Neutral Citation Number: [2020] EWHC 798 (Admin)

Case No: CO/3538/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

ON APPEAL FROM THE CROWN COURT
AT SOUTHWARK (HHJ BARTLE QC & LAY MAGISTRATES)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE SWIFT

- -

Between:

RAHMAN PWR **ISMAIL AKDOGAN** **ROTINDA DEMIR**	**Appellants**
- and –	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -

Jude Bunting (instructed by **Birnberg Peirce Solicitors**) for **the First Appellant**
Joel Bennathan QC & Russell Fraser (instructed by **Morgan Has Solicitors**) for **the Second and Third Appellants**
Dan Pawson-Pounds (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16th January 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 3rd April 2010.

Lord Justice Holroyde:

1. The three appellants took part in a demonstration in central London on 27th January 2018. Each carried a flag of the Kurdistan Workers Party (the Partiya Karkeren Kurdistane - "the PKK"), an organisation proscribed under the Terrorism Act 2000. They were each charged with an offence contrary to section 13(1) of the Terrorism Act 2000, and were convicted of those offences by a magistrates' court and, on appeal, by the Crown Court. They now appeal by way of case stated against their convictions, which they contend were wrong in law. The essence of their argument is that section 13(1) of the 2000 Act does not create an offence of strict liability, and the appellants therefore could not be convicted without proof of mens rea; or alternatively, if the section does create an offence of strict liability, it is incompatible with article 10 of the European Convention on Human Rights.

The facts:

2. The facts are fully set out in the Case Stated, which records that two of the appellants were of previous good character, whilst the third had a single conviction which resulted in an absolute discharge. The broad purpose of the demonstration in which they took part was to demonstrate against the perceived actions of the Turkish state in Afrin, a town in north-eastern Syria.

3. An agreed timeline set out the sequence of relevant events, as follows:

12.30: Protesters began to gather at Langham Place outside the BBC. Images show the assembly of flags present at the BBC when speeches were given and prior to the march setting off.

12.50: Mr Pwr is seen to be standing on a wall waving a flag outside the BBC. Image shows him waving a red flag. The face on the flag is Abdullah Ocalan, who founded the PKK in 1974 and has been imprisoned in Turkey since 1999.

13.06: Police speak to organisers about PKK flags in the crowd.

13.23: Mr Akdogan is seen in crowd outside BBC with a PKK flag. He is there for several minutes. Images show Mr Akdogan with a flag in his hand.

13.30: DS Hearing enters the crowd to address issue of PKK flags.

14.00: March sets off from BBC.

14.17: DS Hearing again enters the march to address flag issues. Males waving PKK flags clearly heard shouting "We are PKK, PKK are us". This is relayed to Inspector Barnes.

14.26: Marshals attempt to tell police evidence gatherers when and where they can film.

14.34: Regent Street south of Oxford Circus. Mr Pwr with same flag in protest marching south.

14.42: Regent Street. Mr Pwr marching south.

14.55: Piccadilly Circus. Mr Pwr marching with flag. Image shows this.

15.20: March arrives at Whitehall.

15.30: PKK flags are still being flown in the march.

15.43: Mr Demir is seen in crowd with a PKK flag.

15.48: Mr Demir is waving flag outside Downing Street. Images show him with a red flag in his hand in Whitehall.

16.06: Mr Pwr is removed from the protest outside Downing Street and was reported for the offence. Image shows him being led away.

16.12: Male addresses crowd and proclaims "Dear friends, a friend over there has just been arrested. Do you know why? Because he was flying the flag of the Partiya Karkeren Kurdistane. He has been arrested because I think, I hope you will agree with me that we will not leave here until he is freed, that we will stay here or go to the police station or do whatever we have to do to make sure this man is free". Whilst he is saying this, someone is shouting "we are PKK we are PKK.".

16.12: Person clearly heard to say "The British police have been trying to prevent this march all along, they are trying to arrest people and intimidate people flying the PKK flag".

16.13: Another male addresses the crowd and says "If the PKK flag is a problem for the British police, do you remember the ISIS flag, the terrorist ISIS flag was flying by the Parliament and they haven't spoken a single word to him … Shame on the British police".

16.13: Mr Demir in crowd when "we are PKK" is being chanted right next to him.

16.15: Person in crowd can be heard to say "The PKK have fought ISIS under this flag, you are not getting your hand on this flag".

16.30: Protesters began to leave the vicinity of Downing Street.

16.32: Mr Akdogan is identified by PS Rooney and is spoken to by officers and reported for offence.

16.38: Mr Demir is spoken to by officers and reported for offence as he leaves the protest.

4. The Case Stated also summarises the evidence given by four witnesses. DS Hearing said that membership of the rally was fragmented and that, in interactions with public order officers about the flying of PKK flags, organisers had told him they could not account for the actions of all present as there were various groups on the march. He agreed that the nature of protests from his experience meant that numerous organisations might attend and that articles could be brought and distributed among people participating.

5. Sergeant Rooney gave evidence that he saw both Mr Pwr and Mr Akdogan carrying flags and considered that each was showing support in carrying a PKK flag. He heard the chanting of "we are PKK" but neither Mr Pwr nor Mr Akdogan was involved in that chanting. Mr Pwr was compliant when stopped and did not say anything in support of PKK. He did not speak English. Mr Demir was stopped after the march.

