



# *The Safe Access Zones Bill Reference* [2022] UKSC 32: clearing the fog of proportionality?

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## INTRODUCTION

In March 2022, the Northern Ireland Assembly passed the Abortion Services (Safe Access Zones) Bill (Northern Ireland) (SAZ Bill)<sup>1</sup> to create buffer zones around lawful abortion providers, in an attempt to criminalise the harassment and intimidation of people who seek services offered by such places or work in them. This is the first such legislative measure anywhere in the United Kingdom (UK) or Ireland, with Scotland and Ireland exploring equivalent measures.<sup>2</sup>

In the interim, the Attorney General for Northern Ireland (AGNI) referred the SAZ Bill to the UK Supreme Court to determine whether it was consistent with the rights set out in the European Convention on Human Rights (ECHR), and thus within the Assembly's legislative competence.<sup>3</sup> On 7 December 2022, the UK Supreme Court handed down judgment in the *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill (SAZ Reference)*.<sup>4</sup>

The two major issues for the Court were the appropriate approach to proportionality and to *ab ante* challenges to legislation. The first issue required consideration of the Court's previous judgment in *Ziegler*<sup>5</sup> and

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1 Royal Assent granted on 6 February 2023. As the judgment concerns the (then) Bill, this article refers to the Bill and not the Act.

2 For Scotland, see Scottish Government, 'Abortion Safe Access Zones: Ministerial Working Group'. For Ireland see the Safe Access to Termination of Pregnancy Services Bill 2021.

3 Northern Ireland Act 1998, s 6(2)(c).

4 [2022] UKSC 32, [2023] 2 WLR 33.

5 *DPP v Ziegler and Others* [2021] UKSC 23, [2022] AC 408.

the judgment of the Divisional Court (England & Wales) in *Cuciurean*.<sup>6</sup> The second issue required consideration of two additional precedents: *Christian Institute*<sup>7</sup> and *Re McLaughlin*.<sup>8</sup> Unusually for a devolution reference, the Supreme Court sat as a panel of seven justices. The *SAZ Reference* judgment was unanimous and delivered by Lord Reed.

The length of this article reflects both the length and complexity of the judgment. The issues explored by the Court are not only myriad, but each issue is also underpinned by multiple decisions of the highest domestic authority. These decisions at times appear to overlap and at other times appear to contradict one another. The *SAZ Reference* attempts to tie these loose ends into a single coherent approach. In what follows, I attempt to explore whether the judgment succeeds in that endeavour.

## THE BILL PROVISIONS

The SAZ Bill has four main interrelated components.

First, it defines ‘protected premises’ which are healthcare facilities<sup>9</sup> where information, advice or counselling in relation to abortion services are provided<sup>10</sup> and the operator of such a facility has notified the Northern Ireland Department of Health of the intention for the facility to be protected as such.<sup>11</sup>

Second, the SAZ Bill defines ‘protected persons’ as anyone attending protected premises to access treatment, information, advice or counselling,<sup>12</sup> anyone accompanying a person seeking such access<sup>13</sup> or anyone working at such premises.<sup>14</sup>

Third, the Bill establishes ‘safe access zones’, defined as the public area within at least 100 metres<sup>15</sup> (extendable to 150 metres)<sup>16</sup> from each entrance to and exit from protected premises.

Fourth, and the main part for the Court, the Bill creates two offences within safe access zones: the first is the criminalisation of any act with intent or recklessness as to whether that act influences a protected person, prevents or impedes their access to protected

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6 *DPP v Cuciurean* [2022] EWHC 736 (Admin) [2022] QB 888.

7 *The Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29.

8 [2018] UKSC 48, [2019] NI 66.

9 SAZ Bill cl 2(2).

10 *Ibid* cl 2(3).

11 *Ibid* cl 2(4).

12 *Ibid* cl 3(a).

13 *Ibid* cl 3(b).

14 *Ibid* cl 3(c).

15 *Ibid* cl 4(2).

16 *Ibid* cl 4(3).

premises or causes them alarm, harassment or distress.<sup>17</sup> The second offence criminalises the recording of a protected person without their consent within a protected zone, with intent or recklessness as to whether that recording has any of the same effects as the first offence.<sup>18</sup> Both offences are summary offences only, punishable with a fine of up to £500.<sup>19</sup>

### **THE PRELIMINARY POINT: STATUTORY INTERPRETATION AND LEGISLATIVE COMPETENCE**

The Court considered the test which the Bill must pass in order to be within the Assembly's competence. There is an important point to be made here, considering that this was a devolution reference<sup>20</sup> and not a post-enactment challenge grounded on a specific and real factual matrix. This is thus an *ab ante* challenge, in respect of which the Supreme Court had, in *Christian Institute*, asked whether the legislation under challenge 'is capable of being operated in a manner which is compatible with [the ECHR] rights in that it will not give rise to an unjustified interference ... in all or almost all cases'.<sup>21</sup>

In the *SAZ Reference*, the Court pointed to a tension between the test in *Christian Institute* and a later citation of it in *Re McLaughlin*. *McLaughlin* was a challenge to the provision of widowed parent's allowance being paid to surviving spouses but not surviving *unmarried* partners under article 8 of the ECHR (read with article 14).<sup>22</sup> Here, the *Christian Institute* test was cited by Lady Hale, who referred to legislation operating incompatibly in 'a legally significant number of cases'.<sup>23</sup> In the *SAZ Reference*, Lord Reed indicated that this was an inaccurate citation of the *Christian Institute* test and reiterated its original form as accurate.<sup>24</sup>

With respect, this appears to be a problematic reading of the relevant passages across the two cases. In *Christian Institute*, the Court had been concerned with the requirement that legislation should operate *compatibly* in all or almost all cases, leaving open the possibility that compatible legislation may nevertheless operate incompatibly in some cases. In *McLaughlin*, by contrast, the reference to 'legally significant'

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17 Ibid cl 5(2).

18 Ibid cl 5(3).

19 Ibid cl 5(4).

20 Northern Ireland Act 1998, s 11(1).

21 *Christian Institute* (n 7 above) [88], the court citing *R (Bibi) v Home Secretary* [2015] UKSC 68, [2016] 2 All ER 193.

22 *McLaughlin* (n 8 above) [1].

