Neutral Citation Number: [2021] EWCA Crim 97

Case Nos: C201900126 C3, 201900128 to 201900135 and 201900137 to 201900142

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CHELMSFORD CROWN COURT
HHJ MORGAN SITTING WITH A JURY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE JAY
and
THE HONOURABLE MRS JUSTICE WHIPPLE

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Between:

R	**Respondent**
- and –	
EDWARD THACKER, BENJAMIN SMOKE, MELANIE STRICKLAND, LYNDSEY BURTONSHAW, LAURA CLAYSON, MAY MACKEITH, MELANIE EVANS, ALISTAIR TAMLIT, NICHOLAS SIGSWORTH, EMMA HUGHES, RUTH POTTS, JYOTSNA RAM, JOSEPH MCGAHAN, NATHAN CLACK AND HELEN BREWER	**Appellants**
-and-	
LIBERTY	**Intervener**

(Transcript of the Handed Down Judgment.
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Clare Montgomery QC (instructed by **Hodge, Jones and Allen Solicitors**) for **Thacker, Smoke, Strickland, Evans, Hughes, Potts, Ram, McGahan and Clack** (with **Owen Greenhall** for Strickland and **Blinne Ní Ghrálaigh** for the remainder)
Tim Moloney QC (instructed by **Hodge, Jones and Allen Solicitors**) for **Brewer, Burtonshaw, Clayson, MacKeith, Sigsworth and Tamlit** (with **Owen Greenhall** for Tamlit and **Blinne Ní Ghrálaigh** for the remainder)
Tony Badenoch QC, Phillip McGhee and Karl Laird (instructed by **the Crown Prosecution Service**) for the **Crown**

Jude Bunting (instructed by **Liberty**) for the **Intervener**

Hearing dates: 24 – 26 November 2020

Judgment
As Approved by the Court

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on 29 January, 2021.

LORD BURNETT OF MALDON CJ:

Introduction

1. On 28 March 2017 the Home Office chartered a Boeing 767 in order to remove or deport some 60 individuals to West Africa. That evening the 15 appellants breached the security perimeter fence at London Stansted Airport and entered the restricted area. They were intent on halting the flight by various means including erecting makeshift tripods using scaffolding poles and "locking on" to one another around the base of one of the tripods and around the nose of the plane. Builders' foam was used to secure the locking mechanisms. Disruption at the airport ensued, including the closure of the single runway for a significant period. The appellants fulfilled their immediate aims in that the flight was unable to depart.

2. On 10 December 2018, after a trial which lasted 41 days, the appellants were convicted in the Crown Court at Chelmsford (HHJ Morgan sitting with a jury) of the offence of "intentional disruption of services at an aerodrome", contrary to section 1(2)(b) of the Aviation and Maritime Security Act 1990 ("the 1990 Act"), an offence which requires the consent of the Attorney General to prosecute. Sections 1(1) and 1(2) provide:

> "**Endangering safety at aerodromes.**
>
> (1) It is an offence for any person by means of any device, substance or weapon intentionally to commit at an aerodrome serving international civil aviation any act of violence which—
>
> (a) causes or is likely to cause death or serious personal injury, and
>
> (b) endangers or is likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome.
>
> (2) It is also, subject to subsection (4) below, an offence for any person by means of any device, substance or weapon unlawfully and intentionally—
>
> (a) to destroy or seriously to damage—
>
> (i) property used for the provision of any facilities at an aerodrome serving international civil aviation (including any apparatus or equipment so used), or
>
> (ii) any aircraft which is at such an aerodrome but is not in service, or
>
> (b) to disrupt the services of such an aerodrome,
>
> in such a way as to endanger or be likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome."

3. On 6 February 2019 at the same court Edward Thacker, Alistair Tamlit and Melanie Strickland were sentenced to 9 months' imprisonment suspended for 18 months, with an unpaid work requirement attached. The remaining appellants were sentenced to community orders. An exclusion requirement was imposed on all the appellants for a period of 12 months prohibiting entry to any restricted zone at Stansted Airport or any flight terminal, save for the purpose of travel or the collection of an individual.

The Grounds of Appeal

4. The appellants advance five grounds of appeal.

5. Ground 1: the judge misinterpreted section 1(2)(b) of the 1990 Act in the light of its international and domestic law context. This is an offence which is directed to serious violence often of a terrorist nature, and not the much lower level of risks generated by the actions of the appellants. Further, the judge erred in his analysis of the constituent elements of the offence.

6. Ground 2: the judge should have ordered disclosure and should have stayed the prosecution on the basis that the Attorney General's consent was wrongly given.

7. Ground 3: the judge should not have withdrawn defences under section 3 of the Criminal Law Act 1967 (preventing crime) and of necessity/duress of circumstances from the jury.

8. Ground 4: the judge's summing-up lacked balance in that he commented on aspects of risk of harm arising from the appellant's action that went beyond the arguments advanced or evidence relied on by the Crown.

9. Ground 5: the judge ought to have directed the jury not to draw adverse inferences from the appellants' no comment interviews.

10. The single judge granted leave to appeal limited to Grounds 3 and 5. The appellants renew their applications to appeal on the other grounds. We grant leave on Ground 1 but not grounds 2 and 4. For reasons we discuss later we are satisfied that there is no substance in Grounds 3 or 5. However, we accept the argument advanced by Ms Montgomery QC on behalf of the appellants that their conduct did not fall within section 1(2)(b) of the 1990 Act and so the appellants succeed on ground 1.

The Facts

11. The perimeter fence was breached using a bolt cutter at approximately 21:50 on 28 March 2017. The appellants, accompanied by two journalists, crossed a grassy area of approximately 80 metres, and then an airport road. They made their way to Stand 505 where the aircraft was situated in a "remote area of the North of the airfield" (as a prosecution witness put it) some 341 metres from the runway.

12. Some of the appellants were wearing high visibility jackets. They brought scaffolding poles, "lock-ons" that had been purpose-made, and builders' foam. They also had a large banner with the words, "Mass Deportations Kill – Stop Charter Flights", which in due course was unfurled and attached to a tripod. Some were wearing tops bearing the slogans, "Mass Deportations Kill" and "No One is Illegal".

13. Four appellants lay around the nose wheel of the aircraft using the makeshift lock-on devices which were then secured with the builders' foam. The others erected two tripods between the main wing of the aircraft and the tail wing. One climbed to the top of the tripod nearer to the main wing. Nine locked-on to one another at its base. One of the appellants failed to lock-on and he was soon removed by police.

14. At 21:58, following a report of individuals being in the vicinity of this aircraft, an immediate decision was made to close the runway. The runway was searched, including by helicopter and by rangers looking for "foreign object debris", but was confirmed to be sterile. By the time it was reopened at 23:17, 23 planes had to be diverted to other airports and a number of take-offs were delayed. The appellants were arrested at the scene on suspicion of aggravated trespass. It took a specialist police team to remove the lock-on devices.

