Having concluded that departure from CJEU case law was inappropriate, there was a question over the relevance of a 2021 CJEU decision. Section 6 (2) of the EUWA permits all courts to "have regard" to decisions of the CJEU handed down after IP completion day. Arnold L.J. considered the new case should be treated as "highly persuasive" as – not only was it relevant to the case – it was a Grand Chamber decision closely related to and refining an extensive body of retained EU case law from which the Court of Appeal has decided not to depart (at [91]). New CJEU decisions are thus likely to remain influential.

Importantly, the EUWA does not upset the domestic judicial hierarchy as membership of the EU did. All courts can have regard to new CJEU decisions, but lower courts will remain bound by decisions of the Court of Appeal. Returning to *Lipton* briefly, in any future litigation the High Court will be bound to treat staff illness as an inherent risk in an air carrier's activity (see on a related point *Varano v Air Canada* [2021] EWHC 1336 (Q.B.)). In this regard, Rose L.J. raised a concern about the comprehensive statement of CJEU case law by Arnold L.J. Her concern was that the ability of lower courts "to have regard to such future CJEU judgments should not be hindered by the fact that the pre-existing, retained law has been described in a judgment of this court, even though a decision of this court would, in general, be binding on that court or tribunal" (at [183]).

Where *Lipton* and *TuneIn* are perhaps in tension is as regards the appropriate legal regime for cases where the facts arose before IP completion day. In *Lipton,* the cancellation occurred in 2018 but the Court of Appeal decided the case as one of retained EU law. Whereas in *TuneIn* the copyright breach was ongoing for several years – from while the UK was a member of the EU, during the transitional period and after IP completion day – but the judgment proceeds on the basis that departure from CJEU jurisprudence was only possible from 1 January 2021 and as such would not affect any financial penalties accrued prior to that date (at [76]).

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APPLYING CONVENTION RIGHTS TO STATUTORY DEFENCES

IN *Director of Public Prosecutions v Ziegler and others*, protestors against the arms trade blocked an access road to the venue for an international arms fair for about 90 minutes. They were charged with wilfully obstructing the highway without lawful authority or excuse contrary to Highways Act 1980, s. 137(1). District Judge Hamilton decided that convicting them would interfere with the exercise of their rights to freedom of expression

and peaceful assembly (ECHR, arts. 10.1, 11.1). Could the interference be justified? Only one of several access routes to the venue had been blocked; the delay caused, while more than *de minimis*, was for a limited time; no road user had complained to the police; and the defendants had sincere, long-standing objections to the arms trade. The judge decided that in those circumstances convicting them would not be a proportionate way of achieving a legitimate aim and thus necessary in a democratic society under Articles 10.2 and 11.2. Reading section 137(1) of the Highways Act in a way that was compatible with their Convention rights as required by section 3(1) of the Human Rights Act 1998, he decided that the defendants had a "lawful excuse" for obstructing the road, and he acquitted them.

The prosecution appealed by case stated, a procedure available where an aggrieved party argues that a magistrates' court's decision is "wrong in law or is in excess of jurisdiction" (Magistrates' Courts Act 1980, s. 111(1)). Two issues arose. First, in what circumstances may the Divisional Court substitute its own assessment of proportionality for that of the trial court? Second, when may the exercise of Convention rights establish a statutory defence of "lawful excuse"? The Divisional Court ([2019] EWHC 71 (Admin), [2020] Q.B. 253) decided that a proportionality assessment, although fact-sensitive, is not a fact. It calls for a legal value judgement which the appellate court is as well placed to make as the trial court. Convention rights must be given significant weight, but if a judge wrongly decides that the facts show an interference not to be proportionate, an appellate court can reverse that judgment if the judge took account of irrelevant facts or reached a conclusion from the facts which is unsustainable. The judge had wrongly held that a more than *de minimis* obstruction of the highway could give rise to a defence of lawful excuse. The court entered convictions and remitted the case for sentencing.

The defendants appealed to the Supreme Court ([2021] UKSC 23, [2021] 3 W.L.R. 179), which had to decide (1) what the proper test is for an appellate court's power to reverse a magistrates' court's decision on an appeal by case stated; and (2) whether a defence of lawful excuse under the Act could ever be available to protestors in respect of an obstruction which prevents other road users from passing along the road and is more than *de minimis*.

