Neutral Citation Number: [2021] EWHC 3100 (QB)

Case No: E01BS396

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE, BRISTOL
ON APPEAL FROM THE BRISTOL COUNTY COURT
JUDGMENT OF HHJ RALTON DATED 26th JANUARY 2021
COUNTY COURT REF: E01BS396

Date: 19/11/2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

- -

Between:

(1) MICHAEL OVERD **(2) MICHAEL STOCKWELL** **(3) DON KARNS** **(4) ADRIAN CLARK**	**Appellants/ Claimants**
- and –	
THE CHIEF CONSTABLE OF AVON AND SOMERSET CONSTABULARY	**Respondent/ Defendant**

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Mr Iain Daniels (instructed by **Andrew Storch Solicitors**) for the Claimants
Mr Mark Ley-Morgan (instructed by **the Legal Services Directorate of Avon and Somerset Constabulary**) for the Defendant

Hearing dates: 21, 22 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30am on Friday 19th November 2021.

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MR JUSTICE LINDEN:

Outline of the appeal

1. The Appellants, who I will refer to as the Claimants, are evangelical Christians. On the afternoon of Saturday 6 July 2016, they were arrested by officers of the Defendant at Broadmead shopping centre in Bristol after complaints from members of the public about the content of their street preaching. These complaints were to the effect that their preaching was racist and anti-Islamic and was causing a disturbance. A crowd had gathered and, on arrival at the scene, officers concluded that public disorder was imminent.

2. Mr Overd was arrested on suspicion of an offence under section 50 of the Police Reform Act 2002. This provides, in summary, that where a constable in uniform has reason to believe that a person is, or has been, acting in an anti-social manner they may require that person to give his name or address. Failure to do so is an offence. The other three Claimants were then arrested on suspicion of a racially aggravated offence under section 5 Public Order Act 1986 i.e. using *"threatening or abusive words or behaviour….within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby"*.

3. The Claimants were detained for periods of 6-7 hours before being released on bail that night. They were then prosecuted under section 5 of the 1986 Act but the prosecutions ultimately failed. In the case of Mr Karns, the charges were dropped before they came to court. The other three Claimants were tried at Bristol Magistrates Court on 23, 24 and 27 February 2017. A submission of no case to answer succeeded in the case of Mr Clark. Mr Overd and Mr Stockwell were convicted, but their convictions were overturned on appeal.

4. The Claimants then brought proceedings in the Bristol County Court alleging breaches of Articles 9, 10 and/or 11 of the European Convention on Human Rights ("ECHR"), wrongful arrest, assault/trespass to the person/battery, false imprisonment, malicious prosecution and misfeasance in public office. By Order dated 12 February 2021, His Honour Judge Ralton dismissed all of the Claimants' claims after a trial which was conducted in person over a period of 8 days with Messrs Karns and Stockwell attending remotely. The Judge's reasons for his decision are set out in a Reserved Judgment dated 26 February 2021 ("the Judgment").

5. By Order dated 12 May 2021, Henshaw J granted limited permission to appeal against the Judge's Order as follows:

> *"a) granted as to Grounds 1-5, insofar as they relate to the lawfulness of the Claimants' arrests and their claims for breach of Convention rights in that regard;*
>
> *b) granted as to Ground 9, insofar as it relates to the lawfulness of the First Claimant's arrest on 19 August 2017 (Particulars of Claim § 31 (f)(ii)) and the dispersal orders referred to in Particulars of Claim § 31 (f)(i), (iii) and (iv)), and his claims for breach of Convention rights in connection with those matters, but otherwise refused as to Ground 9;*

c) refused insofar as they relate to the Claimants' claims for detention in custody, malicious prosecution and misfeasance in public office; and

d) refused as to Grounds 6, 7 and 8."

6. By way of further explanation:

i) Grounds 1-3 relate to the dismissal of the Claimants' claims under the Human Rights Act 1998. These Grounds complain, in summary, that the Judge failed to give sufficient consideration to the Claimants' ECHR rights, that he was *"unreasonable"* to find that the officers had "*a legitimate aim"* for the purposes of the relevant provisions, and that he erred in his approach to the question of proportionality. The Claimants also contend that the Judge erred in failing to consider the officers' *"positive duty"* to protect the Claimants' ECHR rights in relation to each of their arrests and that his findings in this regard were *"unreasonable".* The particular points which Henshaw J highlighted as giving rise to a realistic prospect of success for the appeal were:

a) as to the limited and second hand information about what had been said by the Claimants which the Judge found (at [31]-[34] of the Judgment) was the basis for the officers' suspicion that racially aggravated public order offences had been committed; and

b) as to the question whether the Judge's findings at [38] of the Judgment suggested that, rather than the Claimants' speech being so provocative that members of the crowd might *"without behaving wholly unreasonably"* be moved to violence, the problem lay with two or three members of the audience who officers knew to be troublemakers and liable to instigate unlawful violence. In this regard Henshaw J referred to the decision of the Divisional Court (Sedley LJ and Collins J) in **Redmond-Bate v Director of Public Prosecutions** [2000] HRLR 249.

ii) Ground 4: alleges that the Judge erred in Mr Overd's particular case in failing to deal with his argument that his arrest was unlawful because he had not been informed of the power to arrest for an offence under section 50 of the 2002 Act and that, in any event, that was not the basis for his arrest.

iii) Ground 5: complains that the Judge was wrong to hold that the arresting officers had reasonable grounds to suspect that any of the Claimants had committed an offence given his findings as to what had been reported to the police, given that the officers did not know what each of the Claimants had actually said, and given that the Claimants were exercising their ECHR rights. The Judge's findings in this regard are said to have been *"unreasonable"*. Mr Daniels confirmed that this Ground was, in effect, a complaint that the Judge was wrong to dismiss the claim that the arrests of the Claimants were unlawful at common law.

iv) Ground 9: complained that the Judge had failed to deal adequately with Mr Overd's case that officers of the Defendant had breached his ECHR rights on other occasions. Henshaw J was satisfied that it was arguable that the Judge should have dealt more fully with 4 incidents - on 19 August, 8 September and

28 October 2017 and 7 January 2018 - when Mr Overd had been arrested or issued with a dispersal notice pursuant to section 35 Anti-Social Behaviour, Crime and Policing Act 2014 in Taunton and Bridgwater.

7. Henshaw J expressly did not give permission to challenge the Judge's findings that, for the purposes of section 24(4) Police and Criminal Evidence Act 1984, there were reasonable grounds for believing that it was *"necessary"* to arrest the Claimants for one of more of the reasons set out in section 24(5) of that Act, assuming that there were reasonable grounds to suspect that they had committed an offence. This was Ground 6. He also refused permission to challenge the Judge's conclusions on the legality of the Claimants' detentions assuming that their arrests were lawful (Ground 7). And he refused permission in relation to Ground 8, which disputed the Judge's finding that a second arrest of Mr Overd had not been challenged by him in the Claim.

8. The Claimants did not challenge the Judge's dismissal of their claims for malicious prosecution – the decision to prosecute had been entirely that of the Crown Prosecution Service rather than that of the Defendant - and misfeasance in public office. He found that there was no evidence that the Defendant or its officers had in any way sought to manipulate the process, nor of any malice on their part. No challenge to the decision of Henshaw J as to the scope of the permission granted was made by the Claimants either.

9. As I read Henshaw J's Order and reasons, he therefore gave permission for the following issues to be considered in this appeal:

   i) Whether the Judge was wrong to hold that the arrests of the Claimants were compatible with Articles 9, 10 and/or 11 ECHR?

   ii) Whether the Judge erred in the manner alleged in Ground 4 in relation to his decision as to the reason for the arrest of Mr Overd?

   iii) Whether the Judge erred in finding that there were reasonable grounds to suspect the Claimants of having committed offences under section 50 of the 2002 Act in the case of Mr Overd, and under section 5 of the 1986 Act in the case of the other Claimants?

   iv) Whether the Judge erred in failing to consider, in relation to each of the four subsequent incidents in respect of which permission was given by Henshaw J, whether there was a breach of Mr Overd's ECHR rights?

10. As I understood it Counsel for the parties interpreted the scope of the permission granted in the same way, and the appeal was argued on this basis.

The Hearing

11. In view of the skeleton arguments which had been prepared by Counsel, and the 891-page appeal bundle, I felt it necessary to remind them of paragraph 5 of Practice Direction 52A and of CPR 52.21 and to ask about the basis for the appeal.

