Neutral Citation Number: [2020] EWHC 3421 (Admin)

Case No: CO/3202/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 16/12/2020

Before:

THE RT. HON. LORD JUSTICE BEAN
AND THE HON. MR JUSTICE WARBY

- -

Between:

Katherine Elizabeth Scottow	**Appellant**
- and -	
Crown Prosecution Service	**Respondent**

- -
- -

Diana Wilson (instructed by **McLartys Solicitors**) for the **Appellant**
John Riley (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 December 2020

- -

Approved Judgment

We direct that copies of this version as handed down may be treated as authentic.

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Approved Judgment

Mr Justice Warby:-

Introduction

1. This is an appeal against conviction by Kate Scottow, aged 39. On 7 February 2020, after a trial in the Magistrates' Court at St Albans, she was convicted by District Judge Margaret Dodd of one offence of improper use of a public communications network, contrary to section 127(2)(c) of the Communications Act 2003. This provides that a person commits an offence if "for the purpose of causing annoyance, inconvenience or needless anxiety to another [she] … persistently makes use of a public electronic network". Ms Scottow now appeals by way of case stated.

2. The case stated raises five questions, that fall into two main categories. First, there are questions of procedural error. It is Ms Scottow's case that the prosecution was an abuse of process, the charge was duplicitous, and partly out of time. Secondly, there are matters of substantive law. Ms Scottow says that those acts that were within time could not be described as "persistent" and, in any event, on a proper interpretation and application of s 127(2)(c), the facts alleged disclosed no case to answer, so and it was wrong in law to convict her on that factual basis. In this regard she relies, among other things, on human rights arguments founded on the right to freedom of expression.

3. At the conclusion of the hearing we announced that the appeal would be allowed and the conviction quashed. It follows that all orders made on conviction will also be quashed. These are my reasons. As I explain below, I would answer questions 3, 4 and 5 in Ms Scottow's favour. The conviction was vitiated by errors of law and for that reason cannot stand.

The factual background

4. The prosecution stemmed from complaints by Stephanie Hayden about messages posted on social media. Ms Hayden is a trans woman, with a public profile as an activist and advocate on transgender rights. It is common ground that she is to an extent a public figure. Ms Scottow describes herself as a radical feminist, and takes views that oppose some of those advocated by Ms Hayden.

5. The facts of the matter have not been as easy to identify as they should have been. This is a result of several factors: the fact that the prosecution did not obtain all the contextual material for the offending messages; the somewhat disorderly way in which the case for the prosecution was presented at trial; the diffuse nature of the arguments for the appellant; the limited fact-finding in the judgment of the District Judge; and the unorthodox nature of the case stated. The formal information that was laid before the Magistrates Court is not before us, nor is the summons, nor were the essential facts relied on set out in the prosecution opening, nor has anyone prepared a basic chronology of the key facts. An argumentative chronology was prepared by Counsel for the purpose of the case stated and Skeleton Argument, but this was not adopted nor commented upon by the District Judge. It unhelpfully weaves together facts which were, and those which are not clearly found by the District Judge, together with comment and submission, and contains some errors and omissions. To a substantial extent, it has been necessary to reconstruct events, using the papers before us. I am confident however that the following facts were established before the District Judge, or are agreed, or clear beyond dispute.

6. The acts of using a public telecommunications network that were relied on by the prosecution at trial consisted of 17 messages on social media: 16 tweets which Ms Scottow admitted making, and 1 message on Mumsnet from a username BurntMarshmallow, which she could not recall. The nature of Twitter and Mumsnet are by now well known. The former is a social media platform for microblogging, the characteristics and workings of which are set out in *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin) [2013] 1 WLR 1833 [7-10] (Lord Judge CJ) and in the Appendix to *Monroe v Hopkins* [2017] EWHC 433 (QB) [2017] 4 WLR 68 entitled "How Twitter Works". Mumsnet is a well-known website providing an online community forum for parents.

7. Seven of the messages relied on by the prosecution were posted in 2018 ("the 2018 Messages"). The sequence of key events during 2018 is as follows.

   (1) On 9 September 2018, Ms Hayden, using her Twitter handle @flyinglawyer73, posted a tweet which started: 'You know not so long ago people like you had no civil rights! Yet you…' Ms Scottow using her Twitter handle of @bustedwench, tweeted in response as follows ("**Tweet 1**"):-

   > "Let's hope they take a serious stance on your racism"

   Evidently, she took Ms Hayden's tweet to be addressed to a black person.

   (2) On 12 September 2018, Ms Hayden issued a Part 8 claim in the County Court at Leeds under claim no E73LS068, alleging harassment by four defendants, of whom Ms Scottow was one. Ms Hayden made a witness statement, but did not formally serve the claim form or the witness statement on Ms Scottow.

   (3) On 24 September 2018, Ms Hayden and Ms Scottow entered into a written settlement agreement by which Ms Hayden agreed not to pursue any legal remedy against Ms Scottow in the Leeds proceedings, or to bring any further legal proceedings against her, provided that she complied with certain undertakings, recorded in paragraph 3 of the document. These were to:

   > "(a) Delete any tweet on the Twitter account known as "@BustedWench" referring to "@flyinglawyer73", or "Stephanie Hayden" by 4pm on Tuesday 2 October 2018. A notice of discontinuance was filed with the County Court and served on 28 September 2018.
   >
   > (b) Not tweet, retweet, or quote tweet on the Twitter account known as "@BustedWench" any reference to "@flyinglawyer73", or "Stephanie Hayden".
   >
   > (c) Not make any publication on any form of social media stating that the Claimant is a racist or has published anything racist on any form of social media."

   (4) A notice of discontinuance was filed with the County Court and served on 28 September 2018. Ms Hayden posted the settlement agreement online in some form.

(5) On 1 or 2 October 2018, Ms Scottow tweeted a copy of the notice of discontinuance, tagging in Ms Hayden ("**Tweet 2**"). To do this, Ms Scottow used a newly created Twitter account with the handle @AliceHampton. By this time, Ms Scottow had blocked Ms Hayden from her @bustedwench account.

