



Summary

The Queen on the application of Harry Miller (Appellant) v The College of Policing (Respondent) and anor. [2021] EWCA Civ 1926 On appeal from [2020] EWHC 225 (Admin)

Judges: Dame Victoria Sharp (President of the Queen’s Bench Division), Lord Justice Haddon-Cave and Lady Justice Simler

BACKGROUND TO THE APPEAL

The Hate Crime Operational Guidance (the Guidance) is a document, issued by the College of Policing, which sets out the national policy in relation to the monitoring and recording of non-crime hate incidents in respect of five monitored strands. Under the Guidance, the police must record as non-crime hate incidents, complaints of incidents that are *perceived* by the victim or any other person to be motivated by hostility or prejudice against a person who is within one of the monitored strands, irrespective of whether there is any evidence of hostility. This is known as perception-based recording [9]-[18].

Mr Miller is someone who became the subject of a non-crime hate incident record, following a complaint about comments he had made on Twitter concerning gender recognition. These comments were made in the context of a Government consultation on proposed reforms to the Gender Recognition Act that placed greater emphasis on the self-identification by a person of their gender [31]-[46].

Before Julian Knowles J, Mr Miller challenged both his treatment by Humberside Police and the Guidance itself. He succeeded against Humberside Police, but the challenge to the Guidance was dismissed [47]-[50]. On appeal, he challenged the lawfulness of the Guidance at common law and on Article 10 (freedom of speech) grounds [52].

JUDGMENT

The Court of Appeal unanimously allowed the appeal on two grounds.

REASONS FOR THE JUDGMENT

The Guidance clearly constituted a real and significant interference with the right to freedom of expression [67]. The risk of recording in such a case (together with knowledge of that risk and potential disclosure of non-crime hate incidents on an Enhanced Criminal Record Check, for example) had the potential to create a chilling effect in relation to public debate on a controversial issue [67]-[76] and [102].

As to whether that interference was justified, the Guidance pursued the legitimate aims of the prevention of crime and the protection of the rights of others. Furthermore, the measures taken were rationally connected to those aims [108]. However, the aims could be achieved by less intrusive measures and the overall impact of the measures on the right to freedom of expression was therefore disproportionate [109 & 122]. In particular, although the Guidance contained two narrow exceptions to the general rule that complaints *must* be recorded, the lack of any ‘common-sense’ discretion not to record irrational

complaints meant that there was a risk of recording incidents which are essentially non-crime non-hate incidents [112]. The Guidance made no provision for any proportionality exercise in relation to recording and said nothing about the language to be used in any such record, or whether the subject should be notified that an incident has been recorded [117]. Such safeguards as there were in the Guidance did not sufficiently address these issues. Less intrusive measures could have been used to achieve the legitimate aims of recording incidents of this kind without unacceptably compromising those aims.

A revised version of the Guidance was issued in October 2020 which emphasised the need for proportionate action by the police. However, this did not go far enough to address the chilling effect of perception-based recording in the circumstances described [122].

References in square brackets are to paragraphs in the judgment.

NOTE : This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments/>