Neutral Citation Number: [2023] EWHC 2938 (Admin)

Case No: CO/763/2023
AC-2022-LON-000887

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

Tuesday, 21st November 2023

Before:
LORD JUSTICE POPPLEWELL
MR JUSTICE FORDHAM

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Between:

THE KING (on the application of DIRECTOR OF PUBLIC PROSECUTIONS)	**Claimant**
- and –	
MANCHESTER CITY MAGISTRATES' COURT	**Defendant**
- and –	
(1) RUTH WOOD	**Interested**
(2) RADICAL HASLAM	**Parties**

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Tom Little KC and James Boyd (instructed by CPS) for the **Claimant**
Tom Wainwright and Elena Papamichael (instructed by Kellys Solicitors) for the **First Interested Party**
Owen Greenhall and Mira Hammad (instructed by Robert Lizar Solicitors) for the **Second Interested Party**

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Hearing date: 26.10.23

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Fordham J

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MR JUSTICE FORDHAM:

Introduction

1. On 15 November 2022 at Manchester Magistrates' Court, Senior District Judge Goldspring ("the Judge") acquitted the Interested Parties of an offence of using threatening, abusive or insulting words or behaviour with intent, contrary to s.4A of the Public Order Act 1986 ("the 1986 Act"). By an application dated 5 December 2022, the Prosecution asked the Judge to state a case for an appeal to the High Court pursuant to s.111 of the Magistrates' Courts Act 1980 ("the 1980 Act"). The application identified as the decision sought to be appealed the acquittal of the Interested Parties on the basis that "the interference" with their Article 10 and/or Article 11 Convention rights (the "Convention Rights") was "disproportionate", and their conduct was "therefore reasonable" under s.4A(3)(b) of the 1986 Act. The Judge was invited to state this question: "was there sufficient evidence on which I could reasonably find as a fact that the [Interested Parties'] conduct amounted to a reasonable exercise of their Convention rights"? The Judge refused to state a case, on the basis that the application was "frivolous", and issued a reasoned certificate to that effect ("the Certificate") pursuant to s.111(5) of the 1980 Act. This is the Prosecution's claim for judicial review of the acquittal decision, and the decision not to state a case, for which permission for judicial review was granted at an oral hearing on 22 June 2023.

2. Section 4A(1) and (3)(b) of the 1986 Act provide:

> ***(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he – (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress… (3) It is a defence for the accused to prove – … (b) that his conduct was reasonable.***

I am going to describe as "elements" of the s.4A(1) offence: the necessary conduct ("uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or displays any writing, sign or other visible representation which is threatening, abusive or insulting"); the necessary intent ("intent to cause a person harassment, alarm or distress"); and the necessary consequence ("thereby causing that or another person harassment, alarm or distress"). I will refer to s.4A(3)(b) ("[their] conduct was reasonable") as the "Reasonable Conduct Defence". There is a related but lesser offence under s.5 of the 1986 Act (harassment, alarm or distress) which also has the Reasonable Conduct Defence (s.5(3)(c)).

3. The provisions centrally relevant to the Convention Rights are found in the Human Rights Act 1998 ("the HRA") at ss.3(1) and 6(1) and Schedule 1 Articles 10 and 11. These provide as follows:

> ***3(1). 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…***
>
> ***6(1). It is unlawful for a public authority to act in a way which is incompatible with a Convention right…***

> ***Article 10. (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.***
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> ***Article 11. (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.***

The Issues

4. The claim for judicial review has raised 3 issues. (1) Whether the Judge's decision that the Interested Parties' conduct amounted to a reasonable exercise of Convention rights involved a material misdirection as regards the application of the statutory defence of reasonable conduct. (2) Whether that decision was unreasonable in failing to take into account a number of highly relevant considerations. (3) Whether the Judge was wrong to characterise the application to state a case as frivolous.

5. Issue (1) – as it developed – has raised two linked but distinct questions: (i) as to the burden of proof (§13-25 below); and (ii) as to the proportionality assessment (§§26-42 below). Issues (1) and (2) are issues of substance which could have arisen on a case stated appeal. The judicial review court, dealing with a challenge to a refusal to state a case, can address such questions directly in an appropriate case: Sunworld Ltd v Hammersmith & Fulham London Borough Council [2000] 1 WLR 2102 at 2106-2107.

The Ruling and Reasoning

6. The Judge's ruling acquitting the Interested Parties was given orally at the end of a two-day trial on 14 and 15 November 2022. There are two sources on which we can rely as constituting the Judge's reasons, and which also identify the background and context. The first is a note approved by the Judge on 15 November 2022 after giving the ruling earlier that day ("the Approved Note"). It contained text extracted by Mr Smart – the Prosecution advocate – from his contemporaneously-typed notes of what the Judge had said at the hearing. The second source is the Certificate, written by the Judge.

7. By way of overview, the Judge recorded (Certificate §§3-4):

> ***3. Mr Haslam and Ms Wood were both charged with an offence under s.4A Public Order Act 1986 (the Act). In respect of these offences, the case was not subject to a half time submission***

> ***and having heard evidence from witnesses for both the prosecution and defence, plus submissions, I acquitted them both.***
>
> ***4. I emphasised that my decision set no precedent as to what may or may [not] constitute unlawful behaviour in other circumstances – but that in this case, on these facts, the use of those words did not amount to an offence, as in the circumstances it was reasonable and protected by the Convention.***

8. As to the nature of the incident with which the case was concerned, the Certificate recorded the following within a section entitled "the facts" (Certificate §§5-12):

