Neutral Citation Number: [2024] EWHC 1908 (Admin)

Case No: AC-2023-LON-000697; CO/0543/2023

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2024

**Before**:

**THE LADY CARR OF WALTON-ON-THE-HILL**
**THE LADY CHIEF JUSTICE OF ENGLAND AND WALES**
and
**THE HONOURABLE MR JUSTICE SAINI**

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**Between:**

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| **(1) Jonathan Cobban** | **Appellants** |
| **(2) Joel Borders** | |
| **- and -** | |
| **Director of Public Prosecutions** | **Respondent** |

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**Nicholas Yeo** and **Charles McCombe** (instructed by **Reynolds Dawson Solicitors**) for the **Appellants**
**Jocelyn Ledward KC** and **James Boyd** (instructed by **Crown Prosecution Service Appeals Unit**) for the **Respondent**

Hearing date: 26 June 2024

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# APPROVED JUDGMENT

This judgment was handed down at 10:00am on Friday 26 July 2024 in Court 4 and by release to the National Archives.

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**Lady Carr of Walton-on-the-Hill, CJ and Mr Justice Saini:**

**This judgment is in 13 sections as follows:**


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## I. Overview

1. This appeal concerns electronic messages sent between serving officers of the Metropolitan Police Service ("MPS") who were members of a WhatsApp group named Bottle and Stoppers ("the Group"). There were seven officers in the Group, including Wayne Couzens, who was convicted of the kidnapping, rape, and murder of Sarah Everard in June 2021. As members of the Group, the Appellants were involved between April 2019 and August 2019 in sending messages, and responding to messages, with content which can fairly be described as abhorrent. We set out the relevant content of the messages at [8] below ("the messages"). The messages concerned the Appellants' policing duties and perspectives on those duties, and it is not in issue that their content was racist, misogynistic, sexist, homophobic, and disablist. No other members of the Group challenged the Appellants, nor did they express any concerns about the contents of the messages when received. Mr. Couzens' membership of the Group is relevant to these proceedings only in that it was as a result of his arrest and the subsequent inspection of his mobile telephone that the messages were discovered.

2. In its broadest terms, the question before us is whether the judge below was right to convict the Appellants of improperly using a public electronic communications network contrary to section 127(1) of the Communications Act 2003 ("section 127(1)") ("the 2003 Act") when they were engaged in private consensual messaging. The central features of such messaging included the following: the messages were sent within a closed group; they had a content which the recipients welcomed and did not find

offensive but amusing; and the messages were never intended for any wider circulation, nor were they expected to be read by the types of person or communities referred to negatively in the messages.

3. It was held that the acts of sending the messages contravened the statutory prohibition in section 127(1) on using a public electronic communications network to send messages of a "grossly offensive" nature. Whether that was right turns principally on the correct construction of section 127(1).

4. WhatsApp is owned by Meta Inc., but messages on that platform are sent over the internet (comprising landline, optical fibre, and mobile phone networks) which, it is common ground, is a "*public electronic communications network*" within the meaning of section 127(1).

5. This appears to be the first time that the application of section 127 of the 2003 Act ("section 127") to private consensual messaging has come before the senior courts.

## II. The proceedings in the Magistrates' Court

6. The matter comes before us on an appeal by way of case stated against the convictions, following a trial, of the First Appellant, Joel Borders, and the Second Appellant, Jonathan Cobban, before District Judge (MC) Sarah Turnock ("the judge") sitting at the Westminster Magistrates' Court and then at the City of London Magistrates' Court. On 21 September 2022, Mr Borders was convicted of five offences of improper use of a public electronic communications network, contrary to section 127. Mr Cobban was convicted of three offences under the same provision. As set out in more detail below, the judge found that the messages each met the statutory requirement of being of a "*grossly offensive*" character. She further found that the messages were intended to be jokes and were not intended to be taken seriously by the other members of the Group. There was no direct evidence that anyone who read the messages was offended. Although the judge found that the Appellants did not intend the messages to cause gross offence, she did find that the Appellants were aware of the risk that members of the public and the persons to whom the messages related would be grossly offended by the contents of the messages. The judge held that, at the very least, the Appellants had wilfully shut their minds to the grossly offensive impact that the messages would have had on the persons to whom they related. A third co-defendant, William Neville, also a member of the Group, was acquitted of two counts of sending grossly offensive messages in respect of which he had been jointly charged with Mr Cobban (who was also acquitted on those two counts).

7. The judge delivered two judgments which are appended to the Case Stated dated 6 February 2023 ("the Case"): (1) a "*half-time*" ruling dated 29 July 2022; and (2) a detailed and impressive written judgment dated 21 September 2022 ("the Written Judgment") containing her factual and legal conclusions in finding the Appellants guilty.

8. On 2 November 2022, the judge sentenced each Appellant to concurrent terms of 12 weeks' immediate custody in respect of each offence. The judge granted each Appellant bail, with residence and reporting conditions, pending determination of the present appeal. Independently of the challenge to their convictions, the Appellants also seek to

challenge these sentences before us. That matter gives rise to certain procedural complications as we set out further below.

9. As noted above, at the time of the messaging in 2019, the Appellants were both serving police constables with the MPS. In due course, they each resigned: Mr Borders on 9 December 2020 and Mr Cobban on 28 November 2022. On 28 November 2022, a hearing took place under the Police (Conduct) Regulations 2020 (SI 2020/4), before a misconduct panel of the MPS and two other police services ("the Panel"). It was alleged that by sending and receiving these messages, the Appellants, Mr Neville, and three other officers in the Group had misconducted themselves in respect of the professional standards of Authority, Respect and Courtesy, Discreditable Conduct, Equality and Diversity, and Challenging and Reporting Improper Conduct. The conduct complained of did not rely on the fact that, by the time of the disciplinary proceedings, the Appellants had been convicted of criminal offences. On 9 December 2022, the Panel found the allegations proved and dismissed those officers who had not already resigned. The Panel also placed all the officers on the police barring list, which prevents their working in policing and certain other roles in the future.

## III. The Messages

10. The messages and exchanges which are the subject of the convictions were in the following terms:

(1) 5 April 2019
Joel Borders (JB)
JB stated that he "*can't wait to get on guns so I can shoot some cunt in the face!*" and in response to Jonathon Cobban (JC) who had referred to tasering cats, dogs and children, JB stated "*and a couple of downys?*"

("*downys*" is a reference to those with Down's Syndrome)

(2) 25 April 2019
Joel Borders
In response to JC's comment that "*Kate*" will "*look after you*" JB stated "*She will use me as an example. Lead me on then get me locked up when I rape and beat her! Sneaky bitch.*"

("*Kate*" was a fellow police officer of the Appellants)

(3) 21 June 2019
Jonathan Cobban and Joel Borders
As part of a conversation between JC, JB and another in which it was implied that JC had "*fingered a DV victim*", JC replied, "*That's alright, DV victims love it... that's why they are repeat victims more often than not*" and to which JB responded "*No, they just don't listen!*"

("*DV victims*" are domestic violence victims)

(4) 29 June 2019
Jonathan Cobban and Joel Borders

In a chat between JC, JB and another, JC referred to Hounslow as "*a fucking Somali shit hole. There goes pussy patrol…more like fgm patrol.*" JC commented that when walking through Hounslow central "*it was like walking along a dulux colour code*". JB replied that "*feltham is worse! I went there the other week and I felt like a spot on a domino!*" and refers to Hounslow as "*twinned with Baghdad*".

("*fgm*" refers to female genital mutilation)

(5) 7 August 2019
Joel Borders
In response to a comment that there had been three domestic violence cases that day, JB commented, "*I bet they all had one thing in common…Women that don't listen.*"

(6) 9 August 2019
Jonathan Cobban
During a conversation between JC and JB in which JB referred to being "*paired up with the only gay on section!*", JC stated in response "*Oh yeah I dealt with one of those, hospital guard for some attention seeking self harming fag*"

11. We set out the judge's findings of fact in relation to each message at [17] below.

12. At trial, the Appellants contended that these messages were examples of "*sarcasm*" or "*dark humour*", with the strength of the jokes resting in the fact that they were "*extreme*" and would generate a high degree of controversy. They disputed the contention that the messages were "*grossly*" offensive in their nature (even with the benefit of hindsight and reflection) but accepted that at least some of the messages were offensive, and that they no longer regarded them as "*funny*". Their case was that they did not intend, or expect, the messages to be taken seriously by the others in the Group, and they had no reasonable expectation that the messages would be seen by the wider public. Consequently, it was said on their behalf that, at the time the messages were sent, they had not given any thought to how anybody other than the members of the Group would have reacted to them. They rejected the suggestion that they appreciated that there was a risk that the persons to whom the messages related (or members of the public more widely) would be grossly offended by the messages.