15. When interviewed under caution for three summary-only offences, namely criminal damage, aggravated trespass and breach of Stansted Airport byelaw 3(17), prepared statements were read on behalf of each appellant. They did not answer when questioned. In July 2017, shortly before the date of trial in the Magistrates' Court, the offence under section 1(2)(b) of the 1990 Act was preferred against each, the Attorney General's consent to the prosecution having been granted on 12 July. That is indictable only. The research of counsel has revealed only one previous occasion on which this offence was charged. In *R v Lees* [2003] 2 Cr App R (S) a man flew his helicopter directly at an airport control tower.

The Trial

16. The Crown's case was that the actions of the appellants on 28 March 2017 presented several real risks to the safe operation of the airport and those present, thus satisfying the requirement that the appellants endangered or were likely to endanger the safe operation of the airport or the safety of persons at it. We mention some of that evidence.

17. Patricia Hillier, the Duty Manager, said that individuals present "airside" and not trained in the layout of the aerodrome were a security risk. The resulting disruption caused safety issues for people on the ground at the aerodrome as well as those on landing aircraft. Stacy Perkes, Airside Operational Duty Manager, said that upon becoming aware that there were protestors on the site, he authorised the closure of the runway for safety reasons. He was concerned for the safety of staff, aircraft and passengers. He made his way to Stand 505 and authorised safety sweeps of the runway and all other areas of the airfield.

18. The evidence of David Cox was that he was preparing the flight for departure on the relevant day. On seeing four or six people walking towards the plane he immediately realised that there was a security issue and contacted the owners and Air Traffic Control. He was fearful of the appellants' motives and what they might do, including placing a device on or near the aircraft. He looked out of the window and saw a woman perched on a tripod under the wing, almost within touching distance. There were people standing around the base of the tripod and other people, dressed in predominantly dark clothing, whom he believed were running towards the centre of the airfield. CCTV footage showed that he was mistaken in that. Nobody went beyond the stand. An auxiliary power unit was running. It had been switched on to enable him and other engineers to conduct the pre-flight security checks without starting the engines.

19. There was also documentary evidence in the form of an Airside Safety Manual and the London Stansted Aerodrome Manual. These documents detailed assessments of risks and hazards and how to safeguard against them, including risks posed by people, lights and foreign object debris.

20. It was the Crown's case that the offence was committed as soon as the appellants had gone through the fence and were airside, in other words that the offence under section 1(2)(b) of the 1990 Act was complete when the appellants entered the prohibited area. The Crown accepted that the appellants did not endanger safety. Rather, the contention was that there was "likely" endangerment. The "device, substance or weapon" for the purposes of the subsection were the scaffold poles, builders' foam and lock-ons. The intention to disrupt the services of such an aerodrome in such a way as was likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome could be inferred from all the circumstances. The illegality relied upon was breaching the perimeter fence contrary to the bye-laws or aggravated trespass. The Crown relied on the following matters taken individually and cumulatively:

(1) The "inherent danger" of the appellants' presence airside, coupled with the fact that at the outset their number and intentions were unknown.

(2) The unauthorised items taken airside.

(3) The flammable nature of the aerosol can of builders' foam.

(4) The lights used by the appellants.

(5) The erection and positioning of one of the tripods close to the wing.

(6) The risk of foreign object debris making its way to the taxiway or even the runway.

(7) The possibility that a police officer might have slipped in a chase.

(8) The "down arming" by an unspecified number of airport anti-terrorist police to attend the scene, creating the risk of under-manning in the event of an actual terrorist attack.

(9) The need to take precautions to free the appellants from the "lock-ons".

(10) The appellants' failure to consider the safety manuals in advance of their direct action.

21. The defence case was that any likely endangerment to the safe operation of the aerodrome or the safety of persons was trivial and far-fetched. They had carried out their own risk assessment. The appellants' purpose was to prevent a single chartered flight from taking off, and the disruption which they intended was confined to the plane and its immediate environs. Stand 505 was in a remote location away from the terminal, taxiway and runways. The appellants knew from reconnaissance that those who were to be deported arrived at the airport one hour or so before departure. They also knew that the aircraft's engines would not be turned on until it was towed away from the stand.

22. An issue arose during the appeal whether any of the appellants who gave evidence conceded that they knew that there would be disruption "beyond the aeroplane". Ms Burtonshaw accepted that she knew that her actions would bring disruption to the airport, although she was not asked to specify what this might be. At least two appellants accepted that police would be required to leave the main terminal and attend the scene. None accepted that they appreciated that their actions were likely to endanger safety at the airport.

23. The appellants testified to their extensive campaigning around immigration issues, including volunteering with organisations supporting immigrants and asylum seekers. They detailed their engagement with Members of Parliament, their letter writing and petition signing and their prior participation in protests, all of which had been unsuccessful. Some had been considering more direct action and has thus been undertaking reconnaissance trips to the airport to improve understanding of the procedures.

24. The appellants asserted that they were aware of evidence that charter deportation flights were being deployed in a way that circumvented legal requirements. They understood that serious harm had previously been caused to detainees during the deportation process and believed that the Home Office habitually removed individuals without due consideration of their legal applications, preventing fair determination of those claims and exposing persons to the risk of serious injury and death. They were concerned about the risk to LGBTQ+ individuals being removed to countries where homosexuality is illegal and where they would be at immediate risk. In general, the appellants said that they believed that those on the flight were facing the threat of violence, trafficking, death and destitution on their return.

25. Almost all of this evidence was vague and general. In reality, the appellants' position was that Home Office removal and deportations policy was intrinsically malign and had to be opposed, as one of them said, on the basis of some "higher law". This intervention had been a number of months in the planning, involving amongst other things practising the installation of the scaffolding poles in a field in Oxford.

26. The high watermark of the appellants' case that their actions were justified or necessary was that in March 2017 some of them had read various blogs from "Detained Voices" (a pressure group) of accounts from those in immigration detention. On Sunday 26 March 2017 some of them met an individual from "Detained Voices" who provided further evidence. Benjamin Smoke gave evidence that he knew of three specific individuals, including an LGBT woman who had been threatened with death by her husband, due to be deported on this flight. The appellants were informed that her lawyer was preparing a last-minute legal challenge, but its outcome was not known by the evening of 28 March.

27. The appellants' case was that their direct action represented the last real opportunity to prevent these various risks from materialising. But they had no idea of the up-to-date position including, in particular, whether any last-minute legal application or fresh claim had altered what they had understood to be the situation. Nor did they have any information about the immigration histories of any of the others on the flight.

28. The appellants now point out that out of the 60 individuals due to be removed it appears that eleven are still in the country and five of them have, for one reason or another, established their right to remain in the United Kingdom.

29. Seven appellants gave evidence. The remainder chose not to do so. The judge gave the standard adverse inferences direction. He did not comment on the appellants' failure to answer police questions.

