Michaelmas Term
[2021] UKSC 58
On appeal from: [2021] UKSC 15

JUDGMENT

Her Majesty's Attorney General (Respondent) *v* Crosland (Appellant)

before

Lord Briggs
Lady Arden
Lord Kitchin
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
20 December 2021

Heard on 18 October 2021

Appellant
Tim Crosland
(Instructed - in person)

Respondent
Aidan Eardley
(Instructed by The Government Legal Department)

LORD BRIGGS, LORD KITCHIN, LORD BURROWS AND LADY ROSE:

1. Introduction

1. Mr Timothy Crosland appeals against the order of the Supreme Court dated 10 May 2021 in which he was ordered to pay a fine of £5,000 to HM Paymaster General for contempt of court and ordered, further, to pay the Attorney General's costs of the committal application in the sum of £15,000. The order recited in its preamble that the court was satisfied that, by disclosing the outcome of the court's judgment in *R (on the application of Friends of the Earth) v Heathrow Airport Ltd* on 15 December 2020, while the judgment was still in draft and subject to embargo, knowing that such disclosure was prohibited by the court, Mr Crosland committed contempt of court. That order gave effect to two judgments of the court, both of which Mr Crosland challenges in this appeal. We refer to the panel of Supreme Court Justices who delivered those judgments (Lords Lloyd-Jones, Hamblen and Stephens JJSC) as the "First Instance Panel". The first judgment was delivered on 10 May 2021 setting out the First Instance Panel's decision on liability and penalty: [2021] UKSC 15; [2021] 4 WLR 103 ("the Contempt Judgment") and the second, delivered on 14 June 2021, determined the issues as to costs ("the Costs Judgment").

2. The events leading up to the order under appeal are described in detail in the Contempt Judgment so only a summary is needed here. Mr Crosland, who is an unregistered barrister, had been involved in the proceedings giving rise to the judgment which he disclosed on 15 December 2020 ("the *Heathrow* judgment") because the charity of which he is a director, Plan B Earth, had been the second respondent in the case of *R (Friends of the Earth Ltd) v Heathrow Airport Ltd*. That case concerned the lawfulness of the Airports National Policy Statement, published by the Secretary of State for Transport on 5 June 2018 and designated as national policy under the Planning Act 2008 on 26 June 2018 ("the ANPS"). The challenges to the lawfulness of the ANPS focused largely on whether the Secretary of State had failed to have proper regard to the Paris Agreement or to explain how the ANPS was compatible with the United Kingdom's emissions targets. The Paris Agreement was adopted by the parties to the United Nations Framework Convention on Climate Change in December 2015 and ratified by the United Kingdom on 17 November 2016.

3. The hearing of the appeal to the Supreme Court in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* took place on 7 and 8 October 2020. On 9 December 2020, a copy of the court's draft of the *Heathrow* judgment was circulated to the parties' representatives in accordance with paras 6.8.3 to 6.8.5 of the court's Practice Direction 6. In the draft judgment, the court held that the ANPS was not unlawful and allowed the appeal against the contrary conclusion of the Court of Appeal. There is no doubt

that Mr Crosland was well aware, when he received the draft *Heathrow* judgment, that he was bound not to disclose the result of the appeal or the contents of the draft to anyone before the hand down, which he knew was fixed for the morning of 16 December 2021.

4. When Mr Crosland read through the draft, he formed the view that there were some inaccuracies in it. In particular, he believed and still believes that the ANPS is misleading because the policy on the third runway at Heathrow was presented by the then Secretary of State for Transport as being compatible with the United Kingdom's international obligations on climate change. Such a reassurance by the Secretary of State implies, Mr Crosland asserts, that the ANPS has been assessed against the Paris Agreement obligation to bring carbon emissions to net zero by 2050. Mr Crosland believes further that this reassurance is also misleading because the policy was assessed in June 2018 only against an earlier, discredited goal of limiting temperature rises to 2^0C contained in the Climate Change Act 2008, and was not assessed against the more challenging target set by the Paris Agreement. Mr Crosland thought on reading the draft *Heathrow* judgment that it perpetuated this misleading presentation by failing to highlight the fact, as he sees it, that the Secretary of State had failed to take the Paris Agreement target into account when assessing the Heathrow expansion plan. On the contrary, Mr Crosland complains, the court stated that on a correct understanding of the ANPS and the Secretary of State's evidence, which the court had analysed in the preceding paragraphs, the Secretary of State had taken the Paris Agreement into account in the limited way the court there described. The question was, the court said, whether the Secretary of State had acted irrationally in omitting to take the Paris Agreement further into account, or to give greater weight to it, than in fact he did: see para 125 of the *Heathrow* judgment.

5. Mr Crosland entirely properly drew to the attention of the court the point that he wanted to make in the comments that he sent to the court in response to the draft. He was told that the draft judgment would be amended to acknowledge the argument he had advanced but that there would be no substantive change to the text. On the morning of 15 December 2020, Mr Crosland sent an email to the Press Association and possibly to other media organisations in which he disclosed the outcome of the *Heathrow* appeal and described what he saw as the inaccuracies in the *Heathrow* judgment. He issued a statement to similar effect on Plan B Earth's Twitter account. The Supreme Court's Communications Team sought to prevent the further dissemination of the embargo breach but with limited success. The court asked Mr Crosland to remove the statement he had shared on Twitter until 9:45 the next morning when the *Heathrow* judgment would be handed down. Mr Crosland did not respond and did not delete his tweet. It was re-tweeted at least 406 times by other Twitter users, including Extinction Rebellion UK, which had 55,600 followers at that time. The *Heathrow* judgment was handed down by the Supreme Court at 9:45 am on 16 December 2020: [2020] UKSC 52; [2020] PTSR 190.

6. At the hearing of this appeal, as at the hearing of the committal application, Mr Crosland was candid as to the motivation for his conduct on 15 December and thereafter. He accepted that he would have been free to make whatever comments or criticisms he wished of the *Heathrow* judgment if he had waited till 9:45 am the following day. But, in his view, that would not have generated the same level of publicity for his complaints about the judgment as he was able to generate by breaching the embargo and presenting himself to the media as someone who was prepared to take a serious personal risk by so doing because he felt so strongly about the point he was making. His assessment was that if he waited to make his criticisms until the *Heathrow* judgment was available to be scrutinised by everyone, his points would be lost in the general coverage of the judgment and then the rolling 24 hour news cycle would swiftly roll on to other matters. By breaching the embargo, he made something unusual happen and that, he calculated, gave him a better chance of bringing his points to the public's attention. He therefore decided that breaching the embargo presented his best chance "of sounding the alarm loudly".

7. On 17 December 2020, the Registrar of the Supreme Court, wrote to the Attorney General's office setting out what had happened, including the detail of the email exchanges between Mr Crosland and the court between 9 and 15 December. The letter closed:

> "15. In the light of these events, Lord Reed has decided that the court should refer the matter to the Attorney General so that she can consider whether proceedings should be taken against Mr Crosland for contempt of court. Lord Reed also intends to make a complaint about Mr Crosland's conduct to the Bar Standards Board, so that it can consider whether disciplinary action should be taken."

8. On 10 February 2021, after some correspondence between Mr Crosland and the Government Legal Department acting on behalf of the Attorney, the Attorney General issued an application for the committal of Mr Crosland for his alleged contempt of court. The Attorney's application stated that by disclosing the outcome of the appeal to the public, knowing that such was prohibited by the court, Mr Crosland interfered with, or created a real risk of interference with, the administration of justice and thereby committed contempt of court. The application was supported by an affidavit from a legal advisor to the Attorney. He described the Attorney's decision to bring proceedings as follows:

> "20. The applicant has considered carefully whether it is in the public interest to bring these proceedings and has

> concluded that they are necessary to uphold the due administration of justice. In particular, the applicant has taken into account the powerful public interest in the courts being able to circulate draft judgments confidentially among the parties prior to being handed down in complex and important cases, so that typographical mistakes and other errors can be addressed and the parties can prepare themselves for the consequences of them becoming public. Indeed, it is of such significance that the applicant had cause to issue a media advisory notice in October 2020 drawing attention to the importance of observing this confidentiality. The applicant has also had regard to the deliberate nature of the respondent's actions, the very extensive publication which flowed from them, and the respondent's unapologetic stance thereafter."

9. In mid-March 2021, Mr Crosland was in touch with the Supreme Court Registry with regard to the hearing of the Attorney's committal application. The hearing before the First Instance Panel had been fixed for 10 May 2021 to take place at the Royal Courts of Justice (rather than at the premises of the Supreme Court) because arrangements could be made there to take Mr Crosland into custody if the court imposed a custodial sentence. Mr Crosland asked the Registrar whether the proceedings would be open to the public, both in terms of people being able to attend court in person and as to whether the hearing would be live streamed, as he wished it to be. He also asked about the order of speeches, proposing that the sequence should follow that of a criminal trial where the defendant has the last word. The Registrar responded on 26 March 2021 saying as regards live streaming that "criminal trials are not live streamed and the Justices have decided that this practice should be followed in this case. The criteria of a public hearing are met without live streaming". She confirmed that the speeches at the hearing would be in the sequence Mr Crosland had outlined.

10. Mr Crosland then made an application to the court for the proceedings to be live streamed and for him to be able to record the proceedings. That application was refused by order dated 19 April 2021. That order recorded that the hearing would take place in Court 4 which is the Lord Chief Justice's Court and the largest court in the Royal Courts of Justice. Further, there would be a live audio-visual relay of the proceedings to Court 6.

11. On 7 May 2021, the Registrar wrote to Mr Crosland setting out the timetable for the hearing on 10 May 2021. Mr Crosland objected that this allowed him insufficient time to present his case and that it would require him, at short notice, to reconfigure

his submissions to fit in a shorter time slot than he had been expecting to be allotted. The court responded that given the extensive written submissions from both parties, the timetable provided sufficient time.

12. At the hearing before the First Instance Panel on 10 May, Mr Eardley opened the case on behalf of the Attorney. Mr Crosland responded by explaining in detail that his view was that evidence that the Heathrow expansion would breach the Paris Agreement temperature limit of an increase of 1.5^{0}C was being deliberately suppressed. He submitted that "the antidote to that suppression was the spotlight of publicity that would follow from breaking the embargo". During the course of the hearing, Mr Crosland was very clear that he had taken the deliberate decision to breach the embargo, recognising that this was likely to be regarded as a contempt of court. Mr Crosland then gave evidence before the First Instance Panel about his professional background and reiterated his views about the conduct of the then Secretary of State. He was cross-examined by Mr Eardley, who raised with him his assertion that his conduct had achieved his objective of garnering more publicity for his views than would any comments made after hand down. Mr Crosland had relied in support of this assertion on a letter sent by a large number of leading scientists, economists and others to the court on 30 March 2021 ("the Scientists' Letter"). This letter referred in strong terms to the consequences of the United Kingdom failing to ensure respect for the entirety of the Paris Agreement and expressed disappointment at the court's conclusion that there was no requirement on the Government to take the Paris goals into account. The Scientists' Letter says "We understand why Tim Crosland of Plan B. Earth felt it necessary to raise the alarm about the goals of the Paris Agreement being ignored by the British courts". The Scientists' Letter describes the catastrophic consequences of climate change and urges the court "to consider the actions of Tim Crosland in this light". Mr Crosland asserted that the Scientists' Letter would not have been written if he had waited until the judgment was handed down before making his criticisms of it.

13. Mr Eardley made further submissions and Mr Crosland then made his closing submissions, taking the First Instance Panel through the relevant authorities. Mr Crosland's submissions continued for about half an hour after the lunchtime adjournment. After a break of about six minutes, the First Instance Panel resumed and Lord Lloyd-Jones announced that they were satisfied to the criminal standard that Mr Crosland had committed a criminal contempt of court. He said that the court would give its reasons shortly but would hear the parties on the question of penalty after a further short break to allow everyone to gather their thoughts. Both parties then made submissions as to penalty. Lord Lloyd-Jones asked Mr Crosland if he wanted to tell the court anything about his financial position and Mr Crosland gave some brief details of his very limited income. After a further short break, the Contempt Judgment was delivered orally, dealing with both liability and imposing the penalty of £5,000.