13. The prosecution invited the judge to look beyond the bare messages themselves and to take account of their context and the relevant circumstances. It was submitted to the judge that she would need to apply the standards of an open and just multi-racial society and consider whether reasonable persons in such a society would find the messages grossly offensive. In doing so, the prosecution submitted that it was plainly relevant to consider (on behalf of the reasonable person in an open and just multi-racial society) that the people sending messages - that were characterised as being racist, misogynistic, sexist, homophobic, and disablist - were serving police officers responsible for protecting and supporting the very vulnerable people to whom the offensive messages related. It was submitted that this is what rendered the messages so grossly offensive to society generally, and to those to whom they related. The prosecution submitted that the fact that the Appellants had said they had given no thought to how people outside of the group would have reacted to the messages did not prevent the judge finding that,

when they sent them, they either intended, or were aware, that their content would be considered grossly offensive to those to whom they related, and to reasonable and tolerant members of the public more generally. Accordingly, it was argued that it was open to the judge to find the mental element of the offence proven.

14. The judge essentially accepted the prosecution case. We turn in more detail to her findings below. She acquitted in relation to certain other messages.

## IV. The Case Stated

15. The judge summarised her findings of fact in the Case but also cross-referred to her conclusions in the Written Judgment.

16. The judge's overarching factual findings can be summarised as follows:

(1) In the context in which each of the messages were sent (in particular the fact that the messages were sent by serving police officers, and that she considered most of the messages were deeply offensive and derogatory "*jokes*" targeted towards vulnerable persons with whom they would come into contact as a result of their role as police officers), the judge found each of the message chains to be "*grossly offensive*". She was satisfied that they were couched in terms liable to cause gross offence to those to whom they related.

(2) The WhatsApp group in which these messages were posted was viewed by the Appellants as a "*safe space*", involving a small number of like-minded individuals, in which they had free rein to share "*deeply offensive*" messages without fear of retribution.

(3) The messages were intended to be "*darkly humorous jokes*" where the strength of the joke resided in it being extremely controversial.

(4) Based on the extensive training that they had received as police officers, and the College of Policing Code of Ethics ("the Code of Ethics") to which they were subject (see further [93] below), it would undoubtedly have been obvious to the Appellants that the contents of these messages were likely to cause gross offence to the persons to whom they related, as well as to members of the public more widely. They accepted that they had received extensive training in police standards, in the Code of Ethics, and that they had been warned that they could be held accountable for information contained in privately held social media accounts.

(5) Whilst the Appellants did not intend the messages "*to cause gross offence*", they were fully aware of the risk that members of the public, and the persons to whom these messages related, would be grossly offended by their contents.

(6) Even if she was wrong about their awareness of this risk, at the very least the Appellants had wilfully shut their minds to the grossly offensive impact that these comments would have had on the persons to whom the messages related.

17. The judge's specific factual findings (by reference to each of the messages set out at [10] above) were as follows:

**(1) 5 April 2019 messages – JB**

The judge found as a fact that the messages were grossly offensive because JB was a police officer joking about using firearms and tasers against children and people with Down's Syndrome, who were pejoratively referred to as "*downys*". The judge found the mental requirement of the charged offence proven, as, in his evidence, JB accepted that he found these comments funny because they were "*so wrong to say*" and accepted that a person would "*probably*" be grossly offended by the idea of a police officer joking about deliberately shooting someone in the face.

**(2) 25 April 2019 messages – JB**

The person to whom these messages related was "*Kate*", JB's female police colleague. The judge rejected the evidence of JB that the message should be read as referring to a complaint that Kate might falsely accuse him of sexual assault. The judge had no doubt that Kate would be grossly offended by this message. She concluded that the "*joke*" went far beyond something that was made merely in bad taste. She found it was both misogynistic and aggressive in its nature and a clear example of "*victim blaming*". Applying the standards of an open and just society and when considered in its context, namely that JB was a police officer required to deal with female victims of sexual assault, the judge was satisfied that the messages were of a grossly offensive character.

**(3) 21 June 2019 messages – JB and JC**

The judge found that these messages clearly implied that victims of domestic abuse are blameworthy. She concluded that it was grossly offensive for police officers to find it amusing to promulgate such harmful stereotypes of vulnerable members of society - stereotypes which are partly responsible for the well-known under-reporting of sexual abuse in a domestic setting. Such humour was "*beyond the pale*", and victims of domestic abuse would undoubtedly be grossly offended by these messages.

**(4) 29 June 2019 messages – JB and JC**

The judge rejected the Appellants' suggestion that the messages were intended to be a positive celebration of the vibrancy and diversity of the London Borough of Hounslow as a total contradiction of the ordinary meaning of the words used. She concluded that they may have intended them to be humorous, but that the conversation thread demonstrated a "*deeply racist attitude*" on their part. She concluded that there was no place for such beliefs amongst the police service in England and Wales and, applying the standards of an open and just multiracial society, it was without doubt grossly offensive for a police officer to speak about the people, and the area for which they are responsible, in such terms.

**(5) 7 August 2019 message – JB**

The judge concluded that this message would be deeply distressing to the victim of any domestic assault. Distress would be caused in learning that a police officer, who was sworn to protect them from harm and to investigate the crimes that have been committed against them,

was trivialising their trauma by joking about them in such a callous manner. She considered it another example of "*victim blaming*".

**(6) 9 August 2019 message – JC**

The judge concluded that this message was plainly derogatory in its nature. JC's references to "*attention seeking*", "*self harming*", and "*fag*" were deeply offensive when considering the context, namely that he was referring to someone whom he had to guard and to protect. When taken together, she had no doubt that the person to whom this message related would have been grossly offended by its content, as would the public more generally.

18. The Case sets out the following questions ("the Questions") for the opinion of the High Court:

    (1) Q1: After the close of the evidence, was the District Judge right to direct that the particulars of Charges 1 and 4 against Joel Borders and Charge 2 against Jonathon Cobban be amended?

    (2) Q2: Was the District Judge wrong to conclude that the messages were "*grossly offensive*" in their nature, in light of her findings of fact that they were "*jokes*" and were not therefore intended to be taken seriously by the recipients?

    (3) Q3: In determining that the messages sent were of a grossly offensive nature, was the District Judge correct to disregard the fact that other members of the group were not offended by their contents and that the messages only came to light as a result of an unrelated criminal investigation?

    (4) Q4: Is the *mens rea* requirement, for an offence of sending a grossly offensive message contrary to section 127 of the Communications Act 2003 ("the 2003 Act"), satisfied in circumstances where the Defendants did not reasonably expect that their messages would be read by person(s) who may be grossly offended by their contents?

    (5) Q5(a): In the particular circumstances of this case, should the District Judge have given a heightened meaning to the words "*grossly offensive*" in order to ensure that their convictions under section 127 of the 2003 Act were compatible with the Defendants' rights under Articles 8 and 10 of the ECHR?

    (6) Q5(b): Was the District Judge wrong to conclude, in the particular circumstances of this case, that the Defendants' convictions furthered a legitimate aim, namely to prevent a public electronic communications network from being used to damage the rights of others?

    (7) Q5(c): Was the District Judge required to carry out an individual proportionality assessment under articles 8 and 10 ECHR?

19. The Appellants no longer pursue Q1.

*Sentence*

20. The Appellants were sentenced to a total of 12 weeks' imprisonment for each offence to run concurrently to one another. The judge declined the Appellants' application to state a question in the Case in relation to the issue of sentencing. She held that the application was frivolous within section 111(5) of the Magistrates' Courts Act 1980 and observed that this was a matter for an appeal to the Crown Court. The judge gave oral reasons for her sentences but no written sentencing remarks. In light of the Appellants' challenge to that sentence, the judge set out her reasons in full at [23]-[24] of the Case. The reasons are taken from her notes made at the time of the sentencing hearing.

