CA-2026-000583

IN THE COURT OF APPEAL (CIVIL DIVISION)
BETWEEN

THE KING
on the application of
HUDA AMMORI

Respondent

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

(1) AMNESTY INTERNATIONAL UK
(2) LIBERTY

Interveners

WRITTEN SUBMISSIONS OF AMNESTY INTERNATIONAL UK AND LIBERTY

References in the form JX are to paragraphs of the Divisional Court judgment; AX are to paragraphs of the Appellant's skeleton argument

A. INTRODUCTION

1. This appeal raises issues of general importance about the use of counter-terrorism powers against individuals engaged in direct action protest, and the specific constraints on the exercise of the Secretary of State's power to proscribe an organisation under s 3 Terrorism Act 2000 ("**TACT 2000**") in that context. Amnesty International UK ("**AIUK**") and Liberty, who have themselves been directly affected by the decision under challenge, seek to assist the Court on the issues arising under Ground 2 in this appeal, which concerns Articles 10 and 11 of the European Convention on Human Rights ("**ECHR**").

2. AIUK and Liberty's submissions can be summarised as follows:

    a. **First**, the broad powers under TACT 2000 were designed by Parliament to be subject to the controlling principles of the ECHR, including the principle of proportionality. However, the effect of the Secretary of State's argument in this appeal would largely or entirely nullify the intended operation of the ECHR.

Once the Secretary of State considers an organisation to be "*concerned in terrorism*", which is the necessary statutory precondition to the exercise of the proscription power, the Secretary of State contends that Articles 10 and 11 ECHR are not engaged. Moreover, the Secretary of State contends that even if those articles are engaged, the proscription of Palestine Action is proportionate. But given that the activities of Palestine Action, on the findings of the Divisional Court, are forms of protest and the few actions which have met the definition of terrorism have done so only at the outer margins of a very broad definition of terrorism, a finding that the proscription of Palestine Action is proportionate would in effect give proportionality no role to play in constraining the extremely wide discretionary power of proscription: it would be proportionate to proscribe any organisation where the statutory precondition for its exercise was met. While any conduct meeting the definition of terrorism constitutes a serious criminal offence, where, for the organisation in question, such conduct is an outlier, the established criminal justice responses to terrorism should be used to combat those outliers, rather than resorting to an order which disbands the entire organisation with the serious attendant impacts on the rights of its members, including the vast majority who are not involved in activities meeting the definition of terrorism. Invoking proscription in this context, and arguing, as the Appellant does, that Articles 10 and 11 have no role to play, is contrary to the scheme of safeguards that Parliament intended when it enacted TACT 2000.

b. **Secondly**, the Divisional Court was in any event right to conclude that the decision to proscribe Palestine Action engages the rights protected by Articles 10 and 11 ECHR. It is clear from the authorities that classification by the State of conduct or expression as undesirable, unlawful, criminal, or *"terrorist"*, does not, without more, take speech or conduct outside the scope of Articles 10 or 11. The Divisional Court was also right to recognise the chilling effect on legitimate campaigning activities that the proscription of Palestine Action effected, as illustrated by the evidence before the Court from both AIUK and Liberty, which is material to the assessment of whether Articles 10 and 11 are engaged.

c. **Thirdly**, in approaching the issue of justification and proportionality, the courts are well-placed to assess the proportionality of a decision to proscribe a direct action protest group, and considerations of relative institutional competence do not require significant weight to be afforded to the views of the Secretary of State or Parliament.

d. **Fourthly**, the Divisional Court was correct to conclude that the decision to proscribe Palestine Action was disproportionate. Historically, this country has a tradition of moderation in relation to property damage as a form of conscientious protest, even in cases of very serious damage to property touching on national security.[1] Such action is criminal and it has been addressed appropriately within the ordinary criminal justice system. The use of the proscription power against an organisation concerned with such forms of protest represents a classic instance of using a sledgehammer to crack a nut, which is the essence of disproportionality. Proscription gives rise to sweeping, ill-defined criminal offences for speech and association and has severe consequences not only on members of the organisation but also wider chilling effects, as shown by the evidence of Liberty and AIUK.

