Easter Term
[2021] UKSC 15

JUDGMENT

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

before

Lord Lloyd-Jones
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

10 May 2021

Heard on 10 May 2021

Applicant	*Respondent*
Aidan Eardley (Instructed by The Government Legal Department)	Timothy Crosland

JUDGMENT OF THE COURT:

1. This application by Her Majesty's Attorney General for permission to pursue an application for committal for contempt concerns an alleged breach of an embargo on publication of a judgment of the Supreme Court in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] PTSR 190 by Mr Timothy Crosland, an unregistered barrister who represented the charity Plan B Earth in those proceedings. That appeal concerned the lawfulness of the Airports National Policy Statement, ("the ANPS"), and its accompanying environmental report. The ANPS was designated as national policy on 26 July 2018 by the Secretary of State for Transport. The ANPS is the national policy framework which governs the construction of a third runway at Heathrow Airport. Any future application for development consent to build this runway will be considered against the policy framework in the ANPS. The ANPS does not grant development consent in its own right.

2. The alleged breach of embargo was referred by Lord Reed, President of the Supreme Court, to the Attorney General and the Attorney General decided to apply for permission to pursue proceedings against the respondent, Mr Crosland, seeking his committal or such other penalty as the court considers appropriate for contempt of court. This application is being heard by a different panel of the Supreme Court from that which sat on the Heathrow Airport case.

3. This hearing is not concerned with the substance of the judgment of the Supreme Court in the Heathrow Airport case. That judgment has been handed down by the Supreme Court and, as with all judgments in all courts in this country, members of the public are free to subject it to the closest scrutiny and to express their views on the decision. The present proceedings are about a distinct and very limited matter: the conduct of Mr Crosland in disclosing the result of the appeal in breach of the embargo before it was made public by the Supreme Court and whether that constitutes a contempt of court.

<u>The grounds of committal</u>

4. The grounds of committal relied on by the Attorney General are as follows:

> The applicant applies for the committal of the respondent or such other penalty as the court considers appropriate for his contempt of court on the following grounds:

"1. On 7 and 8 October 2020 the court heard an appeal in the case of *R (Friends of the Earth Ltd) v Heathrow Airport Ltd*. The respondent to this application represented the second respondent to the appeal, Plan B Earth, in his capacity as director of that organisation.

2. On 9 December 2020, a copy of the court's draft judgment in the appeal was circulated to the parties' representatives in accordance with paragraphs 6.8.3 to 6.8.5 of Practice Direction 6. The draft was marked 'in confidence'. The rubric on the title page stated that those to whom the content of the draft are disclosed must take all reasonable steps to preserve their confidentiality and that any breach of these obligations may be a contempt of court. The covering email via which the draft judgment was circulated repeated that the draft was strictly confidential.

3. On the morning of 15 December 2020, the day before judgment in the appeal was due to be handed down, the respondent sent an email to the Press Association, and, it is to be inferred, other persons unknown, containing a personal statement in which he disclosed the outcome of the appeal. The said statement included the words, 'I have taken the decision to break the embargo on that decision as an act of civil disobedience. This will be treated as "contempt of court" and I am ready to face the consequences'.

4. At around 12.41 pm on 15 December 2020 the respondent published the same statement on Twitter via the account of Plan B Earth (@PlanB_earth). The said account has some 3,585 followers.

5. At all material times the respondent was aware that he had been sent the draft judgment in confidence and that he was prohibited from disclosing its contents to the public prior to the judgment being handed down.

6. As a result of the publication of the said statement by the respondent, and as he intended or was reasonably foreseeable, the outcome of the appeal was widely publicised online in the national media on 15 December and the morning of 16 December prior to the judgment being handed down at

> 09.45 am on 16 December 2020 by Reuters, City AM, The Independent, the Daily Telegraph and the Mail Online. The statement was also re-tweeted in advance of the judgment being handed down by followers of Plan B Earth, including the organisation Extinction Rebellion, which itself had some 55,600 followers at the time.
>
> 7. By disclosing the outcome of the appeal to the public as set out above, knowing that such was prohibited by the court, the respondent interfered with or created a real risk of interference with the administration of justice and thereby committed contempt of court."