21. On 9 February 2023, the Appellants lodged the Case with the High Court, and applied for directions that the Case be amended to include the decisions as to sentence and certain additional matters and documents. On 12 February 2024, Sweeting J directed on the papers that a directions hearing was unnecessary. He held that the necessary material for the appeal against sentence was before the court and it was desirable to proceed straight to hearing. He decided that there was no need for other documents to be appended to the Case. The Respondent, the Director of Public Prosecutions ("the DPP"), agreed that we should deal with the appeal against sentence, although there is a procedural concern, identified below at [114], which arises in this regard.

## V. Legal Framework

22. Section 127 is one of a group of sections headed "*Offences relating to networks and services*". The full terms of section 127 as follows:

> "**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".

23. As regards section 127(1), a relevant "*message*" or "*matter*" can fall into one or more of four potential proscribed limbs: that is, messages or matter that have the character of being: (i) grossly offensive; (ii) indecent; (iii) obscene; or (iv) menacing. This appeal is concerned with the first limb, namely "*grossly offensive*" messages.

24. The purpose of section 127(1) as a whole, and the scope of the prohibition in relation to this specific limb, was addressed by the House of Lords in *R v Collins* [2006] UKHL 40; [2007] 1 WLR (HL) ("*Collins*"). The judge held at [17] of the Written Judgment "*…that the dicta of the House of Lords in the case of DPP v Collins [2006] UKHL 40 is directly applicable to this case and constitutes binding authority upon me*".

25. For the DPP, Ms Ledward KC and Mr Boyd argue that the judge was correct in her conclusion that *Collins* was binding and determinative of the main issues before her as to the purpose of section 127(1), and the relevant *actus reus* and *mens rea*.

26. For the Appellants, Mr Yeo and Mr McCombe argue that *Collins* did not determine that section 127(1) applied to private consensual messaging. It is submitted that the opinions in *Collins* must be read in light of the particular facts of that case – the reasoning was not intended to be a general statement of principle applicable to a very different factual scenario (see, in this regard, *Re Gallagher's application for JR* [2019] UKSC 3; [2020] AC 185 at [41]). Reliance is placed on the observations of Leggatt LJ in *R (Youngsam) v Parole Board* [2019] EWCA Civ 229; [2020] QB 387 ("*Youngsam*") at [48] and [55]-[58]. The Appellants submit forcefully that, if *Collins* is treated as authoritative and binding on the present facts, private consensual messages, and communications online, including consensually exchanged material which might be objectively characterised as indecent but which the recipient welcomes, will be criminalised.

27. We turn to the facts in *Collins*. The defendant in *Collins* telephoned his MP a number of times and spoke either directly to him or to members of his staff or left messages on an answering machine. In those conversations and messages, the defendant referred to "*wogs*", "*Pakis*", "*black bastards*" and "*niggers*". None of the people to whom he spoke on the telephone or who picked up the recorded messages were a member of an ethnic minority. The Magistrates' Court held that, although the conversations and messages were offensive, a reasonable person would not have found them grossly offensive and acquitted the defendant. The Divisional Court dismissed the prosecution's appeal by way of case stated. The House of Lords allowed the prosecution's further appeal, overturning the Magistrates' Court's conclusion on the facts.

28. Lord Bingham gave the leading opinion. After setting out section 127(1)(a) of the 2003 Act ("section 127(1)(a)"), and at [6] tracing the genealogy of earlier legislation dating back to the Post Office (Amendment) Act 1935, Lord Bingham said (with our underlined emphases) as follows:

> "7. This brief summary of the relevant legislation suggests two conclusions. First, 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.

8. Secondly, it is plain from the terms of section 127(1)(a), as of its predecessor sections, that the proscribed act, the *actus reus* of the offence, is the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent. Thus it can make no difference that the message is never received, for example because a recorded message is erased before anyone listens to it. Nor, with respect, can the criminality of a defendant's conduct depend on whether a message is received by A, who for any reason is deeply offended, or B, who is not. On such an approach criminal liability would turn on an unforeseeable contingency. The Respondent did not seek to support this approach.

9. The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour (*"Old Contemptibles"*). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with section 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection. What, if anything, must be proved beyond an intention to sent the message in question? [Counsel] for the Director, relying by analogy on section 6(4) of the Public Order Act 1986, suggested that the defendant must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so.

[Recalling Sweet v Parsley [1970] AC 132 at [148]], this passage is relevant here, since Parliament cannot have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage. On the other hand, a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender. The same will be true where facts known

to the sender of a message about an intended recipient render the message peculiarly offensive to that recipient, or likely to be so, whether or not the message in fact reaches the recipient. I would accept [Counsel for the DPP's] submission.

12. In seeking to uphold the decisions below in the Respondent's favour [Counsel for the Respondent] relied on the context in which the messages were sent, stressing that they were sent by him to his MP seeking redress of his grievances as constituent and taxpayer. This is undoubtedly a relevant fact. The Respondent was entitled to make his views known, and entitled to express them strongly. The question is whether, in doing so, he used language which is beyond the pale of what is tolerable in our society.

13. The Justices thought not. A decision of justices on a matter of this kind is not to be disturbed at all readily, as the Divisional Court rightly recognised. But some at least of the language used by the respondent was language which can only have been chosen because of its highly abusive, insulting, pejorative, offensive character. There was nothing in the content or tenor of these messages to soften or mitigate the effect of this language in any way. Differing from the courts below with reluctance, but ultimately without hesitation, I conclude that the respondent's messages were grossly offensive and would be found by a reasonable person to be so. Since they were sent by the respondent by means of a public electronic communications network they fall within the section. It follows that the respondent should have been convicted."

29. Lord Bingham also indicated his express agreement with the reasons given by Lord Carswell and Lord Brown in their concurring speeches.

30. Lord Carswell said (with our underlined emphases):

"21. I respectfully agree with the conclusion expressed by my noble and learned friend Lord Bingham of Cornhill in paragraph 11 of his opinion that it must be proved that the respondent intended his words to be offensive to those to whom they related or be aware that they may be taken to be so. I also agree with his conclusion in paragraph 8 that it can make no difference to criminal liability whether a message is ever actually received or whether the persons who do receive it are offended by it. What matters is whether reasonable persons in our society would find it grossly offensive.

22. These conclusions are sufficient to answer the certified question. It remains to apply the principles to the facts of the present case and the findings of the magistrates' court. I felt quite considerable doubt during the argument of this appeal whether the House would be justified in reversing the decision of the magistrates' court that the reasonable person would not find the terms of the messages to be grossly offensive, bearing in mind that the principle to which I have referred, that a tribunal of fact must be left to exercise its judgment

on such matters without undue interference. Two factors have, however, persuaded me that your Lordships would be right to reverse its decision. First, it appears that the justices may have placed some weight on the reaction of the actual listeners to messages, rather than considering the reactions of reasonable members of society in general. Secondly, it was conceded by the respondent's counsel in the Divisional Court that a member of a relevant ethnic minority who heard the messages would have found them grossly offensive. If one accepts the correctness of that concession, as I believe one should, then one cannot easily escape the conclu'©on that the messages would be regarded as grossly offensive by reasonable persons in general, judged by the standards of an open and just multiracial society. The terms used were opprobrious and insulting, and not accidentally so. I am satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive".

