



Neutral Citation Number: [2022] EWHC 736 (Admin)

Case No: CO/745/2022

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 March 2022

**Before:**

**THE LORD BURNETT OF MALDON**  
**LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**MR JUSTICE HOLGATE**

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**Between:**

**DIRECTOR OF PUBLIC PROSECUTIONS**  
**- and -**  
**ELLIOTT CUCIUREAN**

**Appellant**

**Respondent**

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**Tom Little QC and James Boyd** (instructed by **Crown Prosecution Service**) for the  
**Appellant**  
**Tim Moloney QC, Blinne Ní Ghrálaigh and Adam Wagner** (instructed by **Robert Lizar**  
**Solicitors**) for the **Respondent**

Hearing date: 23 March 2022  
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**Approved Judgment**

## Lord Burnett of Maldon CJ:

### Introduction

1. This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *DPP v. Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 requires a criminal court to determine in all cases which arise out of “non-violent” protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention on Human Rights (“the Convention”) which protect freedom of expression and freedom of peaceful assembly respectively.
2. The respondent was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”) consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The Deputy District Judge, sitting at the City of London Magistrates’ Court, accepted a submission advanced on behalf of the respondent that, before she could convict, the prosecution had “to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11 ...” In short, the judge accepted that there was a new ingredient of the offence to that effect.
3. Two questions are asked of the High Court in the case stated:
  - “1. Was it open to me, having decided that the Respondent’s Article 10 and 11 rights were engaged, to acquit the Respondent on the basis that, on the facts found, the Claimant had not made me sure that a conviction for the offence under s. 68 was a reasonable restriction and a necessary and proportionate interference with the defendant’s Article 10 and 11 rights applying the principles in *DPP v Ziegler*?”
  2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?”
4. The prosecution appeal against the acquittal on three grounds:
  - 1) the prosecution did not engage articles 10 and 11 rights;
  - 2) if the respondent’s prosecution did engage those rights, a conviction for the offence of aggravated trespass is - intrinsically and without the need for a separate consideration of proportionality in individual cases - a justified and proportionate interference with those rights. The decision in *Ziegler* did not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

- 3) in any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.
5. Before the judge, the prosecution accepted that the respondent's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the respondent suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither Ground 1 nor Ground 2 was advanced before the judge.
6. The respondent contends that it should not be open to the prosecution to raise Grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that Ground 1 is being pursued; and that although Ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.
7. Rule 35.2(2)(c) of the Criminal Procedure Rules relating to an application to state a case requires:

“35.2(2) The application must—

...

(c) indicate the proposed grounds of appeal”
8. The prosecution did not include what is now Ground 1 of the Grounds of Appeal in its application to the Magistrates' Court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.
9. Applying well-established principles set out in *R v R* [2016] 1 WLR 1872 at [53]-[54]; *R v. E* [2018] EWCA Crim 2426 at [17]-[27] and *Food Standards Agency v. Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin) at [25]-[31], we are prepared to deal with Ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the respondent, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the Magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

### **Section 68 of the Criminal Justice and Public Order Act 1994**

10. Section 68 of the 1994 Act as amended reads:

“(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.

(1A) ...

(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) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

(4) [repealed].

(5) In this section “land” does not include—

(a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of “land” in subsection (9) of that section; or

(b) a road within the meaning of the Roads (Northern Ireland) Order 1993.”

11. Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words “in the open air” were repealed by the Anti-Social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12. The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at [4]): -

“(i) the defendant must be a trespasser on the land;

(ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity;

(iii) the defendant must do an act on the land;

(iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it.”

13. Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

### **Factual Background**

14. The respondent was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.
15. The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London to West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.
16. The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.
17. Protesters against the HS2 project had occupied the Land and the respondent had dug a tunnel there before 2 March 2021. The respondent occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.
18. The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed from trees on the site. On the same day the team found the respondent in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The respondent went back into the tunnel.
19. The HS2 team instructed health and safety experts to help with the eviction of the respondent and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The respondent left the Land voluntarily at about 14.00 on 18 March 2021.
20. The cost of these teams to remove the three protesters over this period of three days was about £195,000.
21. HS2 contractors were unable to go onto the Land until it was completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

## The Proceedings in the Magistrates' Court

22. On 18 March 2021 the respondent was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not guilty. The trial took place on 21 September 2021.
23. At the trial the respondent was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions: -
- i) “*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant’s rights under articles 10 and 11 ECHR. It is of general applicability. It is not limited to offences of obstructing the highway”;
  - ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;
    - (a) First, the Supreme Court’s reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 (“1998 Act”) not to act in a manner contrary to Convention rights (referred to in *Ziegler* at [12]). Accordingly, in determining a criminal charge where issues under articles 10 and 11 ECHR are raised, the court is obliged to take account of those rights;
    - (b) Second, violence is the dividing line between cases where articles 10 and 11 ECHR apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant’s right to protest in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the respondent was not violent;
  - iii) Accordingly, before the court could find the respondent guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at [71] to [78], [80] to [83] and [85] to [86]). This required a fact-sensitive assessment.
24. The prosecution did not produce a skeleton for the judge. She recorded that they did not submit “that the respondent’s article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass” or that the principles in *Ziegler* did not apply in this case (see paragraph 10 of the Case Stated).
25. The judge made the following findings:
- “1. The tunnel was on land owned by HS2.