12. Mr Daniels had prepared a 30 page skeleton argument which, with respect, was not *"concise"* and did not *"define and confine the areas of controversy"* as clearly as it might have (paragraph 5(2) PD 52A). As part of the overall approach in this document,

his skeleton argument suggested that I pre-read for half a day to a day. His list of pre-reading included asking me to watch an hour of footage of the events of 6 July 2016 and to read the whole of the following documents from the trial: all of the statements of case (35 pages), all of the Claimants' witness statements (35 pages), the statements of seven police officers (52 pages), the transcripts of the whole of the evidence of some of the witnesses at the trial (324 pages), and the opening and closing written arguments of the parties (113 pages) as well as the Judgment (40 pages) and the parties' skeleton arguments for the purposes of the appeal (40 pages). The body of Mr Daniels' skeleton argument then contained very few cross-references to the trial documents which he had suggested I read. The overall impression given was that he wished to re-argue the case which had been argued below.

13. I told Counsel that I had viewed parts of the footage on a provisional basis but that it would be a matter for submission as to whether I should take it into account. In the time available to me I had not been able to read all of the materials which were before the Judge which Mr Daniels had listed, and he would therefore need to draw attention to any particular aspects of the evidence or arguments below on which he relied. I also reminded Mr Daniels that an appellate court would not normally re-try the case and asked him whether he was alleging errors of law on the part of the Judge or errors of fact. He said that his case was that the Judge had erred in law, that he did wish me to take the footage into account but that he would only be taking me to some of the evidence which was before the Judge. This was part of the evidence in relation to the behaviour of the crowd and the question whether the police should have reacted by dealing with the individuals whom they recognised as troublemakers, rather than by arresting the Claimants.

14. Mr Ley-Morgan provided a 9-page skeleton argument which was, at least, succinct. It also helpfully directed me, with cross references to the bundle, to specific passages in the materials which were before the Judge. But the introductory paragraph stated that the Defendant relied on everything said in his written closing submissions on the law and the facts at trial (43 pages) so far as relevant to the appeal. This was contrary to the requirement in paragraph 5(2) of Practice Direction 52A that skeleton arguments must *"be self-contained and not incorporate by reference material from previous skeleton arguments"*.

15. By the end of the hearing, both Counsel agreed that if I found that there had been an error of law on the part of the Judge, and was not able to come to my own conclusion on the basis of his findings of fact, I was not in a position to decide the claims myself on the evidence. The relevant issues would have to be remitted or re-tried. This was because, for example, I did not have the transcripts of all of the evidence that was called. Counsel also agreed that it would be necessary for me to hear from the witnesses as to their experiences and perceptions on the day and as to why they acted as they did. Mr Ley-Morgan's position was that I should not take the footage into account in coming to my decision but I did not see why I should not do so, in the same way that I could have regard to any other materials which were before the Judge, provided I kept in mind the fact that this was only part of the evidence which the Judge received and, in particular, that he received live evidence as to the levels of tension and the risk of disorder during the relevant events.

The facts

16. Mr Overd and Mr Clark live in the west country. Mr Stockwell and Mr Karns are US citizens who live in New York and Virginia respectively. They all describe themselves as Christians and Messrs Stockwell and Karns regularly come to England to do street preaching with Mr Overd. It appears from their preaching that they are creationists. Their message is socially conservative. They preach that all other gods are false gods that, that there is a heaven and a hell, that only Christ can set sinners free, that there will be a day of judgment and that sinners will be cast into *"the eternal lake of fire"*.

17. On the afternoon of Saturday 6 July 2016, the Claimants set up in the Broadmead shopping centre, which is an open air pedestrianised area. There was therefore no obstruction of any highway, although they were stationed in a place which meant that pedestrians would have to walk to either side of them in order to pass. The Claimants took it in turns to preach from a portable step, using a body worn amplifier, whilst the others stood nearby to support them. They also set or held up signs, and there was literature available to the public.

18. Mr Overd was in the habit of wearing a GoPro video camera on his chest when he was doing street preaching and would use it to record the situation if there was significant agitation amongst his audience, so that he would have evidence if anything untoward occurred. There came a point when he was sufficiently concerned to switch the camera on, and the Judge made findings as to what could be seen on the footage. He made the following findings at [25]-[30]:

> *"25. At about 20 minutes into the footage tensions rose and Mr Overd can be heard asking persons who have got too close to the preachers to "take it back a bit".*
>
> *26. At about 26 minutes in, Mr Overd took over the preaching. Tensions rose further when Mr Overd preached that the audience are "depraved people" and that "Mohammed is a liar and a thief, just like you and me" and "Buddha is a liar, just like you and me". Some of the individuals who argued back were becoming heated.*
>
> *27. Mr Overd moved on to preach against sex outside of marriage and gay marriage which caused upset. Later on, Mr Overd preached that "Allah is a false god" and he was critical of the Qur'an.*
>
> *28. At about 46 minutes in a woman, who has been in lively debate with Mr Overd, stood on a chair to preach her word in competition. In the meantime, there is at least one man who was angry and swearing at Mr Clark. An attempt was made to interfere with the GoPro and some of the angrier members of the crowd closed in on the preachers.*
>
> *29. Mr Clark took over the preaching. The woman stopped preaching but there is another person who started preaching the teachings of Islam (I think) in competition with Mr Clark and that person drew much of the crowd away from Mr Clark. The content of Mr Clark's preaching was rather less inflammatory and the tension noticeably waned.*
>
> *30. There is no doubt that at all times all of the Claimants remained calm and polite; they did not use any bad language."*

19. Having viewed the footage and read the transcript of what was said which was in the appeal bundle, these passages may not fully convey the flavour of the preaching although the Judge clearly had this in mind, having studied the footage closely. Although the Judge found that the Claimants remained calm and polite and did not use bad language, in his exchanges with the audience which gathered Mr Overd, in particular, could be seen as disparaging his audience and provocative. As part of his message that those who choose his form of Christianity are enlightened, he contrasted believers with those in his audience who did not believe, referring to the latter in disparaging terms, and he related his own experience of conversion, contrasting the person he had been (like them) with the person he had become. For example:

    i) Mr Oved accused his audience of being *" vile….rude and aggressive towards the preacher"…."behaving like animals"….."depraved towards God"….."heathens"…,,,"pagans"….."wicked and facing punishment"…"spiritual zombies"…"fools"*.

    ii) He referred to all other religions as *"dead…kaput….lies"* and to Mohammed, for example, as *"a liar and a thief just like you and me"*.

    iii) He referred to the *"filthy immorality of our nation"*, to sex outside of marriage as *"filthy….depraved….perverted"* and to everything other than marriage between a man and a woman as *"an abomination and disgusting before the God of the Bible"*. Mr David Cameron (whose government introduced the Marriage (Same Sex Couples) Act 2013) came in for particular criticism in this regard for highlighting "*sodomisation and buggery turning into lesbianism the only institution of God"*.

20. These remarks have to be seen in their overall context and, of course, it was open to members of the public to ignore them and move on (although the amplifier meant that the preaching was loud). But, without expressing agreement or disagreement with what was said by Mr Overd, or condoning the reaction of the members of the public who gathered, it was not entirely unpredictable that a number of people reacted angrily given the range of views and perspectives which are likely to have been represented in Broadmead on a typical Saturday afternoon and, indeed, appeared to be represented in his audience.

21. Meanwhile, the Judge found at [31]-[34], complaints were made to the police. At [32] the Judge noted that the complaints were logged and gave the example of a complaint that the preaching included a *"quite strong anti-muslim message"*, that there were approximately 20 people watching, a few had shouted back and it was possible that there would be further problems. Some of the callers described the preaching as *"racist"*. At [33] the Judge found that the preaching was not, in fact, racist: the complainants were actually referring to what they regarded as islamophobia. Other callers referred to the situation as *"getting out of hand"*.

22. In his skeleton argument for the trial Mr Daniels summarised the complaints from members of the public as follows:

> *"a. That the crowd were getting 'angry'; b. A gentleman was preaching sort of racial stuff and being quite abusive with it; c. Preaching anti-Muslim stuff; d. The crowd was going to die if it did not repent; e. Anti-Muslim, anti-other faith stuff; f.*

> *Allah was evil; g. Muslims are going to hell, we are all going to hell; h. Muslims only kill; i. The caller was not keen on being called a sinner; j. Sinner for being a female; k. Muslims are going to hell; l. Islam only teaches murder; m. A male shouting obscenities, the crowd shouting back;"*

23. Police Community Support Officer Caines was the first officer to arrive on the scene. He told the Claimants that they could preach but that he wanted them to turn the amplification off, and then sought to calm a man who was accusing them of *"hate crime"* and complaining that they were saying that everyone was *"foolish"*. The Claimants did not switch off the amplification and Mr Overd asked to see the law which said that they should do so. The crowd began to rebuild and was jeering at the Claimants from behind PCSO Caines. PCSO Caines asked two of the more agitated members of the crowd to step back, and Mr Overd's evidence was that he heard one of the members of the crowd threaten to stab PCSO Caines. PCSO Caines *"resumed his imploration"* of the Claimants to switch the amplifier off and told them that he wanted them gone by 5pm. Mr Clark did then turn the amplification off, but the preaching continued. PCSO Caines *"radioed in an incident"*.