> ***5. On 4th October 2021, the Conservative Party annual conference was taking place at the Midland Hotel in Manchester. Outside the hotel were a large number of protestors with placards and some with drums. At approximately 15:50 Iain Duncan Smith left the Midland Hotel to walk to the Mercure Hotel for a conference about 'Brexit'. He was accompanied by his wife, Betsy Duncan Smith, and by Primrose Yorke.***
>
> ***6. Between five and eight protestors, including Ruth Wood, began to follow Mr Duncan Smith remaining some distance behind them at all times.***
>
> ***7. Witnesses gave evidence that some of those following Mr Duncan Smith were shouting and swearing. There was no evidence as to what, if anything, Ruth Wood said or did at this stage.***
>
> ***8. As Iain Duncan Smith crossed a side road, an individual ran up behind him and placed a traffic cone on his head. This individual was said to be Elliott Bovill who stood trial with the two defendants but was found not guilty following a submission made at the close of the prosecution case that the identification was so weak that, following the guidance in Galbraith and Turnbull, no tribunal of fact could properly convict the defendant.***
>
> ***9. Mr Duncan Smith removed the traffic cone, called the protestors 'pathetic' and continued on his way.***
>
> ***10. The prosecution case against Ruth Wood was based upon video footage taken at this point in the incident, after the traffic cone had been removed and shortly before Mr Duncan Smith arrived at the Meridian hotel. In the footage, Ruth Wood can be seen and heard banging a drum and shouting, still some distance behind Iain Duncan Smith and his party.***
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> ***11. The prosecution case was that in the footage Ruth Wood had called Iain Duncan Smith a 'Tory cunt'. However, after the footage was played in cross-examination to the Officer in the Case, DC Foy, the Crown accepted that she clearly said 'Tory scum'. Officers confirmed that some of the other protestors who had been part of the group following Iain Duncan Smith were arrested but not charged.***
>
> ***12. Iain Duncan Smith, Betsy Duncan Smith and Primrose Yorke gave evidence that they felt alarmed as a result of the events.***

9. As to further evidence about the words used, and about each of the Interested Parties' conduct in using them, the Certificate continued with this within the same section entitled "the facts" (Certificate §§13-19):

> ***13. Evidence was also heard about the regular use of the words 'Tory scum' at protests, the fact that the phrase had been in the news at the time and that badges were being sold and worn at the conference by Conservative party members.***
>
> ***14. Both defendants gave evidence.***
>
> ***15. Ms Wood gave evidence that she attended the protest on 4th October 2021 and participated in a 'wall of sound' protest outside the conference centre, during which she and others played***

> ***drums, as she had done at many other protests. She explained how her job working with homeless people in her local community meant she felt very strongly about the impact that Conservative party policies (on her view not the court's) were having on peoples' lives.***
>
> ***16. The decision to follow Iain Duncan Smith was spontaneous and not planned or coordinated with others. She did not notice his companions and stayed approximately ten feet behind Iain Duncan Smith throughout.***
>
> ***17. Ms Wood accepted that she banged her drum and called Iain Duncan Smith 'Tory scum'. She recalled that she had heard the term 'Tory Scum' being used throughout the weekend of protests as well as in many other protests she had attended previously. Indeed, she felt that it was so common that it was not perceived as offensive and had lost its power in the content of protest.***
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> ***18. Ms Wood also accepted that she said 'fuck off out of Manchester', because she felt strongly that as a result of Conservative Party policies (and those of Iain Duncan Smith specifically) he was not welcome there. She stated that she had no intention to cause Iain Duncan Smith, or anyone else, any alarm or distress, and she did not perceive that any had in fact been caused. Had she thought it was causing anyone harassment, alarm or distress she would have stopped.***
>
> ***19. The case against Radical Haslam, was the use of the term "Tory Scum" , however it must be seen that it was in the context of a speech , in which [Radical Haslam] said:- "Shame on you for 4 million children growing up in poverty because of tory welfare reforms. Shame on you for the tripling of homelessness in this country. Shame on you for the total lack of action on climate change. Condemning my entire generation to a shitty future. Shame on you for the privatisation of our education service. Shame on you for the defunding of our NHS. These are just a small snippet of all the reasons why people hate you, why people call you scum. It doesn't come out of nowhere. It comes from what you have done to ordinary people's lives. To you this is just politics. These are just a small snippet of all the reasons why people hate you, why people call you scum. It doesn't come out of nowhere. It comes from what you have done to ordinary people's lives… shame on you, tory scum."***

10. In the same "facts" section, the Certificate continued (Certificate §§20-24):

> ***20. Both in opening the case and in closing, the prosecution confirmed that their case was that using the words 'Fuck off' and 'Tory scum' was unreasonable in the circumstances. They went on in closing to accept that their case was really based on use of the term 'Tory scum', accepting that, unfortunately swearing in and of itself is not criminal.***
>
> ***21. The Crown referred to the drumming and shouting being persistent and continuing after the incident with the traffic cone. I asked … the prosecution to set out what they said made the term 'Tory scum' unreasonable in the circumstances.***
>
> ***22. The prosecution stated they had nothing they could add to their submissions. None of the additional points now set out at paragraphs 11 and 12 of the application to state a case were raised.***
>
> ***23. Having made it clear in the course of discussion with the prosecution that I considered that they had not established that the interference with the defendant's ECHR rights was proportionate and therefore the defence of reasonableness was made out, the defence were asked whether they wished to make any closing submissions. In light of that indication, no submissions were made.***

I will explain later (§§43, 45 below) what were "the additional points" set out at paragraphs 11 and 12 of the application to state a case, to which the Judge was referring at Certificate §22.

11. As to the Judge's ruling, the Approved Note had contained these four paragraphs (the numbering is mine for ease of later cross-reference):

> ***[1] Under the legislation for the offence, must prove that in a public place with intent to cause harassment alarm or distress, a person used threatening, abusive or insulting words or behaviour. It is for the prosecution to prove to criminal standard that each defendant used words at the time causing IDS harassment alarm or distress.***
>
> ***[2] I am satisfied that there was targeting of IDS by following him and the use of Tory scum is insulting and pejorative, that was the intent of the two defendants. Under s.4A(3)(b) it is a defence for the accused to prove on balance of probabilities, more likely than not, that that behaviour was reasonable – particularly in protest cases, in the prism of convention of human rights, fundamental freedoms enshrined in articles 10 and 11.***
>
> ***[3] Lord Reid in Brutus v Cozens said; referred to paragraph 805 in judgment. That neatly encapsulates when assessing whether something that is said in context of legitimate protest goes beyond what is distasteful into criminal, we do not criminalise distasteful words if within the context of convention protections.***
>
> ***[4] The use of Tory scum was to highlight the polices of IDS, not proportionate act to criminalise those words. I do not consider the case to be proven. It is for the prosecution to disprove beyond reasonable doubt – not proportionate for CPS to criminalise words.***

The Judge's reference at Approved Note §[3] is to Brutus v Cozens [1973] AC 854 and the passage cited to the Judge is at page 862 of that law report.