Permission

5. We consider that the application discloses a reasonable basis for seeking the committal of the respondent and that it is in the public interest that the application should be heard; see *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477, paras 23 and 98 to 101. The conduct alleged to constitute the contempt is not disputed and, if established, the contempt would be a serious one. Accordingly, we grant permission.

The rubric

6. It is necessary to refer to the relevant events in a little more detail. The draft judgment in the Heathrow appeal was circulated in confidence to the parties' representatives, including the respondent on 9 December 2020. The rubric on the draft judgment read:

> "IN CONFIDENCE
>
> This is a judgment to which paragraphs 6.8.3 to 6.8.5 of Practice Direction 6 apply. The contents of this draft are confidential initially to the parties' legal representatives and, when disclosed to the parties in the 24 hours prior to delivery, also to the parties themselves. Those to whom the contents are disclosed must take all reasonable steps to preserve their confidentiality. No action is to be taken in response to them before judgment is formally pronounced unless this has been authorised by the court. A breach of any of these obligations may be treated as a contempt of court."

7. The email from the judgments clerk sent with the draft judgment invited corrections to the draft judgment. It continued:

> "The judgment is strictly confidential until given. The contents of these documents are not for publication, broadcast or use on club tapes before judgment has been promulgated. The documents are issued in advance by the Justices of the Supreme Court on the understanding that no approach is made to any organisation or person about their contents before judgment is given (see paragraph 6.8.3 to 6.8.5 of Practice Direction 6)."

8. The Practice Direction states in relevant part:

> "6.8.3 The judgment of the Court is made available to certain persons before judgment is given. When, for example, judgment is given on a Wednesday morning, it is made available to counsel from 10.30 am on the previous Thursday morning. In releasing the judgment, the Court gives permission for the contents to be disclosed to counsel, solicitors (including solicitors outside London who have appointed London agents) and in-house legal advisers in a client company, Government department or other body. The contents of the judgment and the result of the appeal may be disclosed to the client parties themselves 24 hours before the judgment is to be given unless the Court or the Registrar directs otherwise. A direction will be given where there is reason to suppose that disclosure to the parties would not be in the public interest.
>
> 6.8.4 It is the duty of counsel to check the judgment for typographical errors and minor inaccuracies. In the case of apparent error or ambiguity in the judgment, counsel are requested to inform the Judicial Support section as soon as possible. This should be done by email to Judicial Support no later than two working days before the date judgment is to be given. The purpose of disclosing the judgment is not to allow counsel to re-argue the case, and attention is drawn to the opinions of Lord Hoffmann and Lord Hope in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587.
>
> 6.8.5 Accredited members of the media may on occasion also be given a printed copy of the judgment in advance by the Court's communications team. The contents of this document

> are subject to a strict embargo and are not for publication, broadcast or use on club tapes before judgment has been delivered. The documents are issued in advance solely at the Court's discretion, and in order to inform later reporting, on the strict understanding that no approach is made to any person or organisation about their contents before judgment is given."

Events following the circulation of the draft judgment

9. There is no substantial disagreement between the parties as to the primary facts. Documents before this court show that, following circulation of the draft judgment, the respondent sent emails to the court in which he contended that there were inaccuracies in the draft judgment and sought permission to discuss them with external lawyers prior to hand down. In those emails, the respondent maintained that the Secretary of State for Transport had in June 2018 assessed the ANPS against the historic global temperature limit of 2 degrees Centigrade, a standard which by that date had been rejected by the UK Government and by the wider international community. The respondent said that the fact that this standard had been applied had only come to light through the disclosure process in the Heathrow litigation.

