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Case No: 202102710 B5 and 202103179 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Perrins
T20190440

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 January 2022

Before:

THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE SINGH
and
MR JUSTICE GOSS

- -

Between:

REGINA	**Respondent**
- and -	
JAMES HUGH BROWN	**Appellant**

- -
- -

Tim Moloney QC and Blinne Ní Ghrálaigh (instructed by **Hodge Jones and Allen Solicitors**) for the **Appellant**
Tom Little QC (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 8 December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 9:45am on 14 January 2022.

Lord Burnett of Maldon CJ:

Introduction

1. On 28 July 2021 at the Crown Court sitting at Southwark the applicant was convicted of public nuisance and on 24 September was sentenced to 12 months' imprisonment. On 10 October 2019 he had glued himself to the top of a commercial passenger aircraft operated by British Airways at London City Airport. He had booked a ticket to fly to Amsterdam on the aircraft. His actions caused inevitable disruption to that flight and others. His intention, as the judge found, had been to cause as much disruption as possible and garner extensive publicity. His motivation was to draw attention to climate change and the contribution that air travel makes to the emissions which cause it. His application for leave to appeal against both conviction and sentence has been referred to the full court.

2. The grounds of appeal against conviction are, by Grounds 1 and 2, that the judge was wrong to refuse to stay the prosecution as an abuse of process, given the availability of a charge of aggravated trespass and contraventions of local bylaws. Ground 3 (which was not pursued) suggested that the judge failed in his summing up to identify the ingredients of public nuisance correctly. By Ground 4 the applicant contends that the judge misdirected the jury when explaining that he was unrepresented at trial. Ground 5 argues that the prosecution should not have been allowed to make a closing speech and Ground 6 that the financial cost to British Airways should not have been admitted in evidence. These last three grounds are all said to render the conviction unsafe.

3. We grant leave to pursue Grounds 1 and 2 but refuse leave to appeal against conviction on Grounds 3, 4, 5 and 6. For reasons which follow, we dismiss the appeal against conviction.

4. The grounds of appeal against sentence are that an immediate custodial term of 12 months' imprisonment was disproportionate in the context of peaceful protest, that the judge adopted an evidential basis for sentence which was not established at trial and failed to have due regard to the impact of prison on this appellant because of his substantial impairment of vision. We grant leave to appeal against sentence. For reasons which we develop at [58] and following below we allow the appeal against sentence and substitute a sentence of four months' imprisonment. At the conclusion of the oral hearing we granted the appellant bail with the consequence that he was released from custody on 8 December 2021. He has served the custodial part of his sentence.

The Facts

5. The appellant was part of a group of climate activists associated with Extinction Rebellion who styled themselves "the New Pretenders". He is substantially visually impaired, a well-known Paralympian with a successful business. On 10 October 2019 the group made up of at least ten launched a concerted attack on London City Airport. The appellant had a ticket for the lunchtime British Airways flight to Amsterdam. He passed through the airport as an ordinary passenger and, because of his disability, was allowed to board the aircraft first. Others in the group glued themselves to departure gates and also sought to disrupt the Docklands Light Railway. The activities were carefully co-ordinated using WhatsApp. They were designed to cause significant disruption to the operation of the airport and inconvenience the travelling public.

6. When the appellant arrived at the door of the aircraft he was greeted by a flight attendant who, on account of his disability, offered to escort him to his seat. He declined that offer and told her that he intended to climb on top of the aircraft. That he did by clambering up the open door. He then lay on top of the aircraft. The flight attendant, pilot, other members of the crew, and then airport staff, police and fire service personnel who came to the scene were first concerned principally for the safety of the appellant. He was insecure on the roof of an aircraft far above ground and a fall could be fatal. Two further sets of steps were placed by the plane to break his fall should that happen. A measure of their concern for his welfare is found in the provision of a blanket because they were worried that he would get cold. In due course the appellant reached inside a pocket and extracted a tube of superglue with which he glued one of his hands to the fuselage. The appellant's activities were being filmed from within the terminal building by one of his fellow protesters and he too filmed (and livestreamed) part of the action. A cherry picker was eventually used to enable a member of staff to use a debonding agent to unglue him and he was removed from the aircraft after having been there for more than an hour.

7. The aircraft either side were moved because there was concern that if either started their engines the appellant might be dislodged and suffer injury. The taxi way passing the British Airways aircraft was closed to movement.

