

SUPREME COURT

RECORD NO. S:AP: IE:2025:000131

BETWEEN:

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

DAN DOWLING

APPELLANT

-AND-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

-AND-

THE ATTORNEY GENERAL

NOTICE PARTY

Legal Submissions on behalf of the Irish Human Rights and Equality Commission

Introduction

1. The Irish Human Rights and Equality Commission ('the Commission') was granted liberty to intervene in this appeal as an *amicus curiae* on 26 March 2026. These submissions are structured as follows:

- A. Article 40.6.1 of the Constitution and acts of protest
- B. The criminal law and acts of protest under Articles 10 and 11 of the European Convention on Human Rights ('the ECHR')
- C. Defining the parameters of the defence of necessity
 - (i) English case law – necessity and duress of circumstances
 - (ii) Necessity as excuse or justification?
 - (iii) Necessity and acts of protest in the United States and Canada
- D. Necessity, excuse and the offences of trespass and criminal damage
 - (i) The *mens rea* of the offence of trespass and acts of protest or civil disobedience
 - (ii) The offence of criminal damage and 'lawful excuse'
 - (iii) Lawful excuse and necessity – overlapping factors for consideration
- E. Replies to the Statement of Case
- F. Conclusions

A. Article 40.6.1 of the Constitution and acts of protest

2. Article 40.6.1 of the Constitution of Ireland provides for the freedoms of expression (40.6.1.i), peaceful assembly (40.6.1.ii) and association (40.6.1.iii). The Article 40.6.1 rights are all subject to limitations of "*public order and morality*". These should not be overly restrictive as they must be applied in accordance with the State's commitment to democracy under Article 5 of the Constitution, as this Court has recently noted in *Emmett Corcoran and Oncor Ventures Ltd t/a The Democrat v. The Commissioner of an Garda Síochána and the DPP* [2024] 3 I.R. 464 ('*Corcoran*').

3. The jurisprudence of the Superior Courts is acknowledged to have been underdeveloped regarding Article 40.6.1,¹ particularly when compared with the jurisprudence of the European Court of Human Rights ('ECtHR'), considered below.² This appeal presents an opportunity for the rights to be considered as they arise outside of the context of the media (in contrast to *Corcoran*).
4. The relevance of the Article 40.6.1 rights to the State's commitment to democracy is important. As Barrington J. noted in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359:

"Article 40.6.1° deals with three rights, the right of the citizens to express freely their convictions and opinions, the right of the citizens to assemble peaceably and without arms and the right of the citizens to form associations and unions. All of these relate to the public activities of the citizens and to the practical workings of a democratic society. They are part of the dynamics of political change. They are at once both vitally important to the success of a democracy and potentially a source of political instability. That is why the Constitution and the European Convention both assert and circumscribe them. That is also why it is so important to get the balance right in interpreting them." [Emphasis added]

5. In *Corcoran*, Hogan J. addressed the interaction between the State's constitutional identity as a democracy, as provided for in Article 5, and the freedom of expression provisions of Article 40.6.1° at §70-71:

"[70] As this court recently pointed out in Costello v. Government of Ireland [2022] IESC 44, the democracy guarantee in Article 5 is a fundamental part of the State's constitutional identity. Democracy in this sense is, of course, rather more than simply filling in ballot papers at elections and referenda, vital though this is: it also

¹ This was noted by the Chief Justice in *Corcoran* at §3, which goes some way to redressing this. The underdeveloped nature of the jurisprudence in this area was observed previously by Hogan J. (writing extra-judicially) as "*stubbornly underdeveloped and under-litigated*", in Gerard Hogan, "The Historical Origins of Article 40.6.1" in Carolan and Doyle Eds., *The Constitution of Ireland: Governance and Values*, Thomson Round Hall, 2008).

² This arises both at the level of the ECtHR which has a well-developed body of jurisprudence and also domestically where, as Daly opines, the constitutional protection has been "*sidelined*" in favour of the well-developed principles under Article 10 of the ECHR (Tom Daly, "Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1°(i) of The Constitution", *Dublin University Law Journal* 2009, 31(1), 228-262

presupposes, for example, as I put in the referendum context in Doherty v. Referendum Commission [2012] IEHC 211, [2012] 2 I.R. 594, at p. 604, the existence of an informed and deliberative societal and political discourse is thereby presupposed:

“[23] ... by urging the citizenry to engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse.”

“[71] While few would be naïve or starry-eyed enough to believe that we had achieved a perfect form of Athenian civic democracy of a kind of which the shades of Pericles and Thucydides might be proud, at the same time, in the very words of Article 40.6.1°, the “education of public opinion” and allowing for robust political debate is vital if the life blood of the democratic order envisaged by Article 5 is to be safeguarded. This, at any rate, is the role which Article 40.6.1° assigns to the media. It has been given the task of holding up a mirror to society and government so that the public can form their own — inevitably diverse — opinions as to how the problems and issues of the day can be best addressed.” [Emphasis added]

6. The interpretation of the provisions therefore requires a contextualised reading within the Constitution’s overall commitment to democracy.³

7. A further issue that was addressed by this Court in *Corcoran* (and in many other cases) is the status of the ECHR vis-a vis the Constitution.⁴ Whilst it is imperative that constitutional protections are examined in the first instance, there is a body of relevant

³ This is also addressed in commentary on freedom of assembly. See for example Barry and Ó Drisceoil, “Constitutional Right to Protest and the Freeman On The Land Movement” (2017) 1 *Irish Judicial Studies Journal* 40.

⁴ See the comments of Collins J. in *Corcoran* at §189: “Before explaining that position further, I should first address the issue of priority. The courts have emphasised the primacy of the Constitution as the fundamental law of the State. The ECHR does not have such status. Its status and effect as a matter of domestic Irish law is as prescribed by the 2003 Act. Issues regarding the relationship and interaction between the Constitution and the ECHR in litigation have been considered in many recent decisions of this Court, starting with *Carmody v Minister for Justice* [2009] IESC 71, [2010] 1 IR 635 and including *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, [2020] 3 IR 113, *Fox v Minister for Justice and Equality* [2021] IESC 61, [2021] 2 ILRM 225, *Clare County Council v McDonagh* [2022] IESC 2, [2022] 1 ILRM 353, *MK (Albania) v Minister for Justice & Equality* [2022] IESC 48 and *Middelkamp v Minister for Justice and Equality* [2023] IESC 2. At 11 “In general, it is clear that the Constitution should be the first port of call when fundamental rights are at issue.”

jurisprudence of the ECtHR which may be of assistance in determining this Appeal and which the Court is obliged to consider where ECHR rights are engaged: section 2 of the ECHR Act 2003. The Commission does not suggest that the 2003 Act informs the interpretation of the Constitution itself – as Collins J. in this Court observed in *Corcoran* at §74 “[t]he 2003 Act does not, of course, govern the interpretation of the Constitution” – but there are nonetheless two sources of fundamental rights that are of importance.

