Neutral Citation Number: [2026] EWHC 427 (Admin)

Case No: AC-202-LON-004461

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2026

Before :

LORD JUSTICE WARBY

-and-

MS JUSTICE OBI

- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
HAMIT COSKUN	**Respondent**

- -
- -

David Perry KC and James Boyd (instructed by the **Crown Prosecution Service**) for the **Appellant**
Tim Owen KC and Rosalind Comyn (instructed by **3D Solicitors**) for the **Respondent**

Hearing date: 17 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WARBY and MS JUSTICE OBI:

Introduction

1. Hamit Coskun set fire to a copy of the Qu'ran outside the Turkish Consulate in London while shouting negative statements about Islam. He was charged with religiously aggravated disorderly behaviour contrary to the Public Order Act 1986 and the Crime and Disorder Act 1998. He was convicted in the Magistrates' Court but acquitted on appeal to the Crown Court (Bennathan J and magistrates). The Director of Public Prosecutions ("DPP") now appeals to this court.

2. This is not a re-hearing of the case at which we reach our own decision about the facts and legal merits of the charge against Mr Coskun ("the Respondent"). It is an appeal by case stated, in which the court below sets out the facts it found and its decision and identifies a question of law for the opinion of the High Court. The question of law posed by the Crown Court is as follows:-

> On the evidence we received, were we entitled to conclude **[1]** that the Respondent's conduct was not "disorderly", and **[2]** that it was not "likely" to have caused a person within the hearing and sight of it the necessary "harassment, alarm or distress?"

3. We have added the numbering to highlight that there are in fact two separate questions. The DPP invites us to answer each question "no". His case is that neither of these two conclusions was rationally open to the Crown Court. Two arguments are advanced. First, that the only conclusion reasonably available on the evidence was that the Respondent's conduct *was* "disorderly" within the meaning of the legislation. Secondly, that the court's conclusions that the conduct was *not* "disorderly" and that it was not "likely" to cause "harassment, alarm or distress" flowed from flawed reasoning.

The facts

4. We take these from the case stated by the Crown Court:-

> 5. The Respondent was raised in Turkey. In 2022 he sought asylum in the UK and subsequently applied for refugee status. We noted that in recent years Turkey has moved from being a secular state to becoming more Islamic. The Respondent disapproves, and on 13 February 2025 he travelled from his home address to the Turkish Consulate at Rutland Gardens in Knightsbridge in central London with a copy of the Koran. He arrived at approximately 14:00. His conduct there was captured in video footage recorded by an observer at the scene and by CCTV. In accordance with r. 35.3(4)(d) CrimPRs, we attach (at Annex 2) the relevant video footage to the Case, which were clips exhibited as ELS/02 and ELS/03 at the trial.
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> 6. That footage showed him setting fire to a copy of the Koran. He also shouted, "Koran is burning", "Fuck Islam" and "Islam is the religion of terrorism". The pavement on which he stood was sparsely populated and he did not initiate any interaction with any member of the public. There was, however, a reaction to his actions and behaviour. A man, now known to be Moussa Kadri emerged from a nearby building, called

the Respondent a "fucking idiot" and said he would "fucking kill" him. The Respondent responded "fuck you" and "fuck Islam". Mr. Kadri went back into a building and re-emerged moments later brandishing a knife. He chased the Respondent into the road, making slashing motions towards him with the knife. The Respondent fell to the ground and Kadri began kicking him and spat at him. As the Respondent lay on the road a second attacker, a passing delivery cyclist, kicked and spat at the Respondent then cycled away.

7. The police arrived at approximately 14:25. The Respondent told the officers, through a telephone interpreter, that he had had (sic) been exercising his democratic right to protest by setting fire to the Koran, and that a man had approached him and attacked him with a knife. He pointed out the first attacker, Mr. Kadri. In due course he and Mr. Kadri were both arrested. Mr. Kadri was later charged and convicted of assault and the possession of a knife, and sentenced to a suspended term of imprisonment.