10. The respondent's request to discuss the implications of this with external lawyers prior to hand down was refused.

11. On 14 December 2020, the respondent was informed that the draft judgment would be amended to acknowledge an argument he had advanced but that there would be no substantive change to the judgment. At 11.22 on 15 December 2020, the respondent published his personal statement in which he disclosed the outcome of the appeal in an email sent to the Press Association and possibly to other media organisations. He issued a statement in similar terms on Plan B's Twitter account at 12.41. He also emailed the Supreme Court judgments clerk in similar terms at 13.55.

12. At about 11.35 on 15 December 2020, the Supreme Court's Communications Team was notified of the statement through a telephone call from the Press Association. It issued a statement to the Press Association and from 11.50 the Supreme Court began notifying media organisations of the breach of embargo. However, by that time publication had been made by various organisations, including Reuters, City AM, The Independent, The Daily Telegraph and the Mail Online. Some of these withdraw their articles but The Independent and the Mail Online did not. The Independent article was removed after the judgment had been handed down.

13. At 16.36 on 15 December 2020, the Supreme Court requested the respondent to remove the statement he had shared on Twitter until 9.45 the next day as it was in breach of the embargo. The respondent did not respond to the email and the tweet was not deleted. Plan B's Twitter account had 3,585 followers. 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 judgment was handed down by the Supreme Court at 9.45 am on 16 December 2020.

14. On 16 December a link to the respondent's statement was posted on Plan B's website.

15. The respondent wrote an article for The Independent which was published online on 17 December 2020. It was published under the title "I am the lawyer who committed contempt of court over Heathrow's expansion plans - this is why I did it". We note that the respondent states that he in fact submitted the article under the title "Why I broke the court embargo on the Heathrow judgment" and that the title was changed by the editor at The Independent. We also note that the respondent appears to have made no objection at the time to the amended title under which it was published, that that title reflected what was said in the last paragraph of the article, and that in his blog post entitled "Barrister who breached Supreme Court embargo: I felt I had no choice" the respondent referred to "my contempt of court in breaking the embargo on the Heathrow judgment".

The issues for decision

16. The principal issues that we have to decide are (1) whether the respondent was responsible for disclosing to the public the outcome of the Supreme Court's judgment in the Heathrow Airport case prior to the Supreme Court handing down its judgment in breach of an embargo on disclosure; and, if so, (2) whether, when he did so, he was aware of the embargo on disclosure; (3) whether in all the circumstances the respondent's actions were or created a risk of an interference with the administration of justice that was sufficiently serious to amount to the *actus reus* of criminal contempt; and (4) whether the respondent had a specific intention to interfere with the administration of justice. If the contempt of court is proved to the criminal standard, it will be necessary to consider questions relating to penalty and costs.

Findings of fact

17. We make the following findings of fact which we find proved to the criminal standard.

18. First, the respondent was responsible for the disclosure. On the morning of 15 December at 11.22 the respondent sent an email to the Press Association containing his personal statement in which he disclosed the outcome of the appeal. It stated in terms, "Tomorrow the Supreme Court will overturn the Court of Appeal's judgment in Heathrow's favour and rule that Mr Grayling acted lawfully". Just over an hour later at 12.41 he posted a similar statement on Plan B's Twitter account. The respondent has not denied that he made these publications. On the contrary, he has admitted them.

19. Secondly, when the respondent made the disclosures, he was aware of the embargo. Once again, this was admitted by the respondent. The personal statement sent to the Press Association at 11.22 stated that he had taken the decision to break the embargo as an act of civil disobedience. The statement posted on Plan B's Twitter account at 12.41 stated, "I am breaking the court embargo on Heathrow to protest against the injustice of the verdict, which is a betrayal of the younger generation and those on the frontline of the crisis in the UK and around the world."