14. Mr Eardley then asked for an order that Mr Crosland pay the Attorney General's costs of the proceedings. In his response on costs, Mr Crosland addressed the fact that Mr Eardley had referred during the course of his submissions to the issue of a media advisory notice in October 2020. This notice was a response to an earlier breach of the draft judgment embargo that occurred in July 2020 when a newspaper obtained an advance copy of the judgment of the Court of Appeal in *Begum v Special Immigration Appeals Commission* [2020] EWCA Civ 918; [2020] 1 WLR 4267. The media reports at the time indicated that the breach of the embargo may have been committed by someone within the Government. The press release issued by the then Solicitor General in October 2020 drew attention to the legal requirements not to publish, disseminate or retain material that has been obtained from embargoed court judgments. Mr Crosland submitted that this constituted a compelling reason not to make an order for costs.

15. Lord Lloyd-Jones announced that the court would make an order that Mr Crosland pay the costs of the application to be assessed if not agreed. At that point Mr Crosland made an application for an appeal. Mr Crosland submitted that there was an automatic right of appeal from a contempt of court hearing so that no permission was required but that it was not clear what the process was. Mr Eardley stated briefly that there was no right to appeal, certainly no statutory right to appeal. He referred to section 13 of the Administration of Justice Act 1960 which he said concerns appeals to the Supreme Court not from the Supreme Court. The provision was briefly considered by the First Instance Panel and we discuss it in more detail below since it is key to the question of jurisdiction raised by this appeal. Lord Lloyd-Jones said that it appeared to the court that there was a right of appeal from their decision to a panel of justices, none of whom had sat on the *Heathrow* case or on the contempt proceedings and that insofar as there may be a requirement of permission, the court granted permission. That brought the hearing on 10 May 2021 to a close.

16. The Attorney later circulated a draft order. The draft included a provision that the costs would be assessed in accordance with rules 48-52 of the Supreme Court Rules 2009, if not agreed. Mr Crosland responded by email, referring to the Practice Direction (Costs in Criminal Proceedings) 2015 (as amended) [2016] EWCA Crim 98 and stating that any order for costs inconsistent with its terms would be unlawful.

17. On 13 May 2021, the Supreme Court Registry issued directions for dealing with costs, directing the Attorney to provide his draft bill of costs and to respond to Mr Crosland's points on costs by 21 May 2021. Mr Crosland was given a further week to make submissions on costs in reply. The Attorney's bill of costs was for £22,504. Mr Crosland provided his submissions on 25 May 2021. His written submissions, at the top of which was a hyperlink to his Crowdfunder page seeking donations towards his £5,000 fine, focused on what he described as the court's "unequivocal

communication" to him that the case would be dealt with as a criminal case and not as a civil case. As to his means, Mr Crosland described himself as a full-time volunteer dependent on financial support from others. He said that he did not have the means to pay costs of that amount or anything like it. He included with his costs submissions an Annexe, which he said was confidential, containing some further information about his financial position.

18. On 23 June 2021 the First Instance Panel informed the parties that a costs judgment would be added at the end of the Contempt Judgment and circulated a copy of the finalised Costs Judgment which was then put on the Supreme Court's website. Mr Crosland objected to the inclusion of a reference to material in the confidential annexe and the text was amended in response. The Costs Judgment, as we have said, ordered Mr Crosland to pay £15,000 towards the Attorney's costs of the committal application.

2. <u>The Contempt Judgment</u>

19. The Contempt Judgment opens with a statement which applies equally to this judgment. The court is not concerned with the substance of the *Heathrow* judgment. The *Heathrow* judgment is, like all judgments of all courts across the country, now subject to scrutiny, comment and criticism by anyone who reads it and everyone is free to express their views on the merits of the decision. The Contempt Judgment sets out the terms of the embargo that had applied to the draft *Heathrow* judgment and the relevant Practice Direction concerning the confidentiality of draft judgments circulated to the parties. It describes the events of 9-15 December 2020, noting that there was no substantial disagreement between the parties as to the primary facts. From paras 17 onwards, the First Instance Panel set out the facts they had found proved to the criminal standard, namely that Mr Crosland was responsible for the disclosures, that he was aware of the embargo when he made the disclosures and that his actions were deliberate and calculated breaches of the embargo.

20. The First Instance Panel went on to consider whether Mr Crosland's conduct was, or created a risk of, an interference with the administration of justice that was sufficiently serious to amount to a criminal contempt. They found that it was and that it passed the threshold of seriousness. It was not necessary for the Attorney to prove an ulterior intention to interfere with the administration of justice but:

> "28. … we are also satisfied to the criminal standard that in publishing the judgment in breach of the embargo the respondent did have a specific intention to interfere with the administration of justice. Such an intention may be readily

> inferred here. The respondent is a barrister who would have been well aware of the purpose of the condition of confidentiality attaching to draft judgments and the significance of its breach. He knew that the prohibition on publication was intended to serve the interests of justice. Nevertheless, as he stated in his personal statement, he took the deliberate decision to break the embargo as an act of civil disobedience, knowing that it would be likely to be treated as a contempt of court. He wanted to demonstrate his deliberate defiance of the prohibition and to bring this to the attention of as large an audience as possible."

21. The First Instance Panel then turned to Mr Crosland's submissions. The judgment records that Mr Crosland considered that his actions were lawful and that the court should have regard to his intentions, beliefs and motivations in disclosing the result of the appeal. His breach of the embargo was, he submitted, a reasonable and proportionate measure to prevent harm to the public as a result of the catastrophe which would be caused by global warming. The judgment records that the First Instance Panel had read the material that Mr Crosland placed before it relating to what he sees as the erroneous approach of the Supreme Court and the consequences to which it will lead. The First Instance Panel stated at para 30:

> "In our view, these matters do not assist the respondent in relation to the issue whether there has been a contempt of court."

22. They first rejected Mr Crosland's submission that the Attorney had to prove there had been a breach of confidence because Mr Crosland had been given a direction by the court and he was bound to obey it. Secondly, the obligation not to disclose the result of the appeal was prescribed by law for the purposes of article 10(2) of the European Convention on Human Rights ("ECHR"). The judgment went on:

> "33. Thirdly, the respondent submits that he cannot have had the requisite *mens rea* to be in contempt of court because he was acting for the purpose of preventing serious harm to the public. There is, however, no defence available to the respondent arising out of his concerns or fears as to the consequences of the Supreme Court's decision. There is here no defence of public interest. There is no such thing as a justifiable contempt of court; see *Attorney General v Times Newspapers Ltd* [1974] AC 273, 302 per Lord Morris of Borth-

> y-Gest. The respondent was bound to observe the confidentiality attaching to the Supreme Court decision irrespective of any such belief. In particular, it is clear on the authorities that a person may have an intention to interfere with the administration of justice even if he or she acts with the motive of securing what he or she considers to be a just outcome overall; see *Connolly v Dale* [1996] QB 120; *Attorney General's Reference No 1 of 2002* [2002] EWCA Crim 2392.
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> 34. It was, in any event, not necessary for the respondent to disclose the result of the appeal in breach of the embargo, in order to permit or facilitate public scrutiny or criticism of the judgment which was to be handed down the following day. Once the judgment had been handed down, the parties, the media and the public were all free to scrutinise the judgment and to comment on it. On any view, the respondent's conduct in disclosing the outcome of the appeal cannot reasonably be considered, as he suggests, 'reasonable and proportionate action to prevent mass loss of life'."

23. The Contempt Judgment rejected Mr Crosland's other defences, including his reliance on article 2 ECHR and on the criminal defence of necessity or duress of circumstances.

24. The First Instance Panel then considered the application of article 10 ECHR. They recognised at para 41 that the prohibition on the publication of the *Heathrow* judgment prior to hand down did amount to a restriction on the disclosure of information, albeit only for a limited period. The restriction was necessary, they held, in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result.

25. Turning to penalty, the First Instance Panel, as we have said, imposed a fine of £5,000. As Mr Crosland has not challenged that fine in this appeal we need say nothing further about the court's reasoning beyond this: the court said that in imposing the penalty it was mindful of article 10 and had had regard to the extent of the interference with article 10 rights and the likely deterrent effect on the future exercise of those rights: para 50.

3. The Costs Judgment

26. The First Instance Panel decided that Mr Crosland's reliance on the Criminal Costs PD was misplaced because it had no application to proceedings in the Supreme Court. They recognised that the Supreme Court Rules (SI 2009/1603) do not apply directly to these proceedings but held that those Rules can be used to guide the court's use of its powers to control its own procedures and processes: para 7. Rule 46 confers on the court a discretion to make such orders as to costs as it considers just and provides that costs on the standard basis are allowed only if they are proportionate to the matters in issue and are reasonably incurred and reasonable in amount. The First Instance Panel stated that when a respondent is found to be in contempt of court there will usually be no principled basis for opposing a costs order so that the sole question is whether the costs incurred are reasonable and proportionate. In assessing that, the court may take into account the respondent's means and the relationship between the value of any costs order and the level of any fine imposed. They noted expressly at para 12 that, as Mr Crosland's rights under article 10 were engaged, the combination of any penal measure and any costs order must be a proportionate interference with such rights.

27. Applying those principles to the present case, the key issue was whether the amount of £22,504 was reasonable and proportionate. So far as Mr Crosland's means were concerned, the First Instance Panel described three occasions on which Mr Crosland had been invited to provide information about his financial position and set out the limited material that he had provided to the court. Having regard to all the factors mentioned, the court held that it was fair and reasonable to order Mr Crosland to pay £15,000 towards the Attorney's costs.

4. Mr Crosland's appeal

28. On 16 July 2021, Mr Crosland filed a notice of appeal raising four grounds of appeal which we summarise below. The Attorney filed a notice of objection. The Attorney did not indicate on the form that he was asking the Court either to give him permission to cross-appeal or to allow the appeal for reasons which were different from, or additional to, those given by the First Instance Panel. However, in a document attached to the notice of objection, the Attorney invited the court "to revisit the question whether an appeal lies from its decision of 10 May 2021." The Attorney stated that the point was not fully argued at the hearing and submitted that, properly construed, section 13 of the Administration of Justice Act 1960 did not create a right of appeal from a decision of the Supreme Court. This challenge to the existence of a right of appeal was not referred to in Mr Crosland's written case lodged with the court on 14 September 2021 but the Attorney's written case, filed a week later on 21

September raised as a preliminary issue whether the court has jurisdiction to entertain this appeal.

29. Mr Crosland's grounds of appeal can be summarised as follows:

(i) **Ground 1**: the First Instance Panel erred in its approach to considering the relevance of Mr Crosland's beliefs and motivations namely whether his breach of the embargo was a proportionate response to the suppression of evidence about the dangers of the Heathrow expansion. The approach set out in the Contempt Judgment was inconsistent with the Supreme Court's subsequent analysis of article 10 rights in the context of acts of civil disobedience in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 ("*Ziegler*"). The judgment in *Ziegler* was handed down on 25 June 2021, after the Contempt Judgment.

(ii) **Ground 2**: The First Instance Panel failed to mention and therefore wrongly disregarded the Scientists' Letter as demonstrating, amongst other things, the efficacy of Mr Crosland's tactic of breaching the embargo.

(iii) **Ground 3**: the First Instance Panel was not an impartial tribunal, contrary to article 6 ECHR.

(iv) **Ground 4**: the Attorney had breached her obligations under article 6 ECHR by failing to disclose the details of the breach of the embargo in relation to the *Begum* judgment in July 2020.

(v) **Ground 5**: the First Instance Panel's ruling on costs was oppressive and unjust, in particular by failing to apply the principles applicable to criminal proceedings and by failing to have regard to his modest disposable income.

5. The court's jurisdiction to hear Mr Crosland's appeal

30. This section addresses the question, raised by the Attorney General in response to Mr Crosland's appeal, whether a panel of justices of the Supreme Court has jurisdiction to hear an appeal against an order made by another panel of justices of the Supreme Court in exercise of this court's jurisdiction to punish for contempt of court.

