EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2017-085-002703
[2019] NZDC 3860

NEW ZEALAND POLICE
Informant

v

GARY THOMAS CHILES
Defendant

CRI-2017-085-003051

NEW ZEALAND POLICE
Informant

v

ADRIAN JAMES LEASON
Defendant

Hearing: 17 and 18 September 2018

Appearances: Sergeant Stonyer for the Police
D Vincent for the Defendants

Judgment: 5 March 2019

JUDGMENT OF JUDGE W K HASTINGS

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[1] I start with a comment I made at the end of the evidence. We are so very fortunate to live in New Zealand. I have taught human rights law in Tunisia and have been taught human rights law in the United States. If the events I describe below had unfolded in either of those places, the outcome may well have been very, very different.

[2] The evidence of both the Police witnesses and the defendants was informed by playing very good quality videos of the events as they unfolded. The videos were played essentially as an aide memoire after each witness had given his account of what happened. They were very useful exhibits and, with the witnesses' accounts, provided the best evidence of what took place that day.

[3] On the morning of 10 October 2017, protesters began to gather at the Westpac Stadium in Wellington. The stadium had been booked for the 20th Annual New Zealand Defence Industry Forum, due to start later that morning. About 500 delegates were expected at the convention. Police also arrived that morning.

[4] The Westpac Stadium is situated between the railyards and the wharf in Wellington, on Aotea and Waterloo Quays. The Quays are a four-lane road that provide the principal means of access for vehicles into and out of the city. There are two lanes northbound, and two lanes southbound. There is a footpath on the stadium side of the road, but there is generally not a lot of pedestrian traffic on it.

[5] Each of the three groups had different intentions that day. The Defence Industry Forum was promoted "as an opportunity for industries to understand defence and security needs and promote their ability to supply them". The delegates to the forum took buses from an assembly point northwest of the stadium to attempt entry through one of several gates in the fence surrounding the stadium. [Name deleted – Inspector 1] said ten buses made the trip, and not all of them were full. Of the 500 delegates, 350 attended. The remainder decided not to attend the forum because the demonstration meant that the buses' access to the stadium was too slow. The last bus to drive to and enter the stadium was at 3.30pm.

[6] The protestors had beliefs that could not be reconciled with the very notion of such a conference. Some also felt that such a conference should not be held in a stadium. They wanted to demonstrate their beliefs and disrupt the delegates' attendance at the forum. Mr Chiles said,

> First off is that I don't believe that we should be hosting these conferences in our nation anywhere. The second thing is that there is a long history in the twentieth century of despots and tyrants carrying out coups in countries, rounding up all the dissidents and all of the subversives and musicians, et cetera, locking them into sports stadiums and massacring them and I didn't want to see our stadium associated with any of that.

Mr Leason said, "I have deep and grave concerns about this event occurring." He explained why he became part of the protest:

> … as an individual I have been moved, my conscience has been moved and moved me to act. Sometimes it's been slow, I've had to gather courage because it's uncomfortable to leave my classroom and leave my small farm and do things that are problematic and so sometimes there has been a delay as I've gathered courage to disrupt the smooth running of these war machines. … And so as a Catholic, a Christian activist, as a humanitarian, I wanted to disrupt this because my conscience would not let me just stay home and sleep easily in my bed while there's something happening in my town. I can't do much about Iraq right now or Syria or any of the other places, but when there's something happening in my own backyard all my excuses don't stack up, I have to get involved.

[7] The Police were there to assist the security firm hired by the Defence Industry Association. The security company, the Chivalry Group, decided not to allow walk-ups. It was their decision to have the delegates arrive by bus. [Inspector 1], the Operation Support Manager for the Wellington District Police, said that the Police had to work with the security company "to look at ways to bring the delegates through the gates". [Name deleted – Sergeant 1] was one of the police officers assigned to Westpac Stadium that day. He said that the purpose of the Police presence was

> … to facilitate, to make sure the safe access to the delegates and also enabling the protestors a safe space to be able to protest as well, as well as allowing the members of the public to be able to carry on their daily business so we were, I guess the best to describe it, we were the in-between to try and facilitate everyone's daily business.

[8] Both the protestors and the Police had a well thought out strategic framework within which tactical decisions were made all day. Mr Leason said, in general, he

thought the Police did a "balanced" job. He described the manner in which the Police behaved in the following terms:

> And I also thought the police were also offering some courtesy to activists as an earlier testimony was given around police trying to walk that balanced line between the rights of delegates and the rights of activists. And so whenever they were on the road it provided opportunity for activists to protest safely so they were giving, it felt like to me, that they were giving some grace and some balance to one side and then at the same time getting the delegates in, which in the end of the day, every delegate that wanted to enter the Westpac Trust Stadium was able to enter. And we heard that 150 didn't enter the building but they chose, they got tired of waiting in the buses and gave up but anyone who wanted to enter could, so I think the police did a balanced job of helping the delegates get in and helping the activists be safe.

[9] The police were assembled inside the fence surrounding the stadium. They were armed with small extendable batons. [Sergeant 1] said he was assigned a group of 21 constables; three sections of six constables and a sergeant. It appears from the videos that more constables were involved throughout the day, and particularly during the last operation of the day.

