Neutral Citation Number: [2024] EWCA Crim 25

Case No: 202201829 B5; 202303514 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CHESTER CROWN COURT
His Honour Judge S Everett
T20210059

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2024

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE WARBY
and
MRS JUSTICE CHEEMA-GRUBB

- -

Between :

REX	**Respondent**
V	
THOMAS CASSERLY	**Appellant**

- -
- -

Danny Friedman KC (instructed by **Hodge Jones & Allen**) for the **Appellant**
Lucy Organ (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 15 December 2023

- -

Approved Judgment

This judgment was handed down at 10.00am on 23 January 2024 in Court 4 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Carr of Walton-on-the-Hill, LCJ:-

Introduction

1. On 16 May 2022, in the Crown Court at Chester, the appellant, Thomas Casserly, was convicted after trial of a single count of "sending an indecent or grossly offensive electronic communication with intent to cause distress or anxiety contrary to s 1(1)(b) of the Malicious Communications Act 1988". He was later sentenced to a community order with requirements for 50 hours of unpaid work and a 10-day rehabilitation activity. A five-year restraining order was also imposed, restricting his freedom to contact the complainant. He now appeals against conviction with the leave of the full court.

2. The complainant was an elected town councillor. The prosecution was based on the contents of an email sent to her by the appellant, one of her constituents, in which he challenged her ability to perform her public role. The appellant maintained that his communication was a legitimate expression of his opinion; he was entitled to express his concerns in accordance with Article 10 of the European Convention of Human Rights (Article 10) (the Convention).

3. The appeal raises the interaction between s 1 of the Malicious Communications Act 1988 (s 1) (the 1988 Act) and Article 10.

4. Section 1 provides materially as follows:

> "(1) Any person who sends to another person-
>
> (a) a letter, electronic communication or article or any description which conveys-
>
> i) a message which is indecent or grossly offensive;
>
> ii) a threat; or
>
> iii) information which is false and known or believed to be false by the sender; or
>
> (b) any article or electronic communication which is, in whole or in part, of an indecent or grossly offensive nature,
>
> is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated."

5. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers….

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

6. It is argued that the conviction is unsafe because the prosecution itself was incompatible with the appellant's right under Article 10 and that the case should have been withdrawn from the jury altogether; alternatively it is argued that the manner in which the jury were directed as to the appellant's right of freedom of expression was inadequate. Also before the court is an application for an extension of time for seeking leave to appeal the sentence (on the basis that the stigma of sentence is incompatible with the appellant's right under Article 10). This is said to have a bearing on the conviction appeal.

7. This is the judgment of the court, to which each member has contributed.

The facts

8. The appellant lives in Middlewich, Cheshire. For many years he has taken a keen interest in local politics, frequently attending meetings of the Town Council and asking questions. One of his subjects of interest is the maintenance of Middlewich Cemetery.

9. The complainant, Victoria (Vicky) Dominguez-Perez, was elected as a Town Councillor for Middlewich in May 2019 and held that position at all material times. She is profoundly deaf, visually impaired and has a muscle-wasting condition. She had a guide dog, hearing aids and sometimes used a wheelchair. These matters had been reported in a local online newspaper, the Daily Post.

10. On 1 June 2020, the appellant sent an email to Middlewich Town Councillor Mike Hunter with the subject line "Re: Middlewich Cemetery: very serious public concerns". The email raised concerns about "the underhandedness and secrecy that surrounds the Middlewich Cemetery Board". It made allegations of mendacity against two named individuals and called on Mr Hunter to endorse a complaint which the appellant had made to the Ministry of Justice. The email was sent at 09:05 using the pseudonym "a random" and the email address itsrandom2003@yahoo.co.uk. It was copied to other Town Councillors, including the complainant, and a few other individuals. About two hours later, Mr Hunter replied to all saying "Hi. Show me the proof. Mike." Shortly afterwards the complainant also responded by a "reply all" email saying "Hi. I would like to see evidence and proof".