8. Section 2 of the ECHR Act 2003 provides that:

“In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

9. Section 1 provides that “rule of law” includes common law.

10. The import of section 2(1) was recently considered by Collins J. in *Corcoran*:

[154]. ... the interpretative obligation imposed by s. 2 of the 2003 Act clearly requires that s. 10 be interpreted as entitling a judge to have regard to Article 10 in exercising his or her functions under s. 10. That proposition follows inevitably from the terms of s. 2 itself, as well as the ECtHR’s Article 10 jurisprudence (of which judicial notice is to be taken by virtue of s. 4 of the 2003 Act). This Court, like the High Court and the Court of Appeal, is duty bound to interpret s. 10 in a manner compatible with the ECHR; see this Court’s decision in Mahon v. Keena [2009] IESC 64 and 78, [2010] 1 IR 336, to which further reference is made below. The interpretive obligation imposed by s. 2 is not unlimited and does not permit the court to act as legislator: see the decision of this Court in Ryan v. Clare County Council [2014] IESC 67, [2015] 1 ILRM 81, per McMenamin J. (Laffoy and Dunne JJ.) at para. 55 as well as the decision of the High Court (McKechnie J.) in Foy v. An tArd-Chláraitheoir [2007] IEHC 470, [2012] 2 IR 1, at paras 75 – 76.

Significant questions arise as to whether s. 10 is capable of being interpreted in a manner that would comply fully with the requirements of Article 10. But the immediate issue here is more straightforward: it is whether a judge exercising the functions

conferred by s. 10 can, in that context, have regard to Article 10 and the interests protected by it. That appears to me to be the irreducible minimum if s. 10 is to be capable of operating in a manner compatible with the State's ECHR obligations. Of course, s. 10 makes no reference to Article 10. Equally, however, it makes no reference to the protection of the dwelling-house or to rights of privacy but it is clear that such interests must be taken into account where relevant in assessing whether to issue a search warrant (Damache, Quirke).

155. That s. 10 can and should be interpreted so as to enable – and, in appropriate circumstances, require – a judge to whom an application for a search warrant is made to have regard to Article 10 was not, as I understand it, contested at the hearing of the appeal. While disputing that s. 10 could properly be read as the Court of Appeal had read it (an issue to which I will return) Counsel for the Director accepted that, having regard to Damache, the judge here was entitled to have some regard to Article 10 and the protection afforded to journalistic material in considering whether it was proportionate to issue a warrant. But irrespective of the stance taken by the Director, the legal position is, in my view, clear. [Emphasis added]

11. This gives rise to two propositions, once these rights are engaged. First, that there was an interpretive obligation on the Circuit Court to interpret section 11 of the 1994 Act, and the defence advanced by the Appellant, in light of the provisions of Articles 10 and 11 of the ECHR. The Judge's charge to the jury would presumably reflect this. The second proposition that appears to flow from section 2 of the 2003 Act is that, for present purposes, there is an interpretive obligation on this Court in this Appeal to consider the interpretation of section 11 of the 1994 Act and the defence of necessity as advanced by the Appellant, in light of the provisions of Articles 10 and 11 of the ECHR.

12. It is also notable that in **Corcoran** Collins J. concluded that it was appropriate for the Court to depart from its "*general approach*" in terms of the priority of the Constitution and the ECHR, and to consider the jurisprudence under the latter in the first instance.⁵ This arose in circumstances where the Strasbourg jurisprudence on the protection of journalistic sources (under Article 10 of the ECHR) was "*well developed*" in comparison

⁵ See discussion at §66.

to that under Article 40.6.1.i which had “*been the subject of only limited judicial consideration and has never been considered by this Court.*”⁶

13. In the Commission’s respectful submission the protections of the Constitution cannot be any *lesser* than those offered by the ECHR, absent a fundamental difference in language or content between the two documents such that the interpretation would do violence to the constitutional provision in question. The substantive case law of the ECtHR will be addressed in due course but the primacy of the Constitution over the ECHR is acknowledged, albeit that this may be a case where the principles established by the ECtHR are an appropriate starting point.
14. While there has been some judicial consideration of Articles 40.6.1.i and 40.6.1.ii in the context of acts of protest (for example *Hyland v. Dundalk Racing (1999) Ltd* [2014] IEHC 60 (*‘Hyland’*)), the particular relationship between the exercise of rights of expression and assembly and the criminal law has not been the subject of extensive judicial consideration to date. It is, however, a matter which the ECtHR has considered and, as referred to below, it has been considered in other jurisdictions also.
15. It is the Commission’s position that the engagement of Article 40.6.1.i is not so limited as to exclude acts of civil disobedience. Whilst it is acknowledged that in *Hyland*, Hogan J. placed particular emphasis on the lawfulness of the protest (see §87 in particular), the right may be interpreted more broadly. Indeed, it is appropriate to do so in circumstances where the freedoms of expression and peaceful assembly have received limited judicial scrutiny until recent years (see *Corcoran*) and where the guidance of this Court may be of assistance in future cases which engage, for example, the right to protest on environmental matters under the Aarhus Convention. While these rights are not engaged in the present appeal, the State is bound by the obligations in relation to protest under Article 3(8) of the Aarhus Convention, and it is important that guidance on the parameters of Article 40.6.1 is cognisant of protest in many diverse areas and allows for flexibility. The issue of climate change is a global one that is giving rise to cases in many jurisdictions: see, for example, (i) “*The necessity defence in (the Swiss) climate protest cases: Democratic contestation in the age of climate activism*”, European Law Journal,

⁶ As discussed at §66.

2023, Vol. 29, pp.393–421 and (ii) Guidelines published by the UN Special Rapporteur on Environmental Defenders under the Aarhus Convention in October 2025.⁷

16. In the Commission’s submission, the freedoms of expression and peaceful assembly protected by Article 40.6.1 ought to be read as broadly as possible, up to the point of the limitations within the text of the Constitution itself, i.e. the limits of “*public order and morality*. Acts of protest and civil disobedience, provided they are peaceful (and, therefore, a legitimate part of the democratic process enshrined by Article 5), can and should find protection under Article 40.6.1. The connection between expression, assembly, protest and civil disobedience with democratic engagement and participation is of significant importance in the development of the politics of the State through the people (who are ultimately sovereign in our constitutional order).
17. The textual limitations of “*public order and morality*” must be meaningful and there is a connection here to the respect owed to the democratic legitimacy of the criminal law itself. Legitimate acts of protest must be peaceful. The rights of others must be respected, such that any disruption caused is proportionate and private property rights are given a high, but not necessarily absolute, level of protection. For example, privately owned ‘open spaces’ may attract protection under Articles 10 and 11 of the ECHR, to which these submissions now turn.

A. Acts of protest and the criminal law under Articles 10 and 11 of the ECHR

18. Article 10 of the ECHR provides for freedom of expression, subject to a range of limitations in paragraph 10.2, and freedom of assembly is protected by Article 11 ECHR, with similar limitations in its second clause. There is a significant body of jurisprudence developed by the Strasbourg Court on these Articles.