31. Mr Crosland seeks to appeal against the order, on the basis that he had not been in contempt at all, and against the order for costs. Permission to appeal was granted by the same panel which heard the contempt application, and it was listed to be heard before a panel of five justices, none of whom had been involved either in the proceedings in which the embargo had been breached, or in the contempt application. The hearing was for reasons of economy and good case management conducted on the basis that the panel would hear argument both on jurisdiction and on the merits of the appeal at the same time, without first deciding the question of jurisdiction. The court did not treat the grant of permission to appeal as decisive of the question of jurisdiction, since that question was only considered briefly, and without full argument, by the panel which gave permission. While we acknowledge Mr Crosland's point that the Attorney General did not make a challenge to the court's jurisdiction the subject of a cross-appeal or any other formal step we consider that the point has been sufficiently clearly raised for it to be incumbent upon us to deal with it on its merits.

32. The ordinary work of the Supreme Court is of course to act in an appellate capacity, as the final court of appeal from which there is no further appeal of any kind. There is no higher court by which a further appeal could be heard. In sharp contrast, its jurisdiction to punish for contempt is that of a first instance court. It is not in exercising that jurisdiction acting in an appellate capacity at all, even though the matters said to constitute the contempt will almost always have arisen in the course of appellate proceedings. That gives rise to two opposed questions of principle. First, how can there be an appeal from a decision of the Supreme Court? But secondly, how can there not be an appeal from the exercise at first instance of a contempt jurisdiction, which extends to the imposition of an unlimited fine and, more seriously, a sentence of imprisonment?

33. If there were no right of appeal from the decision on contempt of the First Instance Panel, that would represent a serious lacuna in the law. That is because it is well-accepted that there ought to be a right of appeal by the defendant in a contempt matter that may result in imprisonment or a fine. This was expressed in very strong terms by the 1959 Report entitled *Contempt of Court* by *Justice* (chaired by Lord Shawcross). The *Justice* Report preceded section 13 of the Administration of Justice Act 1960 and said, at p 35:

> "At present there is no right of appeal against any decision or punishment for any criminal contempt whether it is committed in the presence of the court or out of court. As no human being is infallible, and as any sentence of imprisonment involves a basic question of civil liberty, it is not surprising to find that in every system of law of any civilised State there is always a right of appeal against any

> sentence of imprisonment. For contempt of court alone can an Englishman be sent to prison by a court from whose decision there is no appeal. … Even in enemy-occupied territory in time of war, there must, under the Hague Convention, always be some right of appeal or petition against any sentence of imprisonment …"

34. It follows that, although it may be that article 6 ECHR does not dictate that there is a right of appeal, we consider that, if at all possible within the bounds of ordinary statutory interpretation, we should strive to interpret the relevant statutory words of section 13 of the Administration of Justice Act as affording a right of appeal from a panel of the Supreme Court when it is exercising its contempt jurisdiction at first instance.

35. Mr Eardley submits that the Supreme Court has inherited the previously inherent jurisdiction of the Judicial Committee of the House of Lords to revisit and if necessary vary or rescind decisions of the court which are alleged to have been vitiated by unfair procedural error, as exemplified by *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, and described by Lord Browne-Wilkinson at p 132D-F. But he emphasised, and we agree with him, that this exceptional power to revisit or review is not an appeal. It is limited to serious procedural error (in that case apparent bias) and admits no challenge to findings of law or fact, or the egregious exercise of discretion. It would have accommodated only one or possibly two of Mr Crosland's grounds of appeal.

36. In her judgment Lady Arden considers that the inherent jurisdiction extends to putting right any kind of unfairness, but we respectfully read Lord Browne-Wilkinson's words (which she quotes) as being expressly limited to cases of unfair procedure. Furthermore, we do not consider that Lady Arden's condition that the unfairness alleged should be "particularly serious" would offer any protection against a flood of applications by unsuccessful litigants in the Supreme Court, aggrieved by their perception that the outcome had, for an unlimited range of reasons, been seriously unfair.

37. In our view any jurisdiction to hear an appeal from a decision of the Supreme Court in exercise of its undoubted jurisdiction to punish for contempt must be found, if at all, in primary legislation. Unlike its predecessor the Supreme Court is itself a creature of statute. Now is not the occasion for an examination of the extent of its inherent jurisdiction. It is sufficient to say that nothing has been found to suggest that the House of Lords had an inherent jurisdiction to hear an appeal of this kind which the

Supreme Court could have inherited, and wider than the *Pinochet* jurisdiction to deal with procedural error, as described by Lord Browne-Wilkinson.

38. Attention has therefore focussed on section 13 of the Administration of Justice Act 1960 ("section 13"), which is the only piece of primary legislation which appears capable of bearing upon the issue. In our view, it is the interpretation of this section that is crucial to determining the issue. It provides, so far as is relevant, as follows:

> "**13. Appeal in cases of contempt of court**
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> (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.
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> (2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie -
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>> (a) from an order or decision of any inferior court not referred to in the next following paragraph, to the High Court;
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>> (b) from an order or decision of the county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal;
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>> (bb) from an order or decision of the Crown Court to the Court of Appeal;

(c) from a decision of a single judge of the High Court on an appeal under this section, from an order or decision of a Divisional Court or the Court of Appeal (including a decision of either of those courts on an appeal under this section), and from an order or decision (except one made in Scotland or Northern Ireland) of the Court Martial Appeal Court to the Supreme Court.

(2A) Paragraphs (a) to (c) of subsection (2) of this section do not apply in relation to appeals under this section from an order or decision of the family court, but (subject to any provision made under section 56 of the Access of Justice Act 1999 or by or under any other enactment) such an appeal shall lie to the Court of Appeal.

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section, provision may be made by rules of court rules made under section seven of the Northern Ireland Act 1962 for authorising the release on bail of an appellant under this section.

(4) Subsections (2) to (4) of section one and section two of this Act shall apply to an appeal to the Supreme Court under this section as they apply to an appeal to the Supreme Court under the said section one, except that so much of the said subsection (2) as restricts the grant of leave to appeal shall apply only where the decision of the court below is a decision on appeal to that court under this section.

(5) In this section '*court'* includes any tribunal or person having power to punish for contempt; and references in this section to an order or decision of a court in the exercise of jurisdiction to punish for contempt of court include references -

(a) to an order or decision of the High Court, the family court, the Crown Court or the county court

under any enactment enabling that court to deal with an offence as if it were contempt of court;

(b) to an order or decision of the county court, or of any court having the powers of the county court, under section 14, 92 or 118 of the County Courts Act 1984;

(c) to an order or decision of a magistrates' court under subsection (3) of section 63 of the Magistrates' Courts Act 1980;

(d) to an order or decision (except one made in Scotland or Northern Ireland) of the Court Martial, the Summary Appeal Court or the Service Civilian Court under section 309 of the Armed Forces Act 2006,

but do not include references to orders under section five of the Debtors Act 1869, or under any provision of the Magistrates' Courts Act 1980, or the County Courts Act 1984, except those referred to in paragraphs (b) and (c) of this subsection and except sections 38 and 142 of the last mentioned Act so far as those sections confer jurisdiction in respect of contempt of court.

(6) This section does not apply to a conviction or sentence in respect of which an appeal lies under Part I of the Criminal Appeal Act 1968, or to a decision of the criminal division of the Court of Appeal under that Part of that Act."

39. Notwithstanding its origin more than 60 years ago, it is evident from the numerous references to more recently created courts, including the Supreme Court, that this provision for appeal from orders exercising the contempt jurisdiction has been kept constantly up to date by Parliament, so that it may reliably be construed in a modern context, free from the difficulties which frequently attend the need to interpret legislation on an "always speaking" basis.

40. That context includes the fact that the Supreme Court, like the House of Lords, has its own original jurisdiction to punish for contempt. In *In re Lonrho Plc* [1990] 2 AC

154 it was held that the House of Lords was the normal and natural, and indeed only, forum for the hearing of contempt relating to proceedings before the House. Rule 9(2)(a) of the Supreme Court Rules 2009 (SI 2009/1603) makes express provision for the exercise of the same jurisdiction by a panel of justices of the Supreme Court, at an oral hearing.

41. Section 13(1), read on its own, provides in apparently clear express terms for there to be an appeal from any order or decision of a court in the exercise of its contempt jurisdiction. "Court" in section 13(1) includes any tribunal or person having power to punish for contempt, subject to minor and irrelevant exceptions: see section 13(5). The Supreme Court clearly falls within that non-exclusive definition of "court". So at first sight "court" in section 13(1) means any court, including the Supreme Court.

42. But section 13(1) begins with the phrase "subject to the provisions of this section". Thus it is possible that the provisions of subsections (2) to (6) may cut down the generality of the express right of appeal conferred by subsection (1). The Attorney General submits that, taken as a whole, section 13 does contain a limitation of the generality of that right of appeal, so as to exclude any appeal from an order or decision of the Supreme Court in the exercise of its original contempt jurisdiction. Mr Eardley points first to the complete absence of any prescribed route of appeal from the Supreme Court, in an otherwise comprehensive list of such routes, and to the assumption implicit in section 13(3) that an appeal will always be from the "court below" to a higher court. He points to the express inclusion of the Supreme Court as a court to which an appeal shall lie: see subsection (2)(c), but not from which an appeal shall lie. All in all, he submits that section 13 contains a complete statutory code for appeals from the exercise of the contempt jurisdiction, which therefore excludes appeals from the Supreme Court by its silence. He adds that the very concept of an appeal from the Supreme Court to a higher court is a conceptual impossibility, and that article 6 ECHR does not require that there always be an appeal from every decision of a court.

43. These are cogent submissions, but we have not been persuaded by them. The starting point, having regard to what we said in para 34 above, is the apparent generality of the express right of appeal conferred by section 13(1) and the undoubted inclusion of the Supreme Court within the phrase "order or decision of a court" because of the very broad definition of "court" in subsection (5). Bearing in mind the potentially draconian consequences of such an order or decision, we would expect to see an express exclusion of orders and decisions of the Supreme Court, if an appeal against them were to be excluded, of the type to be found for example at the end of subsection (5) and in subsection (6) in relation to orders made under certain specified statutes. In that context silence, in the absence of any exclusionary reference to the Supreme Court, points towards rather than away from, the existence of a right of

appeal from orders or decisions of the Supreme Court made in the exercise of its undoubted original contempt jurisdiction. In short, the signpost to a possible exclusion implicit in the phrase "subject to the provisions of this section" simply leads nowhere, because no relevant exclusion is expressly provided for.

44. On close examination most of the provisions of the subsections which follow section 13(1), to which it is subject, are not all or even mainly about cutting down the courts or types of order or decision which give rise to a right of appeal at all. They include provisions about who may appeal, in subsection (2), and there couched in broad inclusionary terms which always include the defendant. They are about procedural routes of appeal, again in subsection (2), about the orders which the appellate court may make, in subsection (3), and about the limited circumstances in which leave may be required, in subsection (4). Subsections (5) and (6) do exclude certain types of order from giving rise to a right of appeal under section 13, but do so in express and clearly demarcated terms. The Attorney General did not submit that even those subsections meant that the orders with which they were concerned were not subject to any kind of review on the merits, under other statutory provisions. The point of this analysis is that the phrase "subject to the provisions of this section" in section 13(1) is not to be construed as meaning that the rest of section 13 is all about limiting the right of appeal, so that some implied limitation might be derived from silence about the existence of a right of appeal from orders or decisions of the Supreme Court exercising its original contempt jurisdiction. It follows that there is no relevant cutting back of the express conferral in section 13(1) of a right of appeal. The essential words are: "an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt) …".

45. There remains the argument based upon conceptual impossibility. It is said that an appeal is by its very nature something which lies from the decision of a lower court to a higher court, and that there is no higher court than the Supreme Court. Lady Arden favours this view. It assumes that the order or decision in issue is an order or decision in this case of the Supreme Court, and that an appeal would have to lie to the Supreme Court. While acknowledging the immediate force and simplicity of this argument, we respectfully disagree with it.