11. On 3 June 2020 the appellant, using the same pseudonym, emailed the complainant, copied to Mr Hunter and the other Town Councillors, under the same subject line ("the 3 June email"). The email chain as produced before the jury was redacted so as to remove both the Town Councillors' various email addresses and the subject line (which read "Re: Middlewich Cemetery – Very serious public concerns.") We can see no justification (at least) for the redaction of the content of the subject line – which was relevant to the appellant's defence that he was entitled to express what he considered to be genuine matters of public concern.

12. The main body of the 3 June email was in these terms:

> 'Hi Vicky,
>
> For somebody that was so quick to demand evidence you're very slow in acknowledging it (means confirming you've received it, or that you're grateful I sent it to you).
>
> As a councillor you owe your position to the fact that Middlewich Labour were desperate to stand 12 candidates (any 12) against Middlewich First, but at the 11th hour they learned that your dog Toby was ineligible (meaning not allowed). With the best will in the world you don't have the basic intelligence or aptitude to be a councillor, but to Middlewich Labour that didn't matter because to them you are still a bum on a seat who supports them.
>
> I was at the November 2019 Middlewich town council meeting where Mike Hunter had you publicly read out the motion. Although it was a very short motion he had to step in on two or three occasions as struggled to pronounce fairly simple words. Personally I thought it was very embarrassing that Mike put you in a position where you revealed you had the reading ability of a primary school child.
>
> Middlewich has many problems which need addressing and the residents are looking to the councillors to have the knowledge, understanding and intelligence to improve the town for all residents. Therefore how does a councillor that has limited reading ability, profoundly deaf, and partially sighted feel that they can make a difference?"

13. The email then continued with a cut and paste of a press clipping and a link with some lines from the Daily Post outlining the complainant's disabilities. The email went on:

> "You've proved you're prepared to ask me questions, so surely you should be prepared to answer mine!
>
> Regards,
>
> Harry"

14. The complainant did not reply but rather forwarded the 3 June email to the police for investigation. On 24 August 2020, the appellant was contacted by the police. On 3 September 2022 he attended voluntarily at Sandbach police station for an interview under caution. He admitted sending the 3 June email, asserting that the email address (itsrandom2003@yahoo.co.uk) was one that he used to communicate with the Town Councillors, all of whom knew who he was. When questioned about his intention in sending the 3 June email, he stated that he often questioned the Council to find out information or to hold people accountable. His intention in sending the email to the complainant was "to put her on the spot so that she can answer those questions." He said that he thought it appropriate for Town Councillors to explain their disabilities and to identify the reasonable adjustments that they required. He said that elected representatives needed to have a thicker skin than others and to be accountable. He cited the case of *Calver,* to which we refer later, and the Nolan Principles for Standards in Public Life.

The proceedings

15. On 5 January 2021 the appellant was charged with an offence contrary to s 1 by way of a notice and summons to appear at the Magistrates' Court. The appellant chose to represent himself, as he did throughout these proceedings until the full court's grant of leave to appeal (on 11 May 2023). On 12 February 2021, at the Magistrates Court, the appellant elected to be tried by jury and was sent for trial in the Crown Court.

16. The indictment contained a statement of offence in the terms we have set out in [1] above. The particulars were that the 3 June email was an electronic communication "which was in whole or part, of an indecent or grossly offensive nature" and that the appellant's "purpose, or one of his purposes, in sending it was that it should cause distress or anxiety to the recipient or to any other person to whom he intended its contents or nature to be communicated." This language mirrors the terms of s 1(1)(b) of the 1988 Act, as set out at [4] above. The appellant pleaded not guilty on 12 March 2021.

17. Over the following 10 months seven preliminary hearings took place before the trial judge. During this period the appellant was offered an arrangement by which, in lieu of prosecution, he would submit to a wide-ranging restraining order requiring him to cease contact with the complainant and other Town Councillors. He expressed a willingness to undertake not to contact the complainant directly but declined to agree otherwise to the proposed arrangement. This was on the basis that the proposed order was too wide and not justifiable under Article 10.