⁷ Available online at:

https://unece.org/sites/default/files/202510/Aarhus_SR_EnvDef_Guidelines_Right%20to%20Peaceful%20Environmental%20Protest_Civil%20Disobedience_ENG_0.pdf See also, more generally the International Covenant on Civil and Political Rights, Human Rights Committee General comment No. 37 (2020) on the right of peaceful assembly (article 21),

19. Harris, O’Boyle, and Warbrick, *Law of the European Convention on Human Rights*, 5th edition, describe Article 10 as “one of the cardinal rights guaranteed under the Convention”, referencing its historic backdrop and stating:

*“The marked importance attached to this right is readily explicable by its close linkage to democracy’s political process and its role as an indispensable vehicle for minorities, political opponents, and civil society to foster public debates. Such a constitutional underpinning of freedom of expression lends succour to the consistent assertion of the Court that interference with this right can be justified only by ‘imperative necessities’ and that exceptions to this right must be interpreted narrowly.”*⁸ [Emphasis added]

20. The extensive jurisprudence on the forms of protest that have attracted the protections of Article 10 (read in conjunction with Article 11) is a testament to this commitment to expression in light of its connection to democracy.⁹ Article 10 protects not only the substance of the ideas and information, but the form in which they are conveyed.¹⁰

21. In *Steel and Others v. United Kingdom* (Application no. 24838/94, 23 September 1998; (1998) 28 EHRR 603), the applicants were convicted of breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. The ECtHR held that the actions of the defendants, in obstructing a grouse shoot and breaking into a construction site, constituted expressions of opinion within the meaning of Article 10 even though they had taken the form of physically impeding certain

⁸ Harris, O’Boyle, and Warbrick, *Law of the European Convention on Human Rights* 5th ed (Oxford University Press 2023) at p 597-8, citing inter alia *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (Application no. 15153/89) Judgment of 19 December 1994.

⁹ The Court has considered the following, non-exhaustive, list of forms of disruptive protest to fall under the protections of the Convention:

- (i) obstructing machinery to impede engineering works by environmental activists (*Steel and Others v. UK* App no 24838/94 (23 September 1998) § 92.);
- (ii) using ‘go-slow’ walking techniques to repeatedly and intentionally block a public highway (*Barraco v. France* App no 31684/05 (5 June 2009).);
- (iii) protesting in a courthouse by chanting slogans, displaying banners and throwing leaflets for an hour, impeding hearings (*Ekrem Can and Others v. Turkey* App no 10613/10 (5 September 2022).);
- (iv) blocking major roads for approximately two days, creating significant road delays and cross-border trade disruption in protest over agricultural subsidy reforms (*Kudrevičius and Others v. Lithuania* App no 37553/05 (15 October 2015).); and
- (v) impeding the scheduled eviction of squatters, the foreseeable result of which was to impede the activities of others (*Laurijsen and Others v. the Netherlands*)

¹⁰ See e.g. *Baldassi and others v. France* (Application no. 15271/16 and 6 others; 11 June 2020) at §62.

activities (i.e. shooting and construction respectively).¹¹ The Court rejected the UK Government's argument that the protest activities had not been peaceful and that Article 10 had thus not been applicable. There had been an interference with Article 10 rights, and the issue was whether it had been proportionate. The ECtHR ultimately found that, given the dangers and risk of disorder in the first and second applicants' protest activities, their arrest and detention was not disproportionate. The measures taken against the third, fourth and fifth applicants were disproportionate, since their protest was entirely peaceful. This case was cited by the UK Supreme Court in *DPP v. Ziegler* (addressed below).

22. Similarly in *Lucas v. United Kingdom* (Application no. 39013/02, 18 March 2003) the ECtHR held that protests can constitute expressions of opinion within the meaning of Article 10, "*and that the arrest and detention of protesters can constitute interference with the right to freedom of expression*". The applicant was convicted of breach of the peace for having sat in a public road leading to a naval base to protest against the British Government's decision to retain nuclear submarines. The Court found that the four-hour detention pending trial and the fine imposed were proportionate to the legitimate aim of protecting public order.
23. As is evident in *Lucas* the engagement of Article 10 does not necessarily give rise to a breach, as a restriction may be found to be proportionate.
24. Of particular relevance is the case of *Perinçek v. Switzerland*, (Application. no. 27510/08, 15 October 2015), in which the applicant had been convicted of publicly denying the genocide against the Armenian people. The Grand Chamber of the ECtHR was critical of the domestic court's silence on the effect of the conviction on the applicant's rights under Article 10, although there was a large dissent on the issue of whether there was a violation of Article 10, with seven of the 17 judges dissenting. The majority observed that the domestic court "*made no reference to the conviction's necessity in a democratic society, and did not engage in any discussion of the various factors that bear on that point*". They stated at §278:

¹¹ *Steel and Others v the United Kingdom* (Application no. 24838/94; 23 September 1998 at §92.

*“an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires **detailed judicial assessment** of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances” [Emphasis added]*

25. This was the first time that the Strasbourg court required not just national authorities to apply standards in conformity with ECHR principles, but for national courts specifically to engage in a detailed judicial assessment of the specific conduct. As the ECtHR was not satisfied that the Swiss court had conducted the necessary balancing exercise (or any such exercise), it held that it had to carry out this exercise itself. Taking into account various elements, including that the statements related to a matter of public interest and did not amount to a call for hatred or intolerance, the Court found that it had not been necessary in a democratic society to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the case. Whilst, as already pointed out above, the Article 10 violation was found by a majority of ten to seven, subsequent ECtHR judgments have expanded on the requirement for domestic courts to conduct this kind of analysis: e.g. *Saygılı and Seyman v. Turkey*, App. No. 51041/99, 16 April 2018, *Handzhiyski v. Bulgaria*, App. No. 10783/14, 6 April 2021 and *Bumbes v. Romania*, App no. 18079/15, 3 May 2022.
26. In *Saygılı and Karataş v. Turkey* (Application no. 6875/05, 16 January 2018), the Court noted, at §30, that “[i]n assessing the relevance and sufficiency of the national courts’ findings, the Court ... takes into account the extent to which the former balanced the conflicting rights implicated in the case” In that case, the ECtHR held that “the national courts did not carry out a balancing exercise of the competing interests at stake seen in the context in which the disputed remarks were made” (at §38). The lack of detail and reasoning meant the Court was “unable to conclude that the national courts applied the standards which were in conformity with the principles embodied in Article 10” (at §43). The absence of relevant and sufficient reasons contributed to a finding of a violation of Article 10.

27. In *Handzhiyski v. Bulgaria*, cited above, the ECtHR found that a conviction and fine for placing Santa Claus accessories on a communist leader's statue (characterised as “*minor hooliganism*”) was a violation of Article 10. The Court held, at §52, that “[w]hen an interference with the right to freedom of expression takes the form of a “penalty”, it inevitably calls for a detailed assessment of the specific conduct sought to be punished. It cannot normally be justified solely because the expression at issue was caught by a legal rule formulated in general terms”. It was noted that in relation to acts which “*though capable of profaning a monument, do not damage it ... the precise nature of the act, the intention behind it, and the message sought to be conveyed*” are significant (at §55). See also *Bumbeş v Romania*, App no. 18079/15, 3 May 2022.

