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# Freedom of expression

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## INTRODUCTION

This article is based on a lecture I gave at Queen's University Belfast on 20 October 2021. I have included some materials which have emerged subsequently. I draw attention to two recent decisions of the European Court of Human Rights (ECtHR) in this area delivered on the same day and the application of the underlying principles in the leading decisions in this jurisdiction. I also want to look briefly at the recent Supreme Court decision in *DPP v Ziegler*[1] dealing with freedom of assembly.

## THE EUROPEAN CASES

Freedom of expression and freedom of assembly engage rights under the European Convention of Human Rights under articles 10 and 11. The scheme of both articles is to assert the right in the first part of the article and the grounds for interference in the second part.

### ARTICLE 10 FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

1 [2021] UKSC 23.

The first ECtHR decision is *Lilliendahl v Iceland*.[2] The background was that an Icelandic municipal council had approved a proposal to strengthen education and counselling in elementary and secondary schools on matters concerning those who identify themselves as lesbian, gay, bisexual or transgender (LGBT). This was to be done in cooperation with the National LGBT Association. The decision was extensively reported in the news and led to substantial public discussion. That included radio stations where listeners could phone in and express their opinions on the decision of the municipal council. The applicant was one of those who took part in the public discussion. He criticised the radio station for covering what he called 'sexual deviation' and indoctrinating children on how to become sexual deviants. He expressed his disgust at the content of the radio show.

The applicant's comments were investigated by police as a result of numerous complaints and were considered to potentially constitute publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity. The District Court before which the case progressed considered that the comments did not reach the threshold required to justify interference with the applicant's freedom of expression rights and that the applicant had not intended to violate the relevant domestic statutory provision.

That decision was overturned by the Supreme Court. The court found that the requirement of intent was satisfied by the intentional use of the words by the applicant and that account should not have been taken of the motives which the applicant claimed were behind his expression. He was convicted and fined.

The Supreme Court first considered the application of article 17 of the Convention. This provides:

> Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The Supreme Court explained that the decisive point under article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it. article 17 is one of the Convention rights brought home by the 1998 Act.

If applicable, the effect of article 17 is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. Article 17 is only applicable on an exceptional

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2 App no 29297/18 (11/06/20).

basis and in extreme cases, and in cases concerning article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statement sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.

The Supreme Court concluded that the circumstances of this case did not reach the high threshold for the applicability of article 17. It accepted that, although the comments were highly prejudicial, it was not immediately clear that they were aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention.

Having rejected the applicability of article 17, the Supreme Court then began the conventional article 10 exercise noting that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress. That included ideas that might offend, shock or disturb. Such were the demands of pluralism, tolerance and broad mindedness without which there was no democratic society. Any interference had to be construed strictly and the need for restrictions had to be established convincingly.

The Supreme Court noted that the relevant penal provision had been introduced after Iceland's ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination and subsequently extended its protection to sexual orientation and gender identity. The interference with freedom of expression was in accordance with law. Curbing that freedom in this case was justified and necessary to counteract the sort of prejudice, hatred and contempt against certain social groups which hate speech could promote.

The applicant lodged proceedings in the ECtHR. The ECtHR explained that states had a margin of appreciation which meant that where the independent and impartial domestic courts have carefully examined the facts applying the relevant human rights standards consistently with the Convention and its case law and adequately balanced the applicant's personal interests against the more general public interest in the case it was not for the court to substitute its own assessment of the merits unless there were strong reasons for doing so. This approach has also been particularly noticeable in deportation cases.

The ECtHR then went on to look at the concept of hate speech. The first category is the gravest form of hate speech which falls under article 17 and is therefore excluded entirely from the protection of article 10. The second category is comprised of less grave forms of hate speech which the court has not considered to fall entirely outside the protection of article 10 but which it is considered permissible for the contracting states to restrict.

Into this category the court has not only put speech which explicitly calls for violence or other criminal acts but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient to allow the authorities to combat prejudicial speech within the context of permitted restrictions on freedom of expression. In hate speech cases which did not call for violence or other criminal acts the conclusion has been based on an assessment of the content of the expression and the manner of its delivery. This would tend to support the proposition that the test is objective and the motives of the speaker in such cases will not prove exculpatory.

In this case the ECtHR agreed that the comments were serious, severely hurtful and prejudicial. The prejudicial nature of the comments was not necessary for participation in the ongoing public discussion. Discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour (*Smith and Grady v UK*.[3] The Supreme Court had, therefore, acted within its margin of appreciation. The application was inadmissible.

