



Neutral Citation Number: [2026] EWHC 2437 (Admin)

Case No: AC-2025-MAN-000533

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

**On appeal by way of Case Stated**  
**From Chester Crown Court**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M60 9DJ

Date: 23/09/2026

**Before:**

**President of the King's Bench Division**  
**Mrs Justice Hill**

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**Between:**

**Neil Cox**  
**- and -**  
**Director of Public Prosecutions**

**Appellant**

**Respondent**

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**Kirsty Brimelow KC and Christopher Jeyes** (instructed by **VHS Fletchers**) for the  
**Appellant**  
**Louis Mably KC and Megan Millar** (instructed by the **Crown Prosecution Service**) for the  
**Respondent**

Hearing date: 21 April 2026  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on Wednesday 23 September 2026 by  
circulation to the parties or their representatives by e-mail and by release to the National  
Archives.

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**Dame Victoria Sharp, P.***Introduction*

1. This is the judgment of the court.
2. On the morning of 22 August 2023 the Appellant, Mr Neil Cox, was walking along a public footpath called Middlewood Way in the vicinity of Macclesfield. He was entirely naked. Whilst walking on the footpath he encountered an off-duty Detective Chief Inspector out for a morning jog, and then two women, each on their own, on their way to work.
3. The Appellant was subsequently charged with one offence of disorderly or threatening behaviour likely to cause harassment, alarm or distress, contrary to section 5 of the Public Order Act 1986 (“the 1986 Act”). On 26 April 2024, following a trial at Crewe Magistrates’ Court, he was convicted of that offence and ordered to pay a fine of £800 plus costs. He appealed against his conviction pursuant to section 108 of the Magistrates’ Courts Act 1980. On 8 November 2024, following a rehearing, the Crown Court at Chester (Mr Recorder McDonald sitting with two Justices) dismissed his appeal.
4. As the Recorder explained, the case had started before a different judge but part way through the hearing it was realised that the judge knew one of the witnesses. The case therefore restarted later that day before the Recorder, sitting with the same Justices, and finished late. In those circumstances, and with the parties’ agreement, he gave a short ex tempore judgment which he said explained the court’s conclusions without being as full as it might have been under different circumstances.
5. Following an application by the Appellant, the Crown Court agreed to state a case, setting out a series of questions for the opinion of this court. The questions relate, in summary, to the Crown Court’s interpretation of the section 5 offence, whether the correct principles were applied having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), and whether the Appellant’s conviction was a proportionate interference with his rights under articles 8 and 10 of the Convention on the facts of this case.
6. For the reasons that follow, this appeal is dismissed.

*The hearing before the Crown Court and its findings*

7. The Crown Court heard evidence from the individuals the Appellant had encountered on the footpath and from the Appellant. We have a transcript of the closing submissions and of the Crown Court’s ruling, which the Case Stated incorporates by reference. There was no significant dispute of fact before the Magistrates or the Crown Court.
8. At paragraph 6 of the Case Stated the Crown Court set out its findings of fact as follows:  

“a. At approximately 6.30 am on 22 August 2023, the Appellant was walking on a footpath known as Middlewood Way in the vicinity of Macclesfield.

b. While doing so he was completely naked, save for carrying a small bag which was slung across his shoulder. He was also carrying a mobile phone.

c. The Appellant is a naturist who practised naturism as a lifestyle choice and who personally believed that it was reasonable to do so. There was no dispute that this was an entirely genuine and legitimately held belief.

d. The Appellant had intended to visit a business premises which turned out to be open slightly later than he had understood it would open. The business knew him and had no concern with him shopping naked, which he had done many times before. As it was closed, the Appellant decided to take a walk and return when it was open. He chose an area that he knew to be quiet and considered it to be the quietest area he could reasonably find; the place where people were least likely to be in close proximity.

e. The path connected a residential estate and Macclesfield town centre before running out into the countryside. It was a route used by people walking from the estate to the town and back again but at the time of this incident it was early morning.

f. The Appellant was aware that he might encounter one or more people while walking on the footpath. He had often met people whilst walking or cycling before. However, he considered that the path was the quietest option available for him to walk.

g. The Appellant did not deliberately intend to cause harm or distress to any person whom he might encounter while on the footpath.

h. The Appellant was aware from past experience that reactions from people he did not know, whom he encountered while naked, varied with most people being indifferent or agnostic to nudity, some being supportive, some being curious, and some being angry, annoyed or upset.

i. While walking along the footpath, the Appellant encountered three people: one off-duty Police Officer and two civilians. The two civilians were communicated with by the off-duty Officer Mark Whittaker and became witnesses at his request. Each of these people gave evidence in court.

j. Firstly, the Appellant encountered a male, Mr Mark Whittaker. He was an off-duty Detective Chief Inspector of Cheshire Constabulary, out for a morning jog. He passed the Appellant and proceeded in the opposite direction to the Appellant after making his disapproval known. The Appellant did not say anything to him or interact with him in any way other than to explain he was a naturist out for a walk. After he had jogged past the Appellant, DCI Whittaker decided that he should reverse his

course and follow the Appellant in order to arrest him. Some time later he did so and took hold of the Appellant.

k. Secondly, the Appellant encountered a female, Ms Katia Umbrasko. This occurred after the initial encounter with DCI Whittaker but before DCI Whittaker caught up to the Appellant after reversing his course. She was walking in the opposite direction to the Appellant, and they passed each other. The Appellant did not say anything to her or interact with her in any way. Ms Umbrasko was confused and scared by the encounter which she had not expected or anticipated. The Court found that amounted to alarm or distress. Whilst following the Appellant DCI Mark Whittaker passed her and told her to call the police.

l. Thirdly, the Appellant encountered another female, Ms Nina Profitt. She came upon the scene when DCI Whittaker had detained the Appellant. She heard some discussion between the two men, but the Appellant did not say anything to her or interact with her in any way. She was angry and concerned that the Appellant was walking around naked. The Court found that amounted to alarm or distress. DCI Whittaker told Ms Profitt to call the police, which she did. He then used her telephone to provide details to the Call Handler.

m. Uniformed police officers attended the scene and took the Appellant to the police station. Those officers had body worn cameras and video footage of the scene was captured and was shown in court as evidence.

n. The Appellant behaved politely and reasonably throughout the whole incident. He put his view to DCI Whittaker and told him that he was a naturist. He tried to point to the naturism guidance from the College of Policing (which he carried in the bag over his shoulder). He also sought to explain to DCI Whittaker that he had had previous dialogue and meetings with an Inspector Watkins regarding his naturism. DCI Whittaker was not prepared to look at the guidance. The Appellant behaved in a respectful, calm manner throughout his detention and arrest. He gave a full interview”.

9. At paragraph 9 of the Case Stated the Crown Court summarised its reasons for dismissing the appeal:

“a. By reason of the factual findings set out at paragraph 6 above, the Appellant had reason to believe that there may be a person within sight who might be likely to be upset by him being naked on the footpath in the circumstances of the case.

b. Objectively, being naked on a public footpath in those circumstances was disorderly.

c. The fact that witnesses had been scared, angry or upset was supportive of the finding that such conduct was objectively disorderly.

d. The defence of reasonableness was not available to the defence because the defence of reasonableness cannot avail [where] the underlying conduct is threatening or disorderly save in exceptional circumstances.

e. While the Appellant's rights under Articles 8 and 10 ECHR were engaged, a conviction for the section 5 offence was neither an unreasonable nor a disproportionate interference with those rights".

### *The questions in the Case Stated*

10. At paragraph 10 of the Case Stated the Crown Court posed the following questions for the opinion of this court:

"On the facts as we found them to be:

a) Were we incorrect to decide that the Appellant's behaviour in being naked on a public footpath in the particular circumstances of this case was disorderly so as to amount to an offence under section 5 of the Public Order Act 1986?

b) Did we wrongly elide two elements of the offence in reaching our conclusion that awareness that some people may be upset by nakedness meant that walking naked could properly be regarded as threatening or disorderly?

c) Did we fail to give "disorderly" an appropriately narrow construction, in accordance with section 3 of the Human Rights Act 1998?

d) Did we wrongly reject the defence of reasonableness?

e) Were we incorrect to determine that the Appellant's rights under Articles 8 and 10 ECHR: (i) Did not affect our rejection of the defence of reasonableness? (ii) Did not make a conviction for the section 5 Public Order offence an unreasonable or disproportionate interference with those rights? (iii) Were impaired no more than is necessary to accomplish the legitimate objective, by imposing a criminal sanction on the Appellant?

f) Were we correct in dismissing the Appellant's appeal against his conviction in the circumstances and context of this case?"

11. Although the Case Stated refers only to "disorderly" behaviour, it appears from the transcript that the Crown Court found that the Appellant's behaviour was "threatening or disorderly" on an objective basis. The parties' focus before the Crown Court and before us however has been on the allegation that the Appellant's conduct was disorderly and we therefore approach this appeal on that basis.

