPP v Cuciurean* [21] came before the Divisional Court. The defendant had dug a tunnel on land to be used for the construction of the HS2 railway and taken up residence in his tunnel. He was prosecuted in the Magistrates Court for aggravated trespass under s.68 Criminal Justice and Public Order Act 1994: this is another offence in which there is no defence of lawful excuse or reasonableness. He persuaded the Deputy District Judge that before she could convict the prosecution had to satisfy her that to do so would be a proportionate interference with his Convention rights; and she proceeded to acquit the defendant.

In allowing a prosecutor's appeal, the Court held that there was a distinction between offences in which there was a defence of lawful excuse or reasonableness, and those in which there was not: aggravated trespass was, like *Brown (James)*, another offence in this second category. In respect of that second category, sometimes referred to as "general measures", Lord Burnett provided an explanation why Convention compliance was met[22]:

> "The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct 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."

[21] [2022] EWHC 736.

[22] at [58].

There is Strasbourg authority that a "general measure" may, compatibly with the Convention, adopt a provision which criminalises a specific situation, regardless of the particular facts of an individual case[23].

Thus *Cuciurean*, read together with *James (Fiona)*, drew a clear, and easy to apply, distinction between two categories of offence:

> (1) Offences whose ingredients require the prosecution to prove that the defendant's conduct was not reasonable. Typically, this is where the definition of the offence includes a phrase such as "without lawful excuse", or where the existence of a "reasonable excuse" is a defence. Obstructing the highway and criminal damage are examples of such offences. Those features allow a trial court by use of the enhanced interpretative approach in s.3 HRA to treat the question whether the defendant was proportionately exercising Convention rights as a factor.
>
> (2) Offences where the definition of the offence does not include a phrase such as "without lawful excuse", or where there is no defence of a "reasonable excuse". Here the trial court is not concerned to consider whether a conviction would create a situation in which the defendant's Convention rights were infringed. Public nuisance at common law, aggravated trespass, and the Public Order Act offences charged in the *James (Fiona)* and Duncan Smith cases are examples of this category.

The third judgment in this line was that on the Attorney-General's reference following the acquittal of the defendants who pulled down the Colston statue[24], the facts of which trial have been described above. A court presided over by Lord Burnett was able to find a relatively simple route to holding that their Convention defence should not have been allowed to go to the jury. This was that art 11 of the Convention applies only to "peaceful assembly", and that the forcible tearing down of the

[23] *Animal Defenders v UK* (2013) 57 EHRR 21, in which it was held that the UK did not violate the Convention by a statutory prohibition on political advertising.

[24] *Attorney-General's Reference (no. 1 of 2022) re the Bristol Statue* [2022] EWCA Crim 1259.

statue was not peaceful. Therefore, the actions of the defendants were never within the scope of the Convention, or, in the legal jargon, the Convention "was not engaged". Indeed, the court ruled that the causing of "significant" damage would never, by its nature, be peaceful; alternatively, even if theoretically peaceful, a conviction would always be proportionate. The only criminal damage cases which are tried in the Crown Court are those where the damage is of a value over £5,000: at such a value damage would be bound to be "significant". So, concluded the court, there could never be a proportionality defence to a criminal damage case before a jury. However, the court suggested that where the damage would cost less to repair – it gave the example of spraying washable paint – a claim to have been exercising a right to free expression might constitute a defence.

The Supreme Court fails to overrule Ziegler

In late 2022 the Supreme Court was presented with the opportunity to reconsider *Ziegler* by an unexpected route. In March 2022 the Northern Ireland Assembly passed a statute introducing a restriction on influencing persons within a short distance of abortion clinics. The Attorney-General for Northern Ireland was concerned that this offence might amount to a disproportionate interference with the rights of those who wished to protest against abortion unless there was included a defence of "reasonable excuse". In a surprising departure from its supposed mission of protecting the good administration of justice, there was an intervention by JUSTICE to argue a point of substantive criminal law – namely, that there was no necessity for such an explicit defence, because it was always open in any prosecution for defendants to argue that a conviction would be unlawful as an interference with their Convention rights. In other words, the Supreme Court gave permission to JUSTICE to intervene to make submissions in favour of the radical interpretation of the *Ziegler* dictum. It is, perhaps, regrettable that the Supreme Court, which refused another organisation's application to intervene[25], failed to arrange for a submission comprehensively criticising *Ziegler*.