The second European case is *Baldassi v France*.[4] The applicants were members of a local collective supporting the Palestinian cause as part of an international campaign entitled 'Boycott, Disinvestment and Sanctions'. They were prosecuted for calling on customers at a hypermarket not to purchase products from Israel. The relevant law prohibited incitement to discrimination against a group of persons on account of their origin or belonging to a specific nation. The court accepted that the convictions had been intended to protect the right of producers or suppliers of products from Israel to market access. The convictions had, therefore, been a means of protecting the rights of others which was a legitimate aim.

The ECtHR recognised that a call for a boycott constituted a very specific mode of the exercise of freedom of expression and that it combines expression of the protesting opinion with incitement to differential treatment. It may amount to a call to discriminate against others. Incitement to discrimination is a form of incitement to intolerance which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in exercising freedom of expression.

The ECtHR distinguished this case from the earlier decision of *Willem v France*.[5] In that case the applicant as mayor had instructed the municipal catering services to boycott Israeli products. He made the announcement without prior debate or any vote in the municipal council

3 (1999) 29 EHRR 493.
4 App no 15271/16 (11/06/20).
5 App no 10883/05 (10/12/09).

and accordingly had not encouraged free discussion of this subject of public interest. Essentially, he had abused his powers and interference with his decision was justified.

In this case the applicants were ordinary citizens and their influence over consumers was not comparable to that of a mayor over his municipal services. The purpose of the call for the boycott had been to trigger or stimulate debate among supermarket customers. There had been no racist or anti-Semitic remarks or incitement to hatred or violence.

The convictions of the applicants proceeded simply on the basis that they had called for a boycott of products from a particular geographical location. There had been no examination of whether that interference was necessary in a democratic society to attain the legitimate aim pursued. The court had been required to give detailed reasons for its decision. The actions and remarks imputed to the applicants concerned a subject of public interest and contemporary debate. The actions and remarks in question had fallen within the ambit of political or militant expression. It was in the nature of political speech to be controversial and often virulent. That did not diminish its public interest provided that it did not cross the line and turn into a call for violence, hatred or intolerance. That was the limit that should not be overstepped. The applicants' convictions had not been based on relevant grounds sufficient to show that the domestic court had applied the principles set out in article 10.

## THE DOMESTIC DECISIONS

There are two significant recent domestic cases in this area. The first is the decision of Maguire LJ in *Jolene Bunting's Application*.[6] The applicant was a Belfast city councillor. The case arose as a result of complaints made to the Local Government Commissioner for Standards. The complaints related to various remarks made by the applicant and her approbation of remarks made by others about Muslims. The Acting Commissioner considered the complaints and concluded that a suspension for a period of four months from council business was appropriate while an investigation was carried out into whether the applicant had breached the Northern Ireland Local Government Code of Conduct for Councillors (the Code).

Maguire LJ addressed the argument that this was protected as political speech. He adopted the principles derived by Hickinbottom J from the European case law in *Heesom v Public Service Ombudsman for Wales*:[7]

6 [2019] NIQB 36.
7 [2014] EWHC 1504 (Admin), [38].

'i) The enhanced protection applies to all levels of politics, including local (*Jerusalem v Austria* (2003) 37 EHRR 25), especially at [36]).

ii) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated (see, e.g., *De Haes and Gijsels v Belgium* (1997) 1 EHRR 1, at [46]–[48], and *Mamère v France* (2009) 49 EHRR 39, at [25]: see also *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin), at [55] and the academic references referred to therein). Whilst, in a political context, article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false (*R (Woolas) v Parliamentary Election Court* [2012] EWHC 3169, at [105]).

iii) Politicians have enhanced protection as to what they say in the political arena; but Strasbourg also recognises that, because they are public servants engaged in politics, who voluntarily enter that arena and have the right and ability to respond to commentators (any response, too, having the advantage of enhanced protection), politicians are subject to "wider limits of acceptable criticism" (see, e.g., *Janowski v Poland* (1999) 29 EHRR 705, at [33]; but it is a phrase used in many of the cases). They are expected and required to have thicker skins and have more tolerance to comment than ordinary citizens.

iv) Enhanced protection therefore applies, not only to politicians, but also to those who comment upon politics and politicians, notably the press; because the right protects, more broadly, the public interest in a democracy of open discussion of matters of public concern (see, e.g., *Janowski* at [33]). Thus, so far as freedom of speech is concerned, many of the cases concern the protection of, not a politician's right, but the right of those who criticise politicians (e.g. *Janowski*, *Wabl v Austria* (2001) 31 EHRR 51 and *Jerusalem*). *Castells v Spain* (1992) 14 EHRR 445, of course, was both; the senator criticising politicians within the Spanish Government through the press.