B. PROPORTIONALITY AND PROSCRIPTION: OVERARCHING POINTS

3. By s 3(4) TACT 2000, the Secretary of State may proscribe an organisation if she "*believes it is concerned in terrorism*". That is a very broad power:

    a. The threshold imposed by s 3(4) TACT 2000 is that the Secretary of State must "*believe*" that an organisation is concerned in terrorism in order to exercise the proscription power against it. A "*belief*" threshold has been described as a "*relatively low*" evidential threshold which is "*some way short of proof even on the balance of probabilities*": see domestic decisions leading to *A v UK* [GC], App. No. 3455/05, ECHR 2009, as recorded at §§26, 69. Thus, while the belief must be a reasonable one for power to be lawfully exercised, there is no

[1] As in *R v Jones (Margaret)* [2007] 1 AC 136, discussed below. Other examples are provided in the evidence of Amnesty UK and Liberty before the Divisional Court: the Second Witness Statement of Sacha Deshmukh, §§9-19, and the Second Witness Statement of Sam Grant, §5.

requirement, for example, that the Secretary of State be satisfied on the balance of probabilities that the organisation is concerned in terrorism, or to the criminal standard.[2]

b. The applicable definitions of "*concerned in terrorism*" and "*terrorism*" are contained in s 3(5) and s 1 TACT 2000, respectively. These definitions are extremely wide: see, e.g., *R v Gul* [2014] AC 1260, §26, 33-34 in respect of s 1 and *SSHD v Lord Alton of Liverpool and others* [2008] 1 WLR 2341, §33-38 in respect of s 3(5). Accordingly, the range of organisations which may be liable to proscription is broad and the conduct and aims of such organisations are varied – from those whose core purpose is terrorism, to those, like Palestine Action, in respect of whom only a few acts have been found to meet this threshold. Out of 385 actions only three – (less than 1%: J28) were assessed by the Secretary of State to satisfy the s 1 TACT 2000 definition of terrorism (and those only the property damage limb of the definition, rather than the limbs concerned with violence against people; see further at §42 below on the compatibility of this definition with international law).

4. The decision to proscribe an organisation carries serious and far-reaching consequences. Indeed, proscription is, as the Divisional Court recognised "*an event defined by its* consequences" (J13), involving dissolution of a previously lawful organisation and the criminalisation of actions which would otherwise be lawful, including speech, and imposing restrictions on the use of property (J13-14). These are inherently rights-impacting consequences with a "*very significant*" and "*stark*" impact on free speech and freedom of association (J117, J135), including the rights of those (such as civil liberties organisations) who are not members or supporters of the proscribed organisation. The sentences for proscription-related offences are heavy: e.g. s 12(6) TACT 2000 (up to 14 years' imprisonment on conviction on indictment in respect of the support offences).

5. The requirement for proportionality in proscription decisions therefore places an important and necessary constraint on the use of a power which: (i) may be exercised

[2] An example of a requirement that the Secretary of State be satisfied to the criminal standard is contained in s.41(1) of the National Security and Investment Act 2021, concerning the imposition of monetary penalties.

pursuant to a *"belief"* threshold, (ii) arises in wide circumstances and against a potentially broad range of organisations, and (iii) has severe effects. That is particularly so where, as here, the organisation in question is at the very end of the spectrum of groups against whom proscription can be levied (being directed solely towards property damage, rather than engaging in violence against people) and where proscription will have serious effects on people whose conduct has not been assessed to amount to terrorism (including those involved in over 99% of Palestine Action's activities).

6. The broad proscription power was intended to be subject to the constraint of the ECHR. TACT 2000 was enacted in the context of Parliament's recent enactment of the Human Rights Act 1998 ("**HRA 1998**") and in the period immediately prior to the HRA 1998 being brought into force. The proscription power was brought into effect only after the HRA 1998 became effective in October 2000.[3] Section 9 of TACT 2000 addresses the HRA 1998 and ensures that HRA challenges can be raised before POAC and that POAC can determine that "*action of the Secretary of State is incompatible with a Convention right…"* (s.9(4)). TACT 2000 also contemplates challenges under the HRA 1998 being brought other than by way of appeal to POAC.[4]

7. These provisions were of central importance to the legislation, as it was a key element of Parliament's intention that the powers in the TACT 2000 would be compatible with the ECHR. Introducing the Bill on second reading, the Parliamentary Under-Secretary of State for the Home Office stated that the Government had paid close attention to the need for the powers to comply with the United Kingdom's obligations in international law. He stated that the Government had sought to ensure that the "*exceptional powers*" in the Bill "*are proportionate to the threat we face and fully consistent with our human rights obligations*". The Government had "*paid particularly close attention to the need for balance and safeguards*".[5]

---

[3] SI 2001/421, 19 February 2001.

[4] See s 10(b) TACT 2000 which provides that evidence of anything done in an action under s 7 HRA 1998 is not admissible in criminal proceedings.