8. The Respondent was interviewed under caution, with the assistance of a Turkish interpreter and a solicitor. He answered most of the questions asked of him.

9. To summarise:

> 1) he said that he had decided to burn the Koran as it is inciting people to opt for terrorism. As he believed that it is a terror book, he believed that it should be forbidden. He said he was an atheist since the age of 15. He was asked what his feelings were towards Muslims. He said, "I don't have any problem or any prejudice against Muslim people so long as they don't use violence I don't have any problems with it. This is their human rights…. burning that Koran is my right…";
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> 2) he was asked whether he was aware the location he was attending was the Turkish Consulate. He said, "I took through the internet I made decision. I decided just to get the address and so on. Turkey and Qatar were two countries supporting radical Islamist, that's what I thought. There is a person who is in power at the moment who just turn our, my country into a base for radical Islamists. After I decided to burn it. I just found out about the address of it through internet … I had already written through the social media that I was going to burn Koran right outside this Consulate about a week ago … hundreds of people wrote to me asking me whether they want, I would like them to come as well. There was so many atheist and English people as well who their countries were included in those messages. In response I said 'I don't want anyone and no one should come there' and I went there and burnt it." He said he had been alone outside the Turkish Consulate but a journalist was there, apparently because he had advertised on social media that he was going to burn the Koran;

> 3) he did not intend to incite racial hatred, "I'm not racist at all. I was just trying to educate people about what sort of religion Islam is". He expressed his view that there was no law against doing what he did. He believed his actions were peaceful.
>
> 10. There were further passages that the Prosecution relied upon as suggesting an animosity to Muslims as opposed to criticising the Islamic faith. At one stage, for example, the Defendant spoke of Muslims carrying out rapes and of them coming to a country then breeding and then harming that country.

5. We have viewed the video clips referred to in paragraph 5 of the case stated.

The charge

6. The Respondent was charged as follows:-

> Hamit Coskun, on 13 February 2025, in the vicinity of the Turkish Consulate at Rutland Gardens, London SW7, used disorderly behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby, in that he set fire to a copy of the Qu'ran and held it aloft while he shouted, 'Fuck Islam and 'Islam is religion of terrorism' and 'Qu'ran is burning', and at the time of doing so, and in doing so, he was motivated (wholly or partly) by hostility toward members of a religious group, namely followers of Islam, based on their membership of that group, contrary to section 31(1)(c) of the Crime and Disorder Act 1998 and section 5 of the Public Order Act 1986.

The statutory provisions

7. Section 5 of the Public Order Act 1986 provided for a summary offence, punishable by way of a fine up to level 3 on the standard scale (currently £1,000):

> **5 Harassment, alarm or distress.**
>
> (1) A person is guilty of an offence if he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

8. The Crime and Courts Act 2013 amended s 5(1)(a) and (b) and s 6(4) to remove the word "insulting". The offence now covers only "threatening or abusive" words, behaviour or visible representations. The charge with which we are concerned did not, however, allege that the Respondent had done anything "threatening or abusive". The allegation was that he had used "disorderly behaviour". Section 6(4) of the 1986 Act identifies the mental element of that offence, which is that the person "intends his behaviour to be or is aware that it may be disorderly".

9. By section 5(3) of the 1986 Act,

> 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
>
> ...
>
> (c) that his conduct was reasonable.

10. Section 31 of the Crime and Disorder Act 1998 created a racially aggravated version of the section 5 offence, punishable on summary conviction by a fine not exceeding level 4 (currently £2,500). The Anti-Terrorism, Crime and Security Act 2001 amended s 31 by expanding it to cover religiously aggravated public order offences. Section 31(1) as amended provides, relevantly:

> **31 Racially or religiously aggravated public order offences**.
>
> (1) A person is guilty of an offence under this section if he commits—
>
> ...
>
> (c) an offence under section 5 of [the Public Order Act 1986] (harassment, alarm or distress),
>
> which is ... religiously aggravated for the purposes of this section.

