Case No: AC- 2023-LON-001944

IN THE KINGS BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

[2024] EWHC 1181 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2024

Before :

LORD JUSTICE GREEN
and
MR JUSTICE KERR

- -

Between :

THE KING (on the application of NATIONAL COUNCIL FOR CIVIL LIBERTIES)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and –	
PUBLIC LAW PROJECT	**Intervener**

Jude Bunting KC and Hollie Higgins and Rosalind Comyn (instructed by **Liberty**) for the **Claimant**
Sir James Eadie KC and Russell Fortt and Tom Leary (instructed by **Government Legal Department**) for the **Defendant**
Tom De La Mare KC and Tom Cleaver and Bijan Hoshi (instructed by **Herbert Smith Freehills LLP**) for the **Intervener**

Hearing dates : 28 and 29 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Green, Mr Justice Kerr

A. Introduction:

The issue

1. The Public Order Act 1986 ("*POA 1986"*) permits the police to intervene in a public procession or assembly in order to prevent "*serious disruption to the life of the community*", an expression which is undefined in the Act.

2. In 2022 the Police, Crime, Sentencing and Courts Act 2022 ("*PCSCA 2022*") amended the POA 1986 to confer upon the Secretary of State a power to amend the definition of "*serious disruption*" by means of subordinate, secondary, legislation. This is colloquially termed a "*Henry VIII power". In R (on the application of the Public Law Project) v The Lord Chancellor [2016] UKSC 39* ("*PLP*") at paragraph [25] the Supreme Court cited with approval the definition in *Craies on Legislation* (10th ed (2015) ("*Craies*") at paragraph [1.3.9]:

> "The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation."

3. That same year, in order to address new forms of protest being undertaken by certain action groups which the Government considered to be extreme, the Government introduced into the House of Commons a Public Order Bill creating two new offences of "*locking on*" and "*tunnelling*" where they gave rise to "*serious disruption"* broadly defined by reference to a threshold of "*more than minor*". The Government did not seek to amend the threshold for intervention by the police in relation to ordinary public processions or assemblies.

4. In 2023 the Government laid before the House of Lords two amendments to the Public Order Bill which, now in relation to public processions and assemblies, sought to expand the definition of "*serious disruption*" in the POA 1986 to include anything which was "*more than minor*". The House of Lords however rejected one of the amendments and the other was not pursued. The Government made no further attempt to reintroduce the amendments into the legislation during that Parliamentary session.

5. Instead, and before the Public Order Act 2023 ("*POA 2023*") received Royal Assent, the Government exercised the newly conferred Henry VIII power to amend legislation by secondary measure and laid draft regulations before Parliament, under the affirmative resolution procedure, which, in preponderant part, repeated the provisions about processions and assemblies so recently rejected by the House of Lords.

6. The Home Office prepared an Economic Note in March/April 2023 seeking to assess the impact of the draft regulations. In this Note it was estimated that, if adopted, the new definition would increase the number of occasions when the police intervened by up to 50% and that prosecutions would also rise substantially.

7. The draft regulations came before the House of Lords Secondary Legislation Scrutiny Committee ("*the HL Scrutiny Committee*") which published a highly critical report in May 2023. This concluded that: the Regulations would lower the threshold for police intervention in public processions and assemblies; the new definition was legally uncertain; it was unparalleled for the Government to seek to introduce by a secondary measure law which had been rejected by primary legislation; and, the Government

consultation upon the measure was "*inadequate*", given its controversial and far reaching nature.

8. As part of the process leading up to the new regulations the Government consulted law enforcement agencies as to the practical implications of altering the law in this way. The Government did not, however, consult more widely with the public or with any other body or organisation who might have opposed the proposed changes, which had adverse implications for the civil right of protest.

9. The draft regulations were laid before the House of Commons and the House of Lords and came into force on 14 June 2023. In the light of this chronology the Claimant ("*Liberty*") commenced proceedings for judicial review. Public Law Project ("*PLP*") applied successfully to intervene to support Liberty.

The Grounds of challenge

10. Four grounds of challenge are advanced by Liberty which we summarise as follows:

    a. **Ground I - The Regulations are *ultra vires*:** There were two aspects to this argument. The principal argument focused upon the powers introduced to enable the Secretary of State to clarify what was meant by "*serious disruption*". It was argued that this power did not allow the Secretary of State to depart from the natural and ordinary meaning of that expression and/or to lower the threshold for police intervention. On a correct interpretation of the enabling power the Regulations, through the expression "*more than minor*", lowered the threshold for intervention, created a substantially increased exposure to criminal sanctions on the part of protestors exercising their civil rights, and created a test which did not fall within the normal and natural meaning of "*serious disruption*". The Regulations were therefore *ultra vires* the enabling power. The secondary argument concerned the expression "*…disruption to the life of the community*" and now focused upon the words "*disruption*" and "*community*". In relation to both of these terms it was said that the Regulations set out definitions which went beyond the scope of the enabling power. In relation to "*disruption*" Parliament had provided in the POA 1986 that the relevant question for the police officer was whether the public assembly or procession in question may result in serious disruption. The Regulations, however, directed the police to take into account other past or future disruption caused by entirely independent events (including other assemblies or processions). In relation to "*community*" the Regulations went beyond the enabling power by defining the community by reference to a wider class of affected persons than contemplated by the enabling power.

    b. **Ground II – The Regulations are *ultra vires* because they subvert Parliamentary sovereignty in seeking to achieve by subordinate legislation that which Parliament rejected as primary legislation:** The enabling powers do not extend to the making of secondary legislation which is materially identical to draft primary legislation rejected by Parliament. An exercise of the power in this manner subverts the constitutional relationship between the Executive and Parliament and could only be exercised by clear and unambiguous words, which do not exist in this case.

    c. **Ground III: The Regulations are unlawful because they frustrate and circumvent the will of Parliament and lack objective justification:** In the

light of the judgment of the Supreme Court in *R (Miller) v The Prime Minster; Cherry and others v Advocate General for Scotland* [2019] UKSC 41 ("*Miller II*") (on the limits to the exercise of the prerogative power to prorogue Parliament) the enabling power cannot, absent objective justification, be used in a manner which "*undermines or frustrates the legislative policy of Parliament*" and/or "… *amounts to an interference with the fundamental constitutional principle of Parliamentary sovereignty and separation of powers*". In this case the Regulations frustrate Parliamentary policy and undermine the separation of powers and lack objective justification.

d. **Ground IV – The Regulations are unlawful because they are the result of an unfair consultation process:** The process by which the Regulations came into being was vitiated by unlawful procedural unfairness. The Executive voluntarily embarked upon a process of consultation about the contents and drafting of the Regulations but consulted only a narrow group of stakeholders (law enforcement agencies) who had a particular stance or view. The Executive did not act in an even-handed manner to obtain the views of those whose interests might be adversely affected and whose views might be different from those who were consulted.

11. We emphasise at the outset of this judgment that the issues of law are technical. We express no view on the merits of the changes the Government sought to introduce via the Regulations or whether they could in the future be introduced by primary legislation.

B. Legislative Framework and History

12. All parties rely upon aspects of the legislative history. We start by setting out the most important steps in that chronology.

Public Order Act 1986: Processions and assemblies

13. Sections 12 and 14 of the POA 1986 empower the police to impose conditions upon public processions and assemblies respectively. The power is exercisable only if an officer reasonably believes that the procession or assembly may result in "… *serious public disorder, serious damage to property or serious disruption to the life of the community*".

14. Section 12(1) on public processions (as originally enacted) provided:

> "If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—
>
> (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
>
> (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

> he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions."

Section 14(1) makes materially identical provision with respect to public assemblies.

15. The expression "*serious disruption to the life of the community*" in both provisions was not defined.

16. It is a criminal offence (subject to defences) for any person organising or taking part in a public procession or assembly to knowingly or recklessly fail to comply with a condition imposed under these power: see sections 12(4)-(5A) and 14(4)-(5A).

Police, Crime, Sentencing and Courts Act 2022

17. Sections 12 and 14 POA 1986 were amended by the PCSCA 2022. Sections 73-74 amended sections 12 and 14 POA 1986 by the introduction of new sections 12(2A)-(2D) and 14(2A)-(2D). These provide non-exhaustive examples of cases in which a public procession or public assembly may result in serious disruption or serious impacts of the kind described in sections 12(1) and 14(1).

18. Further, a power was conferred upon the Secretary of State to amend key terms in the POA 1986 and in particular the expression "*serious disruption*". This "*Henry VIII power*" conferred on the Secretary of State power to amend primary legislation by subordinate legislation. New sections 12(12) on public processions and 14(11) on public assemblies were introduced. Section 12(12) provides:

> "(12) The Secretary of State may by regulations amend any of subsections (2A) to (2C) for the purposes of making provision about the meaning for the purposes of this section of –
>
> (a) serious disruption to the activities of an organisation which are carried on the vicinity of a public procession, or
>
> (b) serious disruption to the life of the community."

Section 14(11) was to similar effect.

19. Sections 12(13) and 14(12) made further provision about the scope of the power to make regulations:

> "Regulations under [section 12(12) / 14(11)] may, in particular, amend any of those subsections for the purposes of –
>
> (a) defining any aspect of an expression mentioned in subsection … for the purposes of this section;
>
> (b) giving examples of cases in which a public [procession/assembly] is or is not to be treated as resulting in –

> serious disruption to the activities of an organisation which are carried on in the vicinity of the procession, or serious disruption to the life of the community."

20. Sections 12(14)-(15) and 14(13)-(14) provide that regulations under the enabling powers: are to be made by statutory instrument; are subject to the affirmative resolution procedure in each House of Parliament; and, may only apply in with respect to public processions or public assemblies in England and Wales.

21. Section 22 PCSCA 2022 further provided in relation to regulation making powers:

> "Regulations
>
> (1) Regulations under this Chapter are to be made by statutory instrument.
>
> (2) Regulations under this Chapter—
>
> (a) may make different provision for different purposes or areas;
>
> (b) may make consequential, supplementary, incidental, transitional, transitory or saving provision….
>
> (4) A statutory instrument containing regulations under this Chapter may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

Ministerial statement in Parliament on scope of Henry VIII power

22. On 8 June 2021, during a debate in Parliament, the then Under Secretary of State for the Home Department, The Rt Hon Victoria Atkins MP, stated as follows of the order making power (Hansard, PCSC Deb (Bill 005) 8 June 2021, col. 398):

> "I now turn to the parts of the clauses that set out that the Home Secretary will have the power, through secondary legislation, to define the meaning of "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity of the procession", or assembly or single-person protest. Again, to clear up any misunderstandings, this is not about the Home Secretary of the day banning protests. Opposition Members have understandably called for clearer definitions wherever possible, which is what this delegated power is intended to achieve. Any definition created through this power will need to fall within what can reasonably be understood as "serious disruption". The threshold will be clarified, not changed: such definitions will be used to clarify the threshold beyond which the police can impose conditions on protests, should they believe them necessary to

> avoid serious disruption. This is about putting the framework in place to help the police on the ground.
>
> The regulations will be subject to the draft affirmative procedure, which means that they must be scrutinised, debated, and approved by both Houses before they can be made. It will, of course, be for the police in an individual case to apply that definition operationally. They can apply that definition only if the criteria in the Bill are met. This is not about the Home Secretary outlawing particular protests or individual demonstrations; it is about setting a framework for a definition, to help the police operation on the ground to understand the criteria in the Bill. To assist in scrutiny of the Bill, we aim to publish further details of the content of the regulation before consideration on Report.
>
> The clauses relating to protest, public assemblies, marches, processions and demonstrations, as well as other terms that have been used to describe this, represent a modest updating of legislation that is more than 35 years old. They do not enable the police or, for that matter, the Home Secretary of the day to ban any protest. Interestingly, we will come to debates in Committee on new clause 43, which relates to interference with access to or the provision of abortion services. That provision does, in fact, seek to ban such protests, so, again, there is a balancing act, or the grey area that has been referred to in this very debate."

Public Order Act 2023: locking-on and tunnelling

23. On 11 May 2022 the Government introduced the Public Order Bill into the House of Commons. This sought to create new offences for "*locking on*" and "*tunnelling*" and empowered the courts to make "*serious disruption prevention orders*". The offence of locking on was defined, in section 1, as follows:

> "**Offence of locking on**
>
> (1) A person commits an offence if—
>
> (a) they—
>
> (i) attach themselves to another person, to an object or to land,
>
> (ii) attach a person to another person, to an object or to land, or
>
> (iii) attach an object to another object or to land,
>
> (b) that act causes, or is capable of causing, serious disruption to—
>
> i. two or more individuals, or

ii. an organisation,

in a place other than a dwelling, and

(c) they intend that act to have a consequence mentioned in paragraph or are reckless as to whether it will have such a consequence."

24. The offence of tunnelling was defined, in Section 3, as follows:

"Offence of causing serious disruption by tunnelling

(1) A person commits an offence if—

(a) they create, or participate in the creation of, a tunnel,

(b) the creation or existence of the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend the creation or existence of the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether its creation or existence will have such a consequence."

25. The "*serious disruption*" requirement was given a broad definition in section 34:

"34 **Meaning of serious disruption**

(1) For the purposes of this Act, the cases in which individuals or an organisation may suffer serious disruption include, in particular, where the individuals or the organisation—

(a) are by way of physical obstruction prevented, or hindered to more than a minor degree, from carrying out—

(i) their day-to-day activities (including in particular the making of a journey),

(ii) construction or maintenance works, or

(iii) activities related to such works,

(b) are prevented from making or receiving, or suffer a delay that is more than minor to the making or receiving of, a delivery of a time-sensitive product, or

> (c) are prevented from accessing, or suffer a disruption that is more than minor to the accessing of, any essential goods or any essential service.
>
> (2) In this section—
>
> (a) "time-sensitive product" means a product whose value or use to its consumers may be significantly reduced by a delay in the supply of the product to them;
>
> (b) a reference to accessing essential goods or essential services includes in particular a reference to accessing—
>
> (i) the supply of money, food, water, energy or fuel,
>
> (ii) a system of communication,
>
> (iii) a place of worship,
>
> (iv) a transport facility,
>
> (v) an educational institution, or
>
> (vi) a service relating to health."

26. The Explanatory Notes to the Bill explained that its "*purpose*" was to strengthen police powers "… *to tackle dangerous and highly disruptive tactics employed by a minority of protesters…"* (paragraph [1]). Paragraphs [6]-[7] explained that new powers were needed in order to meet new forms of extreme protest which were "*violent or distressing*" for which existing powers were not adequate:

> "6. Current legislation to manage protests provides predominantly for powers to counter behaviours at protests which are violent or distressing to the public. These powers include those under the Public Order Act 1986 (the "1986 Act") which provides the police with powers to manage public processions and assemblies, including protests. Sections 12 and 14 of the 1986 Act (as amended by the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act")) allow the police to impose any type of condition on a public procession or public assembly necessary to prevent: significant impact on persons or serious disruption to the activities of an organisation by noise; serious disorder; serious damage to property; serious disruption to the life of the community; or if the purpose of the persons organising the protest is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.
>
> 7. Recent changes in the tactics employed by certain protest protesters, for example gluing themselves to buildings or vehicles, blocking roads, tunnelling under land that is subject to development, and obstructing access to buildings such as oil

> refineries and newspaper printing works, have highlighted some gaps in current legislation."