A 7-member Supreme Court[26] emphatically held that there was no need for a "reasonable excuse" defence to be included in the N Ireland legislation, since the restriction on activities within the safe zones would not infringe anybody's Convention rights. The single judgment of the Court is less clear on other points and may have suffered from a wish to find a text from which no member would dissent. The effect of the judgment on the three features of *Ziegler* discussed above may be assessed as follows.

As to the first, the Supreme Court declined the opportunity to overrule, or even qualify, the holding in *Ziegler* that the element of "lawful excuse" in the highway offence entailed an assessment of proportionality by a 9-question test, as opposed to the simple criterion of reasonableness. The judgment stated that that question was not an issue in the present case[27]: that was a surprising statement, bearing in mind that the judgment devoted the whole of paragraphs [21] to [41] to discussing *Ziegler*. It also comes unexpectedly in the context of the judgment, since Lord Reed had set out at some length how the criterion of reasonableness had consistently been used by the courts both before and after the Human Rights Act, how it accorded weight to common law rights of freedom of speech and assembly, and how the Divisional Court had embarked on the enunciation of the 9-question test, which Lord Reed labelled "complex", of its own motion and without any argument.

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[25] See "How and Why to Constrain Interveners and Depoliticise our Courts" Anthony Speaight KC published by Policy Exchange at https://policyexchange.org.uk/publication/how-and-why-to-constrain-interveners-and-depoliticise-our-courts

[26] *Reference by the Attorney-General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

[27] [26].

Since 9-question proportionality was not overruled, and since *Ziegler* as a Supreme Court decision is binding on every court unless and until overruled by the Supreme Court or modified by Parliament, it must remain the law. Indeed, Lord Reed's judgment proceeded as if that were the case. He also went on to say:

> "... the judicial protection of statutory rights by appellate courts is not secured merely by review according to a standard of unreasonableness. Nor does such a restricted review meet the requirements of the Convention ..."[28]

As to the second *Ziegler* feature, namely the treatment of s.6 HRA as relevant, Lord Reed appeared to endorse this: in fact, he stressed the s.6 duty, himself mentioning s.6 repeatedly.[29] He also encouraged imaginative use of the reading down power of s.3 HRA.

As to the third *Ziegler* feature, namely the "in every case" dictum, the Supreme Court rejected the proposition that a trial court must consider proportionality in every case. The Court accepted the possibility of a "general measure", that is an offence whose ingredients have been so drawn that in any situation in which its specific ingredients are present, a conviction will not be a violation of Convention rights. Northern Ireland's proposed offence was accepted by the Supreme Court as an example of just that.

If the judgment is clear on the above points, there are two others where it regrettably leaves potential confusion. It might be thought that the rejection of the "in every case" theory would lead on to the conclusion that Convention defences could have no part to play in offences in the category (2) identified in *Cuciurean* and *James (Fiona)*; in other words, to produce the result that Convention defences can be raised only if an offence contains a "without reasonable excuse" type of element. But the judgment does not allow any such clear conclusion to be drawn. Instead, Lord Reed made a point of saying that it would be a mistake to think that all defences can be placed into one or the other of category (1) and (2)[30]. Thus, the Supreme Court ended up blurring the distinction. The furthest the Court went was to state that if the use of s.3 Human Rights Act could not resolve an incompatibility with the Convention, the Court must proceed to convict, notwithstanding an incompatibility. The practical consequence seems to be that in respect of every offence whose definition does not include a "without reasonable excuse" type of element, unless and until there is an authoritative decision by a senior court approving it as a "general measure", there will be scope for defence submissions, perhaps by the most imaginative use of s.3 HRA, that the offence is one in which proportionality must be proved by the prosecutor.