[5] Hansard Vol 611, 6 April 2000, Column 1428. Parliamentary materials can be relied upon under a distinct principle to identify the mischief at which legislative provisions are directed and as part of the background materials: *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at §§104–105 (Lord Neuberger, with whom Lord Sumption and Lord Hughes

8. These "*safeguards*", including the fact that the powers would be subject to the HRA 1998 and the overriding requirement of proportionality, were critical in fulfilling this objective, since Parliament was not in a position itself to foresee all the circumstances in which the "*exceptional powers*" in TACT 2000 might be exercised. The Minister explained that, "*proscription is a very heavy power and we shall use it only when it is absolutely necessary*";[6] similarly, the Government assured the House of Lords Delegated Powers Committee that proscription "*is a heavy power and should only be used sparingly*", taking into account, *inter alia*, the "*nature and scale of the group's activities*". The Government specifically drew the attention of the Committee to "*the safeguards in respect of the use of this power*" provided by POAC, including the ability of POAC to find proscription to be incompatible with the ECHR.[7] The Explanatory Notes to TACT 2000 also made clear to Parliamentarians that, "... *once the Human Rights Act 1998 (c. 42) is fully in force, it will be possible for an appellant to raise points concerning those rights under the European Convention on Human Rights which are "Convention rights" under the 1998 Act*" (para. 17).

9. The limitation that the ECHR and proportionality imposes on the use of the proscription power is thus an integral and important element of the legislative scheme. Furthermore, in *Choudary* [2018] 1 WLR 695, *Pwr* [2022] UKSC 2 and *ABJ* [2026] UKSC 6, the courts have determined that the offences established by ss 12 and 13 TACT 2000 do not themselves admit of Articles 10 and 11 defences, because their proportionality is ensured by the elements of the offence. This assumes and requires the proportionality of the gateway proscription decision: see, e.g. *ABJ*, §§108, 137.

10. The Secretary of State's position on this appeal (Ground 2(a)) is nonetheless that once she has deemed an organisation to be "*concerned in terrorism*", Article 17 of the ECHR is engaged so that the group's members cannot avail themselves of the protection of Articles 10 and 11 (irrespective of where the group sits on the spectrum of organisations

---

agreed); Kennedy v Charity Commission [2014] UKSC 20, [2015] AC 455 at §§118–110 (Lord Toulson, with whom Lord Neuberger and Lord Clarke agreed).

[6] Hansard Vol 611, 6 Apr 2000, Column 1431.

[7] Supplementary memorandum by the Home Office and Northern Ireland Office, 27 March 2000, paras 3 and 5.

liable to proscription) (A58-62). On this view, individuals who express support for the group, even where they themselves/the statements they make are not destructive of ECHR values, also have no protection under those articles. The striking consequence of this argument is that questions of the proportionality of any proscription are entirely removed, and no proscribed organisation or its members/supporters could *ever* rely on ECHR rights to challenge their proscription. The Secretary of State will *always* have deemed such organisations to be "*concerned in terrorism*" because that is a statutory pre-requisite for exercise of the proscription power: s 3(4) TACT 2000. If that determination was enough to engage Article 17 and remove the protections of the ECHR, then the ECHR would have no role to play in respect of proscription or any challenges to it.

11. Moreover, the Secretary of State contends that even if those articles are engaged, the proscription of Palestine Action is proportionate. But given that the activities of Palestine Action, on the findings of the Divisional Court, are forms of protest, a tiny number of which have met the domestic definition of terrorism, at the outer margins of that definition, a finding that proscription of Palestine Action is proportionate would in effect give proportionality no role to play in constraining the extremely wide discretionary power of proscription: it would be proportionate to proscribe any organisation where the statutory precondition for its exercise was met.

12. The Secretary of State's position on this appeal does not reflect Parliament's intention and the manner in which TACT 2000 and the HRA 1998 are designed to interact.

C. THE ENGAGEMENT OF ARTICLES 10, 11 AND 17

13. The Secretary of State's submission that Article 17 ECHR is engaged on the facts of this case is also contrary to the well-established principles regarding the scope of the ECHR protections.

14. Article 10 applies to any *"expressive act"* assessed by reference to both its *"expressive character seen from an objective point of view"* and the *"purpose or intention of the person performing the act" (Murat Vural v Turkey,* App. No. 9540/07, 27 October 2014, §54, as cited by the Court of Appeal in *Attorney General's Reference (No. 1 of 2022)* [2023] 2 WLR 651, §96). It includes not only the substance of the expression but

also *"the mode by which it is conveyed" (Oberschlick v Austria*, App. No. 20834/92, 1 July 1997, §57).

15. Where the mode of expressing protest is criminal, Article 10 remains engaged: it has been held to apply to protests involving criminal conduct which causes *"significant"* disruption of the *"utmost seriousness"* costing hundreds of thousands of pounds *(R v Trowland* [2024] 1 WLR 1164); those which *"physically [impede] the activities of which the [protesters] disapproved" (Steel v United Kingdom* (1999) 28 EHRR 603, §92); demonstrations involving *"forceable entry*" to secure locations or acts of protest causing property damage, such as pouring paint on valuable items *(Murat Vural,* §§7-10, 56*; Taranenko v Russia,* App. No. 19554/05, 15 May 20214, §70); as well as protest causing irreparable damage to the antique frame holding Vincent Van Gogh's Sunflowers painting by throwing tomato soup on the *"literally priceless….cultural treasure"* in an act described a*s "shocking" (R v Hallam* [2025] EWCA Crim 199, §§43, 173). Very substantial property damage was also in issue in *R v Jones (Margaret)* [2007] 1 AC 136*,* where toleration of such conduct by a measured criminal justice response was associated with the cultural traditions of this country.