23 Ibid [43].

24 *SAZ Reference* (n 4 above) [19].

was to cases where legislation may operate *incompatibly*.<sup>25</sup> Thus, contrary to how the AGNI had characterised *McLaughlin* as being ‘less demanding’ than *Christian Institute*,<sup>26</sup> *McLaughlin* was instead the corollary to *Christian Institute*: if legislation operated incompatibly in a legally significant number of cases, it cannot be said to operate compatibly in all or almost all cases, thus failing the test in *Christian Institute*. Read in this way, the Court’s reiteration of the *Christian Institute* test in the *SAZ Reference* seems unnecessary, especially as regards the ‘clarification’ of Lady Hale’s words in *McLaughlin*.<sup>27</sup>

### CLARIFYING ZIEGLER AND CUCIUREAN

At issue for the Supreme Court was whether the criminalisation of influencing a protected person<sup>28</sup> disproportionately interfered with three ECHR provisions: article 9 and the protection of religious freedoms, article 10 and the protection of free speech and expression and article 11 and the protection of free assembly. Central to this question was the issue of proportionality. The Court, therefore, began not with the Bill, but with *Ziegler* and *Cuciurean*. There were two main points underlying the Court’s consideration of both cases: proportionality was a legal test and not a factual one, and that general legal prohibitions (such as might be enacted in statutes) may be proportionate in themselves without requiring a proportionality analysis on a case-by-case basis. There is a great deal of detail and complexity in the discussion of both cases, including the historical approaches to ‘lawful excuse’ or ‘reasonable excuse’ defences. At the heart of this complexity, however, is a simple question: does an offence interfering with free speech need a ‘reasonable excuse’ defence in order to be a proportionate interference?

The Court’s consideration of *Ziegler* begins with a pointed observation: that the remarks of Lords Hamblen and Stephens (who delivered the majority judgment in *Ziegler*) about proportionality being a ‘fact-specific enquiry ... requir[ing] the evaluation of the circumstances in the individual case’ should not be considered a universal rule. Instead, these remarks should be confined to the trial of offences under section 137 of the Highways Act 1980 (wilful

25 *McLaughlin* (n 8 above) [43]: ‘the test is not that the legislation must [original emphasis] operate incompatibly in all or even nearly all cases. It is enough that it will inevitably operate *incompatibly* [emphasis added] in a legally significant number of cases.’

26 *SAZ Reference* (n 4 above) [12].

27 The court might also have considered that Lady Hale’s remarks in *McLaughlin* were an almost exact reproduction of her remarks in *Bibi* (n 21 above) [60], which itself was the origin of the test in *Christian Institute* (n 7 above) [88].

28 SAZ Bill, cl 5(2)(a).

obstruction of a highway without lawful authority or excuse), where ECHR rights under articles 9, 10 and 11 were raised.<sup>29</sup> The same point was made by the Divisional Court in *Cuciurean* (more on that further below).

This is, with respect, a strange observation. *Ziegler* in the Supreme Court was concerned with answering two questions certified for appeal by the Divisional Court, the first of which asked what the proper appellate approach was to offences containing a ‘lawful excuse’ defence when engaging ECHR rights.<sup>30</sup> While the second question was concerned with the section 137 offence, it followed the first question, in that the first question asked for a *general* test, and the second question asked for that test to be *specifically* applied. In the *SAZ Reference*, this point seems to have eluded the Court’s criticism of one of the intervenors’ (JUSTICE) position that *Ziegler* was (at the very least) capable of being read as having laid down a universal rule.<sup>31</sup>

Substantively, the first question in *Ziegler* asked the Supreme Court about the appropriate way in which proportionality should be judicially assessed – whether as a question of fact, the answer being appealable only for an error of law (favoured by the majority) or a question of law which should be appealable in any event (favoured by the minority). In the *SAZ Reference*, it was the minority view in *Ziegler* which prevailed, but with the additional point that general legislative measures may themselves be proportionate without being evaluated against the specific factual circumstances of a particular case.<sup>32</sup>

But here, the Court in the *SAZ Reference* was faced with the European Court of Human Rights’ decision in *Perinçek v Switzerland*,<sup>33</sup> in which the Grand Chamber specifically stated that in interferences with free speech which lead to criminal convictions,

... it is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances.<sup>34</sup>

In the *SAZ Reference*, the Court focused on the word ‘normally’. *Perinçek* was a case concerning the criminalisation in Swiss law of genocide denial as a disproportionate interference with article 10 rights. The Grand Chamber had pointed to the Swiss Government’s acceptance that criminalisation needed to be balanced against free speech and expression in individual cases ‘in such a way that only

29 *SAZ Reference* (n 4 above) [28]–[29].

30 *Ziegler* (n 5 above) [7].

31 *SAZ Reference* (n 4 above) [28].

32 *Ibid* [34].

33 (2016) 63 EHRR 6.

34 *Ibid* [275].

truly blameworthy cases would result in penalties' and that the Swiss courts had not 'paid any particular heed to this balance'.<sup>35</sup> In the *SAZ Reference*, the Court used these passages ostensibly in order to distinguish *Perinçek* from the SAZ Bill.<sup>36</sup> However, as will become clear further below, there are certain circumstances surrounding the passage of the SAZ Bill which muddy its distinction from *Perinçek*.

Two further points followed. First, that the European Court does not 'review legal provisions and practice in abstracto' but confines itself to scrutinising the application of the ECHR in the case before it, whereas the Supreme Court could not proceed on this basis in 'a reference of the present kind' – a reference to the *ab ante* challenge (to which I return further below).<sup>37</sup> Second, that in order to give the ECHR rights a practical and effective dimension, the Court could not make a distinction in the application of the ECHR to civil and criminal measures, by reference to the Government's practice (post-*Ziegler*) of obtaining 'persons unknown' injunctions in respect of protestors rather than prosecuting them under relevant statutory offences.<sup>38</sup>

The second point is ostensibly a reference to *Perinçek*, but it is somewhat problematic. The Court rejected the idea that it should take a particular approach to proportionality in a criminal context. It did so by pointing to 'persons unknown' injunctions as civil remedies, which they are – a civil remedy with potentially *criminal consequences* if breached. Seen in this light, the point which the Court made – that there should be no difference in approaching proportionality between civil and criminal measures – disappears if the focus turns from the nature of the measure to the consequence of breaching it. *Perinçek*, importantly, concerned the Grand Chamber because of the severity of the consequences for breaching the Swiss law in question.<sup>39</sup>

*Cuciurean* received different treatment from *Ziegler*; given that the Divisional Court's position on *Ziegler* in *Cuciurean* aligned with that of the Supreme Court in the *SAZ Reference* (as set out earlier), there was no real need to clarify the impact of the latter case. The Supreme Court did, however, lay down general guidance on how to approach proportionality issues in criminal trials where rights under articles 9, 10 and 11 of the ECHR are raised. First, there is a question whether those rights are engaged at all, considering certain acts (for example, incitement to violence or criminal damage to property) fall outside the scope of those rights.<sup>40</sup> Second, the question arises whether the

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35 Ibid [275]–[276].

36 *SAZ Reference* (n 4 above) [39].

37 Ibid [40].

38 Ibid [41].

39 *Perinçek* (n 33 above) [272].