20. The respondent here points to the sentence in the rubric which states "A breach of any of these obligations may be treated as a contempt of court". He suggests that there is uncertainty in this statement. There is no substance in this submission. First, the rubric made it abundantly clear that there was a prohibition on publication of the judgment or any part of it prior to hand down. What matters here is that, when he made the disclosure, the respondent was aware of the embargo. Secondly, the prohibition on publication was reinforced by the express warning in the email from the judgments clerk which enclosed the draft judgment. Thirdly, the respondent was in no doubt that his conduct would be likely to be treated as a contempt of court. In his personal statement he stated at the outset, "This will be treated as a contempt of court and I am ready to face the consequences". We find that these acts of publication were deliberate and calculated breaches of the embargo.

21. Furthermore, the respondent's suggestion that it was because of some doubt as to the confidentiality of the judgment that he sought leave of the court to obtain independent legal advice is contradicted by what he said at the time. The request that he be permitted to discuss the draft judgment with external lawyers made by email at 11.15 on 11 December gave as the reason that "We need legal advice on what we can and cannot say <u>following the judgment</u>, depending on its final form" (emphasis added).

Civil or criminal contempt?

22. The next question for consideration is whether the respondent'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.

23. In the words of Lord Toulson in *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23; [2014] AC 1246, para 39: "A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice". The present case is not a case involving a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party. Rather the order was made in order to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded; see, for example, *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477, para 54; *Attorney General v Dallas* [2012] EWHC 156 (Admin); [2012] 1 WLR 991; *Solicitor General v Cox (Contempt of Court: Illegal Photography)* [2016] EWHC 1241 (QB); [2016] 2 Cr App R 15, para 73. Furthermore, the requirement of confidentiality was imposed directly by the court on the respondent, who was a representative of a party to the litigation. The strictly confidential basis upon which draft judgments are provided to parties is well established, as are the reasons underpinning the duty of confidentiality in this context; see, for example, *Director of Public Prosecutions v P (No 2)* [2007] EWHC 1144 (Admin); [2008] 1 WLR 1024, paras 2 and 10 per Smith LJ; *R v Noshad Hussein* [2013] EWCA Crim 990, paras 1 to 2 per Treacy LJ. The potential damage to the administration of justice which breaches of this duty of confidentiality may cause has also been emphasised; see, for example, *P (No 2)* at para 10 per Smith LJ. A critical point here is that the respondent has interfered with the court's control of its own proceedings. We accept the submission on behalf of the Attorney General that the publication of the outcome of the appeal in breach of the embargo was an interference with the proper administration of justice.

24. Moreover, we accept the submission on behalf the Attorney General that the threshold of seriousness is passed in this case. First, it is vital for the authority of the court and in the interests of legal certainty that its judgments should be delivered at a time of its choosing and in a definitive form. Published judgments must be accurate, complete and in final form. Leaks of draft judgments could undermine the authority of the court and its judgments.

25. Secondly, the Attorney General has correctly referred to the powerful public interest in the court's being able to circulate draft judgments confidentially among the parties prior to their being handed down in complex and important cases so that

typographical mistakes and other errors can be addressed and a final definitive version of the judgment can be handed down, so that the parties can prepare submissions on consequential matters and so that the parties can prepare themselves for the consequences of the judgment becoming public. These are matters of importance to the administration of justice. If the confidentiality of the process is not respected, it will have to be abandoned and these benefits will be lost. In this regard we also note that in October 2020 the Attorney General had cause to issue a media advisory notice drawing attention to the importance of this confidentiality. In our view, this reflects the importance of the procedure and the need to protect it from abuse.

26. Thirdly, the outcome of the appeal and the respondent's comments on it were published very widely before hand down. It was clearly the intention of the respondent to publish the result and his comments on it as widely as possible.

27. Fourthly, the respondent's statements were in terms which defied the authority of the court and which could encourage others to disobey the prohibition on publication and to disclose this or other draft judgments.