16. The ECtHR has held that Article 10 also encompasses shouting slogans in support of the PKK i.e. an *"armed, illegal organisation"* (*Gul v Turkey* (2011) 52 EHRR 38, §35) widely designated as a terrorist group (e.g. by the European Union since 2004, by the USA, and by the UK) whose methods involves "*a mix of guerilla warfare and terrorist tactics… [including] IEDs, car bombs, grenades, small arms, mortars, suicide bombings, kidnapping operations, unmanned aerial vehicles and man-portable air defense systems*" and whose actions using "*IEDs or unexploded ordnance… killed or maimed civilians and security forces*".[8] Article 10 has also been held to apply to possession of propaganda material from the PKK which *"advocated and glorified violence and aimed at winning over as many persons as possible for the armed struggle*" against the authorities *(Kaptan v Switzlerland,* App. No. 55641/00, 12 April 2001, §1); and delivering a speech paying tribute to a former member of a terrorist

[8] https://www.gov.uk/government/publications/turkey-country-policy-and-information-notes/country-policy-and-information-note-kurdistan-workers-party-pkk-turkey-october-2023-accessible#bookmark16

organisation insofar as it did not recommend the use of violence or armed resistance (*Erkizia Almandoz v Spain*, App. No. 5869/17, 22 June 2021).

17. Article 11 has a similarly broad scope of application, applying to the dissolution of political organisations declared illegal because the government assessed they had ties to terrorist organisations (*Herri Batasuna v Spain,* App. No. 25803/04, 30 June 2019, §52), demonstrations which the government claimed breached domestic law (*Navalny v Russia*, App. No. 29580/12, 15 November 2018, §99), and protests marked by violence against persons (*Primov v Russia*, App. No. 17391/06, 12 June 2014, §119; *Shmorgunov v Ukraine*, App. No. 15367/14, 21 January 2021, §§492, 504). If some individuals act in a violent manner it does not deprive an association as a whole of the protection of Article 11 (*A-G's Reference No 1 of 2022* [2023] KB 37, §84) – a position with which the Appellant's argument on Ground 2(a) directly conflicts – nor does it necessarily remove the protections of Article 11 from the individuals themselves, depending on their intentions and the nature of the circumstances (*Barabanov v Russia*, App. Nos. 4966/13 and 5550/15, 30 January 2018, §75).

18. It is only in very narrow circumstances that Article 17 results in the loss of protection under Articles 10 and 11. It is not the case, as the Appellant argues on this appeal, that as soon as she has determined an organisation is "*concerned in terrorism*" Article 17 applies on a blanket basis so that Articles 10 and 11 are no longer engaged in respect of any conduct related to the proscribed organisation. Nor is it possible (contra A61) to infer from *Sabuncu v Turkey* (23199/17, 19 April 2021 §222) that the ECtHR would defer to a State's domestic designation of an offence as "*terrorist"* as a means through which Article 17 is engaged. The Strasbourg court looks to substance not form. The approach invited by the Appellant would also conflict with the domestic cases on the relationship between Articles 10 and 11 and terrorism offences, which have not proceeded on the basis that Article 17 is engaged by all terrorism offences (see, by way of recent example, the Supreme Court in *ABJ*, determining the specific question of proportionality of a proscription-related offence for the purposes of Article 10, in which there was no dispute about the engagement of Article 10: §87).

19. The limited class of expressive acts or associations/assemblies which fall within Article 17 concern the "*destruction of the rights and freedoms*" of the Convention itself. Article 17 imposes a high threshold applicable only to the "*gravest forms of 'hate speech'*"

(*Lilliendahl v Iceland*, App. No. 29297/18, 11 June 2020, §34), assessed by reference to the substance of the impugned statements or conduct (*Hizb ut Tahrir and Others v Germany*, App. No. 31098/08, 12 June 2012, §73) irrespective of any label applied by a State and focussing on the *specific* impugned example; there is no gateway after which every related act/association will be excluded from the protections of Article 10 and 11. As the Supreme Court in *Pwr v DPP* [2022] UKSC 2 observed by reference to the Strasbourg jurisprudence, "*the function of the Strasbourg Court is to examine the case as a whole*" and conduct a "*multi-factorial assessment of whether the restriction was justifiable under article 10*" (§74) in a "*highly context-specific*" way (§75) – it does not assume that a domestic designation means that Article 17 applies across the board.