8. The flight to Amsterdam was cancelled. The plane was taken out of commission for the rest of the day to enable the door and roof to be checked to ensure safety. In total, four flights by that aircraft were cancelled on which 339 passengers had been booked. Six further flights were delayed because of the appellant's actions. A representative group of statements from passengers to illustrate the impact of the appellant's actions included people who had missed birthday celebrations, other family events and business meetings. The appellant's own evidence was that he needed to do something spectacular to maximise media attention.

Grounds 1 and 2

9. The application for the prosecution to be stayed as an abuse of process proceeded from the premise that in disrupting the operations of the airport he was exercising rights to protest conferred on him by the European Convention on Human Rights ("the Convention") under article 9 (freedom of conscience), article 10 (freedom of expression) and article 11 (freedom of assembly and association). All are qualified rights. It was not suggested that the Convention renders lawful the conduct of the appellant. No sensible application of the Convention through the Human Rights Act 1998 ("the 1998 Act") could sanction the appellant's conduct given its impact. Instead, the submission advanced on his behalf by Mr Moloney QC was that the prosecution for public nuisance was an abuse of process because of the availability of alternative offences, prosecution for which would have been a proportionate response by the prosecuting authorities.

10. The statutory offence in question is that of aggravated trespass, a summary only offence, created by section 68(1) of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"):

> "**68. Offence of aggravated trespass**
>
> (1) A person commits the offence of aggravated trespass if he trespasses on land [in the open air] and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land [in the open air], does there anything which is intended by him to have the effect—
>
> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or
>
> (c) of disrupting that activity."

It carries a maximum penalty of three months' imprisonment.

11. Bylaw 3(13) of the London City Airport Bylaws 1988 creates offences of obstructing persons carrying out an act necessary for the proper execution of a contract with the airport, obstructing a person in the proper use of the airport or behaving in a way which gives reasonable grounds for annoyance of others at the airport. Bylaw 7 prohibits entering or climbing on an aircraft without permission, lawful authority or a reasonable excuse. Contravention of these bylaws carries a maximum penalty of a fine of £400.

12. Ground 1 is that the judge erred in failing to stay the prosecution for the common law offence of public nuisance as an abuse of process, where alternative statutory offences were available, such as to amount (among other things) to a breach of articles 9, 10 and 11 of the Convention. Ground 2 is that he erred in determining that the Crown had "good reason" to prosecute the applicant for the common law offence of public nuisance, such that no abuse of process arose. We will address both grounds together because they are closely related to each other and that is how they were argued.

13. Mr Moloney submits that the alleged offending fell "squarely" within the scope of other offences, in particular aggravated trespass and offences against the City Airport bylaws. As we have explained, the maximum penalty for those offences is significantly lower than that for the common law offence of public nuisance, which in theory is life imprisonment.

14. Although Mr Moloney expressly disavows any suggestion of bad faith on the part of the prosecution, he submits that the reality of the situation is that the reason why the common law offence was chosen was that it circumvents the maximum penalties for those other offences. He submits that the doctrine of abuse of process is not limited to cases of bad faith and that this was a case in which the prosecution should have been stayed.

15. He also submits that the appellant's conduct was of the type for which aggravated trespass has been charged in other cases, including in relation to protests at airports. Some of those cases, he submits, involved protests that resulted in more disruption to the general public than in this case.

Principles on abuse of process

16. We did not understand there to be any dispute before us about the relevant principles which govern an application to stay a prosecution on the ground of abuse of process. First, a stay will be ordered where a defendant cannot have a fair trial. No suggestion was or is made in the present case that the appellant could not have a fair trial. Secondly, a stay will be ordered where that is necessary to protect the integrity of the criminal justice system. *R v Stockli and others* [2017] EWCA Crim 1410; [2018] 1 WLR 5609 (Burnett LJ, Carr and Cheema-Grubb JJ) considered the application of that second aspect in the context of protest. Para. 34 of the judgment of the court established that:

> "… before staying the proceedings it was necessary to be satisfied that the prosecution amounted to a manipulation of the process which the court could not sanction."

and:

> "We cannot accept that the House of Lords in *R v Rimmington* created a new and free-ranging category of abuse of process which allows a court to stop a prosecution in these circumstances whenever it considers that the prosecution lacks a good reason for having charged public nuisance rather than a statutory alternative."