The rejection by the House of Lords of proposed amendments to the seriousness requirement in relation to public processions and assemblies under section 12 and 14 POA 1986

27. In January 2023, during the Report stage of the Public Order Bill in the House of Lords, the Government sought to introduce additional clauses to the Bill by way of amendments 48 and 49 which, had they been enacted, would have amended sections 12 and 14 POA 1986, on public processions and public assemblies, so as to equate "*serious disruption*" with "*… a hindrance that is more than minor …*". On 7th February 2023 the House of Lords rejected amendment 48. Amendment 49 was then not moved. The Government did not engage in ping-pong or invoke the Parliament Acts 1911 and 1949. The Bill became the POA 2023 without the two amendments. It received Royal Assent on 2 May 2023.

The Economic Note

28. Shortly following this rejection by the House of Lords, an Economic Note ("*the Economic Note*") was prepared by the Home Office dated 17th March 2023. It was approved by the Chief Economist on 12th of April 2023, received departmental sign-off on 19th April 2023, and sign-off from the Better Regulation Unit on 25th April 2023. It identifies two options: do nothing, or, amend the definition of "*serious disruption to the life of the community*" for the purpose of sections 12 and 14 POA 1986. It is stated that the latter was the Government's preferred option. Two versions of the Economic Note exist.

29. The version of the Economic Note disclosed by the Secretary of State in these proceedings, under the heading Consultation, provides:

> "A.3 Consultation
>
> 8. The main stakeholders in policing that were consulted regarding this measure were representatives and/or officials from:
>
> i. National Police Chiefs' Council (NPCC).
>
> ii. The Metropolitan Police Service (MPS).
>
> iii. Crown Prosecution Service (CPS).
>
> 9. A full consultation was not necessary as the provisions in this instrument served to clarify existing police powers and do not create new powers or criminal offences. Instead, targeted engagement with operational leads was held.
>
> 10. A similar provision was debated during the House of Lords report stage of the Public Order Act 2023"

30. The version of the Economic Note available to the public domain, on the Internet, is in a different form. It provides:

> "A.3 Consultation
>
> 8. The main stakeholders in policing that were consulted regarding this measure were representatives and/or officials from:
>
> i. National Police Chiefs' Council (NPCC).
>
> ii. The Metropolitan Police Service (MPS).
>
> iii. Crown Prosecution Service (CPS).
>
> 9. No public consultation by the Government has been held for this statutory instrument, however a similar provision was debated during the House of Lords Report Stage of the Public Order Act 2023."

31. In the disclosed version the Secretary of State explained that consultation was not required *because* the Regulations created no new powers or offences. This was confirmed in the Secretary of State's pre-action response at paragraph [30].

32. Paragraph 10 identified the groups affected by the proposed regulations. It contains a lengthy list of both public and private bodies and persons. The latter (private bodies and persons) refers to the following: community and social organisations; the general public; protestors; road and other transport users; and, transport operators and construction companies.

33. Paragraphs 51-54 addressed the increased exposure to criminal prosecution to those engaging in public assemblies and processions if the law were changed as proposed in the Regulations:

> "Magistrates' court costs
>
> 51. Internal Home Office Report Data from 2019 (see Table 2) shows that in the year 2019 there were 907 people prosecuted for failing to comply with conditions imposed on public assembly and public processions. This data reflects the current baseline scenario. As there is currently no evidence on how this number might change from the implementation of Option 2, several scenarios have been tested, based on different assumptions about the increase in conditions applied by the police.
>
> 52. Given the absence of specific data, reasonable assumptions have been made to form these scenarios. It has been assumed that the police will impose between 20 per cent and 50 per cent more conditions, as a result of Option 2, with a central estimate of a 35 per cent increase. This results in between 24 and 30 conditions, with a central estimate of 27 conditions. Considering that

> the existing number of conditions is 20, this means between 4 and 10 extra conditions as a result of this measure, with a central estimate of 7 new conditions.
>
> 53. Based on the 2019 HMICFRS data (which saw 907 prosecutions across an estimated 20 conditions), each condition results in an average of 43 prosecutions. Based on this, the total number of prosecutions to be tried in magistrates' courts is estimated to lie in a range of 1088 and 1361, with a central estimate of 1224 per year.
>
> 54. As there are estimated to be a baseline number of prosecutions in Option 1 of 907, the number of additional cases to be heard in the magistrates' court for one day lie in the range of 181 and 454, with a central estimate of 317 additional cases. When applying to the cost of a day in magistrates' court, estimated by MoJ17 to be £1,473 (in 2023/2024 prices), the additional magistrates' court cost lies in the range of £0.27 and £0.67 million, with a central estimate of £0.47 million per year. The total magistrates' court cost lies in the range of £2.2 and £5.4 million (PV), with a central estimate of £3.8 million (PV) over 10 years."

The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 (the Regulations).

34. On 27th April 2023, before the POA 2023 received Royal Assent, the Secretary of State laid a draft of the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 ("*the Regulations*") before both Houses of Parliament. In accordance with section 22 PCSCA 2022 this was to be by affirmative resolution procedure.

35. The Regulations are a purported exercise of the regulation making power conferred upon the Secretary of State under sections 12(12) and 14(11) POA 1986, created by sections 73 and 74 PCSCA 2022.

36. It is common ground that the Regulations contain the proposed amendments to the POA 1986 which had been rejected by the House of Lords during the passage of the Public Order Bill.

37. Regulations 2 and 3 amend sections 12 and 14 POA 1986 by adding subsections (2A) and (2B) so that they read:

> "(2A) For the purposes of subsection (1)(a) –
>
> (a) the cases in which a [public procession or public assembly] in England and Wales may result in serious disruption to the life of the community include, in particular, where it may, by way of physical obstruction, result in –

(i) the prevention of, or a hindrance that is more than minor to, the carrying out of day-to-day activities (including in particular the making of a journey),

(ii) the prevention of, or a delay that is more than minor to, the delivery of a time-sensitive product to consumers of that product, or

(iii) the prevention of, or a disruption that is more than minor to, access to any essential goods or any essential service,

(b) in considering whether a [public procession or public assembly] in England and Wales may result in serious disruption to the life of the community, the senior police officer –

(i) must take into account all relevant disruption, and

(ii) may take into account any relevant cumulative disruption, and

(c) "*community*", in relation to a [public procession or public assembly] in England and Wales, means any group of persons that may be affected by the [procession or assembly], whether or not all or any of those persons live or work in the vicinity of the [procession or assembly].

(2B) In subsection (2A) and this subsection –

"*access to any essential goods or any essential service*" includes, in particular, access to –

(a) the supply of money, food, water, energy or fuel,

(b) a system of communication,

(c) a place of worship,

(d) a transport facility,

(e) an educational institution, or

(e) a service relating to health;

"*area*", in relation to a [public procession or public assembly], means such area the senior police officer considers appropriate, having regard to the nature and extent of the disruption that may result from the [procession or assembly];

"*relevant cumulative disruption*", in relation to a [public procession or public assembly] in England and Wales, means the cumulative disruption to the life of the community resulting from –

> (a) the [procession or assembly],
>
> (b) any other [public procession or public assembly] in England and Wales that was held, is being held or is intended to be held in the same areas as the area in which the [procession or assembly] mentioned in paragraph (a) is being held or intended to be held (whether or not directions have been given under subsection (1) in relation to that other [procession or assembly]), and
>
> (c) any [public assembly or public procession] in England and Wales that was held, is being held or is intended to be held in the same area in which the [assembly or procession] mentioned in paragraph (a) is being held or is intended to be held (whether or not directions have been given under section 14(1A) in relation to that [assembly or procession]),
>
> and it does not matter whether or not the [procession or assembly] mentioned in paragraph (a) and any [procession or assembly] within paragraph (b) or (c) are organised by the same person, are attended by any of the same persons or are held or are intended to be held at the same time;
>
> "*relevant disruption*", in relation to a [public procession or public assembly] in England and Wales, means all disruption to the life of the community –
>
> (a) that may result from the [procession or assembly], or
>
> (b) that may occur regardless of whether the [procession or assembly] is held (including in particular normal traffic congestion);
>
> "*time-sensitive product*" means a product whose value or use to its consumers may be significantly reduced by a delay in the supply of the product to them."

House of Lords Secondary Legislation Scrutiny Committee

38. On 11 May 2023, the HL Scrutiny Committee published the 38th Report of Session 2022-2023. The Committee drew the "*special attention*" of the House to the draft regulations upon the basis that they raised "*constitutional*" issues.

39. The Committee asked the Home Office to identify the changes made to the primary law by the Regulations. The Committee summarised their conclusions:

> "What changes do the Regulations make?
>
> 14. The Regulations seek to correct current deficiencies in, and provide clarity to, the definition of "serious disruption to the life of a community" by:

> • Providing that serious disruption can include the cumulative impact of concurrent and repeated protests in the same area.
>
> • Referring to absolute disruption: that is, whether or not there may be disruption in an area regardless of the procession or assembly. We found this concept unclear; the Home Office told us that it is to "avoid the circumstances where deliberately disruptive acts are justified by the fact that certain forms of disruption [such as traffic jams] may occur regularly in an area when there are no protests".
>
> • Stating that the definition of "community" can include persons affected by the protest and not just those who live or work in the vicinity of that procession or assembly.
>
> • Amending the list of examples provided by the 2022 Act to include where a protest may result in "the prevention of, or a hinderance that is more than minor to, the carrying out of day-to-day activities (including in particular the making of a journey)".
>
> • Lowering the threshold for serious disruption from "significant" and "prolonged" to "more than minor". There is no further definition of "minor", which again leads to some lack of clarity and uncertainty, although the EM states that the phrasing "aligns with" recent protest case law.

40. The Committee asked the Home Office *why* it was appropriate to bring back as secondary legislation under a procedure subject to less scrutiny, a measure defeated during the passage of primary legislation. Its view on the Home Office response was as follows:

> "The Home Office responded that this was to ensure consistency across the statute book and to provide clarity to the police, the courts, and the public. Specifically, the Home Office referred to other amendments agreed by Parliament in the passage of the 2023 Act that defined serious disruption using the "more than minor" threshold, in relation to two new offences of 'locking-on' and 'tunnelling'. The Home Office said, therefore, that it was trying to avoid a situation where "serious disruption" has different definitions in different areas of public order legislation. As mentioned above, the Home Office also stated that the "more than minor" threshold aligns with recent case law."

41. The Committee was unimpressed:

> "17. We accept that consistency across the statute book, and with case law, could be a desirable aim. However, the arguments about consistency were made prominently during the debate on the defeated amendments. It might, therefore, have been the House's deliberate wish that different situations merit different thresholds. In addition, the Regulations contain elements other

> than the change in the threshold to "more than minor"; for example, that cumulative impact can result in serious disruption. In other words, the Regulations seek to introduce changes wider than would be necessary solely to create consistency within the statute book and no justification has been advanced for bringing back these wider changes.
>
> 18. As well as not justifying the substance of the provisions, the Home Office has not provided any reasons for bringing the measures back in the form of secondary legislation, which is subject to less scrutiny, so soon after they were rejected in primary legislation. We are not aware of any examples of this approach being taken in the past; the House may wish to verify this with the Minister. We believe this raises possible constitutional issues that the House may wish to consider."

42. In relation to consultation the Committee concluded that the process had been "*inadequate*":

> "Inadequate consultation
>
> 20. The EM stated that the Home Office had consulted a number of law enforcement bodies and National Highways, the body that looks after England's major roads, when drawing up the policy. The Home Office told us its view was that "consulting those who would help ensure the Statutory Instrument would be operationally useful was most important".
>
> 21. However, the Government's own Consultation Principles state that departments should "consider the full range of people, business and voluntary bodies affected by the policy." In an Economic Note accompanying the Regulations, the Home Office acknowledges that a wide range of groups will be affected, including the public and protestors.
>
> 22. Given that this is a controversial policy with a wide range of interested parties and strongly felt views, the consultation processes described in the EM are not adequate. A full public consultation, before bringing forward the proposals, would have been appropriate to maximise the chances that the outcome was clear and workable. A wider consultation might have resulted in clearer definitions within the Regulations.
>
> 23. In the Economic Note, the Home Office said that one reason there was not a public consultation was that "a similar provision was debated during the House of Lords Report Stage of the Public Order Act 2023". While important, a debate in Parliament is not a substitute for in-depth consideration by a range of interested parties and those with expert knowledge at the policy formation stage. Moreover, the House of Lords expressed its

> view by rejecting the measures, yet they have been brought back unchanged."

The Committee conclusion, as set out in paragraph [24], was that the Regulations would reduce the threshold for "*serious*" to "*more than minor*". They observed: "*we find some of the definitions unclear and, therefore, unhelpful - something which, perhaps, could have been improved by a more comprehensive consultation*."

Approval of the Regulations

43. On 12 June 2023, the House of Commons voted to pass a resolution approving the Regulations. The following day, the House of Lords voted to approve an amended resolution which approved the Regulations but expressed regret at the circumstances in which the Regulations came before the House and called on the Government to withdraw the Regulations. On 14 June 2023, the Minister of State signed the Regulations, on behalf of the Secretary of State, bringing them into effect.

44. On 23 June 2023 Liberty filed its claim form for judicial review.

C. Ground I: Ultra vires

Preliminary observations

45. The Court is concerned here with an issue of law concerning the scope and exercise of the enabling power conferred upon the Secretary of State to achieve the Government's objectives by secondary legislation. This is an exercise in statutory interpretation of importance in regulating the boundary between Parliament and the Executive. In *PLP* (*ibid*) the Supreme Court held:

> "23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is *ultra vires*, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation."

The approach we adopt to interpretation of the power is conventional and was not in dispute between the parties. We start by considering the ordinary and natural meaning of the words in question, taking into account context and purpose and having regard to case law and other legislative comparables. We then consider principles of interpretation applying to Henry VIII powers. Finally, we consider extrinsic evidence such as ministerial statements in Parliament, Explanatory Memoranda and legislative history, etc.

46. In the text below (paragraphs [47]-[100]) we concentrate upon considering the principal argument of Liberty and PLP which is about the relationship between "*serious*" and

"*more than minor*". We turn at paragraphs [101]-[108] to the secondary issue concerning the expressions "*disruption*", "*cumulative disruption*" and "*community*" which we deal with briefly.

The three stages to the analysis

47. We address Ground I in three stages:

    (1) First, we consider what Parliament intended by the word "*serious*" in the context of "*serious disruption*" in the POA 1986.

    (2) Secondly, we consider the breadth of the power to amend (by secondary measure) contained within the enabling provisions of section 12(12) and 14(11) POA 1986 (the Henry VIII power).

    (3) Thirdly, we consider whether the Regulations, as the exercise of the enabling provisions, are within the scope of the power conferred by sections 12(12) and 14(11) POA 1986.

The meaning of "serious" in the POA 1986

48. The first stage is to consider what Parliament meant by the "*serious*" in the context of disorder, damage and disruption? For reasons set out below we conclude that "*serious*" was intended to indicate a relatively high threshold consistent with the ordinary and natural meaning of that word.

49. We rely upon: (i) the ordinary natural meaning of "*serious*"; (ii) the application of the *de minimis* principle of construction; (iii) the context to the legislation; (iv) extrinsic material relevant to interpretation including the White Paper which preceded the bill; and (v) guidance from other cases and legislative sources including on the word "*serious*" where Parliament has used an adjective to qualify and limits the meaning of a noun.

(i) The natural and ordinary meaning of "serious" and "disruption"

50. "*Serious*" in ordinary parlance connotes something towards the top end of the scale. Dictionary synonyms of the adjective are consistent with this and include: severe, grave, big, and major. Dictionary definitions of "*disruption*", as a noun, refer to the action of preventing something from continuing as usual or as expected or from operating in the usual manner. Synonyms are said to be: disturbance, disorder, confusion, interference.

(ii) The de minimis principle

51. The Secretary of State accepts that the *de minimis* principle of construction applies. According to Bennion on Statutory Interpretation (8th edition paragraph [9.4]):

> "Unless the contrary intention appears, the legislature is presumed to intend an enactment to be read in the light of the principle of the maxim *de minimis non curat lex* (the law does not concern itself with trifling matters)."