30. The judge made several rulings during the trial. He refused the appellants' disclosure applications under section 8 of the Criminal Procedure and Investigations Act 1996 relating to material forming the background to the Attorney General's grant of consent; and Home Office material bearing on the current immigration status of those threatened with removal. He later rejected an application that the proceedings should be stayed on the ground that the Attorney General's consent had not been validly given. The judge ruled that the safety manuals could be admitted in evidence. He ruled that there could be no cross-examination of a Home Office witness about general safety of individuals during their removal or the system more generally. The judge rejected the submission that there was no case to answer. He refused to withdraw any of the heads of risk from the jury's consideration. Finally, he ruled that the defences of prevention of crime (section 3 of the Criminal Law Act 1967) and of necessity and/or duress of circumstance should not be left to the jury.

31. The appellants complain that in summing-up the judge supplemented the Crown's catalogue of safety hazards and appeared to lend his own weight to its case. For example, he drew attention to pages 27 to 28 of the Safety Manual which warned of the hazards associated with the presence of persons on the apron and that the route to the aircraft should not involve travelling under the wing. He invited the jury to consider whether the movements of the appellants in a prohibited area generated a risk of injury and damage to people. He added that the noise of an auxiliary power unit might mask the approach of a vehicle, and therefore cause a risk.

The Legal Framework

32. The 1990 Act, according to its long title, was:

> "An Act to give effect to the [Montreal Protocol] which supplements [the Montreal Convention]; to make further provision with respect to aviation security and civil aviation; and …"

33. Although we have quoted part of Section 1 in the introduction to this judgment, we set out the material parts of the 1990 Act more extensively at this point:

> "**Endangering safety at aerodromes.**
>
> (1) It is an offence for any person by means of any device, substance or weapon intentionally to commit at an aerodrome serving international civil aviation any act of violence which—
>
> (a) causes or is likely to cause death or serious personal injury, and

(b) endangers or is likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome.

(2) It is also, subject to subsection (4) below, an offence for any person by means of any device, substance or weapon unlawfully and intentionally—

(a) to destroy or seriously to damage—

(i) property used for the provision of any facilities at an aerodrome serving international civil aviation (including any apparatus or equipment so used), or

(ii) any aircraft which is at such an aerodrome but is not in service, or

(b) to disrupt the services of such an aerodrome,

in such a way as to endanger or be likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome.

(3) Except as provided by subsection (4) below, subsections (1) and (2) above apply whether any such act as is referred to in those subsections is committed in the United Kingdom or elsewhere and whatever the nationality of the person committing the act.

…

(7) Proceedings for an offence under this section shall not be instituted—

(a) in England and Wales, except by, or with the consent of, the Attorney General, …

…

(9) In this section—

act of violence means—

(a) any act done in the United Kingdom which constitutes the offence of murder, attempted murder, manslaughter, culpable homicide or assault or an offence under section 18, 20, 21, 22, 23, 24, 28 or 29 of the Offences against the Person Act 1861 or under section 2 of the Explosive Substances Act 1883, and

(b) any act done outside the United Kingdom which, if done in the United Kingdom, would constitute such an offence as is mentioned in paragraph (a) above;

> aerodrome has the same meaning as in the Civil Aviation Act 1982;
>
> military service and United Kingdom national have the same meaning as in the Aviation Security Act 1982; and
>
> unlawfully—
>
> > (a) in relation to the commission of an act in the United Kingdom, means so as (apart from this section) to constitute an offence under the law of the part of the United Kingdom in which the act is committed, and
> >
> > (b) in relation to the commission of an act outside the United Kingdom, means so that the commission of the act would (apart from this section) have been an offence under the law of England and Wales if it had been committed in England and Wales or of Scotland if it had been committed in Scotland."

34. By section 11(2):

> "… a person commits an offence if he unlawfully and intentionally places, or causes to be placed, on a ship or fixed platform any device or substance which-
>
> > (a) in the case of a ship, is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation, …"

35. The offence under section 1(2)(b) attracts a maximum sentence of life imprisonment. It is a "specified offence of violence" and a "serious offence" for the purposes of section 224 of and paragraph 50 of Schedule 15 to the Criminal Justice Act 2003. These are the provisions which engage the sentencing regime applicable to "dangerous offenders" under that Act. It is also a "Convention Offence" for the purposes of Schedule 1 of the Terrorism Act 2006. Such offences include, by virtue of section 20, "equivalent offence[s] under the law of a country or territory outside the United Kingdom". The offences listed include the most serious offences of violence, many under the Explosive Substances Act 1883, the Biological Weapons Act 1974, the Internationally Protected Persons Act 1978, the Nuclear Materials (Offences) Act, the Taking of Hostages Act 1982 and Chemical Weapons Act 1996. Section 1 of the Terrorism Act 2006 Act makes it an offence for a person to publish a statement by which he intends to encourage the commission of a Convention Offence, punishable by up to 7 years' imprisonment.

36. The Crown's interpretation of section 1(2)(b) would thus lead to the possibility of someone encouraging this action being prosecuted under the Terrorism Act.

37. The offences created by section 1 are of universal jurisdiction with the consequence that qualifying conduct wherever it occurs in the world, may be prosecuted in our courts.

38. Article 1 of the Convention for the suppression of unlawful acts against the safety of civil aviation of 23 September 1971 ("the Montreal Convention") provides:

> "1. Any person commits an offence if he unlawfully and intentionally:
>
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; …"

39. "Device or substance" is not defined in the Montreal Convention, nor is the phrase defined in the 1990 Act. We have not been shown the *travaux préparatoires*, but the context makes clear that sub-para (c) is concerned with items which are inherently dangerous such as explosives and toxic or corrosive chemicals.

40. The Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Montreal Convention ("the Montreal Protocol") is dated 24 February 1988. Its first preamble provides:

> "Considering that unlawful acts of violence which endanger the safety of persons at airports serving international civil aviation or which jeopardise the safe operation of such airports undermine the confidence of the peoples of the world in safety at such airports and disturb the safe and orderly conduct of civil aviation for all states."

41. By Article 2:

> "In Article 1 of the Convention, the following shall be added as new paragraph 1 *bis*:
>
> '1 *bis*. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:
>
> (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

> (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service thereon or disrupts the services of the airport,
>
> if such an act endangers or is likely to endanger safety at that airport."

42. Once more the words "device [or] substance" are not defined in the Protocol, but they clearly bear the same meaning as in the Convention itself. We do not accept the argument that these terms must be construed as *ejusdem generis* with "weapon", but both Convention and Protocol are concerned in these provisions with items whose potentially dangerous properties are self-evident.

43. We were shown many of the *travaux préparatoires* to the Protocol but can be selective. At the first plenary Meeting in Montreal in February 1988, the philosophy behind the need for additional international safeguards was spelt out:

> "The task is to define such acts which, due to their relation to international civil aviation, endangering or likely to endanger safety at an airport, should be singled out as acts deserving the establishment of concurrent (or universal) jurisdiction, making sure that no perpetrator of such an act would go unpunished wherever he is found … Again, it will be our intention to define as offences under the new instrument only acts of a certain level of magnitude deserving the establishment of concurrent or universal jurisdiction."