### *The legal framework*

(i): *Section 5 of the 1986 Act*

12. Section 5 of the 1986 Act creates a summary only offence, punishable with a fine not exceeding level 3 on the standard scale (£1,000). As originally enacted, section 5 related to the use of threatening, abusive or insulting words or behaviour or disorderly behaviour. The scope of the offence was narrowed when the word “insulting” was removed by section 57 of the Crime and Courts Act 2013, with effect from 1 February 2014.
13. Section 5, as amended, provides:

“5. Harassment, alarm or distress

(1) A person is guilty of an offence if he — (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove — (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or (c) that his conduct was reasonable”.
14. The mental element of the offence is addressed by section 6(4):

“A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening or abusive, or is aware that it may be threatening or abusive or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly”.
15. The following matters were not in dispute before us. First, the offence requires the words or behaviour to be within the sight or hearing of a person likely to be caused harassment, alarm or distress. It is not enough that someone might have seen or heard the words or behaviour or could possibly have done so. It is not, however, necessary for the prosecution to call as a witness a person who can say that they did see or hear what was happening; it is sufficient if the inference can be drawn to the required standard that what was done was visible or audible to people who were in the vicinity at the relevant time: *Holloway v DPP* [2004] EWHC 2621 (Admin) (Collins and Silber JJ). Secondly, the conduct need not be directed at another person: *R v Ball* (1990) 90 Cr App R 378. Thirdly, the words “harassment, alarm or distress” are, as Toulson J put it in *R (R) v DPP* [2006] EWHC 1375 (Admin) (a case on section 4A of the 1986 Act)

at para 12 “relatively strong words” which in combination give a sense of the mischief at which the section is aimed; “distress” in this context requires “real emotional disturbance or upset”, which does not have to be grave but should not be trivialised. As the Divisional Court held in *DPP v Coskun* [2026] EWHC 427 (Admin) (Warby LJ and Obi J) at para 15(4), those observations hold true for the same phrase in section 5. Fourthly, the requirement that the conduct be “likely” to cause harassment, alarm or distress sets an objective standard. The answer does not turn on what the actual impact was, though that may be relevant: *Brutus v Cozens* [1973] AC 854 at p.865 (Viscount Dilhorne); *Coskun* at para 15(5). The general test is what is the natural and probable result of the conduct, judged at the time of the conduct and in the particular circumstances of the case: *Parkin v Norman* [1983] QB 92, 100, applied in *Coskun* at para 15(5).

(ii): *Articles 8 and 10 of the Convention*

16. Article 8 provides:

*“Right to respect for private and family life*

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

17. Article 10 provides:

*“Freedom of expression*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

18. The European Court of Human Rights (“ECtHR”) has accepted that the protection of article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed, and that the right may include the right for a person to express his ideas through his mode of dress or his conduct. On that basis, in *Gough v United Kingdom* (2015) 61 EHRR 8 (*Gough v UK*) at paras 149 to 150 the ECtHR accepted that the public nudity of Mr Stephen Gough, who had chosen to be naked in public in order to give expression to his opinion as to the inoffensive nature of the human body, “can be seen as a form of expression which falls within the ambit of art.10”. As to article 8, the ECtHR has held that personal choices as to an individual’s desired appearance, whether in public or in private places, relate to the expression of his personality and thus fall within the notion of private life; that the fact that behaviour is prohibited by the criminal law is not sufficient to bring it outside the scope of “private life”; and that personal autonomy is an important principle underlying the interpretation of article 8: *Gough v UK* at paras 182 to 183; see also *Borzykh v Ukraine* (2026) 82 EHRR SE6 at paras 36 and 56.
19. It was not controversial before the Crown Court that the Appellant’s qualified rights under articles 8 and 10 were engaged; the Crown Court proceeded on that basis, and it is not suggested in this appeal that it was wrong to do so. That issue is not therefore before us. Nevertheless, the nature and weight of those rights bear directly on the proportionality analysis, and in the light of that we make two points.
20. First, *Gough v UK* and *Borzykh v Ukraine* suggest that the weight to be given to any interference with article 8 in a case of this kind is less than the Appellant’s submissions assume. The ECtHR in *Gough v UK* accepted (at para 182) that personal choices as to an individual’s desired appearance may fall within the notion of private life. But it went on (at para 184) to draw a distinction between carrying out an activity for personal fulfilment and carrying out the same activity for a public purpose, and to hold that article 8 “cannot be taken to protect every conceivable personal choice in that domain: there must presumably be a *de minimis* level of seriousness as to the choice of desired appearance in question”. It said that “[w]hether the requisite level of seriousness has been reached in relation to the applicant’s choice to appear fully naked on all occasions in all public places without distinction may be doubted, having regard to the absence of support for such a choice in any known democratic society in the world”. The court decided the article 8 complaint on the alternative footing that, even if article 8 was applicable, any interference was justified under article 8(2) “for essentially the same reasons” as under article 10.
21. In *Borzykh v Ukraine*, the ECtHR reiterated (at para 56) that choices as to appearance fall within the notion of private life, but went on (at paras 57 to 59) to hold that “in order for an issue to arise under Article 8, the consequences for the applicant must be very serious and affect his or her private life to a very significant degree”, that it is for the applicant to show convincingly that that threshold was attained, and that the applicant in that case (who complained of a prohibition on wearing a particular ribbon in public) had failed to do so, so that his article 8 complaint was inadmissible. Even if article 8 is engaged by a single instance of public nudity on a public footpath, the weight to be given to a personal lifestyle choice exercised for a matter of minutes is, on this analysis, a modest one.

22. Secondly, and more importantly for present purposes, there is a real distinction between this case and *Gough v UK* so far as article 10 is concerned. The Strasbourg jurisprudence identifies a hierarchy of speech, with political speech at its apex. The greater the value of the speech in question, the weightier must be the justification for interference: see for example in the domestic context *R v Casserly* [2024] EWCA Crim 25, [2024] 1 Cr App R 18 at para 48(iv). The converse is equally true. In assessing proportionality the ECtHR has recognised that the margin of appreciation “in reacting to instances of public nudity, as opposed to regulating mere statements or arguments on the subject, is a wide one”: *Gough v UK* at para 172.
23. Mr Gough, also known as the Naked Rambler, had walked naked through the highways and byways of the United Kingdom for many years, and had made it clear that arrests, prosecutions and convictions would not deter him. The ECtHR’s conclusion that Mr Gough’s nudity was a form of expression rested on the finding that he “has chosen to be naked in public in order to give expression to his opinion as to the inoffensive nature of the human body” (para 150), and its proportionality analysis treated him as “an individual intent on achieving greater acceptance of public nudity” who was “entitled to seek to initiate such a debate” (para 172). See also *Gough v DPP* [2013] EWHC 3267 (Admin) where in dismissing Mr Gough’s appeal by way of case stated against a conviction for disorderly conduct contrary to section 5, the Divisional Court (Sir Brian Leveson P. and Openshaw J) said that by walking naked through a public market place accompanied by a film crew, Mr Gough was being deliberately provocative in order to support his own stance.
24. The Crown Court’s factual findings in this case are different. The Appellant was not protesting, campaigning or seeking to initiate a public debate. He was, as Ms Brimelow KC emphasised, simply taking a walk while waiting for a shop to open, and behaving in a manner she described as “introspective rather than outward-focused”. His nudity was the practice of a lifestyle choice rather than the communication of an opinion. It was not political speech, or speech on a matter of public interest, or protest. Whilst we must accept therefore for present purposes that it was expressive conduct, in our opinion, it was conduct that was at the lower end of the article 10 hierarchy.

*(ii): The approach of this court on an appeal by way of case stated*

25. The test to be applied by an appellate court on an appeal by way of case stated, including where a statutory defence depends upon an assessment of proportionality, was set out by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 at para 54. An appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. Where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.
26. In *Hicks v DPP* [2023] EWHC 1089 (Admin), [2023] 2 Cr App R 12 at para 31, Chamberlain J (with whom Bean LJ agreed) said this approach applies not only to the

question whether a conviction is proportionate but also to the prior question whether the elements of the offence are satisfied. In *Coskun* at para 30, the Divisional Court added that where the determinations under challenge involve findings of primary fact coupled with evaluative assessments of whether the behaviour in question crossed the relevant line, the hurdle faced by an Appellant seeking to overturn such findings is a high one: appellate courts “have been repeatedly warned not to interfere with findings of fact by trial judges unless compelled to do so”, and “this applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them”: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para 114 (Lewison LJ). Where the decision under appeal has an evaluative component, the appeal court does not carry out the evaluation afresh but asks whether the decision was wrong by reason of some identifiable flaw in the treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion; and it will assume, unless there is compelling reason to the contrary, that the court below took all of the evidence into consideration: *Coskun* at para 30.

*A preliminary point: the proportionality of the decision to prosecute*

27. Before turning to the interpretation of section 5, it is convenient to dispose of a preliminary point raised by the Appellant’s written and oral submissions. The argument is that the criminal law should not have been invoked where other less intrusive measures were available, such as advice, a request to cover up, or civil remedies under anti-social behaviour legislation. Reliance was placed on the observations of Moses J in *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin) and of Gross LJ in *Abdul v DPP* [2011] EWHC 247 (Admin), [2011] HRLR 16 at para 49(vi). If this amounts to a submission that this court should adjudicate on the proportionality of the Appellant’s arrest and prosecution, the submission is misconceived. The necessity or proportionality of a decision to prosecute is not a matter for the court trying a criminal charge and *Dehal* and *Abdul* should no longer be cited or followed on that point: see *James v DPP* [2015] EWHC 3296 (Admin), [2016] 1 WLR 2118 at paras 25 to 40 (Davis LJ and Ouseley J) (citing *Bauer v DPP* [2013] EWHC 634 (Admin), [2013] 1 WLR 3617 at para 40 (Moses LJ and Kenneth Parker J)).
28. *James* was an appeal by way of case stated against a conviction under section 14(5) of the 1986 Act. Ouseley J gave the leading judgment with which Davis LJ, who had been a member of the court in *Abdul*, agreed. Ouseley J explained at paras 25 to 30 that it is for the prosecutor to decide whether to prosecute and for the trial court to try the case on the evidence; a contention that the decision to prosecute was disproportionate is not one on which the criminal court can rule unless it amounts to an abuse of the process. As Chamberlain J put it in *Hicks* at para 47, the arrest and the conviction are “quite separate interferences” with Convention rights; the trial court “was obliged to consider whether the conviction was a proportionate interference with Article 10 rights”, but “was not ... hearing a claim against the police, so was not obliged or entitled to consider the circumstances of the arrest”.
29. Nor, for the avoidance of doubt, is there a general principle in our criminal law that where a person is being tried for an offence which does engage Convention rights the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights. See *DPP v*

*Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888 (Lord Burnett of Maldon CJ and Holgate J) at paras 56 to 58 and 67. See also *Coskun* at para 28 where the Divisional Court applying *James* at para 51 accepted the DPP's submission that *Abdul* at para 49(vi) "is not good law", because "the Crown does not have to prove that a conviction under section 5 of the 1986 Act would be proportionate".