24. Inspector Finn and other officers arrived but Inspector Finn was concerned that the police were under resourced in the area and called for more back up. Mounted police then arrived, and a mounted police officer placed herself and her horse between the Claimants and the crowd whilst Mr Clark carried on preaching. She warded off a man who had attempted to approach the Claimants in an unfriendly manner. She asked to speak to Mr Clark, who cooperated fully with this request. Mr Overd took over the preaching, accusing the audience of being intolerant and closed minded*..." heathen sinners etc"* whilst members of the audience accused him of preaching hate and of saying that Muslims were going to end the world.

25. By now the crowd had become larger. Mr Karns described it in evidence as *"riotous"*. PC Phillipou then arrived. All of the officers who attended regarded the crowd as *"volatile"* at this point. PC Phillipou recognised three members of the crowd whom he regarded as dangerous [38]. His view was that *"the incident was going to explode at any minute".* The Judge found, at [39], that:

> *"The footage gives some idea of the tension but I do respect the assessment of the police officers who were present and accept as reasonable the opinion as police officers that a public disturbance and violence could break out and their opinion that the preachers were in danger"*.

26. Having viewed the footage, I read this passage as saying that it did not tell the whole story. The Judge accepted witness evidence from officers which was to the effect that the atmosphere was more explosive than it may appear on the footage, and he rightly took into account the fact that they have a good deal more experience of these sorts of situations when he considered their assessments. Indeed, the Judge also relied on the Claimant's evidence in this regard including the fact that Mr Overd had switched on the GoPro and the words which they used to describe the level of tension.

27. Initially, PC Phillipou was going to issue dispersal notices under section 35 Anti-Social Behaviour Crime and Policing Act 2014, requiring the Claimants to leave the locality for a specified period. Such notices may be issued where a duly authorised officer has reasonable grounds to suspect that the behaviour of the person is likely to contribute to

members of the public being harassed alarmed or distressed, or to the occurrence of crime or disorder, and the officer considers that a notice is necessary to remove or reduce this risk. PC Phillipou told Mr Overd that he or they were *"causing a disturbance now…You are not welcome, okay. You are causing a disturbance"*, a choice of words of which the Judge was critical, and he said that he was going to issue Mr Overd with a dispersal notice. The crowd was chanting *"go home"* at this point.

28. Mr Overd started to preach again. PC Phillipou asked Mr Overd for his name and was told *"Michael"*. He asked for Mr Overd's surname and was told *"I don't have to give you my surname"*. He told Mr Overd that he was going to issue a dispersal notice to leave the area and Mr Overd said that he was not going to leave the area. PC Phillipou told Mr Overd that if he did not leave the area he would be arrested, and Mr Overd said *"Okay…I'll be arrested"*. Mr Overd resumed his preaching and PC Phillipou said *"Right, you're being arrested now"*. At that point he did not say what for.

29. The Judge found:

> *"47. PC Phillipou took Mr Overd away from the crowd and out of their sight to a police van parked in The Horsefair. He radioed in to say: "Right I've detained this person who refused to give me his details so I can give him a dispersal notice". A little later PC Phillipou again refers to section 35 of the Anti-Social Behaviour Crime and Policing Act 2014 and, for the first time, to section 50 of the Police Reform Act 2002 ….*
>
> *48. It is clear to me that PC Phillipou has a genuine and reasonable belief that Mr Overd had been committing anti-social behaviour but was muddled about which statutory provision gave rise to a ground for arrest until he mentioned section 50 of the Police Reform Act 2002."*

30. The Judge found that PC Powell asked Mr Clark to leave the area but he refused. PC Powell received further information about the nature of the preaching and he then arrested Mr Clark for *"a racially aggravated public order offence"*.

31. PC Jackson arrested Mr Karns and Mr Stockwell for the same reason.

32. The Judge found that there were reasonable grounds to believe that all of the arrests were necessary to protect the Claimants from suffering physical injury and to allow a prompt and effective investigation. In the cases of Mr Karns and Mr Stockwell it was also necessary to enable their address to be ascertained given that they could not recall the full address of Mr Overd, with whom they were staying.

33. At the end of the footage, Mr Overd can be seen and heard talking to a security guard. He refers to *"Mob rule like that and the hatred and the threats"* which he says are happening more frequently against Christian preachers.

Legal framework

The ECHR

34. Although Mr Daniels' skeleton argument for the purposes of the appeal contained a section on the law relating to Article 11 ECHR which referred to various authorities, it

appeared from [86] of the Judgment that at the trial he had agreed with the Judge that Article 11 did not add anything to the essential nature of the case. In answer to a question from me he confirmed that this was still his position. I will therefore focus on Articles 9 and 10 as Counsel did at the Hearing before me.

Article 9 ECHR

35. Article 9 provides:

> *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

36. Mr Daniels referred to various passages from the ECHR materials which emphasise the importance of Article 9 rights. For present purposes, the following passage from the decision of the European Court of Human Rights in **Kokkinakis v Greece** (1993) 17 EHRR 397 is sufficient:

> *"31. As enshrined in Article 9.., freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*
>
> *While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions."*

37. Mr Daniels also referred to section 13 Human Rights Act 1998, which requires a court to have particular regard to the importance of Article 9 rights where a question arises which may affect the exercise of this right by a religious organisation or its members. However, the section has a somewhat circular quality given that it begs the question as to the content of Article 9 rights in the circumstances of the particular case.

38. Mr Daniels submitted, and I accept, that proselytising may be an aspect of *"teaching"* and therefore a manifestation of a person's religion or belief: see **Kokkinakis v Greece** at [31]:

> *"it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9..would be likely to remain a dead letter."* (emphasis added)

39. Self-evidently, however, a person's right to manifest their religion or belief, including by proselytising, is qualified by Article 9.2. In this regard I note, by way of illustration, that in **Kokkinakis**, which concerned the application to a Jehovah's Witness of laws restricting proselytism, the Court accepted that, in principle, the state could legitimately seek to regulate such activities, for example so as to protect the rights and freedoms of others [44]. The Court also said that there was a distinction between bearing Christian witness and improper proselytism [48], albeit the examples of improper proselytism which it gave (e.g. the use of violence or brainwashing) are not applicable in the present case.

40. More generally, I note that it is very well established in the Convention case law that *"... in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."*: **Kalac v Turkey** (1997) 27 EHRR 552 [27]. As Lord Scott put it in **R (Begum) v Head Teacher and Governors of Denbigh High School** [2007] AC 100 [86]:

> *"Freedom to manifest one's religion" does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs."*

Article 10 ECHR

41. Article 10 provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority....*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others..."*

42. Again, Mr Daniels referred me to general statements of the importance of freedom of expression, which I entirely accept. These include the following very well-known passage from **Handyside v United Kingdom** (1979-80) 1 EHRR 737 [49]:

> *"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."* (emphasis added)

43. For understandable reasons, Mr Daniels was at pains to emphasise that, as this passage states, Article 10 may protect information or ideas which are considered offensive, shocking or disturbing. I accept this. However, Mr Daniels appeared, at times, to go further. For example, the opening paragraph to his skeleton argument for the appeal stated that his case was that:

> *"even where the expressed views, opinions and beliefs may, for some, be unpopular or even offensive, the duty of police officers is to seek to protect the speaker's Convention rights and not to infringe them by limiting those rights, less still by limiting them by way of arrest."*

44. Article 10 rights are important and in principle they protect a broad range of speech, but they are qualified and therefore do not guarantee protection of such speech whatever the circumstances. The passage from **Handyside** on which Mr Daniels relied states in terms that the protection of the right to expression which causes offence is *"subject to paragraph 2 of Article 10"*. As the Court put it in **Giniewski v France** (Application no 64016/00) [43]:

> *"As paragraph 2 of Article 10 recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs…"*

45. This principle focusses on the quality or nature of the speech, whether it makes a meaningful contribution to public debate and/or whether it infringes the rights of others. But, of course, other bases on which offensive speech may be restricted include public safety and the prevention of disorder or crime. Mr Daniels referred on a number of occasions to the officers in this case having a *"positive duty"* to protect the speaker's Convention rights even where what they say is unpopular or offensive. That may be true, as far as it goes. But as those rights are qualified any such duty does not mean, as he appeared to contend, that police officers must always side with the speaker in such a case and must always ensure that they are able to say what they wish to say. It does, however, mean that any action which they take to inhibit the speaker's freedom of expression must be "justified" under Articles 9.2 and 10.2 and proportionate. Moreover, these provisions must be applied having regard to the importance of the relevant rights, and the justification for any infringement must therefore be convincing: see, further, the cases discussed below.