17. That was a reference to the decision of the House of Lords in *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459. At para. 30, Lord Bingham of Cornhill said:

> "30. … Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited. … It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise."

18. The other members of the House of Lords agreed with Lord Bingham. In his concurring opinion, Lord Rodger of Earlsferry explained, at para. 52, that:

> "… Where Parliament has not abolished the relevant area of the common law when it enacts a statutory offence, it cannot be said that the Crown can never properly frame a common law charge to cover conduct which is covered by the statutory offence."

However, as he added at para. 53, Parliament has thought fit to impose certain time limits for certain statutory offences and to prescribe maximum penalties for them. He continued, at para. 54:

> "It is not for the Crown to second-guess Parliament's judgment as to any of these matters by deliberately setting out to reject the applicable statutory offences and to charge the conduct in question under common law in order to avoid the time-limits or limits on sentence which Parliament has thought appropriate. …"

19. In *Stockli*, at para. 38, we find:

> "In our opinion, Lord Rodger captured the essence of the matter in cases of this sort in his discussion … of respecting the will of Parliament. A prosecution for public nuisance brought instead of a statutory offence which covers substantially the same ground to avoid an awkward time limit or seek a sentence beyond the statutory maximum might well be such an abuse. So too might be a calculated decision to deny a defendant the benefit of a statutory defence not available when charged with public nuisance. The fact that a prosecutor has not followed good practice, as Lord Bingham put it, would not be enough."

Then at para. 48:

> "… We emphasise that the court should be slow to interfere with a prosecutorial decision taken in good faith where there is no suggestion that the respondents could not receive a fair trial. We have rejected the Respondents' submission that a failure to follow "good practice" as identified in *Rimmington* will amount to an abuse of process without more. As the authorities referred to above demonstrate, an abuse of process arises when the integrity of the justice system is under threat, not merely where good practice is not followed, serious though that may be."

20. On the facts with which we are concerned in this appeal, we are satisfied that the judge was not only entitled but was right to conclude that there was good reason for the prosecution to be brought under the common law. The real gravamen of the offending in this case was the serious disruption to the rights of members of the public to use City Airport and the disruptive knock-on effect of delaying flights or causing them to be cancelled. This went well beyond an offence of trespass, even aggravated trespass; and it affected many members of the public, not only the passengers on one flight.

21. Although there was an element of trespass in the appellant's conduct, that was not the true or full extent of his offending. The statutory definition of aggravated trespass in

section 68(1) of the 1994 Act does not require there to be any adverse effect on a section of the public or serious disruption to activities. It suffices that a person is a trespasser on land and that he has the intention to do one of the proscribed things, for example to obstruct another person's lawful activity. As in *Stockli* (see para. 45) the statutory offence did not reflect the gravamen of the offending. It was far from being a precise fit.

22. Moreover, as the judge observed at para. 31 of his ruling on the application for abuse of process dated 9 February 2021, it could not be said that the appellant was denied the opportunity to put his defence because of the charge which the prosecution had chosen to bring. It has not been argued that had he been charged with aggravated trespass, any other defences would have been available to him.

23. So far as the City Airport bylaws are concerned, in our judgment, those are not the type of offence that the House of Lords had in mind in enunciating the principle in *Rimmington*. Those bylaws are not statutory offences: they are not rules made by Parliament. Although (as Mr Moloney correctly observes) there is some supervision over the making of those bylaws conducted by the Secretary of State acting pursuant to delegated powers, the Secretary of State is not Parliament. In our view, the real burden of Mr Moloney's submission must be that it was an abuse of process for the prosecution to bring the charge of public nuisance when it could have brought a charge for aggravated trespass, which is undoubtedly a statutory offence. However, for the reasons we have set out above, we do not accept that argument.

Abuse of process and proportionality

24. In the grounds of appeal and the skeleton argument for this appeal, it appeared to be suggested that there is now a free-standing ground for staying a criminal case on the ground of abuse of process, namely that the prosecution is disproportionate under the Convention, in particular articles 10 and 11. In support of that suggestion reliance was placed on the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2021] 3 WLR 179, which postdates the abuse of process ruling in the present case. The judge had the benefit of the judgment of the Divisional Court. It was submitted that *Ziegler* confirms that the prosecution of peaceful protestors amounts to a restriction on their rights under articles 10 and 11 of the Convention, which must be proportionate to be justified. It was submitted that, since a court is itself a "public authority" within the meaning of section 6 of the 1998 Act, it must not permit a restriction of those rights where it would amount to an abuse of process.

