



Neutral Citation Number: [2023] EWHC 1063 (Admin)

Case No: CO/1483/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2023

Before :

LORD JUSTICE BEAN
MRS JUSTICE FARBEY

Between :

DIRECTOR OF PUBLIC PROSECUTIONS
- and -
CATHY EASTBURN

Appellant

Respondent

Tom Little KC and James Boyd (instructed by CPS) for the **Appellant**
Henry Blaxland KC and Blinne Ní Ghrálaigh KC (instructed by Hodge, Jones and Allen) for
the **Respondent**

Hearing date: 25 April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 May 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

This is the judgment of the court.

1. Parliament Square has been the scene of many protests and demonstrations. The central part of the square is a pedestrian area, mainly grass, known as Parliament Square Gardens. This is surrounded by busy roads on all sides, one of which is Parliament Street. On 2 September 2020, Cathy Eastburn sat down in Parliament Street as part of an Extinction Rebellion protest. She was told by a police officer that this was unlawful because a direction had been given under section 14 of the Public Order Act 1986 that the assembly had to be confined to Parliament Square Gardens. She remained seated in Parliament Street. She was arrested and charged with the offence of failing to comply with the direction.
2. On 25 January 2022, she was tried at the City of London Magistrate’s Court before Judge (DDJ) Bone, who acquitted her. The Director of Public Prosecutions appeals against that acquittal by way of case stated.

Public Order Act 1986 s 14

3. This provides, so far as relevant:

“(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that –

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community ...

... he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such ... disruption...

(2) In subsection (1) “the senior police officer” means –

(b) in relation to an assembly intended to be held, the chief officer of police.

(3) A direction given by a chief officer of police by virtue of subsection (2)(b) shall be given in writing.

(5) A person who takes part in a public assembly and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

(9) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

4. Section 14 has been amended with effect from 28 June 2022 by s 75 of the Police, Crime, Sentencing and Courts Act 2022, but those amendments do not affect the present case.
5. Section 15(2) of the 1986 Act delegates the powers of a chief officer to an Assistant Commissioner of the Metropolitan Police. Assistant Commissioner (“AC”) Rolfe gave the direction in the present case.

Findings of fact

6. DDJ Bone (“the judge”) made the following findings of fact set out in the case stated:

“8. By way of background, on 1st September 2020 an Extinction Rebellion demonstration took place in and around Parliament Square, London.

9. This case involved another Extinction Rebellion demonstration that was planned for the following day.

10. The cause of both demonstrations was climate change and the police had prior knowledge of the second event.

11. On 2nd September 2020, protesters again gathered in and around Parliament Square, London and the Respondent was one of those protesters.

12. It was not in dispute that she was exercising her ECHR Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly) rights at the relevant time.

13. I heard testimony from AC Rolfe, PC McGaffin, and the Respondent. The arrest was captured on police body-worn video footage which I viewed with the parties via a lap-top because the usual court video playing facilities were not working.

14. I found the following facts proved to the criminal standard:

a. The protest on 2nd September 2020 was an assembly intended to be held at the time the direction with conditions was made.

b. AC Rolfe was the appropriate senior police officer lawfully able to make that direction in advance. She did so in writing on 1st September 2020 and when doing so, gave evidence that she considered the ECHR rights of the protesters.

c. When making her direction, AC Rolfe reasonably believed that the intended assembly may result in serious disruption to the life of the community.

d. Her reasonable belief was based upon police experience of Extinction Rebellion demonstrations in London.

e. AC Rolfe anticipated among other consequences that the intended assembly might delay traffic, impede the emergency services, prevent access to the Houses of Parliament, disrupt the working of the Supreme Court and/or negatively impact on commerce.

f. Based upon police experience of Extinction Rebellion demonstrations, AC Rolfe did not however anticipate serious public disorder or violence.

g. The conditions imposed by AC Rolfe were those that appeared to her necessary to prevent serious disruption to the life of the community.