Bank Mellat v HM Treasury (No 2) [2014] AC 700

46. In relation to the question of proportionality as part of the assessment of whether a given measure or infringement, which is prescribed by law and pursues a legitimate aim, is *"necessary in a democratic society"*, the test is as set out by Lord Reed at [74] of his judgement in the **Bank Mellat** case:

> *"74. ….it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the*

> *achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. .... I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."*

47. A theme in Mr Daniels' submissions was that the officers involved in this case were not well versed or trained in human rights, and in particular the importance of freedom of expression. Nor, he argued, did they sufficiently inform themselves of what had been said by the Claimants or any of them before acting, or sufficiently weigh up the alternative courses of action open to them. I agree that these considerations may be relevant in a given case because a lack of awareness of the importance of freedom of expression or the making of a judgment based on insufficient information may increase the risk of an officer "getting it wrong". But the question whether the officers in the present case were well informed is not the decisive issue for the court. The question for the court is whether, when the actions of the officers are assessed in the light of the circumstances at the time, those actions were proportionate.

Domestic law authorities on freedom of expression relied on by the parties

48. Mr Daniels drew attention, albeit without drawing any distinction in principle from the position under Article 10 ECHR, to dicta concerning the position under the common law which emphasises the fundamental importance of freedom of expression (in particular, Lord Bingham in **R v Shayler** [2003] 1 AC 247 [21]). He also emphasised that this includes freedom to say things which are unwelcome and provocative: *"Freedom only to speak inoffensively is not worth having"* (per Sedley LJ in **Redmond-Bate** (supra at [20]).

49. Understandably, Mr Daniels also placed emphasis on the result in **Redmond-Bate** given that there were some factual similarities between that case and the present one. In **Redmond-Bate**, three Christian fundamentalist preachers were arrested for wilful obstruction of a police officer in the execution of his duty (to prevent breaches of the peace), contrary to section 89(2) Police Act 1996. A crowd of more than one hundred had gathered, some of whom were showing hostility towards the preachers. Fearing a breach of the peace, PC Tenant had asked them to stop preaching but they had refused. They were subsequently convicted and their appeal against conviction was dismissed by the Crown Court. The issue on the appeal by way of case stated was essentially whether it was reasonable for the officer to believe that the preachers were about to cause a breach of the peace. Sedley LJ, with whom Collins J agreed, held that it was not and the appeal against conviction was allowed.

50. In coming to its conclusion the Divisional Court considered the common law cases on the duty of a constable to prevent a breach of the peace and identified the question in this type of situation as being whether the defendant is responsible for the threat to the peace, or whether somebody else is [9]. Sedley LJ also referred to the imminent incorporation of the ECHR by the Human Rights Act 1998 and noted at [14] that, in **Steel & others v United Kingdom** (Case No 67/1997), the European Court had held that the concept of a breach of the peace in English law is sufficiently certain for the purposes of Article 5 ECHR (the right to liberty and security of the person) because the

offence is confined to persons who cause, or appear to be likely to cause, harm to others, or who have acted in a manner *"the natural consequence of which was to provoke others to violence"*. Sedley LJ also agreed with the Crown Court that *"violence is not a natural consequence of what a person does unless it clearly interferes with the rights of others so as to make a violent reaction not wholly unreasonable"*.

51. It is not necessary for me to dissent from anything which was said in **Redmond-Bate**, but it is important to recognise that the case turned on the application of the common law relating to arrests and convictions for a breach of the peace to the facts of that case. The key factual feature of **Redmond-Bate** was that *"The situation perceived and recounted by PC Tenant did not justify him in apprehending a breach of the peace, much less a breach of the peace for which the three [preachers] would be responsible."* [21]. Although Sedley LJ referred to Articles 9 and 10 ECHR and to **Steel**, he did not purport to carry out a comprehensive analysis of the effect of Convention case law in this type of case. Still less did he purport to establish a test which would apply in every case under the ECHR and which involved asking whether the natural consequence of the words spoken was to provoke others to violence and/or to ask whether the speaker or the crowd is at fault, albeit these considerations may be relevant to the question of proportionality where the relevant rights have been infringed. Somewhat less helpfully to Mr Daniels' argument, what Sedley LJ did say at [19] is:

> *"the Crown Court was right to be alert to the fact that ours is a society of many faiths and none, and of many opinions. If the public promotion of one faith or opinion is conducted in such a way as to insult or provoke others in breach of statute or common law, then the fact that it is done in the name of religious manifestation or freedom of speech will not necessarily save it. It may forfeit the protection of Articles 9 and 10 by reason of the limitations permitted in both Articles (provided they are necessary and proportionate) in the interests of public order and the protection of the rights of others."*

52. Mr Daniels also referred to some of the authorities which consider the relationship between Article 10 ECHR and section 5 Public Order Act 1986, namely **Abdul v Director of Public Prosecutions** [2011] EWHC 247 (Admin) and **Campaign Against Anti-Semitism v Director of Public Prosecutions** [2009] EWHC 9 (Admin). He did so because the **Abdul** case, in particular, contains a very helpful an summary of the relevant principles which is drawn from the earlier cases of **Percy v DPP** [2001] EWHC Admin 1125, **Hammond v Director of Public Prosecutions** [2004] EWHC 69 (Admin) and **Dehal v Crown Prosecution Service** [2005] EWHC 2154 (Admin). But he also wished to compare what was said by the speakers in those cases with what was said by the Claimants in the present case with a view to submitting that what the Claimants had said was no more offensive and arguably less so.

53. Section 5 of the 1986 Act provides, so far as material, as follows:

> *"**5 Harassment, alarm or distress**.*
>
> *(1) A person is guilty of an offence if he—*
>
> > *(a) uses threatening or abusive words or behaviour, or disorderly behaviour, or*

> *(b) displays any writing, sign or other visible representation which is threatening or abusive,*
>
> *within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.*
>
> *(2) ….*
>
> *(3) It is a defence for the accused to prove—*
>
> *(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or*
>
> *(b) …*
>
> *(c) that his conduct was reasonable……"* (emphasis added)

54. Section 6(4) provides that:

> *"A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly."*

55. Section 5(1) originally referred to words, behaviour, signs etc which were *"threatening, abusive or insulting",* but the word *"insulting"* was removed from the legislation by section 57(2) Crime and Courts Act 2013 with effect from 1 February 2014. The use of insulting words therefore ceased to be a potential basis for a conviction under section 5 of the 1986 Act even if it was unreasonable and the words were intended and likely to have the specified effect on those who heard them. This point needs to be borne in mind in reading the authorities which were decided before the amendment to the 1986 Act.

56. In **Abdul**, the appellants had been convicted under section 5. Their offences involved the shouting of slogans as part of a protest in the vicinity of a homecoming parade for a local Royal Anglian Regiment on its return from Afghanistan and Iraq. The slogans which the appellants shouted included *"British soldiers murderers"*, *"Rapists all of you"* and *"Baby killers*". The questions for the Divisional Court asked by the Magistrates' Court, in the case stated, included questions relating to the relationship between section 5 and Article 10 ECHR. The Divisional Court held that the Magistrates Court had not erred in law and had made a decision which was open to it.

57. Gross LJ said:

> *"49. While the authorities are of course fact specific, the principles to be distilled from them governing the relationship between s.5 of the Act and Art. 10 of the ECHR, are now familiar. For present purposes, I would venture the following summary:*
>
> *i) The starting point is the importance of the right to freedom of expression.*

ii) In this regard, it must be recognised that legitimate protest can be offensive at least to some – and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful.

iii) The justification for interference with the right to freedom of expression must be convincingly established. Accordingly, while Art. 10 does not confer an unqualified right to freedom of expression, the restrictions contained in Art. 10.2 are to be narrowly construed.

iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.

v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; sometimes it may be that protesters are to be protected. That said, in striking the right balance when determining whether speech is "threatening, abusive or insulting", the focus on minority rights should not result in overlooking the rights of the majority.

vi) Plainly, if there is no prima facie case that speech was "threatening, abusive or insulting" or that the other elements of the s.5 offence can be made good, then no question of prosecution will arise. However, even if there is otherwise a prima facie case for contending that an offence has been committed under s.5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order.

vii) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by "ruling …out" threatening, abusive or insulting speech: per *Lord Reid, in* ***Brutus v Cozens*** *[1973] AC 854 , at p. 862.*

viii) The legislature has entrusted the decision in a case such as the present to Magistrates or a District Judge. The test for this Court on an appeal of this nature is whether the decision to which the District Judge has come was open to her or not. This Court should not interfere unless, on well-known grounds, the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached…".