As the commentary in Bennion (*ibid* pages [313]-[315]) demonstrates this principle has been applied on many occasions in case law.

52. When applied to the expression "*serious disruption*" it indicates that had Parliament simply used the word "*disruption*", without the qualifying adjective, a *de minimis* threshold would, nonetheless, have applied so that interference (or other synonyms such as disturbance, etc) of a minimal nature would not, in law, qualify as "*disruption*" engaging the power of the police to intervene. To give an example: if pedestrians were forced merely to cross the road to circumvent a procession or assembly it is highly improbable that the resultant inconvenience would amount, in law, to "*disruption*" triggering the right of the police to impose conditions. It would be *de minimis*.

53. It is therefore not disputed that the inclusion of the adjective ("*serious"*) to qualify the noun ("*disruption*") was intended by Parliament to set a threshold for police intervention above the *de minimis* level. It is not hence argued by the Secretary of State that the converse of "*serious*" is "*trivial*" or some other word indicating a *de minimis* threshold.

(iii) Context

54. We turn to the broader context and purpose.

55. The context to sections 12 and 14 POA 1986 is that they countenance intervention by the state (*via* the police) to constrain conduct otherwise amounting to the fundamental common law rights of freedom of expression and assembly. They empower the police to give directions imposing conditions upon individuals organising or taking part in a public procession or assembly. Breach of a conditions is a criminal offence. In *R v Roberts (Richard)* [2018] EWCA Crim 2739 the Lord Chief Justice observed, at paragraphs [37] and [38], in the context of public protests:

> "37. The long-established recognition in the United Kingdom of the value of peaceful protest, echoed in Lord Hoffmann's remarks, is a manifestation of the importance attached by the common law to both the right to protest and free speech: see, e.g., *Hubbard v Pitt* [1976] 1 QB 142 at 174D and 178 per Lord Denning MR; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ (sitting with Lord Esher MR. Lindley, Bowen and Lopes LJJ); *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 297 per Lord Steyn; *R v Shayler* [2003] 1 AC 247 at [21] per Lord Bingham; *Redmond-Blake v DPP* [2000] HRLR at [20] per Sedley LJ. In a free society all must be able to hold and articulate views, especially views with which many disagree. Free speech is a hollow concept if one is only able to express "approved" or majoritarian views. It is the intolerant, the instinctively authoritarian, who shout down or worse supress views with which they disagree.
>
> 38. That importance of freedom of speech and freedom of association is reflected by the ECHR in articles 10 and 11, the first guaranteeing the right to freedom of expression, the second freedom of assembly. Both are qualified rights. Freedom of speech may be subject to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the prevention of disorder or crime, [or] for the protection of the reputation or

> rights of others." A similar, although not identical, qualification applies to article 11."

56. An important part of the context was therefore that Parliament balanced carefully these "*long established*" rights against competing interests and sought to set the threshold for state intervention at a high level. Use of the adjective "*serious*", in common parlance, performs this task. This is reflected in the White Paper to which we now turn.

(iv) Extrinsic sources - The White paper

57. We consider next the White Paper preceding the Bill which led to the POA 1986. The Secretary of State accepted in argument that this was an admissible guide to construction. It supports the interpretation of "*serious*" we have set out above.

58. In May 1985 the Home Office and Scottish Office published a White Paper entitled "*Review of Public Order Law*" (Cmnd. 9510). The overarching approach, as set out in the summary, involved a recognition that the rights of peaceful protest and assembly were amongst the most fundamental of freedoms enjoyed by society and the Government was concerned to regulate such freedoms "*to the minimum extent necessary"* to preserve order and protect the rights of others:

> "**The Government's approach: balancing freedoms**
>
> 1.7 The Government is in no doubt of the importance of the principles at issue in the review. The rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one. Throughout the review the Government has been concerned to regulate these freedoms to the minimum extent necessary to preserve order and protect the rights of others.
>
> 1.8 For these freedoms, although fundamental, are not one-sided: the European Convention on Human Rights, in the Article guaranteeing the right to freedom of peaceful assembly, recognises that it may need to be restricted by law for the prevention of disorder and for the protection of the rights and freedoms of others. It is worth remembering, 50 years after the passage of the Public Order Act 1936, why that Act was considered necessary: because the right to demonstrate had been turned by the Fascist marchers into an instrument of intimidation and provocation. They have their counterparts today in those whose real aim in demonstrating is not to persuade others of their point of view, but to prevent them by force from doing what they have a lawful right to do, or simply to ferment disorder. The Government has been concerned in the review to ensure that the law provides the police with adequate powers to deal with disorder, or where possible to prevent it before it occurs, in order to protect the rights and freedoms of the wider community."

59. The Government considered that "*serious*" represented the appropriate divide between acceptable and non-acceptable disruption bearing in mind the need to regulate those

freedoms to the minimum degree necessary. In Chapter 4 on "*Control on Marches and Processions*", in paragraph 4.22, the word "*serious*" was set out as the test. No definition is given but it is used in that paragraph alongside words such as "*severe*" and "*unreasonable*".

> "4.22 The first test is one proposed by the Select Committee, who vividly described the degree of disruption which can be caused even by a procession of average size. Some degree of disruption must of course be accepted by the wider community; but it does not seem right that the police should have no power to re-route a procession in order to limit traffic congestion, or to prevent a bridge from being blocked, or to reduce the severe disruption sometimes suffered by pedestrians, business and commerce. The Committee therefore suggested an additional test which would enable the police to impose conditions on a procession in order to prevent serious disruption to the normal life of the community. The Government agrees that a new test of this kind is required, in order to prevent marches from causing unreasonable disruption to local residents, other users of the highway, and adjoining shops and businesses. An example of the circumstances in which the test might operate is provided by the policy of the Metropolitan Police in seeking to discourage demonstrators from using Oxford Street during business hours. A number of other police forces have given examples of marches being held through shopping centres on Saturdays, or through city centres in the rush hour. At present the police have no legal powers should the organisers of a march be minded to defy police efforts to persuade them to change their plans. The proposed test would enable the police to re-route a march if they believed that it was likely to be seriously disruptive to the traffic, the shops or the shoppers."

(v) Guidance from case law and from other legislation

60. We turn next to case law on the word "*serious*". We also address other legislation which has used the expression "*serious*". And we further consider case law on the word "*substantial*" which provides useful guidance on the approach of the courts when words are used as an adjective to qualify a noun. We start with cases on "*serious*".

61. In *Nandi v General Medical Council* [2004] EWHC 2317 (Admin) at paragraph [31] the Court was concerned with the expression "*serious professional misconduct*" in the Medical Act 1983 under which it had been construed as referring to conduct at the higher end of the scale which was "*deplorable*" or negligence "*to a high degree*":

> "What amounts to professional misconduct has been considered by the Privy Council in a number of cases. I suppose perhaps the most recent observation is that of Lord Clyde in Rylands v General Medical Council [1999] Lloyd's Rep Med 139 at 149, where he described it as "a falling short by omission or commission of the standards of conduct expected among medical practitioners, "and such falling short must be serious". The adjective "serious" must be given its proper weight, and in other

> contexts there has been reference to conduct which would be regarded as deplorable by fellow practitioners. It is of course possible for negligent conduct to amount to serious professional misconduct, but the negligence must be to a high degree."

62. In *Syed v DPP* [2010] EWHC 81 the issue concerned a power conferred upon a constable under section 17(1)(e) PACE 1984 to enter and search any premises for the purpose "*of saving life or limb or preventing serious damage to property*". The Court cited and followed *Baker v CPS* [2009] EWHC 299 (Admin) in which May LJ stated that the expression "*saving life or limb*" was used in close proximity with the expression "*preventing serious damage to property*" and that in context "*serious*" referred to "*serious bodily injury*" of which knife injuries or gunshot injuries would be obvious examples. Again the word was used to indicate damage towards the higher end of the scale.

63. In *Cooke v MGN Ltd* [2014] EWHC 2831 at paragraphs [36] and [37] the Court was concerned with the expression "*serious harm*" in the Defamation Act 2013. It relied upon admissible Parliamentary material, including Hansard, to show that there had been a deliberate shift from the expression "*substantial harm*", used in the common law, to "*serious harm*" in order to raise the threshold. "*Serious*" was at a higher level on the scale of severity than "*substantial*". In *Ames v Spamhaus Project Ltd* [2015] EWHC 127 at paragraph [40] Warby J (as he then was) reached the same conclusion: "*The use of the word 'serious' obviously distinguishes the statutory test from the common law as stated in Thornton. The threshold identified in Thornton was that a statement should 'substantially' affect attitudes in an adverse way […]*"

64. In *R (Mahmood) v Upper Tribunal* [2020] EWCA Civ 717 the issue concerned the phrase "*caused serious harm*" in section 117D(2)(c)(ii) of the Nationality Immigration and Asylum Act 2002. In each of three separate cases the Secretary of State served deportation notices upon offenders, foreign nationals convicted of criminal offences, upon the basis that deportation was deemed conducive to the public good. In each case it was said that the offender had been convicted of an offence that had "*caused serious harm*". The Court emphasised that the expression was highly fact and context sensitive. It declined to lay down any canonical definition. It did state that the expression was not limited to the *"most serious kind of harm which came before the Crown Court*". It observed that a conviction for an offence of assault occasioning actual bodily harm would generally gives give rise to a finding of causing "*serious*" harm. Again, the context was such that the phrase was being used to indicate harm away from the bottom end of the scale.

65. We turn to the cases cited by the Secretary of State. Reliance was placed upon case law on applications to serve out of jurisdiction and for summary judgment in civil litigation. In relation to the latter the court asks whether a claim is "*more than merely arguable*": see *Wwrt Limited v Zhevago* [2024] EWHC 122 (Comm) at paragraphs [58]-[59]. Jacobs J observed in that case: *The question which I therefore need to consider, in the context of the jurisdiction application, is whether there is a serious issue to be tried on this point. There was no dispute that this involved asking the same question as arises on a summary judgment application, namely whether the case has a real (as opposed to a fanciful) prospect of success."* In *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2011] UK PC 7, [2012] 1 WLR 1804 at paragraph [71], Lord Collins

explained that "*serious issue to be tried*" meant "*a substantial question*". An issue is "*serious*" or raises a "*substantial*" question whenever it is "*more than merely arguable*". These do not assist the Secretary of State. In those cases, the threshold for establishing access to a court is necessarily low (whatever adjective is used). Anything other than a low bar risks colliding with the right of access to a court which is entrenched in the common law and embodied in statute (the HRA 1998) and is critical as legislative context. The importance of the right was underscored by the Supreme Court in *UNISON v Lord Chancellor* [2017] UKSC 51 at paragraphs [66]-[85]) which explained how it was an overarching principle of statutory interpretation. Where: "*a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question*" (paragraph [80]).

66. Liberty and PLP point out that the adjective "*serious*" has been used to qualify nouns in a variety of legislative contexts. First, section 5 Corporate Manslaughter and Corporate Homicide Act 2007 excludes from the scope of the offence certain conduct done for the purpose of policing and law enforcement including operations "… *for dealing with terrorism, civil unrest or serious disorder*". It is argued that the concept of serious disorder takes its tone and colour from the expressions terrorism and civil unrest. In context it indicates a level of disorder towards the higher end of the scale. Secondly, section 93(2)(a)(i) Police Act 1997 empowers the authorisation of action in relation to property or wireless telegraphy where necessary for the action specified to be taken for the purpose of preventing or detecting "*serious*" crime. Under Section 93(4)(a) "*serious crime*" arises "*if and only if it involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose.* Again it is argued that, in context, Parliament used the expression "*serious*" as indicating crime towards the upper end of the scale of criminality. Thirdly, section 68 Arbitration Act 1996 permits parties to an arbitral award to challenge the award where there is "*serious irregularity*" which is defined in section 68(2) as an irregularity "*which the court considers has caused or will cause substantial injustice to the applicant...*" Here, Parliament has equated "*serious*" with "*substantial injustice*", and it is said that in context this is intended to set a relatively high threshold. It is submitted that examples such as this reinforce the conclusion that when Parliament uses the expression "*serious*" it intends to set a threshold relatively high up on the scale.

67. The HL Scrutiny Committee recorded (see paragraph [40] above) that the Home Office argued that the definitions in the Regulations aligned with the recent case law. No case law was referred to. In the Summary Grounds in these proceedings the Secretary of State cites two cases: *Reference by the Attorney General for Northern Ireland: Re abortion services safe access zones Northern Ireland bill* [2022] UKSC 32 paragraph [139]; and *Brehony v The Chief Constable of Greater Manchester Police* [2005] EWHC 640 (Admin) at paragraph [20]. Neither however address the relevant phrase.

68. We turn to cases on "*substantial"*. A recent example is found in *R v Golds* [2016] UKSC 61 where the statutory context indicated that Parliament intended its use of "*substantial*" to refer a threshold at a relatively high level of severity. It provides guidance as to the approach to be taken to statutory terms whereby Parliament has used an adjective to qualify a noun. The Court of Appeal certified a question concerning the meaning of "*substantial*" in the context of *"substantial impairment*" in Section 2 Homicide Act 1957. The question was whether the word was to be defined as "...

something more than merely trivial or alternatively, in a way that connotes more than this, such as 'something that whilst short of total impairment that is nevertheless significant and appreciable'?" The Supreme Court endorsed the conventional approach that the expression "*substantially*" was to be determined by reference to "*ordinary English*" (paragraph [23]). The term, as a matter of dictionary definition, was capable of meaning either: (i) present rather than illusionary or fanciful, thus having substance; or (ii) important or weighty as in a substantial meal or a substantial salary. The Court held that Parliament intended the expressions to bear the second sense. It was important to take account of "*context*" (paragraph [27]). The term regulated the divide between murder and manslaughter. If a defendant was found to have diminished responsibility that affected "*a radical alteration*" in the offence for which he might be convicted (paragraph [36]).

69. The Court also addressed the need for legal certainty:

> "38. Where, however, as here, there are two identifiable and different senses in which the expression in question may be used, the potential for inconsistent usage may need to be reduced. The existence of the two senses of the word "substantially" identified above means that the law should, in relation to diminished responsibility, be clear which sense is being employed. If it is not, there is, first, a risk of trials being distracted into semantic arguments between the two. Secondly, there is a risk that different juries may apply different senses. Thirdly, medical evidence (nearly always forensic psychiatric evidence) has always been a practical necessity where the issue is diminished responsibility. If anything, the 2009 changes to the law have emphasised this necessity by tying the partial defence more clearly to a recognised medical condition, although in practice this was always required. Although it is for the jury, and not for the doctors, to determine whether the partial defence is made out, and this important difference of function is well recognised by responsible forensic psychiatrists, it is inevitable that they may express an opinion as to whether the impairment was or was not substantial, and if they do not do so in their reports, as commonly many do, they may be asked about it in oral evidence. It is therefore important that if they use the expression, they do so in the sense in which it is used by the courts. If there is doubt about the sense in which they have used it, their reports may be misunderstood and decisions made upon them falsified, and much time at trials is likely to be taken up unnecessarily by cross examination on the semantic question. The experience of *R v Brown* (supra at paras 24 and 33) underlines the need for clarification."

70. In paragraph [39] the Court concluded:

> "The sense in which substantially impaired is used in relation to diminished responsibility is, for the reasons set out above, the

> second of the two senses. It is not synonymous with 'anything more than merely trivial impairment'."