Key Points at the Outset

12. Before turning to the issues, these key points warrant emphasis. (1) The issues raised in this judicial review claim are solely concerned with the Judge's approach to the Reasonableness Defence. (2) Mr Little KC (who appears with Mr Boyd for the Prosecution) accepts that the Convention Rights of each of the Interested Parties were and are engaged. (3) Mr Little KC also accepts – on a fair reading of the Judge's reasons – that the Judge found the s.4A(1) conduct element proven, solely on the basis that each Interested Party used "insulting words". (4) On a fair reading of the Judge's reasons, the Judge found the intent and consequence elements of s.4A(1) proven, on the basis of "alarm" (Certificate §12). (5) It was, and is, necessary to focus on what each Interested Party did individually. No case was put against them on a "common enterprise" basis with each other or with any third party or third parties. (6) When the Judge spoke at Approved Note §[4] of whether it was proportionate to "criminalise" the words, he was recognising the question whether a conviction (not arrest or prosecution) is a proportionate interference with Convention Rights. That is the question described in DPP v Ziegler [2021] UKSC 23 at §§57, 94; and in Attorney General's Reference (No.1 of 2022) [2022] EWCA Crim 1259 [2023] 2 WLR 651 at §52.

The Reasonable Conduct Defence – Burden of Proof

13. This is the first part of issue (1). Mr Little KC described it as his principal argument in the case. He submits, in essence, as follows. The Judge made a material error of law about the burden of proof. This is seen at Approved Note §[4] ("not proportionate act to criminalise those words. I do not consider the case to be proven. It is for the prosecution to disprove beyond reasonable doubt – not proportionate for CPS to

criminalise words"). It can be seen at Certificate §23 ("I considered that they [the prosecution] had not established that the interference with the defendants' ECHR rights was proportionate and therefore the defence of reasonableness was made out"). The Judge correctly started with the Prosecution's general criminal-standard burden (Approved Note §[1]). He also correctly stated the Interested Parties' civil-standard burden as to the Reasonable Conduct Defence (Approved Note §[2]). But the Judge subsequently went wrong in law. The legal burden remains on the defence, to prove on the balance of probabilities that conviction is a disproportionate interference with Convention Rights. Primacy needs to be given to the clear legislative words in s.4A(3)(b) ("it is a defence for the accused to prove … that his conduct was reasonable"). No relevant authority places any burden on the prosecution. There is no justification for any reinterpretation pursuant to s.3 of the HRA. Even if the burden was rightly placed on the Prosecution, the Judge was wrong to apply the criminal standard. These errors of law – either or both of them – were material. They produced a fundamental change in the necessary factual enquiry. Any proper and fair assessment of the reasonableness of the Interested Parties' conduct required the Interested Parties to address in their evidence matters such as: (a) whether they were aware that Sir Iain Duncan Smith had been assaulted by another protester that had joined their pursuit of him; (b) whether they were aware that others that were following him were shouting personal abuse that may have been perceived as threatening; and (c) whether they were aware that he was in the company of other people and the effect their conduct may conceivably have had upon them.

14. I cannot accept those submissions. In my judgment, there was no misdirection in law, either as to burden or standard of proof. But even if there was a misdirection, it was not a material misdirection. The outcome would inevitably have been the same.

15. The starting point is that the Reasonable Conduct Defence does place a legal burden of proof on the defence. That reflects Parliament's clear words and purpose (s.4A(3)(b)). The Judge was right to recognise it: Approved Note §[2]. This general starting point is wider than the question of proportionality of a conviction as an interference with Convention Rights. In the first place, the defence is wider than human rights issues. As with defences of lawful or reasonable excuse, the defence may be "relied on in … circumstances that do not raise Convention issues": In re Abortion Services (Safe Access Zones) [2022] UKSC 32 [2023] AC 505 at §58. In the second place, the issues under the Convention Rights are broader than the proportionality issue. The first questions are whether the rights are engaged (see Abortion Services at §54) and whether there is an interference with them. If the answer to either of these related questions is 'no', then no proportionality assessment is reached. Similarly, if the justification for interference is not 'prescribed by law' questions of proportionality do not arise.

16. I cannot accept the invitation of Mr Greenhall (who appeared with Ms Hammad for the Second Interested Party) to conclude that s.3 of the HRA requires s.4A(3) of the 1986 Act to be "read down" to impose an "evidential burden", so that it is sufficient for a defendant to raise a reasonable doubt on any of the issues raised by s.4A(3), and the

prosecution thereby has the burden to the criminal standard of disproof. This is not a new point: in the context of s.5(3), see Norwood v DPP [2002] EWHC 1564 (Admin) at §19. Mr Greenhall's invitation, relying on Sheldrake v DPP [2004] UKHL 43 [2005] 1 AC 264 rested ultimately on the submission, which I cannot accept, that the Reasonable Conduct Defence by its nature involves questions on which the defence cannot be expected to adduce evidence.

17. There is an important distinction between (i) findings of fact and (ii) the question of proportionality: Abortion Services §§30, 66. This would be familiar to any extradition judge, who may need to make findings of fact and then ask whether extradition would be a proportionate interference with Article 8 (private and family life) rights. The same would apply to a county court judge in a housing possession case where proportionality may feature as part of a tenant's defence.

18. It was only on the final evaluative question – whether, in light of any relevant findings of fact, the interference with the Convention Rights is justified as proportionate – that the Judge described the burden as being on the Prosecution. This was what the Judge was saying in the Approved Note at §[4] and the Certificate at §23. The Judge was not contradicting what he had said earlier (Approved Note §[2]). He did not say that it was for the Prosecution to establish that the conduct was unreasonable. He did not say that it was for the Prosecution to prove facts relevant to whether the Convention Rights were engaged, or whether they were interfered with, or the nature and seriousness of the interference, or even relevant facts as to whether the interference was proportionate. He described the burden on the Prosecution by reference, and only by reference, to the evaluative question of whether the Convention Rights interference was proportionate.

19. In my judgement, this is correct as a matter of principle. It is very well established that once the question of the proportionality of an interference with Convention rights arises, it is for "the state" to demonstrate that the interference is justified as proportionate. The case-law also repeatedly refers to proportionality needing to be "convincingly established" (§§22-24 below; Attorney General §55; Ziegler §97). When using the word "proof", we should remember that this is the proportionality evaluative question, and not a finding of fact. In the context of a criminal prosecution it is the prosecutor who is the emanation of the state. We were shown no authority which places a burden on the 'victim' of an Article 10 interference to demonstrate that the interference is unjustified as disproportionate. I can see no error of law in the Judge's approach. I am unpersuaded that there is any difference – certainly any practical difference – between being made "sure" of the proportionality of the interference on the one hand and it having been "convincingly established" on the other. As Mr Wainwright (who appeared with Ms Papamichael for the First Interested Party) pointed out, the Supreme Court – in a case in which a proportionality evaluation has been recognised as arising – has spoken of the criminal court needing to be "sure that the interference was proportionate", and of "the criminal standard": Ziegler at §§60 and 97.