11. Section 28(1)(b) of the 1998 Act provides that an offence is religiously aggravated for those purposes if "the offence is motivated (wholly or partly) by hostility towards members of a ... religious group based on their membership of that group." That was the case against the Respondent. But this appeal does not raise any issue about the religiously aggravated element of the charge. We are concerned only with the basic offence contrary to s 5 of the 1986 Act.

Relevant case law

12. It has long been recognised that legislation of this kind may apply to conduct which involves political or religious protest or expression. There may be a tension between the preservation of public order and the fundamental freedoms of conscience, speech, and association that have long been protected by the common law, now supplemented by Articles 9, 10 and 11 of the European Convention on Human Rights ("the Convention"), and the Human Rights Act 1998. All of these fundamental rights are qualified; in principle the state is entitled to interfere with them by measures, including penal measures, that are prescribed by law. Such measures will be justified if they are necessary and proportionate in a democratic society in pursuit of one or more legitimate aims. The aims that are relevant here include "the prevention of disorder" and "the protection of the rights of others". There is now a substantial body of case law that addresses, in the context of s 5 of the 1986 Act and in other contexts, how the court ensures that the criminal law is applied in a way that meets these standards. We were referred to no fewer than 30 cases that were said to bear in one way or another on the issues for our decision.

13. But this court has recently analysed much of the relevant jurisprudence in *DPP v Hicks ("Hicks")* [2023] EWHC 1089 (Admin), [2023] 2 Cr. App. R 12. The DPP takes no issue with the decision and reasoning in that case. He makes only a faint suggestion that the Crown Court erred in its legal analysis. So, there is no need for us to review all the cases cited. We can confine ourselves to identifying a relatively small number of key propositions which are established by authority or are obvious and not in dispute.

14. Whether conduct amounts to "disorderly behaviour" and whether it is "likely" to cause a person "harassment, alarm or distress" are separate and distinct questions. But each is a question of fact. The words we have quoted are all ordinary English words. Their natural meaning is a question of fact not one of law. The cases do contain some guidance on the meaning and effect these words should be given in the specific context of this offence. But subject to that guidance, the task of a trial court is to apply the statutory language to the particular circumstances of the case as found by the court and to determine whether the prosecution case is made out to the necessary standard; and if it is alleged that the court has reached a wrong decision the only question of law will, 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": *Brutus v Cozens* ("*Brutus")* [1973] AC 854, 861 (Lord Reid). If the court is sure that the defendant contravened the prohibitions in s 5(1) of the 1986 Act, it will need to consider whether the mental element identified in s 6(4) has also been established. If so, the question may arise of whether the defendant has made out one of the defences provided for by s 5(3).

15. The relevant guidance includes the following.

    (1) Although "disorderly" is an ordinary English word, the meaning of which is a question of fact, it must be read in the context of Article 10 of the Convention and Parliament's decision to omit the word "insulting" from s 5: *Hicks* [29(b)], citing *Campaign against Antisemitism v DPP ("Campaign against Antisemitism")* [2019] EWHC 9 (Admin) [7], [9].

    (2) The Article 10 context includes the principle that "[b]ehaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited"; nor is behaviour which is merely "distressing", "offensive", "distasteful", "insulting" or "intemperate"; and "[f]ree speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having": *Hicks* [29(c)] citing *Percy v DPP ("Percy")* [2001] EWHC 1125 (Admin) [25], *Campaign Against Antisemitism* [50], and *Redmond-Bate v DPP ("Redmond-Bate")* [2000] HRLR 249 [20] (Sedley LJ). See also the seminal case of *Handyside v United Kingdom* (1979) 1 EHRR 737.