*The interpretation of section 5*

30. The principles that apply to the interpretation of section 5 when Convention rights are engaged, as they were in this case, have been considered in a large number of cases, most recently by the Divisional Court in *Hicks* and in *Coskun*. Nonetheless there is a disagreement between the parties as to the correct approach: in particular, whether the ingredients of section 5 themselves strike a fair balance so that no individual assessment of the facts is required; whether proportionality is to be ensured by giving the words "threatening", "abusive" and "disorderly" a heightened or appropriately narrow meaning; or whether proportionality is to be assessed by reference to the reasonableness defence in section 5(3)(c).

(i): *In re Abortion Services (Safe Access Zones: Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505

31. It is convenient to start with the decision of the Supreme Court in *In re Abortion Services*, which authoritatively sets out the general approach where a criminal prosecution engages Convention rights. Lord Reed PSC, with whom the other members of the court agreed, explained that a sequence of questions arises, of which two are material here. The second question (para 55) is whether the ingredients of the offence themselves strike the proportionality balance, so that if they are made out and the defendant is convicted there can have been no breach of his Convention rights. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to verify that a conviction would be proportionate on the facts of every individual case. In answering that question the courts must accord appropriate respect to the assessment made by Parliament, which enjoys a margin of appreciation in relation to interferences with the rights protected by articles 9, 10 and 11. The third question (paras 56 to 57) arises where proof of the ingredients does not in itself ensure the proportionality of a conviction. It is whether there is a means by which proportionality can be ensured. Where the offence is statutory, section 3 of the Human Rights Act 1998 ("the HRA 1998") may enable the court to construe the provision compatibly with the Convention, either by interpreting it so that a conviction will always be proportionate, or by interpreting it so as to allow for an assessment of proportionality in the circumstances of individual cases. A defence of lawful or reasonable excuse may provide the route by which that assessment is carried out, where the defence can properly be interpreted, if need be under section 3, as including the exercise of Convention rights. Where the ingredients of the offence do themselves strike the balance, there is no need for a Convention proportionality assessment when a lawful excuse defence is considered (para 58).

(ii): *Brutus v Cozens*

32. The leading authority on the general approach to the construction of section 5 remains the decision of the House of Lords in *Brutus*. The Appellant in that case had been

charged under section 5 of the Public Order Act 1936 with using insulting behaviour whereby a breach of the peace was likely to be occasioned, after he interrupted a match at Wimbledon in protest against apartheid. The magistrates found that his behaviour was not insulting. The Divisional Court had held that “insulting” behaviour meant behaviour which affronts other people and evidences a disrespect or contempt for their rights, which reasonable persons would foresee as likely to cause resentment or protest, and remitted the case. The House of Lords allowed the appeal. Lord Reid said at p.861:

“The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word ‘insulting’ being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision”.

33. Lord Reid warned against the court acting as a dictionary or framing definitions. He said “[f]ew words have exact synonyms. The overtones are almost always different”. He said, “the purpose of a definition is to limit or modify the ordinary meaning of a word and the court is not entitled to do that”. He directly addressed the relationship between the statutory words and freedom of speech, at p.862:

“Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded”.

34. At p.862 to p.863 Lord Reid also said he did “not agree that there can be conduct which is not insulting in the ordinary sense of the word but which is ‘insulting for the purpose of this section’”; and that “Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else”. Lord Morris

of Borth-y-Gest, Viscount Dilhorne, Lord Diplock and Lord Kilbrandon delivered speeches to similar effect.

(iii): *The section 5 authorities since Brutus*

35. The approach in *Brutus* was applied to the word “disorderly” in section 5 of the 1986 Act by the Divisional Court (Pill LJ and Keene J) in *Chambers v DPP* [1995] Crim LR 896, a case concerning protesters who persistently obstructed a surveyor’s theodolite. The court held that “disorderly behaviour” is not defined in the Act; the words are ordinary words in everyday use, to be given their normal meaning; and whether behaviour on any occasion is properly characterised as disorderly is a question of fact for the trial court. The submission that section 5(1) should be given a narrow construction was rejected. Disorderly behaviour need involve no element of violence, present or threatened, and the expression is intended to cover conduct which is not necessarily threatening, abusive or insulting. Disorderly behaviour and the likelihood of harassment, alarm or distress are separate requirements which cannot be equated without robbing each of its force. Critically, the court identified where the safeguards for those involved in demonstrations or protests lay: in the requirement that the prosecution prove that the defendant intended his behaviour to be disorderly or was aware that it might be; in the requirement that someone be likely to be caused harassment, alarm or distress, and in the defence that the conduct was reasonable.
36. The relationship between article 10 and section 5 was addressed directly in three decisions of the Divisional Court after the HRA 1998 came into force.
  - (i) In *Percy v DPP* [2001] EWHC 1125 (Admin) (Kennedy LJ and Hallett J), which concerned a protester who defaced the American flag at an air base, the court held that sections 5 and 6, as enacted and applied by the courts, contain the necessary balance between freedom of expression and the right of others not to be insulted or distressed; that peaceful protest is not outlawed by section 5; that it was significant that the section requires proof of mens rea and provides a defence of reasonableness, which is a question of fact for the tribunal taking into account all the circumstances; and that where article 10 is engaged the justification for any interference with it must be convincingly established.
  - (ii) In *Norwood v DPP* [2003] EWHC 1564 (Admin) (Auld LJ and Goldring J), which concerned the display of an anti-Islamic poster, Auld LJ held that, in the absence of a challenge to the compatibility of section 5 with the Convention, the mechanics of article 10’s operation on a section 5 prosecution are confined to the objective defence of reasonableness in section 5(3); article 10 cannot bear in any reasoned way on whether the prosecution have proved the two limbs of section 5(1). He added that where the prosecution has proved that conduct was of the prohibited character and that the defendant intended it to be, or was aware that it might be, so, it would in most cases follow that the conduct was objectively unreasonable; but he did not exclude the possibility that such conduct could still be reasonable, since it depends on the facts.
  - (iii) In *Hammond v DPP* [2004] EWHC 69 (Admin) (May LJ and Harrison J), which concerned an evangelical preacher’s sign, May LJ contemplated that Convention considerations might be relevant both when the facts are applied to

the statutory word and when the reasonableness defence is considered, recognising that this was not entirely consonant with *Norwood*. But the appeal was, with counsel's agreement, decided on the footing that the defence was the route, the court accepting that a person's conduct will be reasonable if he is exercising Convention rights in circumstances in which an interference with that exercise would not be justified under articles 9(2) or 10(2). The finding that the sign was insulting was one open to the justices as a matter of fact, and their conclusion that the conduct was not reasonable, having regard to article 10, was likewise open to them.

37. We have already referred to *James*. Ouseley J said at paras 34 to 35 that *Norwood* and *Hammond* showed that, for the purposes of section 5, Convention rights and the qualifications to them, and thus the proportionality of restraints on expression and assembly, form part of the statutory defence that the accused's conduct was reasonable; he contrasted other offences where the necessary balance is struck by the terms of the offence-creating provision without more. Davis LJ said:

“51. Section 14(9) of the Public Order Act 1968 [sic] has to be read in the context of Articles 10 and 11 of the Convention, which confer qualified rights. The justification in any particular situation for the qualification of those rights and the proportionality of the restrictions on freedom of speech and of assembly imposed are capable of being accommodated by the express words of the relevant statute or measure as applied to the facts of the particular case. By way of example, s.4A(1) of the Public Order Act 1968 (the relevant provision in *Dehal*) and s.5 of the Public Order Act 1986 (the relevant provision in *Abdul*) satisfy such requirement by permitting reasonableness to be raised as a defence. As stated in *DPP v Percy* at paragraph 25 in the context of a case on s.5 the statutory provisions contain the necessary balance between the rights of freedom of expression and assembly and the right of others not to be insulted: thus those rights are accommodated within the statutory language...”.