[10] The protesters assembled outside the fence. Both described the scene as "fluid" and "very active". Mr Leason said that he placed himself "in different positions in order to be disruptive and to prevent the smooth running of the conference and to communicate that this is abhorrent in the extreme, this gathering." Mr Chiles said that no one who wanted access was prevented from entering the stadium, but when it was put to him that they gained access "only after extreme difficulty", he replied, "We weren't there to make life easy for people."

[11] Each side kept an eye on the other. [Inspector 1] said the protestors were moving from gate to gate. He said, "they had people on bikes spotting where the movement of police staff were and handheld walkie-talkies to move and assemble staff [i.e. other protestors] as required." [Sergeant 1] said he noticed that "as soon as protestors saw police move to one gate they would then follow and move to that direction as well" on the other side of the fence. [Name deleted – Sergeant 2] said "we came up with a plan where we made it look like we were setting up on a particular gate for a bus to come in. … A large group of people moved to that gate and very soon after, we were able to use another entrance and facilitate safe entry. The bus basically came into that unobstructed entranceway."

[12] The protestors used various techniques to achieve their twin purposes of expressing their views and of making it difficult for the buses carrying the delegates to enter the stadium. They expressed their views by loud chanting and carrying signs. Mr Chiles, who said he intended to "support the blockade without actually being involved in the blockade," carried two signs. On one was a quote from the pacifist Archibald Baxter, "We shall not cease". The other said "football not firearms". As well as carrying signs, the protestors used physical techniques to impede the buses' access to the stadium. On some occasions, they linked arms while standing and sitting in front of the buses. On other occasions, they used a "starfish" formation in which a number of protesters would form a circle in front of a bus by lying on their stomachs on the road, linking arms, their heads towards the centre of the circle. Buses either stopped while the Police removed the protestors or drove around the protestors when the Police contained them or drove straight ahead when the starfish formations were removed.

[13] The Police had tactical responses to the protestors' actions. At the briefing the day before, [name deleted – Sergeant 3] said there was a discussion about the potential charges they could use, "and obviously one of them being obstructing a public way."[1] He said that a "general overall warning" would be given first, then the team leaders "would obviously warn as well," and then, "prior to a protestor or person getting arrested the OC needed to that, or reiterate that warning to that person before they were arrested." [Sergeant 2] said the general warning was "along the lines of 'You are being warned for obstructing a public accessway, can you please move.'" He said when he "was involved in the arrest process, it was a specific warning to that person."

[14] [Inspector 1] said the Police closed the northbound lanes to traffic whenever a bus left the assembly area with delegates. The bus would travel from the assembly area south to one of the entry gates using the northbound lanes because these were the lanes adjacent to the stadium. At that point, the footpath was open to pedestrian traffic. When the buses arrived at a gate, the Police would also close the footpath by that gate. They extended a "penetrating formation" or "wedge" of two lines of police officers,

[1] In his article, "Protest and Public Order" written for the Cambridge Law Journal in 1970, (28 Cambridge Law Journal 96), D G T Williams, Professor of English Law at Cambridge University, interestingly foreshadowed [Sergeant 3]'s view when he wrote, at 106, "Obstruction of the highway is an obvious offence to turn to in response to sit-down demonstrations."

from the gate to the bus, which "often required people getting moved, lifted up off the ground, pushed out of the way" according to [Sergeant 3]. Once at the bus, each line would advance around each side of the bus, meeting up behind it to form a "bubble" around it. Each line formed a barrier between the protestors and the bus and cleared the way for the bus to advance to the "safe haven" in front of the gate, where the delegates would disembark and enter the stadium grounds. [Sergeant 3] said this was slow-going because protestors would reform the starfish formations or link arms as the bus "inched" forward after the previous formation had been removed. Once the delegates gained access to the stadium, the Police lines would retreat into the stadium grounds and close the gate behind them. Both [Inspector 1] and [Sergeant 3] estimated that the road and footpath would have been closed by this operation for about 10 minutes each time. [Sergeant 3] said the roads were reopened after each operation. "Once everyone's back on the footpath there were no issues," he said.

[15] [Sergeant 1] said that when the protestors were seated and linked in front of a gate, and a bus was coming, he would give them a general warning over a loud hailer three times, to give them three opportunities to move. He used as an example the bus that arrived at 8 o'clock that morning. Although there were distracting noises from the protestors which seemed to amplify whenever a warning was given, [Sergeant 1] said he was three or four metres away from the fence, and from the protestors along the fence, when he gave the warning. He thought the warnings were "loud enough" and noticed that some protestors "on the fringes" moved away. He said the protestors in front of the gate refused to move. He said he "certainly didn't want to arrest people, it was a last option." He said at that point, those who had been warned were arrested for obstructing a public way and moved to the side. He estimated that about 30 people were seated at the gate, and another 30 or so were standing nearby.