    (3) In deciding whether a defendant's behaviour was "disorderly", it is appropriate to ask whether the line between legitimate freedom of expression and a threat to public order has been crossed. If so, the interference with Article 10 rights is unlikely to have been impaired: *Hicks* [29(d)] citing *Abdul v DPP ("Abdul")* [2011] EWHC 247 (Admin), (2011) 175 JP 190 [49(vii)], [50] and [51]. In deciding whether the line has been crossed "the context of the particular occasion will be of the first importance": *Abdul* [49(iv)].

    (4) "Harassment, alarm and distress" are all "relatively strong words" which in combination give a sense of the mischief aimed at; within this phrase, the word

"distress" takes its colour from its context and denotes "something which amounts to real emotional disturbance or upset": *R (R) v DPP* [2006] EWHC 1375 (Admin) [12]. That was a case about s 4A of the 1986 Act (intentional harassment alarm or distress) but in our judgment these observations hold true for the same phrase as deployed in s 5.

(5) The requirement that the defendant's conduct be "likely" to have the effects referred to in s 5(1) sets an objective standard. The answer does not turn on what the actual impact was in the event, though that may be relevant: see *Brutus* at 865 (Viscount Dilhorne). In this context, the word "likely" does not mean that the effects mentioned are "liable" to result, or that they could or might do so. "The general test is 'what is the natural and probable result of the conduct?'" That question is to be considered at the time of the conduct in question, and the answer depends critically on the particular circumstances of the case: *Parkin v Norman ("Parkin")* [1983] QB 92, 100. (*Parkin* was a decision under s 5 of the Public Order Act 1936 (conduct likely to occasion a breach of the peace), but in our judgment this reasoning must apply equally in the present context.)

(6) A conviction for protest or other activities involving the exercise of the fundamental rights we have mentioned must be compatible with those rights. But this does not require the court to carry out a proportionality analysis in every case; compatibility may be secured by the proper interpretation and application of the ingredients of the offence themselves: see *In re Abortion Services (Safe Access Zones: Northern Ireland) Bill ("Abortion Services")* [2022] UKSC 32, [2023] AC 505. Thus, in *R v Casserly (Thomas) ("Casserly")* [2024] EWCA Crim 25, [2024] 1 WLR 2760 the Court of Appeal, applying *Abortion Services*, held that the offence of sending a grossly offensive communication with intent to cause distress or anxiety, contrary to section 1(1)(b) of the Malicious Communications Act 1988, is inherently Convention-compliant so long as the words "grossly offensive" are given an appropriate construction: see [44]-[48].

(7) Applying this approach to the offence contrary to s 5 of the 1986 Act, provided the court gives an appropriately narrow construction to the word "disorderly" (and, we would add, to the words "likely to cause harassment, alarm or distress") then proof of the elements of the offence, and a failure by the defendant to establish the defence in s 5(3), will generally be sufficient to demonstrate that a conviction would represent a necessary and proportionate interference with Article 10 rights: *Hicks* [29(e)], citing *Abortion Services* [57]. In our judgment this proposition is also supported by *Percy* [25], and by *James v DPP ("James")* [2015] EWHC 3296 (Admin), [2016] 1 WLR 2118, see esp. [51] (Davis LJ), both of them cases about the effect of s 5.

16. We would add two points. First, the right to freedom of expression is not confined to the use of written or spoken words, but extends to "expressive acts": *R v Jordan (John)* [2024] EWCA Crim 229, [2024] 4 WLR 30 [71]. So, the right plainly covers what this Respondent did outside the Turkish consulate as well as what he said. There has never been any dispute about that. Secondly, although forms of expression which are aimed at the destruction of democratic values fall outside the scope of the free expression right and are not protected (*Casserly* [37], and see *Norwood v United Kingdom* (2005) EHRR 111), there has never been any suggestion that this is such a case.