40 *SAZ Reference* (n 4 above) [54].

ingredients of the offence(s) themselves satisfy the proportionality requirement.<sup>41</sup> Third, if the ingredients of the offence do not satisfy proportionality, then the trial court may use the interpretive duty under section 3 of the Human Rights Act 1998 to make the offence ECHR-compliant or assess the proportionality of a conviction if the offence is statutory.<sup>42</sup> If the offence is a common law offence, the court may ‘develop the common law so as to render the offence compatible with Convention rights’.<sup>43</sup>

A case which the Supreme Court did not consider in its judgment, but which was (at least) referred to in oral argument was *Lee Brown v PPSNI*.<sup>44</sup> *Brown* was an appeal by way of case stated in the Northern Ireland Court of Appeal, concerning the proportionality of a conviction for publishing or distributing threatening, abusive or insulting written material<sup>45</sup> against the defendant’s article 10 rights.<sup>46</sup> The defendant had been convicted of the offence, with the District Judge being satisfied that the conviction was proportionate. An appeal to the County Court was dismissed. The Court of Appeal allowed the case stated appeal on the basis that the District Judge had not considered or balanced the competing interests between the prosecution and the defendant’s ECHR rights.<sup>47</sup> The absence of *Brown* is odd when considering that it was handed down by a member of the *SAZ Reference* panel – the Lady Chief Justice of Northern Ireland. More substantively, however, *Brown* was important for two reasons. First, it applied *Ziegler* in a way which the Divisional Court had held to be incorrect in *Cuciurean*.<sup>48</sup> Thus, there was an obvious tension between high judicial authority in different UK jurisdictions. Second, the Court of Appeal in *Brown* had favoured the approach to the role of appellate courts in *Ziegler* over its own broader statutory jurisdiction to decide questions of fact for itself.<sup>49</sup> The role of appellate courts following *Ziegler* was not considered in *Cuciurean* – only whether *Ziegler* had or had not laid down a universal rule.

The net effect of the Court’s consideration of *Ziegler* and *Cuciurean* was therefore twofold. First, that case-by-case proportionality analyses are unnecessary where a defendant raises issues under articles 9–11 of the ECHR. Second, where a proportionality analysis is carried out, it is

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41 Ibid [55].

42 Ibid [57].

43 Ibid [61].

44 [2022] NICA 5.

45 Public Order (Northern Ireland) Order 1987, art 10(1).

46 *Brown* (n 44 above) [1]–[2].

47 Ibid [75]–[77].

48 Ibid [63]. See *DPP v Cuciurean* (n 6 above) [67].

49 Ibid [65].

not a purely fact-dependent exercise. But to what extent does this mark a change in the legal understanding of proportionality?

## A DEEPER DIVE INTO PROPORTIONALITY JURISPRUDENCE

It is worth exploring the Court's scrutiny of *Ziegler* to see what (if anything) needed a critique or clarification in that case. As will become clear further below, this scrutiny bore significant consequences for the Court's assessment of the SAZ Bill.

There are three interrelated issues in the Court's scrutiny of *Ziegler*: the nature of a proportionality assessment under the ECHR, the role of appellate courts when faced with proportionality assessments and the use of precedent in *Ziegler* itself.

As to the nature of a proportionality assessment, Lord Reed began with the position that proportionality 'is not an exercise in fact-finding', citing Lord Bingham's remarks in *A v Home Secretary* in support.<sup>50</sup> Lord Bingham, for his part, stated that 'the European Court does not approach questions of proportionality as questions of pure fact'.<sup>51</sup> While this is uncontroversial, it is worth recalling what happened in *A*. Lord Bingham criticised the Court of Appeal's approach to the Special Immigration Appeals Commission's (SIAC) proportionality assessment as being 'unappealable findings of fact' and allowed the appeal on the basis that SIAC's reasoning based on its findings of fact was vitiated by errors of law.<sup>52</sup> The House relied on SIAC's findings of fact concerning a threat to national security;<sup>53</sup> it was SIAC's reasoning as to whether those findings *justified* the discriminatory measures in issue (and the Court of Appeal's endorsement of this reasoning) which the House of Lords overruled.

The role of appellate courts was a central aspect of the majority's reasoning in *Ziegler*, and which the Court in the *SAZ Reference* clarified. In the latter, the Court favoured a more interventionist approach by appellate courts when faced with questions of proportionality than the approach purportedly adopted in *Ziegler*.<sup>54</sup> But to what extent was this evaluation of *Ziegler* accurate? This is not a straightforward or simple point, but it is important to explore it in some detail.

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50 *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68, cited in *SAZ Reference* (n 4 above) [30].

51 *Ibid* [44].

52 As Lord Bingham stated (*ibid*): 'The reasons given by SIAC do not warrant its conclusion ... I do not consider SIAC's conclusion as one to which it could properly come.'

53 *Ibid* [27].

54 *SAZ Reference* (n 4 above) [33].



To begin, the Court in the *SAZ Reference* took issue with *Ziegler's* analysis of the role of an appellate court for two main reasons. First, the lack of reference in *Ziegler* to those cases which the Court in the *SAZ Reference* identified as demonstrating a more 'interventionist' approach: *Baiai*,<sup>55</sup> *Nicklinson*,<sup>56</sup> *UNISON*,<sup>57</sup> *SC*,<sup>58</sup> *A*, *Bank Mellat (No 2)*<sup>59</sup> and *Elan-Cane*.<sup>60</sup> Second, the reliance in *Ziegler* on a *dictum* of Lord Carnwath in *R*,<sup>61</sup> which the Court in the *SAZ Reference* said was context-specific (to that case), to the effect that an appellate court should not interfere in the proportionality assessment conducted by a lower court merely because the appellate court would have arrived at a different evaluation. I take each point in turn.

On the first point, the comparison the Court drew in the *SAZ Reference* between the seven 'interventionist' cases and the approach favoured by the majority in *Ziegler* is less clear than at first glance. Six out of the seven cases all either identified legal errors which vitiated the proportionality assessments of lower courts,<sup>62</sup> or agreed that the proportionality assessments by lower courts were legally sound.<sup>63</sup> Appeals were allowed in the former category and dismissed in the latter. The decision in *Nicklinson* was unusually complex, both factually and legally. On the issue of proportionality, the Supreme Court was concerned that the courts below had been deprived of the evidence and argument needed for a full assessment of proportionality,<sup>64</sup> and that at least some of these matters were first presented before the Supreme Court itself. Consequently, it is difficult to say with any certainty whether the Supreme Court's approach in *Nicklinson* was more interventionist than that in *Ziegler*; in a major way, it had acted as the court of first instance when fully assessing proportionality in *Nicklinson*. The key point here, however, is that in the remaining six

55 *R (Baiai and Ors) v Home Secretary* [2008] UKHL 53, [2009] 1 AC 287.

56 *R (Nicklinson and Another) v Ministry of Justice*; *R (AM) v DPP*; *R (AM) v DPP* [2014] UKSC 38, [2015] 1 AC 657.

57 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.

58 *R (SC, CB and Others) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223.

59 *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] 1 AC 700.

60 *R (Elan-Cane) v Home Secretary* [2021] UKSC 56, [2022] 2 WLR 133.

61 The reference in the *SAZ Reference* judgment contains the neutral citation [2018] UKSC 47, which is the case of *R(AR) v Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079. The paragraph references in the *SAZ Reference*, as well as the *précis* of the case facts given by Lord Reed in that judgment all match those in *AR*. If this is a typographical error, the error may originate in the report of the case in the *Weekly Law Reports*. The rest of this article refers to *AR* instead of *R*.