20. It does not follow that the Prosecution has to prove facts relevant to the Reasonable Conduct Defence, including whether the Convention Rights are engaged and interfered

with, the nature and extent of the interference, or other facts relevant to the proportionality evaluation. This point is well illustrated by the present case. There were clearly factual questions as to the words "Tory scum" and the nature and purpose of the Interested Parties' actions in using those words. The Interested Parties did not raise those issues for the Prosecution to disprove. They adduced evidence and that evidence persuaded the Judge. The Judge recorded that evidence in the "facts" section (Certificate §§13-19) and made a clear and important finding that: "The use of Tory scum was to highlight the polices of IDS" (Approved Note §[4]). This was not a question of something that the Prosecution had failed to disprove. Mr Wainwright accepts that the effect of s.4A(3), compatibly with the HRA and the Convention Rights, does place on the defence the burden of establishing – to the civil standard – facts relevant to the reasonableness of the conduct, including facts relevant to the nature of the interference and facts relevant to the proportionality of that interference, at least to the extent that they are matters within a defendant's knowledge rather than within the exclusive knowledge of the Prosecution. In the context of s.4A(3) with its express statutory design, I think that is correct.

21. But I do not think anything turns on any of this analysis. Even if the Judge should have put the burden on the Interested Parties to prove – to the civil standard – that the interference with the Interested Parties' Convention Rights was unjustified as disproportionate, it is in my judgment plain that the outcome would inevitably have been the same. A number of points reinforce that conclusion. First, there is the Judge's evidence-based conclusion as to the nature and purpose of the words used, remembering that they were found to be "insulting words" intended to cause, and causing, "alarm". Secondly, there is the evidence which the Judge had. The Interested Parties gave evidence and were able to be cross-examined. The Judge had the video evidence. He was not denied any relevant evidence about the Interested Parties' conduct and knowledge regarding: (a) the traffic cone incident (to which he referred in Certificate §9); (b) the conduct of others (to which he referred in Certificate §7); and (c) Sir Iain Duncan Smith being in the company of others (to which he referred in Certificate §16). The Judge was well aware of the evidence relating to the points emphasised by the Prosecution, about "the drumming and shouting being persistent and continuing after the incident with the traffic cone" (Certificate §21). Thirdly, there is the fact that the Judge specifically asked the Prosecution what other features of the case – beyond those – made the interference disproportionate, and was given none, including those points later relied on (Certificate §§21-22). Fourthly, there is Mr Wainwright's description of a post-ruling exchange with the Judge, the accuracy of which has not been put in issue. The question was raised with the Judge as to where he had placed the burden on the question of proportionality and it was "agreed that this did not make any difference to the [Judge's] findings".

22. In my judgment, this analysis is consonant with – and supported by – the relevant authorities bearing on the issue. In Percy v Director of Public Prosecutions [2001] EWHC 1125 (Admin) the Divisional Court was concerned with a charge of using threatening, abusive or insulting words or behaviour likely to cause harassment alarm or distress contrary to s.5 of the 1986 Act. The Court overturned a conviction in the

Thetford magistrates' court, relating to the desecration of a US flag at RAF Feltwell. The conviction was overturned because the magistrates' approach to the equivalent Reasonable Conduct Defence (s.5(3)(c)) had focused on one relevant factor (the avoidability of the conduct within a peaceful protest) to the exclusion of other relevant factors (see §§32-33). The judgment recorded that Ms Percy had both (a) accepted the Reasonable Conduct Defence burden being on the accused to establish on the balance of probabilities that her conduct was reasonable (§11) but also (b) submitted that it was for the prosecution to establish the necessity and proportionality of restricting the defendant's freedom of expression (§19). The Court saw no contradiction in those two points. It spoke of the defendant having to "establish on the balance of probabilities that his or her conduct was reasonable" (§26) but at the "crucial stage of a balancing exercise under Article 10" the significance of a "presumption" in the defendant's favour (§33), that her conduct was protected by Article 10 "unless and until it was established that a restriction on her freedom of expression was strictly necessary", where "the justification for any interference with that right must be convincingly established" (§27). Percy reflects the distinction between a burden on the defence to establish the facts relied on for a Reasonable Conduct Defence, the need for the prosecution to demonstrate the proportionality of an interference once that evaluative question is reached, and the need for this to be convincingly established.

23. In Norwood the Divisional Court was concerned with a charge of displaying a sign which was threatening abusive or insulting within the sight of a person likely to be caused harassment alarm or distress, racially aggravated by hostility towards members of a racial group based on their membership of that group, contrary to s.5 of the 1986 Act read with s.31(1)(c) of the Crime and Disorder Act 1998. The Court upheld a conviction in the Oswestry magistrates' court, relating to the display of a BNP poster in a Shropshire flat window. The magistrates had been entitled to reject the s.5(3)(c) Reasonable Conduct Defence. The Court said that it was not necessary to give a view in relation to the precise nature of the reverse burden of proof (§38) and left open the question of the nature of the burden of proof on the defendant (§39). But the Court recorded that it saw as "difficult", and had a "predilection" against, the proposition that the prosecution owed a burden of proof "at any rate as to any factual issue going to a value judgment to be made by the court as to the reasonableness of the accused's conduct", on matters "peculiarly within the knowledge of a defendant" (§§19, 38). The Court in Norwood recorded that restrictions on Article 10 rights needed to be "convincingly established" (§37). Norwood assists for recognising the need for the state convincingly to establish the proportionality of the interference, and for recognising that the Reasonable Conduct Defence can properly nevertheless entail the defence owing a burden on relevant questions of fact (including, I would add, facts within the knowledge of the accused relevant to the questions arising under the Convention Rights).