58. As for Mr Daniels' comparison of the facts of the present case with those of **Abdul**, I did not find this a particularly helpful exercise. For one thing, the defendants were convicted in that case and, for another, Gross LJ emphasised that the cases are fact and context specific. Moreover, his principle (viii), above, shows that the Divisional Court was not required to decide whether or not an offence had been committed. It merely decided that the decision of the Magistrates Court was open to it: see, further, the discussion of the basis for intervening in an appeal by way of case stated in **Ziegler v Director of Public Prosecutions** [2021] 3 WLR 179.

59. In the **Campaign Against Anti-Semitism** case, at [11] Hickinbottom LJ adopted Gross LJ's statement of the principles in **Abdul**. In relation to the factual comparison which Mr Daniels sought to make, the case concerned a speech made by a Mr Ali at a rally in central London on a pro-Palestinian day of protest. In the course of the speech, referring to the Grenfell fire (which had happened a few days earlier) Mr Ali said that Zionists gave money to the Conservative party to kill people in high rise blocks. He also said words to the effect that the British Board of Deputies had blood on their hands and they agreed with the killing of British soldiers, and to the effect that Zionists were baby killers. The Divisional Court characterised the relevant remarks as *"intemperate and deeply offensive and distressing to others"* [69]. But, again, I did not find the comparison with the facts of the present case to be of particular assistance:

    i) Again, each case turns on its own facts and how the balance between the competing rights and interests is struck in relation to those particular circumstances. The **Campaign Against Anti-Semitism** case related to political speech and the decision turned on the context in which the extreme statements were made and a consideration of the whole of what was said, including the aspects which were less offensive or inoffensive.

    ii) Second, the decision under challenge in the **Campaign Against Anti-Semitism** case was a decision of the Director of Public Prosecutors to take over a private prosecution and discontinue it because it was considered that, looking at the most objectionable aspects of what had been said in context, it was not more likely than not that there would be a conviction on the basis that the words were *"abusive"*. The question for the Divisional Court was whether this view was irrational, and it held that it was not. This did not imply agreement (or disagreement) with the view of the Director of Public Prosecutions: it merely indicated that the view which had been taken was open to her.

The power of arrest

60. As is well known, Section 24 Police and Criminal Evidence Act 1984 confers a power of arrest without warrant on a constable where, in summary, there are reasonable grounds (a) for suspecting that a person has committed, or is committing, or is about to commit, an offence and (b) *"for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question."*. These reasons include:

> *"(a) to enable the name of the person in question to be ascertained…*
>
> *(b) correspondingly as regards the person's address;*
>
> *(c) to prevent the person in question—*
>
> *(i) ....;*
>
> *(ii) suffering physical injury; …*
>
> *(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;…"*

61. In the present case, having been referred to the relevant case law, the Judge concluded that there were reasonable grounds for believing that the arrests of the Claimants were necessary and that the second limb of the test was satisfied. As I have noted, permission to appeal against that finding was refused. The issues in the appeal therefore relate to the first limb of the test: the existence or otherwise of *"reasonable grounds for suspecting"*.

62. The approach at common law to deciding whether an officer *"has reasonable grounds for suspecting"* is well established. In **Parker v Chief Constable of Essex Police** [2019] 1 WLR 2238 Sir Brian Leveson P said:

> *"115. I can summarise the relevant (and agreed) legal principles. The bar for reasonable cause to suspect set out in section 24(2) of the 1984 Act is a low one. It is lower than a prima facie case and far less than the evidence required to convict… Further, prima facie proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence…. Suspicion may be based on assertions that turn out to be wrong…. The factors in the mind of the arresting officer fall to be considered cumulatively…."*

63. The following, more expansive, account by Lord Hope in **O'Hara v Chief Constable of the Royal Ulster Constabulary** [1997] AC 286 is also helpful in the context of the arguments in the present case:

> *"My Lords, the test …is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind …. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.*
>
> *This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."*

64. There are also two specific principles which are relevant in the present case:

i) First, provided the officer has a power to arrest in the circumstances of the case as they understand them to be, the fact that they do not have the relevant legal provision in mind, or are mistaken as to the scope of the power under the provision which they have in mind, does not render the arrest unlawful. The question is one of substance not form. As Ousley J said in **R v IPCC ex parte Rutherford** [2010] EWHC 2881 (Admin):

> *"18. Accordingly, at the time at which the police officers acted as they did, with the belief they had, the police officers were empowered to act as they did. The power existed and they were justified in using it. There is no requirement at common law for them to be aware of the legal origin of the power they were exercising in order for the exercise of the power to be lawful. A legally accurate identification of the precise legal power under which a police officer acts is not, in the absence of specific provision to that effect, a requirement of its lawful exercise. There is no requirement to call the statutory provision or the correct section or subsection to mind at the moment a police officer exercises any power of stop, arrest or search in order for its exercise to be lawful. An act is not unlawful because a police officer does not ask himself or forgets which power he had, provided that he had the power to do what he did with the knowledge and belief which he had.*"

ii) Second, it is in principle possible for an officer to have reasonable grounds to suspect a group of committing an offence even if they do not have information as to the actions of each individual member of that group. In this connection I was referred to **Cumming & Others v Chief Constable of Northumbria** [2003] EWCA Civ 1844 [41] where Latham LJ said:

> *"Where a small number of people can be clearly identified as the only ones capable of having committed the offence, I see no reason why that cannot afford reasonable grounds for suspecting each of them of having committed that offence, in the absence of any information which could or should enable the police to reduce the number further."*

iii) This is consistent with the point at issue in the present case, but not on all fours with it: Latham LJ was addressing the situation where certain members of a group, but not all of them, must have committed a particular offence. In the present case, it was suspected that all of the Claimants had committed the relevant offences, that they had all been preaching in a way which amounted to anti-social behaviour or fell within section 5. Mr Daniels' real argument was that the information which the officers had did not provide reasonable grounds for this suspicion because they did not know what each Claimant had actually said.

Religious hatred

65. Finally, Mr Daniels drew attention to section 29J of the Public Order Act 1986 which provides as follows:

> *"**Protection of freedom of expression***

> *29J. Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system"*

66. He submitted, and I accept, that this provision reflects the wide scope of the protection which the ECHR gives to freedom of expression in relation to views about religion. But the Part of the Act referred to in section 29J is Part 3A which concerns acts intended to stir up religious hatred, or hatred on the grounds of sexual orientation, and the possession of "inflammatory material". Section 29J therefore is not directly applicable in the present case.

The Judgment

67. It is clear that, in accordance with Mr Daniels' case, the Judge regarded the possibility of a less intrusive approach than that which the police had adopted as being the central issue in relation to the lawfulness of the arrests under the ECHR. At [1] of the Judgment he framed the issue in the case as follows:

> *"1. On 6th July 2016 the police secured the apparent objective of an angry mob to close down four street preachers by taking action against the preachers in the form of arrest rather than by taking any other lesser action against the preachers or action against rowdy members of the mob. In this case were the police legally wrong so to do so?"* (emphasis added)

68. It is also clear from [6] that the Judge had considerable sympathy with the position of the Claimants:

> *"6. Articles 9 and 10 of the European Convention on Human Rights give the street preachers qualified rights to freedom of thought, conscience, religion and expression. If, against their will, the preachers are prevented from preaching by the police because of the reaction of the crowd and the police's concerns about public order, it can be argued strongly that mob rule and police strategy has trampled over the preachers' rights such as to, in effect, suppress and censor the preachers."*

69. However, as noted above at paragraphs 25 and 26, he also accepted the assessment of the officers on the ground at the time that there was an imminent threat to public order.

70. The Judge also traced the development of the situation after officers began to arrive and the measures which they took in an attempt to calm the situation including requesting the Claimants to turn off the amplifier, asking them to move on, placing a police horse between them and the crowd and dealing with individuals who tried to approach the Claimants in an aggressive manner. His findings also indicate that the Claimants did not cooperate fully, and did not wish even to pause their preaching, given their view that they had a right to preach and that any measures should therefore be taken against the crowd rather than against them.