18. The appellant's defence was set out in a defence statement contained in an email of 17 September 2021 and updated by another email dated 7 January 2022. In the first, the appellant accepted sending the 3 June email but disputed that its content was grossly offensive or intended to cause distress or anxiety as alleged. The updated statement expanded on the appellant's reliance on Article 10, saying this:

> "Article 10 protects my freedom to hold opinions and to … impart information and ideas without interference by public authority. …
>
> … I believe that not [only] does Article 10 cover the contents of my email of 3rd June 2020, but that both my prosecution in this court case, and the belief shared by both the CPS and the Judge … that the best way to deal with my email is by way of a Restraining Order is an interference with my rights under Article 10."

19. In support of these points the updated defence statement cited a number of authorities. The passages relied on, in the main, came from decisions of the Divisional Court. Taking them in date order, they were the well-known dicta of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (*Redmond-Bate*) (at [20]) that "freedom only to speak inoffensively is not worth having", and those of Beatson J in *R (Calver) v The Adjudication Panel for Wales* [2012] EWHC 1172 (Admin); [2013] PTSR 378 (*Calver*) (at [55] and [58]) that "freedom of expression includes the right to say things which 'right thinking people' consider dangerous or irresponsible or which shock or disturb"; and that politicians acting in their public capacity should "possess a thicker skin and greater tolerance than ordinary members of the public". Reference was also made to the Divisional Court's decision in *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin); [2021] 1 WLR 1828 and to *R (Miller) v College of Policing* [2021] EWCA Civ 1926; [2022] 1 WLR 4987. In addition, the appellant relied

on the Crown Prosecution Service Guidelines for the prosecution of cases involving communications. These showed, he said, that "the importance of Article 10 in a case like this is something that the CPS are well aware of" yet had been disregarded.

20. The Respondent's Notice states there were "numerous discussions with the Learned Judge about the applicability of such provisions". It is said that the judge correctly interpreted the position thus: "Article 10 is obviously subject to offences in criminal law, eg Threats to kill etc.". The judge "repeatedly set out to the appellant that freedom of expression was always subject to offences under the criminal law", and "the appellant conceded as much".

21. Consistently with this position, the prosecution case at trial was straightforward. The appellant had admitted responsibility for sending the email to the complainant. The jury were invited to consider the sentence asking "… how does a councillor with limited reading ability … feel they can make a difference", and to find that the view expressed in that sentence was grossly offensive and that in sending it the appellant had intended to cause distress or anxiety to the complainant and/or to other recipients of the email. The prosecution relied on the redacted email exchanges and on oral evidence from the complainant and the officer in the case.

22. The appellant's case was in line with his defence statements. He gave evidence in which he accepted that he had sent the email to the complainant, but relied on his right of free speech and the need for the complainant to be accountable to the public. He said that he had expressed an opinion about the complainant's intelligence and aptitude based upon his dealings with her and observations of her since her election as a councillor. He said that he considered that her disabilities had an impact on her ability to perform her role and that he was entitled to express this view.

23. The appellant submitted to the judge that the jury should be directed in such a way as to ensure that when deciding whether the 3 June email was "grossly offensive" they took due account of the public role which the complainant had taken on and the appellant's free speech rights. The appellant relied on the authorities that he had cited in his defence statement.

24. Whilst there is no record of any formal ruling, it appears that the judge did not consider it necessary or appropriate to give the jury any such direction. The Respondent's Notice and the judge's summing up suggest that the judge accepted the legal analysis advanced by the prosecution as described above.

25. The judge left the case to the jury on the basis that the key passage in the 3 June email was the last sentence of the quotation set out in [12] above, namely

> "Therefore how does a councillor that has limited reading ability, profoundly deaf, and partially sighted feel that they can make a difference?"

He stated "the real question" was a simple one: "does that view fall foul of the law?". Written legal directions spelt the matter out, identifying the two key questions for decision as whether that sentence was "grossly offensive by reference to normal everyday language and standards of ordinary decent people", and whether the appellant had intended at the time of sending the email to cause distress or anxiety.

