



Judiciary of  
England and Wales

[2024] EWHC 1908 (Admin)  
AC-2023-LON-000697; CO/0543/2023

**BORDERS AND COBBAN PRESS SUMMARY**

**Borders & Cobban**

v

**Rex**

**SUMMARY OF THE DECISION OF THE HIGH COURT OF JUSTICE, DIVISIONAL COURT, ON 26 JULY 2024 (The Lady Chief Justice, Mr Justice Saini)**

**BACKGROUND TO THE APPEAL**

1. Mr Borders and Mr Cobban were both serving officers of the Metropolitan Police Service (“the MPS”). Along with five other officers they were members of a closed, private WhatsApp group. Between April 2019 and August 2019, whilst in the service of the MPS, Mr Borders and Mr Cobban sent messages with content which was racist, misogynistic, sexist, homophobic, and disablist to the WhatsApp group. These messages were discovered following the arrest and subsequent investigation into Wayne Couzens, a member of the group, for the murder, rape and kidnapping of Sarah Everard. [1]
2. On 21 September 2022, Mr Borders was convicted of five offences of improper use of the public communications network, contrary to s 127 of the Communications Act 2003 (“the 2003 Act”). Mr Cobban was convicted of three offences under the same provision. The District Judge, sitting in the Magistrates’ Court, found that the messages were ‘grossly offensive,’ and that Mr Borders and Mr Cobban were aware of the risk that the members of the public and the persons to whom the messages related would be grossly offended by the contents of the messages. [6]
3. On 2 November 2022, the judge sentenced each of them to concurrent terms of 12 weeks’ immediate custody in respect of each offence. [8]
4. Mr Borders and Mr Cobban made an appeal by way of case stated to the Divisional Court, in relation to both their conviction and their sentence. [6] The issue in this appeal is whether the judge was right to conclude that the actions of Mr Borders and Mr Cobban contravened section 127 of the 2003 Act, and if so, if she was right to impose a custodial sentence.

**JUDGMENT**

5. The Divisional Court dismisses the appeal.

## REASONS FOR THE DECISION

6. The object of section 127(1)(a) of the 2003 Act 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. It is the use of the public network which is the core of the offence. [24]
7. There is binding authority in the form of *R v Collins* [2006] UKHL 40; [2007] 1 WLR (HL) as to the ingredients of the offence under section 127(1)(a) of the 2003 Act. [50] Whether a message sent over an electronic communications network is “grossly offensive” within section 127(1)(a) is a question of fact to be answered objectively by reference to its contents and context, and not its actual effect. [57] In determining whether a message is “grossly offensive” the tribunal of fact must ask whether its contents are liable to cause gross offence to those to whom it relates, or whether reasonable persons in our society would find it grossly offensive. That test requires the application of the standards of an open, just, multiracial and multifaith society. [59]
8. The actus reus of the offence comprises three elements, namely: (a) sending a message; (b) of the proscribed “grossly offensive” character; and (c) by way of an electronic communications network. Provided all three elements are proved, the actus reus is complete at the time of the sending. It makes no difference whether the relevant message is received or read. [57] As regards the mens rea of the offence, the defendant must have intended his message to be grossly offensive to those to whom it related or be aware that it may be taken to be so. [63]
9. However, before a defendant can be convicted for sending a message prosecuted under this section, the court must also be satisfied that the conviction is a proportionate interference with such European Convention on Human Rights as apply. Depending on the circumstances, these rights may include Articles 10(1) and Article 8(1). [76]
10. Article 10(1) is engaged [83] and the interference with the Appellants’ free speech rights was justified within Article 10(2). It was proportionate to the legitimate aim of maintaining public confidence in the police to express public disapproval of their actions through criminal liability. [107]
11. In this case, Article 8(1) is not engaged. The messages all related to policing actions and conduct. Mr Borders and Mr Cobban had received extensive training in police standards and were in obvious breach of a number of regulatory provisions. They could have no reasonable expectation of privacy in the messages in this appeal. [99] Even if Article 8(1) were engaged, the interference with Mr Borders and Mr Cobban’s private life was justified within Article 8(2), for the same reasons as Article 10(2). [108]
12. The judge did not fall into error by imposing a custodial sentence. The stand-out feature of the offending was the enormous indirect “societal” harm caused by the loss to public confidence in the police. It was appropriate, and indeed incumbent on the judge to take this into account. [123] The judge had a wide discretion to decide whether to suspend the sentence and her decision not to was well within this discretion. [126]

**Important note for the press and the public: this summary is provided to assist in understanding the Court of Appeal’s decision. It does not form part of the reasons for the decision. The full judgment ([2024] EWHC 1908 (Admin) ) is the only authoritative document. The judgment is a public document and is available online at Judgments Archive - Courts and Tribunals/Judiciary: <https://caselaw.nationalarchives.gov.uk/>**