On (1), earlier case law offered three possibilities: the decision should stand unless (a) the decision maker made a significant error of principle: *In re B* [2013] UKSC 33, [2013] 1 W.L.R. 1911 and CPR rule 52.21(3); (b) there is an identifiable flaw in the judge's reasoning which undermines the cogency of the conclusion and goes beyond mere disagreement between the appellate court and the trial judge: *R. (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 W.L.R. 4079; or (c) there is an error or flaw on the face of the case which undermines the cogency of the conclusion on proportionality, for example where the decision is one which no reasonable court, properly instructed on the relevant law, could

have reached on the facts found: *In re B* applied in the light of *Edwards v Bairstow* [1956] A.C. 14, where the House of Lords reversed a decision of mixed fact and law as to whether a course of dealing was an "adventure in the nature of a trade".

The majority (Lords Hamblen and Stephens in a joint judgment and Lady Arden) favoured (c). The appellate court must accept the primary and secondary facts as set out in the case stated (secondary facts being inferences or conclusions from the primary facts), unless they are unsupported by evidence or are findings no reasonable tribunal could have reached (at [54], [101]). The position might be different in other contexts, where a more or less intrusive review of proportionality decisions might be appropriate depending on circumstances and statutory underpinnings. Lady Arden further suggested that special considerations applied in criminal appeals against the first-instance court's decision that no offence had been committed. "Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address" (at [102]).

Lord Sales, with whom Lord Hodge D.P.S.C. agreed, dissenting, thought that it made no sense for the appellate approach to first-instance proportionality evaluations to vary according to the grounds on which statutes permit an appeal or review. The appellate court should be obliged to hold that there has been an error of law where it decides that the first-instance assessment of proportionality is wrong, without deferring to the first-instance court's evaluation (at [132]–[133]). No doubt, however, the result will often be the same whichever test is applied. Equally judges will usually be able to fit the outcome they favour within whichever formulation they adopt, as the difference of views on the second issue indicated.

In relation to the second, substantive issue, the court unanimously held that defendants could take advantage of the "lawful excuse" defence even when deliberate obstruction of the highway in the exercise of Convention rights causes more than *de minimis* interference with the right to pass and repass on the highway, and that defendants charged with wilfully obstructing the highway in the course of exercising their rights under Articles 10 and 11 would have a "lawful excuse" unless the prosecution which interfered with the rights could be shown to be necessary in a democratic society for a permitted purpose so as to be justifiable under ECHR arts. 10.2 and 11.2 (reading "lawful excuse" in a manner compatible with the Convention rights).

They were divided, however, as to the test for justifying the interference. Lords Hamblen and Stephens and Lady Arden held that it was the interference which a conviction would represent which had to be justified. The police might have been justified in removing protestors from the highway, but it had been open to the District Judge to conclude that convicting the defendants would not have been proportionate to a permitted aim, and that accordingly the defence of "lawful excuse" had been made out. Lord

Sales, with whom Lord Hodge DPSC agreed, dissenting again, considered that the correct test was whether the action of the police in arresting and removing the defendants had been justifiable. If it was, no separate issue arose in relation to the prosecution. They thought that the police had been justified in removing the protestors from the road, so there was no lawful excuse. In deciding the contrary, the District Judge had been "wrong", and an appellate court was entitled to correct his decision. For the majority, by contrast, the question therefore was whether a conviction would be proportionate independently of the decision to clear the road. The District Judge's decision that the 90-minute period for which the road had been blocked was of limited rather than significant duration was a fact-sensitive finding of secondary fact which was not unreasonable given that there was no evidence of significant disruption caused by the obstruction (at [84]). It was not relevant to assessing proportionality of a conviction that the obstruction would have continued for longer had the police not removed the defendants. The other factors which the Divisional Court thought the District Judge had wrongly taken into account, including the lack of complaints to the police and the defendants' long-standing commitment to opposing the arms trade, were relevant to proportionality in the context of Articles 10 and 11 (at [83]–[87]).

Separating the justification for removing protestors to clear the road from that for convicting someone of committing a crime by obstructing it in the first place is nuanced and principled. Proportionality of police action in removing protestors is relevant in two circumstances: first, when a protestor is charged with assaulting or wilfully obstructing an officer in the execution of his duty (Police Act 1996, s. 89(1), (2)) by resisting police action; second, when a protestor brings a civil action against the police for damages for acts done in clearing the highway. In both instances, the lawful exercise of preventive and enforcement powers is a separate issue from the criminal liability of protestors. Imposing a criminal sanction for protesting is an interference by the state with freedom of expression and assembly independent of the physical interference by the police to maintain free passage along highways.

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FLOODGATES FEARS AND THE UNLAWFUL MEANS TORT

WHEN the House of Lords decided *OBG Ltd. v Allan* [2007] UKHL 21, [2008] A.C. 1, some much-needed clarity was finally brought to the economic torts. Or so we thought. Within a year, in *Revenue and Customs*

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