v) The protection goes to 'political expression'; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views (*Calver* at [79]), but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others (*Thorgeirson v Iceland* (1992) 14 EHRR 843, at [64]: see also *Calver* at [64] and the academic references referred to therein). The cases are careful not unduly to restrict the concept; although gratuitous personal comments do not fall within it.

vi) The cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the

> other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis (e.g. *Lombardo v Malta* (2009) 48 EHRR 23, at [58], *Jerusalem* at [42] and following, and *Morel v France* (2013) Application No 25689/10, at [36]). What amounts to a value judgment as opposed to fact will be generously construed in favour of the former (see, e.g., *Morel* at [41]); and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, 'reasonableness' here taking account of the political context in which the thing was said (*Lombardo* at [59]).
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> vii) As article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. In most instances, where the State seeks to impose a restriction on the right under article 10(2), the determinative question is whether the restriction is "necessary in a democratic society". This requires the restriction to respond to a "pressing social need", for relevant and sufficient reasons; and to be proportionate to the legitimate aim pursued by the State.
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> viii) As with all Convention rights that are not absolute, the State has a margin of appreciation in how it protects the right of freedom of expression and how it restricts that right. However, that margin must be construed narrowly in this context: "There is little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest" (see, e.g., *Lombardo* at [55]–[56], *Monnat v Switzerland* (2010) 51 EHRR 34, at [56]).
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> ix) Similarly, because of the importance of freedom of expression in the political arena, any interference with that right (either of politicians or in criticism of them) calls for the closest scrutiny by the court (*Lombardo* at [53]).'

In a careful and instructive judgment reviewing the terms of the Code, the approach that should be taken by the court to the decision of the Acting Commissioner and the extent of the assistance that the applicant could derive from article 10 of the Convention, Maguire LJ concluded that the decision to suspend for a period of four months was proportionate.

The judge paid particular attention to the question of whether the matter which was the subject of the complaint constituted political speech. He concluded that a generous interpretation should be given to that concept. He also recognised that not every pronouncement by a politician should attract that protection and the test will usually depend upon whether the matter complained of had a sufficient connection with a matter of public interest.

The other relevant domestic decision is the judgment of Keegan LCJ in *Lee Brown v PPS*.[8] The prosecution was concerned with the distribution of a leaflet on behalf of Britain First complaining about an influx of migrants in Ballymena. The LCJ extensively reviewed the most recent case law in a wide-ranging and informative judgment.

The following propositions can be extracted from these decisions:

1 Freedom of expression is a fundamental right in a democratic society.
2 It follows that any restriction on the exercise of the right under article 10 (2) must be strictly construed.
3 If the exercise of the right is to be restricted it is invariably where the speech promotes violence or hatred or intolerance of the democratic values of the Convention.
4 Political speech qualifies for enhanced protection. Generally, the state has a wider margin of appreciation in matters of morals or religion.[9]
5 In order to qualify as political speech it is not necessary that the speaker holds a political office nor does it follow that because the speaker holds a political office the speech attracts the protection. It is for the court in each case to assess whether or not the speech is on a matter of public interest or debate.
6 Cases such as *Willem v France*[10] and *Feret v Belgium*[11] demonstrate that politicians who abuse their position in order to stifle public debate or to promote their personal prejudices will lose the enhanced protection.
7 The ECtHR acknowledges that each state has a margin of appreciation in respect of the restriction of the right to freedom of expression subject to European supervision.
8 This means that the court will review the intensity of the analysis of the nature of the speech and the corresponding strength of the ground upon which a restriction is proposed. A good demonstration of the type of analysis required is that exercised by Maguire LJ in *Bunting* where he analysed each of the complaints and identified those which he found justified the interference and rejected some of the matters upon which the Acting Commissioner had placed reliance.
9 The analysis is central to the ability of the court to adequately explain the justification for any restriction. Where that analysis has not been carried out or relevant and sufficient reasons in accordance with the ECtHR's cases law have not been

8 [2022] NICA 5.
9 *Murphy v Ireland* 38 EHRR 212.
10 App no 10883/05 (10/12/09).
11 App no 15615/07 (16/07/09).

demonstrated the court is likely to find a violation. *Baldassi* is an example of that.[12]

10 Where the analysis and reasons for the restriction are explained bearing in mind the appropriate European case law the ECtHR will not normally interfere with the proportionality assessment made by the domestic court.