71. Reference was made by the Secretary of State to the judgment of the EAT in *Goodwin v Patent Office* [1999] ICR 302 at page [310]. The applicant suffered from paranoid schizophrenia. He was dismissed from his employment following complaints from fellow employees about his behaviour. His complaint before the Industrial Tribunal of discrimination by reason of disability was upheld. It was held that although the applicant had an impairment affecting his ability to perform normal day-to-day activities that effect was not "*substantial*" under Section 1 Disability Discrimination Act 1995 ("*DDA 1995*") because he was able to perform domestic activities without assistance and to perform work to a satisfactory standard. An appeal was allowed. Section 3 DDA 1995 empowered the Secretary of State to issue guidance upon disability, which included upon the meaning of "*substantial*". That word was potentially ambiguous and it could mean "*very large*" or "*more than minor or trivial*". Reference to the published Guidance indicated that in context the word had been used by the Secretary of State in the latter sense. Over and above confirming that context and purpose are important we do not extract a great deal from this judgment. It concerned "*substantial*" (not "*serious*") and was in a particular employment context whereby it was the policy of the Secretary of State reflected in Guidance to increase worker protection. The construction accorded to "*substantial*" reflected this desire to increase protection which meant that the threshold had to be set at a low bar.

(vi) Conclusion

72. In conclusion, the expression "*serious*" is intended to set the threshold for police intervention at a relatively high level. This reflects its ordinary and natural meaning, its purpose and context, and is a conclusion consistent with admissible extrinsic material. It reflects the important balance to be struck between the right of free speech, assembly and protest, on the one hand, and the orderly conduct of society, on the other.

The breadth of the enabling power

(i) The power

73. We turn now to the second stage of the analysis. In any challenge to the *vires* of a subordinate measure the Court must determine the "*scope*" of the statutory enabling power: See *PLP* (*ibid*) paragraph [23]. We turn therefore to the proper scope of the enabling powers in sections 12(12) and 14(11) POA 1986.

74. Here, the Secretary of State may by regulation amend any of subsections (2A) to (2C) "*for the purposes of making provision about the meaning for the purposes of this section of – (a) serious disruption to the activities of an organisation which are carried on the vicinity of a public procession, or (b) serious disruption to the life of the community."* The dispute focused largely upon the breadth of the phrase *"making provision about the meaning*". As described below the difference between the parties turned out not to be as great as initially appeared.

(ii) Submissions of the Secretary of State on the breadth of the power

75. The position of the Secretary of State shifted somewhat over the course of the litigation.

76. It was initially argued that the words "*making provision about the meaning*" entitled the Secretary of State to amend anything "*about*" the meaning of the subject words, such as "*serious*" and "*disruption"*. The power was not limited to clarification or exemplification. Parliament had, through the affirmative procedure, approved the Regulations and thereby *any* meaning the Secretary of State chose to attribute to such words. In the Grounds of Defence it was said that there was "*no limitation on the power of the Secretary of State*" to make regulations amending or defining etc the meaning of "*serious disruption*". Such a limitation "*could have been expressly included*" but was not:

> "The enabling provisions contain no limitation on the power to amend the meaning of 'serious disruption' of the kind contended for. The scope of the enabling provisions is a matter of interpretation of the primary legislation in which they sit. There is no express limitation to that effect; and there is no valid process of interpretation which would enable such a limitation to be implied. If Parliament had intended to create such a limitation, it is inconceivable that it would not have made that expressly clear."

And:

> "As to the enabling provisions relating to 'serious disruption', first, they contain no limitation on the power of the Secretary of State to present to Parliament, or of Parliament by affirmative resolution to approve, Regulations amending/defining etc the meaning of 'serious disruption'. Instead, Parliament set the scope of the enabling power simply by reference to the need for the Regulations to be "making provision about the meaning for the purposes of this section" of the concept of serious disruption to the life of the community. It was thus open to the Secretary of State (and Parliament) to legislate for a more or less broad view of serious disruption of that type. How broad that view should be is a matter of legislative judgement – a judgement which Parliament ensured, in the enabling provisions, should be positively approved by itself."

77. Subsequently, in written submissions and in oral argument, the position moderated. First, in paragraph [3] of the skeleton the Secretary of State accepted that properly interpreted there *were* limits to the power to amend:

> "A meaning cannot be adopted that those words are incapable of bearing. But that is plainly not this case. There is no other limitation to the power."

In paragraph 18 it was acknowledged that the power had to be exercised in a way which retained a linguistic link to "*serious*". It could not be exercised to confer upon "*serious disruption*" a meaning *"... that it cannot properly or linguistically have*":

> "18. No doubt, the Secretary of State cannot thereby purport to give the phrase "*serious disruption to the life of the community*" a meaning that it cannot properly or linguistically have. However, the power to define and clarify its scope is a broad one because it is an inherently broad phrase. The approach taken in the Regulations is one that was properly

> open to the Secretary of State and well within the scope of the powers conferred."

78. Further, Sir James Eadie KC, for the Secretary of State, accepted that the *de minimis* rule of interpretation applied (See paragraphs [51]-[53] above). Accordingly, it was acknowledged that the concept of something that was "*more than minor*" was to be construed as a threshold not *at*, but above the *de minimis* line.

79. Nonetheless, the Secretary of State still contended that properly construed the enabling power was clear and unequivocal and conferred a broad power upon the Secretary of State. A broad construction was also justified because the Regulations had been subject to detailed Parliamentary scrutiny under the affirmative resolution procedure.

(iii) Submissions of Liberty and PLP about the scope of the power

80. Liberty and PLP argued that the power had to be construed by reference to the ordinary and natural meaning of the words "*serious disruption*". The power was to clarify or provide examples of those terms and did not extend to lowering the threshold for police intervention. The power had to be read in the context of the POA 1986 which was about departing from the fundamental common law right of protest to the minimum degree necessary (See paragraph [58] above). The power to amend the expression "*serious disruption*" did not entail the power to re-write the expression in a manner divorced from its ordinary and natural meaning. They relied upon settled authority upon the approach to be adopted to the interpretation of Henry VIII powers. Particular weight was placed upon the judgment of Lord Neuberger in *PLP* (*ibid*), giving the unanimous judgment of the Supreme Court, which highlighted the role of the Court in upholding Parliamentary supremacy:

> "25…. When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament."

81. In terms of the breadth of an enabling power they pointed out that the statutory language was very broad, which they argued militated against a wide interpretation of the power. In *PLP* the Supreme Court (paragraph [25]) endorsed the statement of principle in Craies (paragraph [1.3.11]):

> "… as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation."

82. In determining the intention of Parliament a court will take into account that a delegation to the Executive of a power to modify primary legislation is an *"exceptional*" course. If there is doubt about the scope of the power it should be resolved by reference to a "*restrictive approach*": *PLP* (*ibid*) paragraph [27]; *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, 204; and, *R v Secretary of State for the*

Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 383 all citing with approval the dictum of Lord Donaldson MR in *McKiernon v Secretary of State for Social Security*, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989, to the same effect.

(iv) Conclusion on the scope of the enabling power

83. As observed above the difference between the parties at this stage of the analysis is not that great. They agree that the power is not unlimited and that it cannot be used to promulgate regulations which have no linguistic connection to the phrase "*serious disruption*". The Secretary of State was, in our view, correct to take this position.

84. Applying conventional principles of construction the power must be read in the context of the POA 1986 in which it resides, which, as we have set out above was to set the threshold for police intervention at a relatively high level. This is our starting position and the scope of the power should be consistent with this statutory purpose and context which is that it was intended to clarify but not alter.

85. This conclusion is in line with the Ministerial statement in Parliament (paragraph [22] above) during which the Minister emphasised that the power was to be exercised by reference to what "… *can reasonably be understood as serious disruption*" and that the threshold for police intervention would be "*clarified not changed*". This supports the submissions of Liberty and PLP that the power is about clarification not alteration. Insofar as there is any doubt as to this then the appropriate rule of construction applied to Henry VIII powers supports the conclusion that the power can only be used to clarify or exemplify but not alter or change. This is especially appropriate in a context where the word "*serious*" has been carefully chosen by Parliament to reflect the balance to be struck between competing fundamental common law rights and where altering the balance of those rights, in a manner adverse to protestors, exposes those persons to an increased risk of criminal sanction. That was not the purpose of the enabling power.

Does the expression "more than minor" fall within the scope of "serious?"

(i) What the dispute boiled down to

86. We turn to the third and final stage of the exercise which is to consider whether the Regulations are within the scope of the enabling powers. The parties agree that the power can be exercised only where there is a proper connection or nexus with the concept of seriousness, though there is disagreement about how far the concept of seriousness can stretch.

87. The dispute turns upon whether the expression "*more than minor*" is within the linguistic penumbra of "*serious*" and whether, more particularly, it encapsulates the statutory phrases:

- "a hindrance that is more than minor to, the carrying out of day-to-day activities";
- "the prevention of, or a delay that is more than minor to, the delivery of a time-sensitive product to consumers of that product"; and,
- "the prevention of, or a disruption that is more than minor to, access to any essential goods or any essential service".

(ii) Submissions of Secretary of State

88. The Secretary of State argued as follows: (i) case law supports a broad approach to interpretation of the word "*serious*" (even if the power as a whole was not to be construed broadly); (ii) a broad approach to the word is not inconsistent with the Ministerial statement in Parliament; (iii) a broad construction is also consistent with legal certainty; (iv) case law on Henry VIII power militating towards a narrow approach has no application and only applies where there is doubt about the legislative language, and here there is none; (v) a broad approach to the word is consistent with the *in pari materia* doctrine since the Regulations achieve consistency with the definitions in the POA 2023 in respect of the offences of locking on and tunnelling (see paragraphs [23]-[25] above) which demonstrated that Parliament was of the view that the expression "*more than minor*" was within the reasonable, natural or normal compass of "*serious*"; and (vi), the existence of a broad approach is supported by the fact that the Regulations were subject to detailed Parliamentary scrutiny under the affirmative resolution procedure.

(iii) Submissions of Liberty and PLP

89. Liberty and PLP argue in response that: (i) case law and other legislative comparables on "*serious*" are inconsistent with that term encompassing anything which was "*more than minor*"; (ii) the expanded definition in the Regulations is inconsistent with the Ministerial statement which was admissible in guiding the interpretation of the phrase; (iii) the broad construction promoted by the Secretary of State was inconsistent with legal certainty and would increase confusion; (iv) case law on Henry VIII powers strongly militated towards a strict approach to the meaning of "*serious*"; (v) the *in pari materia* doctrine is inapplicable but insofar as relevant was contrary to the argument of the Secretary of State; and (vi), the nature and level of scrutiny accorded to the Regulations under the affirmative resolution procedure is irrelevant according to case law. They also, standing back, argued that it was inconceivable that Parliament intended that the subordinate enabling power to amend "*serious*" be used in a way which substantially lowered the protection accorded to the fundamental common law rights of public procession and assembly and which materially increased the risk that protesters would be exposed to criminal sanction.

(iv) Analysis

90. We address the arguments in turn.

91. **Ordinary and natural meaning / purpose / context**. We have set out above at paragraphs [60]-[71] an analysis of case law and legislative comparables. The word "*serious*" refers to a point relatively high up on the scale. In our judgment, as a matter of common parlance and in view of the case law and other legislative comparables, "*more than minor*" is different from and materially lower down the scale than "*serious*". It would not on a natural and ordinary meaning be treated as falling within the scope of "*serious*", however generously construed. We also see force in the argument of Liberty and PLP that Parliament, when it adopted the enabling power, would not have contemplated that it could be used to change the meaning of "*serious*" so as to lower the protection accorded to the fundamental common law rights of public procession and assembly and materially to increase the exposure of protestors to criminal proceedings. This was something to be addressed by primary legislation, if it was to happen at all.

92. **Principles governing the interpretation of Henry VIII powers**: Mr Bunting KC for Liberty argued that on one view since there was disagreement about what "*serious*" meant with the parties advocating variously for a broad or a narrower definition that

triggered the strict construction approach to the word. We see the force in this. There is a dispute about the breadth of the word and insofar as there is doubt this case is a paradigm example where, applying consistent authority (see paragraphs [80]-[82] above), a strict approach to construction applies which is against conferring upon "*serious*" an elongated meaning sufficient to embrace anything "*more than minor*". Our ultimate conclusion does not depend upon applying a strict construction. Our primary conclusion is that "*more than minor*" does not fall within the ordinary and natural meaning of "*serious*". Our conclusion on Henry VIII powers is merely confirmatory of our conclusion on the natural and ordinary meaning of "*serious*".

93. **Legal Certainty**: The Supreme Court in *R v Golds* (*ibid*) considered that the implications for legal certainty of the meaning of a phrase were relevant when construing it (see paragraphs [68]-[70] above). The Secretary of State argues that the expression "*more than minor*" will facilitate legal certainty. In our view the expression increases uncertainty and militates against the phrase being given the broad construction contended for by the Secretary of State. The phrase broadens the seriousness net and contemplates police intervention in conduct which is far closer to that which is normal or everyday. It will, by the very nature of the expression, be harder to differentiate the normal or everyday from that which warrants police intervention and it is intrinsically more likely to increase the number of disputes as to where the threshold for intervention lies on the facts of a particular case. Legal uncertainty is further increased by the fact that, because of the *de minimis* doctrine, there is daylight between that threshold and the start of "*more than minor*". Conduct which is more than *de minimis* but less than "*minor*" does not warrant police intervention; but when it is more than *minor* it does. Given the similarity in language between *de minimis* and "*minor*" it seems to us that the expression "*more than minor*" is a recipe for uncertainty. We observe that it was no part of the submissions made to the Government by police and enforcement agencies and bodies that the threshold should be lowered to a "*more than minor*" level. The concern of those bodies, quite understandably, was for greater precision about the ordinary and natural meaning of the word "*serious*" in the context of "*disruption*". We also observe that in the submissions of those parties there was a recognition and acknowledgment that the level at which the police were entitled, in law, to intervene raised an important question of human rights which they did not wish to beg. We therefore disagree that the Regulations enhance legal certainty. We do not believe that the elongated definition will make enforcement any the easier. Our conclusion is similar to that of the HL Scrutiny Committee who stated that the word "*minor*" would lead to "*some lack of clarity and uncertainty*" (see paragraph [39] above).

94. **In pari materia:** The principle that an Act is to be read as a whole applies also to a group of Acts which are *in pari materia*: Bennion (*ibid*) paragraph [21.5] pages [645] and [646]. Two or more acts may be described as *in pari materia* if: they have been given a collective title; they are required to be construed as a single body; they have identical short titles (apart from the year); or, they otherwise deal with the same subject matter on similar lines. Where measures are *in pari materia* they are to be taken as forming a single system and as interpreting and enforcing each other: *ibid* page [645]. The underlying principle is of ancient vintage. In *R v Loxdale* (1758) 1 Burr [445] at [447] Lord Mansfield stated: "W*here there are different statutes in pari materia, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explained explanatory of each other".* Bennion however sounds a note of caution which we consider is important: "*It*

is however necessary to remain realistic". For example, a drafter producing an amending bill does not always have the time or industry to read through the mass of preceding legislation to ensure that the present draft is fully consistent. The broad principle might need to be taken with "*a pinch of salt*" when a long series of acts is being considered. In our judgment the doctrine does not assist the Secretary of State:

(i) The subject matter of the POA 2023 is very different to that of public processions and assemblies in the POA 1986. The Explanatory Notes accompanying the 2023 Act (see paragraph [26] above) explain that new criminal offences were required for the new forms of protest by locking on and tunnelling *because* they were different in nature, extent and effect to ordinary processions and assemblies and were not sufficiently catered for under the existing provisions of the POA 1986. They were described in the Explanatory Notes as powers to "*tackle dangerous and highly disruptive tactics employed by a minority of protesters*". In other words they were materially different and were offences designed to tackle the exception not the rule. The provisions the Secretary of State relies upon in the POA 2023 are, relative the POA 1986, far from being *in pari materia*.