38. The application of section 5 to public nudity was considered by the Divisional Court in *Gough v DPP*. Mr Gough was released from Halifax Police Station in October 2012 and walked naked through Halifax town centre for about 15 minutes, filmed by a camera crew. Two women gave evidence that they were alarmed, distressed and disgusted; one was with children and one felt at risk. The district judge found that Mr Gough foresaw alarm or distress as the consequence of his voluntary decision and was at least aware that his behaviour might be disorderly. Relying on *Hammond* and *Vigon v DPP* (1998) 162 JP 115, he declined to construe the statutory words narrowly, treated disorderly behaviour as behaviour involving or contributing to a breakdown of peaceful and law-abiding behaviour, and held that although article 10 was engaged there was a pressing social need for the restriction and that, as a summary only offence with a maximum penalty of a level 3 fine, the prosecution was a proportionate response. Sir Brian Leveson P, with whom Openshaw J agreed, held that the district judge was clearly entitled to conclude that Mr Gough, by walking through a town centre entirely naked, was violating public order and was thus disorderly. There was nothing passive about his conduct: he knew, not least from past experience, that many members of the public

would be alarmed and distressed by the sight of his naked body, whatever the origins of that reaction, and he was being deliberately provocative in support of his own stance. Nudist beaches and colonies were not to the point, being marked out and avoidable; each case is fact-sensitive. It was beyond argument that he was at the very least aware that his behaviour could be disorderly. As to the reasonableness defence, which overlapped with the article 10 argument, the district judge's analysis could not properly be challenged: those in the town centre had no expectation of seeing Mr Gough naked and no opportunity to avoid him, and it was difficult to see how the judge could have decided otherwise. To say that the adverse reaction to his nudity was not his problem was to ignore reality.

39. Mr Gough had meanwhile complained to the ECtHR. His complaint in its narrowest form concerned a conviction for breach of the peace in Scotland in 2011, but in substance it was that his repeated arrest, conviction and imprisonment for being naked in public violated his rights under articles 8 and 10 among others. On 28 October 2014 the Fourth Section found no violation: *Gough v UK*. As we have said, the court accepted that article 10 was engaged and that the measures were prescribed by law; it held that they pursued the legitimate aims of preventing disorder and crime and protecting the rights of others. On necessity, having restated the familiar principles (that freedom of expression extends to ideas that offend, shock or disturb; that the exceptions in article 10(2) must be construed strictly and the need for any restriction convincingly established; that pluralism and democracy entail concessions on the part of individuals; and that the nature and severity of the penalty is relevant), the court accepted that the acceptability of public nudity is a matter of public interest and that Mr Gough was entitled to seek to initiate a debate about it. But public nudity also raised moral and public-order considerations, the responses of European states to it were far from uniform, and the margin of appreciation in reacting to instances of public nudity, as opposed to regulating statements or arguments about it, was a wide one (para 172).
40. The court noted that the measures taken against Mr Gough were not the result of any blanket prohibition; each incident had been considered on its facts, and the Sheriff had indicated that he might have reached a different conclusion had Mr Gough appeared naked in a more remote place rather than in the main streets of a busy town (para 173). The penalty imposed for each individual offence, taken on its own, raised no issue of proportionality; the cumulative severity of the measures flowed from his own repeated violation of the law in full knowledge of the consequences (paras 174 to 176). A person asking for tolerance of his own conduct is under a duty to show tolerance of and sensibility to the views of other members of the public, and the acceptability of public nudity may vary depending on the nature of the location and the presence of other members of the public (para 175). Article 10 does not enable individuals, however sincere, repeatedly to impose antisocial conduct on other, unwilling members of society and then complain when the State, in the performance of its duty to protect the public from public nuisances, enforces the law (para 176). The ECtHR was thus concerned with a pattern of repeated conduct rather than a single incident; but it expressly treated a criminal sanction for confronting unwarned members of the public going about their ordinary business with public nudity as a legitimate and proportionate response.<sup>1</sup>

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<sup>1</sup> The First Section of the ECtHR rejected as manifestly ill-founded a further application by Mr Gough in 2018: *Gough v UK* (Application no.2153/15 notified on 5 July 2018). The underlying facts were the imposition of an

41. In *Hicks* the Appellant, who believed the Covid pandemic to be a hoax, had gone into a hospital to film and had a confrontational encounter with two healthcare professionals in a stairwell, holding her phone at arm's length from one witness's face. She was convicted of using threatening or abusive words or behaviour contrary to section 5. Chamberlain J, having reviewed *Percy, Abdul, R (Campaign Against Antisemitism) v DPP* [2019] EWHC 9 (Admin), *Ziegler* and *Abortion Services*, set out at para 29 five principles: (a) whether a defendant used threatening or abusive words or behaviour, or disorderly behaviour, is a question of objective fact, to which the perception of others is relevant but not determinative; (b) the words are ordinary English words whose meaning is a question of fact, but they must be read in the context of article 10 and of Parliament's decision to omit the word "insulting"; (c) that context includes the principle that behaviour which is merely an affront to others, or disrespectful or contemptuous of them, or merely distressing, offensive, distasteful, insulting or intemperate, is not prohibited; (d) it is appropriate to ask whether the line between legitimate freedom of expression and a threat to public order has been crossed; and (e) provided the words are given an appropriately narrow construction in accordance with section 3 of the HRA 1998, proof of the elements of the offence and a failure by the defendant to establish the section 5(3) defence will generally be sufficient to demonstrate the proportionality of a conviction. Applying those principles, the court held that tone will rarely convert an unpleasant altercation into a criminal offence and that section 5 imposes no obligation of moderation and no prohibition on rudeness; but the act of filming at close range took the case beyond the bounds of legitimate free speech and supported the finding that the conduct was, objectively, threatening and abusive. The reasonableness defence failed because there was no need to threaten or abuse anyone to convey the Appellant's views; and once the elements were established and the defence rejected, there was no need for a separate proportionality analysis (paras 35 to 37, 43 and 48).
42. In *Coskun* the Respondent had set fire to a copy of the Qur'an outside the Turkish Consulate in London while shouting negative statements about Islam. He was convicted in the Magistrates' Court of the religiously aggravated form of the section 5 offence and acquitted on appeal to the Crown Court, and the DPP's appeal by way of case stated was dismissed. The Divisional Court held (para 14) that whether conduct is disorderly and whether it is likely to cause harassment, alarm or distress are separate questions, each of fact; that the statutory words are ordinary English words; and that, subject to the guidance in the cases, the trial court's task is to apply the statutory language to the facts as found, the only question of law on appeal normally being that identified by Lord Reid in *Brutus*. At para 15 it set out seven propositions, largely derived from *Hicks*. These included that "disorderly" must be read in the context of article 10 and Parliament's omission of "insulting"; that compatibility with Convention rights may be secured by the proper interpretation and application of the ingredients of the offence themselves (citing *Abortion Services* and *Cassidy*); and that, provided the court gives an appropriately narrow construction to "disorderly" and to "likely to cause harassment, alarm or distress", proof of the elements and failure to establish the defence will generally suffice to demonstrate that a conviction is a necessary and proportionate

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interim anti-social behaviour order on him by magistrates following the Halifax conviction dealt with in *Gough v DPP* and further section 5 convictions in 2013 and 2015, and subsequent penalties imposed on Mr Gough for its breach.

interference with article 10, a proposition the court regarded as supported by *Percy* at para 25 and by Davis LJ in *James* at para 51. At para 27 the court in *Coskun* said that the domestic jurisprudence, as summarised in *Hicks*, explains how the language of section 5 is reconciled with free speech rights and is not in conflict with *Brutus*, which continues to provide the authoritative test subject to the refinements in *Hicks*; properly applied, the standard is a stringent and demanding one. At para 28(2) it said that freedom of expression calls for a suitably narrow construction of section 5(1), disorderliness being judged objectively by the standards of a democratic society which respects free speech and the right to protest; but that freedom of expression can also be addressed through section 5(3), which acknowledges that behaviour may be disorderly by those exacting standards, and likely to cause harassment, alarm or distress, and yet not criminal because it is reasonable. The court also accepted (para 28) that the Crown does not have to prove that a conviction under section 5 would be proportionate. The appeal failed because the Crown Court's conclusions on the facts were rationally open to it.

43. Two further decisions should be mentioned. In *R (DPP) v Manchester Magistrates' Court* [2024] 1 Cr App R 12, a case on the reasonable conduct defence in section 4A(3)(b) of the 1986 Act, Fordham J (with whom Popplewell LJ agreed), after an extensive review of the authorities including *Percy*, *Norwood*, *Hammond* and *James*, concluded that where Convention rights are engaged and the elements of the offence do not supply an intrinsic answer to proportionality, a fact-sensitive proportionality assessment is required and the route to it is the reasonable conduct defence; the section 5 cases expressly recognise that assessment as arising within the defence, and no authority calls them into question. He also held that, while the facts relied on for the defence are for the defendant to establish, once the evaluative question of proportionality arises it is for the State, through the prosecutor, to demonstrate that the interference is justified. In *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259, [2023] KB 37 (Lord Burnett of Maldon CJ, Holgate and Saini JJ) at para 46, the Court of Appeal placed section 5 within the category of offences where conduct engages the freedoms of expression and assembly but the ingredients of the offence do not in themselves render prosecution proportionate, and where the legislation instead provides a defence, section 5(3), which enables a fact-specific assessment of proportionality in each case and is therefore straightforwardly compliant with the Convention.

*The parties' submissions on the correct approach*

44. The argument for the Appellant, in summary, is that the Crown Court adopted the wrong approach to the interpretation of section 5. Ms Brimelow relied on *Hicks* at para 29 and *Coskun* at paras 15 and 28 for the proposition that, because the Appellant's article 8 and 10 rights were engaged, the Crown Court was required to give the word "disorderly" (and the words "alarm" and "distress") an appropriately narrow construction in accordance with section 3 of the HRA 1998, and failed to do so; and she submitted that the approach in *Gough v DPP* of not construing the statutory words narrowly was inconsistent with those later authorities. She relied further on the propositions that it is for the State to demonstrate that an interference is justified and convincingly established (*Manchester Magistrates' Court* at paras 18 to 19 and 22 to 24); that even where a restriction is necessary there must be no other means of achieving

the same end which would interfere less seriously with the right (*Glor v Switzerland* (App No 13444/04, 30 April 2009) at para 94); and that those whose rights are interfered with are entitled to effective judicial protection by way of a fact-sensitive proportionality assessment (*Manchester Magistrates' Court* at paras 31 to 32). She accepted that the reasonableness defence in section 5(3)(c) is the route by which that assessment is carried out, but submitted that the Crown Court had wrongly closed off that route.