The second area left unclear is the procedure by which "proportionality", when it arises, is to be determined. Lord Reed recognised the difficulty for a jury of the complex multi-factor public law test. Without again reaching a firm conclusion, he suggested that in England and Wales proportionality questions might be determined by an application to stay on the ground of abuse of process[31]. This suggestion is not without its problems. The Divisional Court pointed out in *James (Fiona)* that the stay for an abuse of process is "an exceptional and limited remedy"[32]. Furthermore, whilst in the Crown Court the stay of process procedure would be a route to placing a complex decision with the judge, rather than the jury, this would not work in the same way in a magistrates court. In a court of summary jurisdiction, the lay JPs or, as the case may be, stipendiary district judge, performs both the role of judge of law and that of judge of fact. Indeed, it is unclear whether a magistrates court even has the jurisdiction to stay proceedings for the kind of abuse of process which a proportionality challenge would involve.

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[28] [32].

[29] [30], [56], and [61].

[30] [53] onwards.

[31] [67].

[32] *James v DPP* [2016] 1 WLR 2118 at [[27] and [28].

The Strasbourg case-law on protests obstructing the highway

Ziegler contains so much discussion of Strasbourg law that observers may believe that the outcome was an inevitable consequence of the UK's adhesion to the ECHR. In fact, there is no Strasbourg case which suggests that the Convention requires toleration of conduct such as that of the *Ziegler* protesters. And the whole methodology of posing the multi-stage questions is British gold-plating unsupported by Strasbourg jurisprudence.

The best-known Strasbourg case on the blocking of roads is, perhaps, *Kudrevicius v Lithuania*, in which the holding was that there had been no violation of the Convention. The blockage in that case, which was carried out by unhappy farmers with tractors on three major highways, was far more serious than in *Ziegler*: so, it gives little clue as to where Strasbourg might draw the line. However, the judgment's tenor does not suggest any great sympathy for deliberate road-blocking[33]:

> "In the Court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by Article 11 of the Convention."

Particularly pertinent is the British case *Lucas v UK*[34]. The applicant was one of a number of protesters who sat in the road leading to the Faslane naval base in Scotland. She was asked to move and refused to do so. She was arrested, detained for 4 hours, and charged with committing a breach of the peace; in November 2001 she was convicted and fined £150. There was no clear evidence that any vehicles had actually been trying to enter the naval base during her sit-down; but it was potentially disruptive of traffic and it was found by the court that such disruption was her intention.

The applicant complained to Strasbourg that her conviction breached of her art 10 and 11 rights. But the Court stated:

> "... the Court considers that the arrest, detention and conviction of the applicant may be regarded as pursuing the interests of public safety and/or for the prevention of disorder and therefore, that the interference with her rights pursued one or more of the aims listed in Article 10 § 2. Finally, the Court finds that the actions of the police in arresting and detaining and of the national court in convicting the applicant were proportionate to the legitimate aim pursued in view of the dangers posed by the applicant's conduct in sitting in a public road and the interest in maintaining public order as well as the relatively minor penalty that was imposed."

Not only did the Strasbourg unanimously find against the applicant, but it declared the complaint to be so weak as to be inadmissible. This is an informative decision for present purposes since the *Ziegler* protesters obstructive conduct was clearly on the facts more serious than that by Lucas.

Another Strasbourg case of some assistance is reported as *Steel and others v UK*[35]. This involved three different cases, and the differing outcomes may be instructive. The first applicant, Steel, disrupted a grouse shoot: as a member of the shooting party was about to lift his shotgun, she placed herself right in front of him so as to prevent him shooting. She was arrested, detained for 44 hours before being brought up in court; and ultimately imprisoned for 7 days for refusing to be bound over to keep the peace. The Strasbourg court held that, while Steel's actions had been an exercise of expression of her views so as to engage art 10, the arrest and ultimate imprisonment were not disproportionate.

The second applicant, Lush, was involved in protesting against the construction of the M11 motorway. She was part of a group which broke into a construction site, climbed trees which were to be felled, and clambered onto construction

[33] Application no 37553/05 at para 97, judgment on 15th October 2015.