(6) On 2 November 2018, Ms Scottow tweeted on the @bustedwench account as follows ("**Tweet 3**"), by way of a reply to tweets by others:

> "'Sadly, I'm not allowed to discuss as per his bullying contract, good will out though, and he will be fucked in a few year's time"

(7) On 6 November 2018, Ms Scottow took, and posted on her @bustedwench account, a screenshot of a post by Ms Hayden, with the message ("**Tweet 4**"):-

> "This person is not a racist, xenophobic larping lawyer/transwoman. This person is a crook using the trans façade to ensure they aren't caught. A pig in a wig"

(8) On 9 November 2018, Ms Scottow used her @bustedwench account to tweet a post by Ms Hayden critical of Mumsnet with the statement ("**Tweet 5**"):-

> "he is a very sick individual I've evidence of that"

(9) On 9 November 2018, Ms Scottow posted a further tweet on her @HampsonAlice account, in which she tagged Ms Hayden. Ms Hayden had tweeted about an intersex advocate, critical of "anonymous freak trolls obsessing and speculating over" her "every move" and suggesting that "Something must have upset them". Ms Scottow's tweet ("**Tweet 6"**) said

> "Christ, surprised your memory has held up given you're claiming PiP for it".

(10) On a date unknown on or before 11 November 2018, a message was left on Mumsnet from an account named BurntMarshmallow as follows ("**Message 7"**):

> "'I have many leads on the claimant they're on pip for memory loss'

(11) On 11 November 2018, Ms Hayden made a report to West Yorkshire Police, alleging harassment and malicious communication by Ms Scottow. She made a statement.

(12) On 1 December 2018, at the instigation of the West Yorkshire Police, PC Kitchen of the Hertfordshire Police arrested Ms Scottow on suspicion of harassment and malicious communication. Ms Scottow was interviewed. She admitted the two Twitter accounts were hers, and that she had posted the 6 tweets. She did not accept posting Message 7. She denied committing any offence. At the time of arrest, the officer seized Ms Scottow's Samsung mobile phone and her ASUS laptop. The police, apparently expecting a guilty plea, decided, later on, that downloading data from the phone or computer would be disproportionate and unnecessary.

(13) On 1 December 2018, Ms Hayden posted 5 tweets highlighting the fact of the arrest (though not Ms Scottow's name) describing this as "positive news regarding the #harassment I have received in recent weeks", and as "sending a clear signal that #transphobia and #harassment will not be tolerated".

(14) In early December 2018, Ms Hayden issued proceedings against Ms Scottow in the High Court under action number QB-2018-000294. On 18 December 2018, Ms Hayden appeared before Jason Coppel QC, sitting as a Deputy Judge of the Queen's Bench Division, and obtained an interim injunction, prohibiting Ms Scottow until trial or further order from publishing "any personal information relating to" Ms Hayden "on any social media platform" as well as (more specifically) "mis-gendering" her on any social media platform, publishing anything linking her current female identity to her former male identity, and anything stating or implying that she "is a racist or has published anything racist on any form of social media". Ms Scottow was neither present nor represented at the hearing when this order was made.

(15) Later the same day, Ms Hayden posted 4 tweets contained news of the injunction, giving a summary, and tweeted a photo of the order (but with Ms Scottow's name redacted), asking others to retweet.

8. The public record shows that the civil proceedings against Ms Scottow remain alive, but stayed pending the outcome of these proceedings.

9. The next relevant event occurred on 1 March 2019, when Ms Scottow posted the 10 further tweets relied on by the prosecution ("the 2019 Messages"). By this time she had closed, or at least ceased to use, the @bustedwench account. She used a further, different Twitter account, with the name MandiMcGirlDick and the handle @BishBas58122507. Copies of this series of tweets are in our papers, in the form of screenshots. Not all the context is before us, but the content and the context of which we are aware can be summarised as follows:

(1) At some point before 17:55 on 1 March 2019, Ms Hayden tweeted, in response to an unknown tweet, that

> "the fact is the Police and CPS need to choose their battles carefully. Whilst there is lots that we do not like the fact is most of it does not even begin to cross the line into criminal liability."

(2) This drew a response from @Kateco, that "You'd know", to which Ms Hayden replied:

> "Indeed I do. That why my application for a civil interim injunction was successful."

(3) At 17.55, Ms Scottow replied as follows ("**Tweet 8**")

> "Was that not because the subject of the injunction was unable to attend? Why do you people keep trying to punish others who disagree with you?"

(4) The conversation continued, involving three other parties. At 18:18. Ms Scottow tweeted as follows (**"Tweet 9**")

> "And hopefully the CPS will view these complaints in future as harassment and vicious. A complete waste of the public's resources. Surely better to focus on more pressing issues."

(5) Ms Hayden tweeted – whether in reply to Tweet 9 or otherwise, is not wholly clear:

> "Every case is considered individually on its merits. Just because one case fails it does not mean that any other case fails (or succeeds). And just because you have a political viewpoint does not mean alleged harassment is automatically vexatious."

(6) At 18:52, Ms Scottow tweeted again as follows ("**Tweet 10**")

> "You must be nervous though given your extensive amount of cases for harassment and what not"

(7) Evidently, Ms Hayden was unaware that MandiMcGirlDick was an account used by Ms Scottow. She replied to Tweet 10, saying "I am absolutely fine thank you". She then replied to an unknown tweet (the record does not reveal its content):

> "Absolutely. Unlike you I actually do know the law (despite what you may read elsewhere). I think obtaining the first injunction in English legal history restraining misgendering and dead naming speaks for itself really. However. I am sure you know better than a High Court Judge"

(8) At 18:59 Ms Hayden tweeted as follows ("**Tweet 11**")

> "Surely the whole point of an injunction is that it's kept quiet. How would you know it was the first? Have you insider knowledge? Also, why has it not been reported as such? Something is amiss."

(9) Ms Hayden replied to Tweet 10, saying

> "Depends what the injunction is for. This one was in harassment so no need to keep it quiet. As for 'reported as such', watch this space as they say. I also have access to legal databases, which you almost certainly do not."