62 *UNISON* (n 57 above) [112], *A* (n 50 above) [44] and *Bank Mellat (No 2)* (n 59 above) [27].

63 *Baiai* (n 55 above) [28], *SC* (n 58 above) [71] and *Elan-Cane* (n 60 above) [62].

64 *Nicklinson* (n 56 above) [120].

cases, the House of Lords or the Supreme Court only interfered with the proportionality assessments of lower courts where there was a legal error which vitiated those assessments. Turning to the approach in *Ziegler*, Lords Hamblen and Stephens said:

... an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test ... where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality.<sup>65</sup>

If there is *per se* a distinction between the approach in *Ziegler* and that in the six cases cited by the Court in the *SAZ Reference*, it is far from clear. This is especially true of *Brown*, which followed *Ziegler*: it is difficult to see how a more interventionist approach to proportionality would have changed the outcome.

On the second point, the Court in the *SAZ Reference* warned against attaching ‘undue significance to a statement which was made by Lord Carnwath (in *AR*) in the context of a particular case without reference to a plethora of other cases’.<sup>66</sup> These ‘other cases’ were references to the seven cases explored above. In *AR*, Lord Carnwath said:

The decision [of the lower court] may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge’s reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be ‘wrong’ ... it is not enough that the appellate court might have arrived at a different evaluation.<sup>67</sup>

It is important to understand these remarks in context: they conclude a section of Lord Carnwath’s judgment entitled ‘proportionality in the appellate court’<sup>68</sup> in which he examined multiple prior authorities on this point. It is unnecessary to delve into all these authorities, but they all share a common strand, which Lord Carnwath adopted as his conclusion above. Indeed, one of these cases, *In re B*,<sup>69</sup> is particularly germane to the discussion here. *In re B* was concerned with care orders under the Children Act 1989, but its discussion of the proper appellate approach to proportionality foreshadowed the same discussion in *Ziegler* with an uncanny resemblance. The majority

65 *Ziegler* (n 5 above) [54].

66 *SAZ Reference* (n 4 above) [33].

67 *R(AR) v Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, [64].

68 *Ibid* [53].

69 [2013] UKSC 33, [2013] 1 WLR 1911.

approach on this issue (Lords Wilson, Neuberger and Clarke) aligned with the majority in *Ziegler*<sup>70</sup> and the minority approach (Lord Kerr and Lady Hale) aligned with the minority in that case.<sup>71</sup> Now, in the *SAZ Reference*, the Court restricted the impact of *In re B* by pointing to the case being about specific care orders.<sup>72</sup> But the fact of the case concerning care order proceedings operated differently. Lady Hale considered that the paramountcy of the welfare of children under the Children Act 1989 was, together with the duty under section 6(1) of the Human Rights Act 1998, a strong reason to favour an appellate court deciding proportionality for itself.<sup>73</sup> Lord Kerr also tied his reasons to a combination of the section 6(1) duty with the specific context of proceedings involving children.<sup>74</sup> The majority's approach, however, was concerned with a general approach to proportionality in an appellate setting. Thus, the fact of *In re B* being a care order case mattered for the minority rather than the majority – contrary to how it was evaluated in the *SAZ Reference*.

Moreover, Lord Carnwath did not simply cite *In re B* as dispositive of the question. He buttressed his view with the general function of an appellate court as explored by Lord Reed in *McGraddie v McGraddie*, to the effect that an appeal is an opportunity to correct lower court errors rather than reargue a case.<sup>75</sup> Thus, far from a decision which is context-specific, *AR* drew multiple proportionality analyses into an attempt to provide a general approach.

This discussion of proportionality jurisprudence takes us to a critical case discussed in *Ziegler: Edwards v Bairstow*.<sup>76</sup> *Edwards* concerned a tax assessment in connection with the sale of a Yorkshire spinning plant, raising the question whether the first instance tax assessment was a matter with which appellate courts could (and should) interfere. The High Court and Court of Appeal both determined that the assessment was untouchable except if legally perverse.<sup>77</sup> The House of Lords strongly disagreed and allowed the appeal. A passage in Lord Radcliffe's speech on the proper approach to appeals was cited in *Ziegler*,<sup>78</sup> but it is worth setting out a passage in Viscount Simonds' speech about the nature of inferences derived from the facts of a given case.

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70 See *Ibid* [46] per Lord Wilson JSC, [88] per Lord Neuberger PSC and [136] per Lord Clarke JSC.

71 See *ibid* [118] per Lord Kerr and [205] per Lady Hale JJSC.

72 *SAZ Reference* (n 4 above) [33].

73 *B* (n 69 above) [204].

74 *Ibid* [121].

75 [2013] UKSC 58, 2013 SLT 1212, [3], cited by Lord Carnwath JSC in *AR* (n 67 above) [57].

76 [1956] AC 14.

77 *Ibid* 19–20.

78 *Ziegler* (n 5 above) [37], citing *Edwards* (n 76 above) 36.

... it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law not of fact what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are ...<sup>79</sup>

Applying these remarks to *A*, we see that the threat to UK national security emanating from terrorism was a fact, but this did not justify implementing measures to combat terrorism *only* against foreign nationals. Here, the question whether a fact justifies a measure (or, to use Viscount Simonds' language, whether a fact is justificatory in character) is a question of law and thus subject to appellate scrutiny. This is precisely what the House of Lords did in *A*.<sup>80</sup> It is difficult therefore to see why the approach in *Edwards*, as endorsed by *Ziegler*, was differentiated in the *SAZ Reference* at all, far less differentiated as being less interventionist than cases such as *A*.<sup>81</sup>

However, this is not to say that the Court's differentiation in the *SAZ Reference* was completely without foundation. Lord Sales, in the minority in *Ziegler*, differentiated between *Edwards* and proportionality assessments by stating, 'the legal standard being applied in the former is the standard of rationality and in the latter is the standard of proportionality'.<sup>82</sup> It seems clear that the Court in the *SAZ Reference* had a similar view, at one point referring to the *Ziegler* approach as being 'a standard of unreasonableness when considering issues of proportionality'.<sup>83</sup> It is worth setting out Lord Sales' own reflections on what unreasonableness or rationality meant in a *judicial* context:

... the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated.<sup>84</sup>

There is an important reason why. Assuming amenability to judicial review, the application of the 'ordinary' rationality standard only allows

79 *Edwards* (n 76 above) 30–31.

80 *A* (n 50 above) [44] per Lord Bingham.

81 *SAZ Reference* (n 4 above) [33].

82 *Ziegler* (n 5 above) [137].

83 *SAZ Reference* (n 4 above) [33].