45. Mr Mably submitted that the section 5 offence is defined by ordinary English words, and that whether conduct falls within them is a question of fact. Applying the approach in *Abortion Services*, the leading authority remains *Brutus*: the words bear their ordinary meaning, neither especially wide nor especially narrow, Parliament having itself solved the difficult question of how far freedom of speech or behaviour must be limited in the public interest. *Percy* recognised that sections 5 and 6, as enacted and applied, contain the necessary balance, which he submitted was a recognition that the ordinary meaning of the words “threatening”, “abusive”, “disorderly”, “harassment”, “alarm” and “distress” incorporates the thresholds and the proportionality content which apply to Convention rights just as they do at common law. There was accordingly force, he submitted, in the proposition that the ingredients of the offence themselves strike the proportionality balance: they require proof of behaviour detrimental to public order in a specified way, of which the perpetrator is at least aware, and which is likely to have a specified detrimental effect on an individual who witnesses it; and even then the defendant is not convicted if he shows that his conduct was reasonable. The removal of “insulting” in 2013 excised the least serious aspect of the conduct formerly criminalised. Alternatively, proportionality is, on the authorities, considered by reference to the reasonableness defence (*Percy*; *Norwood*; *Hammond*). Proportionality is a question of law and not of fact, so that if a conviction would violate Convention rights no tribunal of fact, properly directed, could conclude that the defence was not proved, and there would be no case to answer (*Abortion Services* at paras 30 and 67; *R v ABJ* [2026] UKSC 8, [2026] 2 WLR 542 at para 139).
46. Mr Mably recognised that in both *Hicks* and *Coskun* the Divisional Court had proceeded on the basis that, instead of or in addition to assessing proportionality by reference to the reasonableness defence, proportionality is to be ensured by giving the words “threatening”, “abusive” and “disorderly” an appropriately narrow construction in accordance with section 3 of the HRA 1998. That approach, he submitted, is problematic for a number of reasons, which we discuss below. His ultimate submission was that whichever approach is adopted, the Crown Court was correct to conclude that a conviction was not a disproportionate interference with the Appellant’s rights under articles 8 or 10, so that the differing approaches to the interpretation of section 5 make no difference to the outcome of this appeal.

#### *Discussion and conclusion on the interpretation question*

47. The Respondent’s ultimate submission is right, in our judgment. The Crown Court was however invited to apply *Hicks*, and the approach which magistrates and Crown Courts should take to section 5 in cases where article 10 is said to be engaged is a matter of practical importance. Question (c) in paragraph 10 of the Case Stated touches on the point directly. We therefore set out our conclusions, followed by a summary of them at para 63 below.

48. First, the words used in section 5(1) and (3) – “threatening”, “abusive”, “disorderly”, “harassment”, “alarm”, “distress”, “likely” and “reasonable” – are ordinary English words which bear their ordinary meaning. They are to be given neither a specially wide nor a specially narrow meaning: *Brutus* at p.862; *Chambers*. Whether the conduct proved falls within them is a question of fact for the tribunal which decides the case, to be answered objectively and in the light of all the circumstances, including the context of the particular occasion, which will be of the first importance. The reaction of those who witnessed the conduct is relevant to, but not determinative of, whether it was disorderly and whether it was likely to cause harassment, alarm or distress. These are strong words describing a threat to public order, and, as Lord Reid said, before someone can be convicted it must be clearly shown that the limit they mark out has been disregarded. Conduct which is merely an affront to others, or disrespectful or contemptuous of them, or which is merely irritating, contentious, eccentric, heretical, unwelcome, provocative, offensive, distasteful or intemperate, will not, on the ordinary meaning of the words, be threatening, abusive or disorderly. That is not because the words are given a heightened or narrowed meaning, but because that is what the words mean.
49. Secondly, where the ingredients of the offence, including the mental element in section 6(4), are proved, and the defendant’s conduct engages rights under articles 8, 9, 10 or 11 of the Convention, the proportionality of a conviction is assessed through the defence of reasonable conduct in section 5(3)(c). That is the approach taken in *Percy*, *Norwood*, *Hammond* and *James*, and it is reflected in *Attorney General’s Reference (No 1 of 2022)*, *Abortion Services* and *Manchester Magistrates’ Court*. In applying the defence, the tribunal must consider whether criminalising the defendant’s conduct is a necessary and proportionate restriction of his Convention rights, giving due weight to the presumption in the defendant’s favour and to the requirement that the justification for any interference with those rights be convincingly established. Where Convention rights are engaged, conduct which is a proportionate exercise of those rights is reasonable conduct, and conduct which goes beyond that is not. The burden of establishing the facts relied on for the defence, including facts within the defendant’s own knowledge relevant to the nature of the interference, lies on the defendant to the civil standard. But the evaluative question, whether a conviction is a proportionate interference with a Convention right, is a question of law, and it is for the prosecution to satisfy the court that the interference is justified.
50. Thirdly, once the ingredients of the offence have been proved and the reasonableness defence has been rejected on the above basis, there is no further, freestanding, proportionality question. The prosecution do not have to prove, in addition, that the prosecution or the conviction is proportionate: *James*; *Cuciurean*; *Hicks*; *Coskun*.
51. It follows that we accept the substance of Mr Mably’s submission that the approach in *Hicks* at para 29(e) and in *Coskun* at paras 15(7) and 28(2) is not consistent with the authorities insofar as it is understood as requiring that the words “threatening”, “abusive” and “disorderly” be given a construction under section 3 of the HRA 1998 which is narrower than their ordinary meaning, so that proportionality is secured by the ingredients of section 5 themselves. Our reasons are as follows.

*The “appropriately narrow” construction approach*

52. First, the approach is inconsistent with *Brutus*, which the Divisional Court in *Coskun* accepted continues to provide the authoritative test for the application of section 5, and with *Chambers*, which expressly rejected the argument that the words should be given a narrow construction. *Brutus* and *Chambers* both pre-date the HRA 1998, but the post-1998 authorities (*Percy*, *Norwood*, *Hammond* and *Coskun* itself) have consistently reaffirmed *Brutus*; and section 3 is engaged only where the provision would otherwise be incompatible with the Convention (*Cuciurean* at para 70; *Abortion Services* at paras 56 to 57). The passage in *Percy* at para 25 relied on in *Hicks* is an application of the ordinary meaning of the words; it is not authority for a construction narrower than that meaning. Nor, with respect, is *Abdul* at para 49(vii), which repeats Lord Reid's point that where the line marked out by the ordinary meaning of the statutory words has been crossed, free speech is not impaired by ruling that conduct out.
53. Secondly, the approach is inconsistent with the line of authority which locates the Convention analysis in the reasonableness defence: *Norwood* at para 37, *Hammond*, *James* (both Ouseley J and Davis LJ), *Attorney General's Reference (No 1 of 2022)* at para 46, *Abortion Services* at paras 52 and 57 and *Manchester Magistrates' Court*. It is difficult to reconcile the proposition that proportionality is instead, or also, secured by narrowing the ingredients of the offence with that consistent line of authority. *Coskun* cited *Percy* at para 25 and Davis LJ in *James* at para 51 as supporting the narrow construction proposition. But, as the passage from Davis LJ's judgment set out above shows, those authorities recognise that Convention rights are accommodated by the ordinary words of section 5 together with the reasonableness defence, without altering the meaning of the words.
54. Thirdly, resort to section 3 of the HRA 1998 in relation to the ingredients of section 5(1) is unnecessary. Section 3 is an interpretative obligation which arises only where, on its ordinary construction, the legislation would otherwise be incompatible with a Convention right. Where, as with section 5, Parliament has itself provided a defence of reasonable conduct which is capable of being interpreted (if need be under section 3) as including the proportionate exercise of Convention rights, and the authorities have for a quarter of a century interpreted it in that way, there is no incompatibility for section 3 to cure and no occasion to give the ingredients of the offence a meaning other than their ordinary one. The contrast with *Casserly* is instructive. The offence of sending a grossly offensive communication contrary to section 1 of the Malicious Communications Act 1988 contains no defence of reasonable conduct or reasonable excuse. The Court of Appeal accordingly held that compatibility could only be secured by a Convention-compliant interpretation and application of the words "grossly offensive", reflecting the great weight to be given to free speech. That route was necessary because there was no other. It is not necessary for section 5, and the citation of *Casserly* in *Coskun* at para 15(6) does not support the transposition of that approach to an offence for which Parliament has provided a different and more direct route to compatibility.
55. Fourthly, the approach would lead to the statutory words having a different meaning and ambit depending on whether or not Convention rights are engaged. Section 5 applies to a great range of conduct, much of which has nothing to do with the expression of opinion or any other Convention right: the drunken, the rowdy and the merely anti-social. If "disorderly" bears a narrower meaning where article 10 is engaged, then it

must bear a wider meaning where it is not; and the same conduct, in the same place, would be disorderly if done for no reason and not disorderly if done to make a point. That is the mirror image of the error which Lord Reid identified in *Brutus* when he said that he did “not agree that there can be conduct which is not insulting in the ordinary sense of the word but which is ‘insulting for the purpose of this section’”. The meaning of a word in a statute does not fluctuate according to the motives of the person to whom it is applied. What can and does vary with the circumstances, including whether the conduct was expressive, is the application of the words to the facts; that is what Auld LJ meant in *Norwood* when he said that a section 5 prosecution does not of itself engage article 10, and that it depends on the facts. It is precisely because the question whether a particular exercise of a Convention right should be marked as criminal is fact-sensitive, and requires the weighing of the value of the expression against the countervailing interests, that Parliament’s provision of a reasonableness defence is the appropriate vehicle for it.