[34] Application no. 39013/02.

[35] 67/1997/851/1058 judgment delivered 23rd September 1998.

machinery to interfere with its use. Again, the Strasbourg court held that prosecution and conviction were not disproportionate.

On the other hand, the arrest of the third group of applicants was held to have been a disproportionate violation of their art 10 rights. They staged a demonstration outside the Queen Elizabeth Centre when a conference on fighter helicopters was being held. They carried banners saying, "Work for Peace not War", and handed out leaflets. At the Magistrates Court the prosecution offered no evidence and the case against them was dismissed; their complaint was about their original arrest and detention for committing a breach of the peace. The Strasbourg court held that, in contrast to the first and second applicants, there was no indication that they significantly obstructed or attempted to obstruct those attending the conference or took any other action likely to provoke these others to violence.

Road blocking was the subject of *Baraco v France*[36]. There was an organised "snail" protest involving vehicles driving slowly several abreast on the A46 motorway in France. Then three vehicles, including one belonging to the applicant were found immobilised at the head of the protesting vehicles, so that traffic behind them was brought to a complete halt. Accordingly, the applicant was arrested, and subsequently convicted of a criminal offence of obstructing the passage of other vehicles – apparently an offence similar to s.137 Highway Act. The Strasbourg court rejected the complaint, holding that the applicant had been convicted "because of a specific behaviour adopted during the demonstration, namely the blocking of a highway, thereby causing a greater obstruction than the exercise of the right to peaceful assembly generally entails".

Lords Hamblen and Stephens cited quotations from various Strasbourg cases to advance the proposition that in a case where disruption is caused it is necessary for the domestic court to carry out an evaluation of proportionality. With respect, that is wrong. We are not aware of any case in which the Strasbourg court has held a state to have violated the Convention by reason of the domestic court not adopting that methodology. It is true that proportionality is the test which is applied to the facts of a case by the Strasbourg court, which is, of course, a court composed of jurists and specialist jurists at that; but that approach is adopted to determine whether the outcome of the domestic situation contravenes the Convention. As Lord Reed said in *re Abortion Services (Northern Ireland) Bill*:

> "40 Two other points need to be borne in mind. First, the European court confines itself, as far as possible, to an examination of the concrete case before it. As it has often said, its task is not to review legal provisions and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Domestic courts are not required to proceed on the same basis, and this court cannot do so on a reference of the present kind.
>
> 41 Secondly, the European court has repeatedly emphasised that the Convention is intended to protect rights that are practical and effective, and that its concern is therefore with matters of substance rather than form."

In the light of the way in which the Strasbourg court evaluated the cases discussed above, and the absence of any known case in which that court has held that conduct similar to that of the *Ziegler* protesters was a valid exercise of Convention rights, one can surely conclude with some confidence that if the Supreme Court had upheld the Divisional Court's conclusion, and if the defendant Ziegler had then lodged a complaint at Strasbourg, such complaint would have failed. In explaining its assessment that there should have been a conviction on the facts of *Ziegler*, the Divisional Court identified as a critical factor that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time"[37]: our reading of the Strasbourg case-law suggests that factor would,

[36] Application no. 31684/05, judgment delivered 5th March 2009.

[37] [2020] QB at 253 [117].

indeed, have been likely to be considered critical by the Strasbourg court.

In other words, the problem has lain with courts from the highest to lowest levels which seem so afraid of being "on the wrong side of human rights" that they gold-plate Convention rights to an unjustified level.

Police, Crime, Sentencing and Courts Act 2022

The first of the two legislative interventions by the Government was Part 3 of the Police, Crime, Sentencing and Courts Act 2022. Amongst a number of provisions which attracted opprobrium in some quarters for seeking to frustrate legitimate demonstrations by extending the police's powers to control them, there were just two dealing with specific offences. One made an insignificant amendment to the ingredients of obstructing the highway.