44. At the invitation of Ms Montgomery, we have reviewed the minutes of the plenary meetings. No delegate had in contemplation a device or substance that was other than dangerous in itself, as had been the position since 1971. At the ninth plenary meeting, there was some debate about whether it was necessary to specify the particular means used in the commission of offences which were typically of a terrorist nature (e.g. by wording such as "using a dangerous device, substance or weapon"), or whether, given the elements of the proposed offence as drafted and the additional qualification of actual or likely endangerment, more general language should suffice. The upshot involved a compromise: the epithet "dangerous" was removed from the eventual wording although the offence would only be committed if certain specified items were deployed. Whether "dangerous" remains implicit is a matter which we will come to address.

45. A number of delegates believed that the Montreal Protocol should be confined to acts of a terrorist nature. It is true that the genesis of this Protocol following the deliberations of the 26th session of the International Civil Aviation Organisation Assembly in 1986 was recent terrorist outrages at airports in Kenya, Italy and Austria; but the *travaux* do not support the contention that the protocol was directed *only* at conduct which would ordinarily be considered as terrorist in nature. By contrast, we note the opinion of the French delegation that strikes or gatherings by demonstrators should be beyond the reach of international criminalisation.

46. As we have noted, the offences with which the appellants were originally charged were all summary-only. There is no dispute that the appellants were party to a joint enterprise to cause damage to the fence. The evidential foundation for a charge of aggravated

trespass was present. The judge also referred the jury to byelaw 3(17) of the 1996 Stansted Airport Byelaws which were made by Stansted Airport Limited pursuant to sections 63 and 64 of the Airports Act 1986 and section 37 of the Criminal Justice Act 1982. It provides:

> "**No demonstrations etc**
>
> No person shall organise or take part in any demonstration, procession or public assembly likely to obstruct or interfere with the proper use of the Airport or obstruct or interfere with the comfort and convenience or safety of passengers or persons using the Airport."

Ground 1

The Parties' Submissions

47. Ms Montgomery submitted that section 1 of the 1990 Act was intended to give effect in domestic law to the Montreal Convention as supplemented by the Protocol, and that it is no accident that the language of sub-section (2)(b) reflects the wording of paragraph 1 *bis*. The domestic offence must therefore be construed in the light of the purposes and objects of the Protocol rather than purely linguistically. Her core submission was that "device, substance or weapon" did not raise what she called a gateway or threshold issue in the sense that it was sufficient that these items happened to be at the scene. Instead, what was required was proof of the presence (on these facts) of a device or substance that was inherently dangerous and whose use was both unlawful in itself and causative of the disruption etc. that ensued.

48. In terms of the other constituent elements of the offence, Ms Montgomery submitted that:

(1) The language of subsection 2, namely "by means of any device etc" imported a causative requirement, and that it must be read as of piece with "unlawfully".

(2) "to disrupt the services at such an aerodrome" meant its core services rather than the movements of an individual fuel truck and the like. Furthermore, the disruption had to be actual and not hypothetical.

(3) "in such a way as … to be likely to endanger etc." imported a further causative element, and the degree of likelihood had to be greater than "could have". Her contention was that this clause serves to qualify the nature and gravity of the disruption to services that must have occurred. This is not akin to a health and safety provision but an offence which concerns itself with risks at a higher order of magnitude.

(4) "intentionally" meant that the disruption and the risk had to be subjectively apprehended and intended by each appellant, foresight being insufficient. Given that the evidence of the appellants was that their aim or purpose was not to cause wider disruption at the airport beyond disabling this particular plane, the jury should have been directed that it had to be established to the criminal standard that each

appellant knew that the disruption etc. and likely endangerment would almost certainly occur.

49. Messrs Badenoch QC and McGhee for the Crown submitted that the language of section 1(2)(b) is clear and unambiguous, and that the provision was not limited to acts of violence or terrorism. Accordingly, there was no scope for a purposive approach and, in any case, the 1990 Act went further than the Protocol. "Device or substance" should bear their natural and ordinary meaning, which is broad. There is no requirement that they should be inherently dangerous. On the facts, the presence and use of these devices and substance (tripods, scaffold poles, locking mechanisms, builders' foam) was apprehended by those responsible for airport safety at a relatively early stage. They did affect the ability of planes to take off and land safely because the runway had to be closed.

50. Mr McGhee's further submissions were directed to the elements of the offence. On analysis, he made four submissions. First, the sub-section required: (i) disruption by means of a device or substance, and (ii) disruption which is unlawful. There was no necessary link between the two. Secondly, that the provision created an offence of basic rather than of specific intent. The offence is made out if the disruption is intended regardless of intent of the consequences. This is an endangerment offence akin to section 23 of the Offences against the Person Act 1861. Thirdly, that although Mr McGhee accepted that the disruption to the services of the aerodrome may not have been the appellants' aim or purpose, the Crown's case was that each of them must have known that it was highly likely to happen. Fourthly, that "likely to endanger" imports a relatively low degree of probability and in this context means "could have".

51. Mr McGhee accepted that it was not enough for the Crown's purposes that this particular flight was disrupted. However, the judge directed the jury that it was sufficient. In our judgment, "to disrupt the services of such an aerodrome" must, at least on most cases, mean more than one particular flight; and, for an international airport like Stansted, it must mean that. If it were otherwise section 1(2)(b) would be entirely out of place in a section that otherwise requires proof of a serious act of violence (section 1(1)) or the unlawful use of a device, substance or weapon that destroys or seriously damages an aircraft (section 1(2)(a)). On such an analysis the sub-paragraph would be satisfied on proof of conduct that was less serious by several orders of magnitude.

52. Liberty's core submission was that section 1(2)(b) of the 1990 should be interpreted restrictively to ensure that rights guaranteed by articles 10 and 11 of the European Convention on Human Rights (freedom of speech and freedom of assembly) were not interfered with. We do not accept that these articles could be used to support a proposition that protesters are entitled to enter the secure area of an airport, which, after all, is kept secure for obvious and sound reasons of general security and passenger safety. There are many alternative ways available for protest and articulation of views.

53. Liberty has drawn to our attention the concerns expressed by the UN special rapporteur in his 2018 "World Report" and those set out in a joint letter dated 1 February 2019 to Her Majesty's Government by the Working Group on Arbitrary Detention, the Special Rapporteur in the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on human rights defenders, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms

when countering terrorism. At the heart of their concerns was the suggested disproportionality of the use of section 1(2)(b) against peaceful and non-violent protest.

Discussion

54. The Crown's position in the Crown Court and its primary position before this Court was that the relevant provisions of 1990 Act did not simply implement the Montreal Convention and Protocol. The judge was right to reject that contention.

55. We have no doubt that by enacting section 1 of the 1990 Act Parliament did and was intending to give domestic effect to the Montreal Convention as supplemented by the Montreal Protocol. The 1990 Act's long title says exactly that, and the clause after the first semi-colon ("to make further provision etc.") does not herald the expansion of the ambit of domestic law beyond that of Article 1 *bis*. Rather, as Ms Montgomery pointed out, it was there to introduce section 2 and following.