56. Fifthly, the approach is circular and, in practice, unworkable. The instruction to give “disorderly” an appropriately narrow construction does not tell the tribunal of fact what that construction is. Lord Reid’s warning against synonyms and definitions applies with full force: any attempt to spell out the narrowed meaning would substitute other words for the words of the statute. Whether a term has been construed appropriately narrowly can therefore only be tested by asking whether the behaviour in question has been found to fall within it, which begs the very question that needs to be answered. The narrow construction collapses either into the ordinary meaning (in which case it adds nothing) or into the proportionality assessment itself (in which case it duplicates, under the guise of construing an ingredient of the offence, the exercise which section 5(3)(c) was designed to accommodate). The present case illustrates the difficulty. Question (c) asks whether the Crown Court failed to give “disorderly” an appropriately narrow construction; but neither party identified, and we are unable to say, what the narrowed meaning of “disorderly” is which the Appellant’s conduct is said to fall outside, other than by reference to the very factors (his motive, the time and place, the absence of provocation) which go to whether his conduct was reasonable and his conviction proportionate.
57. The approach also carries further practical difficulties. It converts what *Brutus* holds to be a question of fact, reviewable on appeal only on the limited ground that no reasonable tribunal could have reached the decision, into a question of law about the construction of an ordinary word, thereby expanding the scope for appeals by way of case stated in a manner inconsistent with *Ziegler* at para 54 and *Coskun* at para 30. It makes the task of magistrates markedly more complex, by requiring them to apply an undefined heightened meaning when considering the elements of the offence rather than the familiar and workable question whether the defendant has shown his conduct to have been reasonable. And it obscures where the burden lies: the ingredients of the offence must be proved by the prosecution to the criminal standard, whereas the facts relevant to reasonableness are for the defendant to establish. An approach which imports proportionality into the ingredients risks either casting on the prosecution a burden of proving proportionality as an element of the offence, which the authorities have held it does not bear, or depriving the defendant of the presumption in his favour at the stage where it properly operates.

58. We would add that the *Hicks* formulation, read as a whole and in the context of the decision in that case, is less far-reaching than the Appellant's submissions suggest. Chamberlain J was at pains to say that the statutory words are ordinary English words whose meaning is a question of fact; his identification of what section 5 does not prohibit was drawn from *Percy* and *Brutus*, that is, from the ordinary meaning of the words; and, as Fordham J noted in *Manchester Magistrates' Court*, the compatibility of the conviction with article 10 was in fact addressed in *Hicks* in the passage dealing with the reasonableness defence and the proportionality of the conviction. Similarly, the court in *Coskun* accepted that there was no conflict with *Brutus* and recognised that freedom of expression can also be addressed through section 5(3). Read in that light, the references in both cases to an appropriately or suitably narrow construction are best understood as a reminder that the ordinary meaning of these strong words is itself a stringent and demanding standard which excludes conduct that is merely offensive, distasteful or provocative, and that the tribunal of fact must apply that standard with the context, including any expressive character of the conduct, firmly in mind. Understood in that way, there is no inconsistency with the approach we have set out.

*Whether the ingredients of section 5 strike the balance*

59. We do not accept Mr Mably's submission, not developed at length, that the ingredients of section 5, given their ordinary meaning, themselves strike the proportionality balance. As explained above, the question is whether the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, so that no case-specific assessment is ever needed. The examples given by Lord Reed in *Abortion Services* are instructive: offences of violence and of damage to property; aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 (*Cuciurean*); and, most recently, section 12(1A) of the Terrorism Act 2000 (*ABJ*). In each case the balance is struck by the terms of the provision because the prohibited conduct is defined by reference to a specific harm: physical injury; interference with a property right which the State is obliged to protect; or support for an organisation already proscribed following a Parliamentary assessment of the very interference with expression in issue. Section 5 is not an offence of that kind. It is a general public order measure of some breadth, defined by ordinary English words; it extends to conduct which is neither threatening, abusive nor insulting; and it requires no more than that the defendant be aware that his behaviour may be disorderly. Conduct can accordingly satisfy every ingredient of section 5(1) and section 6(4) and yet, on the facts, be a proportionate exercise of a Convention right, as *Coskun* at para 28(2) recognised. That is why the Court of Appeal in *Attorney General's Reference (No 1 of 2022)* placed section 5 among the offences whose ingredients do not in themselves render prosecution proportionate, but which provide a defence enabling a fact-specific assessment. That categorisation, by the Court of Appeal (Criminal Division) on a reference under section 36 of the Criminal Justice Act 1972, is one we would in any event follow.
60. The structure of section 5 itself demonstrates that Parliament did not intend the ingredients alone to carry the full weight of the balance. Part of Parliament's answer to the difficult question to which Lord Reid referred in *Brutus*, of how far freedom of speech or behaviour must be limited in the general public interest, was to provide the defence in section 5(3)(c); as the Divisional Court identified in *Chambers*, that defence

is one of the safeguards. It would be otiose if the ingredients themselves guaranteed the proportionality of every conviction; the defence presupposes that they do not. *Hicks* and *Coskun* say no more than that proof of the elements and rejection of the defence will generally be sufficient; the qualifier is deliberate, and it locates the proportionality assessment within the defence. The Respondent's primary submission also proves too much. If the ordinary meaning of the statutory words already incorporated the proportionality content of the Convention, section 5(3)(c) could never be engaged by a Convention argument, contrary to a well-developed body of authority; and there would be nothing on which the State's obligation to demonstrate that an interference is convincingly justified could bite. The critical point for present purposes is that Parliament has provided such a defence, and that is where the assessment is carried out. We accept that in most section 5 cases the ingredients and the defence will be co-extensive: as Auld LJ observed in *Norwood*, conduct proved to be disorderly, likely to cause real emotional disturbance and known to be so will in most cases be unreasonable. But that is a statement about the usual outcome of the assessment, not a reason for dispensing with it.

#### *Proportionality as a question of law*

61. Mr Mably suggested that, since proportionality is a question of law in the sense explained in *Abortion Services* at para 30 and *ABJ* at para 139, a conviction which would violate Convention rights could be prevented by a ruling of no case to answer, on the basis that no tribunal of fact, properly directed, could conclude that the reasonableness defence was not proved. The submission is correct in principle, but we think it will seldom arise in practice. In a summary trial in the magistrates' court, and on appeal to the Crown Court, there is no separation of function: the same tribunal finds the facts and applies the law, and the defence turns on facts which the defence must prove, so that a ruling of no case will rarely be available before the defence evidence has been heard.
62. The practical position is that identified in *Ziegler* at para 54. On an appeal by way of case stated, the proportionality assessment is reviewed on the basis of the primary and secondary findings in the case. This court will intervene where there is a material error of law on the face of the case, or a flaw in the reasoning which undermines the cogency of the conclusion on proportionality, or where the conclusion is one which no reasonable tribunal properly directed could have reached. The Respondent's formulation is, in substance, a description of that exercise, viewed from the perspective of a trial judge deciding whether the evidence is capable of supporting a conviction.

#### *A summary of our conclusions on the interpretation question*

63. In summary: (i) the words bear their ordinary meaning and are to be given neither a specially wide nor a specially narrow meaning; (ii) whether the conduct falls within them is a question of fact for the tribunal, judged objectively in all the circumstances; (iii) where Convention rights are engaged, the proportionality of a conviction is assessed under section 5(3)(c); (iv) the defendant proves the facts relied on to the civil standard, but the prosecution must satisfy the court that the interference is justified; (v) there is no further freestanding proportionality question.

#### *The College of Policing guidance*

64. Before turning to the questions in the Case Stated, we should say something about the College of Policing Briefing Note entitled “Public nudity advice and decision aid”, which the Appellant was carrying with him and on which Ms Brimelow placed some reliance.
65. The guidance observes that naturists “have a right to freedom of expression which only engages criminal law if they commit sexual offences or use disorderly behaviour that they intend to or are aware may be disorderly within the hearing or sight of a person likely to be caused harassment, alarm or distress”. It records that the Crown Prosecution Service has issued guidance to prosecutors under which prosecution for a public order offence will normally be considered only if a substantive offence has been committed and the public interest test is met. Having referred to section 5, it states that “[i]n the lawful situation where there is an absence of any sexual context in relation to nudity and where the person does not intend the behaviour to be, and is not aware that it may be disorderly, it will not be appropriate to take any police action”. The accompanying “decision aid” invites an officer to categorise reported behaviour as, among other things, “passive behaviours in public” (such as sunbathing, walking, cycling or swimming), for which the suggested response is to explain that no offence is being committed, or “disorderly behaviours” (“causing harassment, alarm or distress towards others”), for which the suggested response is police attendance.
66. This is guidance for police officers. It is not a statement of law binding on the courts, and it does not purport to be. Its legal content is accurate so far as it goes. It identifies the elements of section 5 and the mental element in section 6(4), and it recognises that public nudity is not of itself an offence. It cannot however answer the question whether on the facts of a particular case as found by the court, conduct was disorderly and the defendant was aware that it might be. Nor does its distinction between “passive” conduct and conduct “causing harassment, alarm or distress towards others” establish that walking naked on a public path can never fall into the latter category. As Sir Brian Leveson P said in *Gough v DPP* at para 15, “each case will be fact sensitive and will fall for consideration on its own merits”. Or, as it was put in *Abdul* (para 49), “the context of the particular occasion will be of the first importance”.