25. In particular it was submitted that the Supreme Court held in *Ziegler* that:

    i) The arrest, prosecution, conviction and sentence of a person are all "restrictions" under articles 10 and 11.

    ii) Each of those restrictions will only be "necessary in a democratic society" if it is proportionate: see para. 57 in the judgment of Lord Hamblen and Lord Stephens JJSC.

    iii) There must be "a separate evaluation of proportionality in respect of each restriction": see para. 67; and "different considerations may apply to the proportionality of each of those restrictions": see para. 57.

26. In the skeleton argument for the appellant it was submitted that, where a prosecution constitutes a restriction of a defendant's rights under articles 9, 10 or 11, the court, as a public authority, must not act in a manner incompatible with those rights. That means that, when faced with an abuse of process application engaging rights of freedom of conscience, speech and/or assembly, the court must consider whether the restriction by way of a prosecution is proportionate, having regard (among other things) to the underlying principle that a prosecution for a common law offence may constitute an abuse of process in circumstances where the offending falls squarely within the terms of a statutory offence.

27. It was also submitted, by reference to the judgment of Lady Arden JSC, at para. 92, that the "constitutional shift" brought about by the 1998 Act applies to all public order-type offences, not only obstruction of the highway, which was the direct subject of *Ziegler* itself. We would observe that what was said by Lady Arden, at para. 92, was not expressly the subject of agreement by any other member of the Supreme Court. In any event, her words must not be read out of context.

28. More fundamentally:

    i) The offence which was the subject of *Ziegler* was obstruction of the highway, contrary to section 137 of the Highways Act 1980. That offence provides for a specific defence of "lawful excuse". The Supreme Court, endorsing what the Divisional Court had said in that case, confirmed that that phrase is capable of being interpreted (pursuant to section 3 of the 1998 Act) to include the proper exercise of Convention rights. In the present context, however, Mr Moloney accepts that exercise of the Convention rights does not provide the foundation for a defence as a matter of substantive criminal law.

    ii) *Ziegler* was not concerned with the doctrine of abuse of process. The passing references to prosecution being a separate restriction on Convention rights were not developed in detail. It is apparent from para. 57, read as a whole, that what Lords Hamblen and Stephens had in mind was more the contrast between the arrest stage and the trial stage, without drawing a rigid distinction between the prosecution of an offence and the question of substantive criminal liability.

    iii) The ratio of *Ziegler* is that, in an appeal by way of case stated, the test for an appellate court when considering whether the lower court erred in finding that a restriction on a Convention right was proportionate, is the usual one of whether there has been an error of law by that court. That error of law can include circumstances where the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. The Supreme Court concluded that the assessment by the District Judge in the Magistrates' Court that the obstruction in question was a reasonable exercise of Convention rights should not, as a matter of law, be disturbed.

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

30. At the hearing before us Mr Moloney relied upon the decision of *James v Director of Public Prosecutions* [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118 for the proposition that the proportionality of a decision to prosecute, in the context of articles 10 and 11 of the Convention, is relevant to the court's jurisdiction to stay an abuse of process. He relies, in particular, on para. 28 in the judgment of Ouseley J:

> "… A contention that a decision to prosecute was disproportionate is not one which criminal courts can rule on *unless it amounts to an abuse of process*, itself an exceptional and limited remedy." (Emphasis added)

31. We would make four observations about that proposition.

32. First, that decision, being a decision of the High Court, is not binding on this Court.

33. Secondly, in any event, the comment we have emphasised in that passage was *obiter* in the context of that case itself. The actual *ratio* of the decision is as set out by Ouseley J at para. 25:

> "The proportionality, for the purposes of Articles 10 or 11, of a decision to prosecute is simply not an issue for the trial Courts to deal with. It is for the prosecutor to decide whether or not to prosecute; it is not for the trial court to reach that decision. Its task is to try the case on the evidence admissible in a criminal trial."

See also the judgment of Davis LJ, at para. 57:

> "… that is a matter for the decision of the Crown Prosecution Service, whose function it is to make such decisions. The magistrates' court is not itself thereafter required to review such a decision."