(ii) The HL Scrutiny Committee also rejected the argument of the Home Office that the Regulations did no more than achieve consistency across the statute book: see paragraphs [40]-[41] above. The Committee observed that: "*It might, therefore, have been the House's deliberate wish that different situations merit different thresholds.*" The Explanatory Notes to the Public Order Bill bear this out.

(iii) Finally, it is artificial to ignore the fact that that the Executive sought unsuccessfully to introduce these measures by primary legislation. It is no answer for the Secretary of State to cast the blame for that failure at the feet of the House of Lords, and then suggest that this rejection did not reflect the democratic will of Parliament in the form of the House of Commons. That is not an argument this Court can take into account because it risks drawing the Court unconstitutionally into a dispute between the two Chambers of Parliament. Ultimately, we simply take note of the fact that, for whatever reason, Parliament (as a whole) did <u>not</u> accept that the amendments be introduced by way of primary legislation and as such this cannot be conducive to accepting that the various primary measures in which the definitions exist are *in pari materia.* We note in this connection that in the skeleton of the Secretary of State the following is stated of Parliament in relation to the Regulations, reflecting its unitary nature: "*Parliament (comprising the House of Lords and the House of Commons) approved the Regulations following debate.*"

95. **The Ministerial statement to Parliament**: We consider next whether the Ministerial statement in Parliament (see paragraph [22] above) is consistent with our conclusion. The Minister said: "*Any definition created through this power will need to fall within what can reasonably be understood as "serious disruption". The threshold will be clarified, not changed: such definitions will be used to clarify the threshold beyond which the police can impose conditions on protests, should they believe them necessary to avoid serious disruption*." We consider that the statement is admissible to construe the scope of the enabling power. It was not submitted by the Secretary of State to be inadmissible. It is confirmatory of a construction of the power as limited to amendments

which do not lower the threshold for police intervention. The use of the ministerial expression "*reasonably be understood*" should be read in this context and as a fair, everyday, proxy for the ordinary and natural meaning of the words. In our judgement something which is "*serious*" cannot reasonably encompass anything that is merely "*more than minor*". The phrases sit towards opposite end of the spectrum. The Minister also indicated that the power could not (ie upon a reasonable understanding) be used to lower the threshold for police intervention. Yet, the Economic Note prepared by the Home Office contemplates a substantial increase in the number of prosecutions based upon this different and lower threshold under the Regulations and as such provides a quantitative evaluation of the difference between the two thresholds. The conclusion of the HL Scrutiny Committee was also that the Regulations lowered the threshold (see paragraph [42] above).

96. **Relevance of the level of scrutiny under the affirmative resolution procedure**: The Secretary of State argued that the affirmative resolution procedure involved a level of scrutiny at the higher end of the spectrum of scrutiny which was more intense than that which led to the rejection of the same measures as primary legislation by the House of Lords and we should accord great weight to Parliament's view. This raises an argument of some significance. It is said that the breadth of the enabling provisions should be endorsed because they reflect a clear Parliamentary will:

> "Unlike the amendment that was rejected only by the House of Lords following debate in that House, the Regulations were approved following debate by the House of Commons on 12 June 2023, which approved the Regulations by 277 votes to 217. On 13 June 2023, also following debate, the House of Lords approved the Regulations by 177 votes to 141. A motion to decline to approve the Regulations due to the previous consideration and rejection of the provisions during debate on primary legislation in the House of Lords was resoundingly rejected by 154 to 68 votes. Parliament has thus expressed its will very clearly in approving the Regulations."

97. PLP countered by reference to evidence concerning actual Parliamentary practice about the use of secondary legislation[1] which it was said reflected a democratic deficit. Reliance was placed upon published Parliamentary and other sources (such as the Hansard Society). The vast majority of statutory instruments are subject to the negative procedure whereby the instrument becomes law unless voted down by either House. A much smaller number are subject to the affirmative procedure pursuant to which (subject to certain limited exceptions) they do not become law unless approved by both Houses. They cannot be amended:

> "Despite being subject to ostensibly greater scrutiny than those subject to the negative procedure, affirmative procedure statutory instruments are all also virtually never voted down. Between 1950 and 2014, the Commons rejected 5 affirmative procedure statutory instruments, most

[1] This was pulled together and set out in a Witness Statement prepared by Professor Joe Tomlinson, Professor of public law at the University of York and a Research Associate at Public Law Project. The accuracy of the Statement was not challenged by the Secretary of State.

> recently in 1978. In the same period the Lords rejected only four, most recently in 2012"

PLP also cited the conclusion of the House of Lords Secondary Legislation Committee Report "*Government by Diktat: A Call to Return Power to Parliament*" (2021) at page [2]:

> "In basic terms, the abridged procedures by which proposed statutory instruments are made mean that they are subject to far less scrutiny than proposed primary legislation. In a 2021 report, the House of Lords SLSC expressed concern over an "absence of robust procedures enabling effective parliamentary scrutiny" and concluded:
>
> "…the more that is left to secondary legislation, the greater the democratic deficit because, in contrast to primary legislation, there is relatively scant effective parliamentary scrutiny of secondary legislation; it cannot be amended; in some cases, it may become law without any parliamentary debate; and, because the decision to accept or reject is all or nothing, very rarely will the Houses reject it."

And they also referred to the Summary of the House of Lords Select Committee Report on the Constitution, Delegated Legislation and Parliament: A response to the Strathclyde review (HL Paper 116, 23 March 2016):

> "Successive governments have proposed primary legislation containing broad and poorly-defined delegated powers, including Henry VIII powers, that give wide discretion to ministers—often with few indications as to how those powers should be used. This Committee and others have noted a trend whereby delegated legislation has increasingly been used to address issues of policy and principle, rather than to manage administrative and technical changes.
>
> The reasons for this are clear. Delegated legislation cannot be amended, so there is little scope for compromise. Far less time is spent by Parliament debating delegated legislation than primary legislation, and there is little incentive for members of either House, but particularly the House of Commons, to spend their precious time debating legislation that they cannot change. Finally, established practice is that the House of Lords does not vote down delegated legislation except in exceptional circumstances. The result is that the Government can pass legislative proposals with greater ease and with less scrutiny where they are able to do so through secondary, rather than primary, legislation.
>
> These developments have strengthened the Executive at the expense of Parliament's legislative authority."

98. The short answer to all of the above is that it is long established that the Courts retain the jurisdiction judicially to review subordinate legislation even where adopted by

affirmative resolution because it is, institutionally, subject to a lesser degree of scrutiny, and, incapable of being amended. The Courts treat the fact that the measure was "*approved by Parliament*" as secondary and subordinate to the fact that it was procured by an Executive act. The Courts intervene, upon this juristic basis, to compare the secondary measure against the scope of the primary measure in order to preserve the sovereignty of Parliament and the separation of powers. The Supreme Court in *PLP* (*ibid*) stated:

> "22. Although they can be said to have been approved by Parliament, draft statutory instruments, even those subject to the affirmative resolution procedure, are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament. Accordingly, it is well established that, unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court. As Lord Diplock said in *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 365, "even though [subordinate legislation] is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament, ... I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the ... Act of Parliament under which the order [was] purported to be made ..."."

In paragraph [23] the Court treated the invocation of the secondary legislation procedure by the Secretary of State as, in substance, an act of the Executive undermining the supremacy of Parliament, which it was the duty of the Court to protect.

99. We reject the submission of the Secretary of State that in some way the Court should attach greater (or lesser) weight according to some evaluative assessment of the actual degree of scrutiny, including the balance of voting rights before the Chambers of Parliament. The analysis cannot be fact specific. It would be improper for the Court to be drawn into an evaluation of degrees of scrutiny from which the Court would then calibrate conclusions about the rigour of the approach to be applied to interpretation of a word such as "*serious*". This is a process fraught with danger and, in any real sense, seems impossible for a Court to perform with any degree of accuracy. We do not have the evidence which would enable us to come to a fair and reliable conclusion. The Court cannot be placed in a position whereby it sets out, even as in this case at the invitation of the Secretary of State, to mark Parliament's homework. Although we did not receive detailed submissions about the impact of Article 9 Bill of Rights Act 1689 we have a concern that were we to embark upon such an investigation we would be improperly questioning "*proceedings in Parliament*" (see further paragraphs [127]-[129] below).

Conclusion on "serious" and "more than minor"

100. For all of the above reasons Ground I succeeds. The conventional approach to interpretation is to start with the ordinary and natural meaning of the words and, having formed a conclusion upon that question, consider other guides to interpretation to see whether they are consistent with the conclusion arrived at. This is the approach we have adopted. As a matter of ordinary and natural language "*more than minor*" it is not within

the scope of the word "*serious*". That conclusion is consistent with, and confirmed by: the purpose and context to the POA 1986; principles of construction applicable to Henry VIII powers; considerations of legal certainty; the *in pari materia* principle of interpretation; and, extrinsic considerations such as the Ministerial statement in Parliament. Our conclusion is not affected by the fact that the Regulations were subject to scrutiny in the course of the affirmative resolution procedure. It follows that the Regulations are *ultra vires* the enabling power contained within sections 12(13) and 14(11) POA 1986.

"*Disruption" and "cumulative*"

101. We turn finally under Ground I to the second aspect of the complaint: see paragraph [10a] above. We have, so far, based our conclusion on Ground I upon the basis that "*serious*" cannot, in the enabling legislation, mean "*more than minor*". That is sufficient for Ground I to succeed and is the most important aspect of the challenge to the *vires* of the Regulations. The further challenge concerns the phrases "*relevant disruption*", "*relevant cumulative disruption*" and "*community*" in Regulations 2 and 3 which purported to amend the POA 1986 by the insertion of sections (2A)(b) and (c), to the definitions in section 2B (see paragraph [37] above). These were given far less emphasis in written and oral arguments. We have applied the same principles of interpretation to these as we have to the issue about "*serious*".

102. Liberty and PLP submit that the enabling power did not provide *vires* for the provisions in the Regulations about "*disruption*" and "*community*" within the phrase "*serious disruption to the life of the community*". The senior police officer must take account of "*relevant disruption*", which can be disruption "*that may occur regardless of whether the [procession or assembly] is held (including in particular normal traffic congestion)*". The senior officer may take into account "*relevant cumulative disruption*", defined as the disruption flowing not only from the public assembly or procession but any other assembly or procession being or intended to be held in the same area. The word "*community*" is defined as "*any group of persons that may be affected by the [procession or assembly], whether or not all or any of those persons live or work in the vicinity of the [procession or assembly]*".

103. Liberty argues that the enabling power does not permit the meaning of "*disruption*" to be thus expanded. Nor does it permit "*community*" to be confined to the persons affected by the procession or assembly, rather than the community in its normal sense, namely the public generally. Mr de la Mare KC, for PLP, supported by Liberty, submitted that those provisions went beyond defining aspects of those expressions or making provision about their meaning. They involved replacing one concept with another. He relied on the definite article ("*the*") before the word "*community*" in the POA 1986; while the Regulations purported to define "*community*" omitting the definite article, as if it were "*a community*". He submitted that dictionary definitions, other legislation and well known human rights jurisprudence supported the concept of a community being "*the civic body to which all belong*" (one of the senses of the word found in the Oxford English Dictionary).

104. Our conclusion on "*serious*" affects how the police can lawfully interpret and apply the connected concepts of "*disruption*" and "*cumulative*". Under section 2A(b) when considering whether a public procession or assembly may result in "*serious disruption*

to the life of the community" a senior police officer "*must*" take into account all relevant disruption and "*may*" take into account any relevant cumulative disruption. If we are correct in our conclusion that "*serious*" does not include "*more than minor*" that affects how the police apply the connected concepts of *disruption*" and "*cumulative*" because it is critical context to those provisions. Nonetheless, and setting this to one side, if we analyse these connected terms upon a standalone basis we prefer the submissions of the Secretary of State that those terms are *within* the scope of the enabling power. We state our reasons briefly.

105. First, we do not accept that taking account of disruption that may occur irrespective of the procession or assembly is an illegitimate expansion of the concept of "*disruption*" beyond the meaning that word can normally or naturally bear. To take an obvious example, a protest march or assembly held near Wembley Stadium on FA Cup Final day, or at the height of rush hour traffic, is likely to cause disruption of a different order to the same march or assembly held at a quiet time with few vehicles on the road. The definition of "*relevant disruption*" does no more than make clear that fairly obvious point.

106. Secondly, the same logic applies to the definition of "*relevant cumulative disruption*". All it does is to make clear that disruption can be cumulative, in the sense that the disruption caused by one procession or assembly may (depending on the facts and circumstances) be affected by the presence or potential presence of another procession or assembly. This might arise if, for instance, the purpose of the second one is to promote a cause hostile to the cause espoused by the participants in the first one. We see no difficulty with a provision clarifying that point to help inform decisions of senior police officers on the ground, when policing demonstrations.

107. Finally, the definition of "*community*" does not, in our judgment, unlawfully replace the concept of "*the community*" in the POA 1986 with a different and narrower concept of *a* "*community*" in the Regulations. Again, the purpose of the provision is to clarify, in the context of a procession or assembly, that it may have no disruptive impact on persons far from the scene and having no involvement in it. The generalised sense of the word in other contexts (e.g. in emergency powers legislation empowering regulations "*for maintaining supplies and services essential to the life of the community*") is not apt in the present context. The definition of "*community*" in the Regulations makes explicit the point that the disruption need not be to the public generally; it may be to a limited class of persons affected by a procession or assembly. We do not consider that when read in context the omission of the definite article from the definition makes any difference.

D. Grounds II and III

The issue – the basic premise

108. In argument Grounds II and III were combined. Mr Bunting KC for Liberty argued that they were free standing and applied irrespective of our conclusion on Ground I. The nub of the argument is that in using the secondary legislation procedure in circumstances where the same measures had been rejected as primary legislation the executive was acting unlawfully because it undermined Parliamentary sovereignty and the separation of powers. In our view Grounds II and III have traction only upon the

basis that the Regulations are otherwise assumed to be lawful. Where a challenged measure is *ultra vires* it is, *ex hypothesi*, outside of Parliament's will and intent and it is unlawful for that reason, so that it is superfluous to go further and conclude that it frustrates or circumvents sovereignty and/or the separation of powers simply because the power was used to introduce a measure already rejected by Parliament. As was confirmed in *PLP* (*ibid*) at paragraphs [22] and [23], it is irrelevant in a case of *ultra vires*, that it was Parliament that made the subordinate legislation. The Court intervenes because of the systemically inferior nature of the secondary legislative process of scrutiny and the inability of Parliament to amend the measure. It is this which leads the Court to treat the secondary measure as having been made by an Executive act: see paragraph [98] above. That is the legal underpinning of our conclusion upon *ultra vires* under Ground I. However, where the measure is *prima facie* lawful (because the secondary measure is within the ambit of the enabling power) the legal basis for the Court to ignore Parliamentary procedure and treat a Minister who invokes it as acting in an Executive capacity, is not the same. The principles underlying the law on *ultra vires* do not seem apposite.

The submissions of Liberty

109. Liberty argues that the Executive has, in substance, abused Parliamentary sovereignty and the separation of powers by obtaining legislative change through the exercise of a Henry VIII power in circumstances where that change had, earlier, been rejected by Parliament. This improperly achieved by the back door what the Executive had failed to achieve through the front door.

110. It is said that well established principle prevents the exercise of powers "… *in ways that frustrate or run counter to the policy or purposes of Acts of Parliament*". As applied to the present case: "*The decision to make the Regulations represents an attempt to frustrate or circumvent Parliament's view on this issue*". The Regulations frustrate: *"… Parliament's view as to the appropriate circumstances in which individual citizens may be made subject to penal sanction and thereby bypasses the statutory protections to which citizens would otherwise be entitled to rely."* Mr Bunting KC argued that case law supported Liberty's position.