46. The starting point is that (as prescribed by rule 9 of the Supreme Court Rules) the original contempt jurisdiction of the Supreme Court is in every case exercised by a panel of the justices. In the present case it was exercised by a panel of three. In the context of the exercise of an original rather than appellate jurisdiction, we do not consider it to be a conceptual impossibility that there can be an appeal from one organ of the Supreme Court to another. It is no objection to the constitution of an appellate panel that it includes one or more judges of equivalent seniority to the judge from

whose decision the appeal is made. This regularly occurs in both the Criminal and Civil Divisions of the Court of Appeal and may, in accordance with the Constitutional Reform Act 2005, occur in the Supreme Court: see section 38(1), (4) and (8)(a) of that Act. Further, it is a very common feature of appeals in the UK generally that the appellate court consists of a larger panel than the court appealed from. It not infrequently happens that a party to an appeal to the Supreme Court wishes the court to depart from an earlier decision of the Supreme Court or of the House of Lords. In such a case the practice is for the appeal to be heard by an enlarged panel of seven or more justices, precisely to clothe it with that greater authority: see *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)* [2020] UKSC 36; [2020] 3 WLR 521, para 49. In this case, it has proved practically possible for there to be an enhanced non-conflicted panel of Justices to hear this appeal and there is no reason to suppose that this should not be possible on the rare occasions in the future when this court deals with an alleged contempt.

47. This is not of course a general invitation to open up for general use the concept of an appeal from one panel of the Supreme Court (or any court) to another. Rather it is an examination of the alleged conceptual impossibility in the context of primary legislation that, for the reasons given above, confers an express right of appeal from an original decision of a panel of justices of the Supreme Court, in the narrowly circumscribed but important sphere of the jurisdiction to punish, including by imprisonment, for contempt of court.

48. Where primary legislation confers a particular right it is not always (or even often) the case that it prescribes a complete code for the effective exercise of that right. That is commonly left to subordinate legislation. Where, as here the right in question is part of the rights embodied in the concept of access to justice, the procedure for its exercise is usually left to rules of court. In the present case the Rules of the Supreme Court do not prescribe how an appeal under section 13(1) from a panel of justices exercising the Supreme Court's jurisdiction to punish for contempt should be heard. But rule 9(7) provides that:

> "If any procedural question arises which is not dealt with by these Rules, the Court or the Registrar may adopt any procedure that is consistent with the overriding objective, the Act and these Rules."

49. In her judgment Lady Arden gives five reasons why she considers that there is no such right of appeal. Taking them briefly in turn, her first is that any such right would need to be conferred by statute expressly. We agree but, in our view, for the reasons already given, Section 13 does just that. It follows that we do not consider it

necessary to address the question whether the ordinary meaning of section 13(1) needs to be more generously interpreted in the light of article 6 ECHR.

50. Her second reason is that, if she is right that section 13(1) confers no express right of appeal, it is a substantive right which cannot be conferred by procedure rules. Again, we agree. But our conclusion that the substantive right is conferred by section 13(1) leaves it open to procedure rules to provide or, as here, pave the way, for a procedural route by which such a right may effectively be exercised.

51. The third reason advanced by Lady Arden is that no similar right exists where the contempt arises in a Scottish appeal. We do not consider that it would be appropriate in this case to decide whether that is so. We have heard no argument on the question. This is a contempt which occurred in England, in the face of the Supreme Court sitting in England, hearing an English appeal. Even if there is no equivalent in relation to a contempt committed in connection with a Scottish appeal, that would not in our view require section 13(1) to be read otherwise than in accordance with its clear express terms as we have construed them.

52. Fourthly Lady Arden describes the Supreme Court as a single court. Fifthly she says that an appeal, by definition, means an appeal to a higher authority. We have already acknowledged the force of these points in our treatment of the submission about conceptual impossibility, and explained why, in our view, they are insufficient to overcome the construction of the express terms of section 13(1) to which effect must be given, even if necessarily in an unusual way.

53. In the present case Mr Crosland obtained permission to appeal (if required) from the panel of three justices which made the orders for a fine and costs, and the appeal was then heard by a completely different panel of five justices. We consider that, for the reasons given above, we had jurisdiction to entertain that appeal.

6. Grounds 1 and 2: failure properly to consider the factual context of Mr Crosland's actions, and failure to mention the Scientists' Letter

54. These grounds of appeal are concerned with Mr Crosland's contention that the First Instance Panel failed properly to address his belief that evidence concerning the dangers associated with the proposals for the expansion of Heathrow Airport had been concealed and suppressed; that the draft *Heathrow* judgment contained material errors and omissions; that he felt duty bound to draw the attention of the public to the true position; and that his breach of the embargo amounted to a proportionate

response to that concealment and suppression, and achieved his objective of getting the accurate information into the public domain.

55. There can be no doubt that Mr Crosland believes passionately in the cause he espouses. Indeed, at para 29 of their judgment, the First Instance Panel recorded his submission that he was justified in breaching the embargo because his action was a reasonable and proportionate measure to prevent harm to the public as a result of the catastrophe which he believes would be caused by global warming. Further, as he explained in his personal statement, in a passage recited by the First Instance Panel at para 28, he took the deliberate decision to break the embargo as an act of civil disobedience, knowing that it would be likely to be treated as a contempt of court. He wanted to demonstrate his defiance of the prohibition and to bring the matter to the attention of as large an audience as possible.

56. In developing his arguments under these grounds of appeal, Mr Crosland submits, first, that what he did was an exercise of his right to freedom of expression under article 10 ECHR, and that the imposition of the embargo, the pursuit of the application for his committal for contempt for breaching the embargo, the finding that he was in contempt, the imposition of a penalty and the award of costs against him were all restrictions on his article 10 rights and amounted to an interference with those rights, and that each such restriction and interference had to be prescribed by law and pursue one of the aims listed in article 10(2) and be necessary in a democratic society for the achievement of that aim, that is to say it had to be proportionate.

57. Mr Crosland submits, secondly, that it was in the assessment of proportionality that the First Instance Panel fell into error because they failed to carry out a fact-specific enquiry into and evaluation of the circumstances of every interference and all of the restrictions as required by article 10(2), and failed properly to recognise that the relevant circumstances and considerations might not be the same for each of them. Here Mr Crosland has focused on the finding that his breach of the embargo constituted a criminal contempt and contends that this was reached without any proper consideration of his belief that evidence was being concealed from the public concerning the relationship between the proposed expansion of Heathrow Airport and the Paris Agreement temperature goal; that the court dealing with the *Heathrow* appeal had got it dangerously wrong; and that his action in breaching the embargo was necessary to set the record straight. Mr Crosland seeks to derive support for these submissions from the recent decision of the Supreme Court in *Ziegler*. But before addressing the implications of the decision in *Ziegler* and its relevance to the submissions now advanced, we think it is important to consider further how the First Instance Panel in fact approached the issues before them, and the basis for the conclusions they reached.

58. As we have seen, the First instance Panel began by considering whether the essential elements of a finding of criminal contempt of court had been proved to the criminal standard, and here they made findings that Mr Crosland was responsible for the disclosure of the draft *Heathrow* judgment in breach of the embargo; that when he made the disclosure, he was aware of the embargo; that his conduct was or created a risk of an interference with the administration of justice that was sufficiently serious to amount to a criminal contempt; and that he intended to interfere with the administration of justice. We would emphasise at this point that the requirement of strict confidentiality was imposed by the court, and the reasons for its imposition in relation to any draft judgment provided to the parties in advance of the hand down are and were well known and understood and were summarised by the First Instance Panel at paras 23-25. They are of the utmost importance to the administration of justice and the ability of the court to control its own proceedings. Yet, as the Panel found, Mr Crosland chose to issue statements in terms which defied the authority of the court and were likely to encourage others to disobey the prohibition on publication of the draft judgment; and they had that effect, just as Mr Crosland intended. The outcome of the appeal and Mr Crosland's comments upon it were published widely in the hours before the judgment was handed down.

59. All of these findings of the First Instance Panel had a firm basis in the evidence, and no effective challenge to them has been or could be made. That was only a part (albeit an important part) of the analysis carried out by the Panel, however. They turned next to Mr Crosland's case on liability, as it had been advanced before them, and recorded, at para 29, the principal submissions he had made, namely that he was aware that he was breaking the court's confidentiality but that at all times he considered his actions to be lawful; that the court should have regard to his intentions, beliefs and motivations in disclosing the draft judgment; and that he was justified in breaking the embargo because his action was a reasonable and proportionate measure to prevent the harm to the public that he believes would result from global warming.

60. The First Instance Panel rejected this case for all of the reasons they gave at paras 30-38 and to which we have referred at paras 22 and 23 above. The elements of that reasoning which are most pertinent for present purposes may be summarised in this way. Mr Crosland had been given a direction by the court not to disclose the *Heathrow* judgment until hand down, and he was bound to respect that embargo until it expired or was varied or discharged by the court upon an application made to the court for that purpose. The embargo was prescribed by law and pursued a legitimate aim, namely, the proper administration of justice. Further, Mr Crosland's belief that the judgment contained material errors and his concerns about its impact on global warming and the environment provided no justification for his actions because there was here no defence of public interest and, in any event, it was not necessary to breach the embargo to permit or facilitate public scrutiny of the judgment: it was due to be handed down the following day, and Mr Crosland would then be free to publicise

all of his criticisms of its reasoning and his concerns about its consequences. For like reasons, there was no rational connection between any breach of the embargo and the harm Mr Crosland maintained he wished to prevent.

61. The attention of the First Instance Panel turned next to a consideration of the application of article 10, essentially, so Mr Eardley submits, as a cross-check. Here, at para 39, the Panel reminded themselves that section 12 of the Human Rights Act 1998 requires the court to have particular regard to the importance of the article 10 right to freedom of expression when considering whether to grant any relief which, if granted, might affect the exercise of the right. The Panel made clear they had taken full account of section 12 and had also given consideration to whether a finding of criminal contempt in this case was compatible with article 10.

62. In this connection the First Instance Panel recognised, at para 40, that any permissible interference with freedom of expression had to be prescribed by law, pursue one of the objectives in article 10(2) and be necessary in a democratic society for the achievement of that aim, and that this last limb required an assessment of the proportionality of the interference to the aim pursued.

63. The First Instance Panel also accepted, at para 41, that the embargo on publication of the judgment in the *Heathrow* appeal prior to hand down amounted to a restriction on the disclosure of information, albeit only until hand down, and so engaged article 10. The Panel therefore addressed the need for and proportionality of that embargo. They observed that it was for a limited period only, from 9 December 2020 until hand down on 16 December 2020, and continued:

> "Furthermore, it [the embargo] was for the specific purposes of enabling the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and to prepare themselves for the publication of the judgment. It is important that the published text of a judgment of the court should be accurate, complete and in its final form. This restriction was clearly necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result."

64. The First Instance Panel were satisfied that the conduct of Mr Crosland in breaking the embargo constituted a criminal contempt of court and, at para 42, they so held.

65. That brings us to the decision of the Supreme Court in *Ziegler.* The appeal gave rise to two issues: the first concerned the test to be applied by an appellate court, on an appeal by way of case stated under section 111 of the Magistrates Courts Act 1980, to an assessment of the decision of a trial court in respect of a statutory defence of "lawful excuse" where Convention rights are engaged in a criminal matter; and the second was whether deliberate and obstructive conduct by protesters was capable of constituting a "lawful excuse" for the purposes of section 137 of the Highways Act 1980 ("the 1980 Act"), where the impact of the obstruction on other users of the highway prevented, or was at least capable of preventing, those other users from passing along that highway. It was common ground that what the protesters did was in the exercise of one of the rights in articles 10 and 11; that the prosecution and conviction of the defendants amounted to an interference with these rights; that the interference was prescribed by law; and that the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That left the final question: whether the interference was proportionate. Here the court emphasised that deliberate obstructive conduct which has a more than *de minimis* impact on others still requires careful evaluation in determining proportionality; and that there must be a separate assessment of proportionality in respect of each restriction to determine whether the interference is necessary in a democratic society so that a fair balance is struck between the legitimate aims of the prevention of disorder and the protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly. This calls for a fact-specific enquiry and the evaluation of the circumstances in the individual case, as Lord Hamblen and Lord Stephens emphasised (see, for example, at paras 58, 59, 64 and 70).

66. We accept that the decision in *Ziegler* highlights an issue at the heart of at least one of Mr Crosland's arguments on this appeal: whether, in finding that he was in criminal contempt, the court ignored his motivations, intentions and beliefs, and whether, as he maintains, these were relevant to the proportionality assessment the court was required to carry out. Mr Crosland submits that the First Instance Panel considered the proportionality of the embargo to the legitimate objective of maintaining the authority of the judiciary and judicial decisions but left out of account his conscientious motives in seeking to draw the public's attention to what he believed to be the facts about the environmental impact of the proposed third runway at Heathrow, and his belief that these facts had been suppressed and concealed by the draft *Heathrow* judgment in the Heathrow appeal.

