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CRIME



Welcome to the first edition of the Crime Briefing which focuses on the topical area of protest law and legislative changes as a result of the Police, Crime, Sentencing and Courts Act 2022, with articles from Francesca Kolar and Madeleine Miller.

Tom Little KC appeared as leading counsel for the Attorney General in AG's Reference No.1 of 2022 [2022] EWCA Crim 1259 ('the Colston statute case') and Jennie Osborne is instructed to prosecute several 'Just Stop Oil' protesters including those accused of damaging the frame of Van Gogh's 'Sunflowers'.

Following the merger of 9 Gough Chambers and 1 Chancery Lane in October, we are now Deka Chambers, one of the largest common law sets in the country. We have a strong experienced team of barristers practising criminal law who prosecute and defend in some of today's most high profile and leading cases. You can see a list of our members at the end of this briefing.

If you'd like further information about our team please get in touch at **clerks@dekachambers.com** or call us on **020 7832 0500**.

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POLICE, CRIME, SENTENCING AND COURTS ACT 2022—UPDATES FOR PRACTITIONERS

By Francesca Kolar



The Police, Crime, Sentencing and Courts Act, ("the Act"), came into effect in April 2022. The Act has far reaching changes for criminal practitioners in respect of public protests and assemblies, changes to custodial and community sentences, and it creates a new either-way voyeurism offence. It has 14 Parts, 209 Sections and 21 separate Schedules, the purpose of this article is to highlight some key changes for criminal practitioners to be aware of.

Part 3 of the Act — Public Order

Causing a public nuisance was a criminal offence which had developed over time under common law, it usually involved causing an environmental danger or loss of amenity or offensive public behaviour.

Section 78 of the Act abolishes the common law offence of public nuisance and creates a new legislative offence of intentionally or recklessly causing public nuisance. For this offence to be committed an individual does an act or fails to do an act they are required by law to do, which creates a risk of, or causes serious harm to the public, or a section of the public or, prevents the public or a section of the public from exercising their rights. An individual is guilty of this offence if they intend that their behaviour will have this consequence, or they are reckless as to whether it will have such a consequence.

Serious harm is defined as death, personal injury or disease, loss of or damage to property, or serious distress, serious annoyance, serious inconvenience or serious loss of amenity. There is a defence of reasonable excuse and the maximum sentence on indictment is 10 years imprisonment. Clearly the scope of what constitutes a public nuisance has widened significantly.

Section 137 of the Highways Act 1980, which concerns a penalty for wilful obstruction, has also been amended. Now if a person without lawful authority or excuse in any way wilfully obstructs a highway, they are guilty of an offence and liable to imprisonment for a term not exceeding 51 weeks,

or an unlimited fine or both. Previously the penalty was merely a fine not exceeding level 3 on the standard scale (up to £1,000). Furthermore, at subsection 1B it sets out that it does not matter whether the free passage along the highway in question has already been temporarily restricted or temporarily prohibited by a police officer, traffic authority or otherwise.

There is also an important change to the mode of trial in respect of criminal damage to memorials. Where the value of criminal damage is less than £5,000, it must be tried summarily in the Magistrates' Court, and it attracts a maximum sentence of 3 months and/or a fine. However, where there is damage to a memorial on or after 28th June 2022, the offence will be triable either way even if the value of the destroyed property or damage amounts to less than £5,000.

A memorial is defined in section 22(11A) of the Criminal Damage Act 1971 as a building or structure, or any other thing, erected or installed on land, which can also be inside or on a building or structure, it could also be a garden, provided it has a commemorative purpose. Subsections 11C and 11D state that something has a 'commemorative purpose' if at least one of its purposes (so not necessarily its sole purpose) is to commemorate one or more individuals or animals, an event, or a series of events (such as armed conflict). Commemorate and commemorative are not defined and should be given their ordinary meaning. It is also immaterial whether or not any of the individuals or animals concerned are or were living or deceased or are capable of being identified.

Changes to the Sexual Offences Act 2003

There are several key sections for practitioners to be aware of:

There is a new offence of voyeurism in respect of breast-feeding, now inserted within Section 67A of the Sexual Offences 2003 Act. This amendment

mirrors the 'upskirting' offence created in 2019. For the offence of voyeurism of breast-feeding to be committed, the person recording the image would have to be acting without the breastfeeding person's consent (or a reasonable belief that they consent), and for the purposes of looking at the image for their own sexual gratification (or the sexual gratification of a third person), or in order to humiliate, alarm or distress the person breastfeeding. It is an either-way offence, the maximum sentence on indictment is imprisonment for a term not exceeding 2 years.