20. Thus even if (quod non) Palestine Action or certain of its members acted in a way that engaged Article 17, there is nothing in the case law to make good the Appellant's suggestion that thereafter the actions of any person expressing support for Palestine Action, irrespective of the substance and nature of those actions, would also be excluded from Articles 10 and 11 ECHR. The Appellant relies solely on *Roj TV AS v Denmark*, App. No. 24683/14, 17 April 2018 to make good her argument. But far from supporting the Appellant's argument, the approach taken in *Roj TV* demonstrates that the ECtHR in considering the application of Article 17 will determine whether the specific speech in question (in that case, repetitive incitements to violence in support of the PKK) is in substance sufficiently extreme to engage Article 17. The Appellant's suggestion (A60) that because the Divisional Court accepted that Palestine Action had undertaken action amounting to terrorism (J137) it therefore ought to have found that Article 17 applies, and *any* expression of support for Palestine Action (irrespective of its manner or content) is thus "*directed against the Convention's underlying values (for example by stirring up hatred or violence)*" (A60), invites a broad-brush approach to the engagement of Article 17 at odds with the manner in which the ECtHR approaches it.

21. The Divisional Court was right to draw the distinction it did at J115, in recognition of *"the rights of individuals who have not acted unlawfully either before or since proscription, who would have wanted to express support for and associate with Palestine Action… and who wished to engage in peaceful protests under the banner of Palestine Action, but are stopped from doing so*" and "*civil society organisations who*

are conscientiously seeking to abide by the law, and whose rights are impacted". The Appellant's argument would have sweeping consequences, excluding from the protection of the ECHR not just action assessed by the government to constitute terrorism, but also the peaceful protest actions of any individual who, concerned at the proscription of a direct action organisation, chose to demonstrate that concern by way of peaceful political protest e.g. by holding a sign alongside others. This is an expressive act at the core of Articles 10 and 11 and is very far from the kind of action contemplated by Article 17.

22. The Divisional Court was therefore right to conclude that Articles 10 and 11 are engaged and Article 17 is not.

D. CHILLING EFFECT

23. Articles 10 and 11 are engaged where a measure "*could have*" or even is "*capable of having*" a "*chilling effect*" on the exercise of expression and association (*Baczkowski v Poland*, App. No. 1543/06, 3 May 2007, §67; *Various Claimants v NGN* [2019] EWCA Civ 350, §18; *Shmorgunov v Ukraine*, §493). Having a chilling effect has been described as having at "*deterrent impact"* on a person exercising their rights (*R (Leigh) v Commissioner of Police of the Metropolis* [2022] 1 WLR 3141, §76) or as being "*capable of discouraging participation"* in the expressive or associative rights in question (*SIC-Sociedade Independente De Comunicação v Portugal,* App. No. 29856/13, 27 July 2021, §69). The Divisional Court rightly recognised that "*the interference with Convention rights in this case must be measured both by the restrictions required by the letter of the criminal offences; and by the further extent to which people will exercise self-restraint in terms of what they say and what they do*": J121.

24. The Divisional Court recognised the impact of the proscription decision on "*civil society organisations who are conscientiously seeking to abide by the law, and whose rights are impacted*": J115. As set out in the evidence of Sam Grant and Sacha Deshmukh, the proscription decision deterred Liberty and AIUK from expressing views, campaigning, and organising in relation to a contentious Government decision and matter of public concern. Liberty conducted "*considerable"* advocacy and campaigning work between the Appellant's announcement of her intention to proscribe Palestine Action and the proscription taking effect (Grant 2, §9). This included writing to the Appellant, briefing

Parliamentarians, and commenting widely in the press (Grant 2, §§11-16). But after the coming into the effect of the proscription order, its activities had to be severely scaled back given the "*breadth of the related criminal offences and the [organisation's] senior leadership team's understandable unwillingness for Liberty and its staff to be exposed to any risk of breach of the criminal law*" (Grant 2, §19).

25. While in normal circumstances Liberty would have "*continued to carry out influencing work in respect of a government decision with a significant impact on civil liberties*" the risks of inadvertently committing serious offences meant Liberty did not engage further with Parliamentarians and refused a large number of media requests (Grant 2, §§22-26). Similarly, see Mr Deshmukh's evidence at §§23-27.

26. The experience of both organisations corresponds with the Divisional Court's conclusion that for campaigning organisations "*the section 12 offences could cause genuine problems*" (J123). Mr Grant and Mr Deshmukh explain that, in addition to limiting the external-facing campaigning work they would ordinarily have undertaken, the decision also inhibited the internal workings of both human rights organisations (Grant 2, §20; Deshmukh 2, §28). As Mr Grant puts it, Liberty has ultimately been compelled to "*conduct its campaigning work in a materially different – and less effective – manner than it has in respect of previous Government decisions and legislation on counterterrorism which we assess seriously impact civil liberties*" (Grant 2, §27).