[16] [Sergeant 1] said that the Police made a tactical decision during the day, "for the very last movement", to block both the southbound and the northbound lanes, as well as the footpath on both sides of the quays, fence to fence. He said the reason this was done was "to get buses that were coming in from a southerly direction, so the intent was to push everything clear of the gates from the southern side, so we were able to get those vehicles in and out safely without them being obstructed by protestors lying on the ground or getting in front of the buses. The only way to do that safely, so

no one was at risk, was to cover that area completely, from fence to fence, either side of the road."

[17] Mr Leason first appeared in the videos as part of a starfish formation. He was not arrested then. He next appears sitting down, during the last movement of the day, linking his arms with another protestor, in front of [name deleted – Constable 1]. [Constable 1] recalled Mr Leason "being in multiple locations" and having been warned previously, but this time, he said he was "directed to arrest him by a sergeant, who I know is from Christchurch, for obstructing a public way and at this point I have warned him … if he did not move he would be arrested for obstructing a public way". [Constable 1] said Mr Leason was arrested on the footpath. He said, "technically the gate could be opened I guess at that stage inwards but still blocking access to get to the gate from where he was." [Constable 1] said Mr Leason was behind the Police line when he was arrested, not in front the gate, but slightly to the north of it. Mr Leason said his arrest took him by surprise, and hearing that the Sergeant from Christchurch had pointed him out, he said that this felt "quite random." He said he did not hear [Constable 1] say please desist" or "move, leave this area or you'll be arrested." [Constable 1] said he grabbed Mr Leason's arm to break the grip he had on the person beside him. Once the grip was broken, "we started placing his hands behind his back [and] he instantly became compliant and he was handcuffed and walked away." He said that when he was arrested, [Constable 1] said Mr Leason's demeanour was "quite pleasant." When [Constable 1] asked him if he had any complaints, he said Mr Leason replied, "no, you're just doing your job." [Constable 1] said that he would not have arrested Mr Leason, despite being told to do so by the sergeant from Christchurch, if Mr Leason had unlinked arms, got up, and moved on.

[18] Mr Chiles was arrested during the last incident of the day, when the Police blocked off the whole road and both footpaths, fence to fence, "so protestors couldn't get around the sides and flank us" according to [Constable 1]. [Sergeant 2] agreed that this operation was carried out in six steps. Step one was to stop normal use of the road. The "penetrating line" went out as step two. Step three involved the penetrating line claiming the space for the bus to arrive. In step four, the delegates disembarked and entered the stadium. [Sergeant 2] agreed that to access the stadium on foot, the delegates did not need the northern gate opened when, as was the case, the southern

gate opened inwards. Step five involved the Police reducing the bubble as they went back into the gate. Step six was the reopening of the road to normal traffic.

[19] [Constable 1] said his section's task during this operation was to clear the people in front of the southernmost gate. He estimated that between eight and 15 protestors "were sitting in the way, linking arms, blocking the gate." He said he started from the southern side of the gate, and "as we moved people away from the southern end, working our way to the northern end." [Constable 1] was not involved in Mr Chiles' arrest, but [Sergeant 2] was. He described the arrest of Mr Chiles:

> So yeah, warnings to Mr Chiles. He was trying to grab onto another person. I recall we might have been momentarily sort of free and we were about to move him and then grabbing, him grabbing the gate that had been partially opened and at that point, you know, yelling because everything's (inaudible 10:46:55) yelling at him about, to let go and he will be arrested and then he's continued to hold the gate. I've managed to get him free and sort of all in the same time dragged him free and then dragged him backwards behind our line because at that point, he had been arrested and I was telling him that he was under arrest and I – I recall that he had a backpack on I believe and I initially started to drag him backwards by a backpack. I'm not too sure if I then grabbed some clothing and the backpack but dragged him backwards in the line as we're trained to do. The line closed and then immediately handing him to the custody staff.

[20] The gate in question was a double gate. Each side was hinged to the fence. It opened in the middle. Each side of the gate could open inwards towards the stadium or outwards onto the footpath. The Police decided to open the north side outwards. [Sergeant 1] conceded that opening the gate outwards could have harmed the protestors on the footpath. He said, "that could have been but there was no intent involved with that." [Sergeant 2] also said that harm might have been caused by opening the gate outwards "if they refused to move and continued to block that accessway." [Sergeant 2] recalled that Mr Chiles "was sideways, that he was trying to grab some people next to him and then somehow got the gate, or the edge of the gate." He said he told Mr Chiles "to let go or be arrested." Mr Chiles said he did not hear any warning, but [Sergeant 2] said "that's not right and I speak with utmost confidence on that." [Name deleted – Detective 1] said he saw Mr Chiles holding onto the gate. He said, "I hadn't actually moved or used that gate at all, so I don't know the mechanics of it and I wasn't able to see what exactly was going on at the front, but he was definitely holding onto the gate really tightly and [Sergeant 2] was him pulling

away to stop him holding onto it." [Detective 1] said he "couldn't hear specifically a person's voice or a specific warning, there was a lot of noise going on."