The Crown Court proceedings

17. This was an appeal by way of re-hearing, not a review of what the Magistrates' Court had decided. The Crown called its evidence. The Respondent chose not to give evidence. The court heard submissions on behalf of both parties. The argument for the Respondent had three main strands of relevance to this appeal: (1) the term "disorderly" sets a high threshold, as illustrated by dictionary definitions of the word; (2) whilst the Respondent's conduct may have upset at least one person it did not meet the statutory test of being "likely to cause harassment, alarm or distress"; and (3) given the political nature of the protest the court should find his conduct "reasonable". For the DPP it was submitted that although there is no law that criminalises blasphemy, the Respondent had chosen to burn the Qu'ran, knowing full well how upsetting that act would be to any Muslim. That conduct, in combination with the shouted comments and passages in the Respondent's interviews under caution, was said to provide the clearest evidence that the offence was proved in its aggravated form.

18. The Court delivered a written judgment containing its decision and reasons for acquitting the Respondent. This began with a section headed "Introduction and law". Here, the Court set out some "important matters of principle". It pointed out that there is no offence of blasphemy in our law. Causing upset, even grievous upset (for instance by burning a copy of the Qu'ran) is not of itself a criminal offence. That would be incompatible with the right to freedom of expression guaranteed by the common law and Article 10. The court set out the terms of Article 10 of the Convention, and emphasised its breadth, citing *Handyside* and *Redmond-Bate*. But it noted that the right to freedom of expression is not unqualified, and sometimes has to yield to the protection of human beings. "The criminal courts *will* interfere to protect people. A person who acts so as to cause harassment, alarm or distress to another may commit an offence."

19. The Court set out the terms of the legislation and cited relevant domestic case law, quoting or referring to *Brutus, Parkin, R (R) v DPP, Abdul, Campaign against Antisemitism, Abortion Services,* and *Hicks.* The court then set out the facts and summarised the parties' submissions, before coming to a section headed "Discussion and decision". In this section, at [33], the court identified five questions which it might have to answer in the appeal:

> (1) Has the Prosecution made us sure the Defendant used threatening or abusive words or behaviour, or disorderly behaviour? If the answer is "no", the Defendant's appeal must be allowed. If "yes" we need to consider the next question.
>
> (2) Has the Prosecution made us sure the Defendant did so in the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. If the answer is "no", the Defendant's appeal must be allowed. If "yes" we need to consider the next question.
>
> (3) Has the Prosecution made us sure the Defendant intended his behaviour to be, or was aware that it may be, disorderly. If the answer is "no", the Defendant's appeal must be allowed. If "yes" we need to consider the next question.

> (4) Has the Defendant persuaded us it is more likely than not 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 that his conduct was reasonable. If the answer is "yes", we must allow the appeal. If "no" we need to consider the final question.
>
> (5) Are we sure the Defendant demonstrated towards the victim of the offence hostility based on the victim's membership or presumed (by the Defendant) membership of a racial or religious group or that the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group. If the answer is "yes" we must convict the Defendant of the racially aggravated form of the offence. If the answer is "no" we must convict the Defendant of the simple section 5 offence.

20. At [34] the Court explained that it had considered the first two questions together because it saw an "overlap when we look at the precise factual context in which they arose." At [35]-[42] the court concluded that the answer to each of those questions was "no", and that it therefore did not need to consider the later issues on which it had been addressed and must allow the appeal. The court gave seven reasons for that conclusion (we have added the numbering).

> [i] ... the Defendant's conduct was not aimed at a person. While such a generalised protest might amount to an offence under section 5, it is less likely to do so than one where the conduct or words are directed at a person or people.
>
> [ii] …the location was outside the Turkish Consulate. The offices of foreign nations, be they embassies or consulates, are recognised locations for political protest against the policies of those countries. Such buildings can be anticipated to be secure, with systems in place to survey and protect the premises. This is significant. A protest outside someone's home or place of worship might well create an anticipation that those who witness it may feel vulnerable and, very easily, become harassed, alarmed or distressed. A protest outside a secure and recognised location for such activities, less so."
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> [iii]... the Defendant was by himself. There were one or two other people around, but the only person involved in the protesting activity was him. As a matter of common sense, on many occasions a crowd may be intimidating far more easily than one man by himself."
>
> [iv] ... it was daylight. Any passerby could clearly see that the Defendant was stood by himself, empty handed save for the book he then set alight."
>
> [v] ... his protest was of short duration, perhaps two or three minutes. The longer a potentially distressing protest occurs, the greater the