67. The material circumstances of the *Ziegler* case were very different from those concerning Mr Crosland's actions the subject to this appeal, however. *Ziegler* was concerned with the question whether, in deliberately obstructing the highway, the protesters had acted "without lawful … excuse" and, in that context, whether their convictions for offences under section 137(1) of the 1980 Act were justified restrictions

on their Convention rights. By contrast, the draft *Heathrow* judgment was provided to Mr Crosland for particular purposes and under court imposed (and time limited) conditions of confidence of which Mr Crosland was at all times aware and which he understood. Yet Mr Crosland chose to flout the order of the court and knew full well that in doing so he might be found to have acted in criminal contempt of court.

68. Further, it is not correct to say that the First Instance Panel ignored Mr Crosland's motives, intentions and beliefs. In addressing whether Mr Crosland's breach of the embargo was sufficiently serious to amount to a criminal contempt at common law, the Panel did consider his case on liability and, among other things, his submission that he was acting for the purpose of preventing serious harm to the public. The Panel rejected that case both as a matter of principle and on the facts, as we have seen at para 60 above.

69. In turning next to proportionality, whether by way of cross-check or as part and parcel of their analysis of culpability and of the seriousness of Mr Crosland's breach, the First Instance Panel assessed the proportionality of the embargo with the rights of Mr Crosland and others to speak freely about the judgment and its outcome. Here we are satisfied that the approach of the First Instance Panel to the question whether the embargo constituted a restriction on the disclosure of information which was necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions, and the Panel's finding that the embargo was a proportionate means of achieving that result, were, respectively, appropriate and correct. It would have been wholly superfluous to repeat at this point that Mr Crosland's justification for breaking the embargo had failed on the facts, there being no relevant connection between the breach and the harm he sought to prevent. Moreover, the embargo was only imposed for a limited period of time and simply delayed for a short time his ability to discuss the outcome of the appeal. Further and in any event, Mr Crosland and any others affected by the embargo could have applied to the court for its variation or even discharge if they had proper grounds for doing so.

70. It was also in the next section of their judgment, from para 39, that the Panel addressed the question whether a *finding* of criminal contempt in this case was compatible with article 10. Here, having found that the prohibition on publication was itself compatible with article 10, they went on to consider all of the relevant circumstances in considering culpability, the deliberate nature of Mr Crosland's breach and his abuse of the hand down procedure in order to gain publicity (at para 45); the actual and potential damage Mr Crosland's actions caused to the system (at para 46); and Mr Crosland's motivations, beliefs and fears, and lack of any principled justification for his deliberate flouting of the order of the court (at paras 47-48). Mr Crosland's submission that the First Instance Panel did not have these matters in mind when finding that he was in contempt and, by implication, in permitting the Attorney

General to pursue this application for his committal for his contempt is unsustainable and we reject it. The Panel had no need to revisit its earlier conclusions that there was here no defence of public interest, and that Mr Crosland had intended to interfere with the due administration of justice despite his motive of securing what he believed to be a just outcome overall.

71. Faced with these difficulties, Mr Crosland contends that he was nevertheless entitled to take the action he did to attract publicity for his cause, and that it was only by breaching the embargo that the judgment and his criticisms of it became the subject of great media attention. He submits that he needed to be seen to be defying the court and that if he had awaited hand-down, he would have missed the moment at which his comments would attract the publicity which his breach of the embargo would generate.

72. We are not persuaded by these arguments. Mr Eardley submits and we agree that they have an air of unreality about them. First, and accepting as he does that a finding of contempt is an interference with Mr Crosland's right to freedom of expression, Mr Eardley argues that it is an interference which does not go to the heart of that right. Again, we agree. The interference here, such as it was, did not prevent Mr Crosland from expressing publicly his disagreement with the *Heathrow* judgment at any point after its hand down. Nor, after hand down, did it prevent him from expressing his concerns about the impact on the environment of any expansion of Heathrow airport. The embargo simply delayed the expression of his criticisms of the *Heathrow* appeal decision, and it did so for only a short period of time.

73. Secondly and in any event, we do not accept Mr Crosland's submission that he needed to be seen to be defying the authority of the court to attract the publicity he sought or, as he put it, to shine a spotlight on the failures and deficiencies he wanted to expose and to which we have referred at para 4 above. Judgments of the Supreme Court regularly receive a good deal of scrutiny after hand down and Mr Crosland's organisation, Plan B, issues press releases on a regular basis and at the relevant time and (as we have observed) it had a Twitter account with over 3,500 followers. Indeed, the statement Mr Crosland made on Twitter in breach of the embargo was re-tweeted at least 406 times by other Twitter users, including Extinction Rebellion, which had over 55,000 followers. We have seen no persuasive evidence that Mr Crosland would not have been able to get his message across if he had complied with the embargo and refrained from discussing the outcome of the *Heathrow* appeal and his criticisms of the judgment until after it had been handed down.

74. Mr Crosland filed written evidence in advance of the hearing before the First Instance Panel in which he sought to explain the impact of his decision to "sound the

alarm" but he accepts (and maintains) that he did not, by his action, reveal anything that would not be public knowledge a day later. Further and importantly, nothing Mr Crosland has put forward demonstrates that his breach of the embargo drew facts to the attention of the public which would otherwise have passed unnoticed; nor has Mr Crosland shown that, by breaching the embargo, he was able to express his views and concerns to a wider group of persons than would otherwise have been possible.

75. In this connection, we have also given careful consideration to the letter sent to the Supreme Court on 30 March 2021 by a large number of leading scientists, economists and others - the Scientists' Letter - to which we have referred at para 12 above, and upon which Mr Crosland has placed particular reliance. It forms the subject matter of his second ground of appeal, but it is convenient to deal with it now for it is closely related to the issues under the first ground. Mr Crosland submits that the First Instance Panel ought to have taken this letter into account in considering the issues of liability, penalty and costs, and that it ought to have been an important consideration in the balancing exercise demanded by article 10(2). Yet the Panel made no reference to the letter in their judgment and, so Mr Crosland continues, they appear to have disregarded it.

76. We do not accept these submissions. The letter was written some three months after the hand down of the *Heathrow* judgment and it contains comments which are strongly critical of that judgment, but it does not suggest that that its signatories only became aware of the judgment and its contents as a result of Mr Crosland's breach of the embargo or that, but for Mr Crosland's breach, they would not have participated in the public discussion that followed its hand down. The signatories to the letter say they understand "why Tim Crosland … felt it necessary to the raise the alarm about the goals of the Paris Agreement being ignored by the British Courts" and urge the Supreme Court to take "appropriate steps to mitigate the profound harm its judgment has caused" and "to consider the actions of Tim Crosland in this light", but this does not begin to establish that, but for the breach of the embargo, the signatories would not have engaged in the public debate about the impact of the decision after hand down or the effect of Heathrow expansion on climate change. Moreover, Mr Crosland was unable to advance any convincing basis for his submission that its signatories only raised concerns about the *Heathrow* judgment and its conclusions as a result of his breach of the embargo.

77. After careful consideration of all of the points raised by Mr Crosland in both his oral and written submissions, we have reached the conclusion that grounds 1 and 2 of Mr Crosland's appeal must be rejected. The First Instance Panel made no material error in approaching the matter as they did, and subject to the further grounds of appeal, we have no doubt they were entitled and right to find that Mr Crosland's conduct amounted to a criminal contempt of court. In reaching their conclusion the

First Instance Panel did address Mr Crosland's case and his article 6 challenge under grounds 1 and 2 also falls away.

7. Ground 3: the court was not an independent and impartial tribunal

78. Mr Crosland's third ground of appeal is that the First Instance Panel, which found him in contempt of court and fined him, was not an independent and impartial tribunal as required by article 6(1) ECHR, incorporated into domestic law by the Human Rights Act 1998. By article 6(1):

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

It was made clear by the House of Lords in *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856, at para 14, that, in relation to apparent bias, the common law test laid down by the House of Lords in *Porter v McGill* [2001] UKHL 67; [2002] 2 AC 357, is also the appropriate test for determining whether a tribunal is independent and impartial under article 6 ECHR. That test, as set out by Lord Hope in *Porter v McGill* at para 103, is as follows:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

79. Mr Crosland submits that for two main reasons the First Instance Panel was not independent and impartial and that the fair-minded and informed observer would conclude that there was a real possibility that the Panel was biased. The first was because it was the Supreme Court's own decision in the *Heathrow* appeal that contained the alleged misrepresentation of fact that prompted the alleged contempt; and, secondly, it was the President of the Supreme Court who had instigated the contempt proceedings. He further submits that there were a number of other measures, such as announcing fundamental changes to the procedure to be followed in the hearing just half a working day ahead of the hearing and the delivery of a pre-prepared judgment only six minutes after the conclusion of his submissions, that reinforced the perception of bias.

80. In further written submissions prompted by this court having brought to Mr Crosland's attention the decision of the European Court of Human Rights in *Kyprianou v Cyprus* (2007) 44 EHRR 27, he argued that that case supported his submissions on bias. In that case, it was held that there had been an infringement of article 6 in a situation where the same panel of judges had themselves dealt almost immediately with a contempt in the face of the court by the defence advocate in a murder trial. The contempt had been found proved and the advocate had been punished with a sentence of imprisonment of five days.

81. We reject all those submissions. Certainly, the need to ensure that the tribunal is impartial and does not give the appearance of being biased means that it will rarely be acceptable, where there has been an alleged contempt in the face of the court, for the same judge or judges in that court to go on, at least without a significant adjournment, to hear the allegation of contempt and, if established, to decide on the appropriate punishment. That is well illustrated by *Kyprianou v Cyprus*.

82. However, on the facts of this case, there is no real possibility of the fair-minded and reasonable observer, having considered the facts, concluding that the First Instance Panel was biased. This is for two main reasons. The first is that the decision to bring proceedings for contempt was taken by the Attorney General, to whom the matter had been referred by the President of the Supreme Court, and was therefore not taken by the Supreme Court itself. As Mr Eardley put it, the court was not acting as prosecutor in its own cause. Secondly, the First Instance Panel hearing the committal application did not include any of the judges who sat on the *Heathrow* appeal. We also reject, as not reinforcing any perception of bias, the additional factors mentioned by Mr Crosland. So, for example, it is commonplace in the courts of England and Wales for judgments to be given ex tempore and this does not indicate that the court has made up its mind prior to the hearing.

83. The facts of *Kyprianou v Cyprus* were also very different from the facts of this case. Here the judges dealing with the alleged contempt were not the same; and, far from proceeding almost immediately with the contempt matter, this was referred to the Attorney General and the contempt hearing took place several months after the alleged contempt.

84. We add that, as is well-known, Supreme Court judges take the judicial oath requiring them "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will". Moreover, they quite commonly disagree with each other: a quick perusal of Supreme Court judgments reveals that there are dissenting judgments and judgments that concur with a main judgment but for different reasons. The fair-minded and reasonable observer knows that one panel

of Supreme Court judges is bound to, and can be expected to, exercise an independent and impartial view in relation to contempt matters affecting a differently constituted panel.

85. Mr Crosland submits that, as article 6(1) ECHR made it impermissible for a panel of the Supreme Court to hear the contempt matter, the correct course would have been for his breach of the embargo to have been referred to the Bar Standards Board and/or the Charity Commission. But it is far from clear that the sanctions available to those bodies would have come anywhere near providing an adequate punishment for what was a deliberate contempt of court. In any event, it is for a court, not a regulatory body, to punish a contempt of court; and the sanctions available would not be directed at the contempt itself but rather at different matters such as bringing the barrister's profession into disrepute. It is also purely fortuitous that there are bodies with some sort of sanction over Mr Crosland's behaviour. In other cases of contempt by breach of an embargo (for example, by a litigant in person working for a commercial, rather than a charitable, organisation) there would be no such alternative.