[21] Mr Chiles said he saw the Police begin to push on the gate that the protestors were sitting in front of. He said his reaction "was immediately to drop my signs and grab the gate to prevent it being used as a weapon to push over on top of people." He said he "didn't hear any warning for anyone to move out of the way. The gate was being pushed on top of people who were sitting in front of it that could bring about injury. No one was given the opportunity to exit from the front of the gate and no one was asked to or given a warning. There were no bullhorn warnings, no general warnings. The police moved on the gate without warning which is why I reacted to try and prevent an injury." He said the people in front of the gate "had no chance to get out of the way." He said he did not remember [Sergeant 2] warning him to "let go or you will be arrested." Mr Chiles said that when he first got to the front gate, the traffic was flowing freely, and everybody was sticking to the footpath. He said, "that changed when the police opened the gates and carried out the action." When it was put to him in cross-examination that he was simply stopping the gate being opened to prevent the delegates arriving easily, Mr Chiles replied, "It did not stop the delegates arriving at all. You can clearly see the delegates entering" in the video that was played several times in Court.

The law

[22] At its highest level, whether or not the prosecution has proved the charges beyond reasonable doubt will involve some discussion and reconciliation of the right of the protestors to protest with the right of the delegates to access their forum by means of a public way. This is not a new tension. There are always moments in any democracy when some members of the public feel the need to demonstrate their views on issues of the day and exercise their right to do so. Protest is a safety valve that relieves the pressures inherent in any democracy, allowing the machinery of democracy to continue to function through vigorous and critical debate manifested in different places and in different ways. For the exercise of that right to be effective, it

must "bite".[2] The extent to which that bite hurts other members of society will be determined by the response of those in authority who are charged with the unenviable but essential task of reconciling the right to demonstrate with the right of everyone else to go about their business. One of the great virtues of a democracy is that there is a shared recognition that the right to protest exists and has value, even amongst those who are inconvenienced by its exercise, and amongst those who are called upon to regulate its exercise.

[23] It has been observed with respect to the Chartist demonstrations of the 1840s and the Social Democratic Federation demonstration of 1886, that "to sit on the safety valve is not the best means of preventing an explosion."[3] Arthur Balfour, not yet Prime Minister, said in 1893 that "there are fit and proper subjects of public discussion which, if you refuse all natural outlets of discussion, will probably breed very much more mischiefs than if you allowed the free outlet."[4] The Police of course make decisions on the day as to how much pressure to apply to the safety valve in the interest of maintaining public order and preventing offending. The role played by the Courts is very much at the end of the line that begins with warnings, arrest, and charging, and then moves on to prosecution, trial, verdict and, if necessary, sentencing. Professor Williams has said that it is arguable that "the very process of prosecution in such circumstances can be a useful deterrent, for it means that the accused have to wait a fair length of time to be tried".[5] I turn now to the end of this line, to the charges that have been brought against the defendants.

[24] Mr Chiles and Mr Leason have been charged under s 22 of the Summary Offences Act 1981, which provides as follows:

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[2] K J Keith, "The right to protest" in K J Keith (ed) *Essays on Human Rights* (Sweet and Maxwell, Wellington, 1968) 49. See also the comments of Elias CJ, "whether particular behaviour is disruptive of public order ultimately entails contextual judgment and is a matter of degree. In *Brooker* I suggested that the assessment cannot be too nice." *Morse v Police* [2011] NZSC 45 at [40], and *Brooker v Police* [2007] NZSC 30 at [42].

[3] *Pall Mall Gazette*, 14 November 1893, cited in D G T Williams, "Protest and Public Order", 28 Cambridge Law Journal 96 at 100.

[4] Id.

[5] Id. at 101.

22 Obstructing public way

(1) Every person is liable to a fine not exceeding $1,000 who, without reasonable excuse, obstructs any public way and, having been warned by a constable to desist,—

(a) continues with that obstruction; or

(b) does desist from that obstruction but subsequently obstructs that public way again, or some other public way in the same vicinity, in circumstances in which it is reasonable to deem the warning to have applied to the new obstruction as well as the original one.

(2) In this section—

obstructs, in relation to a public way, means unreasonably impedes normal passage along that way

public way means every road, street, path, mall, arcade, or other way over which the public has the right to pass and repass.

[25] This provision is not found in the part of the Summary Offences Act creating offences against public order. It is found under the heading "Intimidation, Obstruction, and Hindering Police". It sits with the offence of intimidation, the offence of publicly advertising a reward for the return of stolen property using words to the effect that no questions will be asked, and the offences of resisting police and making a false allegation to the police. The common theme of these offences is that they all to a greater or lesser degree adversely affect the conduct of police functions of investigating and preventing offending. The purpose of s 22 on the other hand does not appear to be directed to the ability of the police to investigate or prevent offending. It appears to be directed to a more mundane function of regulating "normal passage" along a public way by making it an offence for anyone to "unreasonably impede" normal passage, unless there is a "reasonable excuse" for the unreasonable impediment, and only after the police have given a warning. There is no offence of unreasonably impeding a public way. The only offence is not heeding a warning to desist from unreasonably impeding a public way. Reasonableness therefore plays a significant role in both the interpretation and application of s 22.