2. Albeit that the Respondent had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.
3. The act of Respondent taking up occupation of the tunnel on 15th March, sleeping overnight and retreating into the tunnel having been served with the Notice to Vacate was an act which obstructed the lawful activity of HS2. This was his intention.
4. The Respondent's article 10 and 11 rights were engaged and the principals in R v Ziegler were to be considered.
5. The Respondent was a lone protester only occupying a small part of the land.
6. He did not act violently.
7. The views of the Respondent giving rise to protest related to important issues.
8. The Respondent believed the views he was expressing.
9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.
10. The land specifically related to the HS2 project.
11. HS2 were aware of the protesters were on site before they acquired the land.
12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of billions.
13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195k I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the Respondents article 10 and 11 rights"

## **Convention Rights**

26. Article 10 of the Convention provides: -

### **“Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority

and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

27. Article 11 of the Convention provides: -

**“Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

28. Because section 68 is concerned with trespass, it is also relevant to refer to Article 1 of the First Protocol to the Convention (“A1P1”): -

**“Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”

29. Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: -



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

30. Section 6(1) provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right” unless required by primary legislation (section 6(2)). A “public authority” includes a court (section 6(3)).
31. In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v. France* [1992] EHRR 362 at [37]).
32. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both “private meetings” and “meetings in public places” (*Kudrevicius v. Lithuania* [2016] 62 EHRR 34 at [91]).
33. Article 11 expressly states that it protects only “peaceful” assemblies. In *Kudrevicius v. Lithuania* (2016) 62 EHRR 34, the Grand Chamber of the European Court of Human Rights (“the Strasbourg Court”) explained that article 11 applies “to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society” ([92]).
34. The respondent submits, relying on the Supreme Court judgment in *Ziegler* at §70, that an assembly is to be treated as “peaceful” and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the respondent’s peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality.
35. Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see e.g. *Kuznetsov v. Russia* No. 10877/04, 23 October 2008 at [44], cited in *City of London Corporation v. Samede* [2012] PTSR 1624 at [43]; *Kudrevicius* at [150] and [155]).
36. The respondent relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (e.g. *Hashman v. United Kingdom* [2000] 30 EHRR 241 at [28]). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevicius* at [97]).
37. Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a “reprehensible act” within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevicius* at [149] and [172] to

[174]; *Ezelin* at [53]; *Barraco v. France* No. 31684/05, 5 March 2009 at [43] to [44] and [47] to [48]).

38. In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights.
39. *Barraco* and *Kudrevicius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no right of access at all. The respondent submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (paragraph 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the respondent's argument (e.g. *Samede* at [5] and see Lindblom J (as he then was) [2012] EWHC 34 (QB) at [12] and [136] to [143]; *Canada Goose UK Retail Limited v. Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth LBC v. Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.
40. Instead, we gain much assistance from *Appleby v. United Kingdom* [2003] 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg Court decided that the landowner's A1P1 rights were engaged ([43]). It also observed that a shopping centre of this kind may assume the characteristics of a traditional town centre [44]. Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".
41. Instead, the court stated at [47]: -

“[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this 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 the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see *Marsh v. Alabama* [326 US 501], cited at paragraph 26 above).”

The court indicated that the same analysis applies to article 11 (see [52]).

42. The example given by the court at the end of that passage in [47] shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner’s property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the applicants did have alternative methods by which they could express their views to members of the public ([48]).
43. Likewise, *Taranenko v. Russia* (No.19554/05, 15 May 2014) does not assist the respondent. At [78] the court restated the principles laid down in *Appleby* at [47]. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks ([25], [61] and [79]). The qualified public access was an important factor.
44. The respondent also relied upon *Annenkov v. Russia* No. 31475/10, 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business-people protested by occupying the market at night. The Strasbourg Court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.
45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent’s proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not “bestow any freedom of forum” in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.
46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are

prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47. We now return to *Richardson* and the important statement made by Lord Hughes JSC at [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 European Convention on Human Rights 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.”

48. *Richardson* was a case concerned with the meaning of “lawful activity”, the second of the four ingredients of section 68 identified by Lord Hughes (see [12] above). Accordingly, it is common ground between the parties (and we accept) that the statement was *obiter*. Nonetheless, all members of the Supreme Court agreed with the judgment of Lord Hughes. The *dictum* should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.
49. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the “clear and constant jurisprudence of the Strasbourg Court”. It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

50. For the reasons we gave in para. [8] above, we do not determine Ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg Court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case.