111. The argument of Liberty that an otherwise lawful power may be rendered unlawful for conduct that is said to be unconstitutional is based upon the judgment of the Supreme Court in in *Miller II*, as representing the most up to date articulation of relevant principle. There it was explained that it was the common law that established the basic constitutional principles of the sovereignty of Parliament, the separation of powers and the prerogative powers (Judgment paragraph [40]-[41]). It was the duty of the Court to ensure that those rights were respected by the other pillars of the State, in particular the Executive. Where there was what *prima facie* appeared to be an incursion by one onto the rights of the other the role of the Courts was to determine whether the impugned act was objectively justified, which was a straightforward question of fact: Judgment paragraph [51].

112. It was also argued that there was no objective justification for using the Henry VIII power in this way. The mere fact that the Executive disagreed with Parliament did not, in law, amount to an objective justification. A reasonable justification requires something such as a material change in circumstance or a demonstrably flawed approach to fact or law. In written submissions the following was stated:

> "The Defendant's detailed grounds, §27, state that the Defendant set out such a justification during the debate in the House of Commons on 12th June 2023. Even if those remarks were admissible, they simply repeated the Defendant's view on the advantages of the substantive amendments that would be made by the Regulations. If that were sufficient by way of justification, that would be tantamount to saying that a Minister is entitled to exercise a Henry VIII power to override the previously expressed will of Parliament whenever s/he disagrees with it. That cannot be the standard. It was not sufficient for the Attorney General to say in Evans that he disagreed with the view of the Upper Tribunal. It was not sufficient for the Prime Minister in Miller 2 to say that he considered it appropriate to prorogue Parliament at the time and for the duration which he did."

113. It is said that this is supported by additional authority and in particular: *R (Evans) v Attorney General* [2015] AC 1787 ("*Evans*"); and case such as *R v Liverpool City Council, ex p Baby Products Association* [2000] LGR 171 ("*Baby Products Association*"), at page 178c-g, as approved in *R (W) v Secretary of State for Health* [2016] 1 WLR 698 at paragraph [57].

The submissions of the Secretary of State

114. The Secretary of State argues that no authority provides that an enabling power cannot be interpreted as permitting, whether by an affirmative resolution procedure or otherwise, the making of a provision to the same or a similar effect as one previously rejected by the House of Lords in an earlier Bill. Further, nothing in the enabling powers imposed such a limit and no constitutional principle operated to introduce such a limitation. To conclude otherwise would be "*constitutional heresy*" because it would confer legislative sovereignty on the unenacted views of the House of Lords (as opposed to legislative enactments by Parliament). In *Wilson v First County Trust Ltd* [2004] 1 AC 819 at paragraph [139] the Supreme Court held that it was "…*a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself . . . Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law*" and at paragraph [58] in relation to the Court's "*constitutional task of determining objectively what was the intention of Parliament in using the language in question*". In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC [26] ("*R(SC)*") at paragraphs [167]-[173] Lord Reed at paragraph [167] observed: "… *the will of Parliament finds expression solely in the legislation which it enacts*". No conclusion could be drawn about Parliamentary intentions from the rejection of the proposed amendments to the POA 2023. Amendments might be rejected, for instance, because Parliament concluded that it did not need to act because the Executive had the power to do so.

Analysis.

115. The principles of Parliamentary sovereignty and the separation of powers have their genesis in the common law and it the duty of the courts to protect those principles. In *Miller II* the Court stated that deciding an issue of legality:

> "34. … will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers."

The issue under Grounds II and III is whether those constitutional principles are violated when the Executive uses a statutory power to make subordinate legislation for an object and purpose which it has earlier failed to achieve by primary legislation.

116. We have explained in paragraph [108] above why we consider that the normal rules on *ultra vires* legislation are not four-square applicable. If Liberty is correct it has to be upon the basis of some different principle. We see two basic difficulties with Liberty's argument. First, *on the facts* we do not accept the theses that there has been what can legally be classified as frustration or circumvention of Parliament supremacy or the separation of powers. Secondly, we do not consider that the case law stretches to embrace the present situation.

(i) Was there frustrating or circumventing of the supremacy or Parliament and the separation of powers?

117. The argument of Liberty, with its emphasis upon frustration and circumvention, assumes that the Executive abused the processes of Parliament. It invites the Court to go behind the incontrovertible fact that it was Parliament that adopted the Regulations and find that because of an alleged improper purpose (to frustrate and circumvent) on the part of the Secretary of State that exercise in Parliamentary process was unlawful.

118. On the premise that the exercise of the power was *prima facie* lawful we see real difficulties in classifying the bare fact that Parliament adopted by secondary legislation that which had failed to pass as primary legislation as an act of frustration or circumvention of sovereignty or the separation of powers. All the Executive did was to invoke legitimate Parliamentary processes in a wholly transparent manner. Parliament created the Henry VIII power. Draft regulations were laid in accordance with the mandated statutory procedure. The proposed draft regulations were within the contemplation of Parliament. Explanatory Notes were produced in the normal way. The Home Office even produced and published an Economic Note seeking to quantify the effect of the draft regulations (if adopted). There was review by each Chamber of Parliament in accordance with the relevant rules. It was for this reason that the draft regulations were scrutinised, and criticised, by the HL Scrutiny Committee and its clear and strong constitutional concerns were published and brought to the attention of the House of Lords which was invited by the Committee to reject the draft Regulations. But both Chambers of Parliament, in accordance with the rules, proceeded to resolve to pass the Regulations. They were then signed by the Secretary of State in accordance with the relevant legislative and procedural rules. The mere fact that Parliament's own

procedure was used to pass as a secondary measure that which had failed to come into being as a primary measure is not, in and of itself, a misuse of Parliamentary procedure. Simply because the measure was "*controversial*" (as it was described by the HL Scrutiny Committee) and unpopular (to some) does not mean that it was undemocratic or constitutionally defective or frustrated the sovereignty of Parliament or violated the separation of powers. The bottom line is that, on the premise that the Regulations were *intra vires*, it was Parliamentary procedure that permitted the Regulations to come into force, not acts of the Executive. This was an exercise of the sovereign power of Parliament.

(ii) Case law

119. Secondly, the case law relied upon does not the support the submission of Liberty. The starting point for evaluating the case law is that but for arguments about circumvention and frustration, the Regulations were within the lawful ambit of the enabling power (see paragraph [108] above). We do not think the cases cited to us assist. In all the cases the Court was patrolling the boundaries of the relationship between different pillars of the constitution, for example between the Executive (whether central or local government) and Parliament, or the Executive and the Courts. No authority cited involved the Court determining where the balance of power lay as between two different but otherwise lawful exercises of Parliamentary power (the rejection of the amendments as primary legislation and the adoption of the same measures as secondary legislation). We turn to the principal cases relied upon.

120. ***Miller II***: Great weight was placed upon the judgment in *Miller II.* The protagonists were the Executive and Parliament. The context was the prerogative power exercised by the Crown advised by the Privy Council to prorogue Parliament. The specific issue was whether an executive act (advice given by the Prime Minister to the Queen on 27th/28th August 2019 that Parliament be prorogued from a date between 9th September until 14th October) was lawful. The advice was an exercise of a power "*relating to the operation of parliament*"; but it was not an act of Parliament itself. As the Court recognised: "*Parliament does not decide when it should be prorogued*". There was cause and effect as between the executive act and prorogation since the process of prorogation was a formality: "… *the Government of the day advises the Crown to prorogue and that request is acquiesced to*" (Judgment paragraph [3]).

121. The Court was not therefore reviewing the legality of two different acts of the same institution; but the relationship between two different organs of the state. The question for the Court was whether "… *the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account*": Judgment paragraph [55]. Thus, when addressing justiciability, the Court explained that the role of the Court was to determine the "*limits*" of the prerogative power recognising that it marked "*the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand*" (Judgment paragraph [52])

122. The Court stated that the issue had never arisen before and was unlikely ever to arise again. It was a "*one off*" but the common law was used to rising to such challenges

and supplied the courts with the legal tools to resolve the dispute (Judgment paragraph [1]). The Court compared the difficulties of determining the limits of the prerogative power with the comparable exercise of determining the limits of a statutory power:

> "38. In principle, if not always in practice, it is relatively straightforward to determine the limits of a statutory power, since the power is defined by the text of the statute. Since a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie. Since the power is recognised by the common law, and has to be compatible with common law principles, those principles may illuminate where its boundaries lie. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law."

123. Whether there was reasonable justification was an issue of fact for the Court. It examined: advice on political and strategic matters given to the Prime Minister by senior civil servants; the handwritten notes of the Prime Minister; memoranda prepared by No 10 staff on the proposed arrangements including, for example, how the Prime Minister should contact the Queen; cabinet minutes in which the Prime Minister notified cabinet colleagues of decisions taken; letters sent by the Prime Minister to MPs, etc: See judgment paragraphs [17]-[20]. It also took into account witness statement evidence submitted by former Prime Minister, the Rt Hon Mr. John Major, to the effect that only a short period of time was required to prorogue Parliament for a legitimate purpose; and it took into consideration that the present Prime Minister had tendered no evidence to refute that of Mr Major or support his decision to prorogue Parliament. Upon this evidential basis the Court found that there was no reasonable justification for the exercise of the power. The decision was unlawful and was to be quashed. To arrive at this decision the Court did not examine evidence emanating from *within* Parliament relating to its workings.

124. *Miller II* is accordingly very different to the present case. It concerned a direct clash between an act of the Executive and the functioning of Parliament. The Executive was the perpetrator and Parliament the victim. The evidence relied upon by the Court supporting the conclusion that the exercise of that common law power was unjustified came from disclosure from within Government, not from within Parliament. There was no sense in which the Court was supervising the internal workings of Parliament as opposing to drawing a line of demarcation between two organs of the state.

125. ***Evans***: Various government departments, and on appeal the Information Commissioner, refused the request of a journalist for disclosure of communications passing between the Prince of Wales and the departments. The Upper Tribunal allowed an appeal. There was no application for permission to appeal. Instead, the Attorney General, as the appropriate accountable person, issued a certificate under section 53(2) Freedom of Information Act 2000 that he had on reasonable grounds formed the opinion that there had been no failure to comply with the relevant provisions of the 2000 Act. The effect was to override the decision of the Upper Tribunal. A majority of the Supreme Court (5:2) held that the Attorney General had no power to issue the disputed

certificate. It violated two constitutional principles. First, that a decision of a court was binding as between the parties and could be ignored by the Executive. Secondly, that decisions of the Executive were reviewable by the court at the suit of an interested citizen. As such the power in dispute fell to be restrictively interpreted. In *Evans*, and in contradistinction to the present case, the dispute concerned the primacy of the discrete acts of two different organs of the state, the Courts and the Executive.

126. ***Baby Products Association***: Liverpool City Council issued a press release adverse to certain models of baby-walker said to fail safety tests. The application before the court was whether, having regard to the legislative scheme governing regulation of the safety of consumer products, it was beyond the power of the Council to issue the disputed press release. The relevant legislation allocated certain enforcement powers to local authorities. The Court held that the authority acted outside the powers conferred upon it by primary legislation and made a declaration that the release was contrary to law. Again, this was a case where the court was ruling upon the balance of power as between different acts of Parliament and an arm of the Executive (the local authority).

127. There is a final point. We do not find support in case law for the proposition that it is unconstitutional for Parliament to adopt by secondary measure a law which it has hitherto rejected as a primary measure. Had we considered however that the law was moving in the direction contended for by Liberty we would have wished to understand how the argument enmeshed with Article 9 of the Bill of Rights 1689. This was alluded to very briefly in argument but we did not receive detailed submissions upon the issue. Article 9 provides:

> "Freedom of Speech.
>
> That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

128. Where Article 9 applies it has been treated as a principle of importance. Lord Browne-Wilkinson observed in *Pepper v Hart* [1993] AC 593 at page 638D: "*Article 9 is a provision of the highest constitutional importance and should not be narrowly construed*". The Lord Chief Justice observed in *R v Chaytor* [2010] 2 Cr App R 34: "[*t]his provision has remained in force for over 300 years. Its importance cannot be overstated. It has never been questioned*" (para. 14). The ambit of the provision is however the subject of much academic and judicial commentary and there is scope for argument about the meaning of "*Speech and Debates*", "*Proceedings in Parlyament*", and "*impeached or questioned*".

129. If Liberty is correct and the duty of the Court is to go searching for conduct which frustrates or circumvents Parliament's will and sovereignty then it seems to us that we might need to inquire deeply into evidence and conduct about Parliamentary proceedings. It is unclear how we would do this: see for instance the observations of the Supreme Court in *R(SC)* (*ibid*) at paragraph [167]. We would in any event need assurance that such an exercise did not collide with Article 9. Liberty contended that the *only* facts we needed to take account of were, first, that Parliament had hitherto rejected the substance of the Regulations as primary legislation, and secondly, that the Executive secured that same substance through the use of secondary legislation *via* a

Henry VIII power. Taking note of such strictly limited facts did not, it was said, involve questioning the process of Parliament. When we consider the depth of the evidential inquiry performed by the Supreme Court in *Miller II* (see paragraph [122] above) we are not confident that the abbreviated exercise suggested by Liberty is an answer. In past cases where Article 9 has been live Parliament has on occasion appeared before the Court to make submissions. We would have welcomed such assistance.

Conclusion.

130. For the reasons set out above we reject Grounds II and III.

E. Ground IV: Consultation

The issue

131. Ground IV is summarised in the skeleton argument of Liberty as follows:

> "The decision to make the Regulations was vitiated by a one-sided, unfair consultation which preceded it. The Defendant voluntarily embarked upon a process of consultation about the contents and drafting of the Regulations but then only consulted a narrow group of stakeholders in support of the amendments rather than an even-handed group representative of all those whose interests may be adversely impacted."

Relevant facts in outline

132. The salient events relevant to this Ground are as follows.

133. On 1 December 2022 a roundtable meeting at 10 Downing Street took place, attended by the Prime Minister, the Home Secretary, the Policing Minister, senior representatives of policing bodies, the Mayor of London, the CPS and senior civil servants. According to the "*read out*" email the next day, the Home Secretary opened the meeting by stating its purpose as doing "*more to prevent protesters bringing chaos and misery to the public*".

134. Chief Constable BJ Harrington of the National Police Chiefs Council ("*NPCC*") suggested, among other things, that there should be a statutory definition of "*serious disruption*", including reference to "*cumulative impact*". Commissioner Mark Rowley, the head of the MPS, agreed that clarification of "*serious disruption*" would be helpful, as "*parliament has left this a grey space*". There was general agreement on this and the Prime Minister closed the meeting saying he "*wants to progress the 'serious disruption' issue asap*" and asking "*[c]an you set out for us by 3pm tomorrow how we can change this in legislation before Christmas*", by statutory instrument.

135. The subsequent progress of the proposal is set out in the witness statement of Mr Williams, of the Home Office:

> "16. The policy solution was to introduce a measure to amend the meaning of "serious disruption to the life of the community" in sections 12 and 14 of the Public Order Act 1986 via the Public Order Bill (that was then at report stage in the House of Lords). Some steps had already been taken to achieve this in July 2022,

as outlined above. The possibility of amending the definition by way of Statutory Instrument pursuant to the powers contained in the Police, Crime, Sentencing and Courts Act 2022 was also left on the table.