[26] As in any criminal case, the Police must prove each charge beyond a reasonable doubt. When the defendants elect to give evidence as occurred here, there are three

possibilities. If I accept the defence evidence with respect to a charge, on the face of it, the defendant must be acquitted because that would mean that I cannot be sure of the prosecution case. If I am not sure whether to accept the defence evidence, the same thing follows because I would have a reasonable doubt about the prosecution case being proven. If I reject the defence evidence, that does not automatically mean that the defendant would be found guilty. I then need to stand back, consider all the evidence I do accept, whether from the defence or from the prosecution, and decide whether I am satisfied that the charges against the defendant have been proved beyond a reasonable doubt.

[27] In this case, the prosecution must prove beyond reasonable doubt, first, that each defendant was on a public way. There is no doubt that the area in which the protest took place was a public way. The prosecution must then prove beyond reasonable doubt that each defendant obstructed that public way, which, as defined in the statute, means that the prosecution must prove that each defendant unreasonably impeded "normal passage" along that way. The prosecution then needs to prove beyond reasonable doubt that each defendant was warned "to desist". Lastly, the prosecution needs to prove beyond reasonable doubt that each defendant either continued with the obstruction or desisted but then re-obstructed in circumstances in which it is reasonable to deem the warning to apply to the new obstruction. Failure to prove beyond reasonable doubt any of the elements of the offence must result in a verdict of not guilty. A verdict of not guilty will also result if the defendants establish that they had a reasonable excuse.

[28] The defendants invoke their rights to the freedoms of expression, association, movement and peaceful assembly. Section 22 engages these freedoms when they are exercised on a public way. Sections 5 and 6 of the New Zealand Bill of Rights Act provide a mechanism for upholding these rights when they can be read consistently with s 22, or where s 22 restricts them in a manner that is reasonable and that can be demonstrably justified in a free and democratic society. The questions in this case are therefore whether s 22 can be given a meaning that is consistent with these rights as required by s 6 of the New Zealand Bill of Rights, or whether s 22 restricts these rights in a manner that is reasonable and that can be demonstrably justified in a free and

democratic society as permitted by s 5 of the New Zealand Bill of Rights. The sequence in which these questions are asked has been the subject of much comment.

[29] In *Moonen v Film and Literature Board of Review (No 1)*,[6] the Court of Appeal said that s 5 should be addressed in deciding whether or not a statutory provision was inconsistent with a right before applying s 6. Essentially, the Court of Appeal decided that the direction in s 6 to prefer a meaning, in this case of s 22, that is consistent with the rights and freedoms contained in the New Zealand Bill of Rights should be read as a direction to prefer a meaning that is consistent with those rights and freedoms as reasonably limited in accordance with s 5.[7] The Court of Appeal said:

> In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes, and on protecting society generally, or sections of it, from being exposed to the various kinds of conduct referred to in s 3 of the Act. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

Applied to this case, *Moonen* would appear to require an assessment of the value placed by society on the freedoms of expression, association, movement and peaceful assembly against the value society places on normal passage along a public way that is not unreasonably impeded.

[30] In *Hansen v R,*[8] Elias CJ thought the sequence should be reversed because incorporation of s 5 reasonable limits at the first, interpretive, stage risked diluting the

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[6] *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 at [18] per Tipping J.
[7] *Hansen v R* [2007] NZSC 7 at [186] per McGrath J.
[8] *Hansen v R* [2007] NZSC 7.

rights and freedoms against which a statutory restriction must be assessed. Her Honour said, "[T]he use in s 5 of the same language of 'rights and freedoms contained in this Bill of Rights' would make no sense if it referred to limited rights justified under it."[9] In other words, applying s 5 when interpreting legislation "would require words to be read into s 6 to indicate that consistency is required only with the recognised rights as reasonably limited by law. That course is not required to give proper effect to the legislation."[10] This holds true even if the right is by definition qualified. If the right is qualified, it still remains that the restriction must be interpreted in a manner consistent with the qualified right, "viewed in context (including the context provided by the International Covenant [on Civil and Political Rights]" without reference to s 5. Two examples given were that the scope of the freedom of expression may be restricted to protect the reputations of others as Art 19 of the International Covenant envisages, and that the freedom of movement may be restricted if necessary for the protection of public order as provided by Art 12. A third might be added, that the New Zealand Bill of Rights restricts the freedom of assembly to the freedom of "peaceful" assembly, as distinct from riotous assembly. Article 21 permits "no restrictions" on peaceful assembly except those that "are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

[31] *Morse v Police*[11] concerned a protestor who, amongst other protestors, set two New Zealand flags alight and blew horns for three to five seconds in a place to which the public have access, the Victoria University of Wellington Law School, during an ANZAC Day service, before police stopped them. Ms Morse was charged with offensive behaviour under s 4(1)(a) of the Summary Offences Act. The interpretative discussion above was developed further. Although the judgments were limited to interpreting s 4(1)(a), what was said can be applied to any offence created by the Summary Offences Act. Elias CJ said the offence "is not to be left to be described only in application according to a "balance" between the interests of those whose conduct or speech is in issue and the feelings of those exposed to it". Such an approach

[9] Id, at [16].
[10] Id.
[11] *Morse v Police* [2011] NZSC 45.