84 *Ziegler* (n 5 above) [138], referring to Lord Carnwath's remarks in *AR* (n 67 above) [64]. The *Ziegler* majority did not distinguish rationality and proportionality and instead pointed to a line of authorities exploring the nature of criminal appeals as grounded partly in *Wednesbury* rationality, see *Ziegler* (n 5 above) [29]–[35].

a court to interfere in discretionary non-judicial decisions where the decision in question is robbed of logic.<sup>85</sup> This is because a court does not self-evidently possess the capacity and expertise for decision-making in any context other than a judicial one; a judge is qualified in law and not policy.<sup>86</sup> This is not the same as an appellate court interfering in the decision of a lower court, because both possess the same capabilities over legal reasoning. Thus, the *Ziegler* approach entails a level of scrutiny which is, by its very nature, more ‘interventionist’ than the High Court reviewing the decision of a minister or a local authority. Although Lord Sales warned in *Ziegler* against treating rationality and proportionality interchangeably,<sup>87</sup> it is clear that the lines between them are blurred.<sup>88</sup>

A related issue is whether a straight line can be drawn between *Edwards*, rationality and *Ziegler*, as the Court appears to have done in the *SAZ Reference*. In *Ziegler*, Lords Hamblen and Stephens explored the ‘conventional’ approach of the Divisional Court to appeals by way of case stated (of which *Ziegler* was one) as involving rationality, citing a number of Divisional Court judgments in support.<sup>89</sup> But none of these judgments cited *Edwards*. Lords Hamblen and Stephens themselves did not equate *Edwards* and rationality outright, merely observing that *Edwards* is an authority for appellate restraint in connection with findings of fact, and that appellate restraint is also exhibited by the Divisional Court judgments.<sup>90</sup> Lord Sales in *Ziegler* cited Lord Diplock’s equation of *Edwards* with rationality in *Council for Civil Service Unions v Minister for the Civil Service*,<sup>91</sup> but even this remark was *obiter* in that case, as Lord Diplock had invoked *Edwards* to justify the court’s interference with irrational decisions, rather than using it to define the rationality standard itself.

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85 *R v Parliamentary Commissioner for Administration, ex p Balchin* [1996] 1 PLR 1 (EWHC) [27], per Sedley J (as he then was).

86 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411F, per Lord Diplock.

87 *Ziegler* (n 5 above) [138].

88 See eg *Kennedy v Charity Commission* [2014] UKSC 20, [2015] 1 AC 455, [55]–[56] per Lord Mance JSC, endorsed in *Pham v Home Secretary* [2015] UKSC 19, [2015] 1 WLR 1591, [60] per Lord Carnwath JSC and [109] per Lord Sumption JSC. For academic commentary cited with approval in these judgments, see P Craig, ‘The nature of reasonableness review’ (2013) 66(1) *Current Legal Problems* 131 and G Lübke-Wolff, ‘The principle of proportionality in the case-law of the German Federal Constitutional Court’ (2014) 34 *Human Rights Law Journal* 12.

89 *Ziegler* (n 5 above) [29]–[35].

90 *Ibid* [37]–[39].

91 *Council of Civil Service Unions* (n 86 above) 410H–411A. Cited in *Ziegler* (n 5 above) [137].

I now turn to the SAZ Court's final issue with *Ziegler*: the use (or non-use) of precedent. Lords Hamblen and Stephens in *Ziegler* had also been critical of the Divisional Court (in the same case) for not referring to a number of authorities which they considered relevant.<sup>92</sup> On one level, one Supreme Court panel identified a set of authorities which it considered relevant to a given issue, while another panel of the same court identified another set of authorities which that panel considered relevant to the same issue. Logically, the larger panel prevailed.

However, whether or not a judicial panel missed relevant authorities is not the issue here. No panel can conceivably examine *every* authority on a point of law before deciding it and requiring such an exercise would strain resources, reason and possibly even sanity. Rather, the issue is one of framing. The *SAZ Reference* and *Ziegler* framed proportionality in palpably different ways. In the former, Lord Reed's anchor for proportionality lay in the court's 'constitutional function and ... its duty under the Human Rights Act'.<sup>93</sup> In the latter, the majority was instead focused on the *appellate* approach to proportionality assessments (which, after all, was one of the two questions certified for appeal in *Ziegler*). *AR*, another decision which had its effect restricted by the *SAZ Reference*, also explored the issue of appellate review of proportionality assessments.

However, just because the difference in the framing of proportionality between the two cases is palpable, it does not follow that the difference is consequential. The crux of the criticism of *Ziegler* is contained in a short section of the *SAZ Reference*, in which the Court galloped through around 15 years of proportionality jurisprudence in various factual contexts. By exploring this jurisprudence on a granular level, however, it is apparent that there is not much clear blue water between the two approaches. The duty not to act incompatibly with ECHR rights under the Human Rights Act does not, by itself, turn an appeal from a review to a rehearing, and not even the *SAZ Reference* suggests otherwise. Thus, the real difference between the two cases is one of degree. If, as explored earlier, these different approaches effectively produce if not the same then similar results (in terms of when appellate courts interfere with lower courts' proportionality assessments), then how significant is the degree of difference between them?

Of course, one may point to the difference in means between *Ziegler* and the *SAZ Reference*, rather than the result. *Ziegler* asked appellate courts to review lower courts' proportionality assessments while the *SAZ Reference* directed appellate courts to conduct proportionality assessments themselves. But of the interventionist precedents cited in

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92 *Ziegler* (n 5 above) [29]–[35].

93 *SAZ Reference* (n 4 above) [33].

the *SAZ Reference*, three<sup>94</sup> reviewed the lower courts' proportionality assessments for errors while three<sup>95</sup> approached proportionality largely or completely independently of the lower courts.<sup>96</sup> Thus, even in the means, there is no bright line distinction of the kind drawn in the *SAZ Reference* between its favoured approach and that of *Ziegler*.

A paper by Lord Sales sheds further light on the existence and extent of this distinction.<sup>97</sup> In the paper, Lord Sales expanded on the argument he subsequently made in *Ziegler*, observing that there is a difference in appellate approaches between deference to first instance proportionality assessments and appellate courts conducting such assessments themselves.<sup>98</sup> It is unnecessary to embark on a critical evaluation of the paper in extensive detail for present purposes. What is relevant in the present context is the reason why Lord Sales saw a problem with the approach exemplified in cases such as *AR* and *Ziegler* and what his proposed approach is.

In Lord Sales' view, the tension between the duty to act compatibly with the ECHR and the general rule in England and Wales that an appeal is by way of review rather than rehearing, was resolved *In re B*:

The obligation of the appellate court under section 6 of the HRA [Human Rights Act] did not require it to depart from its normal appellate function under CPR [Civil Procedure Rules] part 52.11, of secondary review of the trial judge's decision.<sup>99</sup>

A major problem with adopting this as a general approach to proportionality in an appellate setting, according to Lord Sales, is that the nature of appeals varies in the UK's different jurisdictions. As proportionality is itself a general rule, it must rise above the nature of an appeal according to a distinct approach found in England and Wales only.<sup>100</sup>

Instead, Lord Sales proposed the following approach:

The appellate court should adopt a primary decision-making function when it is able to add value to the normative exercise in deciding whether a measure can be regarded as proportionate, where that potential for added value sufficiently reflects the additional costs and delay associated with an appeal.