24. In Hammond v DPP [2004] EWHC 69 (Admin) the Divisional Court was concerned with a charge of displaying a sign which was threatening abusive or insulting within the sight of a person likely to be caused harassment alarm or distress contrary to s.5 of the 1986 Act. The Court upheld a conviction in the Wimborne magistrates' court relating to

the display of a sign bearing the words "stop homosexuality" and "stop lesbianism" paraded in Bournemouth town centre. The magistrates had been entitled to reject the Reasonable Conduct Defence. The Court recorded that it was a "defence for Mr Hammond to prove" that his conduct was reasonable (§10). As in Percy, the Court identified two distinct points being made on behalf of the defendant. The first was to accept that the statute itself required the defendant to prove that their conduct was reasonable (§22). The second was the submission that "the respondent prosecutor had to show that the interference with Mr Hammond's freedom of expression" was a restriction which was "necessary in a democratic society" (§27). Again, there was no perceived conflict. May LJ said the magistrates had to consider "whether Mr Hammond had established that his conduct was reasonable with particular reference to all the considerations to which I have referred, deriving from article 10" (§31). That was a clear reference back to having recorded that it was for the respondent prosecutor to show that the restriction was necessary in a democratic society (§27). As to the standard of proof, the Court recorded (at §15) the need for justification to be "convincingly established". Hammond reflects the burden on the defence to establish the facts relied on for a Reasonable Conduct Defence, the need for the prosecution to demonstrate the proportionality of an interference, and the need for this to be convincingly established.

25. As an end-note to this issue, I record that when the Prosecution made its application to the Judge to state a case, the burden and standard of proof points were not raised in the application as suggested errors of law. That was notwithstanding the contents of the Approved Note at §[4]. To this, I add the postscript at §53 below.

The Reasonable Conduct Defence – Proportionality Assessment

26. This is the second part of issue (1). It is a question which emerged by reference to three cases which I have already mentioned: Ziegler; Attorney General; and Abortion Services. In discussing proportionality, the cases use – interchangeably – the words "fact-sensitive" and "fact-specific", and the words "enquiry" and "assessment". I will speak of a "fact-sensitive" proportionality "assessment".

27. In Ziegler the Supreme Court held that the Stratford magistrates had been entitled to acquit a protester of wilful obstruction of the highway, by virtue of the "without lawful authority or excuse" element of the offence (s.137 of the Highways Act 1980). In the application of the Convention Rights, that element involved a fact-sensitive proportionality assessment. In Attorney General the Court of Appeal held that violent or significant criminal damage raised no separate Article 10 proportionality issue for a fact-sensitive proportionality assessment under the "without lawful excuse" ingredient of the offence of criminal damage (s.1 of the Criminal Damage Act 1971). That was because a conviction in a case involving those features (violent action or significant criminal damage), together with the other elements of the offence, would necessarily be Article 10 compatible. In Abortion Services the Supreme Court held that the statutory criminalisation of protest within a safe access zone without a reasonable excuse defence was a general measure and restriction intrinsically compatible with Article 10 rights, capable of being applied compatibly with the Convention Rights, and therefore falling within the devolved competence of the Northern Ireland Assembly. Based on that line

of cases, and in particular the discussion of Ziegler in the Attorney General and Abortion Services cases, Mr Little KC advanced a line of argument which sought to confine and contextualise the role which Convention Rights considerations play within the s.4A(3)(b) Reasonable Conduct Defence. The argument was advanced by reference to Article 10, but the same considerations would apply equally to Article 11. I must confess that I found the argument somewhat elusive.

28. Mr Little KC accepted and maintained that the Interested Parties' Article 10 rights were and are engaged in the present case. He also accepted and maintained that, if a s.4A conviction would constitute a disproportionate interference with those Article 10 rights, then it would necessarily follow that the conduct would constitute reasonable conduct for the purposes of the s.4A(3)(b) Reasonable Conduct Defence. This mirrors the observation about "lawful excuse", made by the Divisional Court in Ziegler: see Abortion Services at §24. Mr Little KC accepted that the application of the Reasonable Conduct Defence needed "properly to take into account", and give "significant weight" to, the Convention Rights including Article 10(1) and 10(2). He put forward no alternative standard or principle for testing incompatibility of a conviction with Article 10 freedom of expression, other than asking and answering the evaluative proportionality question. He did not submit that the intrinsic design of s.4A – through the elements of the offence – secures the Article 10 compatibility of a conviction. He did not submit that those other statutory elements, together with some other identifiable feature of the present case, intrinsically secure the Article 10 compatibility of a conviction. Nor did he submit that Article 10 compatibility is secured by the criminal court asking itself the simple question whether a defendant's conduct was reasonable.

29. Mr Little KC's suggested analysis crystallised as follows. Primacy has to be given to the legislative design of s.4A and the words used by Parliament, which puts the focus on the reasonableness of the defendant's conduct. That is a question of objective reasonableness in all the circumstances. There is no separate freestanding proportionality question or assessment. Still less is there any complicated, complex or detailed jurisprudential analysis. The application of the Reasonable Conduct Defence, in a case where Article 10 rights are engaged, does need to take proper account of Article 10(1) and (2) considerations. In a case where a conviction would be an interference with Article 10 rights, account needs to be taken of Article 10(2): the question of justification for the interference. Yes, the question whether the conduct was reasonable must properly take account, and give significant weight to, Article 10(1) and (2) factors. But the magistrates (and in a racially aggravated case, if tried on indictment, it would be the jury) do not conduct a proportionality assessment or ask a proportionality question. Instead, they ask this question: whether the defendant's conduct was reasonable "taking account of" and "giving significant weight to" Article 10(1) and (2) considerations.

30. In support of this line of analysis, emphasis was placed on these features of the judgment of Lord Reed in Abortion Services. (1) First, Lord Reed's observation that it was incorrect to say that all convictions of protesters must be proved to be justified by a proportionality assessment (see §§28-29, 42, 63). (2) Secondly, Lord Reed's

observations about the law pre-Ziegler regarding the s.137 offence of wilful obstruction of the highway where rights of freedom of speech and assembly were "treated as an important factor in the assessment of reasonable user [of the highway]" (§22), rather than using "a complex legal test" (§24). (3) Thirdly, Lord Reed's observations about defences – including a defence of lawful or reasonable excuse – and the mistake of assuming that such defences necessarily mean that a proportionality assessment is appropriate (§58).

31. I cannot accept Mr Little KC's analysis. In my judgement, the Judge was right in law to conduct a fact-sensitive proportionality assessment. It is a central truth of the introduction of the HRA that those whose Convention Rights are being interfered with are entitled to the effective judicial protection of the application of the proportionality standard, as Lord Sales explained in Ziegler at §131. There is no other standard "taking account of" or "giving significant weight to" Article 10(1) and (2) considerations.