26. The relevant part of the judge's written legal directions was as follows:

> "In order to prove that the defendant is guilty of the offence charged, keeping in mind the burden and standard of proof, the prosecution must make you sure of the following matters:-
>
> (1) On 3rd June 2020 the defendant sent an electronic communication (i.e. an email) to Victoria Dominquez-Perez.
>
> (2) The prosecution must also prove that the email that he sent was either "indecent" or "grossly offensive". I direct you that, as a matter of law, the email that was sent could not be regarded as "indecent". Consequently the prosecution must, alternatively, prove that the email was, instead "grossly offensive". You must decide what is grossly offensive by reference to normal everyday language and standards of ordinary decent people. Consequently, it wouldn't be sufficient, for example, for you to decide that the message was, for example, rather rude. You will appreciate that that will not be sufficient to prove the case against the defendant.
>
> (3) Additionally, the prosecution must also prove that one of the purposes of the defendant in sending it was that he should cause distress or anxiety to its recipient or to any other person to whom he intended its contents or nature to be communicated. The prosecution does not have to prove that anyone was actually caused distress or anxiety. Whether someone was or, indeed was not, actually caused distress or anxiety, as a result of receiving the message, is irrelevant to your considerations. It is the intention of the defendant, when sending the message, which is relevant, in this regard. To decide what the defendant's intention was at the time of sending the message you need to consider what he did and said before, at the time of and, after the sending out of the email, and then draw conclusions from your finding about these things."

27. The written legal directions went on to summarise the rival contentions on those points and to direct the jury as follows:-

> "As you know it is not in issue that, on 3 June 2020 – nearly 2 years ago – the defendant Mr Casserly sent his local councillor, Ms Dominguez-Perez an email following issues, locally, over which he was critical of her actions. In his email he stated "Therefore how does a councillor that has limited reading ability, profoundly deaf and partially sighted feel that they can make a difference?". It is the prosecution case that this email was grossly offensive and that one of the purposes of the defendant was that he should cause distress or anxiety to Ms Dominquez-Perez or to anyone else to whom he intended the email to be communicated.
>
> If you were sure of <u>all</u> of those matters you would find him guilty as charged.
>
> However, as you know, it is the defendant's case that he was unhappy with some work that Ms Dominguez-Perez was doing as a councillor – and did not believe that she was capable of properly discharging her duties as a councillor - in part because of her disability. His case is that he was simply exercising his right of expressing an opinion to his councillor and that the email could never be described

> as grossly offensive, nor was his purpose to cause distress or anxiety – rather he was simply expressing his view about her ability as a councillor.
>
> Keeping in mind the burden and standard or proof, if his case is or may be correct – or if you were not sure that the prosecution has proved any one or more of the matters in (1)-(3) above – you would find him not guilty as charged."

28. The judge then gave the jury a further legal direction as to the correct approach to adopt when considering the fact that (apart from the cross-examination of the complainant, which had been conducted by counsel in the normal way) the appellant had represented himself. In this context, the judge said:-

> "… because, as you will appreciate, he is not fully conversant with the law and the procedure in cases of this nature, part of my job was to ensure that he was assisted to ensure that the law and the procedure throughout the trial was followed correctly. If he did not always follow the procedure correctly you should not hold that against him. Additionally, anything he said when he was not giving evidence on oath is not evidence upon which you can decide this case. In that regard he is treated as any other advocate would be treated, i.e simply arguing the case and making submissions for you to consider."

29. Later, when summing up the complainant's evidence, the judge said:-

> "… it is what you think about the email that is important; and so *you* have to decide, firstly, was that email, and particularly that sentence, was it grossly offensive? And if you come to the conclusion are you sure it was Mr. Casserly's intention in sending it to cause distress or anxiety either to her or to others who were copied into the message? It is as simple as that."