86. We add three points for completeness in relation to whether there were any other options open for dealing with an alleged contempt of the Supreme Court. The first two have already been mentioned. The House of Lords in *In re Lonrho Plc* [1990] 2 AC 154, 176 laid down that an alleged contempt of the House of Lords (the predecessor of the Supreme Court) could be heard only by the House of Lords. Secondly, by the Supreme Court Rules (SI 2009/1603), rule 9(2), "Any contested application - (a) alleging contempt of the Court; … shall be referred to a panel of Justices who shall, in a case of alleged contempt, … hold an oral hearing." In other words, this secondary legislation confirms for the Supreme Court the position laid down for the House of Lords in *In re Lonrho Plc* that an alleged contempt of the Supreme Court must be referred to a panel of Supreme Court Justices who must hold an oral hearing. Thirdly, as confirmed by the Court of Appeal in *Attorney General v Dallas* [2012] EWHC 156 (Admin); [2012] 1 WLR 991, trials on indictment for contempt are obsolete and cannot be sought by either the Attorney General or the alleged contemnor.

8. Ground 4: the Attorney General was in breach of obligations to Mr Crosland by failing to disclose to him evidence of the Government's breach of a court embargo in July 2020

87. Mr Crosland submits that, pursuant to the Attorney General's obligations of disclosure under article 6 ECHR and section 3 of the Criminal Procedure Investigations Act 1996, Mr Crosland should have been given information about an alleged breach of the embargo on court judgments in the case of *Begum v Special Immigration Appeals*

Commission [2020] EWCA Civ 918: see para 14 above. He argues that information about that alleged breach of the embargo and, in particular, what action was taken by the Attorney General in relation to the leaking of the judgment to a newspaper, would have assisted his case or undermined the case for the Attorney General.

88. Although section 3 of the Criminal Procedure Investigations Act 1996 does not apply to proceedings for contempt (because they fall outside the scope of section 1 of that Act), we are prepared to assume in Mr Crosland's favour that analogous obligations of disclosure do apply to proceedings for contempt not least because of the requirements imposed by the right to a fair trial under article 6 ECHR.

89. Nevertheless this submission has no force because it was irrelevant to the decision as to whether Mr Crosland was in contempt of court, or the punishment for contempt, to consider what the Attorney General may, or may not, have done in a different case concerning a breach of the embargo on court judgments. Put another way, the clear importance of maintaining the confidentiality of court judgments, prior to the Supreme Court making them public, is unaffected by what did, or did not, happen in relation to a different case.

9. <u>Ground 5: the Court's ruling on costs was oppressive and unjust</u>

90. In the Costs Judgment described at paras 256 and 267 above, following the receipt of further written submissions, Mr Crosland was ordered to pay £15,000 costs: [2021] UKSC 15. This was in addition to the fine imposed on him of £5,000. In that judgment, the First Instance Panel set out the main principles to be applied as follows:

> (i) When a respondent is found to be in contempt of court, there will usually by no principled basis for opposing a costs order. Put another way, costs normally follow the event. Normally, the sole question will be whether the costs claimed in relation to a contempt application are reasonable and proportionate: see para 9.
>
> (ii) In determining whether the claimed amount is reasonable and proportionate, the court may take into account the respondent's means: the court may also consider the relationship between the value of any costs order and the level of any fine which has been or is due to be imposed: see para 10.

(iii) As the respondent's rights under article 10 ECHR are engaged in the present case, the combination of any penal measure and any costs order must be a proportionate interference with such rights: see para 12.

Applying these principles, the First Instance Panel held that, while the £22,504 costs claimed by the Attorney General were all reasonably incurred, it was fair and proportionate to order Mr Crosland to pay £15,000.

91. Mr Crosland submits that the costs order against him was unjust and oppressive because it contravened the principle in criminal law cases (which it was appropriate to apply here) that, ordinarily, the sum ordered to be paid by way of costs should not be greatly at variance with any fine imposed (see *Practice Direction (Costs in Criminal Proceedings) 2015* [2015] EWCA Crim 1508 and [2016] EWCA Crim 98, para 3.7 and *R v Northallerton Magistrates' Court, Ex p Dove* [2000] 1 Cr App R (S) 136, 142 per Lord Bingham of Cornhill). In any event, he submits that, as his disposable income is modest, an overall financial penalty of £20,000 for an act of conscience is oppressive, arbitrary and disproportionate.

92. We reject those submissions. The award of costs is a matter for the discretion of the court making the order and an appeal court should interfere only if there has been an error of legal principle. We can detect no such error. The principles governing the award of costs in contempt proceedings are not the same as those in other criminal law cases and the First Instance Panel correctly identified those principles and applied them in a manner that cannot be faulted.

93. In particular, as we have seen in para 90 above, the First Instance Panel explicitly referred to Mr Crosland's means and the relationship between the value of any costs order and the level of fine. And again, at para 18 of the Costs Judgment, the Panel made clear that it had had regard to Mr Crosland's means; and that it had also had regard to "the requirement that the combined effect of any fine and costs order must, to the extent that it interferes with the respondent's rights under article 10, … be proportionate". In paras 20-23 it then explained the "limited" information (see para 20), it had had about Mr Crosland's means and the opportunity it had given him to provide the relevant information.

94. We also agree with Mr Eardley's submission that, even if one were to assume in Mr Crosland's favour that the same principles on costs are applicable to criminal contempt proceedings as in other criminal cases, there was still no contradiction by the First Instance Panel of what was said by Lord Bingham in *R v Northallerton Magistrates' Court, Ex p Dove* (or the relevant Practice Direction). This is because Lord Bingham had made clear, at p 142, that he was talking about "the ordinary way"; Lord

Bingham also said, at p 142, that there was "no requirement that any sum ordered … to be paid to the prosecutor by way of costs should stand in any arithmetical relationship to any fine imposed."

10. Conclusion

95. In the light of these reasons, we dismiss Mr Crosland's appeal.

LADY ARDEN:

Overview of this judgment

96. The first matter which we have to decide is what jurisdiction exists to hear Mr Crosland's application against the order of this court dated 10 May 2021 finding him in contempt of court and imposing a fine of £5,000 and costs ("the Order"). In my judgment, section 13(1) of the Administration of Justice Act 1960 ("the Act"), on which the majority rely for holding that there is jurisdiction to hear an appeal, does not apply to an application before a different panel of this court from that which made the original order. I have five reasons for this conclusion which I set out below. My conclusion means that there is no higher court to which Mr Crosland can appeal and therefore no right of appeal lies. However, this court has inherent jurisdiction to review an order should it consider that it has resulted in significant unfairness. I have five reasons for my conclusion.

97. After examining the inherent jurisdiction, I will apply it to Mr Crosland's case.

A. Mr Crosland has no right of appeal under section 13(1) against the Order

98. I will set out section 13 of the Act, and then my five reasons for concluding that it does not confer any right of appeal against the Order. Section 13 provides:

> "**13. Appeal in cases of contempt of court**
>
> (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of

court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie -

(a) from an order or decision of any inferior court not referred to in the next following paragraph, to the High Court;

(b) from an order or decision of the county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal;

(bb) from an order or decision of the Crown Court to the Court of Appeal;

(c) from a decision of a single judge of the High Court on an appeal under this section, from an order or decision of a Divisional Court or the Court of Appeal (including a decision of either of those courts on an appeal under this section), and from an order or decision (except one made in Scotland or Northern Ireland) of the Court Martial Appeal Court to the Supreme Court.

(2A) Paragraphs (a) to (c) of subsection (2) of this section do not apply in relation to appeals under this section from an order or decision of the family court, but (subject to any provision made under section 56 of the Access of Justice Act 1999 or by or under any other enactment) such an appeal shall lie to the Court of Appeal.

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section, provision may be made by rules of court rules made under section 7 of the Northern Ireland Act 1962 for authorising the release on bail of an appellant under this section.

(4) … [omitted as it incorporates by reference section 1 of the Act, which was repealed by the County Courts Act 1984]

(5) In this section 'court' includes any tribunal or person having power to punish for contempt; and references in this section to an order or decision of a court in the exercise of jurisdiction to punish for contempt of court include references -

> (a) to an order or decision of the High Court, the family court, the Crown Court or the county court under any enactment enabling that court to deal with an offence as if it were contempt of court;
>
> (b) to an order or decision of the county court, or of any court having the powers of the county court, under section 14, 92 or 118 of the County Courts Act 1984;
>
> (c) to an order or decision of a magistrates' court under subsection (3) of section 63 of the Magistrates' Courts Act 1980;
>
> (d) to an order or decision (except one made in Scotland or Northern Ireland) of the Court Martial, the Summary Appeal Court or the Service Civilian Court under section 309 of the Armed Forces Act 2006,

but do not include references to orders under section five of the Debtors Act 1869, or under any provision of the

> Magistrates' Courts Act 1980, or the County Courts Act 1984, except those referred to in paragraphs (b) and (c) of this subsection and except sections 38 and 142 of the last mentioned Act so far as those sections confer jurisdiction in respect of contempt of court.
>
> (6) This section does not apply to a conviction or sentence in respect of which an appeal lies under Part I of the Criminal Appeal Act 1968, or to a decision of the criminal division of the Court of Appeal under that Part of that Act."

First reason: rights of appeal must be created expressly by legislative authority

99. Firstly, it is a rule of the common law that any right to appeal must be expressly conferred by legislation: see the decision of the House of Lords in *Attorney General v Sillem*, (1864) 33 LJ Ex 209; 10 HLC 704. In the earlier case of *R v Stock* (1838) 8 Ad & El 405, 411; 112 ER 892, 894, Lord Denman CJ explained that: "The reason why a power of appeal ought not to be implied is, that the appeal brings a new set of parties into action, and it is necessary that the person to be affected and the machinery to be employed should be distinctly pointed out." In other words, a right of appeal involves interference with the successful party's rights and therefore the right had to be expressly conferred by Parliament. Specifically in relation to contempt, Lord Cranworth, giving the advice of the Privy Council in *Rainy v Justices of Sierra Leone* [1852-3] 8 Moo 47 and rejecting an appeal from the Recorder's Court of Sierra Leon gave a further reason (p 54):

> "… we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court."

100. Rights of appeal play an important role in ensuring the fairness in judicial decisions and the accountability of the judiciary, and the Justice Report of 1959 referred to at para 33 above may help to show the mischief to which section 13 of the Act was directed. Section 13(1) has changed the pre-existing position by granting a right of appeal from the decision of the court which heard the contempt application. Subsection (2)(c) then gives a further right to appeal from the decision of the court hearing the appeal but only where that court is the Divisional Court or the Court of

Appeal. However, it remains the position that some orders for contempt even now cannot be appealed: there is an express exception from any right of appeal for the orders listed in the tailpiece of section 13(5). Importantly where the right of appeal is given, it is described in terms which are predicated upon a process of application to a higher court. So, it remains the position that when section 13(1) confers is a right of appeal that means, as I explain below, a right of appeal to a *higher* court. Any other right is not a right of appeal within the meaning of section 13, and therefore does not have to be mentioned in that section, still less specifically excluded.

101. There may have been other reasons connected with the structure of the courts before 1873 and the nature of prerogative writs for why no right of appeal existed, but I need not develop the historical background as it has not been suggested that we should depart from a previous decision of the House of Lords in this matter. Moreover, the rule of the common law applied in *Attorney General v Sillem* has been applied since the restructuring of the courts in 1873: see, for example, *Furtado v City of London Brewery Co* [1914] 1 KB 709 (Court of Appeal). It follows from the common law rule that a right of appeal cannot be conferred by implication from section 13 of the Act.

102. An appeal is to be distinguished from the power for the decisions of a single judge of the Court of Appeal of England and Wales to be reconsidered by that court (see now Senior Courts Act 1981 as amended, and CPR rule 52.24(6)). For instance, it was until recently the practice of the Court of Appeal of England and Wales for a single Justice of Appeal to make or refuse an order for permission to appeal on paper, but the unsuccessful applicant could ask to renew his application in open court. There are other similar instances where a court can review its own order. A review of this kind does not constitute an appeal: *Boyd v Bischoffscheim* [1895] 1 Ch 1. Similar procedures existed in the High Court where decisions were made in chambers. They were regarded as renewals of the original applications, not appeals. So those practices militate against treating Mr Crosland's application to another panel of the same court as an "appeal".