6. PC Bray gave evidence that he saw Mr Demir and took the view he was supporting the PKK by waving his flag.

7. An expert witness, Mr Stephens of the Royal United Services Institute, gave evidence that the flags which the appellants were carrying were PKK flags. The summary of his evidence in the Case Stated continues as follows:

> "(4) The vast majority of observers of a Turkish/Kurdish background would recognise these flags as those of the PKK and know that this had been designated as a terrorist organisation. This would be particularly true of those politically aware enough to attend rallies of this nature.
>
> (5) Given the plethora of political parties with three letter acronyms that exist in the Kurdish political space, Kurdish political parties make themselves more readily identifiable by the symbols and flags they adopt. As such, the adoption of flags and pictures of ideological forebears is central to the expression of political loyalty in Kurdistan.
>
> (6) Many attendees at demonstration of this type have chosen not to fly such flags.
>
> (7) Those at a march can express their sympathy by using flags which are not PKK flags."

8. At the conclusion of the prosecution evidence, submissions of no case to answer were made by the appellants. Those submissions were dismissed by the Crown Court in a judgment given on 6th February 2019, which addressed many of the authorities now cited to this court. The trial was then adjourned part heard. When it was resumed, the appellants did not give evidence. In a judgment given on 8th May 2019, the Crown Court found that the offences were proved and convicted the appellants.

The decisions of the Crown Court:

9. In rejecting the submissions of no case to answer, the Crown Court was satisfied that section 13 of the 2000 Act created an offence of strict liability and that the prosecution were not required to prove mens rea. The court found the language of section 13 to be clear and unambiguous, and therefore declined to look at other Parliamentary material to establish its meaning. Although the presumption of mens rea was well established, the court could not substitute for the plain words of the statute a different provision. Although neither consideration was determinative, the court took into account that other

sections of the 2000 Act do provide for mens rea and that the wording of section 13 was identical to that of two predecessor provisions.

10. The Crown Court accepted that the existence of the offence prima facie infringed the rights arising under article 10. It concluded that the offence was prescribed by law, so that the principal issue was as to whether section 13 was a proportionate response to the mischief at which it was aimed. The court was satisfied that it was, section 13 being part of the legislation which Parliament considered necessary to make effective the proscription of terrorist organisations. The absence of any incitement to violence as an element of the offence was relevant but not determinative. *Gul v Turkey*, on which the appellants relied, did not compel a conclusion that the prohibition contained within the section 13 offence amounted to a breach of article 10. It was relevant to take account of the fact that section 13 created a summary-only offence with a maximum penalty of 6 months' imprisonment.

11. In its final conclusions, the Crown Court noted that it was accepted that each of the appellants was in a public place carrying a flag of the PKK, a proscribed organisation. The court was sure that each had carried a PKK flag in such a way and in such circumstances as to arouse reasonable suspicion that he was a member or supporter of a proscribed organisation. "Reasonable suspicion" presupposed the existence of facts or information which would satisfy an objective, informed and reasonable observer that the person concerned may be a member of supporter of a proscribed organisation. At paragraph 21 of the Case Stated, the Crown Court gave the following reasons for its decision:

> "First, each defendant was carrying the same PKK flag for a prolonged period: (1) Mr Pwr for over 2 hours… (2) Mr Akdogan for over 2 hours… (3) Mr Demir was holding the flag aloft in Whitehall for a continuous period of at least 5 minutes…
>
> Second, in respect of all three defendants: (1) he was part of a highly visible demonstration in central London; (2) the flag he was carrying was unfurled, held aloft and, on occasion, waved; in the case of Mr Demir, vigorously at 10:24, 12:20 and 13:20 of the timeline; and (3) the flag that each was carrying was different from the vast majority of other flags at the rally.
>
> Third, all three defendants looked up at the flag that he was carrying at the following times in the timeline: (1) Mr Pwr at 02:12, 02:44 and 03:14; (2) Mr Akdogan at 06:15, 06:27, 07:24 and 08:06; (3) Mr Demir at 10:32, 10:38, 10:44 and 10:59.
>
> Fourth, as to Mr Pwr, (1) at 12:20 he took a "selfie" image of himself carrying the flag, with the rally in the background; (2) his body language throughout the footage demonstrated pride in holding the flag; (3) at 01:33 he made a "V" for victory gesture whilst carrying a PKK flag.
>
> Fifth, the most natural and likely reason for a person to display a flag at a public rally is to demonstrate support for the organisation represented by that flag, and any objective,

informed and reasonable bystander witnessing the conduct of the three defendants would have had a reasonable suspicion that he was a member or supporter of that organisation."

The questions for this court:

12. On the application of the appellants, the Crown Court stated a case in which the opinion of this court is sought on two questions:

> "1) If section 13 of the Terrorism Act 2000 creates an offence of strict liability;
>
> 2) If section 13 of the Terrorism Act 2000 creates an offence of strict liability, is that compatible with article 10 of the European Convention on Human Rights?"

The legislative framework:

13. At the time of the demonstration, section 13 of the Terrorism Act 2000 ("section 13") provided:

> "**13. Uniform**
>
> (1) A person in a public place commits an offence if he –
>
> (a) wears an item of clothing, or
>
> (b) wears, carries or displays an article,
>
> in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.
>
> (2) A constable in Scotland may arrest a person without a warrant if he has reasonable grounds to suspect that a person is guilty of an offence under this section.
>
> (3) A person guilty of an offence under this section shall be liable on summary conviction to –
>
> (a) imprisonment for a term not exceeding 6 months,
> (b) a fine not exceeding level 5 on the standard scale, or
> (c) both."

14. It is relevant to note that with effect from 12th April 2019, section 13 was amended by the Counter-Terrorism and Border Security Act 2019. The amendments did not alter sub-sections (1) and (2), but included the insertion of new sub-sections (1A) and (1B):

> "(1A) A person commits an offence if the person publishes an image of –
> (a) an item of clothing, or
> (b) any other article,

> in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.
>
> (1B) In subsection (1A) the reference to an image is a reference to a still or moving image (produced by any means)."