(10) At 19:04, Ms Scottow replied as follows ("**Tweet 12**"):

> "You just said it was for misgendering and deadnaming, and now it's for harassment? It was posted online, doesn't seem that ground-breaking."

(11) Ms Hayden replied to Tweet 12:

> "Is that your considered 'expert' legal opinion? The cause of action it was granted in was harassment, the elements of the injunction include restraining misgendering and dead naming."

(12) At 19:11, Ms Scottow replied as follows ("**Tweet 13**")

> "So how can you confirm it's the first of its kind when injunctions are usually kept in legal settings as opposed to being posted online?"

(13) Someone by the name Theresa Davis tweeted:

> "Not necessarily in legal terms an injunction is pretty much a run of the mill procedure there are hundreds every day… not really worth reporting about."

(14) At 19:51, Ms Scottow replied to this tweet in the following terms ("**Tweet 14**"):

> "Well exactly my point. Stephanie has publicly stated that the injunction they sought was a first of its kind, I mean that suggests it's worthy of world-wide coverage so why has this not happened despite Stephanie's assurance that media interest has been courted?"

(15) Ms Hayden replied to Tweet 14, saying:

> "This one was reported and there may well be another report about it in the very near future focusing on the fact it was almost certainly the first of its kind in England and Wales. Let's just see. Trolls are going to troll Theresa lol!"

(Meaning "laugh out loud").

(16) At 19:54, Ms Scottow tweeted a reply ("**Tweet 15**") asking:

> "Where was it reported? Have you a link? Seems bizarre that it hasn't had more coverage given your insistence that it's the first of its kind."

(17) Someone by the name Jennie Bujold tweeted

> "You're inestimably more sensible than I [emoji] What a creep huh?"

(18) At 20:16, Ms Scottow tweeted the following reply, tagging Jenni Bujold and Ms Hayden ("**Tweet 16**"):

> "Oh are you referring to Stephanie Hayden who couldn't produce evidence of their injunction being the 'first of its kind' despite their insistence that it was"

(19) At a time unknown on 1 March 2019, Ms Scottow posted a reply to an unknown tweet from @MRKHvoice as follows ("**Tweet 17**"):

> "'What is Hattie's take on the court case?"

10. Ms Scottow attended a police station for re-interview, to address the 2019 Messages. She gave a no comment interview, on advice. On 27 August 2019, an information was laid, and a summons was issued alleging that, for the purpose of causing annoyance, inconvenience or needless anxiety, Ms Scottow had "made a false statement" on a public electronic communication network. That is an offence contrary to s 127(2)(a) of the Communications Act 2003. The charge was later amended to allege the offence under s 127(2)(c), which came before the District Judge for trial in February 2020.

The trial

11. The trial was listed for 6 and 7 February 2020. On the first day, the defence applied for the proceedings to be stayed or dismissed on a number of bases, submitting as follows: (1) the proceedings should be stayed as an abuse of process on the grounds that it was impossible for Ms Scottow to have a fair trial; (2) it was artificial and duplicitous to treat the various messages relied on as a single course of conduct: the 2018 Messages and the 2019 Messages should be looked at, and should have been charged – if at all - separately; (3) on that basis, any prosecution in respect of the 2018 Messages would be barred by the 6-month time limit in s 127 of the Magistrates Courts Act 1980[1]; (4) the prosecution in respect of the 2019 Messages, though in time, was bound to fail, as these were incapable in law of founding a charge under s 127(2)(c); (5) alternatively, and in any event, Ms Scottow's messages could not properly be regarded as "persistent" conduct, or as having the purposes alleged, upon the true construction of the section, as interpreted and applied in the light of the right to freedom of expression, guaranteed by Article 10 of the Convention, and s 3 of the Human Rights Act 1998 ("HRA"). The District Judge dismissed all these applications and proceeded to hear argument and evidence from the prosecution and defence on the substantive charge.

12. The fact of the messages was not in dispute, nor was Ms Scottow's authorship of the 16 tweets. It was accepted that the messages had been sent over a "public telecommunications network"; that point was decided by this Court in *Chambers v DPP* (above). The issues were whether the messages represented the "persistent" use of such a network by Ms Scottow "for the purpose of causing annoyance, inconvenience or needless anxiety" to Ms Hayden within the meaning of s 127(2)(c).

13. The prosecution submitted in opening that the case was about

> "the use of social media, Twitter, to send or cause to be sent messages *of offence* from one person to another or so that another person would see them" (emphasis in original).

It was said to be "a reasonably straightforward case" in which the messages relied on "had at their heart the purpose of causing annoyance, inconvenience or needless anxiety" to Ms Hayden. It was submitted that:

[1] "… a magistrates' court shall not try an information … unless the information was laid … within six months from the time when the offence was committed."

> "These states, the *purpose* of the communication(s), are of a relatively lower effect when compared to other states of distress in other offences eg " ... Harassment Alarm or Distress ..."
>
> … Whether the … messages actually had that effect or may have done is irrelevant and the Crown do not have to prove that the messages had the desired effect [but] If the Crown are in a position to prove that the messages did have that effect then … that goes a long way to underpin the purpose."

(emphasis in original).

14. Three prosecution witnesses were called. Two were police officers, who gave formal evidence, establishing the facts and content of the interview and other formal matters. The third was Ms Hayden. In her evidence in chief, she gave evidence of "online abuse from trolls" from 9 September 2018, of which Bustedwench account "stood out". She described a Twitter "pile on" as a result. She described the steps she took to investigate, the compromise agreement, and the injunction application. She gave evidence about what she considered to be the motives or intentions of Ms Scottow, her own views about the meaning of the 2018 messages, their impact on her feelings, and whether they were (as she said they were) abusive and harassing.