28. So far as the *mens rea* of a criminal contempt of court is concerned, we are satisfied to the criminal standard that the respondent’s breach of confidentiality was deliberate and in breach of a court order of which the respondent was well aware. In our view, that is sufficient for present purposes (see *Solicitor General v Cox* at paras 69 and 73) and it is not necessary for the applicant to prove an ulterior intention to interfere with the administration of justice. However, in any event, 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.

<u>The respondent’s case on liability</u>

29. The respondent accepts that he was aware that he was breaking the court's confidentiality and that in practice the authorities were likely to pursue him for contempt of court. However, he submits that, at all times, he considered his action

to be lawful. The respondent submits that the court should have regard to his intentions, beliefs and motivations in disclosing the result of the appeal. He submits that he was justified in doing so in breach of the order because this 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. To that end he has placed before this court material which we have read relating to what he sees as the erroneous approach of the Supreme Court and the consequences to which it will lead.

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

31. First, the respondent submits that in order to prove contempt the applicant must prove a breach of confidence which cannot be made out here because there was an overriding public interest in disclosure which defeated the obligation of confidentiality. However, we are not concerned here with a contractual or equitable duty of confidentiality owed by the respondent. The respondent had been given a direction by the court not to disclose the draft judgment and he was bound to obey it unless there was a successful application to the court to vary it.

32. Secondly, for the same reason, this was an obligation prescribed by law in accordance with article 10(2) of the European Convention on Human Rights ("ECHR"). In any event, we have already referred to the fact that the respondent fully appreciated that his conduct would be likely to be treated as a contempt of court.

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.

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".

35. Fourthly, the respondent submits that he was entitled to act as he did because he believed it was reasonably necessary to do so in order to protect the right to life in accordance with article 2 ECHR. In this regard he refers to the positive obligation on States to protect life under article 2. This submission was not entirely clearly formulated. If the respondent's case is that the Supreme Court judgment violated article 2, then that could be tested in proceedings against the United Kingdom in Strasbourg. But, in any event, as we have explained, there was no rational connection between any breach of the embargo and the harm the respondent says he wished to prevent.

36. Fifthly, the respondent relies on the interpretative obligation under section 3 of the Human Rights Act 1998. The short answer to this submission is that we are not concerned here with any statutory obligations, including the provisions of the Contempt of Court Act 1981, but with contempt at common law.

37. Sixthly, the respondent relies on the criminal defence of necessity or duress of circumstances. We are of the clear view that there is no scope for the operation of the defence here, in circumstances where there was no requirement for action to be taken between the circulation in confidence of the draft judgment and the hand down of the final judgment.

38. Seventh and finally, the respondent submits that it was at all material times his belief that, had the Supreme Court properly understood the implications of its judgment on Heathrow expansion, it would have consented to the respondent's course of action. This submission is entirely unrealistic. It had been made clear to the respondent that he was required not to disclose the outcome of the appeal until the judgment had been handed down. Moreover, hand down occurred the following day and thereafter the respondent, the media and all members of the public were free to criticise the judgment and it was open to the respondent to raise all of the issues which concerned him.

Article 10 ECHR

39. Section 12 of the Human Rights Act 1998 provides that the court must have particular regard to the importance of the Convention right of freedom of expression

when considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. We have taken full account of section 12. We have also given consideration to whether a finding of criminal contempt in this case is compatible with article 10 of the European Convention on Human Rights which provides in relevant part:

> "(1) Everyone has the right of 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 ...
>
> (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."

40. A permissible interference with freedom of expression must therefore be prescribed by law, must pursue one or more of the legitimate objectives in article 10(2) and must be necessary in a democratic society for the achievement of that aim. The last limb requires an assessment of the proportionality of the interference to the aim pursued.

41. In the present case, the prohibition on publication of the judgment of the Supreme Court prior to hand down did amount to a restriction on the disclosure of information. However, it was for a limited period only, from 9 December 2020, when the judgment was sent to the parties in draft in confidence, until hand down at 9.45 on 16 December 2020. Furthermore, it 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.