28. In *Baldassi and others v. France* (Application no. 15271/16 and 6 others, 11 June 2020), the applicant activists had been involved in calling for a boycott of Israeli products as part of the BDS campaign (by displaying items in a supermarket). They were convicted of incitement of discrimination. It was not disputed that this constituted an interference with the applicants' Article 10 rights. The Court found that the interference was prescribed by law, and its aim was to protect the rights of others. However, it was not necessary to achieve that aim and was thus disproportionate. There was no violence or damage, and the ECtHR observed that the domestic court did not establish that the conviction was necessary, noting (at §§78-80):

*“78. The need for detailed reasoning was, however, all the more essential in the present case because it involved a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. On the one hand, the actions and remarks complained of concerned a subject of general interest, namely the State of Israel's compliance with public international law and the human rights situation in the occupied Palestinian territories, and were part of a contemporary debate which was ongoing in France and throughout the international community. On the other hand, these actions and statements were a form of political and “militant” expression (see, for example, *Mamère v. France*, no. 12697/03, § 20, ECHR 2006-XIII). The Court has repeatedly emphasised that there is little scope under Article 10§2 of the Convention for restrictions on political expression or on debate on questions of public interest (see *Perinçek*, cited above, §197, and the references therein).*”

79. As the Court pointed out in *Perinçek* (*ibid.*, §231), it is in the nature of political speech to be controversial and often virulent. That does not diminish its public interest, provided of course that it does not cross the line and turn into a call for violence, hatred or intolerance. That is also true of a call for a boycott, as observed by the Special Rapporteur on freedom of religion or belief in his report to the members of the United Nations General Assembly dated 20 September 2019 (paragraph 21 above), and by the *Fédération internationale des ligues des droits de l'homme* together with the *Ligue des droits de l'homme* in the observations they submitted as third-party interveners in the present case (see paragraph 55 above).

80. The Court concludes that the applicants' conviction was not based on relevant and sufficient reasons. It is not persuaded that the domestic court applied rules which adhered to the principles enshrined in Article 10 or that it based its decision on an acceptable assessment of the facts.”

29. This case may be of particular assistance in the present Appeal, given that the activities appeared to take place in a private premises, albeit one generally accessible by members of the public (a supermarket), and a violation arose as the national court failed to have sufficient regard to the relevant factors arising under Article 10.¹²

30. The case of *Bryan and Others v. Russia* (Application no. 22515/14, 27 June 2023) involved a protest by Greenpeace activists on a boat at a Russian offshore oil drilling platform. Two of the activists had begun climbing the platform to unfurl a banner. They had been detained on charges of piracy, later reclassified as hooliganism. The proceedings were ultimately discontinued under an amnesty. The Court found that “notwithstanding [the protest's] disruptive character”, the arrest, detention and prosecution was an interference with the applicants' freedom to express their opinion on a matter of significant public interest (namely the environmental impact of oil drilling), which had not been prescribed by national law.¹³

¹² In a separate Opinion, Judge Siofra O'Leary agreed with the finding of a violation of Article 10 but dissented in that she would also have found a violation of Article 7 – fair criminal trial.

¹³ Another finding of a violation of Article 10 on the basis that the interference was not “prescribed by law” is *Hashman and Harrup v. United Kingdom* (Application no. 25594/94; 25 November 1999). There a majority of the Grand Chamber found the requirement not to behave “*contra bonos mores*” impermissibly imprecise. This was cited by the UK Supreme Court in *Ziegler* (at §65), noting that “that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality”.

31. The ECtHR has recognised that Articles 10 and 11 are closely related, not least because the protection of opinions and the freedom to express them is one of the objectives of the freedom of assembly.

32. In *Taranenko v. Russia* (Application no 19554/05, 15 May 2014), the applicant had with others locked herself inside an administrative building, waving placards and distributing leaflets from the windows, and was ultimately convicted of an offence. The Court found a violation of Articles 10 and 11. It surveyed some of the caselaw on protests and proportionate sentences for criminal activity, summarising the position (with reference to the of *Ezelin v. France*) that (at §§87-88):

“... the Contracting States’ discretion in punishing illegal conduct intertwined with expression or association, although wide, is not unlimited. It goes hand in hand with European supervision by the Court, whose task is to give a final ruling on whether the penalty was compatible with Article 10 or 11. The Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence ... that participants in a demonstration which results in damage or other disorder but who do not themselves commit any violent or otherwise reprehensible acts cannot be prosecuted solely on the ground of their participation in the demonstration.”

33. The ECtHR noted that the building was open to the public subject to identity and security checks, which the protesters had not complied with. Their actions in storming into the building, and pushing one of the guards aside, could have frightened those present and thus arrest and removal may have been justified by public order. However, the length of the applicant’s detention (one year) pending trial and the penalty imposed on her (three years’ imprisonment, suspended) were not proportionate to the legitimate aim pursued. The Court took the view that the unusually severe sanction imposed must have had a chilling effect on the applicant and others taking part in protest actions. Thus, the interference had not been necessary in a democratic society.

34. ***Tuskia and others v. Georgia*** (Application no. 14237/07, 11 October 2018) also involved activities in a semi-private premises. The applicants were university staff members. They held an unauthorised meeting on university premises and then forced their way into the Rector's office, demanding his resignation. They were removed by police, found guilty of administrative offences, and fined. The Court assessed the interference with Article 11, read in light of Article 10, and noted some limits on the right of assembly including in relation to private property; there was no “*automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries*” (at §72).
35. The ECtHR accepted that the assembly in the office, though arising in a situation of tension, was not of such a violent nature as to exclude it from protection under Article 11. The removal of the applicants from the (private) premises and subsequent sanction constituted an interference with their Article 11 right. However, the interference pursued the legitimate aims of preventing public disorder and protecting the rights of others, and so was not disproportionate – particularly as the applicants had been allowed to proceed with a meeting and other protests elsewhere on campus previously.
36. In ***Novikova and Others v. Russia*** (Application nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, 26 April 2016), the applicants had taken part in “*solo static demonstrations*” and had been arrested, with some convicted of offences. The Court held that the measures interfered with Article 10 and failed the necessity test under Article 10(2); the arrests and conveyance to police stations were not justified as the applicants had been engaging in peaceful acts of political speech, which did not involve obstruction of pedestrians or traffic, or calls for violence. For this reason, it had not been shown that there was a need to take the applicants to police stations.
37. In ***Bumbeş v. Romania*** (Application no. 18079/15, 3 May 2022), the applicant (and others) protested against mining activities by handcuffing himself to a barrier blocking access to the parking area of the government's headquarters and by holding up signs. He was fined for his actions. The Court was of the view that the case fell within the scope of Articles 10 and 11.

38. The Court noted that Article 11 protects the right to “peaceful assembly”, reiterating (at §66) *“that measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it”*. It noted the close link between Articles 10 and 11, finding it appropriate to examine the case under Article 10, interpreted in light of Article 11 (at §69):

“the Court considers that the thrust of his complaint is that he was punished for protesting, together with other participants in the non-violent direct action, against the government’s policies. The Court is therefore persuaded that the event constituted predominantly an expression, all the more so since it involved only four persons and lasted a very short time ... Moreover, since it was the result of a rather spontaneous decision ... and lacked any prior advertisement, it is difficult to conceive that such an event could have generated the presence of further participants or the gathering of a significant crowd warranting specific measures on the part of the authorities”

39. The ECtHR found an interference with Article 10, by failure of the necessity test under Article 10(2), interpreted in light of Article 11. It stated that where demonstrators do not engage in violence, authorities must show a degree of tolerance to peaceful gatherings (at §95):

“The appropriate “degree of tolerance” cannot be defined in abstracto: the Court must look at the particular circumstances of the case and particularly the extent of the “disruption of ordinary life” since it is understood that any large-scale gathering in a public place inevitably creates inconvenience for the population or some disruption to ordinary life (see Primov and Others, cited above, § 145, and Novikova and Others, cited above, § 165)”¹⁴

¹⁴ See similarly *Oya Ataman v. Turkey* (App no 47552/01; 5 December 2006) at §42, where the Court commented that *“where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”*.

