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doi:10.1017/S0008197323000259

PROPORTIONALITY AND PROTEST-RELATED OFFENCES

FOR the second time in less than five years, the UK Supreme Court has considered the issue of access to abortion services in Northern Ireland. In its most recent decision – *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 – the court examined whether the (then Bill form of the) Abortion Services (Safe Access Zones) (Northern Ireland) Act ("SAZA") was compatible with the rights of anti-abortion protestors as protected by Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of peaceful assembly) of the European Convention on Human Rights. While the judgment is patently significant in terms of the rights of patients and protestors, it has wider implications. Most notably, it addresses the implications of the court's decision in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23 when considering whether protest-related offences are compatible with protestor's Convention rights.

The SAZA arose in the context of a protracted disagreement between Westminster and Stormont following a damning 2018 report of the Committee on the Elimination of Discrimination against Women (CEDAW) recommending that the UK take immediate steps to expand access to abortion in Northern Ireland CEDAW/C/OP.8/GBR/1 (6 March 2018). The SAZA was specifically intended to address the report's recommendation that the UK should adopt "measures … to protect women from harassment by anti-abortion protestors" (at [79]).

It creates "safe access zones" around "protected premises" (premises where treatment for, or information, advice or counselling in respect of, lawful termination of pregnancy is offered) to enable "protected persons" (patients, accompanying persons and staff) to access the premises unhindered by protestors. Such zones are established automatically upon notice from the operator of protected premises and may extend for up to 250 metres. The SAZA criminalises certain behaviours within safe access zones, though these provisions were not challenged by the Attorney General. This is unsurprising; as the UKSC recognised, it is questionable whether such conduct would be protected by Articles 9 to 11 in the first place, given that the Convention protects *peaceful* protest (at [111]). Indirectly or directly "influencing" someone is, however, a different category of conduct. It clearly has the potential to criminalise peaceful protest which does fall within the protections afforded by Articles 9 to 11.

While the crux of the Convention dispute centred on proportionality *stricto sensu*, an aspect of the court's wider proportionality assessment is worth noting. While the Strasbourg court is yet to find a general right to abortion within the Convention rights, it has held that where a state

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permits abortion, it must ensure that there is a "procedural framework enabling a pregnant woman to exercise effectively her right of access to a lawful abortion" (at [115] citing *P and S v Poland* (2012) 129 B.M.L.R. 120). The UKSC extrapolated from that case law a positive obligation on states under Article 8 "to enable pregnant women to physically access the premises where abortion services are lawfully provided, without being hindered or harmed in the various ways described in the evidence before the court" (at [115]). This development is significant given that it squarely pits two conflicting rights against each other in the context of peaceful protest. This can be contrasted with the more typical scenario in which peaceful protest, while a potential "hindrance" to the wider public, does not directly conflict with another person's Convention rights. In such cases, the European Court of Human Rights has emphasised the obligation on states to "show a degree of tolerance" for the inevitable disruption a demonstration in a public place may cause (e.g. *Kudrevičius and Ors v Lithuania*, Grand Chamber, App No. 37553/05, at [150]). As conceptualised by the UKSC, peaceful protest (for instance "praying, holding bibles, singing around large religious pictures" (at [84])) within a safe access zone is not simply a matter of disruption that patients must tolerate but, rather, a direct interference with a right protected by Article 8 not to be hindered in accessing a lawful service. The state has a positive obligation to ensure that patients are able effectively to exercise that right.

In rejecting the Attorney General's claim that section 5(2)(a) was a disproportionate means of complying with that positive obligation, the UKSC emphasised the fact that the SAZA does not prevent protestors from exercising their rights under Articles 10 and 11; they can continue to "express their views in terms that are uninhibited, vehement, and caustic. They can do so wherever they please except within the immediate vicinity of hospitals and clinics where abortion services are provided" at [132]. While Strasbourg has reiterated the importance of location in the context of protests, the Convention "does not bestow any freedom of forum for the exercise" of the right to protest (at [127]). Further, protestors are not entitled to a "captive audience": women and staff have no choice as to how to access protected premises and they are, thus, "compelled to listen to speech or witness silent prayer which is unwanted, unwelcome and intrusive" (at [128]). Finally the UKSC observed that the SAZA gives effect to the judgment of a democratic legislature "that activities falling short of violence are also capable of deterring unimpeded access to clinics" which was "amply support by the evidence" and consistent with the approach taken in a number of other countries including Canada and Australia which had similarly determined such restrictions to be compatible with the rights of protestors (at [91]–[101], [140]–[151]).