32. It is important to be clear about the basis which Lord Reed identified for the points which he was making in Abortion Services. It is all set out clearly in the judgment. It came to this (all references are to Lord Reed's judgment):

    (1) No proportionality assessment is needed if the Convention Rights are not "engaged". If that is so, there is no interference needing to be justified as proportionate. It will be so if the elements of the offence or some recognisable feature puts the defendant's conduct beyond the "scope" of the Convention Rights. (§54)

    (2) No case-specific fact-sensitive proportionality assessment is needed if there is an intrinsic answer. That intrinsic answer may be given where the proportionality question – whether a conviction is proportionate to any interference with the defendant's Convention Rights – is answered by the elements of the statutory or common law offence (§§44-51 and 55); or it may be given by some other justification which does not require an examination of the facts of each case (§§29, 34-41, 53).

    (3) Where there is an intrinsic answer, no proportionality evaluation will need to be addressed through a 'reasonable conduct' or a 'lawful or reasonable excuse' element or defence. (§§52-53)

    (4) The fact that there may be an intrinsic answer (§§29, 34-41, 45-51) explains why it is wrong to say that there must always be a fact-sensitive proportionality assessment. (§63)

    (5) Points (1)-(3) explain why it is wrong to say that Convention Rights-compatibility necessarily needs a 'lawful or reasonable excuse' element or defence (§64); and the same points also explain why it is wrong to say that a 'lawful or reasonable excuse' element or defence necessarily involves a fact-sensitive proportionality assessment (§58).

(6) Point (2) (§§34-41, 45-51 and 55) explains why it is right to say that the ingredients of an offence can themselves ensure the Convention Rights-compatibility of a conviction (§65).

(7) Where a case-specific fact-sensitive proportionality assessment is needed – because points (1) and (2) have not supplied the answer – the question is how it can be addressed (§56). The answer is that routes to achieve it include any 'reasonable conduct' or 'lawful or reasonable excuse' element or defence (§§52, 57).

33. The key points at the heart of this analysis had been encapsulated in two sentences, as follows, by the Criminal Division of the Court of Appeal in Attorney General at §52:

> ***A defence of lawful or reasonable excuse will provide a route by which a proportionality assessment may be carried out if the prosecution must prove that a conviction would be a proportionate interference with Convention rights. That becomes necessary only if (a) Convention rights are engaged in the circumstances of the case and (b) the ingredients of the offence do not themselves strike the appropriate balance so that a case-specific assessment is required.***

34. In the present case all of the following are true: (i) the Interested Parties' Convention Rights are engaged; (ii) the Interested Parties' conduct was within the scope of those rights; (iii) a conviction would be an interference with those rights; (iv) it is not the case that the elements of the offence, or some recognisable feature, puts their conduct beyond the scope of those rights; (v) it is not the case that the proportionality question is answered by the elements of the offence, or by some other recognisable feature of the case, including addressed at a level of generality by a proportionality assessment of the statutory provision (s.4A).

35. What follows from these truths is that a fact-sensitive proportionality assessment was needed; and the route to achieve this was within the Reasonable Conduct Defence. In Lord Reed's words, what became "relevant" was "the proportionality" of the "restrictions on the exercise of rights under articles 10 and 11" (Abortion Services §52); it was the "assessment of the proportionality of a conviction in the circumstances of [the] individual case[]", where the Reasonable Conduct Defence was the "route by which a proportionality assessment can be carried out" (§57).

36. Mr Little KC is right that Lord Reed described "a complex legal test" (Abortion Services §24). Lord Reed explained when the proportionality assessment would not be necessary. But he was not criticising or detracting from it as the disciplined sequence of questions. Indeed, he referred back to precisely this test when he later said "the determination of whether an interference with a Convention right is proportionate … involves the application, in a factual context (often not in material dispute), of the series of legal tests set out in para 24 above" (§30). He was not saying that proportionality is invariably, and in every case, an elaborate exercise. The objective and its legitimacy may, for example, be accepted or obvious. It is not just the factual context which may not be in material dispute. Where it is needed, a proportionality assessment – after any relevant findings of fact – needs a discipline. That is true in the criminal context, just as

it is when county courts decide housing possession cases or Westminster magistrates' court decides extradition cases.

37. Lord Reed also discussed the pre-Ziegler case-law on s.137 wilful obstruction of the highway (at §22). In doing so, Lord Reed identified a post-HRA case: Buchanan v CPS [2018] EWHC 1773 (Admin). In Buchanan the crown court, in dealing with the appeal against conviction of a protester who had deliberately blocked traffic in Parliament Square, had approached the statutory element of "without lawful authority or reasonable excuse", specifically asking and answering the proportionality question: whether there was a "necessary" interference with Mr Buchanan's Convention Rights. That question was directed at Mr Buchanan's arrest and prosecution. In the light of the subsequent case-law, the question would now be directed at conviction. But it was unmistakeably the proportionality question.

38. On this part of the case, it is worth returning to the line of cases between 2001 and 2004, concerning the Reasonable Conduct Defence in s.5 of the 1986 Act: Percy; Norwood and Hammond. I have discussed these in the context of the burden of proof and the proportionality question (§§22-24 above). Each of those cases expressly recognises the fact-sensitive proportionality assessment arising as part of the Reasonable Conduct Defence. In Percy the Court emphasised the Reasonable Conduct Defence (§26), the need for justification for any interference with the Article 10 right that was engaged (§27) and the crucial stage of a balancing exercise under Article 10 (§33). In Norwood the Court spoke of the way in which Article 10 intrudes on the operation of a s.5 prosecution as being whether the defendant's conduct was objectively reasonable. That was to be answered having regard to all the circumstances, including importantly those for which Article 10(2) itself provides, requiring consideration whether conviction (marking as criminal the accused's conduct) was a necessary restriction of their freedom of expression for the prevention of disorder or crime and/or for the protection of the rights of others (§37). In Hammond the Court spoke of the Reasonable Conduct Defence (§22), of the Convention considerations treated as arising when that defence is considered, and specifically of the notion of proportionality: whether the restriction was necessary in a democratic society (§27). That was the discussion referenced when the Court spoke of the questions for the magistrates, critical to the appeal, as including whether the conduct was reasonable for the purposes of the defence "with particular reference to all the considerations" – "deriving from Article 10 of the European Convention of Human Rights" – to which it had "referred". So, this line of authority identified the proportionality assessment within the Reasonable Conduct Defence, for the purposes of s.5 of the 1986 Act. There is a principled read-across to s.4A.