34. Davis LJ continued, at para. 58:

> "It further follows that it would be improper for defendants, under the guise of an abuse of process application made to the magistrates' court, to advance arguments which are in truth simply directed at considerations of the proportionality of the decision to prosecute. Applications for a stay on the grounds of an abuse of process are to be circumscribed and orders of stay are, when made, granted only exceptionally. Applications for a stay on the ground of abuse of process must not themselves be permitted to become an abuse."

35. In reaching that conclusion, the Divisional Court held that two earlier decisions of that Court had been wrongly decided and should no longer be followed: *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin); 169 JP 581; and *Abdul v Director of Public Prosecutions* [2011] EWHC 247 (Admin); 175 JP 190. In those cases, it had been said that the decision to prosecute on grounds of proportionality could be reviewed by a criminal court. Before us Mr Moloney accepted that is wrong. It seems to us,

however, that his submission came close to resurrecting that erroneous proposition by recasting it as an argument that the prosecution is an abuse of process.

36. Thirdly, we would observe that the leading authority of *Rimmington* was not referred to by the Divisional Court in *James* nor, it would appear, was it cited to it. Nor did the Court have the advantage of the later decision of this Court in *Stockli*.

37. Fourthly, Mr Moloney fairly and correctly conceded that the Convention rights in articles 10 and 11 do not provide a defence to the offence of public nuisance as a matter of substantive criminal law. In this regard, a contrast can be drawn with cases such as *James* itself or *Ziegler*, which concerned statutory criminal offences in which the relevant legislation provided for defences (for example that a defendant was acting reasonably or with lawful excuse) which permitted reference to be made to Articles 10 and 11. There is no such defence in the context of the present offence. In those circumstances, it would be curious, to say the least, if the proportionality question could come in by the back door, as part of an application to stay a case on the ground of abuse of process, when it could not be properly raised through the front door, at a substantive trial.

38. At the hearing before us Mr Moloney relied on the Convention rights in a more modest way than had been suggested in the written grounds of appeal and skeleton argument. He contended that the only relevance of the question of proportionality under the Convention in this context was that it was one of the factors to be weighed in the balance by a court when considering an application to stay on the ground of abuse of process. If that is all that the submission amounts to, it is apparent, in our view, that the judge in the present case did have regard to the Convention rights. In his ruling refusing the application to stay, he expressly concluded that the prosecution was compatible with the Convention, in particular that it had a legitimate aim and that it was proportionate because it was necessary in a democratic society: see para. 28.

39. In all the circumstances, we have reached the conclusion that all that is required when an application is made to stay a prosecution on the ground of abuse of process is to apply the well-established principles in cases such as *Rimmington*. The concept of abuse of process in a criminal case is the creature of domestic law and does not turn on any issue under the Convention or the 1998 Act.

The relationship between Grounds 1 and 2 and sentencing

40. We should address one other aspect of the submissions for the appellant under Grounds 1 and 2: the fact that the prosecution was for public nuisance meant that the sentence eventually passed (12 months' imprisonment) was far higher than the maximum penalty for aggravated trespass (three months).

41. In his ruling on abuse of process, at para. 30, the judge referred to the decision of this Court in *R v Roberts and Others* [2018] EWCA Crim 2739; [2019] 1 WLR 2577 (Lord Burnett of Maldon CJ, Phillips and Cutts JJ) and in particular paras. 31-34, 37-38 and 43. The judge observed that, whilst it is correct that public nuisance carries a significantly higher sentence than the summary offence of aggravated trespass, it does not necessarily follow that the defendant will receive a higher sentence if convicted. That much was made clear from the approach in *Roberts*, in which the appellants were convicted of public nuisance arising out of an anti-fracking protest.

42. *Roberts* rejected the submission that those convicted of any offence in the course of protest should never receive a custodial sentence in the absence of violence against the person but accepted that "the motivation of an offender can go to increase or diminish culpability."

> "… It is well-established that committing crimes, at least non-violent crimes, in the course of peaceful protest does not generally impute high levels of culpability." (para. 32)

43. After referring to the observations of Lord Hoffmann in *R v Jones (Margaret)* [2007] 1 AC 136, the Court said, at para. 34, that:

> "there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

44. Mr Moloney complains that the judge imposed a custodial sentence of 12 months' imprisonment. That is four times the statutory maximum for the offence of aggravated trespass. He made it immediate rather than suspending it. In our judgment this point does not undermine the judge's reasoning at the stage when he was considering the application to stay on the ground of abuse of process. When he was considering that application, he was right to make the observation which he did about the approach to sentencing set out in *Roberts* and that the importance of freedom of peaceful protest can properly be taken into account at the sentencing stage if there is a conviction after a trial. Whether or not the criticism of the judge's eventual sentence is made out is a matter to which we shall have to return in considering the appeal against sentence, but it is not something which means that the judge was wrong to refuse the application to stay the prosecution in the first place.