Conclusion on liability

42. For these reasons, we are satisfied that the conduct of the respondent constitutes a criminal contempt of court.

Penalty

43. We turn therefore to consider what penalty is appropriate. The available penalties for an individual found in contempt of court are a term of imprisonment of up to two years (section 14, Contempt of Court Act 1981) or an unlimited fine. A sentence of imprisonment may be suspended.

44. General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:

> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
>
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
>
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
>
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.

6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.

45. Turning to the present case, in terms of culpability this was an interference with the administration of justice sufficiently serious to constitute a criminal contempt of court. The embargo on publication was intended to protect the operation of the legal system. The breach of the embargo was carried out intentionally and in full knowledge of the prohibition on disclosure. The respondent admitted in the contemporaneous documents that the breach of embargo was a considered act on his part. In addition, there was a clear intention to interfere with the administration of justice. The conduct in question was intended to attract publicity to conclusions in the judgment with which the respondent fundamentally disagreed. The respondent was deliberately disobeying the court's embargo and abusing the court's judgment hand down procedure in order to gain publicity.

46. In terms of harm, as a result of the respondent's conduct the outcome of the appeal was published very widely on social media in advance of the hand down. This was as the respondent intended. This risks undermining respect for the confidential nature of the court's judgment hand down procedure and may encourage others, dissatisfied by the impending outcome of the case, to do likewise. Deterrence is a relevant consideration in sentencing in such a case. It appears that little direct harm was caused as a result of the publication. It has not been suggested, for example, that this was a case where market-sensitive information was released prematurely to the public. The Attorney General accepts that the direct adverse consequences were limited. Nevertheless, the respondent's conduct was damaging to the system whereby judgments are made available to the parties in advance of hand down, a system which is beneficial to the parties to civil litigation and to the courts.

47. The respondent was motivated by his concerns and fears relating to the consequences of global warming and his disagreement with the decision of the Supreme Court. However, this does not begin to justify his conduct. There is no principle which justifies treating the conscientious motives of a protester as a licence to flout court orders with impunity. It was, moreover, a futile gesture as the judgment would in any event have been available some 22 hours later for scrutiny and

criticism by the media and the public. However, we do accept that greater clemency is normally required to be shown in cases of civil disobedience than in other cases; see *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357.

48. At 16.36 on 15 December 2020 the respondent was asked by the Registrar of the Supreme Court to remove the tweet which shared his statement until after the embargo was lifted the following morning. The respondent did not respond to the email. The tweet was not deleted. The respondent has not made any attempt to mitigate his conduct by admitting his contempt or by apology. On the contrary, he has remained unrepentant, save that he apologised for the inconvenience he had caused to the staff at the Supreme Court.

49. In considering what penalty to impose, we are mindful of article 10 ECHR. We have already referred to the governing principles and we have been referred helpfully to the judgment of the European Court of Human Rights in *Cumpana & Mazare v Romania* (2005) 41 EHRR 200, which we take fully into account.

50. Any penalty imposed must be necessary for the legitimate objective of maintaining the authority and impartiality of the judiciary and must be proportionate for that purpose. As a result, we have had regard to the extent of the interference with article 10 rights and the likely deterrent effect on the future exercise of article 10 rights. The sentence we propose to impose is, in our view, a necessary and proportionate penalty for the purpose of maintaining the authority of the judiciary and its judgments.

51. We also take into account that the respondent is of positive good character.

52. In these circumstances, we propose to deal with this matter by the imposition of a fine. In coming to a conclusion as to the appropriate level of fine, we have taken account of the fact that the respondent faces disciplinary proceedings before his professional body. We have also taken account of what the respondent has told us about his income. We therefore impose a fine of £5,000. That fine will be enforceable in like manner to a judgment of the High Court for the payment of money under section 16(1)(a) of the Contempt of Court Act 1981.