40. Notably, it found that the national court did not seek to strike a balance between Article 10 on the one hand, and public order on the other, “*giving the preponderant weight to the formal unlawfulness of the event in question*” (§98).

41. The ECtHR also stated:

“the fine imposed on the applicant for taking part in the event in question was the minimum statutory amount envisaged for the impugned contravention and the applicant did not argue or submit evidence that paying the fine was beyond his financial means. Nevertheless ... the imposition of a sanction, administrative or otherwise, however lenient, on the author of an expression which qualifies as political ... can have an undesirable chilling effect on public speech” (§101).

42. The imposition of any sanction, no matter how minimal, is therefore relevant to the Court’s overall consideration of the protections afforded to the Appellant under Articles 10 and 11 of the ECHR.

43. In the context of the present appeal, the *Perinçek* case is perhaps of greatest significance in terms of its application. The ECtHR stated that the protection of the rights protected by Article 10 (read in conjunction with Article 11) require that the domestic Courts have engaged in a detailed analysis of the conduct in light of the ECHR. This includes an analysis of the proportionality of any interference with the right, and the extent to which restrictions are necessary in a democratic society.

44. The United Kingdom Supreme Court has grappled with the implications of the principle in *Perinçek*, beginning with the case of *DPP v. Ziegler* and then in a series of subsequent cases, which are referred to in this Court’s Statement of Case. The approach is the subject of a critique by Richard Martin in “*Convicting Peaceful Protestors: Proportionality’s Proper Place at Criminal Trial*” [2024] 44(2), Oxford Journal of Legal Studies, pp.342-375, who suggests that the “offence-centric’ approach adopted in the U.K. puts their domestic courts at odds with Strasbourg authority.

A. Defining the parameters of the defence of necessity

45. When an individual participates in an act of protest or civil disobedience, which engages constitutional and ECHR rights, the criminal law must ensure the proper respect for those rights. This may take the form of consideration by the presiding judge and/or by the jury. The precise form which this requires will depend on the facts of the case.
46. In the present case, the statutory defence of lawful excuse (to the charge of criminal damage) and the common law defence of necessity (to the trespass charge) are relied on by the Appellant.
47. Two issues are the parameters of (i) the defence of necessity itself and (ii) that defence in the Appellant’s case.
48. It is acknowledged by all the parties that there is limited jurisprudence on the parameters of the defence of necessity. The Director submits that the definition adopted by the Court of Criminal Appeal, endorsing that in Charleton & McDermott’s *Criminal Law and Evidence* (2nd edition) textbook, at paragraph 22.14, alongside the approach in the English cases of *Thacker* and *Jones*, is correct. The Appellant’s position is that this is too narrow. The Commission’s respectful position is also that it is too narrow.

(i) English case law – necessity and duress of circumstances

49. The DPP’s submissions address the post-*Ziegler* case law alongside the *Thacker* case. It is of note that some of the case law in England and Wales on this point has tended to oscillate between discussions of “necessity” and “duress of necessity”, with commentary also addressing the cases under each of these headings.¹⁵
50. Smith and Hogan observe that (at 395):

“As with both forms of duress [duress by threats and duress of circumstances], we are again concerned with situations in which a person is faced with a choice between two unpleasant alternatives, one involving their committing a breach of the criminal law and

¹⁵ The *Thacker* case, for example, is discussed under the heading of “duress of circumstances” rather than under that of “necessity” in Smith, Hogan and Ormerod, *Criminal Law* (17th edition, Oxford University Press, 2024).

the other involving some evil to themselves or others. Unlike the defence of duress, the defence of necessity is more open-textured without prescribed thresholds. If the evil avoided outweighs any evil involved in breaching the letter of the law, it is arguable that the actor should have a defence of necessity”. [Emphasis added]

51. The authors acknowledge that this approach had not been affirmed by the courts in England and Wales (up to 2024). They go on to discuss the conflation of the defences of duress of circumstances and necessity observing that:

“The precise scope and definition of the defence [of necessity] remains elusive. Indeed, there may be a degree of ambiguity arising from the emergence of duress of circumstances discussed earlier. In many cases this is treated simply as an instance of necessity. On some occasions the Courts have even merged the terms, as in Quale, where the reference is to ‘necessity of circumstance’. [...] Despite the explicit recognition of necessity, the courts persistently adopt a restrictive approach to its application. There is an underlying anxiety that it must be kept within strict limits to prevent defendants claiming that they thought their actions in breaking the law were reasonable and represented the lesser of two evils.

52. The authors quote from Alan Norrie’s analysis in the 3rd edition of *Crime, Reason and History: A Critical Introduction to the Criminal Law* (Cambridge University Press, 2014) which is also of potential relevance to the present appeal:

“... necessity operates to permit alternative political, ethical, economic and moral arguments to confront the formal logic of the law. Resting on a concept of moral involuntariness, it opens up the grounds upon which a defendant can say ‘I could do no other’. For this reason, the law has fought shy of the defence, yet there remains at the same time a cogent reason for accepting it. It introduces broader ideas of justice, either in terms of social or environmental justice, or the requirements of a properly democratic polity. It requires the criminal law to be mindful of such ideas and the underlying social and political reasons which represent the only means of sustaining its legitimacy” (at 218)

53. A number of cases in England and Wales are of relevance. Particularly so, the *Ziegler* case: discussed in greater detail below in the context of the connection between necessity and acts of protest/civil disobedience. Prior to *Ziegler*, a number of decisions grappled with the contours of the defence of necessity and the related defence of duress of circumstances.

54. In *Re A (Children)* [2000] 4 All ER 961 the Court of Appeal of England and Wales considered the doctrine of necessity in the context of conjoined twins whose separation would result in the death of one but in the absence of which both would die. Brooke L.J. considered the application of the defence of necessity in considering whether the operation would be lawful (other members of the Court relied on different rationales to reach the same conclusion). Brooke L.J. considered the historical development of the defence of necessity in English law, back to the thirteenth century writings of Bracton, and through the following centuries, in reaching his decision. He concluded on the key elements of the defence of necessity with reference to the writings of Sir James Stephen as follows:

“According to Sir James Stephen, there are three necessary requirements for the application of the doctrine of necessity:

- (i) the act is needed to avoid inevitable and irreparable evil;*
- (ii) no more should be done than is reasonably necessary for the purpose to be achieved;*
- (iii) the evil inflicted must not be disproportionate to the evil avoided.”*

55. It is of note that Brooke L.J. summarises that *“[i]n cases of pure necessity the actor’s mind is not irresistibly overborne by external pressures. The claim is that his or her conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified”*. He refers to the case of *R v. Martin* (considered below) to demonstrate that necessity may arise in circumstances which fall far short of the life-and-death scenarios considered in a great deal of the case law such that an individual’s will is entirely *“overborne by external pressures”*.

56. It is notable that the definition outlined by Brooke L.J., adopted from that of Stephen, does not require immediacy or imminence of the *“real and pressing danger”* or

“inescapable necessity”, or a pressing danger *“to the accused, or possibly someone close to him”*, criteria which are required by Charleton and McDermott and adopted by the Court of Appeal.