71. In a section headed *"The Convention Rights"* the Judge then set out Articles 9 and 10 before noting, at [87], that these Articles were clearly engaged. A further indication of how the Judge saw the case is at [89]:

> *"89. No one has cited to me any authority (by way of case law, legislative provision, code of practice or suchlike) in support of the principle that in an emergency unplanned situation the police should focus on upholding the convention rights rather than taking the most effective measures that the immediate situation facing them called for."* (emphasis added)

72. As I read this passage, the Judge was here dealing with the perspective of the Claimants and their argument that, in effect, the police should always side with the speakers in this type of situation. His view was essentially the same as the one which I have given at paragraphs 43-45 above. Mr Daniels submitted that in fact **Redmond-Bate** was just such a case and it was cited to the Judge, as the Judgment shows. I have dealt with this authority above.

73. Having set out section 5 of the 1986 Act and section 2 Anti-Social Behaviour Crime and Policing Act 2014 the Judge noted the tension between *"freedom of expression on the one hand and harassment, alarm and distress caused by the expression"* before going on to consider the guidance in **Brutus v Cozens**, **Redmond-Bate** and **Abdul** which I have referred to above. He then said:

> *"96. In all the above authorities the courts have been tasked with considering whether the relevant convention rights were an effective shield in the context of prosecutions for public order offences. The above authorities identify that there is a line which can be crossed, for example, when the speech is so provocative that it moves a person, not entirely unreasonably, to violence or the speech is so abusive that it is likely to cause harassment, alarm or distress.*
>
> *97. In this case the police were concerned that the Claimants may have crossed the line. In my judgment that was a reasonable conclusion to reach when the police officers took action against the Claimants on 6th July 2016 given that they were dealing unprepared with an emergency situation. In my judgment the scene which unfolded on 6th July 2016 did not allow for better exploration of what was actually being said or for consideration of other solutions.* (emphasis added)
>
> *98. It would have been a different matter entirely if the police had had an opportunity to prepare for the street preaching or if they had come across a crowd which was rather less riotous. Mr Daniels pointed to PCSO Caines' strategy but thereafter the tensions continued to rise. If the preaching had been (as reported to the police by the complaints) less extreme in nature and if the threat to order came from an observer acting unreasonably, there would be merit in the argument that the police should have taken action against the observer rather than the preachers but once faced with a riotous mob I cannot see that the police's strategy was wrong.*
>
> *99. Convention rights may be infringed provided that the infringement is in pursuit of a legitimate aim and is proportionate. In this case the legitimate aim was the preservation of public order and/or the cessation of ant-social behaviour and the action taken on 6th July 2016 was proportionate."*

74. That the Judge's view was that, in arresting the Claimants, the police had taken the most effective measures available in circumstances where there was no realistic scope for other less intrusive measures is also apparent from his concluding remarks:

> *"131. I have considerable sympathy with both sides in this case:*
>
> *(a) The Claimants should be able to preach pursuant to Articles 9 and 10 of the Convention Rights; it is the reaction of members of the public to that preaching which resulted in the preachers being shut down; the public should respect Articles 9 and 10;*
>
> *(b) The Defendant must maintain law and order as best he can through his officers; as some of them said in evidence when challenged upon their actions. "we are damned if we do and damned if we don't"*
>
> *132. It is easy to be wise with hindsight; the police were not given the opportunity to be wise with foresight. If the street preaching had been organised and policed from the start with there being an opportunity to tell anyone who was becoming unruly that the law allowed the street preachers to preach and to deal with any such person who did not respect the preachers' rights, the preaching may have continued.*
>
> *133. Mr Daniels carried out a very effective forensic dissection of the events of 6th July 2016, but the reality is the police came upon a developing emergency. In my judgment the officers, and thus CC, were not legally wrong in the actions they took and the decisions they made."* (emphasis added)

75. Evidently, his use of the phrase *"legally wrong"* in [133] tied back into the question which he posed at [1] as to whether the police should have taken *"other lesser action against the preachers or action against rowdy members of the mob"*.

The Appeal

Grounds 1-3: The Judge's rejection of the claims under the ECHR

76. In addition to the arguments about the law which I have addressed above, Mr Daniels' submissions emphasised the failure of the officers who attended on 6 July 2016 to give sufficient consideration to the Claimant's ECHR rights and to inform themselves as to precisely what had been said by the Claimants and who had said what. He pointed out that there is a range of words which a given person may regard as anti-Islamic, racist or homophobic, depending on their perspective and understanding of these terms, from the relatively innocuous to the deeply offensive. The officers were, he said, therefore in no position to judge whether the Claimants or the crowd were at fault, and the Judge's findings about their demeanour and the content of their preaching suggest that the Claimants were not to blame, and that the behaviour of the audience was unreasonable.

77. Mr Daniels also challenged, by reference to some of the evidence, the Judge's findings as to the level of tension at the time of the arrests which, he submitted, was not as high as the Judge found it to be. He argued that the fact that the arrests were unnecessary and disproportionate was evident from the fact that PCSO Caines had been willing to allow the preaching to continue. He submitted that the officers could have adopted a

more conciliatory approach which sought to negotiate a reduction in tension which involved lesser measures against the Claimants and/or measures to restrain the audience, particularly given that there were (he said) in reality two or three troublemakers, albeit the crowd was substantially larger than this. He also drew a distinction between Mr Overd, who was arrested at the height of the tension, and the arrests of the other three Claimants, which took place after this and when the preaching had stopped, albeit he ultimately acknowledged that they would have wished to resume.

78. These were essentially attempts to re argue the case which was before the Judge and which he addressed in his findings. The Judge clearly acknowledged that the officers who gave evidence were relying on what they had been told about the complaints from the public and were not able to recall any of the words used by the Claimants [31]. However, the nature of the complaints about what had been said was a matter of record and he also made findings as to the sorts of things which had actually been said, some of which were favourable to the Claimants' case, some less so.

79. The Judge's findings of fact as to the level of risk of public disorder and to the Claimants' safety, and as to the situation being an emergency were, in my view, open to him on the evidence. Whilst the Claimants' reliance on the GoPro footage for the purposes of the appeal is understandable, the fact that the Judge took into account the oral evidence of witnesses who were at the scene in making his findings of fact as to the degree of risk of public disorder seems to me to pose a fundamental difficulty for this aspect of the Claimants' appeal.

80. Moreover, although the Judge noted that PC Phillipou recognised three particular troublemakers it is clear from his findings that he did not accept that the risk was limited to these individuals. He found that the risk came from the crowd as a whole. As to the view of PCSO Caines, he did not have a power of arrest, he felt it necessary to call for support, the Judge found that the situation escalated after his arrival, and it was open to other officers to take a different view. In any event, ultimately the question whether they acted in a way which was disproportionate was a matter for the Judge who was not bound by the views of any of the officers.

81. As to the argument that a more conciliatory approach could have been taken, the Judge found that there were some attempts by officers to calm the situation before they resorted to arresting the Claimants. On the Judge's findings the willingness of the Claimants to assist in this was limited, as was the willingness of the audience if the Claimants were to continue preaching in the way that they were. The fact that the situation was an emergency meant that there was no time to explore other options and, indeed, there were no other realistic options. It seems to me that these were also findings which the Judge was entitled to make on the evidence.

82. As for the contrast which Mr Daniels sought to draw between Mr Overd and the other three Claimants, it does not appear from his skeleton argument and written closing submissions at trial that he placed any real emphasis on the delay before the arrests of these Claimants as affecting the analysis under the ECHR. He does not appear to have submitted, for example, that they could be differentiated from Mr Overd because the preaching had stopped and they were preparing to go home, or because the crowd had now dispersed or there was no risk of it re-forming, and it does not appear from the Judge's findings that this was in fact the case at the time of their arrests. As I understood his final position before me Mr Daniels accepted that for the purposes of their human

rights claims Messrs Clark, Karns and Stockwell intended to continue preaching and had been prevented from doing so by their arrests. The Judge clearly had the sequence of events in mind when reaching his conclusions but he made no findings which suggested that the delay made a material difference to the analysis and I note that he found that there were reasonable grounds to believe that the arrests were necessary to protect the physical safety of these Claimants. All of these considerations have persuaded me that I should reject this argument.