103. Of course, to modern eyes, it may seem retrograde and unfair for there to be no appeal even in the case of a sentence of imprisonment imposed for contempt of court. However, as Mr Eardley points out, such a right is not required by article 6 (right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), although, if a right of appeal is conferred, the exercise of it is subject to the supervisory jurisdiction of the European Court of Human Rights ("the Strasbourg court"). The absence of any requirement for a right of appeal in the fair trial guarantees provided by the Convention indicates that the absence of a right of appeal does not automatically mean that there has been unfairness even today. It is worthy of note that there are even some orders made by

the Strasbourg court from which a party cannot appeal, such as a decision on admissibility and a decision not to refer a case to the Grand Chamber.

104. The narrow view taken of the right to a fair trial as excluding a right of appeal may have led to or be the result of the addition of Protocol 7 to the Convention. Article 2 of Protocol 7 (opened for signature on 22 November 1984) gives a right of appeal in criminal cases in many situations:

> "**Article 2 – Right of appeal in criminal matters**
>
> 1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

105. It is not, however, necessary to analyse the jurisprudence under this article as the UK has not yet ratified Protocol 7. Nonetheless it is relevant to the interpretation of other parts of the Convention. The significant points arising from Protocol 7, article 3 for my purposes are (1) that the right of appeal under that Protocol, article 2 is to a "higher" tribunal and not a referral to a panel of the same court; (2) there is no right of appeal where, as in this case, the person convicted was tried in the first instance by the highest tribunal, and (3) the presence of Protocol 7, article 2 means that there is no immediate prospect of the Strasbourg court developing its jurisprudence on article 6 of the Convention so that a right to an appeal is treated as part of the right to a fair trial. Finally, the exclusion from article 2 of Protocol 7 of rights of appeal from convictions imposed by the highest court sitting as a court of first instance indicates that a right of appeal properly so called cannot then be given (consistently with my fifth reason) and/or that fairness does not require such a right to be given. Some constitutions of other signatories to the Convention specifically provide that the order of the highest court shall be final and conclusive (for example, article $34.5.6^0$ of the Constitution of Ireland). Within the Strasbourg court, where a case is referred to the Grand Chamber it is not called an appeal even though it involves a rehearing (see article 43 of the Convention).

106. The jurisprudence on article 6 to which I have referred (no guarantee of a right of appeal) is in any event long-standing, and may have pre-dated the Act. The Strasbourg institutions have held there is no Convention guarantee to a right to appeal even where the hearing was a first instance trial and even if the defendant was imprisoned as a result: see, for example, *Crociani v Italy* (Application No 8603/1979 and others), in which the Constitutional Court of Italy (a final court) as a first instance court heard criminal charges against ministers of state who were then punished with a substantial sentence of imprisonment. The defendants in question appealed to the Cour de Cassation but the Constitutional Court held that the appeal was inadmissible (as it had jurisdiction to make such a ruling). The defendants in question complained to the European Commission of Human Rights ("the Commission") that article 6 had been violated because they had no right of appeal. The Commission, at para 16, rejected this argument, holding:

> "In so far as the applicants complain of having been deprived of the right of appeal to a higher court, the Commission notes that in accordance with its established precedents (Application Nos 277/57 and 690/60, Yearbook 1, pp 222 and 243), confirmed by the European Court of Human Rights, article 6(1) of the Convention does not compel States to institute a system of appeal courts (Eur. Court of Human Rights, *Delcourt* case, judgment of 17 January 1980, p 14. Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (merits) judgment of 23 July 1968, p 33). However, in the latter judgment, the Court also held that in 'A state which does set up such courts … would violate that article, read in conjunction with article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions'."

107. The only circumstances in which there could be a violation of article 6 in relation to a right of appeal is if the Supreme Court itself had a right to refer a matter to another court on appeal and failed to consider that option or arbitrarily refused to exercise it: see generally *Coëeme v Belgium* (Application No 32492/96 and others) at paras 111-117).

108. Another reason why historically in this country there was no lacuna in the law in relation to orders for imprisonment for contempt of court was that such orders by one court could be reviewed by another court having jurisdiction to issue the powerful writ of habeas corpus (see *Habeas Corpus - from England to Empire*, PD Halliday, Harvard, 2010, pp 119-120). In the absence of the modern system of appeals, courts regularly

intervened to “upend” the orders of other courts which they considered were not justified. There was no mechanism for setting aside the orders first. There is no reason to think that the jurisdiction in habeas corpus does not apply in some situations today. It might be employed for instance where a defendant convicted of contempt and imprisoned contends that he had purged his contempt. This diminishes to some extent the importance of the absence of an appeal from a sentence of imprisonment for contempt, though it does not fully remove it. I have incidentally been unable to find any authority for an analogous situation, namely an authority giving a right of appeal from an order refusing to discharge a prisoner pursuant to the writ of habeas corpus but that would be consistent with *Sillem*, above.

109. In my judgment the rule that a right of appeal could not be conferred except by express statutory provision, is very well established and has formed part of the common law for nearly 100 years before the passing of the Act. That means that a right of appeal being created would either have to be expressly mentioned or it would have to be identified by some appropriate description or by necessary implication. The common law rule formed the background against which section 13 was drafted. In the present case, the right of appeal relied on does not appear from section 13(1) expressly or by some defining set of words or by necessary implication. Section 13(1) can be given meaning without reference to contempt proceedings in the Supreme Court.

110. It follows that the words “subject to the provisions of this section” in section 13 are a signpost to the various features of the rights of appeal specified in the remaining provisions of section 13, and that, as Mr Eardley submits, section 13 constitutes a comprehensive list of the rights of appeal applying in England and Wales (unless provision is made by some other special statutory provision). Of course, the rights of appeal so stated may apply to tribunals and courts which, like the Supreme Court, were created subsequently to the passing of the Act but that is because of the definition of “court” in section 13, not because any such right arises by implication. Moreover, if the proposition that a right of appeal arises by implication under section 13(1) from an order of the Supreme Court acting under its original jurisdiction is carried to its logical conclusion, a right of appeal may equally so arise from any order of the Supreme Court which re-exercises the discretion to punish for contempt of court. This may be a small point, but it is some indication of the unlikelihood of the proposition. The important point is despite the width of the definition of a “court” there is no provision of subsection (2) which would apply to orders of the Supreme Court for contempt.

111. To dispose of one point, if this is suggested, it makes no difference that, without the benefit of full argument Justices of this court made an order granting permission to

appeal. If it is necessary to do so, I would set it aside. The Order cannot create jurisdiction or fill the void.

Second reason: rights of appeal are substantive and not procedural

112. Secondly, a right of appeal cannot be described as a matter of procedure. It is a substantive right: see the decision of the Privy Council in *The Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, 372. Lord Macnaghten held:

> "And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

113. On the basis that a right of appeal is substantive, then, if I am right that section 13 does not enable one panel of Justices of this Court to hear an "appeal" from the decision of another panel of Justices, the gap in the jurisdiction of this court cannot be filled by any part of rule 9 of the Supreme Court Rules. These Rules were made by Lord Phillips, President of the Supreme Court at the time, exclusively under the powers conferred by section 45 of the Constitutional Reform Act 2005 to make rules of practice and procedure:

> "**45. Making of rules**
>
> The President of the Supreme Court may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court."

114. Reliance is placed by the majority on rule 9(2) and (7). Rule 9 itself is headed "Procedural decisions", which indicates that it does not extend to substantive questions. Sub-rule (2) deals with which Justices shall hear an application alleging contempt of the Supreme Court, which is indeed procedural. Sub-rule (7) provides for the resolution of procedural questions for which no provision is made in the Rules. This does not advance the argument. It can only avail if there is a right of appeal under section 13(1). I have addressed this under the first reason and will return to it under the fifth reason.

Third reason: no equivalent right applies in Scottish appeals

115. Thirdly, there is no equivalent to section 13 of the Act which applies in Scotland: see *Contempt,* Arlidge, Eady & Smith, 5th ed (2017). This is an important point. There is no good reason Parliament should confer a right of appeal from a decision of this Court on contempt where the matter arose from an appeal from England and Wales but not from Scotland. That anomaly supports that argument that section 13 of the Act did not confer a right of appeal from decisions by this Court with respect to contempt of it.

116. I have not forgotten Northern Ireland but the statutory provision applying in that jurisdiction is similar to section 13 of the Act. The point is sufficiently made even if it applies only to Scottish cases. There is no logical difference for any distinction between Scottish cases on the one hand and cases from England, Wales or Northern Ireland.

Fourth reason: The Supreme Court is a single court

117. Fourthly, the Supreme Court is a single court, not a court composed of divisions or having unlimited jurisdiction. The Justices are of equal standing, and it is not open to some only of the Justices to review the acts of others by way of an appeal. If the position were otherwise, a case might arise in which five Justices make the order which leads to the appeal, and the appeal is heard by a different three Justices. If the two panels of Justices differed in their conclusion on the law or the outcome, there might be great uncertainty as to what the law was. It is no answer to this point that the appeal would have to be heard by a larger panel than the panel who made the ruling on contempt (and there does not appear to be a source for any such requirement).

118. Indeed, it may not be possible to assemble such a panel. This court has far fewer Justices than some supreme courts. A right of appeal could not be dependent on the number of available Justices.

119. In my judgment, it does not assist to say that an earlier decision of the court may be distinguished or overruled by another constitution of the Supreme Court because that statement is made in the context of an appeal in a subsequent case, not in the same case, and this appeal is sought to be made in the same case. If there is a further right of appeal where the panel of this court sitting on appeal re-exercises the discretion of the first panel to punish for contempt of court (see the last three sentences of para 15 above), there may also for that reason be a lack of available Justices. It can hardly have been intended that the right of appeal should be

dependent on the availability of acting Justices or members of the court's supplementary panel.

120. I do not consider that, if this is suggested, there are any grounds for concluding that Parliament must have made a mistake in section 13 of the Act. The absence of a right of appeal in the present case is not casus omissus because it would have been totally unnecessary for Parliament to have created any right of appeal from orders for contempt made by the Appellate Committee of the House of Lords. Even if it were not a final court from which no appeal can lie, it was a committee of the House of Lords and therefore it had power to regulate its own procedure.

<u>Fifth reason: an appeal naturally means an appeal to higher authority</u>

121. Fifthly, the ordinary meaning of appeal is to a body of higher authority. This is too obvious to need authority. All the rights of appeal septically mentioned in section 13 are rights of appeal of this nature. I have already made the point that the Justices of this Court are of equal standing. Accordingly, the idea of an appeal being heard by a different constitution of Justices of the same court is simply inconsistent with the ordinary meaning of the word "appeal". Historically when such applications can be made, they are not treated as appeals: see, for example, *Boyd v Bishoffsheim*, above. Moreover, to say that there is no appeal save to a higher court does not rest on conceptual impossibility but the ordinary use of language.

122. I will call a right of appeal to a higher court a vertical right. The innovation of the majority is to introduce for the very first time in this court or potentially in the whole of the modern legal system of England and Wales the concept of a right to review a decision of a court by way of an ordinary appeal which is horizontal only. It is said that it relates only to contempt, but it is an innovation, and no-one can say where it will end or whether it will lead to a greater number of applications to the court under its original jurisdiction or affect the meaning of appeal and the practice on appeals in other situations. Questions arise as to what is the extent of the innovation: does the horizontal right arise purely because this is a contempt application? Does the word "appeal" now include a horizontal right? Is a right of appeal henceforth for the purposes of English and Welsh law an inherent part of the right to fair trial? Does the same apply in Northern Ireland and Scotland? Is permission required? What are the grounds for such an appeal or the standards of review which must be applied? If it is a right of appeal, the guarantees in article 6 will apply to it.

123. I can see that in some systems (especially those in some civil systems whose Supreme Courts have many members) a horizontal right (and not simply a procedure for referral to larger panels) may exist, and that in some international treaties and

human rights instruments such a right may be regarded as necessary to ensure the overall fairness of a trial. However, the context in which section 13(1) arises is entirely different. We are interpreting a domestic statute against the background of domestic law and in the context of a regional human rights system which does not require an appeal right to be given.

124. Moreover, the argument that Parliament intended to confer a horizontal right in section 13 is simply inconsistent with the jurisprudence of the Strasbourg court, the position of the UK in relation to Protocol 7 and the distinction which is drawn in English and Welsh procedure between renewing an application (where this is permitted) before another judge of the same court of co-ordinate and an appeal to a higher court.