94 *Bank Mellat (No 2)* (n 59 above) [22], *A* (n 50 above), [44], and *Baiai* (n 55 above), [27]–[28].

95 *Elan-Cane* (n 60 above) [56]–[61], *SC* (n 58 above) [56]–[60], and *UNISON* (n 57 above) [90]–[99].

96 *Nicklinson* (n 56 above), as set out earlier, stands out uniquely in this group of interventionist cases.

97 Lord Sales, 'Proportionality review in appellate courts' (2021) 26(1) *Judicial Review* 40.

98 *Ibid* 40–42.

99 *Ibid* 49.

100 *Ibid* 50.

Generally, that is unlikely to be the case in relation to reviewing facts found by the first instance court. But the appellate court has a constitutional function to articulate and police general legal norms. Thus, there may be a spectrum of potential engagement by an appellate court, depending on the precise nature of the issue which arises in relation to a proportionality assessment. On this approach, there will be differences of degree, regarding how far the appellate court should be drawn into acting as primary decision-maker to make the assessment afresh for itself. Depending on the circumstances in a particular case, it may be possible for the appellate court to accept findings of fact made at first instance (subject only to rationality review) and then supply its own view of the values in contest in that factual position and of the normative outcome.<sup>101</sup>

If we revert briefly to Viscount Simonds' speech in *Edwards*, there is little difference between these two approaches. In *Edwards*, the finding of fact was not in issue – it was whether the fact could give rise to the impugned inference in that case; in short, whether the Income Tax Commissioners' view on the *legal consequence* of that fact could be upheld. The House in that case supplied its own view of the legal consequence of the finding of fact, thereby overruling the Commissioners. In doing so, it also adopted a primary decision-making function as the authoritative expositor of law.

*Edwards* also provides an answer to Lord Sales' concerns about hewing too closely to the CPR when the nature of an appeal may differ across the UK. The case was decided at a time when appeals were conducted by way of rehearing in England and Wales<sup>102</sup> and Northern Ireland,<sup>103</sup> the latter having retained this approach to this day.<sup>104</sup> The adoption of the *Edwards* approach into the modern appellate setting, therefore, does not necessarily privilege the CPR – certainly, any reference to the CPR would be wholly unjustified in a Northern Ireland appeal to the Supreme Court. Rather, the approach in *Edwards* takes account of appellate restraint in a system where appellate courts have an important public role in maintaining confidence in the legal system itself.<sup>105</sup> This restraint, and its importance in the public role of an appellate court, operates regardless of jurisdictional differences in the general nature of an appeal. This explains why the Northern Ireland Court of Appeal declined to utilise its statutory jurisdiction to its fullest extent in *Brown*, observing that to do so would be 'inappropriate in

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101 Ibid 57.

102 Rules of the Supreme Court 1883, order LVIII r 1.

103 Rules of the Supreme Court (Northern Ireland) 1936, order LVIII r 1.

104 Rules of the Court of Judicature (Northern Ireland) 1980, order 59, r 3(1).

105 *Edwards* (n 76 above) 38 per Lord Radcliffe. See also J A Jolowicz, 'Appeal and review in comparative law: similarities, differences and purposes' (1986) 15(4) Melbourne University Law Review 618, 631.



an appeal of this nature',<sup>106</sup> speaking to the legal system in general, rather than the interests of the particular appellant.

The above discussion bears some similarities with the perceived divergence between the English and Scottish courts' approaches to the question in issue in *Edwards*. Lord Radcliffe demonstrated that there was no real divergence at all, given that the relevant authorities in both jurisdictions largely aligned on the issue: the legal consequence of a finding of fact was self-evidently a matter for appellate scrutiny and interference if that consequence was wrongly determined by the courts below. The real divergence, if any, was 'in the understanding and application of the governing principles'.<sup>107</sup> To that end, Lord Radcliffe pithily summed up the proper appellate approach:

Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.<sup>108</sup>

When considered together with the discussion of reasonableness or rationality in a judicial context (as above), the extent to which this approach is inappropriate for proportionality is, at best, debatable.

We thus arrive at the end of a meandering journey through two decades of proportionality jurisprudence to find that appellate courts have arguably been aligning rather than diverging in their approaches. In the circumstances, and with the greatest respect to the Supreme Court, if the *SAZ Reference* appears to have clarified little, perhaps there was little to clarify in the first place.

## **THE PROPORTIONALITY OF THE SAZ BILL**

The SAZ Bill was moved in the Assembly to remedy a serious situation. Vulnerable, anxious women and those who assisted them in accessing abortion services, advice and counselling, were spat at, assaulted, verbally abused and splashed with holy water. Clare Bailey, the former leader of the Northern Ireland Green Party who introduced the SAZ Bill in the previous Assembly, described her own experience at the receiving end of 'a very deliberate campaign of harassment and intimidation against women'.<sup>109</sup>

Having been introduced and voted through its second stage, the SAZ Bill came before the Assembly Health Committee for consideration.

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106 *Brown* (n 44 above), [65] per Keegan LCJ.

107 *Edwards* (n 76 above), 38.

108 *Ibid* 39.

109 *SAZ Reference* (n 4 above) [91].

The Committee Report<sup>110</sup> makes for interesting reading, with one of the most relevant aspects being a remark from then Health Minister Robin Swann MLA. The Bill as introduced had conferred discretionary powers on the Minister's Department regarding the location and extent of a safe access zone. The Minister made it clear that he did not think such discretionary powers were appropriate for the Department. The full passage is worth setting out:

The Minister advised that in making these decisions, his Department would become responsible for balancing the safety and dignity of protected persons and the right to respect for private and family life on the one hand against the right to manifest religious belief and the rights to freedom of assembly and expression on the other. In the Minister's view, these are not appropriate functions for the Department of Health, as it does not, and should not, have competence in this arena and stating that such matters are therefore *better left to the judicial system*. (emphasis added)<sup>111</sup>

Matters being left to judicial discretion, including the operation of a 'reasonable excuse' defence to clause 5(2)(a), were developed further in the fourth stage of the Bill's passage through the Assembly, where an amendment which would have added a 'reasonable excuse' defence was supported by the Bill's sponsor and defeated by four votes.<sup>112</sup>

These points demonstrate that the debate surrounding the proportionality of the SAZ Bill's offences in general, and clause 5(2)(a) in particular, were complex, nuanced and decided, on the point of a proposed defence, on a knife-edge. This bears similarities with the deliberations surrounding the Swiss law in *Perinçek*, which the Supreme Court distinguished in the *SAZ Reference*. These nuances and complexities, moreover, were accounted for in the positions of the Lord Advocate and JUSTICE in respect of the question of the Assembly's competence over clause 5(2)(a). Both parties invited the Court to declare that the clause *was* within competence, *inter alia* because a conviction under this clause would nevertheless be subject to the trial court's obligations under the Human Rights Act, and thus enabled a proportionality analysis of any conviction on a case-by-case basis.<sup>113</sup>

Turning to the Court's consideration of the main issue of the Bill's proportionality, its analysis was concise and uncomplicated on the majority of the relevant questions. The Court held, rather

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110 Northern Ireland Assembly, Report on the Abortion Services (Safe Access Zones) Bill (NIA 133/17-22) (27 January 2022) para 86.