Ground 3

45. By Ground 3 the appellant suggested that the judge failed to direct the jury that his actions had to be independently unlawful in order for the common law offence of public nuisance to be made out. In the result, the fundamental elements of the offence were not proven to the requisite standard.

46. In his written legal directions to the jury the judge identified the following three elements to make out the offence of public nuisance:

    i) D did an act which is not warranted by law.

    ii) The effect of that act was to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all members of the public.

    iii) D knew or ought to have known that his actions would cause a public nuisance.

47. Mr Moloney did not pursue this ground at the hearing. The simple fact is that, as the judge directed the jury, there is no warrant by law for somebody to climb on top of an

aeroplane as this appellant did or to glue his hand to the fuselage of the aircraft. The first element of the offence of public nuisance was obviously made out.

48. Accordingly, we refuse leave to appeal on Ground 3.

Grounds 4, 5 and 6

49. Grounds 4, 5 and 6 relate to alleged irregularities in the trial, each said to render the appellant's conviction unsafe.

50. Ground 4 arises out of the judge's direction in his summing-up concerning the appellant being unrepresented. The appellant had been represented by counsel and solicitors before trial, including in the abuse of process application. He decided to represent himself at trial. He chose once more to be represented at the sentence hearing. In his summing up the judge told the jury that the appellant had dispensed with his lawyers before trial, done so of his own free will and could have been represented by his original team had he wished. He explained that all had the right to represent themselves in a criminal trial. No complaint is made, as suggested in the Crown Court Compendium (August 2021) at Para. 3-5(7), that a jury should be directed at the start of the trial that a defendant has a right to represent himself and the jury should be told to bear in mind the difficulty that may present to the defendant. That the judge did.

51. The appellant submits that nothing should have been said about his previous representation and that to do so was unnecessary, prejudicial and out of step with the examples of direction in the Crown Court Compendium. The fact that he was previously represented was neither relevant nor of assistance to the jury on any issue. It gave rise to the risk of them speculating about why he had dispensed with his lawyers. The effect of the reference was compounded by the failure to give a positive direction that dispensing with lawyers was irrelevant to the issues in the case. Mr Moloney distilled the complaint in oral argument to the proposition that there was "potential for the jury to take against" the appellant because he chose to dispense with his lawyers and represent himself.

52. In *R v Hammond* [2014] 1 WLR 4303 at para. 23, this court said it was clear that directions to be given to the jury where a defendant chooses to be, or becomes, unrepresented are to be tailored to the particular case. Although it was not necessary for the jury to be told that the applicant had dispensed with his legal team, the judge went on to direct the jury that they should make all due allowance for the fact that he was unrepresented and the consequent difficulties he faced. The jury was also directed to try the case on the evidence and not to speculate. We are unable to accept that the terms of the judge's directions gave rise to any risk of prejudice to the appellant by way of provoking adverse speculation about why he was representing himself or rendering his conviction unsafe. Indeed, it is difficult to understand why the jury should take against him and all the more so when they were directed to make all allowances for the difficulties of self-representation. We refuse leave on this ground.

53. Ground 5 relates to the judge permitting prosecuting counsel to make a closing speech to the jury. It is a well-established convention or rule, confirmed by Criminal Procedure Rule 25.9(2)(j) that the circumstances when the prosecution may make final representations at the close of the evidence are limited. The rule provides that they are where,

> "(i) the defendant has a legal representative,
>
> (ii) the defendant has called at least one witness, other than the defendant himself or herself, to give evidence about the facts of the case, or
>
> (iii) the court so permits."