31. Lord Brown said (again, with our underlined emphases):

"25. …The contrast between section 127(1)(a) of the 2003 Act—under which the respondent was charged—and section 1 of the Malicious Communications Act 1988 (a contrast struck by Lord Bingham at para 7 of his speech) is crucial to an understanding of the true nature and ambit of liability under section 127(1)(a). Whereas section 127(1)(a) criminalises without more the sending by means of a public electronic communications network of inter alia a message that is grossly offensive, the corresponding part of section 1(1) of the 1988 Act (as amended by section 43(1) of the Criminal Justice and Police Act 2001) provides that:""Any person who sends to another person (a) a letter, electronic communication or article of any description which conveys (i) a message which is . . . grossly offensive . . . is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated""

26. In short, for liability to arise under section 1(1), the sender of the grossly offensive message must intend it to cause distress or anxiety to its immediate or eventual recipient. Not so under section 127(1)(a): the very act of sending the message over the public communications network (ordinarily the public telephone system) constitutes the offence even if it was being communicated to someone who the sender knew would not be in any way offended or distressed by it. Take, for example, the case considered in argument before your Lordships, that of one racist talking on the telephone to another and both using the very language used in the present case. Plainly that would be no offence under the 1988 Act, and no offence, of course, if the conversation took place in the street. But it *would* constitute an offence under section 127(1)(a) because the speakers would certainly know that the grossly offensive terms used

> were insulting to those to whom they applied and would intend them to be understood in that sense.
>
> 27. I confess that it did not at once strike me that such a telephone conversation would involve both participants in committing a criminal offence. I am finally persuaded, however, that section 127(1)(a) is indeed intended to protect the integrity of the public communication system: as Lord Bingham puts it at paragraph 7 of his speech,"*"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 societ"*". (Quite where that leaves telephone chat-lines, the very essence of which might be thought to involve the sending of indecent or obscene messages such as are also proscribed by section 127(1)(a) was not explored before your Lordships and can be left for another day.)."

32. Although *Collins* is the leading case concerning section 127(1)(a) as regards the *"grossly offensive"* limb of the subsection, there are other authorities on other limbs of the subsection and in relation to other legislation (in particular, section 1 of the Malicious Communications Act 1988 (*"*the 1988 Act*"*) to consider, in particular because they provide assistance in relation to issues under the European Convention on Human Rights ("the Convention").

33. *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin); [2008] 1 WLR 276 (DC) (*"Connolly"*), was an appeal by way of case stated against a conviction for an offence under section 1 of the 1988 Act for *"sending a communication of an indecent or grossly offensive nature with the purpose of causing distress or anxiety"*. The Divisional 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). Having referred at [17] in detail to the interpretive obligation in section 3 of the Human Rights Act 1998 (*"*section 3*"*) (*"*the 1998 Act*"*) and to *Ghaidan v Godin-Mendoza* [2004] UKHL; [2004] 2 AC 557, Dyson LJ explained at [18] that section 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, ie a breach of article 10(1), not justified under article 10(2)."

34. Dyson LJ went on to hold that the Crown Court (which had dismissed an appeal from the Magistrates' Court) had wrongly conducted *"little or no analysis"* of Article 10(2). That exercise therefore had to be carried out by the Divisional Court: see [20] and [32]. It was held that the interference with Mrs Connolly's Article 10(1) rights was proportionate to the legitimate aim of protecting the rights of others. Reference was made earlier (at [23]-[25]) to the Strasbourg jurisprudence in relation to Article 10(2) and, in particular, to the scope of the terms *"for the protection of the rights of others"*,

citing *Chassagnou v France* [1999] 29 EHRR 615 ("*Chassagnou"*) at [113]. There, the Strasbourg Court explained that the *"rights of others"* included, but were not restricted to, the Convention rights of others, referring to *"indisputable imperatives"* which could justify an interference with Convention rights.

35. *Chambers v DPP* [2012] EWHC 2157 (Admin); [2013] 1 WLR 1833 (*"Chambers"*) is relied upon strongly by the Appellants. The defendant was charged with sending a message under the *"menacing"* character limb of section 127(1)(a). The defendant learned that an airport from which he was due to travel was closed due to heavy snowfall. He tweeted: *"Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!"*. None of his followers on Twitter who read the posting were alarmed by it at the time. Some days later, the duty manager of the airport read the tweet and communicated it to the police. The defendant was convicted by the Magistrates' Court and his appeal to the Crown Court was dismissed. On an appeal by way of case stated the Divisional Court quashed the conviction. Lord Judge CJ, giving the judgment of the court, said at [30] that:

> "a message which cannot or is unlikely to be implemented may nevertheless create a sense of apprehension or fear in the person who receives or reads it. However unless it does so, it is difficult to see how it can sensibly be described as a message of a menacing character. So, if the person or persons who receive or read it, or may reasonably be expected to receive, or read it, would brush it aside as a silly joke, or a joke in bad taste, or empty bombastic or ridiculous banter, then it would be a contradiction in terms to describe it as a message of a menacing character. In short, a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside this provision, for the very simple reason that the message lacks menace."

36. At [38] Lord Judge CJ observed:

> "We agree with the submission by [counsel for the defendant] that the mental element of the offence is satisfied if the offender is proved to have intended that the message should be of a menacing character (the most serious form of the offence) or alternatively, if he is proved to have been aware of or to have recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it. We would merely emphasise that even expressed in these terms, the mental element of the offence is directed exclusively to the state of the mind of the offender, and that if he may have intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the *mens rea* required before conviction for the offence of sending a message of a menacing character will be established."

37. *Collins* and *Chambers* were considered and applied in *DPP v Kingsley Smith* [2017] EWHC 359 (Admin) (*"Kingsley Smith")*, an appeal by way of case stated against a decision of a District Judge who had acquitted the defendant of four charges of sending by means of a public electronic communications network a message or other matter that

was grossly offensive, or of a menacing character, contrary to section 127(1)(a). Using his Google+ account, the defendant had posted four extremist messages to a *"wall"* for public viewing. Each message was attached to a YouTube video that the defendant had downloaded to his account.

38. The Divisional Court allowed the Crown's appeal. It accepted the Crown's submissions as to the *actus reus* and *mens rea* of the offence. *Collins* was treated as authoritative in this regard.

39. *Chabloz v Crown Prosecution Service* [2019] EWHC 3094; [2019] All ER (D) 115 (Nov), concerned the posting of a hyperlink to a YouTube video on a blog. The defendant was convicted under the *"grossly offensive"* limb of section 127(1)(a). The Divisional Court dismissed the appeal. It held at [37] that:

> "…there is nothing in the Act to provide any support for the proposition that the message had to be received by a human being in order for the offence to have occurred. Mr Davies accepted that the intended recipient did not need actually to receive it, but maintained that there had to be such an intended recipient in the first place. Such a qualification would, in my view, be contrary to the words of section 127, which is dealing with individuals using a public electronic communications system to send or cause to be sent messages of a particular kind, and does not stipulate if, when, how or by whom any such message has to be received."

40. It also explained at [39], referring to *Collins*:

> "Lord Bingham made clear that the offence was complete when the message was sent to the inanimate answer machine (see [8] of his judgment…); what happened thereafter was irrelevant to the offence. Otherwise, as he pointed out, criminal liability would turn on the happenstance of, for example, whether the message was received by an individual or not."

41. In *Scottow v CPS* [2020] EWHC 3421; [2021] 1 WLR 1828, the defendant had posted on Twitter and on an online community forum seven messages about the complainant. The messages were to the effect that the complainant was racist, xenophobic, bullying, dishonest and fraudulent. The complainant obtained an interim injunction prohibiting the defendant from, among other things, publishing any personal information relating to her on any social media platform or implying that she was a racist or had published anything racist on any form of social media. The proceedings were stayed on the defendant giving certain undertakings. The defendant later posted a number of further messages on Twitter relating to material which the complainant had posted online about the injunction. The defendant was charged with one offence of persistently making use of a public electronic network for the *"purpose of causing annoyance, inconvenience or needless anxiety"* to another, contrary to section 127(2)(c). The defendant was convicted, and the Divisional Court allowed her appeal. It held that a court asked to convict a defendant of an offence under section 127 on the basis of the content of something they had said or written was obliged to ask itself whether such a conviction would constitute an unjustified breach of the defendant's right to freedom of expression, guaranteed by Article 10(1) of the Convention. The Divisional Court held that, although

the prosecution pursued a legitimate aim, namely the protection of the complainant from persistent and unacceptable offence, the prosecution could not on the facts of the case be justified as *"necessary in a democratic society"*, for the purposes of Article 10(2) of the Convention. The Divisional Court found at [45] that it was necessary to test the prosecution against the requirements of Article 10(2), rather than to, as the Appellant submitted, give heightened meanings to the statutory terms.