> likelihood that someone who would be harassed or alarmed or distressed would come across it.
>
> [vi] ... the reaction of people who were present is not determinative. The section 5 offence criminalises the effect of conduct that is likely, not that which actually transpires. Yet the reactions of those who witness the event in real time can be relevant in that it allows a Court, who inevitably view the events at a distance, some insight into the sound, feel and appearance of the impugned conduct. For a moment we leave aside the criminal conduct of Kadri and the delivery rider. In our view it is significant that in the three minutes or so of film that we have watched, a number of people wander by. As things develop, two or three people stop to watch. There is no sense that any of the passers-by or spectators feel sufficiently alarmed to hurry away or even cross the road. They see a man, by himself, on a fairly empty pavement, who shouts and sets fire to a book. At the risk of repetition, their casual reactions to the Defendant's conduct are not determinative, but they are telling.
>
> [vii] ... in our view the actions of Kadri and the delivery cyclist do not assist the Prosecution's cause for a number of reasons. We are concerned with the likely not the actual. Both men may very well have felt insulted but that is no longer a basis for the section 5 offence. Kadri may well have grown very angry, as his threats to kill then procuring of a knife before attacking the Defendant would tend to suggest, but being angry is not the same as being harassed, alarmed or distressed. Further, as articulated in Abdul and Cozens v Brutus, the Courts should be wary of allowing the criminal reaction of one person to make a criminal of another for exercising their right to free speech."

The appeal

21. The DPP's case was presented by Mr Perry KC, leading Mr Boyd (neither of whom appeared in the Crown Court). At the forefront of Mr Perry's submissions was a passage in the speech of Lord Reid in *Brutus* at 862E-F, in which he said, with reference to the offence contrary to s 5 of the 1936 Act, that:

> 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.

22. Mr Perry submitted that this reasoning applies equally to the offence contrary to s5 of the 1986 Act. That offence remains a simple one. It is not necessary to conduct any proportionality analysis. The Crown Court erred in citing and seemingly adopting a passage

in *Abdul* [49(vi)] which stated that it was "for the Crown to establish that prosecution is a proportionate response" to the conduct in question. *James* and other cases show this is a legally misconceived approach. The fundamental values protected by the common law and the Convention are both accommodated by the statutory language. It is sufficient for the court to apply that language. However one approaches the language of s 5(1), the ingredient of "disorderly behaviour" was unquestionably present. To quote from the skeleton argument, "[b]urning a book on a central London street is an intrinsically disorderly act". Worse, this was the deliberate burning of a sacred text. And to do that while holding the book aloft and using "abusive and inflammatory language" was a deliberate act of provocation, a factor taken into account by this court in *Gough v DPP* [2013] EWHC 3267 (Admin), (2013) 177 JP 669 [15]. As for the second ingredient of the offence, Mr Perry submitted that the evidence plainly showed that the Respondent's behaviour stirred up real emotional disturbance and upset, qualifying as "harassment, alarm or distress". And it was obviously "likely" in all the circumstances that people seeing and hearing what the Respondent did and said would experience such emotions.

23. Mr Perry subjected the Crown Court's seven reasons to a point-by-point critique. He submitted that the Respondent's protest involved abuse of the Muslim faith at a location at which believers were likely to be present or visiting; the location in central London outside a diplomatic mission made it more, not less disorderly; the fact that the Respondent acted alone was no reason for finding either ingredient not proven; the time of day and the short duration of the incident were both irrelevant; neither had served to avoid the breakdown in public order that followed; the court was wrong to "disregard" the actions of Mr Kadri and the delivery driver; the violent reaction of these observers was highly material to what was "likely" to happen, indeed it was the best indicator.