17. The PPU sent policy instructions to HOLA [Home Office Legal Advisers] on 6 December 2022. These instructions were copied to various stakeholders at the Metropolitan Police, Staffordshire Police, Essex Police, the NPCC and the College of Policing ("Police Bodies"). The Metropolitan Police Service is the force with the most experience of policing protests, while the Chief Constables of Staffordshire and Essex are the leads for the NPCC on protest and on public order & safety, respectively.

18. There followed a meeting with the Police Bodies on 7 December 2022. Many of those present also attended the Roundtable. According to the agenda, the aim of the meeting was to outline the legislative procedures involved and obtain policing views on the policy instructions. It should be stressed at this juncture that engaging with policing stakeholders in this manner is routine for policy officials when dealing with any specific policy area that may affect operational policing …. .

19. On 12 December 2022 HOLA instructed the Office of the Parliamentary Council ("OPC"). The instructions were shared with Essex Police on 20 December.

20. On 14 December 2022 officials received a first draft of the amended sections 12 and 13 of the Public Order Act from the OPC, and a letter with questions about the wording and general appropriateness of the clauses in considering the policy intent.

21. On 15 December 2022, the draft provisions were circulated to the Police Bodies to gain an operational view on how the measures would be interpreted and used by police. Input was requested "from a police perspective" and the Police Bodies were asked a number of questions aimed primarily at ascertaining the practical impact of the proposed changes at an operational level. As with the meeting on 7 December, this type of engagement is not indicative of a consultation and is routine among officials when handling policy matters that will have a material impact on policing.

22. The National Police Chiefs Council and the Metropolitan Police sent a joint response which outlined their view on the wording of the draft provisions on 21 December 2022. …. .

23. In January an 'Engagement and Handling Plan' for the Serious Disruption provisions was circulated. The handling plan made it clear that officials would continue engaging with NPCC and other Government Departments in regard to the new

> provisions. Officials used the term "engagement" because it was clear that they did not undertake a formal consultation. …. .
>
> ….
>
> 24. On 7 February 2023 the Government amendment to the Public Order Bill, which would have amended the definition of "serious disruption to the life of the Community" within sections 12 and 14 of the Public Order Act 1986, was defeated in the House of Lords …
>
> 25. Following this, a policy decision was made to amend the definition of serious disruption via secondary legislation, through the use of delegated powers, using the same clauses that were tabled as an amendment to the Public Order Bill with the exception of the blanket provisions conditions.
>
> 26. The commission was urgent as the government wanted to deal with protest-related serious disruption swiftly given the regular impact on the public and the forthcoming King's coronation. Due to these time factors, PPU had to arrange for the SI to be laid as soon as possible.
>
> 27. The Parliamentary Handling Plan outlined, amongst other things, the purpose of the regulations, the justification for the regulations, and the engagement that had taken place. …
>
> 28. There was no re-engagement with stakeholders prior to or during the passage of the regulations … ."

136. We have set out the relevant extracts from the Economic Note at paragraphs [28] – [33] above. The rationale for not conducting a public consultation set out there was that the amendment did not create new powers or criminal offences (see paragraphs [29] and [31] above). Paragraph 10 identified the groups affected by the proposed regulations. It contains a lengthy list of both public and private bodies and persons. The latter, private bodies and persons, refers to the following: community and social organisations; the general public; protestors; road and other transport users; transport operators and construction companies. Paragraphs 51-54 (see paragraph [33] above) addressed the impact upon protestors of changing the law, namely an anticipated increase in prosecutions.

137. The Secretary of State laid a draft of the Regulations before Parliament on 27 April 2023. It was accompanied by a draft Explanatory Memorandum. Paragraph 10 was headed "*Consultation Outcome*" and provided as follows:

> "10.1 The National Police Chiefs Council, the Metropolitan Police Service, the Police and Crime Commissioners of the police forces whose areas include the M25, and National Highways were consulted on how to improve the response to highly disruptive protests at a roundtable chaired by the Prime Minister.

> 10.2 Both the National Police Chiefs Council and the Metropolitan Police Service welcomed a commitment to bring further clarity to the meaning of "serious disruption to the life of the community". Drafts of the proposed amendments to the Public Order Bill (see paragraph 6.7) were shared with and commented on by both organisations. As set out in this Explanatory Memorandum, those amendments provided the basis for the changes made by the instrument.
>
> 10.3 National Highways have expressed the importance of the road networks, which are typically disrupted by protests, operating efficiently and that the public have a right to expect this. The changes made by the instrument will improve the police's ability to protect this right."

138. Mr Williams explained in his witness statement that it was not the intent of the drafter of that paragraph to refer to "*consultation*". The error occurred because the drafter was working from a standard template inviting them to state "*who was consulted, how that consultation was done, a summary of responses and, if relevant, a link to any full consultation summary*". Mr Williams says that what occurred was "*targeted engagement*" not a consultation. He says that officials "*were aware that it was not necessary to consult (and no consultation had been conducted)*."

139. After being debated in both Houses on 12 and 13 June 2023, the Regulations were made on 14 June 2023. The final version of the accompanying Explanatory Memorandum had an additional sub-paragraph within paragraph [10] inserted at the start, in the following terms (with the subsequent sub-paragraphs re-numbered accordingly):

> "10.1 A full consultation was not necessary as the provisions in this instrument serve to clarify existing police powers and do not create new powers or criminal offences. Instead, targeted engagement with operational leads was held."

The submissions of Liberty

140. The submissions of Liberty on this ground were made by Ms Hollie Higgins. In broad outline her submissions were as follows.

141. First, the process followed was one of consultation, not "*targeted engagement*". Whether a public body has embarked on a consultation process is a question of substance not form: *R (FDA, PSCU and PROSPECT) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin), at [99], endorsed in *R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810 at paragraph [81].

142. Secondly, whether the procedure was fair was a matter of law for the Court. The test was not rationality: *Article 39*, at paragraphs [35] and [83]; *R (Milton Keynes Council) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575, per Pill LJ, at paragraph [32]; and see Linden J's analysis in *R (Medical Justice) v Secretary of State for the Home Department* [2024] EWHC 38 (Admin), at paragraph [103].

143. Thirdly, in the present case there was no statutory duty to consult. The decision to consult was voluntary.

144. Fourthly, a consultation exercise voluntarily undertaken had to be conducted fairly and in accordance with public law principles, whether or not the situation was urgent and the process embarked upon was carried out "*informally and over a limited period*": *R (Article 39) v Secretary of State for Education* [2021] PTSR 696 ("*Article 39*") , at paragraphs [48], [77]-[78]. A decision maker conducting a consultation, whether voluntarily or under a legal duty, could not pick and choose whom to consult.

145. Fifthly, on the facts the process was procedurally unfair (alternatively it was irrational) because it excluded from the consultation those representing the interests of persons whose conduct in engaging in the fundamental common law right of procession and protest could become criminalised. It was no answer to say that no new offences were being created. According to the Economic Note the Government was proceeding upon the basis that there would be a significant increase in prosecutions. The policing bodies themselves flagged up (marked in green coloured text) human rights concerns in their joint response on 21 December 2022 and on the basis of the disclosed documents they did not promote lowering the threshold for intervention. On the facts, discussions occurring amounted to a consultation exercise. It started on either 6 or 15 December 2022. It was correctly described as such by the civil servants concerned until the terminology was changed, incorrectly, to that of "*targeted engagement*". The exercise was not (as in *Eveleigh*) a survey to ascertain the views of individuals on a general policy commitment, at a high level of abstraction. Nor was it a mere exchange of information, as in *FDA*. Third parties made representations upon: a draft legislative policy; which was still at a formative stage; which had sufficiently crystallised to enable cogent representations to be made by those affected; which affected fundamental common law rights; and which involved a heightened risk of exposure to criminal sanctions for those who were not being consulted. All the *Eveleigh* criteria were met. Those consulted did not represent the range of interests affected by the proposed measure. The Parliamentary context did not assist the Secretary of State. The fact that the Regulations were subject to a form of (attenuated) Parliamentary scrutiny did not affect the obligation to consult fairly; just as the legislative context in *Article 39* (*ibid*) did not assist the Secretary of State who had failed to consult the Children's Commissioner on proposals to be enacted in regulations that would have an important effect on the interests of children. In the circumstances the one-sided consultation that occurred informed the content of the Regulations which are accordingly vitiated by procedural unfairness.

Submissions of the Secretary of State

146. The Secretary of State submitted in his skeleton argument, that "*[i]t was for the Secretary of State to decide who to engage with and from whom to seek evidence, subject only to rationality*". The engagement with policing bodies and National Highways "*did not amount to consultation or create a situation in which the Secretary of State had no rational option but to engage with others*." There was no statutory or other duty to consult and use of the words "*consult*" and "*consultation*" did not mean consultation was voluntarily undertaken.

147. Sir James Eadie KC for the Secretary of State argued that the facts were comparable to the position in *R (Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin); and the *FDA* case (*ibid*), where there was limited

communication of information to, and engagement with, some stakeholders about a particular proposal, without any consultation taking place (see in particular the *FDA* case at paragraph [102]). Engagement of this kind was routine in the running of government business.

148. Moreover, the context was secondary legislation subject to the affirmative resolution procedure, which ensured the ability of Parliament to subject the measure to appropriate scrutiny. If a full consultation exercise were required every time Government sought advice about a particular proposal, nearly every Government act would require consultation; contrary to the remarks of Elias LJ in the *Association of Personal Injury Lawyers* case.

149. Furthermore, whether or not a decision maker was engaging in consultation when holding discussions with particular stakeholders, the authorities showed that it was for the decision maker to decide, subject to rationality, with whom to engage. In *Article 39*, Baker LJ had (at paragraph [35]) intended to endorse the observation of Stanley Burnton J (as he then was) in *R (Liverpool CC) v. Secretary of State for Health* [2003] EWHC 1975 (Admin), at paragraph [44], as authority for that correct proposition (rather than the different case cited, also involving Liverpool City Council).

150. The Court of Appeal judgment in *Eveleigh* did not define comprehensively the circumstances in which a consultation undertaken voluntarily must include the full requirements of a public consultation. The Court was merely focussing on the reasons for concluding that those requirements were not met in the case before it, contrary to the view of the judge below whose decision was reversed.

151. The *Article 39* case turned on its facts. It was common ground in that case that the Secretary of State had embarked on a consultation exercise, unlike in this case. Having done so, it was irrational not to have included the Children's Commissioner among those consulted. In the present case, by contrast, the Secretary of State was entitled to select those approached for advice about the proposal. The principle was not being debated; the Government had already decided to amend the definition of "*serious disruption*". The consultees suggested by Liberty would include every person or group likely to take part in a procession or assembly.

Analysis

(i) The basic principles

152. The law governing the obligation to undertake public consultation is now reasonably well settled. A public body or decision maker owes no general duty in all cases to consult interested persons before deciding upon a measure. But the decision maker may become subject to such a duty in certain circumstances. A duty to consult may be enacted by a statutory provision. If the duty is statutory, the scope of the obligation is determined primarily by the terms of the statute. The process ordained in the statute must be followed and must, in addition, be undertaken in a fair manner.

153. A duty to consult may arise at common law in the second, third and fourth cases identified in the judgment of the court in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), at paragraph [98(2)] where: (i) there has been a promise to consult; (ii) there has been an established practice of consultation; and (iii), where exceptionally a failure to consult would lead to

conspicuous unfairness. It is unnecessary to examine the boundaries of those categories. Liberty does not submit that the present case is within any of them.

154. It is however common ground that where a consultation exercise is carried out voluntarily, it must be carried out "*properly and fairly*" (per Baker LJ in *Article 39* at paragraph [33], citing the judgment of Lord Woolf MR in *R v. North and East Devon Health Authority ex p. Coughlan*, at paragraph [108]). In the same paragraph, Lord Woolf went on to refer to what have become known as the *Gunning* criteria:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p. Gunning* (1985) 84 LGR 168."

155. Not every process of communication and discussion by a public body with chosen interlocutors engages an obligation to carry out a full consultation exercise meeting the requirements of the *Gunning* criteria. For examples of engagements not amounting to consultation, or a promise of consultation, see *R (Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin), [2013] EWHC 1358 (Admin), per Elias LJ at paragraphs [37]-[46]; *R (on the application of FDA, PCSU and Prospect) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin), per Simler J (as she then was) at paragraphs [83]-[92]; and *R (Eveleigh) v. Secretary of State for Work and Pensions* [2023] EWCA Civ 810, per Elisabeth Laing LJ at paragraphs [81]-[86].

156. Elias LJ in the *Association of Personal Injury Lawyers* case, at [44], explained the reasons for the court's reluctance to subject Government to onerous consultation obligations:

> "… Contact with interest groups (or 'stakeholders', I think it is, given the modem spin) is the very warp and woof of democratic government; it is central to decision making. It means that Government is better informed of the implications of the different options, and will more likely to be made aware of potential pitfalls, political or otherwise, which the decision may create. But it cannot be the case that every time a minister deals with one group, he or she must hold a similar meeting with a group holding the opposite view. It must be for Government to decide what information it requires, and from what source and at what time, in order to facilitate its decision making. If the Government decides to enter into a formal consultation process, that exercise must satisfy the Gunning requirements if it is to be fair and meaningful. But, in my view, a court cannot justifiably infer that a minister has entered into a consultation exercise merely because a decision is taken after a meeting with a particular interest group, even where representations from that group have, in fact, proved decisive. The purpose of the meeting may have been to clarify a particular matter, or to gauge the

> strength of the group's opposition to a proposed decision, or simply so that the Government will be able to trumpet that group's support for the decision when it was announced. None of this could remotely be said to amount to consultation with all the baggage inherent in that process."

157. In the *Eveleigh* case, Elisabeth Laing LJ held at paragraph [82] that "*the* Gunning *criteria are based on self-evident assumptions about the characteristics of the exercise to which they are able, and are intended, to apply. If the exercise in question does not have those characteristics, the* Gunning *criteria cannot apply to it*." Those assumptions were, in particular, (see at paragraph [85]):

> "that there is a proposal to make a decision, which, while not inchoate, is at a sufficiently formative stage that the views of those consulted might influence it. But the second assumption, which sheds light on what is meant by formative stage in this context, is that the proposal has crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action."

158. At paragraph [91] she expressly left open the issue of whether the *Gunning* criteria applied in a case of voluntary consultation, a point that had not been the subject of any decision binding on the court. Bean LJ stated at paragraph [95] (Macur LJ concurring with both judgments, at paragraph [98]):

> "I agree with the judgment of Elisabeth Laing LJ. In particular I agree with her that the *Gunning* criteria only apply where a public authority is proposing to make a specific decision which is likely to have a direct (usually adverse) impact on a person or on a defined group of people. The proposal must be at a sufficiently formative stage that the views of those consulted might influence it, but also must have crystallised sufficiently that the public authority knows what the proposed decision might be, and can explain it in enough detail to enable consultees to respond intelligently to the proposed course of action."

159. It is important to recognise the purpose of public consultation. As Baker LJ noted in *Article 39*, at paragraph [37], its purpose "*has various strands*": first, to improve the quality of decision making; secondly, to ensure fairness is accorded to those who may be affected by a regulatory change and to avoid the sense of injustice they may feel if they are not consulted; and thirdly, as "*part of a wider democratic process*". At paragraph [38], Baker LJ cited the well known remarks of Lord Wilson JSC in *R (Moseley) v. Haringey London Borough Council* [2014] PTSR 1317, at paragraph [24], describing fairness as "*a protean concept, not susceptible of much generalised enlargement*" and linking the requirements of fairness with the purpose of consultation.

160. Thus, the purpose of consulting goes beyond merely informing the reasoning in support of the eventual decision. Consultation should ensure that the decision is both of high quality and justly reached. Fairness in carrying out a consultation is part of procedural fairness in decision making more generally. In *Plantagenet*, the Divisional

Court treated the common law duty to consult as part of a wider common law duty of fairness, sitting alongside the two other common law duties mentioned at paragraph [96]: to make sufficient enquiry and to have regard to relevant considerations.