The other concerned the offence of public nuisance. This had the effect – almost unbelievably – of introducing scope for a Convention defence where none had existed previously. The Act chose to end the common law offence and replace it with a new statutory defence. The heart of the new offence mirrored the ingredients of the common law offence: that is, intentionally or recklessly obstructing the public in the exercise of a right enjoyed by the public. So far, so good. But the Act then proceeded to enact a defence of having a reasonable excuse[38]. As already seen, this, of course, opens the Pandora's box of allowing disruptive protesters to claim they were proportionately exercising Convention rights.

An explanation for the enactment doubtless lies in the existence of a Law Commission report in 2015 which had recommended the codification of the law of public nuisance. That report had suggested the inclusion of a defence of reasonable excuse. It did so because the definition in Archbold of the common law offence spoke of an act "not warranted by law", and because the Commission considered that that was "a somewhat old-fashioned way of saying 'without lawful excuse'"[39]. It might seem a large stride from those observations to enact a full-scale defence of "reasonable excuse".

But in any event by the time this Act was completing its passage through Parliament[40], there had been two significant developments.

Firstly, the judgment of the Lord Chief Justice in the Court of Appeal in *Brown (James)* had held in explicit terms (and contrary to the Law Commission's assumption) that there was no reasonable excuse defence in public nuisance[41].

The second development was that an expectation on the part of the Law Commission's that it was "somewhat difficult to imagine examples"[42] in which claims to be exercising rights under Convention articles 10 or 11 would be advanced as reasonable excuses had proved sadly misplaced. By 2022 there had not only been many cases in lower courts in which "reasonable excuse" had been held to allow a "Convention" defence, but also several judicial statements of high authority to that effect[43].

It rather looks as though Home Office civil servants pulled out of a drawer a worthy 7-year-old paper and stuffed it into draft legislation without noticing that the impact of developments in the interim meant that it would produce a result running directly contrary to the aims of the Government. And the Act did nothing to overrule Ziegler.

The Public Order Act 2023

Shortly after the enactment of the 2022 Act the Government announced that it would bring forward further legislation in the field of public disruption. The aim, at least in part, was to enact provisions

[38] The main ingredients of the offence are in s.78(1), and this defence in s.78(3).

[39] para 3.39 in Law Commission paper 358 "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency" HC213.

[40] It received royal assent on 28th April 2022.

[41] at [37]: "There is no such defence [i.e., acting reasonably or with lawful excuse] in the context of the present offence."

[42] footnote 122 to para 3.61 Law Commission report.

[43] *James v DPP* [2016] 1 WLR at [36], *DPP v Ziegler* [2022] AC 408 at [124], and *James Brown* at [37. And more recently see *Cuciurean* at [51] to [52], and *Reference by A-G for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* at [57].

which the Government had sought, but failed, to enact by way of late amendments to the 2022 Act. The new Public Order Bill was introduced into Parliament in May 2022. Again, it has raised a storm of complaints about erosion of civil liberties.

Part 1 created a series of unusually specific offences. On close inspection each is tailored to the facts of a recent disruptive protest. By clause 2, entitled "Offence of locking on", it was to be an offence if a person attaches himself or herself to an object, land or another person so as to cause disruption: it looked remarkably like an attempt by the Government to overcome the acquittal on the specific facts of *Ziegler*[44]. Clause 4 created an offence of causing serious disruption by tunnelling: this at once brings to mind the facts of *Cuciurean*[45]. A third new offence was obstructing the construction of major transport works. That might look as if the Bill was giving the prosecutor a second barrel of the shotgun by which to prosecute future protesters similar to Mr Cuciurean. Finally, the Bill would enact an offence of interference with the operation of key national infrastructure, which is defined to include railways, roads and airports. This might look tailor-made for the protester in the case of *Brown (James)*[46].

One might have been hoped that after the 2022 Act had succeeded, doubtless inadvertently, in expanding the scope for Convention defence arguments, the Government's second bite at the cherry would avoid creating any more new openings for "proportionate Convention rights" defences. Disappointingly, an express defence of "reasonable excuse" was included in the Bill for every one of the new "tailor-made" offences described above. It is, therefore, small exaggeration to say that all the new offence sections in clauses 1 to 9 of the Bill as it stood in the House of Commons are likely to achieve little towards their evident objective.