56. That the 1990 Act does not set out the text of the Protocol by way of schedule or does more than refer to it in the long title does not matter for this purpose: see *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 (per Lord Bingham of Cornhill at para 5) and *Quazi v Quazi* [1980] AC 744 (per Lord Scarman at 822D-F).

57. A comparative examination of the texts leads to the same conclusion. The Parliamentary drafter has adopted a different stylistic technique and word order in at least two respects but, and most importantly, "by means of any device, substance or weapon unlawfully and intentionally" means the same as "unlawfully and intentionally, using any device, substance or weapon". "By means of" and "using" mean the same thing for these purposes. Further, we cannot accept Mr McGhee's submission that the two requirements (disruption by means of a device or substance, and disruption which is unlawful) can somehow be separated. There is no difference between the international and domestic provisions. "Intentionally" governs the intention of the user and "unlawfully" the legal quality of his action, but each is directed to the same physical act.

58. Accordingly, we reject the Crown's submission that the Montreal Protocol is irrelevant as an aid to construction because Parliament has legislated for more.

59. Mr Badenoch's fall-back submission was that recourse to the Protocol is impermissible because the language of the statute is clear and there is no ambiguity. He relied on *R v Lyons* [2003] 1 AC 976, but that was a different type of case concerned with the Human Rights Act, and the celebrated passage in the judgment of Diplock LJ (as he then was) in *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, at 143E-G:

> "Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties. … But if the terms of the legislation are not clear but are reasonably capable of more than one

> meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."

60. We were shown other authorities addressing the circumstances in which a treaty-compliant or purposive construction may be adopted. These included *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (where "damage" was held to include "loss"), *ITC v Commerzbank AG* [1990] STC 285, at 297-98 (per Mummery J as he then was, summarising the relevant jurisprudence) and *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 (where the House of Lords held that "bodily injury" did not include psychiatric harm). In *Fothergill*, Lord Diplock revisited what he had said in *Salomon* but did not materially alter the principle:

> "The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted as Lord Wilberforce put it in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, at 152 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.'" [at 281H-282B]

61. The essential considerations are that an international instrument should be construed in a uniform and harmonious manner across the contracting states, and that "if it be possible" (per Lord Scarman in *Fothergill* at 290G) to do so our courts should speak in harmony. A clear and unambiguous provision will not lend itself to this method but wording that is unclear, ambiguous or, if construed literally, would lead to a result which is manifestly absurd or unreasonable, will.

62. Before examining the true construction of section 1(2)(b) we do not lose sight of the bigger picture. The Montreal Protocol introduced a further layer of protection against activities which are essentially of a violent nature and "of a certain level of magnitude". Section 1 of the 1990 Act, in consonance with the policies and objects of the Protocol, created an offence of universal jurisdiction attracting a maximum sentence of life imprisonment. The offence is so serious that the court is enjoined to consider the dangerousness provisions of the Criminal Justice Act 2003 and it is also a "Convention offence" for the purposes of the Terrorism Act 2006. The actions of the appellants are not readily captured by the language and purposes of the Protocol.

63. However, this stark mismatch cannot be the complete answer to these appeals. It remains necessary to identify statutory wording that is unclear, ambiguous, or would lead to manifestly absurd or unreasonable results.

64. Ms Montgomery identified two keys to unlocking the door to the right answer to these appeals. Her submissions were mainly directed to the wording, "by means of … unlawfully and intentionally" and "device [or] substance". In our judgment she was right to approach the exercise of statutory construction in this way. In her reply she focused more on "device [or] substance", and it is convenient to begin there.

65. According to the *Oxford English Dictionary*, a device is:

> "The result of contriving; something devised or framed by art or inventive power; an invention, contrivance; *esp.* a mechanical contrivance (usually of a simple character) for some particular purpose."

and a substance is:

> "A kind of matter of a definite chemical composition, as a compound or element."

Both basic concepts are extremely wide, and "substance" comprises almost anything.

66. The "device" in the present case was not the scaffolding poles but the tripod made out of them. The "substance" was the builders' foam, whose chemical properties beyond flammability were not in evidence. It would not be an abuse of language to say that these terms are broad enough to encompass the items that the appellants carried to Stand 505 and then used, but the issue for us is whether, in context, they should be interpreted so widely. They are ambiguous and unclear.

67. There are two reasons for holding that a narrower construction is correct. The first is that "device [or] substance" must be interpreted in a uniform manner throughout the 1990 Act, and in section 11(2) it clearly means something more specific than *any* device or *any* substance (see para 34 above). It follows that some qualification of these terms is necessary. Given that the items in question "must [be] likely to destroy the ship or [be] likely so to damage it or its cargo as to endanger its safe navigation", it becomes obvious that the tripod and the builders' foam could not be so characterised. We conclude that the "device [or] substance" must be intrinsically dangerous in order to be caught by the statutory wording. This may be seen as an *implied* statutory limitation on the extreme breadth of the relevant terms interpreted in their proper context.

68. A further consideration on the same theme is that a "device [or] substance" for the purposes of section 1(1)(a) and (b), and section 1(2)(a), of the 1990 Act must be inherently dangerous in order to be capable of causing the damage within contemplation, but on the Crown's argument can be inherently innocuous for the purposes of section 1(2)(b).

69. We appreciate that whether the builders' foam as a "substance" could be regarded as inherently dangerous raises a less straightforward question than the tripods. It was sprayed from an aerosol can and there was evidence that it was flammable. However, we were not taken to any evidence before the jury to suggest that it was capable of causing the sort of damage contemplated, for example, by sections 1(1) and (2)(a) of the 1990 Act.

70. The second reason flows from an examination of the Montreal Convention, the Protocol and the *travaux*. All of these face in the same direction. The same point may be said about the wording of both the Convention and the Protocol as has already been made about section 11(2) of the 1990 Act. The "device [or] substance" must be capable of causing significant damage to the aircraft either on the ground or in flight. On the Respondent's analysis "device [or] substance" means one thing for the purposes of the first and second limbs of Article 1 *bis* (b) of the Protocol and another for the purposes of the third limb. It is clear from the discussions at the plenary sessions that the delegates had in mind dangerous items.

71. The second key to this case is to be found in the correct interpretation of the "by means of" and "unlawfully" in the various places in which they appear in the section. The *actus reus* of the offence under section 1(2)(b) is the disruption to services using a device, substance or weapon. Disruption brought about by other means is not an offence under this provision. The *actus reus* must be carried out "unlawfully and intentionally". It is a curiosity of section 1 of the 1990 Act as a whole that "unlawfully" does not feature in section 1(1), in contrast to the wording of the Montreal Protocol where it applies across the board. In the context of an act of violence, the Parliamentary drafter must have concluded that "unlawfully" would have been surplusage.