11 Proportionality also plays a role in the extent and nature of any interference with the right.

## *ZIEGLER*

That brings me to the case of *DPP v Ziegler*[13] decided by the Supreme Court in June 2021. The case arose from a protest at the 2017 biennial Defence and Security International arms fair. The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading into it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the 'five-stage process' to try to persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

The protestors were prosecuted for obstruction of the highway without lawful excuse. The critical issue was whether the obstruction was the lawful exercise of the right of free assembly.

**ARTICLE 11 FREEDOM OF ASSEMBLY AND ASSOCIATION**

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

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article

12 App no 15271/16 (11/06/20).

13 [2021] UKSC 23.

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 district judge made the following findings:

'a. The actions were entirely peaceful – they were the very epitome of a peaceful protest.

b. The defendants' actions did not give rise either directly or indirectly to any form of disorder.

c. The defendants' behaviour did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

d. The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair ... I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether "non-DSEI traffic" was or was not in fact obstructed since the authorities cited above appeared to envisage "reasonable" obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration ...

e. The action clearly related to a "matter of general concern" ... namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (eg those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

f. The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests – which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer "free agents" but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of "wilfulness" which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in Ziegler lasted about 90–100 minutes ...

> g. I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.
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> h. Lastly, although compared to the other points this is a relatively minor issue, I note the longstanding commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble.'

He held that the interference with the highway was protected by article 11 and the defendants had a lawful excuse for the interference with the highway.

The Divisional Court was not impressed. Its core criticism of the decision was set out as follows:

> 'At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway to and from the Excel Centre, was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not a case where, as commonly occurs, some part of the highway (which of course includes the pavement, where pedestrians may walk) is temporarily obstructed by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said (depending on the facts) that a "fair balance" is being struck between the different rights and interests at stake, and the present cases. In these two cases the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do, namely use the highway for passage to get to the Excel Centre and this occurred for a significant period of time.'[14]

The issue which was then certified for the Supreme Court was whether deliberate physically obstructive conduct by protesters was capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than *de minimis*, and prevents them, or is capable of preventing them, from passing along the highway.

The Supreme Court by a majority allowed the appeal and restored the decision of the magistrate. The principal majority judgment was given by Lords Hamblen and Stephens, with Lady Arden delivering

14 *DPP v Ziegler* [2019] EWHC 71 (Admin), [112].

a concurring judgment allowing the appeal. In the following passage they adopted certain observations of Lord Neuberger:

> 'A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] EWCA Civ 160. The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger identified two further factors as being: (a) whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of considerable breadth, depth and relevance'; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.'[15]

The point of dispute between the majority and Lords Hodge and Sales concerned the importance of the police conduct. If, it was argued, the police were entitled to arrest and remove the protesters it could only be because it was reasonably suspected that the offence of obstruction was being committed and there was no lawful excuse for the continuation of the protest. That had not been addressed by the judge. The minority did not agree that the district judge had properly reflected the fact that the dual carriageway leading into the Excel Centre was completely blocked and did not analyse the disruption actually caused and likely to continue. They also considered that the judge had not properly reflected the period of disruption before the protesters could be removed.

## CONCLUSION

The broad circumstances surrounding the *Ziegler* case are being played out on virtually a daily basis in many parts of the United Kingdom. It is disturbing to find that there is such a degree of dispute as to the relevant factors to be taken into account and the weighting to be given to the disruption caused by the protest. Close scrutiny of many of the cases which have been reviewed earlier shows a pattern of disagreement and conflicting views within the various levels of the appeal process.

As the majority indicated in their review of the principles underlying Article 11:

15 *DPP v Ziegler* [2021] UKSC 23, [72].

> 'Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest, which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate).'[16]

I agree but I also wonder whether the proportionality assessment of police conduct in clearing the highway is different from the assessment that should take place when a decision to prosecute the protester is in issue. Does it necessarily follow that because the police were entitled to clear the highway by arrest and removal that the protester should be the subject of a further interference by way of criminal charges? Does that not require a further proportionality assessment? And may that not give rise to a different outcome? Is there, for instance, a difference between a criminal prosecution and a caution or penalty notice in terms of proportionality?

There is continuing political interest in this area, and it seems inevitable that the Supreme Court will once again be asked to address the issues to see if further guidance can be given. The problem is that, where the issue of interference with the Convention right arises, particularly in a political context, the ECtHR requires a detailed analysis of the relevant and sufficient reasons justifying the decision. The intensity of that exercise, particularly where political speech is involved, in part explains how conflicting views have been taken by different judges in respect of these cases. Difficult though it may be, I consider it preferable that any guidance giving greater clarity to the approach should come from the Supreme Court as any legislative solution is unlikely to be flexible enough to avoid incompatibility issues.

16 *DPP v Ziegler* [2021] UKSC 23, [57].