Easter Term
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COSTS JUDGMENT

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

before

Lord Lloyd-Jones
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

10 May 2021

Heard on 10 May 2021

JUDGMENT OF THE COURT:

1. At a hearing on 10 May 2021, the Court heard an application by the Attorney General ("the applicant") and concluded that Mr Timothy Crosland ("the respondent") was in criminal contempt of court. A fine of £5,000 was imposed and the applicant made an application for costs. Following submissions made by both parties, the court announced:

> "We make an order that the respondent pay the costs of the application to be assessed if not agreed."

2. Following two emails on the subject of costs sent by the respondent to the court on 11 May 2021 and 12 May 2021 the court directed that the applicant provide a draft bill of costs and that the parties make written submissions on costs. The court has considered the draft bill of costs and the written submissions of the parties.

3. The applicant seeks to recover costs from the respondent in a total amount of £22,504. He submits that in committal applications costs should normally follow the event and that the relevant power is found in rule 46 of the UK Supreme Court Rules.

4. The principal submissions on behalf of the respondent are as follows:

(1) Because the court referred to "criminal trials" in an email rejecting the respondent's application to have the proceedings live-streamed, it was fair for the respondent to assume that the court would be adopting procedures which apply to criminal trials at all stages of these proceedings;

(2) Therefore, the court ought to have considered the applicant's application for costs in accordance with the Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 (as amended) ("the Crim P D"), which provides at para 3.4 that:

> "An order [for costs] should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay … An order should not be made on the assumption that a third party might pay";

(3) Due to the failure to consider the relevant provisions of the Crim P D, the order for costs which the court made is unlawful;

(4) Had the Court considered the respondent's means pursuant to the Crim P D (at para 3.4) in addition to the £5,000 fine which it had already imposed, it would have made no order for costs in favour of the applicant;

(5) In light of the unlawful nature of the original order, no subsequent order can be made as the court is now functus officio.

Costs in contempt proceedings before the Supreme Court

5. The respondent's reliance on the Crim P D is misplaced as it has effect in magistrates' courts, the Crown Court, the High Court and the Court of Appeal (Criminal Division) (paras 1.1.2, 3.1-3.3). It has no application to proceedings before the Supreme Court.

6. Part 7 of the Supreme Court Rules deals with costs. Rule 46 provides that

> "The Court may make such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or application to or proceeding before the Court."

Rule 51 sets out the approach to the assessment of costs on the standard basis and the indemnity basis. In relation to the standard basis costs are allowed "only if they are proportionate to the matters in issue and are reasonably incurred and reasonable in amount" (see rule 51(1)).

7. According to rule 2(1), the Rules "apply to civil and criminal appeals to the Court and to appeals and references under the Court's devolution jurisdiction". Therefore, the Rules do not apply directly to these proceedings. Rule 9(7) states 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". The overriding objective, set out in rule 2(2), "is to secure that the Court is accessible, fair and efficient". The Rules can be used to guide the Court's use of its power to control its own procedures and processes.

8. Costs normally follow the event in committal proceedings and a respondent who is found to be in contempt will normally be ordered to bear the costs of the

proceedings in addition to any penalty imposed (Arlidge, Eady & Smith on Contempt ("Arlidge"), at 14-154 and *Attorney General v Yaxley-Lennon* QB-2019-000741 (costs order and reasons, 11 September 2019). However, the court will seek to make an order which is fair, just and reasonable in all the circumstances (*Solicitor General v Jones* [2013] EWHC 2579 (Fam) at para 41 per Sir James Munby PFD).

9. When a respondent is found to be in contempt of court, there will usually be no principled basis for opposing a costs order. (See generally *Calderdale & Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 2537 (QB), per Spencer J at para 14; *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB), per Richards J at paras 105-109.) Normally, the sole question will be whether the costs claimed in relation to a contempt application are reasonable and proportionate (*Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101; [2018] 1 Costs LR 103, at paras 56, 69-70 per Gloster LJ; *Calderdale* at para 14).