72. However, "unlawfully" is statutorily defined and cannot be ignored: section 1(9), see para 33 above. It may well be that Ms Montgomery is correct in submitting that, for the purposes of s.1(2)(b), it is the disruption brought about by the use of a device or substance that must be unlawful, rather than a trespass or the breach of any byelaw; but in the circumstances it is unnecessary to decide the point.

73. "By means of", as we have indicated, is synonymous with "using". What is required is proof of a causal link between the use of the device or substance and the disruption. The mere presence of items at the scene is insufficient. We accept Ms Montgomery's submission that "by means of" plays a central role in section 1 of the 1990 Act, in line with the policy and objects of the Montreal Protocol. Taking the Crown's case at its reasonable pinnacle, the "by means of" aspect of the offence was not satisfied. In our judgment, it could not be demonstrated on the evidence that any disruption to the services of the aerodrome was the consequence of the appellants' use of any device or substance. The evidence was that the runway was closed as soon as Mr Cox had warned Air Traffic Control of the presence of individuals in the vicinity of the aircraft and, at least on one view of the evidence, his apparent but mistaken sighting of people running towards the runway. This was all before the devices etc. were used in any way. We do not think this difficulty is overcome by the Crown's submission that shortly after the runway was closed the presence of devices was apprehended; that was too late.

74. Ms Montgomery's further argument was that the "core services" of Stansted airport were not disrupted. If the premise for the consideration of this argument is that any disruption was not caused by the appellants' unlawful use of any device or substance, that would clearly follow. However, on our understanding of Ms Montgomery's contention the analysis should be the same even if her primary case were incorrect. We are unable to go that far. We agree that "to disrupt the services of the aerodrome" draws attention to the whole airport and requires proof of more than limited interference with traffic movements on the apron or directing a number of police officers to the scene. Whether this part of the statutory test is met will be a matter of fact and degree. But we think that "services of the aerodrome" should not be limited to the take-off and

landing of planes because numerous ancillary activities must be performed in order to enable those things to happen.

75. In any case, the disruption in this case included the closure of the runway and the taking of understandable safety measures and precautions in response to the appellants' presence in a restricted area in proximity to an aircraft that was being prepared for flight. It was not immediately understood that the appellants were engaged in some sort of protest. To that extent, there was a clear causal link between the appellants' presence at the scene and the services at the aerodrome being disrupted, and no break in the chain on account of the intervening actions of third parties. The stumbling block for the Crown is not the meaning of "services of the aerodrome" but consists in our conclusion that mere presence at the scene in possession of devices and substances which are not dangerous falls short of being sufficient to meet the statutory criteria.

76. Ms Montgomery submitted that there are further flaws in the Crown's case in the light of the subordinate clause, "in such a way as to endanger or be likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome". An examination of this aspect of the offence raises a number of issues.

77. The purpose of the subordinate clause, which applies not merely to section 1(2)(b) but to sections 1(1) and (2)(a), is to qualify or delimit the type of disruption that must occur for the offence to be made out. "In such a way" does no more than to make it clear that proof of disruption in itself is insufficient; it must be disruption to the services of the aerodrome which gives rise to endangerment or likely endangerment to safety.

78. The Crown did not suggest that the safety of the aerodrome or of persons there was in fact endangered by the actions of the appellants. The case was advanced on the basis of "likely to endanger" safety. Our attention was drawn to the Scottish case of *McIntosh v HM Advocate* [1994] SLT 59, an authority on the broadly comparable language of section 2 of the Explosives Substances Act 1883. There, it was conceded that it had been wrong for the sheriff to direct the jury to consider what might have happened had the bomb gone off in a different location. The appellants argue that the focus must therefore be on what actually occurred and the endangerment that was likely to ensue, not on facts and circumstances that might have arisen but did not.

79. The prosecutor's concession in *McIntosh* reflected basic common sense. The bomb may have exploded inside the house rather than outside, but the relevant dangers must be considered on the basis of what was known to have happened rather than of what might have. On the facts of the instant case, there was no real risk to the integrity of the wing of the plane, and certainly no likely endangerment to the safe operation of the aerodrome etc., by the installation of the tripod in such a way that it came quite close to the underside. It would be wrong to speculate what the dangers might have been had the tripod been constructed in a different place or out of scaffolding poles which were slightly longer. However, it would be incorrect to insulate the appellants' actions entirely from the panoply of possible knock-on effects. It was entirely foreseeable that the authorities would take prudent preventative measures to ensure that the safe operation of the aerodrome was not endangered. They would not wait to ascertain the appellants' true intentions. Furthermore, the concept of endangerment requires consideration to be given to all the perils that were generated by the appellants' activities. So, if police officers were called away from the terminal to the scene, there was at least a risk that one might be injured by a refuelling vehicle when crossing the

tarmac or that any violent criminal activity within the building could not be responded to, even if there was no evidence of these risks eventuating that evening. "Likely to endanger" does not entail an examination of what might have happened had the appellants behaved differently but it does entail consideration being given to what might have ensued because of what they did.

80. However, the creation of a risk to safety, however low, is not enough. This offence requires proof of likely endangerment to safety and that introduces two further qualifications. The first is that the chances of the danger arising must transcend a certain degree of likelihood and the second is that it must be of a sufficient nature and degree to amount to endangerment, i.e. to something that may properly be described as a peril. The test is a composite one. In our judgment, the available evidence fell well short of meeting it, for two reasons. First, and viewed in terms of their direct consequences, the appellants' actions did not likely endanger the safe operation of this particular aircraft, still less the aerodrome as a whole or the safety of persons present. Secondly, and now viewed in terms of their indirect consequences, insofar as the rapid and prudent actions taken by Stansted airport were causally linked to the appellants' actions and can therefore be attributed to them in some way, those safety measures did not themselves likely endanger the safe operation of the airport or the safety of persons present.

81. In stating that the test is composite in nature, the degree of likelihood falls to be considered. We were taken to domestic authority (e.g. *R v Gareth Marcus* [2013] NICA 60 and *Boyle v SCA Packaging Ltd* [2009] ICR 1056) which suggested that the meaning of the adjective "likely" may fluctuate according to the nature of the activity under consideration. Section 2 of the Explosive Substances Act 1883 provides that a person "who unlawfully and maliciously causes … an explosion of a nature likely to endanger life or to cause serious injury to property" is guilty of an offence. In this context, the Court of Appeal of Northern Ireland held that "likely to" means "could well have", because the activity in question had the real capacity to endanger life.

82. It is unnecessary to decide whether that is the correct approach. Applying principles of general concurrence across the international community might well lead to the conclusion that the meaning of "likely" does not alter according to the context. Rather, the more inherently dangerous the use of the device etc. the more probable it may be that safety is endangered. However, there is force in Ms Montgomery's submission that if the underlying activity is not inherently dangerous, it was impermissible for the judge to direct the jury along the lines that all was required was proof that the danger could well have happened. If the meaning of "likely to" does vary according to the context, proof of a low degree of likelihood can only be justified if the underlying activity is inherently dangerous.