## Ground 2

51. The respondent's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* had decided that in any criminal trial involving an offence which has the effect of restricting the exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in question did not have a "lawful excuse". If that submission is accepted, Ground 2 would fail.
52. Secondly, if that first contention is rejected, the respondent submits that the court cannot allow the appeal under Ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted Ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.
53. On this second part of Ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler*, we consider the case law on this subject, for section 68 and other offences.
54. In *Bauer v. Director of Public Prosecutions (Liberty Intervening)* [2013] 1 WLR 3617 the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at [4]). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do ([27] to [36]). One reason for this was to avoid the risk of inhibiting legitimate participation in protests ([27]). It was in that context that Liberty had intervened ([37]).
55. Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 ([37]). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly,

he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass ([38]). It was in this context that he said at [39]:

“In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants’ article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1).”

56. Moses LJ then went on to say that his earlier judgment in *Dehal v. Crown Prosecution Service* [2005] 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is nothing more to prove, including proportionality, to convict of that offence ([40]).
57. In *James v. Director of Public Prosecutions* [2016] 1 WLR 2118 the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate ([31] to [34]). Offences falling into that first category were the subject of the decisions in *Norwood v. Director of Public Prosecutions* [2003] EWHC 1564 (Admin), *Hammond v. Director of Public Prosecutions* [2004] EWHC 69 (Admin) and *Dehal*.
58. 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”. Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see Ouseley J at [35]).
59. The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required ([37] to [38]).
60. *James* concerned an offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a direction imposing

conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 ([38] to [43]). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61. There are also some instances under the common law where proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 ECHR. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the community. In *Gifford v. HM Advocate* [2012] SCCR 751 the High Court of Justiciary held that “the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace” [15]. Lord Reed added at [17]:

“Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under arts 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg Court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention.”

62. Similarly, in *R v. Brown* [2022] EWCA Crim 6 the appellant rightly accepted that articles 10 and 11 ECHR do not provide a defence to the offence of public nuisance as a matter of substantive criminal law ([37]). Essentially for the same reasons, there is no additional “proportionality” ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights ([24] to [39]).
63. *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a “lawful excuse” defence and therefore falls into the first category defined in *James*. Indeed, at [2020] QB 253 [87] to [91] the Divisional Court referred to the analysis in *James*.
64. The second question certified for the Supreme Court in *Ziegler* related to the “lawful excuse” defence in section 137 of the Highways Act ([2021] 3 WLR at [7], [55] to [56] and [98] to [99]). Lord Hamblen and Lord Stephens JJSC referred at [16] to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the “lawful excuse” defence “depends on the proportionality assessment to be made”.
65. The Supreme Court’s reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second

category defined in *James*, where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way *sub silencio* suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* or offences such as section 68. That was unnecessary to resolve the issues before the court.

66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.
67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.
68. The passages in *Ziegler* upon which the respondent relies have been wrenched completely out of context. For example, the statements in [57] about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application whenever a criminal offence engages articles 10 and 11. The same goes for the references in [39] to [60] to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paragraphs [62] to [70] are entitled “deliberate obstruction with more than a *de minimis* impact”. The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the “lawful excuse” defence in section 137.
69. We are unable to accept the respondent’s submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.
70. Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate “proportionality” ingredient, the question of a declaration of incompatibility under section 4 of the 1998 Act would arise. If granted, it would remain a matter for



Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71. Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well-established that such measures are permissible (see e.g. *Animal Defenders International v. United Kingdom* [2013] EMLR 28).
72. It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a “proportionality” ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.
73. The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.
74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).
75. Secondly, section 68 goes beyond simply protecting a landowner’s right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.
76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.
77. Fourthly, articles 10 and 11 do not bestow any “freedom of forum” to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

78. Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.
79. Sixthly, the Supreme Court in *Richardson* regarded the private law of trespass as a limitation on the freedom to protest which is “unchallengeably proportionate”. In our judgment, the same conclusion applies *a fortiori* to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.
80. We gain no assistance from para. 80 of the judgment in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin), relied upon by Mr Moloney. The legislation considered in that case was enacted to address public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.
81. It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision of the Supreme Court in *Ziegler* nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on Ground 2.

### **Ground 3**

82. In view of our decision on Ground 2, we will give our conclusions on ground 3 briefly.
83. In our judgment the prosecution also succeeds under Ground 3.
84. The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest. One object of section 68 is to discourage disruption of the kind committed by the respondent, which, according to the will of Parliament, is against the public interest. The respondent (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg Court has often observed that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the Common Law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.

85. The judge accepted arguments advanced by the respondent which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or “interference with the rights of anyone other than HS2”. She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.
86. In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the respondent did not act violently. But if the respondent had been violent, his protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.
87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to “only” £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.
88. In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

## **Conclusions**

89. We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler*:
- 1) *Ziegler* does not lay down any principle that for all offences arising out of “non-violent” protest the prosecution has to prove that a conviction would be proportionate to the defendant’s rights under articles 10 and 11 of the European Convention on Human Rights;
  - 2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant’s rights under articles 10 and 11 because the offence in question was subject to a defence of “lawful excuse”. The same would also apply to an offence which is subject to a defence of “reasonable excuse”, once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevicius* and *Barraco* are instructive on the correct approach (see [39] above);

- 3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question;
90. The appeal must be allowed. Our answer to both questions in the Case Stated is "no". The case will be remitted to the Magistrates' Court with a direction to convict the respondent of the offence charged under section 68(1) of the 1994 Act.