15. Section 13 is one of three provisions in Part II of the 2000 Act which create offences. Section 11 makes it an offence to belong or to profess to belong to a proscribed organisation. Section 12 makes it an offence to support (in any of three specified ways) such an organisation. Each of those offences is triable either way and punishable, on conviction on indictment, by imprisonment for up to 10 years.

16. It is relevant to note that the 2019 Act, which amended section 13, also amended section 12 by adding a new sub-section (1A):

> "(1A) A person commits an offence if the person –
>
> (a) expresses an opinion or belief that is supportive of a proscribed organisation, and
>
> (b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation."

17. Article 10 of the European Convention on Human Rights ("article 10" and "the Convention"), incorporated into English law by section 1 of the Human Rights Act 1998, 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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Relevant case law:

18. I do not think it necessary to refer to all the cases cited by counsel. In relation to the well-established common law presumption, that mens rea is an essential ingredient of a criminal offence unless Parliament has clearly indicated a contrary intention, only the following cases need be mentioned.

19. In *Sweet v Parsley* [1970] AC 132 Lord Reid – whose speech is particularly relied on by the appellants in the present case - said, at p148F-H:

> "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence, that is an end of the matter. But such cases are very rare. Sometimes the words of the section which create a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy for what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea."

20. Lord Reid went on, at page 149C-D, to say that it is –

> "… firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.
>
> It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament."

21. Lord Morris of Borth-y-Gest, at page 152G, said that –

> "The intention of Parliament is expressed in the words of an enactment. The words must be looked at in order to see whether either expressly or by necessary implication they displace the general rule or presumption that mens rea is a necessary pre-requisite before guilt of an offence can be found. Particular words in a statute must be considered in their setting within the

> statute and having regard to all of the provisions of the statute and to its declared or obvious purpose."

22. Lord Pearce, at page 156F, said –

> "But one must remember that normally mens rea is still an ingredient of any offence. Before the court will dispense with the necessity of mens rea it has to be satisfied that Parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge."

23. In *B (a minor) v DPP* [2000] 2 AC 428 it was held by the House of Lords that, on a charge of inciting a girl under the age of 14 to commit an act of gross indecency, contrary to section 1 of the Indecency with Children Act 1960, the prosecution must prove an absence of a genuine belief on the part of the defendant that the victim had been 14 or over. At p460F-G Lord Nicholls of Birkenhead summarised the matter in this way:

> "As habitually happens with statutory offences, when enacting this offence Parliament defined the prohibited conduct solely in terms of the proscribed physical acts. Section 1(1) says nothing about the mental element. In particular, the section says nothing about what shall be the position if the person who commits or incites the act of gross indecency honestly but mistakenly believed that the child was 14 or over.
>
> In these circumstances the starting-point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence."

24. Later in his speech, Lord Nicholls at p463H-464A noted that section 1 of the 1960 Act did not expressly negative the need for a mental element:

> "The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. 'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

25. As to the approach to be taken in deciding whether the presumption applies, Dyson LJ (as he then was) said this in *R v Muhamad* [2003] QB 1031 at [15]:

> "The question, whether the presumption of law that mens rea is required applies, and, if so, whether it has been displaced, can be approached in two ways. One approach is to ask whether the act is truly criminal, on the basis that, if it is not, then the presumption does not apply at all. The other approach is to recognise that any offence in respect of which a person may be punished in a criminal court is prima facie sufficiently 'criminal' for the presumption to apply. But the more serious the offence, the greater the weight to be attached to the presumption, and conversely, the less serious the offence, the less weight to be attached. It is now clear that it is the latter approach which, according to our domestic law, must be applied."

26. In *R v Brown* [2013] UKSC 43, [2013] NI 265 Lord Kerr said at [26] that the constitutional principle, that mens rea is presumed to be required in order to establish criminal liability, is a strong one and not to be displaced in the absence of clear statutory language or unmistakably necessary implication.

27. In *R v Lane and Letts* [2018] UKSC 36, [2018] 1 WLR 3647, on which the respondent places particular reliance, Lord Hughes, with whom the other Justices agreed, referred to the presumption, quoted from the speech of Lord Reid in *Sweet v Parsley*, and then said at [9] –

> "Whilst the principle is not in doubt, and is of great importance in the approach to the construction of criminal statutes, it remains a principle of statutory construction. Its importance lies in it ensuring that a need for mens rea is not inadvertently, silently, or ambiguously removed from the ingredients of a statutory offence. But it is not a power in the court to substitute for the plain words used in Parliament a different provision, on the grounds that it would, if itself drafting the definition of the offence, have done so differently by providing for an element, or a greater element, of mens rea. The principle of Parliamentary sovereignty demands no less. Lord Reid was at pains to observe that the presumption applies where the statute is silent as to mens rea, and that the first duty of the court is to consider the words of the statute."

28. Lord Hughes went on to say, at [12]:

> "… the presumption on which the appellants here rely is a principle of statutory construction, which must give way to either the plain meaning of the words, or to other relevant pointers to meaning which clearly demonstrate what was intended. It follows that the Court of Appeal in the present case did not fall into the error suggested, of wrongly starting with the words of the Act. On the contrary, that is the inevitable first port of call

> for any issue of construction, as Lord Reid's statement of the principle in *Sweet v Parsley* [1970] AC 132 expressly stated."

29. Counsel for the appellants submit that these passages were obiter, that the case can be distinguished from the present because the facts were very different (and related to an offence which did require an element of mens rea, so that it could not be said that it was a case in which the statute was silent as the necessary state of mind), and that it would be contrary to strong constitutional principle to treat Lord Hughes' words as diminishing the well-established presumption that crimes require a mens rea.