111 *Ibid* [86].

112 Northern Ireland Assembly, Official Report, 49 (Amendment 4) (14 March 2022).

113 *SAZ Reference* (n 4 above) [6] and [9] for the positions of the Lord Advocate and JUSTICE, respectively.

straightforwardly (and unsurprisingly), that clause 5 of the SAZ Bill restricted rights under articles 9–11 of the ECHR,<sup>114</sup> that these restrictions were prescribed by law (ie the Bill itself)<sup>115</sup> and that the Bill pursued a legitimate aim – that of ensuring access to abortion facilities for treatment, advice and employment,<sup>116</sup> and further that of ensuring access to healthcare.<sup>117</sup> On several of these issues, the parties were also agreed.

In its assessment of whether the Bill’s restrictions were necessary in a democratic society, the parties agreed (and the Court, with them), that the Bill’s aim (ensuring access for protected persons) was sufficiently important to justify interferences under articles 9–11.<sup>118</sup> Moreover, the Court held that there was a rational connection between the Bill’s aim and the means by which it sought to achieve that aim.<sup>119</sup>

The Court’s deliberations on the third and fourth proportionality questions, however, were more elaborate. The third question (whether there were less restrictive alternative means available than those in the Bill) was answered affirmatively, with the Court noting that the Assembly had debated and rejected the ‘reasonable excuse’ defence, *inter alia*, because of the possibility of the defence being used (and abused) to effectively nullify the Bill’s aim.<sup>120</sup>

The fourth question (whether the Bill struck a fair balance between individual rights and the interests of the community) received the most detailed answer. Rather than setting out each factor the Court considered relevant to answering this question, these factors were divided into three broad categories. First, the impact of protest, influence and behaviour which might satisfy the requirements of harassment on women seeking to access abortion services or advice on those services, or employees of those services (which, it is important to remember, provide those services *lawfully*).<sup>121</sup> Second, the restrictions imposed by the Bill on rights under articles 9–11 were themselves spatially limited: the offences under clause 5 were not outright bans throughout Northern Ireland<sup>122</sup> and the penalties were monetary (and limited) rather than custodial.<sup>123</sup> Third, the ECHR grants a wide margin of appreciation in

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114 Ibid [111]–[112].

115 Ibid [113].

116 Ibid [114].

117 Ibid [115].

118 Ibid [117].

119 Ibid [118].

120 Ibid [121]–[123].

121 Ibid [125]–[126] and [128].

122 Ibid [127].

123 Ibid [130].

matters involving ‘sensitive and controversial questions of ethical and social policy’ such as abortion.<sup>124</sup>

These points provided answers to the AGNI’s concerns about bans on individual protests surrounding abortion as stifling public debate on the issue as well as the criticism of the extent of the safe access zones as defined in the Bill.<sup>125</sup> Both concerns were rejected by the Court by pointing to the spatially limited nature of the offences under clause 5, observing that the 100- to 150-metre limits were not unjustified.<sup>126</sup>

Relatedly, in oral argument,<sup>127</sup> counsel for JUSTICE (Blinne Ní Ghrálaigh) provided some examples of factual circumstances which may warrant a proportionality analysis on a case-by-case basis. The first was that a safe access zone within 150 metres of an abortion clinic may unavoidably extend to sites unrelated to abortion clinics.<sup>128</sup> Even a 100-metre safe access zone would exclude numerous other businesses and an extension of such a zone may even exclude notable sites of public gathering such as Belfast City Hall. Another example was of a silent protest within a safe access zone at such an early hour that most (if not all) staff would not even be present. Both circumstances could technically engage behaviour prohibited by the clause 5 offences, but to what extent would their enforcement be a proportionate interference with ECHR rights? The point of this is not to argue against the aim of the Bill, but to set out what a trial court may be faced with in a prosecution under clause 5.

But these matters were not explored by the Court in its judgment. Instead, the Court drew on judgments in similar matters across a range of jurisdictions, including British Columbia, Ontario, Victoria, Tasmania and a Dutch case determined by the erstwhile European Commission on Human Rights.<sup>129</sup> Here, the Court’s reasoning deserves a deeper dive. The Court’s framing of justification (‘proportionality *stricto sensu*’)<sup>130</sup> was to ask whether the clause 5 offence was a fair balance between the rights of access to abortion services and the right to protest against the provision of these services.<sup>131</sup> To that end, all of the comparative jurisprudence on which the Court drew involved conducting balancing exercises in light of *specific* facts – the constitutionality of the criminal laws at issue

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124 Ibid [131].

125 Ibid [132]–[134].

126 Ibid [133].

127 See Day 2 (20 July 2022), [Afternoon Session of the SAZ Reference hearing](#).

128 This is true of at least one such clinic (in a busy high street) which I pass by daily on my morning commute to work.

129 *SAZ Reference* (n 4 above) [141]–[153].

130 Lord Sales (n 97 above), 42.

131 *SAZ Reference* (n 4 above) [124].

was determined with respect to how these laws operated in a factual context specific to each case. The *SAZ Reference*, by contrast, could only be concerned with how the SAZ Bill *would* operate, rather than drawing from real practice. This is of course the nature of an *ab ante* assessment of the proportionality of a bill. But this is also why the assessment of proportionality in such circumstances requires a degree of circumspection. After all, we are concerned here with a general measure (strict liability offences) and the practical operation of such a measure is material to the assessment of its proportionality.<sup>132</sup>

An illustrative example relevant to the *SAZ Reference* is the practice of seeking ‘persons unknown’ injunctions, with their breaches being dealt with by way of contempt proceedings.<sup>133</sup> The courts’ jurisdiction to punish for contempt is general in the sense that any injunction granted must be obeyed without exception,<sup>134</sup> but any decision to punish, as well as the punishment itself, must be proportionate having regard to the factual circumstances of the breach, including those of the alleged contemnor.<sup>135</sup> A finding of contempt for breaching a single injunction, therefore, may be proportionate in one factual situation but not another.

This is why the Court’s finding that the clause 5 offences are *inherently* proportionate<sup>136</sup> has the effect of shutting down even the possibility of hard cases to test these provisions where they matter most: practice. This marks a considerable departure from the genesis of the *ab ante* test in *Bibi*, which concerned an immigration rule requiring pre-entry English competence on the part of foreign spouses of British citizens (or those settled in the UK).<sup>137</sup> The Supreme Court drew a distinction between the rule operating disproportionately in specific cases and the rule being inherently disproportionate, recognising that the former did not necessarily result in the latter,<sup>138</sup> all without foreclosing the possibility of cases of specific (future) disproportionate operation. The question in *Bibi* was whether a law was capable of operating proportionately. But it does not follow that, just because a law is capable of operating proportionately in all or almost all cases, it is *incapable* of operating disproportionately in specific cases. This is where specific operational examples from practical legal operation

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132 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, [108].