The Bill also suffered from a more fundamental limitation: even if it had succeeded in creating an effective offence of locking-on, it would have done nothing to alter the jurisprudential approach signalled by *Ziegler* as that applied to other types of highway obstruction, and all other public order offences.

Attempts to improve the Bill were made in the House of Lords. Lord Hope, a former Supreme Court judge, and Lord Faulks KC tabled amendments to exclude from the scope of "reasonable excuse" a protest on a matter of current debate. Lord Sandhurst KC tabled an amendment in even clearer terms, which had been suggested in a paper by Professor Richard Ekins and Sir Stephen Laws[47], excluding from "reasonable excuse" conduct designed to influence policy, and adding the valuable declaration that the section must be treated as necessary in a democratic society for the purposes of the Human Rights Act.

By this stage the Home Office team who had been responsible for introducing the Bill into the House of Commons had been replaced by a new Home Secretary and other new ministers. This new ministerial team saw the problem which this paper has outlined above, and at the report stage in the House of Lords swung behind the Hope/Faulks amendment. Sadly, the atmosphere had been poisoned by so many ham-fisted Government initiatives, which looked authoritarian whilst achieving nothing, that on 30th January 2023 the Hope/Faulks amendments were narrowly defeated by 224 votes to 221. There has been no subsequent attempt by the Government to introduce features similar to Hope/Faulks or Sandhurst/Ekins amendments; and so, the Bill, likely to become an Act soon after publication of this paper, retains the weaknesses discussed.

How does the law stand today?

The two Supreme Court decisions of *Ziegler* and *re Abortion Services (Northern Ireland) Bill* have left the law in an unsatisfactory state. Parliament's two attempts to legislate have done nothing to improve that.

[44] *DPP v Ziegler* [2022] ACD 408.

[45] *DPP v Cuciurean* [2022] EWHC 736.

[46] *R v Brown (James)* [2022] EWCA Crim 6.

[47] "Amending the Public Order Bill: a Policy Exchange Briefing Paper" January 2023, Policy Exchange at https://policyexchange.org.uk/publication/amending-the-public-order-bill

It seems reasonably clear that in a prosecution for obstruction of the highway it is open to the defendant to raise a full-scale 9-question proportionality defence (*Ziegler* not having been overruled). That will also be open in a low value criminal damage case, such as for spraying washable paint. On the other side of the picture, there are a few situations in which it is clear that a proportionality defence is not open, namely,

(a) criminal damage worth over £5,000;

(b) an offence which a senior court has held to be a general measure: that will apply to abortion clinic safe zone offences, aggravated trespass, and the Public Order Act offence of disregarding a police officer's reasonable direction.

But beyond that, few propositions can be advanced with confidence. A proportionality issue will probably be open in most offences where "without lawful excuse" or the like is an element; and may be open in some others. What this boils down to is that magistrates courts, where the overwhelming majority of public protest cases are dealt with, will continue to have to listen to the complexities of proportionality arguments in very many public protest prosecutions.

In other words, the magistrates and senior police officers, whose views we recorded near the beginning of this paper, are correct to consider that the long shadow of *Ziegler* remains.

We respectfully adopt the [2016] opinion of Davis LJ, describing the very situation which now seems to prevail:

> "(ii) Second, it potentially makes the task of the justices immeasurably more complex. That is not desirable in a situation where justices may already sometimes have quite difficult decisions to make, in balancing the importance of the rights of freedom of expression and assembly against the rights of others, and in making their assessment of reasonableness accordingly by reference to the facts of the particular case. (iii) Third, it has the potential for converting a magistrates court in effect into a court exercising powers of judicial review: something the magistrates court is neither equipped to do nor, indeed, empowered to do: see *R (Barons Pub Co Ltd) v Staines Magistrates Court* [2013] LLR 510."[48] [Emphasis added]

In summary, then, there are three reasons why the present state of the law is undesirable:

(1) The law has abandoned what for years had been a good balance, based on the criterion of reasonableness, between scope for demonstrators and the rights of the public in general to go about their lives unhindered.