E. RELATIVE INSTITUTIONAL COMPETENCE

27. By Ground 2(c), the Appellant criticises the Divisional Court's approach to the fair balance assessment under Articles 10 and 11, in particular on the basis that the Divisional Court erred in deciding that "*the nature and scale of Palestine Action's activities, so far as they comprise acts of terrorism, has not yet reached the level, scale and persistence that would justify the application of the criminal law measures that are the consequence of proscription, and the very significant interference with Convention rights consequent on those measures*" (J140, A58); and on the basis that the Divisional Court failed to accord the Appellant the proper degree of deference (A65 and A67).

28. The Divisional Court recognised that "*some latitude*" needed to be given to the Appellant on this issue (J138). Nevertheless, it was itself well-placed to adjudicate the issue of proportionality, and in this particular context considerations of relative institutional competence have little weight, for the following four reasons:

    a. **First**, the court has considerably more information and evidence than was considered by the Secretary of State and by Parliament, including access to closed material and focused submissions on Articles 10 and 11. Indeed, it is a necessary consequence of there having been no prior notification and consultation on the necessity for and consequences of proscription before the decision was taken that judicial review inevitably proceeds on a better-informed basis, and calls for a more searching form of judicial review to determine the issue of proportionality.

    b. **Secondly**, while the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2025 (the "**Amendment Order**") was approved by resolution of each House of Parliament, it is nonetheless an executive measure (*Bank Mellat v HM Treasury* [2014] AC 700, at §42 (Lord Sumption), §54 (Lord Reed)), which, even with the positive resolution procedure, receives very limited scrutiny in Parliament (*R (PLP) v Lord Chancellor* [2016] AC 1531 at §§22-24).[9]

    c. **Thirdly**, the constraints on Parliamentary scrutiny were accentuated in this particular case by the inclusion in the Amendment Order of two other unconnected organisations which are not protest groups, which – given that SIs cannot be amended – meant parliamentarians could not vote against the proscription of Palestine Action without also voting against the proscription of the other two named organisations.

    d. **Finally**, the court cannot safely assume that the Government or Parliament gave any or any proper consideration to the question of proportionality given that the

[9] The Commons last rejected a negative resolution SI in 1979 and the Lords in 2000: https://guidetoprocedure.parliament.uk/collections/PtBJuBiU/negative-procedure. The Commons last rejected an affirmative resolution SI in 1978 (https://guidetoprocedure.parliament.uk/collections/9CcpWjdj/affirmative-procedure) and the Lords in 2015 (by voting to amend in a way that undercut the resolution) a move which led to the Strathclyde Review to ensure Commons primacy over secondary legislation.

Government's position is that the principle of proportionality does not apply to proscription, since (in its view) neither Article 10 nor Article 11 are engaged. That was the position stated in the explanatory note that accompanied the draft Amendment Order in Parliament.[10] Where a public body has not correctly directed itself as to the law or explicitly weighed the competing considerations, the court's review is required to be closer: *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2017] 1 WLR 1420 at §§26-27 (Lord Rodger), §37 (Baroness Hale), §47 (Lord Mance).

29. For all of these reasons, the Court should not afford any significant weight to the views of Parliament and the Government on the issue of proportionality.

30. For essentially the same reasons, the court should reject the Appellant's contention that, in present circumstances, applying the approach in *Rehman* and *Begum*,[11] the proportionality assessment is little more than a rationality review: A66. Nothing in those cases permits the Court to abdicate its duty to address proportionality as "*a question of substance for the court itself to decide*" (*Shvidler*, §120). Everything depends on the circumstances, and the issues in this case are ones that the court is well-placed to determine.

31. Indeed, the highly intrusive nature of the decision also impacts, in the other direction, on the degree of scrutiny to which the Court must subject the decision, as do the factors identified at §28 above.

32. In addition, proscription is essentially a form of prior restraint, intended to prevent further action meeting the definition of terrorism, through deterrence and disruption. Whereas the traditional criminal justice response to direct action protest tolerates protests occurring and imposes (appropriately attenuated) penalties afterwards, the purpose and effect of proscription is to deter, prevent and disrupt the activities to which it is directed before they take place. The ECtHR has stated that prior restraints *"present*

[10] The SI was accompanied by the statement which accompanies all SIs and draft SIs that the Minister considers the instrument to be compatible with the ECHR, however, as noted in the preceding sentence, this was premised on an erroneous view as to the (non-)engagement of Arts. 10 and 11.

[11] *Rehman v Secretary of State for the Home Department* [2003] 1 AC 153; *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765.

such great dangers that they call for the most scrupulous examination by the Court" (*Kaos GL v Turkey*, App. No. 4982/07, 22 Nov 2016, §50).

33. Thus, the national security context is not the only factor bearing on the approach the Court must take in respect of the proportionality balance. Taking account of all the relevant features, only limited deference should be shown to the Appellant's views on fair balance; in respect of the core features of this case, the Court is equally well or better placed to determine fair balance for itself.