10. In determining whether the claimed amount is reasonable and proportionate, the court may take into account the respondent's means (*Yaxley-Lennon*). 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 generally *Deputy Chief Legal Ombudsman v Young* [2011] EWHC 2923 (Admin); [2012] 1 WLR 3227, para 55 per Lindblom J, citing *LTE Scientific* at para 105.)

11. The court may summarily assess costs or, if appropriate, order that they are subject to a detailed assessment (Arlidge, at 14-154, citing *Taylor Made Golf Co Inc v Rata & Rata* [1996] FSR 528, pp 536-537 per Laddie J). The court may, if appropriate, order costs on an indemnity basis rather than the standard basis (Arlidge at 14-155).

12. 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, for example, *Ileana Constantinescu v Romania* (unreported), No 32563/04, ECHR 2013-III, para 49).

Application to the present case

13. The Supreme Court is not functus officio, no order having been perfected.

14. Proceedings to commit for a criminal contempt are sui generis. The reference to criminal trials in the email sent by the Registrar related solely to the respondent's application that the proceedings should be live streamed. In any event, the Crim P D on which the respondent relies has no application to these proceedings.

15. The respondent has not provided any sound reason why he should not in principle be required to pay the costs of the application to commit him for contempt of court.

16. The key issue to be determined is whether the amount of £22,504 which the applicant seeks to recover from the respondent, is reasonable and proportionate. As this was a first-instance contempt hearing, this case lends itself to summary assessment.

17. The court is satisfied that the costs claimed by the applicant were reasonably incurred.

18. In considering the proportionality of the amount of costs sought, the court has had regard to

(1) The nature of the proceedings, including the £5,000 fine which has already been imposed;

(2) 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 ECHR, must be proportionate;

(3) The respondent's means.

19. In relation to the first two factors, the relationship between the £5,000 fine and any costs order is a relevant consideration (*Young* at para 55 per Lindblom J). Further, as recognised in the judgment handed down at the conclusion of the hearing, the respondent's article 10 rights are engaged in these proceedings and his conduct constituted an act of civil disobedience. Both of these matters are relevant to the nature of the proceedings and the way in which the case is disposed of (see paras 47-50 of the judgment, citing *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357).

20. So far as the respondent's means are concerned, he has been given ample opportunity to provide the court with the relevant information but the information he has provided is limited.

21. First, at the hearing, in advance of imposing a penalty, the court invited the respondent to provide details of his means (Transcript of Hearing, pp 102-106). The respondent first told the court that he was a full-time volunteer for a small charity. He was then encouraged by the court to provide more details of his financial means. He explained that he had a share of the income from properties he owns and rents out with his wife, which came to approximately £1,500 per month, in addition to outgoings of £2,000. This information was before the court and was taken into account when the issue of costs was considered. It appears to be more favourable to him than the details which have since been provided in annex 1 of his written submission.

22. Secondly, the respondent was once again invited to make oral submissions on costs before the Court decided whether to make an order (Transcript of Hearing, pp 107-108). The respondent accepted this invitation and made oral submissions, but he chose not to mention his means.

23. Thirdly, in annex 1 of his written submission he states that he works full time as the unpaid Director of Plan B Earth, a charity. He states that as a result his annual income from letting property and investments is £3,199.76. However, he does own jointly with his wife three properties: the family home and two flats which are let. The combined value of these properties has not been disclosed. The respondent states that the flats are held on trust. From the information provided by the respondent, only one of these properties is subject to a mortgage. While we make no assumption as to possible assistance the respondent may or may not receive from third parties to meet an order from costs, we note that the respondent has informed the court that "a crowdfunder to cover the costs of my court fine … has to date raised £4,240".

24. Having regard to all these considerations, we consider that it is fair and proportionate to order the respondent to pay the applicant's costs in the total sum of £15,000.