h. The conditions allowed the protest to take place but confined the assembly to Parliament Square Gardens so that traffic could continue to move. AC Rolfe also made clear that police officers were briefed to seek compliance with the conditions and were expected to exercise their discretion in making arrests.

i. On 2nd September 2020, the Respondent was part of the assembly to which the direction with conditions applied and was sitting in the road in Parliament Street.

j. Police officers informed her of the fact that the direction had been made which prohibited her from sitting in that road.

k. The Respondent was given an opportunity to leave the road. She continued to sit in the road and her non-compliance was both 'knowing' and within her control.

15. I therefore found the statutory ingredients of the offence to have been proved.

16. However, I did not find it proved that the Respondent had caused or contributed to anything other than very minor disruption.

17. No specific evidence was offered on behalf of the Applicant about how long the Respondent and/or others

18. The police body-worn video footage captured a peaceful protest and appeared to show some vehicles and members of the public on foot passing the assembly without difficulty. The area was also said not to be as busy as usual due to the impact of the Coronavirus pandemic.

19. It followed that whilst AC Rolfe had held the requisite belief to make a direction imposing conditions in advance, on 2nd

September 2020 it was not established there had been any serious disruption to the life of the community.”

The decision of the deputy district judge

7. The prosecution submitted to the judge that if he found the statutory ingredients of the offence under s 14 proved, he should convict Ms Eastburn without further consideration. On her behalf, however, it was submitted that in addition to the statutory ingredients the prosecution was also required to prove to the criminal standard that a conviction would be a proportionate interference with Ms Eastburn’s rights under ECHR Articles 10 and 11. The judge was referred in particular to the decisions of this court in *James v DPP* [2015] EWHC 3296 (Admin), [2016] 1 WLR 1118 and of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23 now reported at [2022] AC 408.

8. In the case stated the judge explained his decision to acquit as follows:-

“32. It is ... established law that:-”

“a. Whilst Article 10 and Article 11 provide important ECHR rights, they are not unfettered rights. A state can impose restrictions upon those rights provided the restrictions are lawful, necessary in a democratic society and proportionate to, for example, preventing disorder and protecting the rights and freedoms of others; and

b. Article 10 and Article 11 rights are therefore not a trump card for protesters, see *Westminster City Council v Haw* [2002] EWHC 2073.

33. Given I did not hear argument that the Respondent should not be prosecuted, I did not refer to that part of the judgement in *James* which makes clear the decision to prosecute is not an issue for a trial Court.

34. The decision I made concerned the proportionality of convicting the Respondent as a restriction of her ECHR rights.

35. That was a decision I made following the finding of facts at the conclusion of a trial. The trial was never argued before me to be an abuse of process and for completeness, the legality of the arrest was never challenged.

36. Arrest, prosecution, conviction, and sentence are all restrictions upon ECHR rights, but the Supreme Court in *Ziegler* confirmed that different considerations to each may apply to the proportionality of those restrictions, see below.

37. I acknowledged in my judgement that *Ziegler* was a case involving Obstructing the Highway, a different offence contrary to Section 137 Highways Act 1980. The second question

considered by the Supreme Court centred around the defence of lawful excuse, not a statutory defence in this case.

38. However, I accepted that the Supreme Court had clarified in Ziegler important principles about how a trial Court should approach the conviction of a defendant who is alleged to have offended whilst exercising her Article 10 or Article 11 ECHR rights.”

39. I was referred to the judgement of Lord Hamblen and Lord Stephens at para 57:

“The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) and 11(2): see paras 14-15 above. Article 11(2) states that “No restrictions shall be placed” except “such as are prescribed by law and are necessary in a democratic society ...” In *Kudrevičius v Lithuania* (2016) 62 EHRR 34, para 100 the European Court of Human Rights (“ECtHR”) stated that “The term ‘restrictions’ in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards” so that it accepted at para 101 “that the applicants’ conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly”. Arrest, prosecution, conviction, and sentence are all “restrictions” within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest, which is typically the police action on the ground, depends on, amongst other matters, the constable’s reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police’s perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales (see for instance para 120, 153 and 154) who considers that the defence of “lawful excuse” under section 137 depends on an assessment of the

proportionality of the police response to the protest and agree with Lady Arden at para 94 that “the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not” (emphasis added).”