F. THE PROPORTIONALITY BALANCE

34. The fact that conduct meets the requirements for proscription does not demonstrate its proportionality, which depends on the precise facts and circumstances. The following factors are relevant to proportionality.

35. **First**, proscribing a protest group organised to pursue forms of direct action on conscientious grounds represents a very substantial restriction on a recognised form of political expression and association.

36. In *R v Jones (Margaret)*, which was concerned with organised protesters who broke into a US airbase with the intention of destroying or damaging a runway, setting fire to aircraft and obstructing and disrupting the maintenance of security, Lord Hoffmann referred to the fact that civil disobedience *"on conscientious grounds has a long and honourable history in this country"*: [2007] 1 AC 136, §89. He referred to the suffragettes—whose campaign of direct action included deliberate property destruction[12]—and said that it *"is the mark of a civilised community that it can accommodate protests and demonstrations of this kind."* His Lordship described the way that protesters *"vouch the sincerity of their beliefs by accepting penalties imposed by law"* and that police and magistrates recognise the conscientious objections, acting with restraint in sentencing such individuals.

37. Proscription of a direct action protest group represents a *fundamental* departure from the traditional criminal justice response described by Lord Hoffmann in *R v Jones*. Rather than addressing any criminal consequences of protest through the ordinary

[12] See Grant 2, §5; and Deshmukh 2, §§9-19 for other examples.

criminal justice system *after* they have occurred, proscription represents a form of *prior restraint* which seeks to stamp-out the activities of a protest group before they occur, and does so whether these activities meet the threshold of terrorism or not.

38. The imposition of criminal penalties itself represents a serious interference with freedom of association and freedom of expression. A criminal conviction has been held to be one of the "*most serious forms of interference*" with the rights to freedom of expression and assembly (*Perinçek v Switzerland* (2016) 63 EHRR 6, §27; *Yordanovi v Bulgaria*, App. No. 11157/11, 3 September 2020, §50). Arrest of protesters (*Steel*, §92) and even the risk of being criminally investigated (*Altuğ Taner Akçam v Turkey,* App, No. 27520/07, 25 October 2011, §70-82) also represent an interference. The criminal offences under TACT 2000 are extremely serious, and a criminal conviction for a terrorism offence is clearly of a different order to a conviction for a public order or property damage offence. The likely penalties are much more severe, as are the reputational and ancillary consequences. For example, most countries will not allow entry to individuals who have a conviction for a terrorist offence. And while some individuals in this category may be engaging in provocative acts of civil disobedience to protest the proscription decision, they are still exercising legitimate expressive rights which *do* have weight in the proportionality balance.

39. The impact of the various corollary criminal offences under ss 12, 12(1A), 12(2) and 13 TACT 2000 created by the decision to proscribe an organisation and the attendant counter-terrorism powers arising must be taken into account. These are broad offences. Section 13 TACT 2000, for example, creates a strict liability offence which provides that a person commits an offence if, in a public place, he "*carries or displays ... an article ... in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation*". Thus, an individual can be convicted of a terrorism offence for the peaceful display of a sign, with no proven risk of or incitement to violence, even when they do not intend to support the organisation. Similarly, s 12(2) criminalises the arranging of a meeting to *"further the activities of"* a proscribed organisation which, where a direct action protest group is proscribed, potentially criminalises any attempt by individuals and organisations to coordinate in continuing direct action protest under an alternative banner post-proscription. Accordingly, it is only proportionate to proscribe an organisation if it is

proportionate for these activities to be criminalised, which is a very significant restriction on Articles 10 and 11. A decision with such consequences will only be proportionate in the most limited of circumstances.

40. The uncertainty as to the scope of the offences is also relevant to the proportionality assessment. For example, there is no authority or guidance on whether public statements opposing proscription, or advocating for de-proscription, of a proscribed organisation constitute one or more of the offences under TACT 2000. Section 12(1A) TACT 2000 criminalises the expression of an opinion or belief that is supportive of a proscribed organisation. It is clear from the authorities that "*support*" includes "*intellectual support: that is to say, agreement with and approval, approbation or endorsement of, that which is supported*" (*Choudhary*, §46). But it is not even clear whether a statement such as "[*Proscribed organisation A*] *should not be proscribed*" or "[*Proscribed organisation A*] *should be de-proscribed*" or "[*Proscribed organisation A*] *is a legitimate organisation because they are engaged in direct action protests, which are a legitimate exercise of free speech*" constitutes an offence: the Divisional Court thought that *"section 12 offences could cause genuine problems"* in the case of campaigning against proscription (J123). There is therefore a real risk that legitimate criticism of the exercise of a coercive power cannot be advanced.