54. The appellant was unrepresented and did not call any witness to give evidence about the facts of case. He called character evidence only. Neither sub-rule (i) or (ii) was applicable. The express permission of the court was not sought but when explaining to the jury the procedure that would follow the conclusion of the evidence, the judge said that the prosecution would address them followed by the defendant. The judge thus gave his permission for the closing speech made by the prosecution without the need for counsel to make an application. We accept that it would have been desirable for the issue to have been raised by the prosecution with the appellant being given an opportunity to object. The rule, at least implicitly, contemplates the issue of whether there should be a closing speech from the prosecution in these circumstances being the subject of an application to which the unrepresented defendant may respond.

55. A breach of this aspect of the rules would not of itself render a conviction unsafe or the trial unfair. Mr Moloney submits that the judge should not have allowed a prosecution closing speech in this case and that the conviction is unsafe as a result. We think it very likely that if the question of whether there should have been a closing prosecution speech had been argued out the judge would have allowed one. There were issues raised in the appellant's evidence relating to the prosecution case and his defence to the charge which called for comment from the prosecution. Moreover, in his summing-up the judge fairly and properly highlighted the appellant's response to the points made in the prosecution closing address. There was no unfairness resulting from the prosecution making an address or from its contents. We do not consider it to be arguable that the conviction was unsafe by reason of the apparent breach of this procedural rule and refuse leave on this ground.

56. Ground 6 is that the judge erred in permitting reference in evidence to the cost of £40,000 to British Airways of the appellant's protest. It was the appellant's case that the impact of his behaviour had been exaggerated. The evidence of that sum had some relevance in that context. In any event, the judge made clear in his summing-up that this evidence was no more than context: -

> "Mr Brown is quite right when he said that you are not focussing here particularly on the cost the airline, that is not what you are here to determine. The question is whether there is a nuisance to the members of the public who were due to travel that day. But you have been given that figure just by way of some context."

57. It is not arguable that the reference to this loss renders this conviction unsafe. In fairness to Mr Moloney, whilst not abandoning this ground altogether he did not press it. We refuse leave to appeal on Ground 6.

The Sentence Appeal

58. In his sentencing remarks the judge summarised the actions of the appellant and put them in the context of the wider disruption planned by the group, of which his actions formed the centrepiece. Ms Ní Ghrálaigh, who argued the sentence appeal on his behalf, submits that the judge was not entitled on the evidence at trial to conclude that he was involved in a "well-planned co-ordinated attack on the airport" seeking severely to disrupt the operation of the airport, including to stop it operating. That forms Ground 2 of the sentence appeal. We disagree. The evidence of the communications between members of the group were more than capable of bearing the interpretation reached by the judge, all the more so in the light of the appellant's own evidence that his intention was to do something spectacular to maximise media attention. That coupled with the associated activities of the others in the group support the judge's conclusion that the more disruption they could achieve collectively, the better. In sentencing the appellant, the judge was obliged to take account of the harm caused along with the harm intended to be caused or which might foreseeably have been caused: see section 63 of the Sentencing Act 2020.

59. Ms Ní Ghrálaigh submits that the sentence was too long. It was disproportionate given that the offence was committed in the course of protest. Founding herself on *Roberts* she submits that the custody threshold was not passed and that the judge should have done no more than impose a fine. Given that the appellant had served 10 weeks and five days (equivalent of a sentence of just over 22 weeks before taking account of release on home detention curfew) she submits that the sentence should be quashed and an absolute discharge imposed in its stead.

60. As we have noted when discussing the conviction appeal, the judge had regard to *Roberts* and its conclusion that a custodial sentence might be appropriate in the context of peaceful protest amounting to public nuisance. That conclusion is consistent with the jurisprudence of the Strasbourg Court, the principal decisions of which were discussed in *Roberts*, and a range of individual decisions of the Strasbourg Court before and since to which we were referred.

61. *Roberts* involved the blocking of an A road passing the site of a proposed "fracking" operation in Lancashire. There was a large demonstration at the site of which the appellants in that case were part. A convoy of seven lorries delivering fracking equipment was brought to a standstill by the crowd and the appellants managed to climb onto the cabs of some of them. That had the effect of blocking one side of the A road. The presence of dozens of others milling around resulted in the whole road being blocked for about three hours. In the meantime, the police set up diversions and as soon as practicable a contraflow was established to enable the road to be used. Very large numbers of drivers were inconvenienced and particularly so when the road became blocked.