15. Her evidence as to the 2019 Messages was, according to the Court clerk's note:

> (in chief) "I received tweet around March 2019, direct tweets, from account, Bishbash. Never heard of it. Tweets 1/3/19 and bottom one tagged me and says ' why do you people …'refering to the injunction. I did not know who it was, so I entertained a conversation for a few tweets. Later that day contacted by someone, so I researched the account and material in the media section which convinced me it was her, her dog featured again as with Bustedwench account. So back to the police
>
> (Cross-examined) 1/3 was next contact. Talking about Miranda Yardley, and MandiMcGirldick response. I was referring to injunction against defendant. She responded, not offensive but in breach of injection. It is persistent, not offensive. She offers a view, I make it clear, I engaged. Not offensive, I just disagreed. It's not just free speech, I thought it was when I realised it was her, I did not take offence, but breach of injunction. Took the view it was stupid.
>
> …
>
> 1/3 not offensive, but breach of injunction. Real objection is not that people disagree with me accept right to views."

16. The note records the following more general evidence from Ms Hayden, under cross-examination:

> "Many people believe cannot change sex, support right to that view. Discuss female only spaces, and sport, I do not object to that. I do not disagree with people taking issues. I do not call

> them bigots when they post on self identification. What is not acceptable is to contact individuals, publish photos, 'dead naming', using incorrect pronouns etc."

17. Ms Scottow gave evidence, and according to the case stated "she denied being persistent or 'out to annoy'". It appears that the Judge made no other note of her evidence. Evidence was read from a doctor, Dr Collins, whose evidence went to Ms Scottow's health.

The Judge's reasons

18. The District Judge gave full reasons. I shall return to some of the detail when I address the questions raised by the case stated, but her main conclusions can be summarised as follows (I have added paragraph numbers for ease of reference).

19. The Judge accepted the evidence of Ms Hayden, and rejected that of Ms Scottow. She found Ms Hayden was "both distressed and angry about what she had read": [7]. She said Ms Scottow "felt able to make personal and offensive comments to and about her" although they had never interacted before. This was not "part of a debate, it was abuse for the sake of it" which "contributed nothing to any debate": [8]. The Judge said that she had Article 10 rights in mind, but that these are not unfettered. Ms Scottow's comments were "merely personal comments aimed at Ms Hayden", which contravened the "rule" that adults teach children, and should follow themselves: "to be kind to each other and not call each other names": [13]. Ms Scottow's comments about PIP were made "out of anger" with "no thinking behind" them, and "a clear example of a comment which Ms Hayden found distressing, and forms no part of any debate": In addition (ibid.)

> "mis gendering, referring to Ms Hayden as 'he' and references to 'you people' and 'pig in a wig' clearly take any comment away from general debate, personalising the comment and rendering it simply unkind and abusive … your repeated use of male pronouns was deliberate …"

20. The Judge addressed the issues of persistence and purpose as follows:

    (1) The Judge was "entirely satisfied" that the requirement of persistence was met: [18]. Persistence is "not solely a question of quantity or frequency" but also a question of a determination to continue communications after realising (due to the court proceedings) that "your comments were not welcomed". The fact that Ms Scottow was "prepared to breach" the settlement and the injunction "demonstrates persistence": [15].

    (2) The Judge was also "entirely satisfied" that Ms Scottow's "purpose and intent were one and the same: to cause annoyance and needless anxiety to Ms Hayden": [18]. Whether Ms Scottow tagged or blocked Ms Hayden "does not… have much bearing", because the sender of a communication on the internet has little control over who will see it. Ms Scottow could not "in the circumstances of this case" say she did not realise Ms Hayden "would see what you had written": [14]. She was satisfied that Ms Scottow "knew that she would see … and that that was your intention": [17].

Questions for this Court

21. The questions referred for the opinion of this Court are as follows:

(1) Should this case have been stayed as an abuse of process on any of the argued grounds in the updated skeleton argument served 5 February 2020?

(2) Should the case have been stayed as an abuse in accordance with [*DPP v Ara* [2002] 1 WLR 815]?

(3) Was the charge duplicitous and therefore should the court have required the prosecution to split the charge and then ruled that anything pre 27.2.19 was out of time (in reality on the evidence pre-9.11.18) or stayed any prosecution of a charge with an end date pre 27.2.19 as an abuse of the court's process.

(4) (a) Did the judge correctly interpret and apply the law in light of the interpretation that would need to be given in light of Article 10 ECHR and s3 Human Rights Act 1998?

(b) Should the case have been stopped on a submission of no case?

(5) Was it proper in law to convict on the facts as alleged (7 tweets only 3 of them directly notified to the complainant September to November 2018 and 9 tweets on 1 March 2019 none of which were said to be objectionable until the complainant learnt (by investigation) that they came from an account operated by the defendant)? i.e. was there evidence on which the Court could come to its decision?

Discussion

22. In my judgment, the prosecution and the Judge had insufficient regard to the legal context, which is all-important.

23. In 1988, Parliament enacted the Malicious Communications Act. By s 1(1), as amended in 2001, a person is guilty of an offence if he

> "… sends to another person
>
> (a) A letter, electronic communication or article of 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, ..
>
> …
>
> if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) … above, cause distress or anxiety to the recipient …"

The offence is punishable by up to 2 years' imprisonment, and a fine, if prosecuted on indictment.

24. In 1997, Parliament enacted the Protection from Harassment Act 1997 ("PfHA"), creating the criminal offence and statutory tort of harassment. The PfHA is now

familiar. It prohibits a person from pursuing a course of conduct which amounts to harassment of another, and which the person knows or ought to know amounts to harassment, of the other. Section 2 creates the crime and section 3 the tort. They are co-extensive in content. There is a great deal of jurisprudence on the question of harassment, and in particular the tort of harassment by publication. A helpful summary can be found in the very recent judgment of Nicklin J in *Hayden v Dickenson* [2020] EWHC 3291 (QB) [40-44]. Points of particular relevance identified at [44] are as follows (for simplicity, I omit most of the internal citations):

> "(ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2 …
>
> (iii) … It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results ….
>
> (iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective. "*The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant*".
>
> …
>
> (vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that they felt offended or insulted …
>
> (vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes "*alarming the person or causing the person distress*". However, Article 10 expressly protects speech that offends, shocks and disturbs. "*Freedom only to speak inoffensively is not worth having*".
>
> (viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and

> unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality … The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the "*ultimate balancing test*" identified in ***In re S* [2005] 1 AC 593** [17] *per* Lord Nicholls.
>
> (ix) The context and manner in which the information is published are all-important … The harassing element of oppression is likely to come more from the manner in which the words are published than their content…"

25. Three further points may be added:

(1) A person alleging harassment must prove a "course of conduct" of a harassing nature. Section 7(3)(a) of the PfHA provides that, in the case of conduct relating to a single person, this "must involve … conduct on at least two occasions in relation to that person". But this is not of itself enough: a person alleging that conduct on two occasions amounts to a "course of conduct" must show "a link between the two to reflect the meaning of the word 'course'": *Hipgrave v Jones* [2004] EWHC 2901 (QB) [62] (Tugendhat J). Accordingly, two isolated incidents separated in time by a period of months cannot amount to harassment: *R v Hills (Gavin Spencer)* [2001] 1 FLR 580 [25]. In the harassment by publication case of *Sube v News Group Newspapers Ltd* [2020] EWHC 1125 (QB) [2020] EMLR 25 I adopted and applied this interpretative approach, to distinguish between sets of newspaper articles which were "quite separate and distinct". One set of articles followed the other "weeks later, prompted, on their face, by new events and new information, and they had different content": [76(1)], [99] (and see also [113(1)]).

(2) As Ms Wilson reminded us, where the claimant is, by choice, a public figure that should influence any assessment of whether particular conduct amounts to harassment of that individual; such a person has "inevitably and knowingly laid themselves open to close scrutiny of their every word and deed", and others can expect them to be more robust and tolerant accordingly: *Poruba v Russia* 8237/03 [2009] ECHR 1477 [45], and domestically, *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) [249-250].

(3) In a case of alleged harassment by publication the Court, in order to protect the right to freedom of speech, "should take account of the extent to which the coverage complained of is repetitious and taunting, as opposed to being new, and prompted by some fresh newsworthy event. The imposition of liability in respect of coverage that falls in the latter category will be harder to justify": *Sube* [106(2)].

26. Ms Hayden reported Ms Scottow for harassment and malicious communication. As a result, Ms Scottow was arrested and interviewed on suspicion of having committed offences contrary to the Acts of 1988 and 1997. Ms Hayden evidently relied on the

statutory tort of harassment (among other causes of action) for her injunction application in December 2018.

27. The prosecution did not charge Ms Scottow with malicious communication or harassment, but with an offence contrary to s 127(2) of the 2003 Act, which charge they then amended. They presented that charge to the Judge as if it were a lesser version of harassment, with a less demanding threshold – a kind of "harassment-lite" - in which it was enough to prove an intent to cause offence of at least one the kinds referred to in s 127(2)(c). That, in my judgment, is also how the Judge treated the matter. I am satisfied that this was wrong in law. In addition, although the Convention was mentioned by the prosecution and the Judge the approach of both, and the Judge's analysis, were legally flawed and inadequate.

28. Section 127 is one of a group of sections headed "Offences relating to networks and services". Section 125 makes it an offence dishonestly to obtain telecommunications services. Section 126 prohibits the "possession or supply, etc," of apparatus for that purpose. The full terms of s 127 are as follows:

> "127 **Improper use of public electronic communications network**
>
> (1) A person is guilty of an offence if he—
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent.
>
> (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false,
>
> (b) causes such a message to be sent; or
>
> (c) persistently makes use of a public electronic communications network.
>
> (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both."

I have emphasised the provisions eventually relied on in the prosecution of the appellant.

29. It is clear, in my judgment, that these provisions were not intended by Parliament to criminalise forms of expression, the content of which is no worse than annoying or inconvenient in nature, or such as to cause anxiety for which there is no need. First, the crime is only committed by conduct that is "*for the purpose*" of causing annoyance, inconvenience or anxiety. I add the emphasis to highlight the contrast with s 1 of the Malicious Communications Act, above. Secondly, it can only be committed by the "persistent" use of a "public telecommunications network". That encompasses the use

of Twitter (see above), but I do not consider that the mischief aimed at by Parliament when it passed s 127 of the 2003 Act was as broad as causing offence online.

30. The legislative history of s 127 was traced by Lord Bingham in *Director of Public Prosecutions v Collins* [2006] UKHL 40 [2006] 1 WLR 2223 [6]:

> "The genealogy of this section may be traced back to section 10(2)(a) of the Post Office (Amendment) Act 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene or menacing character. That subsection was reproduced with no change save of punctuation in section 66(a) of the Post Office Act 1953. It was again reproduced in section 78 of the Post Office Act 1969, save that "by means of a public telecommunication service" was substituted for "by telephone" and "any message" was changed to "a message or other matter". Section 78 was elaborated but substantially repeated in section 49(1)(a) of the British Telecommunications Act 1981 and was re-enacted (save for the substitution of "system" for "service") in section 43(1)(a) of the Telecommunications Act 1984. Section 43(1)(a) was in the same terms as section 127(1)(a) of the 2003 Act, save that it referred to "a public telecommunication system" and not (as in section 127(1)(a)) to a "public electronic communications network". Sections 11(1)(b) of the Post Office Act 1953 and 85(3) of the Postal Services Act 2000 made it an offence to send certain proscribed articles by post."

31. Lord Bingham went on at [7] to identify the object of s 127(1)(a):-

> "the object of section 127(1)(a) and its predecessor sections is not to protect people against receipt of unsolicited messages which they may find seriously objectionable. That object is addressed in section 1 of the Malicious Communications Act 1988, which does not require that messages shall, to be proscribed, have been sent by post, or telephone, or *public* electronic communications network. The purpose of the legislation which culminates in section 127(1)(a) was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society. A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act, but it does not fall within the legislation now under consideration."