"offends against the principle that the criminal law and limitations on rights must be capable of ascertainment in advance."[12] Her Honour went on:[13]

> It is not, I think, a proper discharge of the s 6 interpretative obligation to leave the New Zealand Bill of Rights Act protection to be balanced in application. Section 6 does not look to an ambulatory meaning of an enactment according to whether, on the facts of a particular case to which it is to be applied, it limits rights and freedoms. It requires the enactment itself to be given a meaning consistent with the rights, if it can. That is consistent with the purpose of the New Zealand Bill of Rights Act in promoting human rights.

[32] There is another reason not to interpret Summary Offences Act offences according to a balance of interests on the facts of any particular case, which in this case, would mean balancing the interests of the protestors whose conduct is in issue and the feelings of those exposed to it. Elias CJ said that leaving consideration of the New Zealand Bill of Rights Act to application of a provision capable of being interpreted consistently with rights "also risks dilution of rights, both in the at-large contextual balancing generally and in the inevitable value judgments about the particular exercise of the right."[14] In Her Honour's view, it also[15]

> undermines the responsibility of the courts to supervise for reasonableness or proportionality in that application. In supervising for proportionality of reasonableness in outcome, close attention to the purpose of a restriction imposed by law is critical. The more vague the purpose and meaning of an enactment, the less protection for human rights. That is why the interpretative responsibility is the first responsibility.

[33] Courts interpreting and applying the Summary Offences Act must also have regard to proportionality of outcome. Citing McLachlin J (as she then was) in *R v Lohnes*[16] Elias CJ said that tolerance "of the expressive behaviour of others is expected of other members of the public resorting to public space because of the value our society places on freedom of expression."[17] Her Honour said:[18]

> But if in the result the limitation on the freedom of expression is disproportionate to the statutory purpose of securing public order [or in this case, normal passage without unreasonable impediment], the courts (which in their decisions must conform to the New Zealand Bill of Rights Act) are not

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[12] Id., [13].
[13] Id., [14].
[14] Id.
[15] Id.
[16] *R v Lohnes* [1992] 1 SCR 167 at 181.
[17] *Morse v Police* [2011] NZSC 45 at [40].
[18] Id.

> justified in finding criminal liability under s 4(1)(a). Lack of proportionality in outcome (more restriction than is necessary to achieve the legitimate outcome of preservation of public order under s 4(1)(a)) is a result that is substantively unreasonable and amounts to an error of law able to be corrected on appeal restricted to point of law, as Glazebrook J in the Court of Appeal rightly recognised.

[34] The issue therefore is whether or not s 22 can be given a meaning that is consistent with the freedoms of expression, association, movement and peaceful assembly. This requires ascertainment of the meaning of "unreasonably impedes normal passage" and whether there is a meaning that is consistent with the claimed rights.

[35] The Concise Oxford Dictionary (11th ed.) defines "impede" as "delay or block the progress or action of." The delay or blockage must be to "normal passage", and it must be "unreasonable." This involves consideration of what is included in "normal passage", and what is an unreasonable impediment to that passage. Both "normal passage" and "unreasonably impedes" must be interpreted, if at all possible, in a manner consistent with the rights at issue.

[36] The meaning of "normal passage" has expanded over the years. In *Ex parte Lewis*[19] normal passage on a public way was defined as the right "to pass and repass without let or hindrance." This was marginally extended in *Harrison v Duke of Rutland*[20] to include any other "reasonable and usual" practice. The floodgates inched open again to include various other things that continued to define how public ways could be used. Thus, in *M'Ara v Magistrates of Edinburgh*[21], Lord Dunedin said that citizens may "meet in the street and may stop and speak to each other" as part of normal passage. Stopping temporarily on the verge of a highway to discharge passengers and goods,[22] to rest and sketch for a reasonable time,[23] or to gather to sing carols[24] were all held to be reasonable incidental uses associated with passage.[25] It

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[19] *Ex parte Lewis* (1888) 21 QBD 191 at 197 per Wills J.
[20] *Harrison v Duke of Rutland* [1893] 1 QB 142 at 146 per Lord Esher MR.
[21] *M'Ara v Magistrates of Edinburgh* 1913 SC 1059 at 1073 per Lord Dunedin.
[22] *Iveagh v Martin* [1961] 1 QB 232 at 273.
[23] *Hickman v Maisey* [1900] 1 QB 752.
[24] *DPP v Jones* [1999] 2 WLR 625 at 654 per Lord Clyde.
[25] See Richard Hart, "The Mobs Are Out: The Right to Protest on Public Roads", (2000) 9 Auckland University Law Review 311; W K Hastings, "The Right to Protest Against Monarchism: Has *O'Brien* Come to New Zealand?", [1995] Bill of Rights Bulletin 90; and John Ip, "What a difference a Bill of Rights makes? The case of the right to protest in New Zealand", (2010-2011)

was not until *Director of Public Prosecutions v Jones* though that the House of Lords explicitly recognised that "the right to use the highway goes beyond the minimal right to pass and repass."[26] The Lord Chancellor emphasised the "*starting point* [is] that assembly on the highway will not necessarily be unlawful." Although the House of Lords stopped short of finding a general right of assembly or of protest on a public way, *Jones* established that protests and demonstrations are not in themselves unlawful on a public way. The possibility that protest may in certain circumstances constitute a reasonable use of a public way was left open.