57. In *R v. Martin* [1989] 1 All ER 652 Simon Brown J. summarised similar elements to those espoused by Sir James Stephen, articulating the questions before the Court as follows (at §§11-13):

“First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused’s will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called “duress of circumstances”.

“Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

“Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted, if the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established.”

58. The Court considered this against the factual background that the appellant’s case was that he had driven while disqualified to bring his son to work only in circumstances where his wife (who suffered with evidenced mental health difficulties) had threatened to commit suicide if their son lost his job. The Court considered that the question before it was:

“Sceptically though one may regard that defence on the facts and there were, we would observe, striking difficulties about the detailed evidence when it came finally to be given

before the Judge in mitigation, the sole question before this Court is whether those facts, had the jury accepted they were or might be true, amounted in law to a defence. If they did, then the appellant was entitled to a trial of the issue before the jury. The jury would of course have had to be directed properly upon the precise scope and nature of the defence, but the decision on the facts would have been for them. As it was, such a defence was pre-empted by the ruling. Should it have been?"

59. The Court of Appeal of England and Wales concluded that the appellant should have been allowed to put this defence to the jury and that it was a matter for the jury to consider the probability of the defence on the facts (at §§17-18):

"It follows from this that the Judge quite clearly did come to a wrong decision on the question of law, and the appellant should have been permitted to raise this defence for what it was worth before the jury.

"It is in our judgment a great pity that that course was not taken. It is difficult to believe that any jury would in fact have swallowed the improbable story which this defendant desired to advance. There was, it emerged when evidence was given in mitigation, in the house at the time a brother of the boy who was late for work, who was licensed to drive, and available to do so the suggestion was that he would not take his brother because of "a lot of aggravation in the house between them". It is a further striking fact that when apprehended by the police this appellant was wholly silent as to why on this occasion he had felt constrained to drive. But those considerations, in our judgment, were essentially for the jury, and we have concluded, although not without hesitation, that it would be inappropriate here to apply the proviso."

60. This part of the judgment appears of particular note to the present Appeal.

61. Furthermore, the elements of the defence of necessity as stated in *Martin* (bearing in mind that the law in England and Wales had tended to conflate duress of circumstance and necessity) were approved of by Rose L.J. for the Court of Appeal of England and Wales in *R v. Abdul-Hussain* [1999] Crim LR 570. The Defendants in the case had made a plan on 8 August 1996 to hijack a plane to avoid being deported to Iraq, where they feared persecution. Less than two weeks later (on 27 August) they hijacked a plane which landed in England and they were charged with offences under the UK Aviation

Security Act 1982. The trial judge refused to let the defence of duress go to the jury on the basis that the threat was insufficiently close and immediate to give rise to a spontaneous reaction to the risk arising. The Court of Appeal quashed their convictions and held that the trial judge had interpreted the law too strictly. With reference to *Martin*, Rose L.J. confirmed that, while imminent peril of death or serious injury was an essential feature of both forms of duress, this threat need not be immediate. He referred to the imprecision in the law on duress in concluding that a case-by-case analysis of the defence was appropriate.

62. Notably, in the case of *Thacker*, endorsed in some aspects by the Court of Appeal in the herein Appellant's case, less stringent tests for necessity were advanced on behalf of the accused and were not rejected by the Court of Appeal of England and Wales. They included the passage from Simon Brown J. referred to above.
63. The approach articulated in Charleton and McDermott's textbook points to four limitations which it says "*seem to have been strictly required*". The first is that there is a pressing danger "*to the accused, or possibly someone close to him*". This, if correct, would probably rule out most protestors, because most protestors are likely to be campaigning against actions that affect others who are not necessarily "*close to [the]m*". It is difficult to see, as a matter of principle, why the defence would only apply if the accused or a person close to him was endangered. Action to protect a person at grave risk is surely merited whether one knows them or not.
64. The Law Reform Commission's *Consultation Paper on Duress and Necessity*, published in 2006, includes a discussion of the defence of necessity in a number of countries (at pp. 106-115, including Australia, Canada, South Africa, Germany and Italy). Whilst the defence is undoubtedly approached restrictively for sound policy reasons, it does not appear that the four limitations set out in Charleton and McDermott's textbook are imperative; or, at least, there should be scope for some flexibility to take account of the facts of a particular case, in keeping with the spirit of the common law.

(ii) Necessity as excuse or justification?

65. Across common law jurisdictions, courts and commentators have grappled with the question of whether necessity ought to be considered a defence of excuse or one of justification.¹⁶ An analysis of the underlying rationale may be of assistance in determining the parameters of the defence and in examining its relationship to “lawful excuse”.
66. The Law Reform Commission 2006 Paper, cited above, considers whether duress and necessity may properly be considered “*justificatory*” or “*excusatory*” defences. In the context of the discussion of duress, the LRC provisionally recommended that the latter is most appropriate, with reference to the discussion of it in Charleton, McDermott and Bolger’s textbook on Criminal Law.¹⁷ In relation to necessity, it made the same recommendation that necessity be considered to be an *excusatory* rather than *justificatory* defence, albeit noting that there is a “defensible” case for the latter.
67. In its later Report on *Defences in the Criminal Law* (LRC 95-2009), the LRC expressed the view that necessity is a defence of an *excusatory* nature. It is of note that the LRC referred to the statutory defence under section 6 of the Criminal Damage Act 1991 as an example of a defence of *justification*. Notably, in its Report, it took the view that necessity may be either based on justification or excuse.¹⁸ It concluded [at 205-206]:

“The Commission accepts that necessity has a limited scope and that it is extremely difficult to define its parameters. The Commission has concluded that the defence of necessity should apply in certain exceptional circumstances, such as those already identified in legislation such as the Criminal Damage Act 1991 and in other exceptional circumstances such as those connected with medical necessity. Given the complexity of this area, the Commission has concluded that, as a defence, it should remain to be developed on a case-by-case basis ...

¹⁶ As Ashworth put it “... *the development of duress and necessity in the common law has been characterised by the interplay of reasons of excuse and justification, and by the conflicts between recognising the pressure to which the defendant was subject to and upholding the rights of the victims of the attack*” Andrew Ashworth, *Principles of Criminal Law* (5th edition, Oxford University Press, 2006) at 219.

¹⁷ Law Reform Commission, *Consultation Paper on Defences of Duress and Necessity* (LRC CP 39-2006), at 12.

¹⁸ See the discussion at 196-197.

“The Commission has also concluded that Irish law should provide for a defence of duress of circumstances. The Commission considers that the development of duress of circumstances, while correctly described as an attempt to deal with the necessity cases, actually deals with cases which would be better described as having a purely excuse-based rationale.” [Emphasis added]

68. If we consider these rationales in the Appellant’s case, does necessity act so as to *excuse* him from liability entirely or to *justify* his conduct? It appears that the Appellant, in submissions at trial, sought to rely on the latter formulation, as the logic of the lawful excuse he sought to advance appears more akin to a justification-based formulation of the defence of necessity. This seems permissible under the analysis and recommendations of the LRC which, as seen above, also specifically identified the defence under section 6 of the Criminal Damage Act 1991.