30. In relation to the alleged infringement of article 10, the European Court of Human Rights ("the ECtHR") in *Zana v Turkey* (1999) 27 EHRR 667 at [51] summarised fundamental principles which emerged from its previous judgments: freedom of expression is one of the essential foundations of a democratic society; it is subject to exceptions under article 10, but the exceptions must be construed strictly and the need for any restrictions must be established convincingly; "necessary", in article 10(2), implies the existence of a pressing social need; the Contracting States have a certain margin of appreciation in assessing whether such a need exists; and the court when considering an impugned interference must look at it in the light of the case as a whole, and must determine whether the interference in question was proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient.

31. As to the requirement under the Convention that any restriction on freedom of expression must comply with the principle of legality if it is to be regarded as "prescribed by law", the appellants particularly rely on what was said by Lord Hope of Craighead in *R v Shayler* [2003] 1 AC 247at [56]:

> "The principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to criticism on the Convention ground that it was applied in a way which was arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate."

32. The appellants point to the facts in *Gul v Turkey* (2011) 52 EHRR 38 as being closely analogous to the present case. In that case the ECtHR noted that slogans shouted during a lawful demonstration in which the applicants had taken part, if taken literally, had a violent tone, but concluded that those slogans could not be interpreted as a call for violence or an uprising. In those circumstances, the Court concluded that the applicant's conviction for an offence of membership of an illegal organisation, and imprisonment for 3 years 9 months, was a violation of his article 10 rights. In passages on which the appellants rely, the Court said:

> "42. The Court observes that, by shouting these slogans, the applicants did not advocate violence, injury or harm to any person. Furthermore, neither in the domestic court decisions nor in the observations of the Government is there any indication that there was a clear and imminent danger which required an interference such as the lengthy criminal prosecution faced by the applicants.
>
> …
>
> 44. In view of the above findings, the Court is of the view that the applicants' conduct cannot be considered to have had an impact on 'national security' or 'public order' by way of encouraging the use of violence or inciting others to armed resistance or rebellion, which are essential ingredients to be taken into account."

33. Similar statements, to the effect that when considering whether convictions for criminal offences amounted to breaches of article 10 rights it is relevant to consider whether the conduct criminalised amounts to incitement or encouragement of violence or armed resistance, are made in other ECtHR judgments cited by the appellants, including *Tas v Turkey (no 2)* (Application No. 6813/09) at [18] and *Alekhina v Russia* (2019) 68 EHRR 14, in which the Court said at [260]:

> "The Court reiterates that there is little scope under Art.10(2) of the Convention for restrictions on political speech or on debate of questions of public interest. Where the views expressed do not comprise incitements to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporters' goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict the right of the general public to be informed of them, even on the basis of other aims set out in art.10(2)."

34. In *R v Choudary and Rahman* [2018] 1 WLR 695 the Court of Appeal considered the ingredients of the offence created by section 12(1) of the 2000 Act of inviting support for a proscribed organisation, and whether that offence was compatible with article 10. As a matter of ordinary construction, the court held that to commit the offence under section 12(1) of the 2000 Act the accused must be proved to have known that he was inviting support for an organisation which was proscribed. The point was made, at [57], that sections 12 and 13 of the 2000 Act address types of conduct of differing seriousness, and the differing penalties under those provisions were readily explicable on that basis.

35. The court accepted that article 10 was engaged. It considered a number of decisions of the European Court of Human Rights, most of them relating to Turkey and the PKK, in which breaches of article 10 had been found. The court noted, at [72], that Convention issues of proportionality are usually decided by reference to the detailed underlying facts. It was however submitted to the court that the ECtHR case law showed a "bright

line" between speech which did amount to an incitement to violence and speech which did not, and that only criminalisation of the former was capable of being consistent with the requirements of article 10. Reference was made in particular to *Gul v Turkey*, which the court described as the high point of the defendants' case. The Court of Appeal was not persuaded that the ECtHR decisions showed any "bright line" principle. It noted, at [89], that in the cases cited, references to support for violence were made within a general discussion of the facts and as part of the careful proportionality analysis undertaken by the court. The facts in *Gul v Turkey* involved the shouting of "well-known leftist slogans" during a lawful and peaceful demonstration, and the nature of the slogans limited their potential impact on national security and public order. The Court of Appeal went on to say:

> "We would only add that, contrary to the principle contended for it has been held permissible in article 10 terms to criminalise speech which does not involve any incitement to violence albeit in rather different circumstances. See for example *Hoare v United Kingdom* [1997] EHRLR 678 (obscenity) and *Wingrove v United Kingdom* (1996) 24 EHRR 1 (blasphemy)."

36. This same point is apparent from the judgment of the ECtHR in *Arslan v Turkey* (2001) 31 EHRR 9, one of the series of ECtHR decisions relied on by the appellants, each of which concerns the application in Turkey of criminal sanctions to persons publishing information about Kurdish nationalism and/or the PKK. In all these cases the Court has emphasised that article 10 permits only limited scope for restrictions on political speech. However, at [46] of its judgment in *Arslan*, the ECtHR stated:

> "Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal nature, intended to react appropriately and without excess to such remarks. Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression."

Thus, like the Court of Appeal in *R v Choudary and Rahman,* the ECtHR does not, for article 10 purposes, prescribe any bright line between speech that incites to violence and other speech. Although the State may be afforded a wider margin of appreciation for criminal laws which regulate the former, the latter may still be the subject of a criminal offence so long as what is provided is "appropriate" and "without excess".