[37] The freedom of assembly, the freedom of expression and the right to protest have been considered in other contexts where defendants have been charged under different provisions. The right to publicly demonstrate was considered by Temm J in BL & *LA McGinty v Northern Distribution Union*.[27] When referring to s 16 of the New Zealand Bill of Rights Act, Temm J said,

> When it comes to public demonstrations it seems to me the Court has to repeat continually that the right of the citizen to demonstrate is one that must be jealously guarded.

[38] In *Brooker v Police*,[28] the Supreme Court considered the right to protest in the context of s 4 of the Summary Offences Act which concerns disorderly behaviour. Although this is not the provision under which the present defendants are charged, the Supreme Court's comments on how the Bill of Rights Act affects the interpretation and application of that provision are instructive in how the Bill of Rights Act applies to s 22. In upholding the defendant's right to protest his treatment by the Police by holding a sign, singing, and playing a guitar, Elias CJ said that "unpopular expression will often be unsettling and annoying to those who do not agree with it."[29] As was the case in *Hopkinson v Police*[30] where Ellen France J redefined "dishonouring" the flag to require vilification rather than a mere lack of respect, the majority in *Brooker* agreed that consistency with the freedoms affirmed in the Bill of Rights Act required a stricter test for disorderly behaviour, one that required behaviour that had a tendency to disturb

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[26] *DPP v Jones* [1999] 2 WLR 625 at 632 per Lord Irvine, the Lord Chancellor.

[27] *BL & LA McGinty v Northern Distribution Union* [1992] 1 ERNZ 196 at 199.

[28] *Brooker v Police* [2007] 3 NZLR 91.

[29] Id., at [12].

[30] *Hopkinson v Police* [2004] 3 NZLR 704.

or violate the public order[31] (per Elias CJ), or that caused "anxiety and disturbance at a level which is beyond what a reasonable citizen should be expected to bear[32]" (per Tipping J), rather than behaviour that offended against values held by right-thinking members of the community and which was likely to cause annoyance to others who are present.[33]

[39] These cases show that the New Zealand Bill of Rights has required greater scrutiny of traditional interpretations of words creating offences for consistency with rights they purport to restrict. Such scrutiny was applied in *Oosterman v Police*[34] which concerned a group of protestors marching along Queen Street in Auckland protesting the United States invasion of Iraq. When a vehicle trying to use the public way bumped into some protestors, the police intervened. The police said the protestors could continue their protest on the footpath, but they had to get off the street. Mr Oosterman was arrested and charged under s22 when he refused.

[40] Harrison J said he was not satisfied that "the statutory prohibition on Mr Oosterman's freedom of movement imposed by s 22 is inconsistent with his separate freedom of peaceful assembly."[35] His Honour did not offer a meaning of "unreasonably impedes normal passage" but instead assessed the reasonableness or proportionality of its application in the circumstances.[36] He said the defendant's freedom of peaceful assembly was not infringed by the officer's request for him to leave the vehicular lanes of Queen Street. The officer said that the defendant could continue to exercise his freedom of peaceful assembly with others on the footpath. His Honour said that "[I]f the prohibition was inconsistent, then it was minimal or insignificant in that it did no more than restrict the area of public place available for Mr Oosterman to exercise his freedom." His Honour also said that if there were an inconsistency, the limitation on the defendant's freedom of peaceful assembly was justified in terms of s 5.

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[31] *Brooker* at [24] and [41].
[32] Id., at [90].
[33] *Melser v Police* [1967] NZLR 437 (CA).
[34] *Oosterman v Police*, HC Auckland, CRI-2005-404-251, 24 August 2006, per Harrison J.
[35] Id., [33].
[36] An approach that was subsequently not taken by the Chief Justice in *Morse* at [14].

[41] The approach taken in *Oosterman* was not adopted in *Stanton v Police,*[37] which concerned a defendant charged under s 22 with obstructing a footpath by maintaining a "vigil" with signs and placards. MacKenzie J's approach did not assess the reasonableness of the application of s 22 to the facts as the first step; he considered first whether the defendant's conduct fell within the meaning of s 22, interpreting that section consistently with the New Zealand Bill of Rights Act's rights and freedoms as required by s 6.[38] His Honour said:[39]

> Another common use of public areas such as footpaths is to exercise the right to protest. That right is well established at common law and it is expressly enshrined in the freedoms of expression, of peaceful assembly and of movement contained in ss 14, 16 and 18 of BORA. Section 22 is, so far as possible, to be given a meaning consistent with those rights. I consider that in this case that is to be done by taking those rights into account in determining whether the appellant's actions constituted an unreasonable impediment to normal passage on the footpath.