40. Here, the Supreme Court referred to the response of a trial Court to a prosecution.

41. It was the proportionality of a conviction when Article 10 and/or Article 11 were engaged that was to be considered.

42. Although the alleged offending in Ziegler was Obstructing the Highway and the defence of lawful excuse was under discussion, ‘the more appropriate question’ found by the Supreme Court was whether the convictions in of themselves were justified restrictions of ECHR rights.

43. I therefore concluded that I as a public authority bound by both Section 3(1) and Section 6(1) of the Human Rights Act 1998 did need to consider the proportionality of convicting the Respondent as a restriction of her ECHR rights.

44. It follows I interpreted Ziegler to have wider application in protest cases and concluded the judgement was not confined to offences contrary to Section 137 Highways Act 1980.

45. I did not agree with other submissions made on behalf of the Respondent. I did however agree that in addition to the statutory ingredients of the offence, the Applicant was required to prove to the criminal standard that a conviction would be a proportionate interference with her ECHR rights.

46. If I should not have agreed that, then I accept I should not have acquitted the Respondent.

47. In that regard, I have subsequently been referred by the Respondent to R v Brown (2022) EWCA Crim 6 in which Lord Burnett of Maldon CJ said at para 29:

‘We shall say little more about Ziegler in this case. The exact ramifications of the decision of the Supreme Court will call for exploration in other cases where they arise directly in any of three jurisdictions of the United Kingdom and possibly by the Supreme Court once more. The decision appears to have been misunderstood by some as immunising peaceful protesters from arrest and from the operation of the criminal law in broad circumstances, which on any view it does not.’

48. Whilst I did not accept Ziegler immunised peaceful protesters in that way, it may well be that the ramifications of the decision of the Supreme Court do need to be explored in this case.

49. Having however determined that I did need to make a proportionality assessment concerning the conviction of the Respondent, I answered the five questions found at para 63 of the Divisional Court judgement in Ziegler, approved of by the Supreme Court.

50. In this case, it was clear that:

(Q1) what the Respondent did was in the exercise her Article 10 and Article 11 rights;

(Q2) the conviction of the Respondent by me as a public authority was an interference with those rights;

(Q3) the interference was prescribed by law; and

(Q4) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights and freedoms of others.

51. That left (Q5), whether the interference with either of the rights was ‘necessary in a democratic society’ to achieve that legitimate aim?

52. I concluded the aim was sufficiently important, there was a rational connection between the means chosen and the aim in view and there were no less restrictive alternative means to achieve that aim.

53. However, I was finally required to consider if there existed a fair balance between the rights of the individual and the general interest of the community, including the rights of others. The Divisional Court noted that question was likely to be of crucial importance.

54. The Supreme Court in Ziegler reiterated at para 59 that determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

55. I therefore applied the facts of this case to some of the matters the Supreme Court said may be relevant, paras 71 - 78. That was with reference to earlier decided HR authority, particularly City of London Corpn v Samede [2012] EWCA Civ 160:

a. The extent to which the continuation of the protest would breach domestic law –

I found this Respondent was involved in a peaceful protest and her behaviour was likely to involve no other offence, save that contrary to Section 137 Highways Act 1980. The offence in this case and that offence are both punishable by fine and within the context of a protest may be sentenced by way of discharge.

b. The importance of the precise location to the protesters –

The purpose of this assembly was so Extinction Rebellion protesters such as the Respondent could make their presence and views known to Members of Parliament who were debating the Climate and Ecological Emergency (CEE) Bill that day. It follows the location near Parliament was therefore very important. Whilst AC Rolfe had made a direction with conditions that allowed the protest to take place in Parliament Square Gardens, the right to freedom of assembly includes the right to choose the time, place, manner, and modalities of the assembly.