The submissions:

37. I am grateful to all counsel for their helpful written and oral submissions, which I briefly summarise as follows.

38. On behalf of Mr Pwr, Mr Bunting submits, relying on *Sweet v Parsley* and later cases, that there is a strong presumption that mens rea is an essential ingredient of every offence: the presumption forms an important part of the principle of legality, and can only be displaced by clear statutory language or unmistakably necessary implication. He suggests that the words "in such a way and in such circumstances" in section 13 are

ambiguous, and could be read as requiring knowing conduct on the part of the alleged offender. He submits that the Crown Court, in holding that the offence contrary to section 13(1) was an offence of strict liability, fell into error of law in that –

i) it wrongly treated as decisive the fact that the words of section 13(1) were found to be clear and unambiguous, and included no element of mens rea;

ii) it wrongly refused to look at Parliamentary material, and instead focused only upon the words of the statute;

iii) it wrongly relied on the fact that other sections of the 2000 Act create offences which do expressly require mens rea; and

iv) it wrongly attached weight to the fact that the provisions of earlier statutes, which were in effect replaced by section 13 of the 2000 Act, had themselves been silent as to mens rea.

Mr Bunting submits that, the section being itself silent as to mens rea, there is a clear presumption that Parliament intended mens rea to be an essential ingredient. There is nothing in the statutory provision or in the legislative history to suggest that Parliament must have intended to create an offence without mens rea. To apply the presumption would bring section 13 into line with other offences in the 2000 Act, there being no logical basis for distinguishing between section 13 and those other offences. Although the offence created by section 13 is summary only, it is a "truly criminal" offence which can result in up to six months' imprisonment and which carries the serious social stigma of support for terrorism. Mens rea is expressly required by other provisions of the 2000 Act which create offences, including some which are triable only summarily. For example, section 51 creates a summary offence, punishable with a maximum of 3 months' imprisonment, of parking a vehicle in breach of certain prohibitions or restrictions, or failing to move it when ordered to do so: sub-section (3) provides that it shall be a defence for the accused to prove that he had a reasonable excuse for the act or omission in question.

39. On those grounds, Mr Bunting argues that section 13 should be construed as carrying with it a requirement that the alleged offender carried or displayed an article "with the intention of giving the impression that he is a member or supporter of a proscribed organisation". He submits that any other approach would involve an unjustified interference with the right of free expression which is guaranteed by article 10. He relies on the decision of the Court of Appeal in *R v Choudary and Rahman*, and on a number of decisions of the ECtHR, including in particular *Gul v Turkey*. He submits that the interference with article 10 rights, which the offence under section 13 undoubtedly involves, can only be justified where the offence is aimed at expression which is knowingly intended to further a terrorist cause, or which involves the encouragement of violence or armed resistance or an incitement to violence. The Crown Court was required by section 3 of the Human Rights Act 1998 to construe section 13 in a manner consistent with article 10, but wrongly failed to do so.

40. His submission is that, in order to render section 13 compatible with article 10, the court should read-in a requirement of knowledge on the part of the accused that he was wearing or displaying something which would give rise to a reasonable suspicion of

membership of or support for a proscribed organisation, and an intention to display support for a proscribed organisation.

41. For Mr Akdogan and Mr Demir, Mr Bennathan QC and Mr Fraser adopt Mr Bunting's arguments and similarly submit that the presumption of mens rea applies to section 13 of the 2000 Act. Alternatively, if section 13 is an offence of strict liability, it is incompatible with article 10 because it permits conviction of a serious offence without knowing illegality. Counsel submit that this court has ample power, both at common law and pursuant to section 3 of the Human Rights Act 1998, to interpret section 13 so as to require proof of mens rea and to limit the offence to conduct that might lead to violence. They argue that neither the decision of the Court of Appeal in *R v Choudary and Rahman* nor the decision of the Supreme Court in *R v Lane and Letts* provides any authority against their submissions. They submit that their argument is supported by the decision of a Divisional Court in *O'Moran and Whelan* [1975] 1QB 864, a case concerned with section 1 of the Public Order 1936 (which made it an offence for a person to wear, in a public place or at a public meeting, "uniform signifying his association with any political organisation or with the promotion of any political object"). They suggest that if section 13 created an offence of strict liability, a person would be guilty of an offence even if he did not know the meaning of the item he was carrying, had no knowledge that an organisation was proscribed or was unaware that he was in possession of the item. Thus a blind or partially-sighted person, a child, a police officer carrying an exhibit or someone who had picked up the wrong placard would all be guilty of a terrorist offence. Such a conclusion would offend against the principles of statutory construction because it would produce absurd consequences, and it is no answer to say that prosecutorial discretion would provide a sufficient safeguard.

42. Counsel further submit that unless a requirement for mens rea is read-in, the offence created by section 13 would offend against the principle of legality described by Lord Hope in *R v Shayler* (see [31] above), and so would not be "prescribed by law" for the purposes of article 10(2), in particular because it would encompass the activities of persons who could have no idea they were committing an offence and would therefore be unable to regulate their conduct so as to avoid criminality.

43. In relation to article 10, counsel emphasised that restriction on freedom of expression must be necessary in a democratic society and proportionate. The requirement of necessity will not be satisfied unless there is a pressing social need. They submit that the case law of the ECtHR, and the persuasive authority of decisions of the United States courts, lead to the conclusion that article 10 requires section 13 (and, indeed, "any offence which criminalises protest") to be interpreted so as to require some element of proximity to violence or disorder: for an interference with freedom of expression to be proportionate, there must (they submit) be a nexus between the conduct complained of and violence.

44. Counsel accordingly submit that this court should conclude that the offence under section 13 of the 2000 Act requires an intention on the part of the accused to show support for a proscribed organisation, and either an incitement to violence or at least a finding that violence was likely to be caused.