39. This is the line of cases expressly referenced in James v DPP [2015] EWHC 3296 (Admin) [2016] 1 WLR 2118, as cases where the proportionality of the prohibitions or restraint on expression and assembly "form part of the statutory defence that the accused's conduct was reasonable" (§34). That, in turn, was the passage referenced in Attorney General at §46 and in Abortion Services at §52. This same line of cases had also been discussed in Ziegler, in the Divisional Court's judgment [2019] EWHC 71

(Admin) [2020] QB 253 at §88. We were shown no passage in any authority which calls them into question. And, as it happens, they fit with Buchanan.

40. There is also illumination to be found in a recent case. In Hicks v DPP [2023] EWHC 1089 (Admin) [2023] 2 Cr App R 12, the Court upheld a conviction by the Cheltenham magistrates of an offence in contravention of s.5 of the 1986 Act. The offence arose out of a confrontation with NHS clinicians on the stairwell of a hospital during a Covid lockdown. The conduct was found proved to be threatening and abusive. The Court recognised that there was no freestanding proportionality question, arising after the application of the elements of the offence and the Reasonable Conduct Defence (§§29(e) and 48). In a passage specifically addressing that defence the Court recognised the relevance of Article 10, explained why the conviction was compatible with the defendant's Article 10 rights (§§42-43), and added that "the Judge was obliged to consider whether the conviction was a proportionate interference with Article 10 rights" (§47). Here too we see the proportionality assessment featuring in the Reasonable Conduct Defence.

41. In the present case, the Judge did precisely what the Court in Norwood at §37 had said was "importantly" necessary: "consideration whether to mark as criminal the accused's conduct … as a necessary restriction of his freedom of expression".

42. Finally, this by way of end-note. The Judge had received a Prosecution skeleton argument which argued against any freestanding proportionality question beyond the components of s.4A, and which submitted that the Reasonableness Defence "should be interpreted in accordance with Article 10 and 11 and particularly 10(2) and 11(2)". Authority was then cited by the Prosecution, including for the principle that the justification for interference with the right to freedom of expression must be "convincingly established". Even when the Prosecution made its application to the Judge to state a case, the points about the legal inappropriateness of a proportionality assessment were not raised as suggested errors of law. That was notwithstanding that Attorney General had already been decided, and Abortion Services was decided two days after the application was made; and before the Interested Parties responded and the Judge made his decision.

The Reasonable Conduct Defence - Application

43. This is issue (2). It focuses on the public law legality of the Judge's conclusion that the case was not proven, because it was not proportionate to criminalise the words "Tory scum". Mr Little KC submitted, by reference to the public law standard of reasonableness, that the Judge's conclusion was not open to him; and that we should quash the acquittals and remit the case for a retrial. His submissions, in essence as I saw them, were as follows. The Judge focused exclusively on the words used, when he needed to consider the evidence as a whole. The context in which the words had been used was highly relevant to the question of the reasonableness of the conduct, including any proportionality question. This was conduct which involved not only a politician, but also two others plainly associated with that politician. All three were impacted. That behaviour was alongside, and continued after, the traffic cone conduct of the third

party. There are features of the evidence which made it unreasonable for the Judge to find that the Interested Parties' conduct amounted to a reasonable exercise of their Convention rights. These are reflected in points which were identified in paragraphs 11 and 12 of the application to state a case: the targeted and intimidatory nature of the behaviour, including its duration and proximity; that the conduct was intended – as the Judge accepted – to cause alarm and had that intended effect, in the case of all three individuals affected; that these were insulting words shouted during a pursuit, in a busy street; that the Interested Parties continued after Sir Iain was assaulted with the traffic cone; and that the Interested Parties' protest descended into an intimidating and bullying atmosphere. Linked to this is the fact that the target of the conduct could not simply avert their eyes or walk away (cf. Abortion Services §145). In light of the context and circumstances, the Judge failed to strike a fair and rational balance between the competing interests and rights at stake. His conclusion was not open to him.

44. I cannot accept those submissions. The Judge's approach, reasoning and conclusion on the proportionality question involved no error. The Judge had very well in mind the context and circumstances. He had heard the evidence about them. He watched the videos; as have we. The Approved Note recorded the Judge's finding about being satisfied that there was "a targeting of IDS"; that the use of the words Tory scum was "insulting and pejorative"; and that this was the intent of the Interested Parties. And the Certificate (§12) recorded that all three had been caused "alarm". It is true that the Judge's principal focus was on what was said by each of the Interested Parties, their purpose in saying it, and the way in which it was said. But all of that was for the legitimate and straightforward reason that it was "insulting words" which the Judge found proved. This is why the Judge spoke about the proportionality of criminalising "these words". Importantly, there was no finding of using "threatening words" or of "threatening behaviour", nor indeed of using abusive words or of abusive behaviour, nor of using insulting behaviour. There is no challenge to any of this. There was no joint enterprise case advanced. As the Judge recorded, the Prosecution in closing had accepted that their case was really based on the use of "Tory scum".

45. None of that means that the Judge was looking at the words in isolation from the context and circumstances. The Judge (Certificate §4) set out in terms that the focus was on "the circumstances" and that "in this case on these facts" the use of these words did not amount to an offence, because "in the circumstances" it was reasonable and protected by the Convention. The Certificate recorded the pursuit including what could be seen from the video evidence. It referred to the distance between Sir Iain and his party on the one hand, and the Interested Parties on the other. The Judge referred to the evidence of the impact on all three members of the party. He referred to the third party individual who ran up behind Sir Iain and placed the traffic cone on Sir Iain's head. He referred to the events continuing, with the First Interested Party banging a drum and shouting still some distance behind Sir Iain. He referred to the Second Interested Party and the speech they were making. The Judge referred to the intent as being to cause "alarm", and the impact as being that "alarm" was caused. But characterisations such as "intimidatory", "intimidating and bullying" and "gratuitous offensive personal abuse" – all of which appeared in paragraphs 11-12 of the application to state a case – did not fit

with what the Judge found, as he pointed out in the Certificate (§30). The fact that the Judge had regard to the context is also obvious from the fact that the Judge made a finding about why the words had been used: "the use of Tory scum was to highlight the policies of IDS" (Approved Note §[4]), and the Judge plainly had careful regard to the evidence about those words and the Interested Parties' use of those words (Certificate §§13, 15-19). That was part of the relevant context, in relation to the use of the insulting words. It is why the Judge spoke of the context as one of legitimate protest. And as I have explained, and as he emphasised in the Certificate, the Judge specifically asked the Prosecution to identify what made the term unreasonable in all the circumstances. The Prosecution emphasised the "drumming and shouting being persistent and continuing after the incident with the traffic cone" and had nothing to add.