42. The case law that we have summarised above was analysed and applied recently in *R v Casserly* [2024] EWCA Crim 25; [2024] 1 Cr App R 18 (*"Casserly"*) In that case, the defendant was convicted of *"sending an indecent or grossly offensive electronic communication with intent to cause distress or anxiety"*, contrary to section 1(1)(b) of the 1988 Act. The complainant was an elected town councillor, and the prosecution was based on the contents of an email sent to her by the defendant, who was one of her constituents, in which he challenged her ability to perform her public role. The defendant maintained that his communication was a legitimate expression of his opinion and argued that he was entitled to express his concerns in accordance with Article 10(1) of the Convention. The Court of Appeal allowed the appeal and made extensive reference to *Collins* and a number of additional authorities including *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 (*"Abortion Services"*).

43. The court identified at [44] that a series of cases involving the criminal law and speech or behaviour that is (or is claimed to be) politically motivated has led to the identification of three broad categories of case: (i) those in which, on a proper analysis, the applicable criminal law does not interfere with fundamental rights at all, so that there is no need for any proportionality assessment (e.g. where the case *"involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society"* see *Abortion Services* at [54]); (ii) those in which the criminal law does or may interfere with such rights but proof of the ingredients of the offence will, without more, be sufficient to render a conviction proportionate; (iii) those in which the law does or may interfere with fundamental rights but the ingredients of the offence do not of themselves meet the proportionality requirement, so that the court is required to address it: *Abortion Services* at [52]-[61]. The third category included cases where *"the interpretative duty imposed by section 3…may enable the court to construe the relevant provision in a way which renders it compatible with the Convention rights"*. This may involve *"interpreting [the relevant provision] so as to allow for an assessment of the proportionality of a conviction in the circumstances of individual cases"* (see *Abortion Services* at [57]).

44. It was held that the case did not fall into the first or second categories, meaning that it was necessary to interpret and apply the statute in such a way as to ensure that the proportionality requirement was met. On the facts, what was required, was a Convention-compliant interpretation and application of the language of section 1 of the 1988 Act to the facts of the case. That had not been done in the court below and the conviction was quashed.

45. A number of considerations were identified as being material to that assessment including the context of the speech (at [48]). Strasbourg jurisprudence identifies a "*hierarchy of speech*", with political speech at its apex. The greater the value of the speech in question, the weightier must be the justification for interference. The proportionality assessment must include some evaluation of the kind of speech under

consideration. Where freedom of speech in a political context is engaged, and there is a case to answer, it is essential that the offence be defined in terms which reflect the enhanced meaning of "*grossly offensive*" (referring to *Connolly* at [18]).

## VI. The parties' submissions on construction

46. Questions 2, 3 and 4 of the Case, in particular, turn on the proper construction of section 127(1)(a) as regards the ingredients of the offence when the message in question is sent privately.

47. The Appellants make four core submissions. First**,** the heading to section 127 indicates that the section applies only to "*improper use*" of the network by nuisance messaging, not use for consensual communication. This applies equally to messages that are grossly offensive as it does to those that are of an indecent, obscene, or menacing character. Secondly, it is the sending of a "*message*" of the prohibited type that is proscribed; the word "*message*" connotes addressee as well as contents. Accordingly, sending offensive language to a friend, whom it can objectively be inferred will not be caused gross offence by it, is not a grossly offensive message. Thirdly, no express *mens rea* is articulated in the statutory language so the court has to infer the intention of Parliament in this respect. On a "*conventional approach*", and by analogy with section 5 of the Public Order Act 1986 ("the 1986 Act"), this would include foresight of the risk of the harmful effects of the conduct. Certain of these submissions depend on a particular and confined reading of the ratio of *Collins*. Finally, if section 127 is capable of being read in what the Appellants call an "*expansive way*", the court would need to "*read down*" section 127 to ensure that it is not incompatible with Convention rights, in particular an unjustified interference with Articles 8(1) and 10(1), pursuant to section 3.

48. The DPP submits that there were no errors of law or flaws in the judge's decision-making which undermines the cogency of her conclusions that: (1) the messages were objectively grossly offensive in their character and the *actus reus* derived from *Collins* was accordingly made out; and (2) the mental element of the offences, established in *Collins*, was satisfied on her findings of fact. Mr Boyd led the oral submissions to the effect that Articles 10(1) and 8(1) of the Convention were not engaged; alternatively, that the interference with those rights by the convictions was justified.

## VII. Actus Reus

49. The starting point is to recognise that *Collins* reached the House of Lords on a question of general public importance which was certified as follows:

> "When deciding whether a message is grossly offensive for the purposes of section 127(1)(a) of the Communications Act 2003, what, if anything, is the relevance of (a) the intention of the person who sent the message and (b) the reaction of the recipient?"

50. In our judgment, Lord Bingham's analysis in *Collins* as to the purpose and construction of section 127(1)(a) represents a binding decision of general application. It was for the purpose of answering the certified question that Lord Bingham explained that the provision is not concerned with protecting people from receipt of unsolicited messages of the proscribed character but is rather aimed at ensuring propriety in communications over electronic public communications networks. This is how section 127 and related

offences have been understood in all of the cases following *Collins,* as summarised above. The reasoning of Lord Bingham was the justification, and therefore the ratio, for the conclusions reached by the House of Lords.

51. This conclusion follows the analysis in *Youngsam* at [48]-[59]. At [48], Leggatt LJ cited the classic definition of the necessary reasoning of a decision as "*any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him*". He added at [51]:

> "It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as "necessary" for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted."

52. The conclusions of Lord Bingham at [6] (the history of the legislation) and at [7] (the object of section 127(1)) feed directly into, and explain, his conclusion at [8] that the offence is complete when the message is sent (irrespective of receipt). That is because Parliament's object regarding this offence was to prohibit use of a public electronic communications network for improper purposes (see *Collins* at [7]).

53. Further, Lord Carswell clearly considered at [22] that the "*principles*" (as explained by Lord Bingham) were general principles that then fell to be applied to the specific facts of that case. Lord Brown's speech at [27] and his example of the criminalisation of a telephone conversation between two racists (ie purely private consensual messaging) also supports the conclusion that Lord Bingham's identification of the relevant object of the section was part of the ratio of that decision.

54. Beyond this, we note the Law Commission's *Abusive and Offensive Online Communications: A Scoping Report (Law Com No 381)*. It identified at para. 4.77 that if someone takes "*obscene*" photographs of themselves or writes an "*indecent*" fantasy about a sexual experience and saves these in a private online file storage facility (where there is little possibility of these being seen by others) an offence under section 127(1) may still be complete if the fault element is present. If the same content were printed or typed, and stored in a drawer in a person's house, no offence would be committed without more. It is because of the very fact that the scope of the *actus reus* of the offence is so broad that the Law Commission was asked to look at reform in this area.

55. The Appellants place significant weight on the potential consequences of this construction of the statute for consensually exchanged indecent material, emphasising the need to construe section 127(1) as a whole. It is right that the section needs to be construed holistically; however, section 127(1)(a), as interpreted by *Collins*, is clear. That section 127(1) may criminalise the consensual exchange of indecent material using a public electronic communications network is the consequence of Parliament's will to enact the legislation in question.

56. Two further points can be made. First, such concerns as there are, relating to the consensual exchange of indecent material, are mitigated by the protections afforded by Articles 8 and 10 of the ECHR (addressed below). Secondly, the effect of the *CPS*

*Guidance on Communication Offences* is that not all conduct that might technically meet the broad terms of section 127 is prosecuted. It may not, for example, be in the public interest to prosecute where, "*the communication was or was not intended for a wide audience, or [where] that was [not] an obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question.*" That approach, together with the points addressed in relation to Article 8(1) of the Convention at [110] below, provides safeguards in relation to consensual messaging between private citizens.

57. We are not persuaded by the further submission that the judge was wrong in law, when considering whether the messages were "*grossly offensive*", to exclude the effect of the messages on those who received and read them.

58. Contrary to the Appellants' submissions, *Chambers* (at [32]) does not provide support for the proposition that the recipient's reaction to a message is always relevant to an objective assessment of whether that message is of the proscribed character. As noted above, the defendant in *Chambers* was charged under section 127(1)(a) with sending a "*menacing*" message. A menacing message is defined as one which would create a sense of apprehension or fear in a reasonable member of the public of normal fortitude. Unsurprisingly, it was concluded that it was relevant to the question of whether the message was "*menacing*" that none of those who read it, including those in positions of authority who had been alerted to it, were in the least bit concerned by it. That was a factual finding germane to the assessment of whether the message would create a sense of apprehension and fear in a reasonable person of normal fortitude.