45. For the respondent, Mr Pawson-Pounds submits that Parliament clearly intended to create an offence of strict liability and interfered no more than was proportionate with the right to freedom of expression. The penalty for an offence contrary to section 13 is

limited to six months' imprisonment and/or a fine, and (in contrast to the offences created by section 11 and 12 of the Act) it does not result in imposition of the notification requirements of the Counter-Terrorism Act 2008, or in liability to an extended determinate sentence, or to the special sentence relating to offenders of particular concern. He draws a comparison with section 57 of the 2000 Act, which so far as is material for present purposes, provides:

> "(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
>
> (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism."

46. Relying in particular on *R v Lane and Letts*, Mr Pawson-Pounds submits that it is necessary to start by looking at the wording of the statutory provision and to give the words their plain meaning. Where the meaning is plain, as it is here, the presumption does not justify the court in imposing a different interpretation upon them. He points to the legislative history of section 13, which goes back to a provision in the Public Order Act 1936. He argues that the section is not silent about mens rea: rather, it makes clear that the test to be applied is that of the objective and informed observer, taking account of the conduct of the defendant and any relevant circumstances, which may include evidence of the defendant's intentions. The focus of the offence is not the intention of the defendant, but the reasonable suspicion which his conduct would arouse in the mind of a reasonable bystander. Mr Pawson-Pounds submits that there are obvious and strong public policy reasons for criminalising conduct which could have the effect of causing observers to suspect that the defendant is a member or supporter of a proscribed organisation. Furthermore, he submits, the recent amendment of the 2000 Act to introduce section 13(1A) confirms Parliament's intention to create an offence of strict liability. As to the argument that an offence of strict liability would have absurd consequences, he emphasises the need for the reasonable bystander to form the requisite suspicion.

47. Mr Pawson-Pounds accepts that the offence created by section 13 does entail an interference with the rights protected by article 10, but submits that that interference is justified, applying the proportionality test set out in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700 at [20] per Lord Sumption and at [68-76] per Lord Reed, and that accordingly the court is not required to read-in any mens rea requirement. He submits that the important objective of section 13 is to give effect to the regime of proscription, which is necessary to combat organisations concerned with terrorism. The prohibition in section 13 is rationally connected with that objective, because conduct which gives the impression of supporting an organisation engaged in terrorism may encourage support for that organisation and creates an impression that its activities are acceptable in society. No less intrusive measure could have been used: section 13 only limits freedom of expression by prohibiting conduct which may cause others to suspect that the offender is a member or supporter of a proscribed organisation. The section strikes a fair balance between the article 10 rights of the individual and the interests of the public in having effective measures to prevent terrorism.

Discussion:

48. The case law to which I have referred at [19-29] above makes it clear that the common law presumption, that mens rea is an ingredient of a statutory offence unless it has clearly been excluded by Parliament, is a strong one and cannot lightly be displaced. It is however also clear that the court must consider the words of the statute and other relevant circumstances, and must ascertain whether Parliament – by express words or by necessary implication – has made clear its intention to create an offence, commission of which does not require mens rea. It seems to me that the case law reveals differences of opinion as to whether the question should be approached by starting with the presumption and then looking to see if it has been excluded, or by starting with the statutory wording and other indications of Parliamentary intent and then applying the presumption if there is no clear intention to exclude. In my view, however, it matters not which approach is adopted: the terms of the statute and all other relevant factors and circumstances - conveniently encapsulated in the words of Lord Nicholls which I have quoted at [24] above – must be considered; and if there is no clear Parliamentary intention to create an offence which does not require mens rea, then the presumption will apply.

49. In this case, there are in my view five considerations which, taken together, point clearly to a Parliamentary intention to create by section 13 an offence which does not require mens rea.

50. First, the language of section 13 is in my view entirely clear and unambiguous: a person commits the offence if he wears, carries or displays an item of clothing or an article in such a way or in such circumstances as to arouse the relevant reasonable suspicion. This does in my view require that the person who is wearing, carrying or displaying the item or article in question (hereafter, "the wearer") must act deliberately in the sense that he must know that he is wearing, carrying or displaying that item or article: if, for example, a person had a backpack on his back, and unbeknown to him someone had attached an image or a banner to it, he could not in my view be said to be wearing, carrying or displaying that image or banner. It further requires that the wearer is in fact wearing, carrying or displaying the item or article in question in a way, or in circumstances, capable of arousing the necessary reasonable suspicion: if, for example, a police officer had seized a flag or banner, and was carrying it towards a police vehicle with the item furled or folded and pointing towards the ground, he could not in my view be said to be carrying or displaying it in the requisite manner. But nothing in the section requires any knowledge on the part of the wearer of the import of the item or article, or of its capacity to arouse the requisite suspicion.

51. The wording of the section being clear and unambiguous, it follows that the court should not look at other Parliamentary material, such as debates preceding the Act, in order to ascertain its meaning.

52. Secondly, it is important to consider the purpose of section 13 and the mischief it aims to prevent. Parliament has legislated to proscribe certain terrorist organisations, and the purpose of section 13 is to give practical effect to such proscription. The mischief at which it is aimed is conduct which leads others reasonably to suspect the wearer of being a member or supporter of a proscribed organisation, that being conduct which gives rise to a risk that others will be encouraged to support that proscribed organisation or to view it as legitimate (and I would add, though it is not essential to my decision,

that it also gives rise to a risk of public disorder resulting from a hostile reaction on the part of others). The risk arises whatever the understanding or intention of the wearer. A group of people waving PKK flags in Whitehall is a potent symbol of apparent support for the PKK, and therefore an encouragement of others to support the PKK, whether or not individual members of the group intend to express support for that proscribed organisation. In short, a person who commits the actus reus of the section 13 offence by his conduct creates the risk I have mentioned, whether or not he intends to do so or knows that he is doing so.