c. The duration of the protest –

The Respondent with others was only established to have sat in the road for a short period of time. The police body-worn video footage showed she had been arrested and removed within minutes of being approached by the police. Very little disruption was proved either caused or contributed to by her. That was also the extent to which the assembly occupied the road.

d. The extent of the actual interference the protest caused to the rights of others, including the rights of any members of the public –

Given very little disruption was proved, any interference with the rights and freedoms of others in this case was limited. The police body-worn video footage appeared to show members of the public passing the assembly on foot without difficulty, as well as some vehicular traffic.

e. Whether the views giving rise to the protest relate to very important issues and whether they are views which many would see as being of considerable breadth, depth and relevance –

I ventured no views of my own but found the views of the Respondent went to very important issues. Indeed, the issues were of such significance that they were to be debated in Parliament that day.

f. Whether the protesters believed in the views they were expressing –

I accepted the Respondent had for many years sincerely held her views.

56. Prior notification of the assembly was not however something I could make any real findings about based upon the evidence presented and I did not do so. It was not in dispute that the assembly on 2nd September 2020 had been advertised, including by social media and the police were aware of it.

57. Having considered all those matters relevant to the proportionality assessment, I found I could not be sure a conviction would strike a fair balance between the rights of the individual and the general interest of the community, including the rights of others.

58. There was no evidence that the Respondent had either caused or contributed to anything other than very minor disruption or interfered in any material degree with the rights and freedoms of others whilst she was exercising her ECHR rights regarding important issues.

59. My answer to (Q5) as to whether the interference with either of the rights was ‘necessary in a democratic society’ to achieve the legitimate aim was therefore ‘no’.

60. The Applicant having not proved to the criminal standard that a conviction would be a proportionate interference with her ECHR rights, I acquitted the Respondent.

61. I made it clear that the case set no precedent and had been determined solely upon the facts as proven before me.”

Subsequent case law

9. Since the judge gave his decision on 25 January 2022 *Ziegler* has been considered in three later cases on which Mr Little relies. The first was the decision of this court given on 30 March 2022 in *DPP v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888. The second was the decision of the Court of Appeal (Criminal Division) given on 28 September 2022 in *Attorney General’s Reference No.1 of 2022*, better known as the *Colston* case [2022] EWCA Crim 1259, [2023] 2 WLR 651. The third was the decision of the Supreme Court given on 7 December 2022 on a reference by the Attorney General of Northern Ireland reported as *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] 2 WLR 33 to which we will refer as the *AGNI* case.

Submissions in this court

10. Mr Little KC submits that in the light of the three cases to which we have just referred it is now plain that *James v DPP* remains good law, and that once the elements of the s 14(5) offence are made out there is no scope for the court to consider whether a conviction would be proportionate. *Ziegler* can be seen to relate only to offences, such as obstruction contrary to s 137 of the Highways Act 1980, to which a defence of reasonable excuse or lawful excuse has been provided. *James*, he submits, was criticised by counsel for the acquitted Respondent in the *Colston* case but was nevertheless approved. It is plain from the case stated by the judge that if no proportionality assessment was to be carried out he would have convicted Ms Eastburn: indeed he said as much at paragraphs 45-46 of the case stated.
11. Mr Blaxland KC, for the Respondent, did not challenge the lawfulness of the s 14 direction nor that of Ms Eastburn's arrest. He focused on the proportionality of the conviction and submitted that the judge was entitled to decide, on the facts which he found proved, that a conviction would be a disproportionate interference with Ms Eastburn's Article 10 and Article 11 rights. He submitted that *James* was distinguishable in that (in contrast with the present case) serious disruption had occurred. He also argued that *James* should be treated with caution because it contained no reference to ECtHR authorities. The critical question for us, he submitted, is whether the principles set out by the majority in *Ziegler* apply in a case brought under s 14 of the 1986 Act. That question should be answered "yes". There was, he said, nothing in the *AGNI* case which required us to hold that *Ziegler* is inapplicable to a charge under s 14.
12. Mr Blaxland referred to the decision of the Fourth Section of the Strasbourg court in *Bumbes v Romania* (18079/15, 3 May 2022). In that case the applicant had protested against a mining project by handcuffing himself to the barrier at the entrance to a government building's car park. It is apparent from paragraph 12 of the judgment that no one tried to use the barrier in question to access the car park while the applicant was there and his protest did not affect the car and pedestrian traffic in the area. Mr Blaxland cited the following observations of the ECHR:

"95. Where demonstrators do not engage in acts of violence it is important for the public authorities to show a degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Oya Ataman v. Turkey*, no. 74552/01, § 42, ECHR 2006-XIV). The appropriate "degree of tolerance" cannot be defined in abstracto: the Court must look at the particular circumstances of the case and particularly the extent of the "disruption of ordinary life" since it is understood that any large-scale gathering in a public place inevitably creates inconvenience for the population or some disruption to ordinary life (see *Primov and Others*, cited above, § 145, and *Novikova and Others*, cited above, § 165). The actual degree of such tolerance and its specific manifestations vary on account of the particular circumstances of each case, for instance where dispersal of the event is envisaged with recourse to physical force (see *Primov and Others*, cited above, §§ 156-63, and *Novikova and Others*, cited above, § 166) or where it concerns

an event which was not notified in advance to the authorities but (i) was an urgent reaction to an ongoing political event (see Bukta and Others, cited above, §§ 36-38, and Novikova and Others, cited above, § 166) or (ii) was a purely obstructive protest action which because of its very nature it is doubtful, in principle and as a practical matter, that it could be subjected to prior-notification requirements (see Chernega and Others v. Ukraine, no. 74768/10, § 239, 18 June 2019).

...

98. The Court reiterates that, as acknowledged also by the national courts, the proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other (see Kudrevičius and Others, cited above, § 144). Nevertheless, the Court notes that the national courts did not seek to strike this balance, giving the preponderant weight to the formal unlawfulness of the event in question (see Obote v. Russia, no. 58954/09, § 43, 19 November 2019).

...

100. The authorities' impugned actions disregarded the emphasis repeatedly placed by the Court on the fact that the enforcement of rules governing public assemblies should not become an end in itself (see the case-law cited in paragraphs 94 above; and also Kudrevičius and Others, cited above, § 155; and Obote, cited above, § 42)."

13. This is an interesting and, if we may say so, a sensible decision on the facts – the incident which led to Mr Bumbes' conviction appears to have been remarkably trivial – but the views expressed by the Fourth Section cannot prevail over those contained in domestic case law contained in or approved by judgments of higher courts which are binding on us, namely the Court of Appeal or the UK Supreme Court.

Discussion

14. In *James v DPP* the main issue was whether a decision to bring a prosecution under s 14 of the Public Order Act 1986 was subject to a test of proportionality. The Divisional Court held that it was not and the only basis of challenge to a decision to prosecute was the exceptional one of abuse of process. In the leading judgment Ouseley J, said:-

“33. The fact that the proportionality of a decision to prosecute in relation to articles 10 and 11 cannot be raised before trial courts, otherwise than as an abuse of process argument, does not mean that articles 10 or 11 cannot play their proper role in the trial.”

15. In paragraphs 34 and 35 Ouseley J went on to distinguish between two categories of offences. In the first category the proportionality of the prohibitions or restraints on freedom of expression and assembly form part of the statutory defence that the accused's conduct was reasonable. In the second category, by contrast:

“once the specific ingredients of the offence have been proved, the conduct of the accused has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado.”