69. While the LRC recommended that the defence of necessity be left to the Courts to determine on a case-by-case basis, it contained a draft definition for a defence of duress of circumstances.¹⁹

(iii) Necessity and acts of protest in the United States and Canada

70. The defence of necessity has been used in other jurisdictions, in particular in climate action protest cases. There are a number of cases from the United States and Canada in which the Courts have held that the necessity defence should be allowed to go to the jury.²⁰

71. In *State of Washington v. Ward* 438 P.3d 588 (Wash. App. 2019), the Defendant entered a pipeline facility in Washington and turned off a valve to interrupt the flow of tar sands oil. He was arrested and charged with burglary, criminal trespass, and criminal sabotage. When his first trial ended with a hung jury, he was re-charged with burglary in the

¹⁹ LRC Report on defences at 224: [I]n the case of duress of circumstances,

(a) a threat of death or serious injury arises from the circumstances for that person or another person unless an offence is committed, (b) the threat is imminent, (c) there is no reasonable way to avoid the threat or make the threat ineffective, and (d) the conduct is a reasonable response to the threat.”

²⁰ For an overall analysis see Joseph Rausch, “The Necessity Defense and Climate Change: A Climate Change Litigant’s Guide”, *Columbia Journal of Environmental Law*, 2019, Vol. 442., pp. 553-602.

second degree and criminal sabotage. He was found guilty of burglary but the jury were unable to return a verdict on criminal sabotage. The trial court excluded all evidence in support of his necessity defence (including scientific evidence relating to the environmental impact of oil). The Court of Appeals of the State of Washington overturned this decision, finding this a breach of his constitutional right to present a defence.

72. The Court held that the Defendant should have been allowed to present the necessity defence to the jury. It was satisfied that he had demonstrated sufficient evidence “*that he reasonably believed the crimes he committed were necessary to minimize the harms that he perceived*”, including in relation to successful past acts of civil disobedience and his history of working on environmental issues for 40 years to no avail, such that “*direct action was necessary to accomplish these goals*”(at p.6). The Court found explicitly that “[w]hether Ward’s beliefs were reasonable was a question for the jury”, and noted (at p.7) that he “*did not have to prove that the harm he sought to avoid or minimize was actually avoided or minimized but instead that the reason he broke the law was in an attempt to avoid or minimize harm*”.

73. The Court was of the view that (at pp.9-10) “*[w]hen disobedience and the necessity defense intersect, it is the intent of the protester, not the effectiveness of the protest, that is of the utmost relevance*”. The Court did engage in detail with his actions, finding them more than merely symbolic but rather aimed at preventing a particular potent contributor to climate change from entering the United States.

74. Similarly in *State of Washington v. Spokane County District Court & Taylor*, No. 98719-0, Wash. Ct. App. Div. I, 15 July 2021, the Supreme Court of the State of Washington overturned the lower court’s decision to exclude the necessity defence in respect of a protester who had been convicted of criminal trespass and obstruction of a train. Again the defence was premised on the view that the protester believed his actions “*were necessary to avoid or minimize the imminent danger of climate change and the imminent risk of danger to Spokane citizens in the downtown area where BNSF Railway transports volatile oil*” (p.3). The test in this regard, as had been stated in *Ward*, was that (pp.10-11):

“To raise the necessity defense, a defendant must show by a preponderance of the evidence that “(1) [the defendant] reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.”

75. The case focused on the fourth limb, with the Court noting that *“while there may be alternatives in the abstract, it is ultimately a question for the ‘fact finder’ to take into consideration, when determining whether the ultimate course of action was ‘reasonably necessary.’”* (p.12). In order to be “reasonable”, the alternatives must be effective or adequate in avoiding the purported harm. Illusory alternatives are not such. The Court concluded that (at p.14):

“If the defendant offers evidence that they have actually tried the alternative, had no time to try it, or have a history of futile attempts with the alternative, they have created a question of fact for the jury regarding whether there are reasonable legal alternatives.”

76. The defendant had so created a question of fact in his case, by reference to his dedicating *“much of his life calling attention to the harms of climate change through lawful methods”* (at p.15).

77. The necessity defence has also been accepted by judges where they are the finders of fact. In *Massachusetts v. Gore*, (Boston Mun. Ct., Mass., No. 1606CR000923, Mar. 27, 2018) activists blocked the construction of a gas pipeline in Boston by entering the construction site and refusing to leave. Sixteen were charged with trespass and disorderly conduct, with the charges reduced shortly before trial to civil infractions, such that there was no jury trial. The judge as finder of fact accepted the necessity defence and found them not responsible.

78. In the Canadian case of *R v. Breen* [2024] BCPC 95, two anti-logging activists who had carried out several road blockades were allowed to invoke the necessity defence. The Provincial Court of British Columbia rejected the Crown’s argument that there was no air of reality to the defence and thus no need to hear evidence on it. The Court

acknowledged that climate change constitutes “*an existential threat to life in Canada and around the world*” (at §6). It emphasised three elements as required to establish a necessity defence: (i) an imminent peril or danger; (ii) the absence of reasonable legal alternatives; and, (iii) proportionality between the harm inflicted and the harm avoided. The Court ultimately rejected the necessity defence, finding that the threat of climate change was not sufficiently imminent and that other legal alternatives were available to the activists.²¹

A.Necessity, excuse and the offences of trespass and criminal damage

(i) The *mens rea* of the offence of trespass and acts of protest or civil disobedience

79. The core of the *mens rea* requirement for trespass under section 11 of the Criminal Justice (Public Order) Act 1994 is in the entry having been “*with intent to commit an offence*” or “*intent to unlawfully interfere with any property situate therein*”. The intention required by the section goes to the unlawfulness of the action as either an *offence* or an *unlawful interference*. In circumstances where it is the Appellant’s case that he believed his actions were not unlawful, nor that they amounted to a criminal offence because a defence was open to him – of lawful excuse or necessity, through a legitimate act of protest or civil disobedience – the *mens rea* which the offence requires may not be met. This arises for particular consideration due to the ‘lawfulness’ of the action arising within the definition of the offence.

80. The question may be posed this way: if a person enters a building or its curtilage with the intention of engaging in an act of protest or civil disobedience in respect of which he or she believes there is no crime committed, or that there is a defence to any criminal charge based on an honest belief on the part of the Defendant that his or her actions were necessary to avoid or minimise a real risk of serious harm, can he or she be deemed to have the requisite *mens rea* for the offence under section 11?

²¹ The court in *Breen* relied on a previous decision in *In Trans Mountain Pipeline ULC v. Mivasair* [2020] BCCA 255, (2020) 394 CCC (3d) 242 in which the Court of Appeal for British Columbia rejected the necessity defence on the basis that it was not made out, as there were other legal alternatives open to the Defendants.

81. In the Commission’s submission, addressing this question requires consideration of the fundamental rights in issue, under the Constitution and the ECHR, as outlined above.

(ii) The offence of criminal damage and lawful excuse

82. The offence of criminal damage is provided for in section 2(1) of the Criminal Damage Act 1991 and applies to “[a] person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged”.

83. The definition of “*lawful excuse*” is then addressed in section 6 of the 1991 Act. Several observations may be made regarding this definition and its applications in the Appellant’s case:

- (i) it is clear the absence of lawful excuse is an essential aspect of the offence;
- (ii) the defence arises where an accused honestly believes that his/her actions in damaging property were “*in order*” to protect him or herself or another, and the offence is “*reasonable*” in the circumstances;
- (iii) the defence is not limited only to that provided for within section 6; sub-section (2) suggests that a lawful excuse may also arise outside of the application of the sub-section, and sub-section (5) makes clear that the section does not “*cast doubt*” on any defence recognised by law.