24. The case for the Respondent was presented by Mr Owen KC leading Ms Comyn (both of whom appeared below). The Respondent's core submission was that the Crown Court was perfectly entitled to reach the conclusions it did, which plainly met the test of rationality. The point-by-point critique of the Crown Court's reasoning amounted to no more than disagreement with its conclusions. No arguable error of law had been identified and there was therefore no basis for an appeal. The DPP was simply trying to secure a different result on the facts.

25. Mr Owen focused on the passage we have quoted from the DPP's skeleton argument, and similar assertions. He submitted that in substance the DPP was inviting us to rule as a matter of law that in all circumstances and in every case the burning in a public place of a book, or a holy book, or the Qu'ran, would amount to "disorderly" conduct and be "likely to cause harassment, alarm or distress" and thus be contrary to s 5. That, said Mr Owen, was an untenable position. All depends on context and the particular circumstances of the case. To illustrate this submission, Mr Owen referred us to the protest which has been conducted for some 22 years outside the Chinese Embassy in London, accusing the Chinese government of genocide. He asked, rhetorically, whether that too would be "intrinsically disorderly", and whether it would become so if protesters occasionally burned a political text or an image associated with the state in question, in addition to displaying placards alleging genocide. Mr Owen also cited the 1989 decision of the US Supreme Court in *Texas v Johnson* 491 US 397, where the court held it incompatible with the First Amendment for the State of Texas to find Gregory Lee Johnson guilty of the crime of "desecration of venerated object" contrary to para 42.09 of the Texas Penal Code by burning of the US flag, in circumstances where no one was physically injured or threatened with injury.

26. In reply, Mr Perry disavowed the submission which Mr Owen had attributed to the DPP on the basis of his skeleton argument. He described this as a "straw man" point. He said that the DPP was inviting us to apply the test identified by Lord Reid in *Couzens* (paragraph [14] above) and to find it satisfied.

Analysis and conclusions

27. We have not found Mr Owen's illustrative references helpful. He is right to say that all depends on context. It follows that rhetorical questions about the lawfulness of other protests in this country, the facts of which are not before the court for determination, do little to assist. The decision and reasoning in *Texas v Johnson* reflect First Amendment jurisprudence, including the well-known decision in *Brandenburg v Ohio* 395 US 444 (1969). The approach in this jurisdiction and under the Convention is different. The overall position was accurately summarised by the Crown Court: see [18] above. The constitutional validity of the legislation under consideration in the present case is unquestioned. The domestic jurisprudence explains how the language of s 5 is reconciled with free speech rights. Our law is appropriately summarised in *Hicks,* which reflects the modern position. The DPP did not suggest that this is in conflict with *Brutus* and we see no such conflict. Subject to the modern refinements articulated in *Hicks*, Lord Reid's formulation in *Brutus* continues to provide the appropriate and authoritative test for the application of s.5. Properly applied, this is a stringent and demanding standard, reflecting both the statutory language and the need for a suitably narrow construction compatible with Article 10.

28. The legal analysis in the "Introduction and law" section of the Crown Court's judgment cited all the cases we have mentioned, and reflected all the points that we have made, at [14]-[15] above. Mr Perry has advanced only one criticism of the Crown Court's legal analysis: his submission that *Abdul* [49(vi)], cited by the court, is not good law. The point is sound. The Crown does not have to prove that a conviction under s 5 of the 1986 Act would be proportionate: see *James* [51]. In our judgment, however, this is a narrow semantic point of no substantive merit, and it is in any event immaterial.