30. The jury returned a guilty verdict. On 12 June 2022 the appellant filed notice of appeal against conviction. He was sentenced on 20 June 2022 when the judge told him that the reason why he had sent the message was "totally irrelevant". It was over an issue with the Town Council; although the appellant had the right robustly to challenge Councillors he had to do so "in a courteous and proper manner". The jury had concluded that what he did "was not proper." The judge asked rhetorically "Why should a councillor have to put up with such grossly offensive remarks?" He said that the appellant had shown a complete lack of empathy for the complainant and no remorse. The judge said that he had wondered whether or not a trial was really necessary but, having seen the victim and the belligerent way in which the appellant had approached the case during the trial, he was quite satisfied that the prosecution was right to prosecute the matter.

The appeal

31. The notice of appeal contained four grounds of the appellant's own devising. On his renewed application for leave, the full court affirmed the single judge's refusal on three, but granted leave to argue that the judge's legal directions were incorrect as a matter of law. It was considered arguable that "it was not a complete answer to the applicant's argument under Article 10…to say that the right to freedom of expression took effect subject to section 1(1)(b) of the 1988 Act; the position was, in fact, the other way around" and that "a determination needed to be made on proportionality … either by

the judge (as we are inclined to think) or left to the jury with appropriate directions, neither of which occurred." Reference was made to *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin); [2008] 1 WLR 276 (*Connolly*), *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259; [2023] 2 WLR 651 (*The Colston Statue Case*) and *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 (*Abortion Services*).

32. Mr Friedman KC, now instructed for the appellant, submitted that the judge's legal directions were inadequate as they failed to take due account of the common law right to free speech, or the corresponding Convention right under Article 10. More specifically, he argued that the judge had failed to give any or any adequate consideration to readings of the 1988 Act and related legislation that had taken account of those rights. Mr Friedman emphasised that the 3 June email was political in context and in content. Accordingly, Mr Friedman placed particular reliance on the reasoning of the Divisional Court in *Connolly* that the term "grossly offensive" in s 1 may need to be given an "enhanced" meaning in order to ensure compatibility with free speech rights. He referred to a range of other authorities concerning the importance of political speech, and the narrow circumstances in which it can properly be the subject of interference. These included but were not limited to the authorities mentioned at [19] and [31] above, and *Collins v Director of Public Prosecutions* [2006] UKHL 40; [2006] 1 WLR 2223 (*Collins*).

33. Mr Friedman also sought leave to argue that, for essentially the same reasons, the conviction was (a) unsafe because it should have been withdrawn from the jury and (b) unlawful because the stigma of a criminal conviction and sentence was incompatible with Article 10 and hence contrary to s 6 of the Human Rights Act 1998 (HRA). The application was not resisted by Ms Organ for the respondent, and we grant leave to argue these further grounds.

34. The respondent's principal position, as developed by Ms Organ in oral argument, was that the 3 June email fell outside the scope of Article 10: it was purely offensive and insulting. In the alternative, it was argued that the judge's directions were compatible with the right to freedom of speech and the applicable authorities. "[G]rossly offensive" is at the top end of the scale, meaning offensive in the highest possible degree. The ingredients of the offence themselves therefore strike the necessary balance between free speech and the rights of others, leaving no need for any further analysis of proportionality. It was open to the jury to conclude on the evidence that the 3 June email was grossly offensive. When asked what it was about the email that was grossly offensive, Ms Organ replied that the email implied that the complainant was unable to understand simple matters and lacked the intelligence or aptitude to be a Councillor, and that it contained several references to the complainant's disabilities, asserting that they made her less eligible for political office than her dog. None of this, submitted Ms Organ, amounted to serious criticism of the complainant as a Councillor. It was simply "abuse with no value".

Discussion

35. Article 10(1) of the Convention guarantees the right to "impart and receive information and ideas". This is a fundamental right, the scope of which is not limited to information or ideas on political issues or "serious criticism". As Mr Friedman has rightly reminded us, the common law right of free speech covers the same ground and is also regarded

as a fundamental norm. The two rights can properly be approached on the basis that they are co-extensive.