32. Those observations are not directly in point, but in my judgment the wording, legislative history, and context make it apparent that the mischief at which the offence now contained in s 127(2)(c) was aimed is not the communication of information or ideas that offend the recipient, or even the communication of messages that have offence as a purpose. Its object was to prohibit the abuse of the facilities afforded by a publicly funded network by repeatedly exploiting those facilities to communicate with another

for no other purpose than to annoy them, or cause them inconvenience, or needless anxiety. The focus is not on the content of any communication, but rather its purpose and the way in which that purpose is put into effect. I have no doubt that repeated instances of prank calls, silent calls, heavy breathing, and other common forms of nuisance phone call, containing no meaningful content, would fall within the scope of s 127(2)(c). I do not mean to suggest these examples are exhaustive, but they do indicate the kinds of behaviour that I consider the legislature intended to prohibit by enacting this offence. I am not persuaded that content will always be irrelevant, but I see much force in Ms Wilson's submission that what Parliament intended was to proscribe a course of persistent conduct the sole purpose of which is to cause annoyance, anxiety or inconvenience by virtue of its persistence, rather than its informational content.

33. A prosecution for persistent silent calls or purely nuisance communications of the kinds I have mentioned would not appear to engage Article 10, which protects the freedom to impart and receive "information and ideas". But a Court asked to convict a person of an offence under s 127 of the 2003 Act on the basis of the content of something they have said or written is obliged to have in mind the right to freedom of expression, guaranteed by Article 10, and the requirement of s 3 of the HRA, that "so far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights".

34. In *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin) [2008] 1 WLR 276, this Court considered that obligation in the context of an appeal against conviction for an offence contrary to s 1 of the Malicious Communications Act by "sending a communication of an indecent or grossly offensive nature with the purpose of causing distress or anxiety". The Court held that the conduct impugned by the charge (sending pictures of aborted foetuses to pharmacies which sold the 'morning after pill') was a form of political expression by the defendant, an anti-abortion activist. Accordingly, a conviction would breach her right to freedom of expression under Article 10(1) of the Convention, unless it could be justified under Article 10(2). The same reasoning applied in respect of Article 9 (freedom of thought, conscience and religion) which was engaged because the defendant's conduct was linked to her religious convictions as a Roman Catholic. The Court's conclusion (at [18]) was that s 1 of the 1988 Act could and should be interpreted compatibly

> "by giving a heightened meaning to the words "grossly offensive" and "indecent" or by reading into section 1 a provision to the effect that the section will not apply where to create an offence would be a breach of a person's Convention rights, i e a breach of article 10(1), not justified under article 10(2)."

35. The approach is well-known. A measure that interferes with freedom of expression is only justified if it is prescribed by law, pursues one or more of the legitimate aims identified in Article 10(2), and is shown convincingly to be "necessary in a democratic society". "Necessary" is not synonymous with "indispensable", but nor is it as flexible as such terms as "useful" "reasonable" or "desirable". One must consider whether the interference complained of (1) corresponds to a pressing social need, (2) is proportionate to the legitimate aim pursued and (3) is supported by reasons which are relevant and sufficient. The authorities are cited in *Connolly* at [19], [23-27]. Some of the consequences of this approach are spelled out in the harassment authorities I have

cited. But the points made in those authorities are not confined to cases of harassment. They apply to that crime and tort because, and to the extent that, it engages the right to freedom of expression, and applies to a course of conduct. The same general principles must applyin the present context.

36. In *Connolly*, the Crown Court (which had dismissed an appeal from the Magistrates) had conducted "little or no analysis" of article 10(2), which therefore had to be carried out by the Divisional Court: see Dyson LJ at [20], [32].

37. It is against this background that the prosecution and the District Judge should have approached this case. It is evident that neither did so. Had this case been approached by the Judge in a legally correct manner, it should have been dismissed.

38. I can deal quite shortly with question 3.

(1) The District Judge found that "The behaviour of Ms Scottow, in sending messages was a single, continuing course of action spanning several months from September 2018 until May 2019", and therefore properly charged in a single count. She gave no reasons for this conclusion. As the harassment authorities show, actions on different occasions must have some link if they are to count as a "course of conduct". This is a point of law, but one that flows from the ordinary meaning of the words. The Judge identified no link, and I do not consider that there was any adequate basis for doing so.

(2) The Crown's submission was that Ms Scottow's use of the internet matched the ordinary meaning of "persistent", which was identified as "*continuing, firmly or obstinately in an opinion or course of action in spite of difficulty or opposition.* To this extent, submitted the Crown, "*persistently* has about the word elements of frequency and application to a theme, cause or view point the furtherance of which is supported by determination despite being discouraged from doing so in some form or another." I do not disagree with this linguistic analysis, but I do not consider that it can justify the conclusion arrived at by the District Judge.

(3) For the reasons already given, this was not a single "course of action". Further, on this analysis, a series of communications must have an element of frequency; but here there was one tweet in September, then four or five two months later, in the course of a week in early November, than a gap of over three months, then 10 messages on the same day. The communications must – on this analysis - also have some connecting theme or other factor, if they are to count as persistent. It cannot be enough that they all refer or in some way relate to the same individual.

(4) The 2018 Messages conveyed, over a period of two months, a variety of different defamatory or insulting messages about Ms Hayden, to the effect that she was racist, xenophobic, bullying, dishonest, and fraudulent. There was some element of repetition, but only some. Between 9 November 2018 and 1 March 2019 Ms Scottow did not persist, she desisted. In 2019, she communicated again, but the subject-matter was different. The 2019 Messages were all on the same topic, a new one, evidently prompted by the conduct of Ms Hayden in publicising, promoting and discussing the fact of the injunction. Ms Scottow's messages questioned and challenged Ms Hayden's public position in relation to that, in various different ways.

(5) These were, on a proper analysis, at least two separate courses of conduct, engaged in at different periods of time, separated by a period of several months, and they were of different character. For these reasons I find the District Judge was wrong in law to hold that the 2018 and 2019 Messages were, or could all be considered to be, part of a single course of "persistent" conduct. It was not lawful to prosecute Ms Scottow in August 2019 for her conduct over 9 months earlier.