53. There is good reason for Parliament to have criminalised such conduct. It must be remembered that by section 3(4) of the 2000 Act, an organisation can only be proscribed if the Secretary of State believes that it is concerned in terrorism; and by section 1, terrorism means the use or threat of action which involves serious violence against a person or serious damage to property, endangers life, creates a serious risk to public health or safety or is designed seriously to interfere with an electronic system, and which is designed to influence the government or intimidate the public for the purpose of advancing a political, religious, racial or ideological cause. In short, conduct which falls within section 13 is conduct which arouses reasonable suspicion of membership of or support for an organisation involved in violence designed to influence the government or intimidate the public.

54. In this regard, I accept the respondent's submission that the decision of a Divisional Court in *Parkin v Norman* [1983] 1QB 92 is relevant, and provides an example of Parliament having focused on the effect of conduct on others rather than on the intention of the actor. The court was there concerned with offences contrary to section 5 of the Public Order Act 1936. The court held that the purpose of that Act was to promote good order in public places. At page 98F, McCullough J said –

> "It was the likely effect of the conduct on those who witnessed it with which Parliament was chiefly concerned. What is likely to cause someone to break the peace is his feeling that he has been threatened or abused or insulted, and this will be so whether or not the words or behaviour were intended to threaten or to abuse or to insult."

55. Thirdly, although not conclusive, it is in my view relevant that predecessor legislation, dating back to 1936, has been expressed in materially similar terms. Parliament has therefore had ample opportunity to amend the legislation if it wanted to indicate a requirement of mens rea.

56. Fourthly, far from doing that, Parliament has recently amended section 13 by adding, in sub-section (1A), a further offence in similar terms (see [14] above). Again, this is not conclusive, but is a relevant consideration. So, too, is the fact that at the same time, Parliament introduced a new sub-section 12(1A) which requires an element of recklessness (see [16] above), but it made no change to the wording of section 13(1). I cannot accept the appellants' submission that these amendments take us nowhere in this debate. They show, to my mind, Parliament drawing clear and deliberate distinctions between the ingredients of related but distinct offences.

57. Fifthly, whilst case law makes clear that the inclusion of an express element of mens rea in other offences created by the same Act is not conclusive, it is relevant to take into

account that the 2000 Act does also create offences which require mens rea. It is also relevant that Parliament provided a statutory defence to the offence created by section 57 of the 2000 Act (see [45] above), but has not made a similar provision for the offence created by section 13. Again, the distinctions drawn between the various offence-creating provisions must be deliberate, and are in my view indicative of an intent to create in section 13 an offence which does not require mens rea.

58. It is similarly relevant to consider the section 12 offence, which also forms part of the machinery by which effect is given to the proscription of terrorist organisations, but which is triable on indictment and punishable with a much longer term of imprisonment than the section 13 offence. As *R v Choudary and Rahman* shows, the section 12 offence requires knowledge that the organisation for which support is invited is proscribed. That offence is directed against the intentional inviting of support for a proscribed organisation, whereas section 13, as I have said, focuses on the effect of the relevant conduct on others. The contrasting elements of the offences, and the contrasting penalties, must in my view reflect a deliberate distinction drawn by Parliament between the more serious section 12 offence, which does require mens rea, and the less serious section 13 offence, which does not.

59. I would add that in my view, the appellants' suggested interpretation of the section 13 offence would bring it very close to the sections 11 and 12 offences, including in particular the recently-added section 12(1A) offence, which would be contrary to the plain intention of Parliament in creating different offences with very different consequences.

60. I am not persuaded by the appellants' submission that absurd or unfair consequences flow from treating the section 13 offence as one which does not require mens rea. I therefore do not think it necessary to say anything about the appellants' submissions as to the inadequacy of a prosecutorial discretion as a remedy against such consequences. I emphasise in this regard the need for the relevant item or article to be worn, carried or displayed in such a way or in such circumstances as to arouse the requisite reasonable suspicion. I have noted at [3] above the findings of the Crown Court as to the sequence of relevant events, which show the nature of the conduct of the appellants in this case. That conduct is very far removed from the cases of police exhibits officers, and blind persons, suggested by the appellants; and it must be noted that the appellants chose not to give evidence and so put forward no innocent explanation for their carrying and waving of the flags of a proscribed organisation.

61. For those reasons I am satisfied that Parliament clearly intended by section 13 to create an offence which does not require mens rea, and it is not open to the court to interpret the section as if it had been drafted in different terms. The Crown Court was correct so to conclude.

62. I turn to article 10. Section 13 restricts the freedom of persons to express their opinions by wearing, carrying or displaying certain items of clothing and other articles. Article 10 is accordingly engaged. The issue is whether that restriction is justified by reference to the criteria in article 10(2).

63. There can in my view be no doubt but that the restriction is prescribed by law. The section is expressed in clear terms which provide legal certainty: the restriction relates to the wearing, carrying and displaying of clothing and articles in such a way or in such

circumstances as to arouse the requisite reasonable suspicion. I do not accept the appellants' submissions that there is uncertainty because of the suggested absurd consequences, or because a person cannot know how to regulate his behaviour; but even if I accepted the points made, they relate to factual uncertainty, not legal uncertainty. In any event, I think it important not to lose sight of the facts of this case, the evidence of Mr Stephens as to the likely knowledge of those at the rally (see [7] above) and the findings of the Crown Court (see [11] above): although said to be taking part in a demonstration against the perceived actions of the Turkish state in Afrin, the appellants were carrying and waving flags which were different from the vast majority of flags carried by others and were readily identifiable as the flags of a proscribed organisation.