(2) The law is unduly complex for application by juries and lay magistrates. Owing to the difficulties in being sure what the Supreme Court has decided, it is also uncertain.

(3) The apparent belief of many English judges that Strasbourg case-law requires this state of the law is erroneous.

The options now

What, then, should the Government do now?

One course of action, and the most comprehensive reform, would be to amend the Human Rights Act. All the troublesome decisions in disruptive protest cases have turned on s.3 and s.6 of that Act. A fundamental reform would be achieved by modifying those two sections. S.3 could either be removed completely, as proposed in the Bill of Rights Bill, or brought more closely in line with common law interpretative principles, as proposed by the Society of Conservative Lawyers[49]. The most important reform would be to s.6, which has been used by Baroness Hale[50] and Singh LJ[51] for the most activist applications of the Human Rights Act. But the Bill of Rights Bill proposes to leave it unaltered. As it now seems unlikely that the Government will be proceeding with the Bill of Rights Bill, further discussion of either how its drafting might be strengthened or how it might improve the law on disruptive protest may not be productive. The Government's preference is now

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[48] *James v DPP* [2016] 1 WLR 2118 at [53].

[49] "A Glorious Revolution" March 2022 at www.conservativelawyers.com/_files/ugd/e1a359_894f4af0a0bf4709aead6f455ef84426.pdf

[50] *re G (Adoption: Unmarried couple) [2009]* AC 173.

[51] *Ziegler* in the Divisional Court at [59].

believed to be to seek to deal with Human Rights Act problems by limited legislation in specific fields.

A Right to be Unhindered in Public Places Bill

Since the Government ought not to leave the law in so unsatisfactory a state, that points to fresh legislation, specific to public order. We propose two elements in such a Bill.

One element could be the recognition of a general right for members of the public to be unhindered in public places, and the enactment of a summary offence of significantly violating that right. There should be no "reasonable excuse" defence. But to make it clear that peaceful demonstrations would not be affected, there could be a statutory defence of peacefully imparting an opinion, information or ideas in such a way as not to cause distress, annoyance or serious inconvenience to any other person. This offence would in a sense create a minor version of the old common law public nuisance defence with a lower maximum penalty. But it would bring a new focus: it would start with the rights of the law-abiding citizen, rather than revolving around the scope of the protester's rights.

The second element should be the restoration of the common law to the offences which were working well prior to the Human Rights Act. This could be done by enacting that s.3 and s.6 of that Act have no application to the interpretation and application of "reasonable excuse" and "lawful excuse" in a short list of specified public order offence provisions. Whilst there is as yet no precedent on the statute book for such an exclusion of provisions of the Human Rights Act to a specific situation, this approach is currently proposed by the Government in s.1(5) Illegal Migration Bill. This course would be in line with the emerging Government policy of taking human rights reform in small bites on particular topics.

This would be a different route to an end result similar to that at which the Hope/Faulks and Sandhurst/Ekins amendments aimed, namely curbing the elevation of the theory of proportionate exercise of Convention rights into a protester's charter. The argument for the new approach would be that, since the proposed amendments in the House of Lords were regarded by the narrow majority there as too restrictive of protesters' rights, this would restore a state of the law, namely domestic law in 1998, which, when it was in force, was never suggested to be too restrictive. As we have said, prior to the Human Rights Act there was no criticism in Britain that our law was too harsh on demonstrators or protesters; and neither before nor after the 1998 Act has Strasbourg ever found our law on public protest to violate the Convention.

In other words, whereas the exclusion of s.3 HRA in the Illegal Migration Bill seeks to remove "reading down "expansive interpretation in a highly controversial area, the restoration of common law to the field of public protest would in a sense do the opposite. It would end a state of the law which has caused much disquiet, and replace it with a state of the law, which was tried, tested, and found satisfactory.

We emphasise that this reform would achieve the object of overriding *Ziegler* – which would not be fully achieved by any other current proposal.