83. The closure of the runway was undoubtedly disruptive and expensive, but there was no evidence that it resulted in likely endangerment to the safety of the aerodrome or of persons there. The down arming of an unspecified number of police officers when the terrorist threat was severe may have increased the risks within the terminal, but there was no evidence to enable an inference to be drawn that endangerment was likely. There may have been a slightly enhanced risk of a police officer slipping *en route* to the aircraft, but it would stretch both language and common sense to say that there was likely endangerment, both in terms of the probability of this happening and the seriousness of the consequences if it did happen. It was not plausible that foreign object debris might be carried, by the wind or otherwise, over the 341 metres from Stand 505

to the runway. Each of the various elements of the Crown's case, or the additional matters highlighted by the judge, may be approached in the same way. These were all risks that could variously be described as low-level, conjectural and without any substantial evidential foundation. They were not likely perils within the meaning of the sub-section.

84. Both the Crown's case and the summing-up collapsed the distinction between risk and likely danger and treated the offence as if it were akin to a health and safety provision. Taking the Crown's case at its highest, and considering all relevant potential consequences, it could not be established to the criminal standard that the actions of the appellants created disruption to the services of Stansted airport which was likely to endanger its safe operation or the safety of persons there.

85. The final issue that arises under this first ground is whether the appellants *intended* disruption to the services of the aerodrome that would likely endanger its safety or the safety of persons. We reject the appellants' submission that it was necessary to prove that they each intended all or any of the particular items of alleged endangerment as listed by the Crown. Even in a case where protesters did clearly intend wider disruption, they would not necessarily be aware of all its potential manifestations. It would be sufficient for the Crown to prove that they intended to disrupt the services of the aerodrome in the knowledge and with the intention that there would be likely endangerment or jeopardy to airport safety in some shape or form.

86. However, only one of the appellants accepted in evidence that any such wider disruption was foreseen. Another two accepted that police officers would be required to leave the terminal. It was a strong inference that it was not the aim or purpose of the appellants to cause any wider disruption. This was not a protest about airports and climate change; it was about the purposes and destination of this particular aircraft. It is not in dispute that intention may go beyond aim or purpose, and we remind ourselves of the line of cases which addresses this question. These include *R v Moloney* [1985] AC 905, *R v Nedrick* [1986] 3 All ER 1, *R v Woollin* [1999] 1 AC 82, *R v MD* [2004] EWCA Crim 1391 and *R v Jogee* [2016] UKSC 8, [2017] AC 387. There remains some debate as to whether foresight of "virtual certainty" as opposed to "a very high degree of probability" is required (see *Blackstone's Criminal Practice*, 2021 edition, paras B1.13-B1.14). "Virtual certainty" derives from the judgment of Lord Lane CJ in *Nedrick* and probably still represents the law.

87. The judge in his written route to verdict directed the jury that those appellants who gave evidence admitted that they intended to disrupt services and that this was not disputed by those who did not give evidence. He added:

> "It is quite plain, you may think, that they had the intention to disrupt the Titan flight, which of course, is a service, is it not, at Stansted airport."

The route to verdict also made it clear that in the judge's view the real question in the case was whether the intentional disruption to services was carried out in such a way as to be likely to endanger the safe operation of the aerodrome.

88. If, as we have held, it was necessary for the Crown to go further than prove disruption to this particular flight, the judge did not leave to the jury the issue of whether each of

the appellants intended (1) to disrupt the services of the aerodrome, and (2) by such disruption, some likely endangerment to the safe operation of Stansted airport and the safety of persons there. The jury should have been directed that, given that it was not the appellants' aim or purpose to cause disruption etc., they had to be satisfied so that they were sure that this consequence was a virtual certainty, or at the least very highly probable, and that each appellant appreciated that was the case.

89. For all the reasons we have identified we conclude that the appeals must be allowed on the first ground.

Ground 3

90. The third ground of appeal challenges the judge's decision to withdraw three defences from the jury. Those three defences were: (i) section 3 of the Criminal Law Act 1967 which permits a person to use such force as is reasonable in the circumstances in the prevention of crime; (ii) duress, specifically duress of circumstances, on the basis that the appellants had been impelled to act to prevent imminent death or serious personal injury to the deportees; and (iii) necessity, on the basis that their actions were justified as necessary in order to avoid that greater evil. The Grounds of Appeal challenged the judge's ruling in relation to all three, but Ms Montgomery focussed on necessity, the third defence, in her oral submissions and we too concentrate on that aspect of the appellants' narrowed case.

91. Necessity was considered by the Court of Appeal in *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 and was defined in these terms by Brooke LJ at 240:

> "According to Sir James Stephen there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided."

92. Ms Montgomery relied on *R v Colin Martin* (1989) 88 Cr App Rep 343, where Simon Brown J (as he then was) suggested that there were two limbs to the defence at p 346:

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

93. Put simply, Ms Montgomery submitted that the appellants had given evidence that they acted as they did because of their fears for the safety of the deportees. She took us to the agreed facts placed before the jury which reflected the prepared statements stating that each appellant had a belief that there was a risk of death or serious injury to people

on the flight and a belief that their removal was not a lawful act. She also showed us the summary of their evidence on justification, which was before the judge, specifically those passages where the appellants spoke of individuals whom they knew to be on that flight. She argued that there was a sufficient evidential basis to require the matter to be put before the jury. It met the first limb in *Martin* because it demonstrated their subjective belief. Assessment of that and the second limb relating to objective justification were matters within the proper province of a jury. Seeking to head off the Crown's case, she argued that *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 1360 was a case on section 3 of the 1967 Act and not of broader application.

94. Mr Badenoch reminded us that the defence of necessity only arises in extreme cases. The defence can only be left to the jury if there is "at least some evidence" upon which a jury could conclude that the defence had not been negatived (citing from *R v Leonardo Bianco* [2001] EWCA Crim 2516 per Laws LJ at para 15, a case involving the defence of duress), and that

> "… if the case is one where no reasonable jury properly directed as to the law could fail to find the defence disproved, no legitimate purpose is served by leaving it to the jury". (*Ibid*).

95. Mr Badenoch submitted that *R v Jones* is an important authority, which confirms that necessity does not extend to acts of self-help, civil disobedience or protest. That case is not limited in its application to section 3 of the 1967 Act, and the speech of Lord Hoffmann should not be viewed merely as *obiter dictum*. If authority were needed to support the wider application of that case, it exists in *R (Director of Public Prosecutions) v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin) where Simon LJ incorporated extensive passages from Lord Hoffmann's speech into his judgment, noting at para 17 that the other members of the House of Lords had agreed with him, in particular Lord Mance who endorsed in terms those parts of Lord Hoffmann's speech dealing with self-help and civil disobedience.

96. Mr Badenoch took us to *Southwark LBC v Williams and Anor* [1971] 1 Ch 734, a case where squatters unsuccessfully invoked necessity as a defence to a possession order. The Court emphasised the narrowness of the defence, available only in "very special circumstances" and within "narrow limits" (per Edmund-Davies LJ at p.745H and p.746 C). The narrowness was also emphasised in the *Conjoined Twins* case which was said to be truly a "unique case" (per Ward LJ at 155).