62. The central submission advanced on behalf of the appellants in *Roberts* was that a custodial sentence could never be justified for a conviction arising out of peaceful protest. Having reviewed the Strasbourg jurisprudence this court's conclusion at para. 41 was:

> "The Strasbourg jurisprudence does not support the proposition that detention is necessarily disproportionate for the conduct

> with which these appeals are concerned. On the contrary, the Strasbourg Court has accepted as proportionate both immediate sentences of imprisonment and suspended sentences in cases where the conduct in question caused less harm and was less culpable. In this way, the ECHR marches with the common law. The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences."

63. In his sentencing remarks, the judge observed that there is "a significant difference between simply blocking an A road … and causing major disruption to a significant London airport as part of a co-ordinated group action." He did not consider the cases comparable in terms of harm or culpability. He referred to the intention to cause maximum disruption. The judge also considered the risk of reoffending to be high and that, given the opportunity, the appellant would commit further acts of disruption. He noted that the appellant had a conviction for wilfully obstructing the highway in connection with a protest in Bristol in July 2019. We observe that the London City Airport offence was thus committed while awaiting trial for the Bristol offence (he pleaded not guilty to that charge). The judge referred to character evidence in favour of the appellant and that he was acting in accordance with his conscience which was a mitigating factor.

64. The judge said that "the right to protest does not entitle you to cause major widespread disruption to a major airport with the inevitable impact that has on the lives of hundreds of people simply because you think it is the right thing to do." He added that there was a need to deter those minded to cause serious disruption of this sort and said that "there is a clear dividing line between legitimate protest and deliberate offending and you knowingly crossed it." He concluded that the custody threshold was crossed. The judge had regard to the Imposition Guideline on suspending custodial sentences. He considered that there was no real prospect of rehabilitation and noted that immediate custody would not have a significant harmful impact on others. Those are both matters referred to in the guideline. He had regard to the appellant's disability but nonetheless determined that an immediate custodial sentence of 12 months' imprisonment was appropriate.

65. The first question is whether the appellant's offending passed the custody threshold. For the reasons given by the judge we are satisfied that it did so. We also agree with the judge that having regard to the Imposition Guideline this was not an appropriate case to suspend the custodial sentence. The conclusion that there was little prospect of rehabilitation was inevitable given the circumstances of the offending and its occurring whilst awaiting prosecution on another matter relating to protest.

66. In para. 43 above we cited a passage from the judgment of this court in *Roberts* which referred to "a sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience [being] matched by a relatively benign approach to sentencing." There was no sense of proportion on the part of this appellant which could lead to the conclusion that the benign approach to sentencing should lead to his avoiding a custodial sentence. Those who cause major disruption at airports and are convicted of public nuisance run a substantial risk of going to prison.

67. The question remains whether a sentence of 12 months' imprisonment in the light of this appellant's conduct, his antecedents and his disability was manifestly excessive.

68. In the light of the context of peaceful protest and the mitigating factors, leaving aside for the moment the appellant's disability, but also recognising that he was not of good character we have concluded that a sentence of about six months' imprisonment would have been appropriate. We recognise the difficulty faced by the judge in arriving at a sentence with little precedent to guide him and our respectful disagreement with his view implies no criticism. On the contrary, the judge's sentencing remarks explain with clarity all the factors he appropriately considered. Our starting point takes account of the impact of the appellant's conduct as well as the broader intention to cause wider disruption and the need for deterrence, which is an important factor in this type of case. The right to peaceful protest should not lead to tolerance of behaviour that is far removed from conveying a strongly held conviction but instead seeks to cause chaos and as much harm as possible to members of the public.

69. A modest reduction from that starting point would have been appropriate on conventional grounds to reflect the fact that the appellant's visual impairment would make life in prison more difficult for him than for someone without. Ms Ní Ghrálaigh explained the actual impact, which went beyond what might have been expected. The appellant can see to some extent when he has his glasses. Unaided he has only about 5% of normal sight. Unfortunately, his glasses were not available to him for the first six weeks of his time in custody, for reasons which are not clear, and a request for audio books did not bear fruit until just before the hearing of his appeal. Because he could not see for so long while in prison, he was unable to take part in usual activities and, we accept, endured a much harsher time than would a sighted person or even a person with his disability but for whom appropriate arrangements had been made promptly.

70. Taking account of all the circumstances we have concluded that the sentence should be one of four months' imprisonment.

Conclusion

71. We dismiss the appeal against conviction but allow the appeal against sentence to the extent of quashing the sentence of 12 months' imprisonment and substituting one of four months.