59. On the facts of this case, given that (i) the messages were intended to be "*darkly humorous*" jokes and (ii) the recipients of the messages were found by the judge to have shared the Appellants' sense of humour, no assistance could be gained from their reaction to determine whether the messages were "*grossly offensive*" in the eyes of a reasonable member of the public, judged by the standards of today's society.

60. As was observed in *Kingsley Smith* at [28(6)] and [33]:

> "Whilst in *Chambers* the court decided, on the very particular facts of that case, that the application of that objective test does not necessarily exclude from consideration the reaction of, or any effect on, a person who had actually received or read the relevant message, the need for any such consideration was likely to be relatively rare, and the weight to be attached to it was likely to be relatively limited."

61. We endorse this reading of *Chambers*. In short, the absence of any complaint by the recipients of the messages was of relevance on the particular facts in *Chambers* but was of no relevance on the facts of this case.

62. For all these reasons, we consider that the judge was right in her identification of the *actus reus*; her findings on the facts that the messages were "*grossly offensive*" are unimpeachable.

## VIII. Mens rea

63. Lord Bingham in *Collins* (at [11]) identified the relevant *mens rea* in the following terms:

> "A culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender."

The question is therefore whether the defendant intended to insult the persons to whom the message related or was reckless as to the risk of insulting such persons.

64. The judge found that the Appellants had been reckless as to the risk of insulting the targeted groups that were the subject of the messages. (We note that it would in fact have been open to her, on the basis of her findings, to convict on the basis of intentional insult: it was the very fact that the jokes targeted vulnerable members of society that, in the Appellants' view, rendered them "*darkly humorous*").

65. In challenging the judge's approach, the Appellants argue that the *mens rea* of the offence requires the defendants to have intended or to have been reckless as to whether the message was grossly offensive to those who might reasonably be expected to read it - as opposed to those to whom the message relates. As set out above, that is not what *Collins* establishes.

66. In support of their proposition, the Appellants rely on *Chambers* at [30]. They also seek to argue, by reference to Hansard, that Lord Bingham's conclusions in *Collins* on *mens rea* were based on an incorrect understanding of the purpose of section 127.

67. We are not persuaded on either basis. It is clear that the discussion in *Chambers* at [30], read in its proper context, is focused exclusively on the *actus reus* of the offence. The reference to those who *"may reasonably be expected to receive or read it"* is simply an acknowledgement that, in reality, most messages that may be characterised as being menacing seek to create fear or apprehension in a particular recipient. Where *Chambers* does address *mens rea*, it does so in terms consistent with the approach in *Collins* (see [38] of *Chambers*).

68. As for the submissions in relation to Hansard, the primary legislation is neither ambiguous nor obscure within the meaning of the principles in *Pepper v Hart* [1993] AC 593. Reference to Hansard is neither necessary nor justified. Lord Bingham considered the *"genealogy"* of section 127(1)(a) at [6] of *Collins*; he was clear that the purpose of the legislation is 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*" (see [7] of *Collins*).

69. Thus, the basis for the criminalisation lies in the misuse of the public electronic communications system. Section 127(1) was not designed to protect people from receiving messages of the proscribed character: that object is addressed by section 1 of the 1988 Act.

70. Equally, we reject the further submission for the Appellants that, because Lord Bingham referred to section 6(4) of the 1986 Act when addressing the *mens rea* for section 127(1), we should "*read into*" the *mens rea* an additional qualification (based

on section 5(3) of the 1986 Act) that a person is guilty of an offence under section 127(1) only if he intends his words to be threatening or abusive. Parliament has not provided any such ingredient, and such a requirement would be inconsistent with *Collins*. The 1986 Act provides a specific statutory defence for a very different offence. Similarly, we derive no assistance from the cases cited to us describing the *mens rea* in other offences, such as *R v Rimmington and Goldstein* [2005] UKHL 63; [2006] 1 AC 459 (HL). These do not disturb the conclusions in *Collins*.

71. We also note in this context that the Appellants' construction of section 127(1)(a) would lead to a new offence similar to the replacement offence proposed by the Law Commission (see para. 2.39 of the Law Commission's Final Report, *Modernising the Communications Offences (Law Com No 399)* ("the Final Report")). The Law Commission recommended that section 127 be replaced by a harm-based communication offence, the terms of which would be that a person commits an offence if they send or post a communication likely to cause harm to a likely audience, with "*a likely audience*" being someone who, at the time the communication was sent or posted, was likely to see, hear, or otherwise encounter it. The Law Commission's proposal to introduce a concept of "*likely audience*" would have been unnecessary if the existing offence which it was designed to replace already required proof that the message sent was liable to cause gross offence to those who may reasonably be expected to receive or read it. Whilst this proposed offence was included in the Online Safety Bill on introduction to Parliament, after further consideration, the Government withdrew it (see the Final Report at paras. 72-76).

72. In short, the likelihood of anyone reading the message is not relevant to *mens rea*. This is not to say that it is entirely irrelevant; it remains a consideration for the purpose of the *CPS Guidance on Communication Offences*, which explicitly recognises that it may be a factor that militates against a prosecution being in the public interest. However, this has no bearing on *mens rea*.

73. For these reasons, the judge did not err in her approach to the question of *mens rea*.

## IX. Convention rights: Article 10(1) and Article 8(1)

74. Lord Bingham in *Collins* at [14] addressed as a matter of generality whether the provisions were Convention compliant. He explained that section 127(1)(a) "*does of course interfere with a person's right to freedom of expression*" but he held that it is a restriction clearly prescribed by statute, directed to a legitimate objective (preventing the use of a public electronic communications network for attacking the reputations and rights of others), and that it goes no further than is necessary in a democratic society to achieve that end.

75. However, as later authority shows, it is a separate question as to whether, in a *specific* case, a conviction is Convention compliant if the offence is of a type where Convention requirements are not already satisfied by proof of the offence. We consider that is the correct approach to the Convention issues as they arise in this case.

76. That does not require us to engage in answering the hypothetical question as to whether section 3 requires the court to adopt a different construction of section 127(1)(a), in *all* cases of private consensual messages, as the Appellants argue. That is not the question before us. We must determine whether the prosecution and conviction of the

Appellants, in their particular circumstances for messages with a particular content and subject-matter, leads to an end result which is Convention compliant.

77. Applying the general principles in *Casserly* and the earlier authorities referred to, and subject to engagement of the relevant Convention rights, a court adjudicating on whether to convict a person of an offence under section 127(1), on the basis of the contents of a message exchanged in a closed and private social media group such as WhatsApp, is obliged to take into account the following: the defendant's right to freedom of expression, guaranteed by Article 10(1); the defendant's right to private life guaranteed by Article 8(1); and the requirement of section 3, that "*[s]o 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*". The way in which the relevant Convention rights are to be applied (or "*to be given effect*" under section 3) is to test the prosecution against the requirements of Article 10(2) and Article 8(2). This reflects the approach in *Scottow* at [45], which we respectfully adopt.

78. However, this assumes that, in the circumstances of this case, the Article 10(1) and Article 8(1) rights of the Appellants are in fact engaged in a prosecution based on the contents of their private WhatsApp messages. That the rights were engaged appeared to be common ground below, and the judge proceeded on the assumption that they were. However, on this appeal, the DPP takes issue with this proposition. The parties are agreed that we should address the matter, both as a matter of anterior logic and given the public interest. We are told that there has been a recent increase in prosecutions of police officers for sending/posting grossly offensive messages or content on the internet.

*Was Article 10(1) engaged and the Article 17 exclusion*

79. For the DPP it is argued that the "*reprehensible nature*" of the messages is such that they do not attract the protection of Article 10(1). It is submitted that, when properly contextualised, the messages are not capable of respect within the scheme of values which the Convention exists to protect and promote, pursuant to Article 17 of the Convention. Article 17 is included in Schedule 1 to the 1998 Act and applies within the United Kingdom. It provides as follows:

> "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent that is provided for in the Convention."