39. As for the 2019 Messages, the worst that could be said of Ms Scottow's conduct in sending those messages is that she persisted again, like she had the previous year - albeit in a different way. In my judgment, however, the proper analysis is that the 10 tweets of 1 March 2019 did not in themselves represent "persistent" use of the public network. For the reasons I have given, these tweets must be assessed in isolation from the 2018 Messages. For the same reason, the Judge was wrong to place any weight on the proposition that the 2019 Messages represented a breach of the injunction. It would be illogical to put to one side the 2018 messages, but at the same time rely on the injunction they prompted to prove that the 2019 Messages represented persistence.

40. Viewed in isolation, the 10 tweets of 1 March 2019 could not be regarded as "persistent" use of the network. There was a theme to them: Ms Scottow was taking issue with what Ms Hayden had said about the injunction. But she was not doggedly pressing away at the same point, in the face of opposition. This was a conversation, of a moderately challenging kind, but nothing more and nothing worse.

41. I am satisfied for additional reasons that those 10 tweets cannot be considered a criminally improper use of the network, contrary to s 127(2)(c). The District Judge's finding as to Ms Scottow's purpose is a finding of fact which in principle deserves respect. But in my view her approach to that issue was flawed in several respects and her reasoning is deficient.

(1) The Judge did not address her mind to the question of whether the messages were "for the purpose" of causing annoyance or, put another way, whether the purpose she found was the only purpose of the communications relied on. Her reasons are consistent with, indeed suggest, that she considered it enough that causing annoyance, anxiety or inconvenience, was *a* purpose that Ms Scottow had in view.

(2) She misdirected herself on the issue of tagging and blocking and whether Ms Scottow might have thought Ms Hayden would not see what she had written. The most obvious way to use a telecommunications network for the purpose of causing another annoyance etc is to contact that person directly. If Ms Scottow had blocked Ms Hayden and did not tag her in messages, that was logically relevant to the question of whether her aim, or the end she had in view, was one of the prohibited purposes. The fact that anything can be found on the internet, and would (or might) be found by Ms Hayden is a different issue. Foreseeability is not to be equated with purpose.

(3) The Judge seemingly regarded the evidence of Ms Hayden as to the actual effect on her as in some way relevant to the question of purpose. It was not, as the prosecution rightly observed in opening. The prosecution was wrong to submit that this admittedly irrelevant factor could somehow bolster a conclusion about Ms Scottow's purpose.

(4) There are three prohibited purposes. The Judge did not identify which of the three she found proved.

(5) She dealt with the messages collectively, rather that considering the purpose or purposes of each one. As a result, it is not possible to identify whether she concluded that the 2019 Messages were sent with one of the prohibited purposes. The Judge did not identify any specific reason for reaching such a conclusion. Her reasons for her finding on purpose mentioned a number of remarks that had been made by Ms Scottow in her interview of 1 December 2018, but none of those could have related to the 2019 Messages, which came several months later. Ms Scottow said nothing in interview about the 2019 Messages. Those messages did not "misgender" Ms Hayden, who was referred to as "they".

42. A prosecution under s 127(2)(c) for online speech is plainly an interference by the state with the defendant's Convention right to freedom of expression. This case is no different in principle from that of *Connolly*. Yet the sole reference to the Convention in the prosecution opening came in response to the defence applications. The essential submission was that "There has been … no denial of Article 10 rights to the Defendant. Article 10 does not give free reign to anyone to be offensive or gives an absolute defence to an offence that necessarily has about it purpose the prevention of a person abusing another by communication, speech or writing or other expression." The Judge dealt with the Convention issues as follows:-

> "[13] In considering your evidence, I have reminded myself of Article 10 and accept fully an individual's right to free expression and the right to take part in public debate, and that Twitter is used by many people for that purpose. However, Art 10 rights are not unfettered and I do not find your communications to be part of a debate, they are merely personal comments aimed at Ms Hayden. We teach our children to be kind to each other and not to call each other names in the playground and there is no reason why, simply because some thing is on social media, we should not follow that rule as adults and think about what is being written before sending messages, and not send 'stupid throw away comments', as described by you in xx.
>
> [19] I am asked by your counsel not to criminalise Twitter and shut down free speech. That is not my intention, there should be no restriction on proper debate, but I do not find that what you did was in furtherance of any debate as I hope I have explained."

43. This is an unstructured approach that lacks the appropriate rigour. The Crown evidently did not appreciate the need to justify the prosecution, but saw it as the defendant's task to press the free speech argument. The prosecution argument failed entirely to acknowledge the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another. The Judge appears to have considered that a criminal conviction was merited for acts of unkindness, and calling others names, and that such acts could only be justified if they made a contribution to a "proper debate". Neither prosecution nor Judge considered whether some more demanding interpretation of s 127 or addressed the question of what legitimate aim was pursued, or, more

importantly, whether the conviction of this defendant on these facts was necessary: whether it was a proportionate means of responding to some pressing social need.

44. The Judge evidently attached weight to the notion of a "debate" – a word that appears nine times in her judgment. It is unclear from what source she drew the term. It may have been from Counsel's submissions on behalf of Ms Scottow, which urged the Court to recognise the importance of debate on the rights of trans women, and their limits. The notion of a "debate of general interest" is however a feature of privacy jurisprudence. In claims about the public disclosure of private facts, where the Court must strike a balance between the Article 8 right to respect for private life and Article 10, "the decisive factor … is an assessment of the contribution which the information would make to a debate of general interest": *ZXC v Bloomberg LP* [2020] EWCA Civ 611 [2020] 3 WLR [106]. This, however, is not such a case. There is nothing at all in the 2019 Messages that could count as an interference with Ms Hayden's Article 8 right to the preservation of private information. The 2018 Messages, or some of them, contain statements that could impinge on her reputation, the protection of which falls within the scope of Article 8; but in that context the "debate" criterion is not in play. It is not the law that individuals are only allowed to make personal remarks about others online if they do so as part of a "proper debate". It is only the PIP message that might engage the "debate of general interest" principle.