41. The Divisional Court held that the s 12 offences mean that campaigning organisations are prohibited from campaigning "*against any particular use of the power to proscribe*": J123. If that interpretation were right, it would impose a major restriction on the activities of such organisations. It would render the exercise of highly coercive powers (proscription decisions) immune from legitimate criticism, despite the vital importance of being able to criticise the exercise of public power in a democratic society. Concern about the uncertain scope of the offence did, as explained in the evidence of Mr Grant and Mr Deshmukh, cause Liberty and AIUK to severely curtail the campaigning work they would otherwise have undertaken. Accordingly, organisations like Liberty and AIUK are prevented from campaigning on an "*important civil liberties issue, representing a major extension of the use of executive anti-terrorism powers"* (Grant 2, §8) which would otherwise fall within the core of their work. This therefore is a context where there is a severe interference with political

speech which, in the words of the Supreme Court, "*requires a compelling justification*": *ABJ*, §103.

42. **Secondly**, on the other side of the scales to the severe interference with Articles 10 and 11 described above, only 3 of 385 actions undertaken by Palestine Action meet the statutory definition of terrorism (J28), and those only because the UK definition of terrorism is very broad and includes property damage. The courts have recognised that the definition in s 1 TACT 2000 is, on its face, "*striking*" in its breadth (*R v F* [2007] QB 960, §§27-28, endorsed in *R v Gul* [2014] AC 1260, §26) and "*very far reaching*", capable of including activities which might command a measure of public understanding or support (*Gul*, §29). It is out of line with international definitions.[13] The present case is therefore at the very margins of activities that meet the condition precedent for proscription. The conduct of direct action protesters, whether Palestine Action, or those considered in *R v Jones (Margaret)*, are simply not comparable in nature or degree with other organisations that have been proscribed, which involve the intentional terrorising of people with fear of death, serious injury, use of explosives or hostage taking.

43. The Appellant suggests (A67(b)) that the line between criminality and terrorism is not a bright line, and the Divisional Court therefore ought not to have placed weight on the fact that, at its core, Palestine Action promoted its political cause through criminality rather than terrorism (J138). But the point is plainly highly significant since proscription

[13] See, for example: **International Convention for the Suppression of the Financing of Terrorism** (ratified by the UK on 7 March 2001), Art. 2 of which defines terrorism including as "*any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act*"; **UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism's model definition of terrorism** (Report on ten areas of best practices in countering terrorism, A/HRC/15/51, 22 December 2010), states that terrorism means an action or attempted action which constitutes the intentional taking of hostages; or is intended to cause "*death or serious bodily injury to one or more members of the general population or segments of it*"; or involves "*lethal or serious physical violence against one or more members of the general population or segments of it*". **International Convention for the Suppression of Terrorist Bombings** (ratified by the UK on 7 March 2001), providing universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

is designed as a weapon against terrorism and terrorist organisations, not as a criminal justice measure.

44. At the centre of the Appellant's appeal Ground 2(c) is her criticism of the Divisional Court's conclusions on the "*nature and scale*" (J140) of Palestine Action's activities, and those conclusions as part of the proportionality balance (A58). However, far from being an impermissible consideration, it is incumbent on the Court to take account of the "*nature and scale*" of the organisation's activities, including that only "*a very small number of it actions have amounted to terrorist action within the definition [of s 1 TACT 2000]*" (J138), when reaching its conclusions on proportionality. As noted above, the Government recognised during the passage of TACT 2000 through Parliament that the nature and scale of activities are relevant as part of the safeguards built in to TACT 2000 (see §§7-8 above).

45. **Thirdly**, it is also relevant to consider the objectives of the organisation which is proscribed, and whether its aims are compatible with or repugnant to a human rights-respecting democratic society. Whereas some organisations are committed to the overthrow of democratic institutions or other goals which are abhorrent to human rights-respecting society, the objectives of Palestine Action are directed to upholding *jus cogens* norms of international law – that is, the prohibitions of war crimes, crimes against humanity, and genocide.

46. Having regard to these considerations, AIUK and Liberty submit that the proscription of Palestine Action is disproportionate. Indeed, it is clearly and significantly disproportionate. The law contains a large range of terrorism offences and measures. Such measures were not enacted to address or restrain the conduct of direct action protesters, even those who commit criminality. Previous attempts to use terror-related offences against direct action protestors have rightly been deprecated by the courts: *R v Thacker* [2021] QB 644, §§111, 113. The appropriate, proportionate, response to such protesters is the ordinary criminal justice response described by Lord Hoffmann in *R v Jones* as appropriate to a human rights-respecting democratic society. By contrast, the use of the proscription power against Palestine Action represents a clear instance of disproportionality: the Secretary of State is using the sledgehammer of the power to proscribe terrorist organisations to crack the nut of a protest group engaged in criminal

activity, where less than 1% of that activity meets—the outer margins of—the very broad definition of terrorism under UK law.

TOM HICKMAN KC
JESSICA JONES
ROSALIND COMYN
30 MARCH 2026