97. The judge referred to *R v Jones* before concluding that this was a case of direct action by a group of individuals who believed that the deportation process and use of charter flights was objectionable and illegal. He held that it was no part of the function of a jury to consider the legality or otherwise of government policy when deciding whether an offence was proved, and that the defence of necessity should not go to the jury.

98. *R v Jones* concerned criminal damage at military bases committed by those opposed to the Iraq war. Lord Hoffmann stated at para 78 that:

> "Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands."

99. Turning to the practical implications for trials of direct action protesters, he continued at para 94:

> "If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury."

100. We accept that these passages are both of general application and binding on this court. Lord Hoffmann's analysis and observations formed part of the *ratio* of *Jones* and are not limited to the statutory defence under section 3 of the 1967 Act.

101. The appellants' acts therefore had to be considered in the context of a functioning state governed by the rule of law. In answer to one of the appellants' invocation of some "higher law", the United Kingdom has a developed system of immigration control created by an accountable democratic process and subject to Parliamentary scrutiny and judicial review. Immigration decisions may be challenged in the tribunals and the courts. Judges are routinely required to consider last-minute applications to restrain removal or deportation. We do not know what efforts each of those due to be on this flight had made to challenge removal directions or seek protection for their fundamental rights, but the appellants did not know either, save to a limited extent in respect of one prospective passenger. Yet that fact, known to the appellants, that one of the few passengers about which they knew anything was seeking to challenge her removal, undermines rather than enhances their case.

102. The judge was right to characterise the appellants' conduct as direct action. The appellants' real reason for halting this flight was that they believe that all removals and deportations are "illegal" in the sense in which they would choose to use the term. Essentially, therefore, this was the appellants seeking to take the law into their own hands. The present case falls four-square within *R v Jones*, para 94. The defence of necessity was not a proper matter to put before the jury.

103. Accordingly, the judge was right to withdraw the defence of necessity from the jury. There was no evidence to support it, see *Bianco*. Given that Ms Montgomery implicitly accepted that the remaining defences could not survive if her lowest common denominator defence failed, the judge was right to withdraw those defences too. Ground 3 fails.

Ground 5

104. The judge's direction to the jury as to any inferences that could be drawn from the appellants' failures was as follows:

> "When these defendants were interviewed, each relied upon a prepared statement, which you have in your agreed facts. The prepared statements are part of the evidence, and you will wish to consider that in relation to the issues that remain. But that evidence was not given on oath, and has not been tested in cross-examination. You will remember I asked each advocate who indicated at the time that he or she told us of the defendant's decision not to give evidence, whether the defendant they represented understood that, if he or she failed to give evidence you, the jury, may draw such inference as appeared proper."

In relation to those appellants who did not testify, the judge then proceeded to give the standard adverse inference direction under section 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). In relation to the failure to answer questions at police interview, the judge said nothing. The appellants contend that the judge ought to have directed the jury not to draw adverse inferences from the appellants' no comment interviews.

105. The judge's proposed legal directions were considered by counsel in draft form and there is no indication that any contrary submission was made. The point relied upon now was not advanced at the time. It did not strike any of those representing the appellants that such a direction was needed.

106. Section 34 of the 1994 Act permits a judge to give an adverse inferences direction in relation to a defendant's failure to answer questions at police interview. In circumstances where the Crown does not seek such a direction, the section does not require the judge to direct the jury not to draw any adverse inference.

107. In *R v McGarry* [1999] 1 WLR 500, this court held that in that case the jury should have been given a specific direction that no adverse inference should be drawn from any failure to answer questions at the police station. The advice given in the Judicial College Crown Court Compendium, July 2020 edition, is:

> "If the judge has decided that no adverse conclusion should be drawn from D's failure to mention a fact/s the jury must specifically be directed that they must not hold the fact that, when D was questioned, D did not mention the fact/s against him/her."

108. In *R v Thomas* [2002] EWCA Crim 1308 (at paras 9 to 17) and *R v Jama* [2008] EWCA Crim 2861 (at paras 14 and 15), this court suggested that the trial judge has a discretion not to give the direction along the lines recommended above. We agree that in a situation where the statute does not require a particular course, the Judicial College's strong guidance cannot be regarded as being free from exceptions.

109. Mr Moloney submitted that this was not a case where the discretionary decision not to give the recommended direction could be justified. He pointed out that the appellants were cross-examined on the contents of their police interviews and their failure to mention matters, and that such questioning was not wholly directed to the defences of justification. He observed that the police interviews were not limited to the three summary-only offences with which the appellants were originally charged. Finally, he submitted that, given that the prepared statements dealt almost exclusively with the defences of necessity and prevention of crime, there was a risk of confusion in the minds of the jury regarding the police interviews.

110. In our judgment, the risks identified by Mr Moloney were minimal. Further, and as Mr McGhee pointed out, in the particular circumstances of this case there would have been a greater risk of confusion had the jury been told in terms not to draw any adverse inference from refusal to answer questions at interview. The prepared statements covered issues which the judge had expressly withdrawn from the jury's consideration. They did not cover the issue that the judge had directed the jury as being the real question in the case, namely whether there was endangerment to the safety of the aerodrome. In our judgment, the absence of any specific warning to the jury not to draw an adverse inference from the failure to answer police questions at interview would not have assisted and created no unfairness to the appellants. Ground 5 fails.

Grounds 2 and 4

111. We have concluded that the use of section 1(2)(b) of the 1990 Act was inapt in the circumstances of what occurred at Stansted Airport on 28 March 2017. It does not follow that the consent of the Attorney General was unlawfully given. From time-to-time prosecutors make errors of law and so too, with utmost respect, do Law Officers. The trial and appeal process provide the appropriate mechanism to deal with such points. We are unpersuaded that there is any arguable basis for impugning the decision of the Attorney General to sanction the prosecution. This case, on a renewed application, is not the place to explore the extent to which an attorney's consent may be challenged, something which has not successfully been achieved hitherto.

112. We have read the summing up in its entirety and also had the benefit of a very large volume of other material concerning this trial. Like the single judge, we do not think that there is substance in the complaint that the summing up was unfair. We would add that this was an extraordinarily difficult trial bristling with complex legal argument. Whilst we have disagreed with the judge on the interpretation of section 1(2)(b), finding the Crown's contentions on its reach unpersuasive, we commend the judge on the way he handled the trial.

Conclusion

113. The appellants should not have been prosecuted for the extremely serious offence under section 1(2)(b) of the 1990 Act because their conduct did not satisfy the various elements of the offence. There was, in truth, no case to answer. We recognise that the various summary only offences with which the appellants were originally charged, if proved, might well not reflect the gravity of their actions. That, however, does not allow the use of an offence which aims at conduct of a different nature.

114. These appeals succeed on the first ground and all the appellants' convictions must be quashed.