80. Given the caution with which the total exclusion in Article 17 is to be approached, we do not consider that the facts justify invoking the Article 17 exclusion. The main objective of Article 17 is to prevent totalitarian or extremist groups from justifying their activities by referring to the Convention, for example by relying on Article 10 to advocate violent racist programmes: see *Zdanoka v Latvia* (2005) 41 E.H.R.R. 31 at [109]. Article 17 covers "*essentially [only] those rights which, if invoked, will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention"*: *WP and others v Poland* (dec.), no 42264/98.

81. Given the extreme effect of the invocation of Article 17 (which is to summarily terminate consideration of an interference as opposed to considering the matter through the lens of justification and qualification of rights), Grand Chamber judgments have highlighted that Article 17 be applied only "*on an exceptional basis and in extreme cases*": *Paksas v Lithuania* (2014) 59 EHRR 30 at [87] and *Perincek v Switzerland* (2016) 63 EHRR 6 at [114] ("*Perincek*"). In *Perincek*, the Court added at [114] that in Article 10 cases, Article 17 should only be resorted to "*if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention*".

82. The DPP relies upon *Norwood v United Kingdom* (2005) 40 EHRR SE11 (*"Norwood"*). In that case, the applicant was a regional organizer of the British National Party; following complaints, he had a poster removed by the police from his window, the display of which led to a conviction. The poster "*contained a photograph of the Twin Towers in flames, the words "Islam out of Britain-Protect the British People" and a symbol of a crescent and star in a prohibition sign*". The Strasbourg Court rejected the applicant's complaint under Article 10, refusing the application as incompatible *ratione materiae* with the Convention, for the display of a poster was an 'act' within the meaning of Article 17, which was not protected by Article 10 or Article 14. The Court stated that it agreed with the domestic courts' assessment of the poster as "*a public expression of attack on all Muslims*" in the UK. It was clear that, "*[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, [was] incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination*".

83. The present case is far removed from the facts of *Norwood*. Here, the messages were sent in a private group, not displayed to the public at large, and did not amount to a public expression of attack. The Appellants were not engaging in an activity "*aimed at the destruction of any of the rights and freedoms*" set out in the Convention. We have not overlooked the brief reference to *Norwood* and Article 17 by Lord Bingham in *Collins* at [14], but there is a wider range of authority, including the later Grand Chamber decision in *Perincek*. Given the caution with which Article 17 is to be applied, we approach matters on the basis that the messages fall within the protection of Article 10(1).

*Whether or not Article 8(1) and the reasonable expectation of privacy are engaged*

84. The Respondent submits that the Appellants' rights under Article 8(1) were not engaged. It is said that, where the offending activity in question amounts to the commission of a criminal offence, and the offence itself is Convention compliant (see *Collins* at [14]), it is "*unrealistic*" for an individual to assert any reasonable expectation of being allowed to engage in that activity without interference. The Respondent relies on the brief observations of Lord Hoffmann in *R v G (Secretary of State for the Home Department intervening*) [2008] UKHL 37; [2009] 1 AC 92 (HL) at [9]-[10] to the effect that Article 8(1) is not engaged where the individual's private conduct constitutes a criminal offence, and the state is justified in treating that conduct as criminal. However, the facts of that case are far removed from the present appeal – the conviction was for rape of a girl under 13 years of age. The DPP also relies on a number of policing regulations, and professional standards to which the Appellants were subject, to submit that, by virtue of their position as police officers, and the fact that their conduct

amounted to a clear breach of their professional standards, the Appellants could have no reasonable expectation of privacy in messages of the particular type in issue in this appeal.

85. The Appellants argue that, even if the officers were acting in breach of relevant policing regulations, the correct approach is to hold that Article 8(1) rights are engaged. Those rights were not "*extinguished*", and the court had to conduct a proportionality exercise under Article 8(2).

86. We approach this issue from first principles. To engage Article 8(1), the Appellants have to show that they enjoyed, on the specific facts, a "*reasonable expectation of privacy*" in the messages (see *In the matter of an application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42; [2016] AC 1131 ("*JR38*") at [84]-90]). This is not the same as asking whether those who generally engage in private consensual messaging (or consensually exchange what might be indecent material) have a reasonable expectation of privacy in their exchanges. The issue before us is whether these specific Appellants, who were *police officers* at the time of the exchange of messages with a *particular content,* had a reasonable expectation of privacy in *those messages*.

87. In *JR38*, Lord Toulson explained at [85] that the court had to examine the particular circumstances of the case in order to decide whether, consonant with the purpose of Article 8(1), the applicant had a "*legitimate expectation of protection*" in relation to the subject matter of his complaint. Lord Toulson's approach was adopted in a context very similar to the present appeal in the decision of the Lord Ordinary, Lord Bannatyne, in *BC and others v Chief Constable of the Police Service of Scotland* [2019] CSOH 48; 2019 SLT 875 (*"BC"*) at [162]-[173], as upheld by the Court of Session: [2020] CSIH 61; 2021 SC 265. In our judgment, these authorities correctly identify the legal position.

88. In the appeal in *BC*, the ten reclaiming (appealing) police officers challenged the Lord Ordinary's decision to refuse their petition for judicial review. The officers were subject to police disciplinary proceedings based on the content of privately exchanged WhatsApp messages within their group, which had been discovered during an investigation into a serious sexual offence, in which the reclaimers were not persons of interest. The Professional Standards Department of the police used and relied upon the messages to bring misconduct charges against each of the reclaimers under the relevant disciplinary regulations.

89. The Lord Ordinary was asked to decide whether the disclosure and use of the messages interfered, *inter alia*, with their Article 8 rights. The Lord Ordinary considered that a reasonable person having regard to the content of the messages would be entitled to reach the conclusion that they were sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and included a flagrant disregard for police procedures by posting crime scene photos of current investigations (a holding upheld by the Court of Session).

90. He concluded that the reclaimers had no "*reasonable expectation*" of privacy in respect of the messages. Although an ordinary member of the public could have a reasonable expectation of privacy in respect of WhatsApp messages, even "*of an abhorrent nature*", he decided that the standards and regulatory framework to which a police officer was subject put him in a different category from ordinary members of the public;

applying Lord Toulson's judgment in *JR38*, these attributes were relevant to the issue of reasonable expectation of privacy. Because of the attributes attaching to a constable and the need, in a system of policing by consent, to maintain public confidence, the reclaimers could have no reasonable expectation of privacy when exchanging messages of the character in issue, which were likely to interfere with the impartial discharge of a constable's duties or give that impression to the public.

91. In the alternative, the Lord Ordinary held that, even if the reclaimers did have a legitimate expectation of privacy, the disclosure of the messages would have been proportionate. The principal purpose of the police was the protection of the public. An officer behaving in the way reflected in the messages could reasonably be inferred to be likely to be someone who would lose the confidence of the public and cause a decline in confidence in the police. To maintain public confidence and to protect the public it was necessary for the police to be regulated by a proper and efficient disciplinary procedure, of which disclosure and use of information of the kind recovered in this case was a necessary part.

92. The Lord Ordinary's core reasoning was upheld by the Outer House. Lady Dorrian held at [100] that the "*touchstone test*" (was there a "*reasonable expectation of privacy*"?) was an objective one, to be applied broadly having regard to all the circumstances of the case: see [92]-[94]. She explained that one of those circumstances would "*...surely be the content of the material in question, as would the means by which the material came into the hands of those seeking to use it*". She also agreed that a person's status as a public official, or as here the holder of a public office, was a relevant factor in assessing the threshold test. The fact that the reclaimers were holders of a public office by virtue of which they had accepted certain restrictions on their private life was relevant to the question of whether they may, in the circumstances, be said to have a reasonable expectation of privacy. Lord Malcolm's concurring opinion stated at [149] that the Supreme Court in *Sutherland v HM Advocate for Scotland* [2020] UKSC 32; [2021] AC 427 had affirmed at [31] that *"reasonable expectation of privacy"* was the yardstick.

93. We agree with the DPP that, by virtue of their position as police officers, and the fact that their conduct amounted to a clear breach of their professional standards (a matter not in dispute), the Appellants could have no reasonable expectation of privacy in the specific messages in issue in this appeal. The most relevant regulatory provisions are: the Police Regulations 2003 ("the 2003 Regulations"); the Home Office Guidance on Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures ("the Guidance") and the Code of Ethics, issued under section 39A of the Police Act 1996.