This new offence builds on a series of protections for breastfeeding women, the Equality Act 2010 says that it is discrimination to treat a woman unfavourably because she is breastfeeding.

Section 175 now inserts in section 343 of The Sentencing Act 2020 that a Sexual Harm Prevention Order ("SHPO") may now include positive requirements of an offender, as opposed to merely negative prohibitions. Positive requirements may include a requirement to attend a sexual offender treatment programme, or to undertake a polygraph test.

Subsections (5) and (11) have amended section 350 of the Sentencing Act 2020 and section 103E of the Sexual Offences Act 2003 respectively to enable a SHPO to be varied or renewed, to include additional positive requirements providing that any additional obligations do not conflict with the offender's religious belief, interfere with the offender's work or education, or conflict with any other Court Order or injunction.

Section 176 makes equivalent amendments to Sexual Risk Orders to those made by section 175 in respect of SHPOs, as set out above.

Section 174 makes clear that the standard of proof to be applied in an application for a SHPO or a Sexual Risk Order is the balance of probabilities, the civil standard of proof rather than the criminal standard. This amendment brings these orders in line with other civil orders for example Domestic Abuse Protection Orders under section 32 of the Domestic Abuse Act 2021.

There is a new **section 22A** detailing further positions of trust, which now includes a person who coaches, teaches, trains, supervises or instructs the victim on a regular basis, in a sport or a religion. Sport and religion have also been defined. This change in the law comes after the football and

Catholic Church sexual abuse scandals, which have been widely reported in the media.

Changes to the Time Limit for Common Assault or Battery

For those criminal practitioners who more frequently prosecute and defend in the Magistrates' Court, there is an important change to the time limit in bringing an offence of Common Assault or Battery in domestic abuse cases, under section 39A of the Criminal Justice Act 1998, a summary only offence. The section only applies to proceedings where the behaviour of the accused amounts to domestic abuse. Therefore, there is no change to the six-month time limit for a summary only offence of common assault or battery which occurred for example outside of a pub.

One of the following two conditions must also be met, either the complainant has made a witness statement with a view to its possible admission as evidence in the proceedings to a police officer or a person authorised by a police officer to receive the statement, *OR* the complainant has been interviewed by an officer, or a person authorised by an officer to interview the complainant, and a video recording of that interview has been made with a view to its possible admission as evidence in chief.

If the above is satisfied, then proceedings for this offence can be commenced at any time which is both within two years from the date of the offence, and within six months from the first date on which either the witness statement was given, or the ABE interview was undertaken and recorded.

The scale and impact of the changes to the criminal justice system arising from this Act cannot be reduced into one article and criminal practitioners should review the Act, which also places restrictions on unauthorised encampments, makes amendments to cautions and Youth Justice and has increased penalties for some Road Traffic Offences.



CONVENTION RIGHTS IN PROTEST CASES: HOW WILL CRIMINAL COURTS APPROACH PROPORTIONALITY OF A CONVICTION?

By Madeleine Miller



On 28th September 2022, the Court of Appeal handed down judgment in a reference by the Attorney General on points of law arising from the trials of four protestors involved in the toppling of a statue of Edward Colston in Bristol on 7th June 2020. Colston was a wealthy English merchant born in Bristol who was involved in the slave trade as part of the Royal African Company. A statue of him was erected in 1895 to recognise his philanthropic contributions, however the statue became a source of controversy. There were calls for the statue to be removed because of Colston's role in the transportation of African slaves to the West Indies and America. The 2020 protest, in support of the Black Lives Matter movement, saw the statue pulled from its plinth and rolled into the harbour.

On 5th January 2022 the four defendants were acquitted on charges of criminal damage contrary to section 1(1) Criminal Damage Act 1971, which provides that 'a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence'. This is an either way offence which is treated as summary only generally when the value of the damage does not exceed £5,000. A defence raised was that the damage done to the statue was lawful because it was a proportionate exercise of the right to protest. The judge at first instance directed the jury that they needed to be sure that the elements of the offence of criminal damage were made out and that such a conviction would be a proportional interference with the defendants' rights under the European Convention on Human Rights ('the Convention').