64. It is in my view also clear that the restriction imposed by section 13 pursues a legitimate aim: the restriction is one which is necessary in a democratic society in the interests of national security and public safety, and/or for the prevention of disorder or crime, and/or for the protection of the rights of others. I have referred in [53] above to the nature of proscribed organisations. As was said at [68] in *R v Choudary and Rahman* in relation to section 12, the starting point is the fact of proscription. There is no challenge in these appeals to the system of proscription or to the proscription of the PKK. No one can doubt that action to prevent the activities and/or the spread of terrorist organisations is necessary. Section 13 is a necessary part of the appropriate mechanism to achieve that aim: it prohibits conduct which creates a risk of encouraging others to support a proscribed organisation or to view it as legitimate. As I have said at [52] above, the risk arises whatever the intention of the wearer. There is nothing in the submissions of the appellants which suggests any realistic alternative lesser means of achieving the objective of prohibiting such conduct.

65. The principal argument of the appellants in relation to proportionality relies on the submission that the ECtHR jurisprudence establishes the need for a link between the impugned expression and the incitement or encouragement of violence. They submit that the section 13 offence interferes disproportionately with the exercise of freedom of expression because it is not limited to circumstances in which the expression incites violence. This is a repetition of the "bright line" argument rejected by the Court of Appeal in *R v Choudary and Rahman*. The Court of Appeal's reasoning on this issue did not depend on any distinction between section 12 and section 13, and its decision is binding on this court. Even if were not, I respectfully agree with it.

66. The case law of the ECtHR on which the appellants rely certainly shows a need to consider whether the accused was inciting violence, and the fact that he was not has been a factor in finding a breach of article 10 in some cases; but the decisions are fact-specific, relating to the circumstances of a particular conviction rather than to the offence-creating provision viewed in isolation from those circumstances. A comparison of the decisions in *Tasdemir v Turkey* (Application No. 38841/07) and *Gul v Turkey* illustrates the ECtHR's consideration of the specific circumstances of each case: the words used had not amounted to an incitement to violence in either case, but a breach of article 10 was found only in the latter, and not in the former. The distinction between them lay in the severity of the punishment imposed in *Gul*, in which the court observed at [43] that

> "the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference with freedom of expression"

and went on to conclude that the lengthy criminal proceedings and the sentence were disproportionate.

67. I would add, with reference to penalty, that the maximum sentence for the section 13 offence cannot be regarded as severe by comparison with other terrorism-related offences.

68. The appellants have not been able to point to any unequivocal statement of principle to the effect that a restriction on freedom of expression can only be justified where the expression includes an incitement to violence. In fact, as set out at [36] above, the statement of principle at [46] of the judgment of the ECtHR in *Arslan v Turkey* is to the opposite effect.

69. I therefore reject the submission that the section 13 offence is a disproportionate interference with article 10 rights because it does not require the impugned expression to incite or encourage violence. The submissions of the appellants would lead to the result that conduct which arouses reasonable suspicion of membership of or support for a proscribed organisation – that is, an organisation which is concerned in terrorism and therefore involved in violence - must be free from restriction because the wearing, carrying or display of the item of clothing or other article does not explicitly incite or encourage violence. I do not accept that the cases cited to this court justify such a conclusion. I am strengthened in my view by the reference to "justifying the commission of terrorist offences" in the passage which I have quoted from *Alekhina* at [33] above.

70. Nor am I persuaded that the United States cases cited by Mr Bennathan assist the appellants in this regard: as I read them, they are concerned with cases in which an intent to use force and violence was an ingredient of the conspiracies charged, and the distinction drawn between advocacy of action, and abstract doctrine, has to be seen in that context.

71. In my view, the position in the present case is therefore the same as that found by the Court of Appeal in *R v Choudary and Rahman* at [89], to which I have referred at [35] above.

72. Turning to another aspect of proportionality, it is in my view clear that section 13 strikes a fair balance between freedom of expression and the need to protect society by preventing terrorism. As the facts of this case show, and as the Crown Court found on the basis of Mr Stephens' evidence, the appellants could have shown their support for the people of Afrin without displaying the flags of a proscribed organisation. That, after all, is what the majority of those carrying flags at the march were doing. All that section 13 prevented the appellants from doing was acting in a way which gave rise to the requisite reasonable suspicion; and it seems to me paradoxical for the appellants to argue, in effect, that freedom to express opinions supportive of one group is unlawfully restricted by prohibiting conduct which appears to express support for a different, and proscribed, group. I cannot think that there was any substantial interference with the appellants' article 10 rights. No great burden was placed upon them to regulate their behaviour so as to avoid conduct which others would reasonably suspect to indicate membership of or support for a proscribed organisation. If others would reasonably form that suspicion, there is no obvious reason why the appellants themselves would not appreciate that that would be the likely effect of their conduct. Whilst it would in

principle be possible for someone to commit the section 13 offence without knowing that his conduct would arouse such suspicion, that is not likely to happen in practice. I am therefore not persuaded by the appellants' submissions as to the penalising of "non-intentional support".

73. For those reasons I am satisfied that the section 13 offence is compatible with article 10. It imposes a restriction on freedom of expression which is required by law; is necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights of others; and is proportionate to the public interest in combating terrorist organisations.

74. It follows that the Crown Court's decision was not wrong in law. I would answer Yes to each of the questions posed by the Crown Court. If my Lord agrees, the appeals will accordingly fail and be dismissed.

Mr Justice Swift:

75. I agree, and have nothing to add.