84. In the decision of this Court in *People (DPP) v. Crawford* [2024] 2 ILRM 313, [2024] IESC 44, the Court addressed the defence of self-defence in the context of homicide. There is some parallel in the language in section 18 of the Non-Fatal Offences against the Person Act 1997 and that in section 6(2)(c), in particular the hybrid nature of the defence in that the accused must have a separate purpose for their actions (broadly, the protection of oneself or others) and their conduct must be objectively reasonable, in the circumstances as the person subjectively perceived them. One distinction between the two is that it is not clear from section 6(2)(c) that the person must have “honestly believed” the damage necessary to protect himself or another. Also, there is no reference in section 6 to the jury ascertaining the presence or absence of reasonable grounds for the accused’s belief.

85. *Crawford* does not directly address the question regarding removing the defence from the jury's consideration, but it emphasises the role of the jury as finder of fact – both in relation to what the accused perceived and honestly believed, and in relation to whether the accused's actions thereafter were reasonable as must be assessed by “reasonable members of the community”. The assessment in this regard seems pre-eminently a matter for the jury to decide, with a risk of the judge usurping that role if he or she were to form their own view on reasonableness and withhold the defence on that basis.

86. It may be observed that in the Appellant's case, in permitting the defence of “lawful excuse” to go to the jury it might be assumed that there was at least a tacit acceptance by the trial judge that the defence might arise on the facts of the case.

(iii) Lawful excuse and necessity – overlapping factors for consideration

87. There is considerable overlap in the elements of the statutory definition of “lawful excuse” under section 6(1) of the 1991 Act and the elements of the defence of necessity such that the same factors might have been considered in respect of both definitions.

88. In the present case, a question might be put as follows: if the trial judge accepted that there was some evidence (whatever about the extent of that evidence or its merits) that the accused had an honestly held belief that his actions were undertaken in order to protect others and that his actions were reasonable in the circumstances, ought the same factors not have been considered in respect of the offence of trespass under the heading of a general defence of necessity?

89. Whilst it is accepted that the defences are not identical and that many of the authorities discussed above emphasise there being some temporal element – generally framed as imminence or immediacy – as an element of the offence, the environmental case law seems to suggest the possibility of a broader interpretation of the temporal element. In any event, the Appellant's position appears to have been that he believed that grave wrongs had already been committed such that there was a continuing and on-going risk to others.

90. An excessively narrow construction of the defence of necessity may result in similar challenges to those experienced in England and Wales which has resulted in the development of parallel jurisprudence on duress of circumstances.
91. In the Commission's submission, the case law supports a definition of the defence of necessity which contains both subjective and objective elements so that the defence remains one which is restrictively applied and one which can only be developed case-by-case going forward. The appropriate *mens rea* requirements might be an honest belief on the part of the Defendant that his or her actions were necessary to avoid or minimise a real risk of serious harm, with such belief at the time it was held having some objective basis in fact, and being reasonable in proportion to the purpose to be achieved.
92. On the question of whether a defence of lawful excuse *must include* the defence of necessity where such a defence would properly arise on the facts, in the context of the defence of lawful excuse to a charge of criminal damage (pursuant to sections 2 and 6 of the 1991 Act), the latter section specifically states that it does not "*cast doubt*" on any defence recognised by law. The defence of necessity, whatever about the debates as to its parameters and precise definition, is recognised in law as a defence to a criminal charge. As such the statutory defence of lawful excuse does not appear to supplant necessity within the context of the offence of criminal damage. It appears to the Commission that lawful excuse must include necessity in order to fully encompass the situations in which a person should properly be excused from strict compliance with the law; that it was necessary to undertake a particular action – with reference to properly defined criteria including a proportional relationship between the action undertaken and that obviated.

93. **Additional Questions raised in the Statement of Case**

94. In light of its role as *amicus curiae*, the Commission thinks it appropriate to engage only on the issues upon which it was granted liberty to appear. It is hoped that some of these are addressed (at least in part) above.
95. In respect of Question 9, which has not been addressed above, while it is clear that the factual background to the *Ziegler* case concerned protests on a (public) highway, the

first question addressed by the U.K. Supreme Court in that case, as certified by the Divisional Court, was:

*“What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of ‘lawful excuse’ when Convention rights are engaged in a criminal matter?”*²²

96. This is clearly not, in its terms, limited to protests on the highway but is far more broadly framed.²³
97. As referred to in the Statement of Case, the Court in **Ziegler** held that the necessary proportionality analysis entailed consideration of, inter alia, *“the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public”* (emphasis added). This is suggestive of a broader approach than simply public spaces or roadways, and, rather, that it might encompass protests on land owned by others.
98. Any suggestion that there is no clear ECtHR jurisprudence which suggests that damaging private property attracts ECHR²⁴ must be assessed against the statue cases of **Murat Vural v Turkey** and **Handzhiyski v Bulgaria**.²⁵
99. In this regard, a distinction is to be drawn between what might be termed the procedural obligations on domestic authorities in relation to ECHR rights as against any broader proposition of a positive right to protest on privately owned land or on publicly owned

²² At §7. Later in the judgment is added: “and, in particular the lower court’s assessment of whether an interference with Convention rights was proportionate”.

²³ Albeit the second question considered is narrower and focuses on the statutory provision at issue. The second question was specifically in relation to the statutory defence at issue: *“Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users ... prevents them ... from passing along the highway?”*

²⁴ As noted in the Statement of Case at §40 as being noted by the Court in *Attorney General’s Reference (No 1 of 2022)* [2023] KB 37, [2022] EWCA Crim 1259.

²⁵ The Court in *Attorney General’s Reference (No 1 of 2022)* [2023] KB 37, [2022] EWCA Crim 1259 did refer to these cases.

land from which the public are excluded, with corresponding duties, which the DPP states does not arise from the ECHR jurisprudence.²⁶ The Commission emphasises the former; it is not that the Appellant’s conviction for trespass is, in itself, a violation of Article 10 and 11 rights (or that a prosecution and conviction would always be disproportionate), but rather that a failure to consider or weigh such rights, primarily as they are protected by Article 40.6 of the Constitution, and direct the jury in that regard, constitutes the violation.

100. On that basis, the Commission submits that the notion of “shared space”, though a feature of *Ziegler*, is not a necessary prerequisite and that the ECHR case law is of some assistance in assessing this question, and may yet develop in the future.

101. **Conclusions**

102. The present Appeal raises significant issues regarding the parameters of the defence of necessity and its relationship with acts of protest/civil disobedience. It is the Commission’s respectful submission that where an individual is engaged in a genuine act of protest, such that their rights under Article 40.6.1 of the Constitution and under Articles 10 and 11 of the ECHR are engaged, the criminal process must take account of and give due weight to those fundamental rights. Due regard to those rights would involve express judicial consideration of the rights engaged and of any defences which may therefore be open to an individual, to include the defence of necessity. In the Commission’s respectful submission, the defence of necessity contains both subjective and objective elements so that the defence remains one which is restrictively applied and can only be developed on a case-by-case basis.

Nóra Ní Loinsigh

Michael Lynn S.C.

Instructed by the Irish Human Rights and Equality Commission

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²⁶ As noted in §39 of the Statement of Case.