83. It therefore seems to me that I should proceed on the basis of the Judge's findings of fact and ask whether his reasoning or his conclusions indicate that he erred in law as Mr Daniels submitted. Adopting the analysis required by Articles 9.2 and 10.2 and applying the **Bank Mellat** test:

i) The measure in question in this case was the arrest and consequent detention of the Claimants which had the effect of preventing them from continuing to preach on the afternoon of Saturday 6 July 2016 and of depriving them of their liberty for a short period. The question whether they should then have been prosecuted is not before me and, of course, they were not convicted of any offence. I do not suggest that the treatment of the Claimants with which the appeal is concerned was of no importance but, in carrying out the proportionality analysis, it is important to bear in mind the more limited nature of the infringement which required to be justified.

ii) I confess that I had difficulty in understanding Mr Daniels' argument that the Judge was wrong to find that the officers had a legitimate aim and I had little hesitation in rejecting it. The Judge found as a fact that their aim was *"the preservation of public order and/or the cessation of anti-social behaviour"* [99]. That finding was plainly open to him on the evidence. Putting this in the terms of the relevant articles of the ECHR, the aim was the protection of public order (Article 9) and the prevention of disorder (Article 10).

iii) Mr Daniels did not take issue with the proposition that the arrests of the Claimants were *"prescribed by law"*.

iv) As to whether the measure in question was *"necessary in a democratic society"*, although Mr Daniels did not rely on this point, I was initially concerned that the Judge did not refer to the test in **Bank Mellat** in the Judgment. But the test was cited to him and it is clear to me that he had it in mind and applied it or, at least, addressed the relevant questions when reaching his decision.

v) On the assumption that, contrary to his case, the aim of the arrests was the protection of public order/prevention of disorder Mr Daniels accepted that *"the objective of the measure [was] sufficiently important to justify the limitation of"* the relevant right and was *"rationally connected to the objective"* (questions 1 and 2 of the **Bank Mellat** test).

vi) The main point on which Mr Daniels took issue with the Judge was question 3 of Lord Reed's formulation of the test: *"whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective"*. A fair reading of the Judgment shows that the Judge's assessment was that the answer to this question was no: the police happened upon a

developing emergency and were under resourced. They tried lesser measures but received limited cooperation from the Claimants. Their stance was that they had a right to preach and would continue to do so; the police should control the crowd rather than them. Tensions rose and the steps which the officers then took were the least intrusive steps reasonably available to them in the circumstances if public order was to be maintained. The position might have been different if the police had been given advanced notice and had been in a position to plan ahead and prevent tensions from rising to the point which they had reached or, at least, to ensure that they were better resourced to control the crowd. But by the time the police became involved this was already an emergency situation and they took the only measures which were realistically open to them in the circumstances.

vii) As to the fourth **Bank Mellat** question, Mr Daniels did not address this issue separately, but the Judge clearly considered that it was proportionate in the circumstances to take steps which infringed the Claimants' freedom of expression but to a limited extent – there was an attempt to prevent them from preaching in the location of their choosing by asking them to move on, followed by the arresting officers preventing them from preaching at all for a short period of time – in order to avoid the greater harm of public disorder including harm to the Claimants.

84. Accordingly, I do not accept that the Judge erred in law in rejecting the Claimants' claims under the ECHR. He addressed the relevant considerations, and his conclusion was open to him on the basis of his findings of fact. I reached this view without relying on the point that the Judge found that there were reasonable grounds to believe that the arrests were necessary for the purposes of section 25(4) of the 1984 Act for the personal safety of the Claimants, and in order to enable a prompt and effective investigation. Permission to challenge these findings was refused and they tend to reinforce the view that the Judge was entitled to conclude that the actions of the officers on the day were proportionate.

85. Nor do I accept that the Judgment is a *"heckler's charter"* as Mr Daniels submitted. Each case will turn on its particular facts, as I have pointed out. In the present case, on the Judge's findings the concerns went beyond mere heckling. The balance between enabling the Claimants to say the sorts of things that they wanted to say and the need to maintain public order and protect their safety was struck in a way which meant that they could not continue to preach at the particular time and in the particular place of their choosing, and the Judge found this to be proportionate. But no wider conclusions than this can be drawn from the Judgment, which turns on the facts of this particular case.

86. I therefore dismiss Grounds 1-3.

Ground 4: the Judge's findings as to the basis for the arrest of Mr Overd

87. Section 50 Police Reform Act 2002 provides, so far as material, that:

> *"(1) If a constable in uniform has reason to believe that a person has been acting, or is acting, in an anti-social manner ..., he may require that person to give his name and address to the constable.*

(2) Any person who—

(a) fails to give his name and address when required to do so under subsection (1), ……

in response to a requirement under that subsection, is guilty of an offence..."

88. By virtue of section 50(1A) of the 2002 Act *"Anti-social behaviour"* for this purpose is defined under section 2 of the Anti-Social Behaviour, Crime and Policing Act 2014 as *"conduct that has caused, or is likely to cause, harassment, alarm or distress to any person"*.

89. Mr Daniels argued that the Judge did not find that the Mr Overd was arrested on suspicion of an offence under section 50 or, alternatively, that if he did he was wrong to do so or, alternatively, that the arrest of Mr Overd was unlawful because PC Phillipou did not warn him that if he did not give his name he would be open to arrest for the commission of an offence.

90. I reject these submissions. Dealing with each of Mr Daniels' contentions in turn:

i) The Judge clearly did find that Mr Overd was arrested on suspicion of an offence under section 50. His findings demonstrate this to be the case. As noted above, at [47] the Judge noted that PC Phillipou referred to the fact that Mr Overd had *"refused to give me his details so I can give him a dispersal notice"* (which would have been under section 35 of the 2014 Act). He noted that the officer referred to section 50 and he found, at [48], that the officer had *"a genuine and reasonable belief that Mr Overd was committing anti-social behaviour but was muddled about which statutory provision gave rise to the ground for arrest until he mentioned section 50…"* i.e. at that point he correctly identified the section which provided that what he reasonably suspected amounted to an offence and therefore provided a ground for arrest. As noted above at paragraph 64(i) above, what mattered was whether there was a ground of arrest given the beliefs which led PC Phillipou to arrest Mr Overd, rather than whether he had identified the correct statutory provision: see **Rutherford** (above).

ii) The Judge's finding on this point was a finding of fact which was plainly open to him on the evidence, including what he saw on the GoPro footage, what PC Phillipou said at the time and his evidence as to his reasons for arresting Mr Overd which he gave at trial.

iii) No authority was shown to me which supported the contention that unless a person is warned that failure to give their name will provide reasonable grounds to suspect them of the commission of an offence under section 50, and may result in their arrest, their arrest will be unlawful. I accept that it would be good practice to give such a warning, where practicable, but that is not the same thing.

91. I therefore dismiss Ground 4.

Ground 5: the Judge's finding that there were reasonable grounds to suspect the commission of offences

92. This argument focusses on what the arresting officers knew which formed the basis for their suspicion. The Judge's finding at [115] was as follows:

> *"115. Given the evidence in this case there is no doubt in my mind that the arresting officers genuinely suspected that each of the Claimants had committed a public order or anti-social behaviour offence. The suspicion must be reasonable; given:*
>
> *(a) the complaints made to the police;*
>
> *(b) the nature of the scene before the police;*
>
> *(c) the ongoing preaching by Mr Overd;*
>
> *(d) the reality that no real investigation could be undertaken prior to arrest given the volatility within the crowd*
>
> *(e) the further reality that all four Claimants were involved, and the police were not then in a position to consider the Claimants individually*
>
> *I find that the suspicion was objectively reasonable at the time of the arrests."*

93. Mr Daniels made detailed arguments in writing and orally which sought to dismantle the finding at [115] by addressing each of (a)-(e) in turn and arguing that each did not provide a reasonable ground for suspicion. His arguments were similar to those which he deployed under Grounds 1-3 i.e. that on what the officers knew there were not reasonable grounds to suspect the commission of the relevant offences; the reaction of the crowd was overstated by the Judge and, in any event, it was irrelevant to the reasonable grounds for suspicion limb of the test for a lawful arrest given that the Claimants were arrested on the basis that what they were alleged to have said; the reaction of the crowd only went to the necessity limb of the test; and the officers should have explored and adopted a solution which did not involve the arrests of the Claimants.

94. It seems to me that the Judge was entitled to rely on the cumulative effect of the points which he made and that examining each of them in turn to consider whether, on its own, it established a reasonable ground is therefore not a particularly useful exercise. What the officers were told about what was being said provided reasonable grounds for suspecting that there had been anti-social behaviour and that words which were capable of falling within section 5 had been uttered: they were told that the preaching was racist and anti-Islamic and of sufficient concern for several complaints to have been made, that a hostile crowd had gathered and that it was feared that there would be an incident.

95. I do not agree with Mr Daniels that the reaction of the crowd was irrelevant. The fact that the Claimants were being accused by members of the audience of *"preaching hate"* and of saying that Muslims were going to end the world was capable of lending further support to the officers' suspicion, as was the fact that members of the crowd were angry. All things being equal, that anger and hostility could reasonably be suspected to be a reflection of the nature of what had been said by the Claimants and to suggest that it had been inflammatory. As I have said, the Claimants wished to continue preaching and the Judge found as a fact that the circumstances did not permit further inquiries as to precisely who had said what.