16. Ouseley J went on to explain why the s 14 offence fell into the second category:

“39. To my mind, the starting point is the power to give a direction in s14(1). It is plain that it requires the senior officer to hold the necessary belief that a public assembly may result in serious public disorder, and to have reasonable grounds for that belief. If, upon challenge by a person accused of an offence under s14(5), the officer cannot prove that he actually held the necessary belief and did so upon reasonable grounds, his direction would be unlawful. It is necessarily implicit in s14(5) that the direction containing the conditions must be lawful. *Acquittal would follow, if it were not.* As with *Bauer*, no other words are necessary to imply proportionality at that stage. Satisfaction of the statutory test is proof of the proportionality of the making of a direction. [emphasis added]

40. If the officer holds that belief on reasonable grounds, the conditions imposed by the direction must be such "as appear to him necessary to prevent such disorder". Again, that "necessity" must genuinely appear to him. If no such necessity had appeared to him, the condition would not be lawful; non-compliance with it would not be an offence. If that necessity had appeared, I have some difficulty envisaging the circumstances in which the qualifications to Article 10 and 11 would not also inevitably be satisfied. Rather as in *Bauer*, proof of the ingredients of the offence itself would demonstrate the proportionality of the condition, non-compliance with which underlies the offence. Conviction would require proof of a reasonable belief actually held by the Senior Officer that a public assembly may result in serious disorder, so he had power to make a lawful direction, the purpose of which is to impose conditions on a public assembly; and conviction would then also require proof that it appeared to him that such a condition was necessary to prevent the serious public disorder he reasonably believed may exist.”

17. It is important to emphasize the limited scope of this appeal by way of case stated. Mr Little accepted that if a section 14(1) direction were given which was wider than could reasonably appear necessary to prevent serious disruption, that could be challenged either by judicial review or by way of defence to a criminal charge. An example of this might be where serious disruption was anticipated at one specific location but a

direction was given covering the whole of London. As Ouseley J said in *James*, if the direction containing the conditions were not lawful, acquittal would follow. But in the present case – rightly, in our view - the lawfulness of the direction given by AC Rolfe is not in question. The only issue which the case stated asks us to consider is whether, having found that the statutory ingredients of the offence had been proved, the judge was right to go on to consider whether a conviction would be a proportionate interference with Ms Eastburn’s ECHR rights.

18. *James* was considered in detail by this court in *Ziegler* [2020] QB 253 at [85]-[92] but (although cited by counsel for the Appellants) was not referred to in the judgments when *Ziegler* reached the Supreme Court. It was, however, referred to with approval by the Divisional Court (Lord Burnett of Maldon CJ and Holgate J) in *Cuciurean*. At paragraph 60 they said that the charge considered in *James* (s 14 of the 1986 Act) “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”.
19. The Divisional Court in *Cuciurean* went on to consider the decision of the Supreme Court in *Ziegler*, noting that *Ziegler* was concerned with the offence under s 137 of the Highways Act 1980 which was subject to a lawful excuse defence. They said:-

“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.

...

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. ...

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. ...”