46. So, this was an "insulting words" case. It was not a "threatening" words or behaviour case. It was a case about causing, and intending to cause, "alarm". It was a case where any crime lay in each of the Interested Parties' own conduct, not the actions of third parties. It was a case involving an unassailable finding that the use – in the case of each of them – of the phrase "Tory scum" was "to highlight the policies of IDS", in the light of identified evidence relevant to that question. In the light of these points, and in light of all the evidence and points made relating to context and circumstances, there is nothing in my judgment – whether individually or cumulatively – which can serve to undermine as wrong the evaluative conclusion of proportionality at which the Judge arrived, and which was the basis of his finding of reasonable conduct.

47. Finally, on this issue, I have recorded that Mr Little KC addressed this part of the case by reference to a public law standard of reasonableness review. For the First Interested Party Mr Wainwright, whose submissions were adopted by Mr Greenhall for the Second Interested Party, made clear that they were content – albeit in judicial review proceedings – to adopt the test from Ziegler at §§54 and 105, to which the Judge himself referred in the Certificate when explaining why he had declined to state a case. The Ziegler formulation asks whether there is an error of reasoning on the face of the Judge's ruling which undermines the cogency of the conclusion on proportionality. In the course of argument, we were shown §25 of Lord Reed's judgment in Abortion Services. In my judgment, nothing turns in the present case on the formulation of the test to be applied. Even on an objective correctness-standard, I would decline to interfere with the Judge's evaluative assessment on the proportionality question.

The Refusal to State a Case

48. This is issue (3): whether the Judge's decision to refuse to state a case was vitiated by any public law error. Having been invited to consider issues (1) and (2), and having arrived at the conclusions which I have explained, there is in my judgment no remaining utility in the suggestion that we should overturn and quash the refusal to state a case and direct that a case be stated.

49. Mr Little KC submits, in essence, as follows. The Judge's approach and reasoning were erroneous. Bearing in mind the high threshold which has to be crossed for an

application to state a case to be characterised as "frivolous" for the purposes of s.111(5) of the 1980 Act, and bearing in mind the application that was made and the points that were raised, the Judge clearly fell into error and his characterisation was wrong and unreasonable. The procedure for a case stated would have been far preferable because it would have involved the mechanism for a fully stated case, embodying findings of fact.

50. What "frivolous" means is that the application is considered to be futile, misconceived, hopeless or academic. Here it was misconceived and hopeless, in the view of the Judge, for the reasons that he gave. The true nature of the challenge was that the prosecution disagreed with the decision, but they were dressing this up as an error of law. The error of law was being suggested was an insufficiency of evidence. The invited question was about "sufficient evidence" for finding "as a fact" that the Interested Parties' conduct amounted to a reasonable exercise of their Convention Rights. The question posed was fundamentally flawed, it was not clear from the application which findings of "fact" were said to have been made "without evidence", and the features of the evidence being relied on had not been relied on when the Prosecution was asked what made the conduct unreasonable.

51. In my judgement, these were fair and justified observations. It is revealing that the case become a case about the burden of proof, about whether there is a proportionality assessment, and about whether the Judge's evaluative conclusion of the proportionality assessment was wrong. No objection was taken by the Interested Parties to the issues which the Prosecution has raised with the Court. They have been addressed on their legal merits. But they are several steps removed from the application to state a case. Even now, this is not a case about findings of fact or a conclusion of fact, or about the sufficiency of evidence for a finding of fact. In my judgment, the Judge was not wrong – still less unreasonable – to conclude that the application to state a case was misconceived. But, as I have explained, there is no utility at all in overturning his decision or remitting the case to him to state a case.

Conclusion

52. In those circumstances and for those reasons, I would dismiss this claim for judicial review.

Postscript

53. There is a postscript to the issue of the Reasonable Conduct Defence – Burden of Proof (§§13-25 above). In response to circulation of this judgment in draft, Mr Little KC and Mr Boyd have asked that the judgment record – as their "core submission" – that the legal burden remained on the defence to prove that a defendant's "conduct amounts to a reasonable exercise of their Convention rights". On that basis, I am invited to rewrite the judgment at §§13, 19 and 21 above. I decline to do so. The formulation – "conduct amounts to a reasonable exercise of their Convention rights" – was a global one. It was designed to include Article 10(1) questions, including whether Article 10 rights apply. It was designed to include Article 10(2) questions. Crucially, that means the

proportionality question. It was on the proportionality question that the dispute lay. That was where the Judge placed the onus on the prosecution (§18 above). What was, and is, needed is focus. The oral hearing supplied it. Mr Little KC and Mr Boyd, through their global written formulation, and in the focused oral submissions, were – crucially – contending that the legal burden was on the defence on the proportionality question. The fact that their global formulation extended to the proportionality question, and the way it was deployed to join issue with the Interested Parties on the proportionality question, were clear. This is from Mr Little KC and Mr Boyd's skeleton argument (the emphasis is mine):

> ***The Claimant submits that whether the Interested Parties' conduct was objectively reasonable under the statutory defence necessarily included a consideration of any engaged Convention rights, but the statute is constructed in a way which placed the legal burden on the Interested Parties to demonstrate that their conduct amounted to a reasonable exercise of their Convention rights. In other words, the factors under Article 10.1, and the permissible restrictions on them under 10.2, are part of the relevant circumstances when a tribunal of fact is making a value judgment as to the reasonableness of an accused's conduct.***
>
> ***The Interested Parties contend that although the burden of proving that conduct was reasonable in the circumstances was on the defence on the balance of probabilities, because Convention rights were engaged the prosecution had the burden of proving to the criminal standard – or to a standard which "equates to, or is at least close to, the criminal standard" – that any interference was necessary and proportionate. Otherwise, the conduct would be reasonable.***
>
> ***The Claimant submits that such an approach plainly contradicts the words of the provision. If the statute places the burden on an accused to prove his conduct is reasonable, and the accused relies on his conduct as being an exercise of Convention rights, it logically follows that it is for the accused to prove that his conduct amounted to a reasonable exercise of his Convention rights.***

LORD JUSTICE POPPLEWELL:

54. I agree.