36. We address first the respondent's submission that the sending of the 3 June email did not engage Article 10 at all.

37. Some forms of self-expression will fall outside the scope of the free speech right, because they amount to no more than vulgar abuse and convey no ideas and no meaningful information, or for other reasons. At the other extreme, information and ideas which aim at the destruction of democracy, or its fundamental freedoms are not protected: see Article 17 of the Convention. But the law does not require courtesy. It is trite law that speech does not lose protection just because the information or ideas that it conveys are offensive, disturbing or even shocking. Communications of that kind are within the scope of the right. The passages from the *Redmond-Bate* and *Calver* cases referred to in [19] above are well-known statements of the position. They reflect both the common law (see for instance *R v Central Independent Television plc* [1994] Fam 192 (*Central Independent Television*) (at 203) and the Strasbourg jurisprudence (see for instance *Jerusalem v Austria* (2003) 37 EHRR 567 (at [32] and [38])).

38. The point is well-illustrated by *Connolly.* The defendant was an anti-abortion activist who sent letters to pharmacies which sold the "morning after" pill. The letters contained images of aborted foetuses. The defendant was charged with an offence of sending an indecent or grossly offensive article contrary to s 1. The Divisional Court held that, although the images were "shocking and disturbing", the sending of them was an exercise of the right to freedom of expression: "[i]t was not the mere sending of an offensive article: the article contained a message, namely that abortion involves the destruction of life and should be prohibited" (see [11] to [14]).

39. Very obviously, the 3 June email may have contained passages that were insulting, upsetting and offensive in nature. But its sending did not come close to an act aimed at the destruction of any of the rights and freedoms in the Convention for the purpose of Article 17 of the Convention - and Ms Organ properly withdrew her written submission to the effect that it did.

40. Nor can the 3 June email properly be treated as a meaningless communication that contained nothing other than abuse. The email was sent to the complainant under the subject line: "Re: Middlewich Cemetery: Very serious public concerns" and in her capacity as Town Councillor, and copied to other Town Councillors, similarly in that capacity. It referred to events at a November 2019 Town Council meeting; it referred to the "many problems" which Middlewich was said to have, and to the fact that residents were looking to the Town Councillors to have the capacity to "improve the town for all residents".

41. Further, and consistent with the above, that is not the way the case was treated at trial. On the contrary, as we have noted, the case focused on a single sentence of the 3 June email, raising the question whether this sentence conveyed "views" that were grossly offensive and intended to cause anxiety or distress. The judge's directions recognised that the appellant had been "critical of" the complainant's actions. As Ms Organ's answer to our question confirmed (see [34] above), the real gist and substance of the prosecution case was that the sending of the 3 June email was a criminal offence because it conveyed a message that was grossly offensive. The appellant was

prosecuted for an exercise of his right to free speech and, moreover, the expression of an opinion.

42. The question then becomes whether the process was compatible with that fundamental right. In our judgment it was not.

43. The right to freedom of speech is qualified. There are circumstances in which it can be restricted or, in the language of the Convention, interfered with by the state. But the common law right to freedom of speech is "subject only to clearly defined exceptions laid down by common law or statute" and Article 10(2) prohibits interference with the Convention right unless it is "necessary in a democratic society" for one or more of a limited number of legitimate aims: see *Central Independent Television* at 203. The legitimate aims listed in Article 10(2) include "the prevention of … crime … [and] the protection of the … rights of others…". That does not mean, however, that the criminal law automatically or invariably prevails over the right of free speech. An interference with free speech is only necessary for this purpose if it corresponds to and is proportionate to a "pressing social need".

44. A series of cases involving the criminal law and speech or behaviour that is (or is claimed to be) politically motivated has led to the identification of three broad categories of case: (i) those in which, on a proper analysis, the applicable criminal law does not interfere with fundamental rights at all, so that there is no need for any proportionality assessment; (ii) those in which the criminal law does or may interfere with such rights but proof of the ingredients of the offence will, without more, be sufficient to render a conviction proportionate; (iii) those in which the law does or may interfere with fundamental rights but the ingredients of the offence do not of themselves meet the proportionality requirement, so that the court is required to address it: see *Abortion Services* at [52] to [61].