[42] The use of the word "unreasonably" in the phrase "unreasonably impedes normal passage" gives a degree of latitude in securing a meaning of the phrase that is consistent with the freedom of peaceful assembly affirmed by the New Zealand Bill of Rights. Although courts until *Stanton* were reluctant to establish a positive right to protest on a public way as part of "normal passage", the fact that protest is not an unlawful use of a public way, and indeed is now considered to be a right exercisable on a public way, must inform the meaning of the phrase. Further, the use of the word "unreasonably" before "impedes" logically permits reasonable impediments. Even unreasonable impediments do not become offences until they continue after a warning to desist. The phrase must also be interpreted in light of its location amongst other offences designed to facilitate the ability of the police to do their normal business of investigation, crime prevention, and policing the use of public ways. An interpretation of the phrase "unreasonably impedes normal passage" that is consistent with the freedom of peaceful assembly therefore requires recognition that normal passage includes at its core the ordinary meaning of "passage" but also a range of other activities that are not unlawful; that reasonable impediments are not regulated; that even unreasonable impediments are not regulated until they continue after a warning to desist; and that the purpose of the provision is to facilitate police operations within

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[37] *Stanton v Police* [2012] NZHC 3223.
[38] Id, at [17].
[39] Id., at [15].

the confines of the provision interpreted in a manner consistent with the freedom of assembly.[40]

[43] When these aspects of the meaning of "unreasonably impedes normal passage" are applied to this case, I do not think the activities of Mr Chiles and Mr Leason constituted an unreasonable impediment to normal passage along a public way. Considering where the provision sits in the Summary Offences Act, the Police ably demonstrated their ability to police the various uses to which the public way was put throughout the day. Mr Chiles and Mr Leason were exercising their rights to freedom of expression, movement, association and peaceful assembly contained in the New Zealand Bill of Rights on a public way. Protest is now a "common use" of public ways. This contributes to the reasonableness of their actions. On the evidence, the actions of the protestors impeded, in the sense of slowing down, the delegates' access to the stadium, but they did not prevent their access. This also contributes to the reasonableness of their actions. At the relevant times, the delegates were able to disembark from their bus and walk past Mr Chiles, who was on the footpath, into the stadium. Mr Chiles was more concerned to prevent injury he thought would likely be caused by the police opening the gate onto the protestors. Mr Leason was also on the footpath, against the fence, linking arms. [Constable 1] said he was arrested on the footpath behind the police line, but Mr Leason could not be certain. In any event, at the relevant times, both defendants were protesting on the footpath when the Police had closed both the road and the footpath to normal traffic. The impediments were not long-lasting. The evidence was that each "operation" lasted no more than ten minutes.

[44] I agree entirely with Sergeant Stonyer that this case comes down to reasonableness. Reasonableness, however, as part of the definition creating the s 22 offence, must be interpreted in light of the New Zealand Bill of Rights Act. Whenever

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[40] With respect to the facilitation of police operations, the Full Court in *Police v Beggs* [1993] 3 NZLR 615 held that s 16 of the New Zealand Bill of Rights Act imposed a requirement of reasonableness on the part of any public official seeking to restrict the freedom of assembly. In assessing reasonableness, consideration had to be given to the size of the assembly, its duration, the content of what was being expressed, and the rights of those with competing interests. Notwithstanding the focus on the actions of officials in *Beggs*, the present case does not concern a judicial review of police actions. It concerns the actions of the defendants, and whether those actions constituted an unreasonable impediment to normal passage.

a provision can be given a meaning that is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act, s 6 requires that meaning to be preferred to any other meaning. This was a vigorous and noisy protest, but it was well managed by both sides. The safety valve was at equilibrium, allowing just enough steam out to prevent an explosion.[41] When considered in light of the rights and freedoms engaged by the protest, the conduct of Mr Leason and Mr Chiles in the circumstances of this case cannot be considered to have constituted an unreasonable impediment to normal passage.

[45] Having made that finding, I do not need to go on to the s 5 inquiry into whether s 22 is a reasonable limitation that is demonstrably justified in a free and democratic society. I do not need to consider whether or not the defendants were adequately warned to desist (as distinct from being warned to let go of the fence), or, if such warnings were given, the effect of the surrounding noise on whether the warnings were received by the defendants. I also do not need to consider whether the defendants had a reasonable excuse.

[46] For these reasons, I find the defendants not guilty. The charges are dismissed.

W K Hastings
District Court Judge

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[41] A useful guide to assessing reasonableness can be found in *10 Principles for the proper management of assemblies*, published by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Office of the High Commissioner for Human Rights, September 2016, (A/HRC/31/66), (https://www.ohchr.org/Documents/Issues/FAssociation/10PrinciplesProperManagementAssemblies.pdf). Guiding Principle 3 includes the following:

- Restrictions must conform to the "principle of proportionality," meaning they must be appropriately tailored to achieve their protective function.
- Restrictions must also conform to the principle of necessity, meaning they must be the least intrusive instrument among those which might achieve the desired result.
- Restrictions on the content of assemblies may be imposed only in conformity with the legitimate limitations on rights.