Accordingly, it is hard to see that there could be any justified civil liberties concern if the law as it stood on the eve of the coming into force of the Human Rights Act were to be restored. That law was never found to be incompatible with Convention rights. It follows that this Bill could be certified by a minister under s.19 Human Rights Act as compatible with Convention rights.

The short statute here proposed might be called the Right to be Unhindered in Public Places Act. A draft Bill is appended. As it would be wholly concerned with public order matters, it would be natural for it to be introduced by the Home Office.

APPENDIX – DRAFT LEGISLATION

The Right to be Unhindered in Public Places Bill

The right to be unhindered

1. In this Act a "public place" means –

   (a) any highway, or

   (b) any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.

   [Note: This copies the definition of "public place" in the Public Order Act 1986.]

2. (1) Every person has the right without let or hindrance to use any public place for any purpose for which,

   (a) in cases of access as of right, members of the public are entitled to use it;

   and

   (b) in cases of access by permission, members of the public have permission to use it.

   (2) The right in sub-section (1) is herein referred to as "the right to be unhindered".

   [Note: The expression "without let or hindrance", of course, famously occurs in the statement on British passports. It has also traditional use in connection with a highway: Halsbury's Laws of England, 4th ed, vol 21(1981) defines highway as ". . . a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance."]

Violation of the right to be unhindered

3. (1) A person who significantly disrupts the right to be unhindered of any other person commits an offence.

   (2) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine or to both.

   [Note: The word "significantly" is included to ensure that a de minimis or very minor disruption does not constitute an offence. It may be observed that no such level of disruption has to occur before the offence of public nuisance under s.78 of the 2022 Act is committed: the s.78 offence, which carries up to 10 years imprisonment, requires only that there is "obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large.]

4. It is a defence for a person charged with the offence in section 3 to prove that he or she was peacefully imparting an opinion, information or ideas in such a way as not to cause distress, annoyance or serious inconvenience to any other person.

   [Note: There is no such defence to the offence of public nuisance, but s.78(3) does create a defence of "reasonable excuse".]

5. A constable may arrest without warrant any person (A) if he or she reasonably considers that A is committing an offence under s.3, and that it is necessary to arrest A to prevent A continuing to commit the offence.

[Note: There is a general power of arrest without warrant in PACE s.24 as amended in 2005 in so far as relevant if, but only if, the person is "causing an unlawful obstruction to the highway". Such a power of arrest is universally accepted as essential to enable the police to keep highways open. This provision ensures the availability of that power of arrest, free from a formulation which may yet again take one into the endlessly disputable territory of Ziegler.]

Restoration of the common law

6. (1) This section applies to the offence sections listed in Schedule 1.

(2) The offences to which this section applies shall be interpreted and applied in accordance with the principles of the common law in respect of freedom of speech and freedom of assembly as recognised prior to the coming into force of the Human Rights Act 1998.

(3) Section 3 of the Human Rights Act 1998 has no application to the interpretation, reading, giving effect, or application of any offence to which this section applies.

(4) A court undertaking judicial business is not a "public authority" within the meaning of section 6 of the Human Rights Act 1998 for any purpose connected with any offence to which this section applies.

7. In so far as the offence created by section 3, or the offences to which section 6 applies, be held to restrict or limit the exercise of the rights in Articles 9, 10 and 11 of the Convention rights set out in Schedule 1 to the Human Rights Act 1998, such restrictions or limitations must be treated by any court as prescribed by law and necessary in a democratic society.

Extent, commencement and short title

8. (1) This Act extends to England and Wales only.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which this Act is passed.

(3) This Act may be referred to as the Right to be Unhindered in Public Places Act.

SCHEDULE 1

Criminal Damage Act 1971 s.1

Highway Act 1980 s.137

Public Order Act 1986 ss. 4A, 5, 12, 13, 14, 14ZA, 14B and 14C

Police, Crime, Sentencing and Courts Act 2022 s.78

Public Order [Act] 2023 ss.2, 3, 4, 5, 6, 7, 8

For further information on the Society of Conservative Lawyers contact:
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB
administrator@conservativelawyers.com
www:conservativelawyers.com

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