45. The first category includes cases in which the defendant's conduct falls outside the scope of Articles 9, 10 and 11 of the Convention because it "involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society" (see *Abortion Services* at [54]). The second category includes "many commonly encountered criminal offences, such as offences of violence, and offences concerned with damage to property" which are "likely to be defined in such a way as to make an assessment of proportionality unnecessary" (see *Abortion Services* at [55]). The third category includes cases where "the interpretative duty imposed by section 3 of the Human Rights Act may enable the court to construe the relevant provision in a way which renders it compatible with the Convention rights". This may involve "interpreting it so as to allow for an assessment of the proportionality of a conviction in the circumstances of individual cases" (see *Abortion Services* at [57]).

46. The present case clearly does not fall into the first category. Nor in our judgment does it fall into the second, and the judge was wrong to proceed on the basis that (or as if) it did. The meaning of "grossly offensive" is not defined in s 1 (either generally or specifically in circumstances where the right to freedom of speech is engaged). Rather, the case was one in which it was necessary to interpret and apply the statute in such a way as to ensure that the proportionality requirement was met.

47. What could be achieved on the facts here, and what was required, was a Convention-compliant interpretation and application of the language of s 1 to the facts of the case.

48. Drawing on the authorities referred to above, and in this context, we would identify the following considerations:

    i) Whether a message is "grossly offensive" is a question of fact to be answered objectively by reference to its contents and context, not its actual effect (see in particular *Collins* at [8]*)*;

    ii) The question is whether the message goes beyond the limits of what is tolerable in our society (see in particular *Collins* at [12]);

    iii) The answer must reflect society's fundamental values (see in particular *Collins* at [9]). Those values include the great weight to be given to free speech, the need for tolerance of statements and opinions that some might find offensive or upsetting, and the special need for tolerance on the part of those in public positions (see in particular *Redmond-Bate* at [12] and *Calver* at [55] and [58]);

    iv) The context of the speech must be considered. In a democratic society political speech is to be given particular weight (see in particular *Connolly* at [14]). The Strasbourg jurisprudence identifies a hierarchy of speech, with political speech at its apex. The greater the value of the speech in question, the weightier must be the justification for interference. The proportionality assessment must include some evaluation of the kind of speech under consideration;

    v) Accordingly, where freedom of speech in a political context is engaged, and there is a case to answer, it is essential that the offence be defined in terms which reflect the enhanced meaning of "grossly offensive" (see in particular *Connolly* at [18] (approved in *The Colston Statue Case* at [51]));

    vi) In order to establish that at least one of the defendant's purposes was to cause distress or anxiety, it is not enough for the prosecution to prove that the message was likely to have that effect and that the defendant knew or foresaw this, or that he gave no thought to the matter; the prosecution must prove that at least one of the defendant's objectives was to bring about that consequence. The offence is committed only if causing distress or anxiety is at least one of the defendant's "purposes". In the context of s 1, "purpose" is not to be treated as synonymous (and interchangeable) with "intention". The 1985 Law Commission Report of 1985 (Com No 147) explained (at paragraph 4.31) that the word "purpose" was deliberately chosen instead of "intention" to ensure a "sufficiently restricted interpretation" and to convey "what is appropriate in this context, namely, *a desire and intention* that the specified consequence – in this case distress and anxiety – should come about" (emphasis added). Criminal liability was not intended to arise in "situations where it is necessary to communicate to others information which is shocking or even menacing and, as the sender knows, will inevitably cause distress" (see paragraph 4.23). In our judgment the word "purpose" connotes something that is a motivating objective - a restrictive approach which gives further effect to the interpretative duty imposed by s 3 of the HRA.

49. These considerations may lead to the conclusion that a prosecution cannot be justified. As the CPS Guidelines state, "prosecutors should only proceed with cases under section 1 [of the 1988 Act] … where the interference with freedom of expression is necessary

and is proportionate." There must be sufficient evidence that the communication in question, in its particular context, is "more than offensive, shocking or disturbing" and goes "beyond the pale of what is tolerable in society". We are not persuaded, however, that the prosecution of the appellant was itself unlawful. Nor do we accept that the case should have been dismissed at the outset or withdrawn from the jury at any stage. It would, in our judgment, have been open to a reasonable jury properly directed to conclude from the 3 June email and the other evidence in the case that the email conveyed a grossly offensive message and that at least one of the appellant's purposes in sending it was to cause distress or anxiety to the complainant. There was therefore properly a case to go before the jury. The proportionality issue could and should have been addressed by suitably tailored legal directions.