161. As in other contexts where procedural fairness is at issue, what fairness demands will depend on the facts of the case and the context. Whether those demands have been satisfied in a particular case is a matter for the court, not the decision maker.

162. We turn to our conclusions.

(ii) Did the Secretary of State carry out a consultation exercise?

163. In our judgment, the Secretary of State did undertake a consultation exercise. There was a concrete proposal to introduce legislation that would alter the meaning of "*serious disruption*" in sections 12 and 14 of the POA 1986. It was likely, and intended, to have an adverse impact upon those taking part in processions and assemblies. But it would also have an impact upon other members of the public likely to be inconvenienced by the activities of those taking part in them. The Government sought views on all aspects of the proposals at a point in time which was shortly before the measures were to be adopted. Those consulted submitted views on everything spanning human rights implications, practical issues relating to enforcement through to drafting of the statutory language. This had all of the hallmarks of a consultation.

164. The outcome of the roundtable meeting on 1 December 2022 was that a "*draft set of clauses*" was produced. It was intended to be published and to lead to a change in the law. The draft clauses would address the definition of "*serious disruption*" and included consideration of the "*cumulative*" impact of processions and assemblies. Responses were invited from the policing bodies. The general nature of the proposed changes and the underlying policy was clear, but the detail had yet to emerge from the consultation process.

165. The proposal was clearly at a formative stage. The Secretary of State was aware what the decision was likely to be and was able to explain it to those consulted, who were able to respond and did so. The letter of 14 December 2022 referred to a balancing of the rights of protesters, on the one hand, and affected members of the public going about their business, on the other. The responses of those consulted had the potential to influence how that balance would be struck in the legislation.

166. The draft amendments (which on grounds of privilege have not been placed before the Court by the Secretary of State) were those prepared by the Office of Parliamentary Counsel ("*OPC*") and summarised in eight numbered points by Mr Kelvin Williams in his email of 15 December 2022. A detailed, sophisticated and informed response was provided on 21 December 2022, jointly, by the Commissioner of Police for the Metropolis and, on behalf of the NPCC, the Chief Constable of Essex Police. The College of Policing confirmed the next day that its comments were included in it.

167. This was a classic consultation response, with suggestions and comments on the proposal set out in green coloured text. It addressed the proposal to change the threshold for the setting of conditions for processions and assemblies. It addressed the balancing of the rights of those taking part in them, exercising rights of protest, and those suffering disruption and inconvenience as a result of others taking part in them. The Secretary of State, in his skeleton argument, himself fairly described it as "*a joint response outlining their views on the draft provisions*".

168. We think that it is nigh on inevitable that the comments made in the 14 December 2022 letter and the joint response of 21 December, together with other briefings and meetings (including seeking the support of two former Metropolitan Police Commissioners) influenced and fed into the content of the final draft of the Regulations introduced in Parliament in April 2023.

169. In those circumstances, we accept the submission of Liberty that the conditions for application of the *Gunning* criteria stated by Elisabeth Laing LJ, echoed by Bean LJ, in the *Eveleigh* case, are satisfied in this case. This was a case where the Secretary of State chose to consult.

(iii) Fairness: Can a selective consultation be fair?

170. We turn to procedural fairness. We do not think that the *Gunning* criteria necessarily embody the totality of the requirements in <u>all</u> cases where consultation is undertaken on a voluntary basis. The criteria are valuable and might cover very many cases but the test is ultimately one of fairness, a "*protean concept*" as referred to by Lord Wilson in *Moseley*. What fairness demands is a question of fact in each case.

171. We start with the question: who must be consulted? The answer to this is context sensitive. In a statutory consultation, the legislation may provide the answer, which may be such persons as the decision maker considers appropriate, or some similar formulation. In such cases, it is for the decision maker to decide, subject to rationality, who is appropriate to be consulted. The Court would not interfere merely because other persons not selected, could have been found appropriate.

172. In other cases, there might be no statutory duty to consult or even no duty to consult at all. In *R (Milton Keynes Council) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575, three local authorities sought to quash certain provisions in statutory instruments relating to houses in multiple occupation on the ground that the Secretary of State had consulted local authorities through their representative bodies and not directly (see Pill LJ's judgment, at paragraph [1]). The Court of Appeal upheld the decision below that there was no unfairness. It was common ground (see paragraph [17]) that there was no statutory duty to consult but that if consultation was embarked upon without a legal requirement "*it must be carried out properly*" (citing Lord Woolf MR in *Coughlan*). The Secretary of State argued that the decision-maker could decide whom to consult. He cited *Buckinghamshire County Council v Royal Borough of Kingston-upon-Thames* [2011] EWCA Civ 457) where it was held "…, *that the decision-maker's duty, in the particular statutory context, was to the patient SL and not to another local authority upon whom a financial burden might fall as a result of the decision*". The Court of Appeal disagreed (paragraph [32]):

> "I do not accept the submission that a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing. The *Buckinghamshire* case was in a different statutory context in which it was decided that the local authority need not be consulted. No general principle that it is for the decision-maker alone to decide whom to consult can be extracted from that decision."

173. In *Article 39* (*ibid*), the decision under challenge was to make regulations about children's social care services in order to deal with the impact of the coronavirus pandemic on the children's social care system. Baker LJ at paragraph [78] noted that there had been (swift and informal) voluntary consultation. At paragraphs [82]-[83] he held that there was a statutory duty to consult because (i) the statute required the Secretary of State for Education to consult "*any persons he considers appropriate*" but (ii) it was irrational not to include among such persons the Children's Commissioner and other bodies representing children's rights. Further (paragraph [35]) the question who should be consulted was for the decision maker to determine, subject to review on rationality grounds. In support of that, he cited a case involving Liverpool County Council that had been mentioned in argument but is not on point (*R (Liverpool City Council) v Secretary of State for Health* [2017] PTSR 1564). We accept the submission of Sir James Eadie KC that Baker LJ must have intended to cite a different case also cited in argument, namely the decision of Stanley Burnton J (as he then was) in *R (Liverpool CC) v. Secretary of State for Health* [2003] EWHC 1975 (Admin).

174. In the latter case, Stanley Burnton J stated at paragraph [44]:

> "I infer, and I am satisfied, that the Secretary of State consulted such representatives of local authorities and such local authorities as appeared to him to him to be appropriate; and that there is no basis for suggesting that he was irrational in this connection."

175. However, that was another statutory consultation case (about the level of grant to be paid to local authorities to cover their expenditure on community care services) where the choice of consultees was given to the decision maker by the statute; see the judgment at paragraph [5]): the Secretary of State "… *must consult such [various categories of persons and bodies] as appear to him … to be appropriate*".

176. In *Re JR130's Application* [2023] NIKB 109, the applicant challenged Covid-related temporary legislative restrictions on outdoor sport. The grounds included (as noted in Rooney J's judgment at paragraph [4]) failure to consult with the Northern Ireland Commissioner for Children and Young People. At paragraph [120], after considering well-known authorities, Rooney J accepted that "*as stated by Baker LJ in the Article 39 case once a duty to consult has been deemed to exist, it is for the decision maker to determine the parties who should be consulted*" but that is "*open to challenge on the grounds of irrationality*".

177. For the latter proposition, he cited the decision of Stanley Burnton J in *R (Liverpool CC) v. Secretary of State for Health* [2003] EWHC 1975 (Admin); as Baker LJ must have intended to do in *Article 39*. Rooney J distinguished *Article 39* on the facts, observing that in the case before him, there was no statutory duty to consult ([paragraph 137) nor any voluntary consultation process "… *in which the respondent irrationally engaged with some key stakeholders … but excluded the Children's Commissioner*" (paragraph [132]).

178. We do not regard *Article 39*, or the *JR130* case, or Stanley Burnton J's decision in *R (Liverpool CC) v. Secretary of State for Health*, as clear authority supporting a general principle that a decision maker can always, subject only to rationality, choose whom to consult in a voluntary consultation case. The *Milton Keynes* case suggests

otherwise and was not cited in *Article 39* either in the judgments or, according to the law report, in argument. Nor is it mentioned in Rooney J's judgment in *JR130*.

179. The approach of the Court of Appeal in the *Milton Keynes* case was followed by the Divisional Court in the *Association of Personal Injury Lawyers* case (per Elias LJ at [36], Cranston J concurring). After referring to Pill LJ's judgment, Elias LJ observed at [36]:

> "This case supports the proposition that there may be circumstances where a selective consultation exercise will render a decision taken pursuant to it unlawful. I do not understand the Secretary of State to contend otherwise. His submission is that there never was a consultation exercise."

180. The Divisional Court accepted the latter submission; the proposition that a voluntary but selective consultation may be unlawfully conducted was therefore, strictly, *obiter*, but we think it is correct. We also agree with the observation of Linden J in *R (Medical Justice) v Secretary of State for the Home Department* [2024] EWHC 38 (Admin), at paragraph [103]), where he said he was:

> "… doubtful that Baker LJ [in *Article 39*] was intending to identify irrationality as the only basis on which there may be a challenge to a failure to include a party in a consultation process at common law … The proposition that, at common law, it is for the decision maker alone to decide whom to consult was rejected in *R (Milton Keynes Council) v Secretary of State for Communities and Local Government*… ."

181. In the light of that discussion, we take the law to be as stated by Elias LJ in the *Milton Keynes* case: there may be circumstances where a voluntary but selective consultation exercise will render a decision taken pursuant to it unlawful. Such cases might be relatively rare. The Court will tread with care in characterising as a consultation a process of Government engagement with those from whom it seeks advice.

(iv) Did fairness require consultation of bodies representing the interests of protestors?

182. It is the responsibility of the Court to form its own conclusion about fairness. Nonetheless, the conclusion of the HL Scrutiny Committee is instructive. It identified 7 reasons why the consultation process which included only law enforcement agencies was "*inadequate*" (see paragraph [42] above): (i) the subject matter was "*controversial*"; (ii) it concerned a wide range of identified interested parties all of whom had "*strongly felt views*", which were therefore not being obtained; (iii) this was inconsistent with Cabinet Office Guidelines; (iv) a full public consultation would have been appropriate to maximise the chances that the outcome was "*clear and workable*"; (v) a full public consultation might have resulted in "*clearer definitions*"; (vi) the debate in Parliament during the House of Lords Report Stage of the POA 2023 was not a substitute for in-depth consideration by a range of interested parties including those with "*expert knowledge*" of the relevant policy; (vii) the House of Lords had expressed its view when rejecting the proposals yet they had been brought back unchanged.

183. Applying a broad standard of fairness we conclude that fairness required a balanced, not a one sided, approach, and the procedure adopted was not fair. There are eight reasons for this.

(i) **The proposals assumed an increased exposure to criminal sanction**: In the Economic Note and in the pre-action response before the claim was brought, the Secretary of State stated that the reason for not consulting was that no new offences or powers of a criminal nature were created. Whilst technically correct the legislative framework giving rise to the risk of criminality was materially altered and enhanced powers were given to the police to intervene to impose conditions. The Government was aware that this was likely to increase the number of conditions imposed by the police by up to 50% and that prosecutions would increase by circa one third. We find no sensible difference between amending a criminal offence in a manner that increases the number of people likely to be prosecuted; and amending the legal framework for the application of an offence which has the effect of increasing the number of people likely to be prosecuted. The difference between the two formulations is one of form not substance when it comes to fairness. It is a difference without a real distinction. On the Secretary of State's own logic the case for consultation was compelling.

(ii) **Fundamental common law rights were engaged**: The measure has a significant and negative, restrictive, impact upon the scope and exercise of the fundamental common law civil rights of citizens to protest and to disagree (see paragraph [55] above). The Regulations lower the threshold for intervention by the police and thereby alter the delicate balance struck by Parliament in the POA 1986 between the relative rights of protestors and others (see paragraph [58] above). The legislation is of importance to democracy and is of broad application. It is far removed from other cases where lesser rights, such as narrow financial rights, may be at issue. At an elementary level of fairness if the views of enforcement agencies are sought and obtained; then the views of those negatively affected by enforcement should equally be canvassed.

(iii) **Readily identifiable class of adversely affected bodies and persons**: The categories of those affected were clearly listed in the Government's Economic Note (see paragraph [32] above). It would have been straightforward to identify those to be consulted. Given the sophisticated and expert nature of nature of such bodies it is reasonable to infer that consultation responses would have been of high quality and capable of improving the legislation in question (as the HL Scrutiny Committee suggested). We do not suggest that the consultation would necessarily have had to be open to *all* wishing to respond. Obvious candidates would have been representative groups such as Liberty and other bodies with an interest in promoting civil rights at a general level. It would have been equally straightforward for the Government to identify those from civil society likely to be supportive of the proposed measures.

(iv) **Stage of development**: The proposals were at an advanced, though still formative, stage. This is not a case about a measure already adopted. The point at which the Executive engaged with the police was late in the process

and views were sought on precise drafting issues. It cannot be said that a consultation would have been lacking in utility, premature or lacking a close proximity to the final legislative process.

(v) **Scope of issues / ability to improve the quality of legislation**: This was not a consultation about the implementation of a pre-determined policy or measure. The matters upon which the Government engaged with enforcement agencies included the most important aspects of the proposed measure including legal, practical, procedural, drafting, and human rights implications. These were matters upon which consultees will have had a singular point of view which would not, necessarily, reflect the views of others. The HL Scrutiny Committee made the point, which we endorse, that a broader consultation could have improved the quality of the Regulations in respect of enforcement and clarity (see paragraph [42] above citing paragraph [22] of the Committee report).

(vi) **Conducting a broader consultation would not have been onerous or disproportionate**: Conducting a fair consultation would not have been unduly burdensome. Government consultations are relatively short in duration. Government is experienced in synthesising consultation responses in short order. A modest burden is proportionate to the benefit of obtaining full, fair and comprehensive consultation responses. Liberty argued that the decision maker could have conducted a targeted consultation inviting a limited number of representative bodies to submit evidence and analysis. It was not suggested by the Home Office in submissions to the HL Scrutiny Committee, or indeed by the Secretary of State to this Court, that conducting a broader consultation would have resulted in a disproportionate burden.

(vii) **Existence of Parliamentary scrutiny not an answer**: The HL Scrutiny Committee rejected the argument of the Home Office that the affirmative resolution procedure was sufficient to negate the need for consultation. It pointed out that the measure could not be amended during that procedure and that in any event Parliament had already rejected the measure (see paragraph [42] above, citing paragraph [23] of the Committee Report). We agree. If the Secretary of State were correct there would almost never be a need for consultation because Parliamentary debate (however cursory or whipped) would always obviate the need for a wider range of expert and informed views to be sought. And as Liberty points out (see paragraph [145] above) this argument has not held sway in other cases.

(viii) **Implications for other cases**: We reject the submission of the Secretary of State that to conclude that consultation was required *on these facts* would have the effect of opening up the duty to consult in almost every case, or even a wide variety of cases. Each case turns on its facts. The present facts sit at one end of the spectrum and are very different to many of the cases where courts have held that no consultation was required. Indeed the view of the HL Scrutiny Committee was that the situation arising in this case was unparalleled. We put the proposition the other way around. If consultation was not required in *this* case there would be little daylight left for cases where consultation was required.

Conclusion on Ground IV

184. Ground IV succeeds. A voluntary consultation process was undertaken. It was however one-sided and not fairly carried out. For this reason it was procedurally unfair and unlawful.

F. Disposition

185. For all the above reasons Grounds I and IV succeed. However, Grounds II and III are dismissed. The ultimate effect of this judgement is that the Regulations are unlawful.