96. As to the **Cummings** related argument, in my view the Judge was entitled to find that the officers could reasonably suspect that the Claimants were all involved in the preaching – they were, after all, working as a group – that they were all preaching essentially the same message and that the message involved using words which were capable of forming the basis of the offence. The information which the officers had at the time of the arrests provided reasonable grounds for the officers' suspicions that each and all of them had been involved in the commission of the relevant offences. Moreover, it was not reasonably feasible in the circumstances to seek to differentiate between the Claimants for the purposes of deciding whether to arrest, for example by interviewing them, or asking members of the crowd, about who had said what. That could be done once they had been arrested, away from the imminent threat of public disorder.

97. In my judgment the Judge therefore reached a permissible conclusion that the officers had reasonable grounds for suspecting the commission of the relevant offences given the low threshold emphasised in the authorities above and notwithstanding that it subsequently was found that no offences had been committed. Ground 5 is therefore dismissed.

Ground 9: failure to determine, in respect of each of four subsequent incidents involving Mr Overd whether the Defendant breached his rights under Articles 9 and/or 10 ECHR

98. As noted above, the determination of the question whether the events of 6 July 2016 gave rise to breaches of the Claimants' ECHR rights involved detailed fact finding and an assessment of whether the particular infringements could be "justified" in the particular circumstances which arose on that day. Mr Daniels' case, at least on appeal, was that the Judge should have undertaken the same exercise in respect of a number of previous and subsequent incidents involving Mr Overd which took place elsewhere in Somerset and involved other officers. Henshaw J gave permission for this contention to be advanced in respect of 4 of these events.

99. The answer to this Ground is that it does not arise given the way in which the Claim was argued at trial. Mr Daniels did not ask the Judge to undertake this exercise and the Judge therefore cannot be criticised for failing to do so.

100. As far as the Particulars of Claim are concerned, paragraphs 15-29 pleaded the events of 6 July 2016. Paragraph 30 then pleaded:

> *"This infringement of the Claimants' rights under Articles 9. 10 and 11 of the ECHR is part of a course of conduct by the Defendant's officers to prevent the Claimants and in particular Mr Overd from exercising those rights by way of public speaking in the manner of street preaching."* (emphasis added)

101. Under the heading *"Particulars of Further Infringement of ECHR Rights"* paragraph 31 pleaded:

> *"The following are relied upon to set out a course of conduct designed to and/or having the consequence of infringing the Claimants' Article 9 and 10 rights…*" (emphasis added)

102. There were then 5 incidents which were said to evidence the course of conduct including:

> *"b. Sergeant Kimmins, then based at Taunton Police Station, conducted a course of harassment against Mr Overd which included making an appeal on 12 June 2014 in the Somerset County Gazette for members of the public to complain about Mr Overd's preaching/public speaking;"*

103. At paragraph 31(f) of the Particulars of Claim the 4 incidents which are the subject of this appeal were then pleaded as follows:

> *"f. Since the matters set out above, the Mr Overd (sic):*
>
> *i. was issued with a dispersal notice under section 35 of the Anti-social Behaviour, Crime and Policing Act 2014 whilst preaching/public speaking in Taunton on 8 September 2017 banning him from the town centre 12 hours;*
>
> *ii. arrested in Bridgewater on 19 August 2017 due to allegations of s 5 of the Public Order Act (homophobically aggravated), held for 5 hours and released under investigation with no further action being taken by the Defendant;*
>
> *iii. was issued with a dispersal notice under section 35 of the Anti-social Behaviour, Crime and Policing Act 2014 whilst preaching/public speaking in Bridgwater on 28 October 2017 banning him from the town centre 48 hours;*
>
> *iv. was issued with a dispersal notice under section 35 of the Anti-Social Behaviour, Crime and Policing Act 2014 whilst preaching/public speaking in Taunton on 7 January 2018 banning him from the town centre 12 hours notwithstanding there was no crowd disruption…"*

104. Mr Daniels' Opening Skeleton dealt in detail with the events of 6 July 2016 but the only specific reference to the additional events was in the Introduction, at paragraph 9, and then at paragraph 69. Paragraph 9 said:

> *"9. Finally, in respect of Mr Overd, who regularly preaches in the Avon and Somerset police area, there has been a concerted effort orchestrated by D, to prevent him from doing so, which is both an infringement of his ECHR rights and amounts to harassment."* (emphasis added)

105. Paragraph 69 said:

> *"69. In Mr Overd's case, this interference has been orchestrated and continuing. PS Kimmins... and others have determined, on what basis is unclear, that he will attempt to prevent Mr Overd from preaching. His efforts have included appealing to the public to make complaints…and being made the subject of dispersal notices and a number of prosecutions. There have been six prosecutions, the latter prosecutions having taken place despite the failure to secure convictions against him under the Public Order Act the attempts to infringe his ECHR rights continue."*

106. Two paragraphs of Mr Daniels' detailed Closing Submissions were devoted to this aspect of the case:

> *"83. There is little dispute over what Mr Overd sets out in his statement with respect to incidents up to January 2018 which additionally covers the period up to April 2018... The matters he complains of are of the same ilk as those on 6 July 2016 and if the July 2016 facts amount to a violation of his ECHR rights it must follow that there has been a course of conduct which amounts to a continuing interference with those rights.*
>
> *84. It is apparent that the officers in Taunton had a better understanding of street preaching but not, it appears, a better understanding than their colleagues in Bristol of Mr Overd's ECHR rights. The lack of success in convicting Mr Overd did not stop the violation of his rights, rather it caused the development of a strategy intended to produce better evidence and make convictions more likely. Both PS Kimmins and PC Mason showed a distinct lack of appropriate thinking around what Mr Overd was asserted to have said and little or no consideration for his rights to preach and his rights to offend. Indeed, they were of the view that his right did not include the right to offend."* (emphasis added)

107. The Judge made findings which briefly summarised what happened in each of the pleaded additional incidents and, indeed, other un-pleaded incidents which had been raised in evidence by Mr Overd. The key point for present purposes is, however, that he addressed what he and, for that matter the Defendant understood to be Mr Daniels' case that there was a concerted course of conduct to stop Mr Overd from preaching, and he held that there was not: the interventions by the police on the other occasions had been in response to complaints from members of the public who were unhappy with the content of his preaching: see [71]. He also directly addressed Mr Overd's case that Sergeant Kimmins was the prime mover behind the allegedly concerted actions of the police. At [74] he said:

> "*74. On 12th June 2014 an article appeared in the Somerset County Gazette about Mr Overd and his preaching. It is common ground that Sergeant Kimmins is recorded as wishing to gather evidence and advising members of the public to record incidents on their mobile phones. It was argued that Sergeant Kimmins was encouraging the public to collect evidence against Mr Overd for the use of the police but I accept Sergeant Kimmins' evidence that what he wanted was complainants to record the incidents so that the police would know the words actually said by Mr Overd because a previous prosecution of Mr Overd was unsuccessful when the witness could not remember the words used."*

108. At [100], having addressed the ECHR claims in respect of 6 July 2016 he said:

> *"100. In so far as Mr Overd's other claims are concerned I do not consider that his human rights have been infringed. All of the evidence that I heard with respect to the strategy in Taunton was addressed to obtaining better evidence given the complaints made to the police about the nature of the street preaching and the police need for evidence about what was actually being said rather than acting on general complaints of homophobia or racism etc."*

109. I accept Mr Ley-Morgan's submission that the Judge addressed the Claimants' case as it was put. When I put it to Mr Daniels that it appeared that he had not asked the Judge to carry out an assessment of each of the pleaded incidents on the basis that each was said to be a free-standing breach of Articles 9, 10 and/or 11 ECHR, he did not appear

to deny this. His position was that since the Judge found, at [100], that Mr Overd's human rights had not been infringed in the other incidents it was open to Mr Daniels to argue that the Judge should have evaluated the circumstances of each incident within the framework of the relevant Articles and decided whether each resulted in a discrete breach. Apart from this being a somewhat opportunistic approach, in my view it is based on a misreading of [100] of the Judgment. Mr Daniels had argued at trial that because there was a concerted attempt to prevent him from preaching there were further breaches of his Convention rights; the Judge held that there was no such concerted attempt and therefore there were no further breaches on the basis alleged. Mr Daniels argued that if there was a breach of Mr Overd's ECHR rights on 6 July 2016 it must follow that there had been a course of conduct which interfered with those rights. But this did not follow at all, and in any event the Judge found that there was no breach on 6 July 2016.

110. I therefore dismiss Ground 9.

Conclusion

111. For all of these reasons I dismiss the appeal.