50. But, as indicated, we are persuaded that the jury was not properly directed on both limbs of the s 1 offence, namely the sending of a grossly offensive communication with the necessary intention.

51. Points ii) to vi) in [48] above were either not addressed at all or were addressed only inadequately. There was no direction on the importance of free speech as a fundamental value in society; on the need for special tolerance when it comes to speech on political issues; on the need for public figures to have particular tolerance; or on the need for the prosecution to prove that at least one of the appellant's purposes (in the sense of objectives) in sending the 3 June email was to cause distress or anxiety to its recipients (or any other person to whom he intended its contents or nature to be communicated).

52. Without aiming to dictate in what precise terms the jury should have been directed in order to safeguard the appellant's right of free speech, the following points needed to be made. The jury should have been directed that the law protects freedom of speech because it is part of living in a free and democratic society. Whether a communication is so grossly offensive that it amounts to a criminal offence and loses the protection of freedom of speech, depends on its content, the context in which it was sent and the purpose(s) of the sender. In particular, on the facts here:

    i) The defendant was in dispute with the Town Council and this email was part of a series of communications between him and Town Councillors. Therefore, it was sent in a political context. Holding politicians to account is an important part of a democratic society;

    ii) When people are expressing themselves in a political context the law expects those who receive the communications to have a thicker skin than those who are ordinary citizens;

    iii) The use of strong language, even that which is offensive, shocking or extremely rude, may not be enough to amount to the offence charged;

    iv) Accordingly, the prosecution had to meet a very high threshold. It would only be possible for the communication to be grossly offensive if, in the jury's judgment, it went well beyond robust scrutiny of an elected councillor in the performance of the role to which she was elected;

    v) It was not enough for the prosecution to prove that the 3 June email was likely to have caused distress or anxiety and the defendant either knew it was likely to

have that effect or did not give thought to whether it would. What mattered was what was the defendant's objective(s) in sending the email. The jury had to be sure that at least part of his objective(s) in sending the email was to cause distress or anxiety.

53. As will be apparent, we consider that the directions that were in fact given to the jury fell materially short of what was required. The judge did identify for the jury the nature of the appellant's case but that was not enough. What was necessary was a judicial direction on the matters set out above. The absence of such direction was compounded by the judge's direction as to the appellant's status as a litigant in person. In the circumstances of this case, that direction, whilst in itself impeccable, tended unfairly to downplay and undermine the weight to be given to the points which the appellant had (in fact correctly) made about free speech and political communication.

Conclusion

54. For all these reasons we conclude that the appellant's conviction is unsafe. We allow the appeal and quash the appellant's conviction. In these circumstances, the application to extend time for appealing against sentence does not arise for decision.

55. This judgment should not be read as being in any way prescriptive of the directions (or self-directions in the Magistrates' Court) to be given in every prosecution under s 1. The offence created by s 1 can be committed in a variety of different ways, some of which may not involve any interference with freedom of speech, such as the sending of an "article" of an "offensive nature" by post. Even in cases such as the present where Article 10 is engaged, the directions will always need to be tailored to the specific facts of the case. What matters in such circumstances is that the relevance of Article 10 is reflected fairly in the consideration of whether or not a communication is "grossly offensive", and that the relevant state of mind is identified properly.

56. Finally, we add a few words on the question of a potential retrial. At the outset of the hearing Ms Organ indicated that she had instructions to seek a retrial in the event of the appeal against conviction succeeding. No doubt the position will be reviewed in the light of this judgment. Any application for a retrial will of course be considered fully in the normal way. However, in order to assist the parties, we can express the provisional view that it does not appear to us that the interests of justice require a retrial, taking into account, amongst other things, the fact (so Mr Friedman informed us) that the appellant has served in full the sentence imposed on him.