*Ground 1: the elements of the offence (questions (a), (b) and (c))*

67. In order to convict the Appellant the Crown Court had to be sure that (i) his behaviour was disorderly; (ii) it took place within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby; and (iii) he intended his behaviour to be, or was aware that it might be, disorderly. If the court was sure of those matters, it was a defence for the Appellant to prove that his conduct was reasonable. The parties addressed questions (a) to (c) together under a nominal Ground 1, and we adopt the same course, taking questions (a) and (c) first and then question (b).

*Questions (a) and (c): was the conduct disorderly, and was “disorderly” appropriately construed?*

68. Ms Brimelow accepted that whether conduct is disorderly is a question of objective fact, but submitted that the Crown Court failed to give the word an appropriately narrow construction. It reasoned backwards from the witnesses’ reactions; it trivialised “alarm” and “distress” by treating Ms Proffitt’s anger and concern as sufficient; and the

Appellant's conduct, though unconventional, was not disorderly. There was no breakdown, or anticipated breakdown, of order; he was walking quietly, minding his own business, and did not interact with the witnesses; he was quiet, calm, unprovocative and polite throughout, the antithesis of disorderly. The case was to be distinguished from *Gough v DPP*, where the public reaction, the general spectacle and the provocation were the indicators of disorder. Mr Mably submitted that there was no basis for concluding that the court gave the term a construction that was not appropriately narrow; being naked on a public path can readily fall within the concept of disorderly behaviour however that term is interpreted; and the hurdle faced by an Appellant seeking to overturn an evaluative finding of this kind is a high one (*Coskun* at para 30).

69. In our judgment the Crown Court made no error of law in its approach to the word "disorderly", and its finding that the Appellant's conduct was disorderly was one it was plainly entitled to reach. For the reasons given above, the court was not required to give the word a narrower construction than its ordinary meaning, and question (c), which presupposes that it was, is founded on a misapprehension of the law. In any event, nothing in the Case Stated suggests that the court gave the word a construction wider than its ordinary meaning, or that it treated as disorderly, conduct which was merely offensive, distasteful, eccentric or unconventional. It asked itself, at paragraph 9(b), whether objectively being naked on a public footpath in those circumstances was disorderly, and it answered that question by reference to the circumstances it had found: a public footpath connecting a residential estate and the town centre, in use by people walking to work; a man who was completely naked walking towards those coming the other way; and his awareness that people encountering him in that state might be angry, annoyed or upset. It then recorded, at paragraph 9(c), that the witnesses' reactions were supportive of that finding: relevant to, but not determinative of, the objective question.
70. The Appellant's submissions come close to suggesting that being naked in a public place, without more, can never be disorderly, and that some further outward act (noise, provocation, interaction, a spectacle) is required. That is not the law. *Chambers* establishes that disorderly behaviour need involve no violence, threat or abuse; *Ball* that it need not be directed at anyone. In *Gough v DPP* the Divisional Court rejected the submission that walking naked through a town centre was passive conduct, holding that the district judge was clearly entitled to find that it violated public order and was thus disorderly, not least because Mr Gough knew from experience that many members of the public would be alarmed and distressed by the sight of his naked body. The ECtHR in *Gough v UK* likewise characterised confronting unwarned members of the public going about their ordinary business with nudity as conduct contrary to the standards of accepted public behaviour in any modern democratic society. We accept that each case is fact-sensitive and that there is no rule that public nudity is disorderly. But whether conduct of this kind, in a particular place at a particular time, is disorderly is precisely the kind of evaluative judgment which Parliament has entrusted to the tribunal of fact, and with which this court will interfere only if no reasonable tribunal could have reached it.
71. The Crown Court was entitled to find that at 6.30 am on a weekday the path was not a place where the Appellant could expect to be unobserved: it connected a housing estate to the town, he knew from experience that he was likely to meet people on it (and met three within a short space of time), and the two women he encountered were on their

way to work. To walk completely naked on a quiet path used at that hour by people walking alone to work, who had no reason to expect to encounter him, no opportunity to avoid him and no one to turn to, was conduct the court was plainly entitled to characterise as disorderly in the ordinary sense of that word. We quite understand why the isolation of the area and the early hour would have added to the concern of women walking alone; and it is unsurprising that Ms Umbrasko, in evidence, expressed the concerns that she did. Far from being a conclusion which no reasonable tribunal could have reached, it is difficult to see how the court could have decided otherwise. The answer to questions (a) and (c) is therefore “No”.

*Question (b): did the Crown Court wrongly elide elements of the offence?*

72. Ms Brimelow submitted that the Crown Court elided the element of disorderly behaviour with the element of awareness that the conduct might be disorderly, and failed to separate the likelihood of harassment, alarm or distress from disorderliness. Many everyday activities are carried on in the knowledge that some people may be upset by them – she gave the examples of a group of teenage boys together in the street, a gay couple being affectionate in public, and the display of political slogans – without becoming disorderly. Here the witnesses’ reactions and the Appellant’s awareness that some people are upset by naturism became the determining factors, although neither is an element of the offence, and no objective consideration was given to the likelihood of alarm or distress. Mr Mably submitted that the court reached a standalone finding that the conduct was objectively disorderly (paragraph 9(b)); was entitled to regard the witnesses’ reactions as supportive of it (paragraph 9(c)); considered the mental element separately; and made findings which amounted to a finding that the behaviour took place within the sight of persons likely to be caused harassment, alarm or distress.
73. We agree with Mr Mably. It is better practice to address each ingredient of the section 5 offence separately and in turn, though we bear in mind that the Recorder’s *ex tempore* judgment was, for the reasons he gave, less full than it might otherwise have been. But it is not an error of principle or logic to consider the ingredients together provided the court addresses all the relevant facts (*Coskun* at para 31). Read fairly and as a whole, the Case Stated and the transcript show that the Crown Court did address each element and reached a separate conclusion on each. The finding at paragraph 9(b) is a freestanding finding, expressed as such, on the objective question. The reference at paragraph 9(c) to the witnesses’ reactions as supportive of it is not reasoning backwards: the way in which behaviour is perceived by those who witness it is legitimately relevant to whether it was disorderly.
74. As to the second element, the statutory question is whether the behaviour was within the sight of a person likely to be caused harassment, alarm or distress. That is an objective question, answered by reference to the natural and probable consequence of the conduct for persons in the position of those who were within sight. The court found that Ms Umbrasko was confused and scared by an encounter she had not expected or anticipated, that Ms Profitt was angry and concerned, and that each amounted to alarm or distress; and at paragraph 9(a) it found that the Appellant had reason to believe that there might be a person within sight who might be upset by his nudity. We do not accept that the finding in respect of Ms Profitt trivialised the concept of distress. The evidence was that Ms Umbrasko described herself as distressed, and Ms Profitt as alarmed and, being alone, vulnerable. A woman walking alone to work at 6.30 am who feels scared

or vulnerable on being confronted by a naked man is experiencing something well within the ordinary meaning of alarm, and real emotional disturbance within the ordinary meaning of distress. There is no basis for the suggestion that the reactions of these two witnesses were untypical of the natural and probable reaction of a person in their position. The court was entitled to find the second element proved.

75. As to the third element, the transcript shows that the Crown Court addressed the mental element separately, and found it proved because the Appellant knew from past experience that people he encountered while naked were sometimes angry, annoyed or upset. Ms Brimelow's submission that awareness that some people may be upset is not the same as awareness that conduct may be disorderly is correct as a matter of abstract logic, but it does not reflect the way the court reasoned. The court did not hold that the Appellant's awareness of others' reactions made his conduct disorderly. It held, first, that the conduct was objectively disorderly in the circumstances; and, secondly, that the Appellant, who knew that he was likely to encounter strangers on the path and that some of them would be angry, annoyed or upset at being confronted by him naked, was aware that his conduct might be disorderly. That reasoning followed that of the Divisional Court in *Gough v DPP*, where the Appellant's knowledge from past experience of the likely reactions of the public was treated as relevant both to the disorderly character of his conduct and to his awareness that it could be disorderly. Section 6(4) requires only awareness that the behaviour may be disorderly; it does not require an intention to cause harm or distress, and the finding at paragraph 6(g) that the Appellant had no such intention is not inconsistent with the finding on the mental element. Ms Brimelow's examples do not assist: the court was concerned with the nature of the conduct itself, judged by the standards of public behaviour generally accepted in a democratic society. The answer to question (b) is "No".

*Ground 2: reasonableness and proportionality (questions (d) and (e))*

*The submissions*

76. Ms Brimelow submitted that the Crown Court failed to consider the reasonableness defence at all. Its statements that it was hard to imagine circumstances in which behaviour found to be disorderly could be reasonable, and that the defence could not avail where the underlying conduct was threatening or disorderly save in exceptional circumstances (paragraph 9(d) of the Case Stated), effectively removed the defence from the Act whenever disorderly conduct is found and were contrary to *Coskun* at para 28(2). Having summarily rejected the defence, the court failed to address proportionality within it, and so failed to address articles 8 and 10. Had it done so it should have considered a series of factors: the absence of any intention to cause alarm or distress; the time and location; the circumstances which led to the walk and whether he had any realistic alternative; that his conduct was not directed at anyone; his consultation of the College of Policing guidance and his consideration for the rights of others; the extent to which naturism is practised and accepted, and its recognised benefits; the inadvertent, limited and brief nature of any distress; the absence of any warning or of any alternative to arrest such as covering himself or leaving; and the availability of less intrusive measures, including civil remedies under anti-social behaviour legislation (*Glor* at para 94).