133 *SAZ Reference* (n 4 above), [41].

134 See eg *Cuciurean v Transport Secretary and Another* [2021] EWCA Civ 357, [9(4)], per Warby LJ.

135 *Ibid* [17]. See also eg *MBR Acres and Others v McGivern* [2022] EWHC 2072 (QB), [96] per Nicklin J.

136 *SAZ Reference* (n 4 above), [155].

137 *Bibi* (n 21 above), [1].

138 *Ibid* [2] per Lady Hale DPSC and [69] per Lord Hodge JSC.

assume importance, with the Court in *Bibi* squarely acknowledging the requirement of ‘examination on the facts of specific cases’ in order to determine whether a law declared *ab ante* proportionate may still operate disproportionately.<sup>139</sup> This aside, it is important to recall that, in *Bibi*, the Court considered examples of how the law in question may operate disproportionately before determining whether the law was *ab ante* proportionate.<sup>140</sup> The Court in the *SAZ Reference*, by contrast, drew together *general* principles from cases decided by courts in other jurisdictions. This is not the same thing as considering any specific circumstances in which the SAZ Bill would operate (especially when, as previously set out, the Court was invited to consider some of these circumstances). It is therefore especially jarring that the Court should have concluded that the SAZ Bill’s offences were inherently proportionate.

This is not to argue that the SAZ Bill was disproportionate in the circumstances of the reference. Rather, the point is that proportionality is not predictable. Although the Court was at pains to point out the democratic credentials of the Bill and the margin of appreciation accorded by the European Court to matters such as abortion access,<sup>141</sup> such credentials must necessarily be caveated. A validly enacted law may operate in a changed legal landscape<sup>142</sup> and, as set out earlier, the debates accompanying the Bill’s passage were not clearly decisive as far as the clause 5 offences were concerned. In these circumstances, it is worth remembering that the mere passage of legislation does not preclude a judicial assessment of its compatibility with ECHR rights.<sup>143</sup> At the risk of being accused of judicial supremacism, neither legislative arithmetic nor the quality of legislative debates ensures a law operates proportionately in all cases, the more so because the process of law-making is not the same as the process of legal interpretation.<sup>144</sup>

The language of clause 5 certainly achieved an appropriate balance between protest and access to healthcare in the examples of threatening, abusive, intimidating and violent behaviour presented to the Court. But this is very different from saying the clause 5 offences could *never* operate disproportionately, especially considering that the law has yet to come into force. To hold that no proportionality assessment of any prosecution of these offences is required is to omit this reality.

This omission, however, is understandable as a consequence of the Court’s earlier minimisation of the importance of fact-finding

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139 Ibid [73] per Lord Hodge JSC.

140 Ibid [50]–[55] per Lady Hale DPSC.

141 *SAZ Reference* (n 4 above) [131] and [140].

142 *Wilson v Trade and Industry Secretary* [2003] UKHL 40, [2004] 1 AC 816.

143 *A* (n 50 above) [42].

144 *SC* (n 58 above) [169].

in proportionality. If proportionality is not fact-specific, then the assessment of a general measure in specific operational examples is unnecessary, which is the Court's ultimate conclusion.<sup>145</sup> But proportionality is fact-dependent. This dependency is writ large in one of the main doctrines underpinning the jurisprudence of the European Court: the margin of appreciation. Here, the European Court defers to national authorities' evaluation of the 'local needs and conditions' in which the ECHR must be given effect.<sup>146</sup> Thus, for example, despite an emerging European consensus favouring broader access to abortion services than were available in Ireland,<sup>147</sup> the European Court nevertheless paid particular attention to the 'profound moral views of the Irish people' in dismissing a claim that Ireland's (then) highly restrictive abortion provisions breached article 8 of the ECHR.<sup>148</sup> The Irish law on abortion was thus proportionate not generally, but on the particular facts of Irish society at the relevant time.<sup>149</sup>

The SAZ Bill is compatible with the ECHR not necessarily because it is inherently proportionate, but because it would operate proportionately in almost all cases. Foreclosing the possibility of disproportionate operation (however rare or infrequent) marked not only a departure from the established approach to *ab ante* challenges, but also omitted the fact that a case-by-case proportionality analysis is rooted in a statutory duty – section 6 of the Human Rights Act. This omission is curious given the prominence of the Human Rights Act in the appellate approach to proportionality favoured by the Court (as discussed earlier).

## CONCLUSION

In law, the framing of a question is critical. The Court's concluding remarks on its judgment in the *SAZ Reference* provide some insights on its framing of the substantive question of the SAZ Bill's ECHR compliance:

The right of women in Northern Ireland to access abortion services has now been established in law through the processes of democracy. That legal right should not be obstructed or impaired by the accommodation of claims by opponents of the legislation based, some might think ironically, on the liberal values protected by the Convention. A legal system which enabled those who had lost the political debate to

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145 *SAZ Reference* (n 4 above) [155].

146 *Buckley v United Kingdom* (1996) 23 EHRR 101, [74].

147 *A, B and C v Ireland* (2011) 53 EHRR 13, [235].

148 *Ibid* [241].

149 This has remained the view of the European Court, see eg *RR v Poland* (2011) 53 EHRR 31, [187].

undermine the legislation permitting abortion, by relying on freedom of conscience, freedom of expression and freedom of assembly, would in practice align the law with the values of the opponents of reform and deprive women of the protection of rights which have been legislatively enacted.

The Court thus framed the question as a balancing exercise between access to reproductive healthcare and the expression of opinions on the availability of that healthcare. Although the Court commendably recognised the serious situations faced by vulnerable women accessing reproductive healthcare, its remarks are odd in the context of this case for two reasons. First, the *SAZ Reference* was a devolution reference validly taken by a relevant law officer in circumstances where none of the parties or intervenors sought to ‘undermine’ legislation permitting abortion<sup>150</sup> (the SAZ Bill, of course, does not permit abortion services but merely protects access to them). Second, the Court’s framing of proportionality and its approach to the *ab ante* challenge to clause 5 led to an ironic outcome. The judgment simultaneously asked for greater judicial intervention in criminal matters while precluding all such intervention into the SAZ Bill’s own criminal provisions.

In the end, the *SAZ Reference* was a significant milestone in the history of women’s rights in Northern Ireland. Access to safe and lawful abortion services is a matter of reproductive healthcare and Northern Ireland’s history in this respect is viewed by many as a textbook case in gender discrimination.<sup>151</sup> More widely, however, its legacy might lie in its application to increasing legislative trends towards criminalising protests.<sup>152</sup> As the enacted law hardens in this context, judicial scrutiny appears to have commensurately softened.

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150 Bearing in mind the Supreme Court’s recent endorsement of a devolved law officer’s ability to bring references before it (even on a prospective bill) in *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, [2022] 1 WLR 5435.

151 Committee on the Elimination of Discrimination against Women, *Report on the Inquiry concerning the UK under article 8 of the Optional Protocol to the CEDAW* (6 March 2018) [64]–[83].

152 Public Order HL Bill (2022–23).