45. In these circumstances, as in *Connolly*, it falls to us to make the Convention assessment which was not, or was not adequately carried out in the Court below. It is only necessary, and it is only appropriate, to make that assessment in relation to the 2019 Messages. Ms Wilson submits that this Court should give heightened meanings to the terms statutory terms "persistently", "purpose" and "annoyance", or alternatively that we should test the prosecution against the requirements of Article 10(2). I see some difficulty in following the first of these approaches. Few if any prosecutions under s 127 will engage Article 10, and the meaning of the section cannot depend on whether the Convention is or is not engaged in an individual case. But the second approach is one that we are duty bound to apply.

46. I would accept that the stated aim of the prosecution, namely the protection of Ms Hayden from persistent and unacceptable offence, is a legitimate aim. It falls within the scope of the "protection of the rights of others", which may be, but do not have to be Convention rights. I do not consider, however, that a prosecution in respect of the 2019 Messages could be justified as necessary in a democratic society.

47. Ms Scottow's messages related to material that Ms Hayden had posted online about the injunction she obtained from the High Court in December 2018. They were messages about public statements made by a public figure in relation to the acts of a public authority. Those are topics of legitimate public interest and, as Mr Riley conceded in argument before us, it was "a public conversation or discourse". The protection of individuals from annoyance or inconvenience is not in itself a strong public policy imperative. In this respect, the actual impact on the recipient of the communication is of some importance, so Ms Hayden's contemporary responses (such as her reply to Tweet 10) and her evidence at trial are highly relevant. The 2019 Messages did not do any of the things she identified in her evidence as "unacceptable". The record shows that she did not regard what was said as in any way offensive or objectionable, until she discovered that Ms Scottow was the pseudonymous author. At that point Ms Hayden was angered, to the point of contacting the police again. Her reason was not that she

considered the messages to represent harassment or any other criminal offence, but rather that they were a breach of the injunction. Given the (remarkably) broad terms of the injunction, that says nothing about the content of the messages, which was largely innocuous. No convincing, relevant or sufficient reasons have been given for the decision to prosecute Ms Scottow under s 127 for those messages, and there was and is in my judgment no pressing social need to do so. A prosecution and conviction on these facts would represent a grossly disproportionate and entirely unjustified state interference with free speech.

48. For these reasons, I would answer questions 4 and 5 in favour of Ms Scottow. Having reached these conclusions, with which I understand My Lord, Lord Justice Bean is in agreement, it is unnecessary to answer questions 1 and 2.

The civil proceedings

49. In the light of our decision, the stay on the civil proceedings will come to an end. This is not the context in which to review those proceedings, but they do require review. The interim injunction in this case is, in the experience of either of us, unprecedented in its breadth and content. An application for relief on similar lines was refused by Nicklin J in *Hayden v Dickenson*, observing that "I can scarcely conceive of circumstances in which the Court would grant an injunction in these terms": see [55(b)], [67(ii)] and [68]. Examination of the court file reveals that, two years on, the injunction against Ms Scottow remains in place, and an application issued in June 2019, to commit Ms Scottow for contempt of court by breaching that order, remains pending. Under the version of Part 53 of the Civil Procedure Rules that is now in force the Media and Communications List ("MAC List") is a "specialist list", to which claims of harassment by publication are required to be assigned. That was not the position when this claim was issued. But as Judge in Charge of the MAC List I have made an order that Ms Hayden's claim should be transferred into that List, and ordered a directions hearing to review the state of the case and its future progress.

Lord Justice Bean:-

50. Section 127 of the Communications Act 2003, headed "improper use of public electronic communications network", creates an offence with three subspecies:

> (i) (s 127(1)) sending or causing to be sent a message or other matter that is grossly offensive or of an indecent, obscene or menacing character;
>
> (ii) (s 127(2)(a) and (b)) sending or causing to be sent a message known to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another;
>
> (iii) (s 127(2)(c)) persistently making use of a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another.

51. The first of these corresponds closely to s 1(a)(i)-(ii) of the Malicious Communications Act 1988, under which the message conveyed has to be a indecent, grossly offensive or a threat. The second corresponds closely to s 1(a)(iii) of the 1988 Act, under which the information conveyed has to be false and known or believed to be false by the sender.

52. The third, which is of course the one with which we are concerned in this case, does not mirror s 1 of the 1988 Act, and says nothing about the nature of any message or information communicated. In my view this is because this offence is not concerned with the communication of a message or of information but with the persistent use of the network. The classic example, to which Warby J has referred, is of persistent nuisance telephone calls, where the caller may not necessarily say anything at all, but the *fact* of the calls causes annoyance, inconvenience or needless anxiety.

53. If the prosecution argument accepted by the District Judge in this case were correct, it would create a curious anomaly under which a repeated message whose contents are intended to annoy, but which are not grossly offensive, menacing, indecent or obscene, nor known to be false, would be criminal if sent in a tweet or otherwise placed on an electronic network but not if conveyed orally or in print. A newspaper columnist who persistently criticises someone in terms which the target finds annoying could not be prosecuted in respect of the print edition, but might (subject to the point Warby J has made about "purpose") be at risk of prosecution in respect of an online edition.

54. In short, I do not consider that under s 127(2)(c) there is an offence of posting annoying tweets. I would reach that conclusion as a matter of domestic statutory interpretation without reference to the Human Rights Act, but once one takes Article 10 into account the position is even clearer.

55. For these reasons and those given in the judgment of Warby J, with which I agree, I too would allow the appeal and quash the conviction.

56. This appeal illustrates the need for decision-makers in the criminal justice system to have regard, in cases where they arise, to issues of freedom of speech. In that context I add by way of footnote that when reading the judgment of Nicklin J in *Hayden v Dickenson*, which Warby J has cited, I was surprised to read at paragraph 39 that the defendant, who like Ms Scottow had been arrested following a complaint made by Ms Hayden, was released on pre-charge bail, one condition of which was that she was "not to post on social media *anything* relating to the Claimant" [emphasis added]. It will have to be decided in some other case whether a condition of this kind can be justified under Article 10 or s 3(6) of the Bail Act 1976.