77. Mr Mably submitted that in rejecting the defence the Crown Court took into account that the behaviour was disorderly and not reasonable and that the Appellant was aware that it was disorderly (paragraph 9(a) and (d)); that whether the defence was made out was a matter of fact and evaluation for the court; and that in concluding that a conviction was not a disproportionate interference with articles 8 and 10 the court in substance concluded that the Convention did not lead to a different result on reasonableness. There is a strong public interest in prohibiting displays of nudity in circumstances likely to cause harassment, alarm or distress to unsuspecting members of the public, all the more so where the person displaying his nudity is aware that such a reaction is likely. Those facts underpinned the Crown Court's conclusion and are sufficient to overwhelm the contention that proportionality requires the law to permit the Appellant to act as he did.

*Question (d): the rejection of the reasonableness defence*

78. We accept that the language used by the Crown Court in relation to the defence could have been better expressed. Had the court meant that, as a matter of law, the defence in section 5(3)(c) is unavailable once the prosecution has proved that the conduct was disorderly, that would have been an error. The defence presupposes that the ingredients of the offence, including the mental element, have been proved. It is the vehicle through which conduct which is disorderly, and likely to cause harassment, alarm or distress, and known to be so, may nevertheless be found not to be criminal because it was reasonable in all the circumstances; and where Convention rights are engaged it is the vehicle through which the proportionality of a conviction is assessed. A court which declined to consider the defence at all because the ingredients had been proved would deprive the defence of its purpose and, where Convention rights were engaged, would fail to conduct the fact-sensitive assessment which those rights require. We do not consider that the Crown Court fell into that error, and the Appellant's characterisation of its reasoning as a summary rejection of the defence without consideration is not a fair reading of what occurred. Three points lead us to that conclusion.
79. First, the court did not say that the defence was unavailable as a matter of law. It said that it was hard to imagine circumstances in which conduct found to be disorderly could be reasonable, and paragraph 9(d) is expressly qualified by the words "save in exceptional circumstances"; the Recorder illustrated the point with the example of a person who runs naked from his house in pursuit of a burglar. That is, in substance, the observation of Auld LJ in *Norwood* at para 39: where the prosecution has proved that the conduct was of the prohibited character and that the defendant intended it to be, or was aware that it might be, so, it will in most cases follow that the conduct was objectively unreasonable, although on particular facts, difficult though they may be to envisage, it may still be reasonable. The Crown Court's formulation was less precise than Auld LJ's, but it was to the same effect and it was not wrong.
80. Secondly, and more importantly, the court did not stop there. Having recorded its view on reasonableness, it went on to accept that the Appellant's rights under articles 8 and 10 were engaged and to consider whether a conviction would be an unreasonable or disproportionate interference with those rights, concluding that it would not in the light of its findings that the conduct was disorderly, that it was not reasonable and that the Appellant was aware that it was disorderly. That is the very exercise which the authorities require to be conducted within the reasonableness defence: a consideration

of whether, having regard to the defendant's Convention rights and to the countervailing interests identified in articles 8(2) and 10(2), it is necessary and proportionate to mark his conduct as criminal. We bear in mind that merely stating that an interference is proportionate is not sufficient. But the Crown Court did more than state a conclusion. The findings of fact on which the conclusion rested are set out in detail, and they are the findings which any assessment of proportionality on these facts would have to weigh. Paragraph 9(e) of the Case Stated is an express finding of proportionality, and the substance of the proportionality assessment was carried out.

81. Thirdly, the court had before it, and recorded in its findings of fact, all the matters on which the Appellant relies as relevant to reasonableness: his genuine belief (paragraph 6(c)); the reason for the walk and his choice of what he considered the quietest available area (6(d)); the early hour (6(e)); his awareness that he might encounter people (6(f)); the absence of any intention to cause harm or distress (6(g)); the varied reactions of which he was aware (6(h)); the absence of interaction with the witnesses (6(j) to (l)); and his polite, calm and respectful behaviour throughout, including his attempt to refer DCI Whittaker to the College of Policing guidance (6(n)). On an appeal by way of case stated we assume, unless there is compelling reason to the contrary, that the court took all the evidence into consideration; and here the transcript shows that the Crown Court's approach was measured and careful and that it had all relevant matters in mind. The Appellant's real complaint is not that these matters were left out of account, but that the court did not attach to them the weight which he says they deserve. That is not an error of law.
82. Even if we had concluded that the Crown Court's treatment of the defence disclosed an error of law, we would not have allowed the appeal on that ground. On the facts found there was only one conclusion reasonably open to the court on the question whether the Appellant had shown that his conduct was reasonable and his conviction proportionate, so that any deficiency in the expression of its reasoning was immaterial to the result. The answer to question (d) is "No".

*Question (e): articles 8 and 10 and proportionality*

83. The three sub-questions in question (e) are all directed to the same issue: whether the Appellant's conviction was a proportionate interference with the Convention rights engaged. It is not in dispute that the interference was prescribed by law, or that section 5 pursues the legitimate aims of preventing disorder and protecting the rights of others (and, in the context of public nudity, moral and public-order considerations: *Gough v UK* at paras 158 and 172). The question is whether a conviction was necessary in a democratic society, that is, whether it corresponded to a pressing social need and was proportionate to the aim pursued. On the Crown Court's findings that question admitted, in our judgment, of only one answer, for four reasons.
84. First, the weight of the rights engaged. For the reasons given at paras 20 to 24 above, the Appellant's article 8 rights were engaged at a modest level, and his article 10 rights were at the lower end of the hierarchy of expression. Secondly, the countervailing interests. The right of members of the public going about their ordinary business not to be confronted without warning by a naked stranger, in a place where they have no reason to expect it and no opportunity to avoid it, is a real one, and it was vindicated by the evidence of the two women in this case. The ECtHR has recognised that the State

is entitled to enforce the criminal law against such conduct in the performance of its duty to protect the public from public nuisances, and that the acceptability of public nudity legitimately varies with the nature of the location and the presence of other members of the public. Respect for the views of a minority requires tolerance of conduct which is not incompatible with the norms of a democratic society; but it also requires of the person asking for that tolerance a corresponding tolerance of and sensibility to the views of other members of the public (*Gough v UK* at paras 168, 175 and 176). The Crown Court found that the Appellant knew from past experience that some of the strangers he might encounter were likely to be angry, annoyed or upset, and chose nonetheless to walk naked on a path which he knew connected a residential estate and the town and on which he expected to meet people.

85. Thirdly, the nature and severity of the sanction. Section 5 is a summary only offence carrying a maximum penalty of a level 3 fine; the Appellant was fined £800, after an individual assessment of his conduct on a particular occasion in a particular place. That is a factor of real weight (*Gough v UK* at paras 169 and 174 to 175, where the penalty for each individual offence taken on its own was held to raise no issue of proportionality; *Gough v DPP* at para 20). Fourthly, the factors on which the Appellant relies do not, singly or cumulatively, displace those considerations. Many of them rest on facts found in his favour by the Crown Court and are properly to be taken into account. But the route he chose was one which he knew was used by members of the public, and on which he met three of them within a short space of time. The harm which section 5 exists to prevent was likely to be, and on the findings was, caused by the fact of his nudity in that place, not by any additional act. As Hallett J observed in *Percy* at para 31, the fact that a defendant could have expressed himself in a way that did not cause the harm is one relevant factor among others; here the Appellant had means of practising naturism (at the sympathetic business he intended to visit, for example) which did not involve confronting unwarned members of the public on an isolated path where they had no opportunity to avoid him. The submission that naturism has benefits for those who practise it and enjoys growing awareness is not a matter on which there was evidence before the Crown Court, and in any event does not bear on whether it was reasonable to practise it in this place at this time. Reliance on *Glor v Switzerland*, a case which concerned article 14 read with article 8 and a military service exemption tax, in support of a rigid “least restrictive means” test does not assist.
86. The question for us is whether the Crown Court’s conclusion that a conviction was not a disproportionate interference with the Appellant’s rights was wrong. We do not consider that it was; in our judgment it was correct. The answer to each part of question (e) is therefore “No”.

### Conclusion

87. For all of these reasons, we answer the questions in the Case Stated as follows:
- a) Were we incorrect to decide that the Appellant’s behaviour in being naked on a public footpath in the particular circumstances of this case was disorderly so as to amount to an offence under section 5 of the Public Order Act 1986? No.

b) Did we wrongly elide two elements of the offence in reaching our conclusion that awareness that some people may be upset by nakedness meant that walking naked could properly be regarded as threatening or disorderly? No.

c) Did we fail to give “disorderly” an appropriately narrow construction, in accordance with section 3 of the Human Rights Act 1998? No.

d) Did we wrongly reject the defence of reasonableness? No.

e) Were we incorrect to determine that the Appellant’s rights under Articles 8 and 10 ECHR: (i) did not affect our rejection of the defence of reasonableness; (ii) did not make a conviction for the section 5 Public Order offence an unreasonable or disproportionate interference with those rights; and (iii) were impaired no more than is necessary to accomplish the legitimate objective, by imposing a criminal sanction on the Appellant? No, in each case.

f) Were we correct in dismissing the Appellant’s appeal against his conviction in the circumstances and context of this case? Yes.

88. Accordingly, this appeal is dismissed. We thank all counsel for their able assistance in this case.