125. It may be argued that a statute is "always speaking" and must be interpreted in the light of current conditions. But there is a limit to which a statute may be interpreted under this doctrine. It is still necessary to be satisfied that the provision as interpreted is one permitted by the context. To interpret the word "appeal" in section 13(1) as including an appeal one would have to hold that a right of review by judges of the same level of seniority would today be regarded as an appeal. I do not consider that that can be shown. Rights of review exist between judges of co-ordinate jurisdiction, and they are not treated as appeals requiring permission to appeal and so on.

126. As I explained in my judgment in *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22; [2021] 3 WLR 231, para 94 statutes may use words which are open-textured and permit evolution:

> "In principle the courts can adopt a dynamic construction of legislation particularly where Parliament uses open-textured expressions which are intended to apply in circumstances which may change with time (eg 'unreasonable conduct'), or where such a construction is required by some other statute such as the Human Rights Act 1998."

127. However, the word "appeal" is not an open-textured word in this sense. Court procedure may be changed from time to time, but the core feature of an appeal is that it is a process of review involving a higher court.

128. Therefore, even the doctrine of always speaking cannot enable the court to interpret the expression "an appeal" as including as a horizontal right.

Conclusion on jurisdiction

129. Accordingly, in my view, Mr Eardley is correct in his submission that the Supreme Court does not have jurisdiction under section 13 of the Administration of Justice Act 1960 to hear Mr Crosland's appeal. No-one has suggested that this Court has any other jurisdiction to hear Mr Crosland's appeal. So, I would rule in favour of the Attorney General on her preliminary application.

B. The inherent jurisdiction of the Court relevant to this case

130. The larger issue posed by Mr Crosland is essentially the well-known issue of *quis custodiet ipsos custodes* (who guards the guards themselves?). That question is answered by the existence of the court's inherent jurisdiction. It may also in a case such as this, in the unlikely event that the inherent jurisdiction does not resolve the matter, in appropriate circumstances the defendant may be able to apply to the Strasbourg court.

131. The inherent jurisdiction of the Supreme Court enables it, in certain circumstances, to revisit and if necessary vary or rescind decisions of the court. This court inherited the inherent jurisdiction of the Appellate Committee of the House of Lords. That Committee had considered the scope of its inherent jurisdiction in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. Lord Browne-Wilkinson dealt with the matter in the most detail. He held that the inherent jurisdiction was unlimited and enabled the Committee to avoid any injustice caused by an order of the Committee as a result of an unfair procedure arising through no fault of a party, but he ruled out any power to review the merits of a previous decision of the Committee:

> "In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no

> fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong." (p 132D-F)

132. Although in the second paragraph Lord Browne-Wilkinson speaks of a party being subjected to an "unfair procedure", I do not consider that he meant that the inherent jurisdiction was only available where there was a purely procedural irregularity, that is, a departure from the practice on an appeal. Although that would normally be the case, it is possible that the inherent jurisdiction may be invoked for example where a party has wrongly withheld some critical evidence from the other party. The key question is whether there has been an injustice of a particularly serious nature which as a result of some step by the court or a party undermines the order of its essential quality of being a judicial decision.

133. It is customary to say that the jurisdiction on which the Appellate Committee relied in *Pinochet (No 2)* is a narrow jurisdiction but there are two reasons why I do not consider this to be so. Firstly, as I have explained the jurisdiction is to avoid unfairness and so is not simply limited to purely procedural irregularity (although in *Pinochet* the irregularity was procedural). It is possible therefore that in some circumstances the jurisdiction may extend to an irregularity consisting of a serious violation of the defendant's human rights. For the purposes of this judgment, I will proceed, without deciding it, on the basis that in certain circumstances the inherent jurisdiction encompasses power to intervene if there is a serious violation of human rights and that that jurisdiction was engaged in this case.

134. The inherent jurisdiction exists to ensure that the process which is applied is not flawed by some failure to provide a truly judicial process in all material respects. The existence of such a jurisdiction is not unique to the Supreme Court. Since the decision of the Court of Appeal in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 the Court of Appeal in England and Wales has exercised its inherent jurisdiction to reopen even the final determination of appeals which it has already determined where three conditions are fulfilled. These conditions are that: (i) it is necessary to do so in order to avoid real injustice; (ii) the circumstances are exceptional and make it appropriate to reopen the appeal; and (iii) there is no alternative effective remedy. The procedure is now consolidated in CPR rule 52.30.

135. The notes in the White Book 2021 give details of the way in which the jurisdiction is exercised (see CPR rule 52.30.2). For instance, in *Feakins v Department of*

Environment, Food and Rural Affairs [2006] EWCA Civ 699; [2006] NPC 66, the Court of Appeal of England and Wales gave permission to reopen an appeal which had been heard five years previously. The court at the original hearing had been misled by untrue evidence, and it was "highly likely" that, if the court had known the true position at the original hearing, it would have reached a different decision (para 38). Thus, the jurisdiction is not confined to procedural irregularities. The inherent jurisdiction of this court must be no less than that of the Court of Appeal.

136. In the context of reopening final appeals, great weight must be given to the desirability of finality in litigation, but this is not in my judgment necessarily so where the determination sought to be reopened is a determination of the Supreme Court in its original jurisdiction. Should the Supreme Court exercise its inherent jurisdiction in this case? In my judgment, for the reasons given below that question must be answered in the negative.

137. Mr Crosland's five grounds of appeal are set out in the judgment of the majority. It is necessary to examine Mr Crosland's grounds to see if they engage the court's inherent jurisdiction.

138. I take the facts as helpfully set out by the majority's judgment. I will first deal with Ground 1 and the impact of article 10 of the Convention, which is engaged by these proceedings, on the finding of contempt and penalty. Article 10 guarantees the right to freedom of expression, but it is a qualified right. Article 10 of the Convention provides:

> "**Article 10**
>
> 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 and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

139. Mr Crosland is particularly concerned about the climate change emergency and global warming. Under the United Nations Framework for combating Climate Change, agreed at Paris in 2015, states set an objective of ensuring that global temperature increases remain well below 2°C and of driving efforts to limit the temperature increase to 1.5°C. Mr Crosland contends that the judgment of this Court which he released in breach of the embargo misled the public because it did not disclose that the Secretary of State had acted on the basis of the 2°C target, not the reduced target of 1.5°C. I do not consider that there is any substance in his allegation about the judgment. On a proper analysis of the judgment, that matter was not relevant to the court's reasoning.

140. Mr Crosland contends that his actions were justified because the leading scientists who wrote to the Prime Minister in consequence of the judgment would not have done so without the publicity arising from his breach of the embargo. He also contends that the media would not have given the matter the same attention as it did flow his breach of the embargo. These points are only assertions. There is no evidence that this was so, and it is inherently unlikely that the publicity could only be obtained if he breached the embargo.

141. In my judgment, Mr Crosland could equally well have made his points *after* the embargo was lifted and that would not have involved any conflict with the court's directions. Therefore, he had no good excuse for his actions. He simply wanted to obtain publicity and what article 10 protects is the right to speak, not the right to gain the maximum publicity.

142. Moreover, the breach is aggravated by the fact that Mr Crosland has been called to the Bar of England and Wales and therefore would be particularly aware of the seriousness of not complying with the court's directions. A barrister plays an essential role in the administration of justice. He owes duties to the court. As Sir Malcolm Hilbery wrote in *Duty and Art in Advocacy* (Stevens, 1959, p 19), "the privilege which covers all he says and does in the course of a [hearing], lays on him a heavy obligation never to abuse the situation." He is trusted to observe the directions of the court. The breach was found to be deliberate and there has been no apology.

143. The directions which Mr Crosland breached are imposed to maintain the authority of the court's rulings. As Lord Lloyd-Jones explained in the judgment which

led to the Order, a major reason for the embargo in this sort of case is to enable judgment to be finally corrected before being released to the public. Without the embargo a great injustice could be done by publicity being given to an unintended inaccuracy. In Mr Crosland's favour it appears to be the position in this case that at least at the point in time of his publication of this court's judgment there was no error in it requiring correction.

144. There is no question as to legitimate aim of the contempt jurisdiction or as to the fact that it was prescribed by law. Those requirements are satisfied. So, in cases such as this, the question must necessarily arise as to the proportionality of the restriction. As regards proportionality, this court has recently held that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case." (*Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2021] 3 WLR 179, para 59)

145. In the great generality of cases, it is important that the proportionality exercise is carried out in a granular way taking each point in turn. Nonetheless there can in my judgment be exceptional cases where the result of the proportionality exercise is so clear that it would be formulaic to have a requirement to spell out each factor in turn for the purposes of the balancing exercise. In my judgment this is such a case, and the court did not when balancing proportionality at any stage in these contempt proceedings have to articulate all the reasons which Mr Crosland contended that he had when he breached the embargo and which he contends justified his actions. Self-evidently they did not justify what he did, as I have explained.

146. The approach of the respondent is that contempt of court does not engage article 10 and that proportionality only falls to be considered at the point of the penalty. I do not accept that submission. Contempt of court restricts the right to freedom of expression and may chill the exercise of freedom of speech in relation to judicial decisions. In my judgment, an embargo imposed prior to hand down of a judgment is an interference with the right of free speech and accordingly to be punishable it must be justified under article 10: see generally Appendix B to the Consultation Paper of the Law Commission of England and Wales on Contempt of Court (Law Com No 209, 2012). In *Kyprianou v Cyprus* (Application No 73797/01), para 166, the Grand Chamber recorded that it was common ground that it was not just the penalty for contempt but the conviction for contempt that had to be justified. But this difference has in my judgment no impact on the outcome of the present application

since on any basis, for the reasons already explained, Mr Crosland cannot show that the embargo violated his article 10 right.

147. It follows that the exceptional inherent jurisdiction does not arise by virtue of the bringing of these proceedings or the finding of contempt. There was no unfair failure to apply article 10 of the Convention.

148. Ground 2 raises no question of an irregularity because the transcript of the hearing shows that the court was clearly aware of this letter. As I have explained, even if the scientists only became aware of the judgment through the breach of the embargo (which has not been demonstrated), that would not provide any justification for breach of the embargo. So, there is no unfairness in this of the scale and degree that justifies interference with the Order.

149. Ground 3 potentially raises an argument that there has been a serious procedural irregularity because on any basis Mr Crosland was entitled to have his case heard by an independent and impartial tribunal. The court had, it is suggested, demonstrated bias by referring the matter to the Attorney General and to the Bar Standards Board. No other allegation of bias is made. Mr Crosland relied on *Kyprianou v Greece*, but this concerned a case where the national court in question had found a contempt by a summary procedure, which was not used in this case. Mr Crosland relied on a number of other minor matters as showing bias, but they do not take his case any further.

150. In my judgment, no apparent bias can be said to arise in the circumstances of this case. The court did not itself take the decision to prosecute Mr Crosland in contempt and impose sanctions on him accordingly. Rather the President of the court referred the matter to the Attorney General for her decision. The proceedings were not summary proceedings in which the court acts as judge and prosecutor. There is no allegation that the panel was not acting objectively, independently and judicially in the way the contempt case against Mr Crosland was tried. On the contrary, the transcript and judgment show that the court was scrupulously fair in the conduct of the hearing. This ground accordingly cannot engage the court's inherent jurisdiction to vary or set aside its previous order.

151. Ground 4 relates to the disclosure of information held by the Attorney General. I accept that it is part of the right to a fair trial that the prosecutor should make available to the defendant information that is relevant to his defence, the information relied on here has nothing to do with his defence. The argument seems to be that the fact the embargo may have been breached in another case could somehow justify the breach in the present case, or that the attitude of the prosecution in that case could

somehow make the present case an abuse of process. If there were any such arguments, they were available to be taken at the hearing of the contempt application and rejecting Ground 4 at this stage therefore does not involve any injustice to Mr Crosland.

152. Ground 5 raises the contention that the order for costs was disproportionate and did not follow the practice in criminal cases. I do not consider that this discloses the serious level of unfairness required for invoking the inherent jurisdiction of the court. There was no rule imposing an arithmetical relationship between the costs and the penalty and it is up to the defendant to provide satisfactory evidence of his lack of means.

C. Conclusion

153. For the reasons given above, I would dismiss this application.