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In those circumstances, "if the ingredients of an offence under [section] 5 are established, then a conviction of the offence will not be a disproportionate interference with the defendant's Convention rights under articles 9 to 11" (at [155]). There is, thus, no need for courts to conduct a proportionality assessment when a defendant is being tried for an offence under section 5 of the SAZA. As the court clarified, the appropriate test to apply when deciding whether a provision of devolved legislation is beyond legislative competence on the basis that it is a disproportionate interference with a Convention right is that set out in *Christian Institute v Lord Advocate* [2016] UKSC 51 (at [10]), namely, whether the provision "is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference … in all or almost all cases" (at [19]). In those circumstances, given that the SAZA would operate proportionately in "all or almost all cases", the SAZA was not outside the legislative competence of the Northern Ireland Assembly (at [157]).

In reaching its related conclusions on compatibility and competence, the court outlined (and applied) the approach to be taken when protest-related offences potentially interfere with the rights protected by Articles 9 to 11. It rejected the contention that its judgment in *Ziegler* espoused a "universal rule" that in any case involving a protest-related offence where there is an alleged interference with rights protected by Articles 9 to 11 there must always be an assessment of proportionality on the facts of the individual case (at [10]). Rather, "it is possible for a general legislative measure in itself to ensure that its application in individual circumstances will meet the requirements of proportionality under the Convention, without any need for the evaluation of the circumstances in the individual case" (at [34] citing the Grand Chamber decision in *Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21).

The UKSC offered guidance as to the application of those general principles "[w]here a defendant relies on article 9, 10 or 11 Convention rights as a defence to a protest-related offence" (at [54]). In such cases, a series of cumulative questions arise:

(1) Are those articles/rights engaged?
(2) If so, is the offence one "where the ingredients of the offence themselves strike the proportionality balance"?

Where both are answered affirmatively, the court does not need to consider the issue of proportionality on the specific facts. Where question 1 is answered affirmatively but question 2 is not, "it is necessary to consider a third question: whether there is a means by which the proportionality of a conviction can be ensured", including by way of the interpretative power in section 3 of the HRA (at [56]). As the judgment in *Ziegler*

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illustrates, this may occur via a lawful excuse defence to an offence. If the offence arises at common law (for instance, breach of the peace which is regularly relied upon in policing protests: *R. (On the Application of Hicks and Ors) v Commissioner of Police for the Metropolis* [2017] UKSC 9) "the question arises whether the court can develop the common law so as to render the offence compatible with the Convention rights, either on ordinary principles or by virtue of the duty imposed by section 6(1) of the Human Rights Act" (at [61]). Given the proliferation of protests – and legislation restricting protests – in recent years, this will likely be swiftly employed by the lower courts. Indeed, it has been relied upon in several subsequent cases involving proportionality challenges to convictions for protest-related offences (e.g. *Director of Public Prosecutions v Bailey & Ors* [2022] EWHC 3302 (Admin) and *Hicks v Director of Public Prosecutions* [2023] EWHC 1089 (Admin)).

The judgment in *Safe Access Zones* is clearly a profoundly significant decision with respect to the rights of patients accessing abortion services. However, to characterise the decision as a "win" for reproductive rights ignores the wider issues that persist with respect to abortion access in Northern Ireland. Certainly, reducing the physical impediments to accessing the very limited number of abortion service providers in Northern Ireland is a much-needed step towards addressing the human rights violations observed by the CEDAW Committee in its 2018 report (and noted – albeit *obiter* – by five of the seven justices in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27). But, much more remains to be done to ensure that pregnant people can exercise their right to access lawful abortion in Northern Ireland. Further, it would be a mistake to focus on the implications of the judgment solely by reference to issues of reproductive freedom. It is inevitable that lower courts will be called upon to consider the compatibility of other recent enactments criminalising various forms of protest (including protest that entails "noise" that has a "significant impact" on persons in the vicinity: Public Order Act 1986, s. 12(1)(ab)) with Articles 10 and 11 of the Convention. Only time will tell whether the court's clarification of *Ziegler* has resolved the issue of the proper approach in such cases. Indeed, the court has left open whether the approach taken in *Ziegler* to section 137 of the Highways Act 1980 was correct, keeping alive the prospect of further litigation regarding the approach to be taken in cases involving unlawful obstruction of a highway.

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https://doi.org/10.1017/S0008197323000259 Published online by Cambridge University Press