20. Both *James* and *Cuciurean* came under sustained attack before the CACD (Lord Burnett CJ, Holgate and Saini JJ) in the *Colston* case. A statue of the slave trader Edward Colston had been removed from its prominent location in Bristol and thrown into the harbour. Four protesters were charged with the offence of causing criminal damage without lawful excuse. They elected trial in the Crown Court and were acquitted by the jury. One of the defences raised was that a conviction would be a disproportionate interference with the defendants’ right to protest. *Ziegler* was relied on. The CACD approved what two of its members had already held in *Cuciurean*, namely that *Ziegler* did not lay down a general principle that for any offence arising out of non-violent protest, the prosecution must prove that a conviction would be proportionate to the defendant’s rights under Articles 10 and 11. They held that nothing in *Ziegler* cast doubt on the effect of the line of authority culminating in *James*. They noted, however, that the Supreme Court had by this time heard argument and reserved judgment in the *AGNI* case and that anything said by the CACD would clearly be subject to revision if the Supreme Court were to take a different view.
21. In the *AGNI* case the Northern Ireland Assembly had passed a bill allowing the designation of “safe access zones” adjacent to premises providing abortion services. The bill created an offence of doing certain acts within a designated zone and provided no defence of reasonable excuse. The question referred by the Attorney General to the Supreme Court is whether the bill was outside the legislative competence of the Assembly on the grounds that it involved a disproportionate interference with the Convention rights of anti-abortion protestors under Articles 9, 10 and/or 11 of the ECHR. A seven member panel of the Supreme Court, none of whom had sat in *Ziegler*, held that the bill did not involve a disproportionate interference with Convention rights and was accordingly within the legislative competence of the Assembly.
22. The single judgment in the Supreme Court was given by Lord Reed PSC. He considered the cases of *Ziegler* and *Cuciurean* in some detail. He referred to the observation of Lords Hamblen and Stephens JJSC at paragraph 59 of *Ziegler* that “determination of the proportionality of an interference with ECHR rights is a fact-specific inquiry which requires the evaluation of the circumstances in the individual case”, noted that this dictum had been widely treated as stating a universal rule, and held at paragraph 29 that that view was mistaken.
23. At paragraph 48 Lord Reed summarised the decision in *James* including the finding that where the prosecution satisfied the statutory tests for the imposition of a direction or condition under s 14 of the Public Order Act 1986, that was proof that the imposition of the condition was proportionate. The other mention of *James* begins at paragraph 52.

Having set out the Divisional Court's distinction between the two categories of offence, Lord Reed went on to say that it is a mistake to think that all offences can be placed into one of the two categories, or to suppose that a reference to lawful or reasonable excuse in the definition of an offence necessarily means, in cases associated with protests, that a proportionality assessment must always be carried out.

24. Lord Reed held at paragraph 54 that where a defendant relies on Article 9, 10 or 11 as a defence to a protest-related charge, the first question is whether those articles are engaged. Since there is no dispute about that in Ms Eastburn's case, we can go straight on to paragraph 55:

“If articles 9, 10 or 11 are engaged, the second question which arises is whether the offence is one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case. The cases discussed in paras 47-50 above, and *Cuciurean*, are examples of circumstances where that approach was applied. Indeed, many commonly encountered criminal offences, such as offences of violence, and offences concerned with damage to property, are likely to be defined in such a way as to make an assessment of proportionality unnecessary, either because the conduct in question falls outside the scope of protection under the Convention or because proportionality is inherent in the ingredients of the offence. In considering whether the ingredients of the offence ensure the proportionality of a conviction, it is also necessary to bear in mind that decision-makers enjoy a margin of appreciation in relation to interferences with rights protected by articles 9, 10 and 11: see, for example, *Delfi AS v Estonia* 62 EHRR 6, para 131, and more recently *Lilliendahl v Iceland* (Application No 29297/18) (unreported) given 12 May 2020, paras 30-31. Courts therefore have to accord appropriate respect to the assessment made by the decision-maker, whether that be Parliament in the case of primary legislation or, in the case of offences created by subordinate or devolved legislation, the government or the devolved legislatures or executives.”

25. This passage shows that in the view of the Supreme Court s 14 of the 1986 Act is an example of an offence-creating statute where the ingredients of the offence in themselves ensure the compatibility of a conviction with the defendant's rights under Articles 10 and 11. There is no requirement for the prosecution to prove that a conviction would be a proportionate interference with those rights. That is decisive of the present appeal. Having found the ingredients of the offence proved, the judge should have convicted the Respondent without further consideration. His finding that she had

caused very little disruption can properly be reflected in the level of any penalty to be imposed.

26. For these reasons we allow the DPP's appeal and remit the case to the City of London Magistrates' Court (to be heard by DDJ Bone if he is available) with a direction to convict.