    (1) The Crown Court did not conclude that it had to assess whether a conviction would be proportionate. After citing paragraph [49(vi)] of *Abdul*, the Court went on to express the view that a proportionality assessment would "almost inevitably have been undertaken" by the court when considering the defence under s 5(3), as indicated by this court in *Hicks*. That view was reflected in the framing of the Court's fourth question. That question is not criticised by the DPP and in our judgment the Crown Court's approach was correct.

    (2) The right to freedom of expression calls for a suitably narrow construction of the language of s 5(1). Whether behaviour is "disorderly" is to be judged objectively, applying the standards of a democratic society which respects free speech and the right to protest. But freedom of expression can also be addressed via s 5(3) of the 1986 Act. This acknowledges that behaviour may be both "disorderly" by these exacting standards and "likely to cause harassment, alarm or distress" and yet still not criminal because it is "reasonable". That, we think, is another way in which the court can, in an appropriate case, take account of some of the points made in the authorities, including the observations that "legitimate protest can be offensive at least to some – and on occasions must be, if it is to have impact" (*Abdul* [49(ii)]) and the need to avoid criminalising a protestor on account of responses by "determined opponents" or

counter-protestors aiming "to silence a speaker whose views they detest" (*Brutus,* 862E, *Abdul* [58]).

(3) In any event, the court never reached its fourth question. It saw no need to go beyond the first two.

(4) The court's summary of the legal principles relevant to those two questions is consistent with the way we have set out the position above, and has not been criticised by the DPP.

29. Against that background, the question for us is whether the Crown Court's conclusions were rationally open to it. Stripped to its essentials, the DPP's case is that the Crown Court, having correctly directed itself as to the relevant law, was not entitled to reach the conclusions it did; the only conclusion rationally open to it on the evidence was that the Respondent's behaviour *was* shown to the criminal standard of proof to be both [1] disorderly and [2] likely to cause harassment, alarm or distress within the meaning of s 5 of the 1986 Act.

30. The determinations under challenge involve findings of primary fact, coupled with evaluative assessments of whether the behaviour in question crossed the line to which we have referred, and whether it was more likely than not to lead to certain consequences. The hurdle faced by an appellant seeking to overturn such findings is a high one. The principles are well-known. 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, [2014] ETMR 26 [114] (Lewison LJ). Where, as here, the decision under appeal has an evaluative component the appeal court does not carry out the evaluation afresh but must ask "whether the decision ... was wrong by reason of some identifiable flaw in the judge's 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'": *Re Sprintroom Ltd* [2019] EWCA Civ 932, BCC 1031 [76]. In deciding whether the court left something out of account the appeal court will assume, unless there is compelling reason to the contrary, that the court took all of all the evidence into consideration: *Volpi v Volpi* [2022] EWCA Civ 464 [2022] 4 WLR 48 [2(iii)] (Lewison LJ).

31. The Crown Court took the two ingredients of the offence together. We think it might have been better to analyse each ingredient separately and in turn. But we do not consider this was an error of principle or logic. Mr Perry did not suggest it was. The court addressed the following factors: whether the Respondent's conduct was targeted at a person; the location at which it took place, and ordinary reasonable expectations about behaviour in such a location; the number of people involved in, and in the vicinity of, the protesting activity; the time of day; the duration of the protest; the various reactions of those who were present; and what those reactions suggested about what was "likely" to result from the Respondent's behaviour. In our judgment, the court was entitled to consider all these factors to be relevant to one or both of the ingredients under consideration.

32. Having considered with care the DPP's submissions about the Crown Court's seven reasons, we conclude that these are essentially no more than counter-arguments offering a different perspective, or a different approach to the facts and circumstances of the case. We are not persuaded that the court left any material factor out of account or relied on any immaterial factor. The evaluation of the facts, their relevance, and their weight, was a

matter for the Crown Court. We do not consider its reasoning contained any logical flaw of the kind we have referred to. We are satisfied that the conclusions arrived at were rationally open to the court.

33. For these reasons our answer to the question posed in the Case Stated is "yes" and the appeal is dismissed.