The Attorney General's reference posed a fundamental question for the Court of Appeal – whether the trial judge was right to leave to the jury

the question of whether a conviction in a case of criminal damage would be a disproportionate interference with the defendants' Convention rights. This was formulated as three distinct legal issues:

- 1) Does the offence of criminal damage fall within that category of offences, identified in *James v DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin), where conviction for the offence is - intrinsically and without the need for a separate consideration of proportionality in individual cases - a justified and proportionate interference with any rights engaged under Articles 9, 10 and 11 of the Convention?

If not, and it is necessary to consider human rights issues in individual cases of criminal damage:

- 2) What principles should judges in the Crown Court apply when determining whether the qualified rights found in Articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest?
- 3) If those rights are engaged, under what circumstances should any question of proportionality be withdrawn from a jury?

James drew a distinction between two types of offences. The first being offences where the prosecution must prove that any restriction on Convention rights is proportionate. The second comprises offences where, once the elements of the offence have been proven, the defendant's conduct has, by definition, gone beyond reasonable conduct in the exercise of Convention rights, meaning there is no need to consider proportionality further.

The Supreme Court in *DPP v Ziegler* [2021] UKSC 23 reinstated a decision that a conviction for obstruction of the highway would have been a

disproportionate interference with the defendant's human rights. This decision in *Ziegler* was initially interpreted in a number of cases at first instance as establishing a universal rule that in any criminal case where there is a prima facie interference with Convention rights the court must consider whether the interference with those rights arising from a conviction is a proportionate one.

This approach was rejected in *Cuciurean*, where the Divisional Court considered the application of *Ziegler* to offences other than obstruction of the highway. The Court held that conviction for aggravated trespass was intrinsically a proportionate interference with Convention rights, without the need for a separate consideration of proportionality in individual cases.

In the *Colston* reference, acting for the Attorney General, Tom Little KC's position was that the legislative provision creating the offence of criminal damage strikes the proportionality balance itself, meaning that the prosecution would not need to prove separately that a conviction would be a proportionate interference with a defendant's Convention rights. The Respondents submitted that every prosecution for criminal damage arising out of a protest requires a proportionality assessment on the basis that a conviction for criminal damage is not automatically a justified interference with Convention rights and that the ingredients of the offence do not render it intrinsically proportionate.

The Court of Appeal decided that criminal damage, unlike aggravated trespass, was not an offence where any conviction was intrinsically a proportionate interference with Convention rights. However, the Court held that Convention protection, and thus the question of proportionality, does not arise where the conduct in question is not peaceful or where the damage is significant. As such, given that the criminal damage cases which are heard in the Crown Court will engage one or both of these conditions, the Court held that inevitably the issue of proportionality should not be left to a jury. The Court acknowledged the possibility that theoretically cases might arise in the Magistrates' Court involving minor or trivial

damage where the issue of proportionality may arise, in which case the authorities suggest that conviction might not be proportionate in the context of protest. However, the Court envisioned that such cases would likely be rare.

This judgment represents a continuation of a line of authority confirming that *Ziegler* did not create a universal rule, and that defendants who raise Convention rights will not always have the proportionality of interference with those rights considered by the jury. In particular, those defending charges of criminal damage in the Crown Court.

The Supreme Court recently confirmed this approach in *Attorney General for Northern Ireland* [2022] UKSC 32, a reference in relation to Clause 5(2)(a) of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill, which created an offence of doing 'an act in a safe access zone with the intent of, or reckless as to whether it has the effect of, influencing a protected person, whether directly or indirectly'. The Court set out that, where a defendant raises Articles 9, 10 or 11 Convention rights as a defence to a protest-related offence, there will be three questions arising:

1. Are Articles 9, 10 or 11 engaged? Or, as in the *Colston* case, does the conduct itself mean there is no Convention protection?
2. Is the offence one where the ingredients of the offence themselves strike the proportionality balance?
3. If the conduct falls within the scope of the articles and proof of the offence does not itself ensure proportionality of conviction, is there a means by which the proportionality of a conviction can be ensured?

This has clarified that it is not the case that all offences can be placed into one of the two *James* categories, but also that simply because an offence contains a defence of 'lawful or reasonable excuse' does not in and of itself mean that a proportionality assessment can or should be undertaken. There is more nuance to the position, as we have seen with *Colston* – if the offending conduct is violent or not peaceful, it falls outside Convention rights and falls

away at the first of the three questions even if there is available a defence of lawful excuse. A similar situation would arise with offences of threats to kill; violent offences fall outside the scope of Convention protection, even though threats to kill contains a defence of lawful excuse. With many more protest cases on the horizon this year, such as the Just Stop Oil protestors, we can expect to see further development in this area.



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