94. Under the heading, *"RESTRICTIONS ON THE PRIVATE LIFE OF MEMBERS OF POLICE FORCES"*, paragraph 1(1) of Schedule 1 of the 2003 Regulations provides, "*A member of a police force shall at all times abstain from any activity which is likely to interfere with the impartial discharge of his duties or which is likely to give rise to the impression amongst members of the public that it may so interfere*".

95. The purpose of the Guidance is to emphasise that police officers are expected to act with honesty and integrity and in a manner which does not discredit the police service. It also makes clear that the standards of professional behaviour also reflect relevant principles enshrined in the Convention and the Council of Europe Code of Police

Ethics. The Guidance stipulates that police officers must behave in a manner which does not discredit the police service or undermine public confidence, whether on or off duty, and that police officers must report, challenge, or take action against the conduct of colleagues which has fallen below the standards of professional behaviour expected.

96. The Code of Ethics stipulates "*authority, respect and courtesy*" and "*equality and diversity*" as part of the standards of professional behaviour. It also provides that officers must carry out their role and responsibilities in an efficient, diligent and professional manner; they must avoid any behaviour that that might impair their effectiveness or damage either their own reputation or that of policing; they must ensure their behaviour and language could not reasonably be perceived to be abusive, oppressive, harassing, bullying, victimising, or offensive by the public or their policing colleagues. The Code of Ethics further specifies that officers must uphold the law regarding human rights and equality, treat all people fairly and with respect, and treat people impartially. It provides also that social media must be used responsibly so as ensure that nothing published online can reasonably be perceived by the public or policing colleagues to be discriminatory, abusive, oppressive, harassing, bullying, victimising, offensive, or otherwise incompatible with policing principles. More specifically, officers must not publish online or elsewhere, or offer for publication, any material that might undermine their own reputation or that of the policing profession or might run the risk of damaging public confidence in the police service.

97. Notably, and as identified by the judge, the Appellants were in addition subject to (and had been trained in) a social media policy – which explicitly included WhatsApp – and which provided that "*[a]ll employees are responsible and can be held accountable for information they put into the public domain, even in a privately held social media account*" and that they must not post anything "*prejudicial, defamatory, bullying, libellous, discriminatory, harassing, obscene or threatening*" on social media: see the Written Judgment at [25].

98. As a result of their extensive training, the judge found at [26] of her Written Judgment that the Appellants were "*fully aware of the risk that members of the public would be appalled by the contents of the messages*".

99. In our judgment, given the abhorrent nature of the messages (which all related to policing actions and conduct), the Appellants' knowledge and training, and the obvious breaches of the 2003 Regulations, the Guidance, and the Code of Ethics, the sending of these messages was not an aspect of their lives to which they were entitled, nor could expect, to keep private. Again, we emphasise that this is not a conclusion which touches upon the rights to private life of ordinary members of the public engaged in consensual private messaging. That is not the issue in this case.

100. In our judgment, therefore, Article 8(1) was not engaged.

101. We turn then to the proportionality exercise for the purpose of Article 10 (and Article 8, if we are wrong in the conclusion that Article 8 was not engaged). The classic test to be applied may be summarised as follows. A measure, such as a prosecution and conviction, that interferes with freedom of expression, or the right to private life, is only justified if it is prescribed by law, pursues one or more "*legitimate aims*" for the purposes of Article 10(2) or Article 8(2), and is shown, convincingly, to be *"necessary in a democratic society"*. The court must in that regard consider whether: the

interference complained of corresponds to a pressing social need, is proportionate to the legitimate aim(s) pursued and is supported by reasons which are relevant and sufficient.

102. The judge proceeded incorrectly on the basis that that the principle of proportionality was "*inherently satisfied*" by the ingredients of the offence (Written Judgment [43]-[45]), relying upon *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] QB 888. She did not have the benefit of *Casserly* or *Abortion Services*, which both post-dated her decision. We do not accept that she carried out a proportionality analysis in substance if not form. It therefore falls to us to conduct a proportionality analysis. Neither side encourages us to remit the matter.

*Legitimate aim*

103. We reject the Appellants' suggestion that the interference with their Convention rights, in the form of a conviction, does not pursue one of the legitimate aims for the purpose of Articles 8(2) and 10(2). The submission is that, since the recipients of the messages were not, and could not have been expected to be, offended by them, the interference was not necessary, "*for the protection of the rights and freedoms of others*". This overlooks the fact that section 127 is aimed principally at ensuring propriety in communications over a public electronic communications network, and (unlike section 1 of the 1988 Act) is not concerned exclusively with protecting other people from receipt of unsolicited messages of the proscribed character. In our judgment, the convictions pursued the legitimate aims of public safety and the prevention of disorder or crime. An aspect of those aims included ensuring public confidence in policing. The police are there to protect the public, including by the prevention of disorder and crime. A police officer, who sends messages revealing that they hold a discriminatory state of mind as to the public's right to be treated fairly in policing matters, loses the confidence of the public in the police. The maintenance of public confidence is essential for the purpose of successful policing, particularly in a multi-ethnic and inclusive society. If that confidence is eroded or lost, public safety would be put at risk. The convictions plainly engaged the legitimate aims set out in Article 8(2) and Article 10(2). Further, and in any event, ensuring that public confidence in the police is not put at risk is an "*indisputable imperative*" of the state (see the Strasbourg Court in *Chassagnou* (see [34] above).

*Proportionality and the balancing exercise*

104. As for Article 10, it has been long-recognised that the "*value of free speech…must be measured in specifics*" and that "*not all types of free speech have equal value*", with enhanced protection being afforded to matters of public concern or political expressions of view that are considered by many to be shocking or offensive: see *R (Calver) v The Adjudication Panel for Wales* [2012] EWHC 1172 (Admin); [2013] PTSR 378 at [49] and [55]-[58].

105. The Strasbourg Court has observed that satirical humour is a form of artistic expression that will often attract the protection of Article 10(1) as it may cast a critical light on contemporary issues of public concern: see, for example, *Vereinigung Bildender Künstler (VBK) v Austria* [2007] ECDR. 7 at [33]. However, the Appellants' messages were not of this type. The fact that the judge accepted that they were intended to be received as jokes in no way nullifies their racist, misogynistic, homophobic, and

disablist content. They can be readily distinguished from robust and often shocking humour, which nonetheless performs a societal function. In our judgment, the contents of the messages were gratuitously offensive and were not contributing to any form of public debate capable of furthering progress in human affairs.

106. Accordingly, the messages fell right at the bottom of the hierarchy of speech and a considerable distance away from the core of the protected freedom.

107. Taking that starting point and conducting the proportionality exercise, the prosecution and convictions were plainly proportionate to the achievement of the legitimate aims. The Appellants acted in clear and obvious breach of their duties as public office holders; the messages they sent were highly offensive and liable to erode public confidence in the police. It was proportionate to the aim of maintaining public confidence in the police to express public disapproval of their actions through criminal liability, over and above professional misconduct proceedings.

108. The interference with the Appellants' Convention rights was thus justified under Article 10(2). Assuming against ourselves that Article 8(1) also applied, the same conclusion would follow in relation to Article 8(2).

*Consensually exchanged private messages*

109. The Appellants rely heavily on the fact that, unless *Collins* is confined to its particular facts, the law would criminalise conduct which is now commonplace. Reference is made to the modern phenomenon of the consensual exchange of material which might objectively be regarded as indecent or obscene. This was the potential conundrum identified by Lord Brown in *Collins* at [27] but left unresolved.

110. Those are not the facts before us. However, in the case of private messages consensually exchanged on a medium such as WhatsApp between purely private persons (not public officials, such as police officers, discussing policing matters) like the Lord Ordinary in *BC*, we consider that such persons are very likely to have a reasonable expectation of privacy. In the unlikely event of a prosecution being brought under section 127(1), difficult questions may arise as to whether the interference with Article 8(1) rights could be justified. As explained by the Law Commission at para. 4.77 of its Final Report, if a prosecution was based on such facts, or where indecent material was simply stored in an online facility and not seen by others, that would raise questions about the scope of the offence, and its compatibility with the rights to private life and freedom of expression. The question as to whether any interference was proportionate in those circumstances, would be for the court in that case to decide, on the facts of that case.

## X. Summary of conclusions

111. Drawing the threads together, we can summarise our conclusions as follows:

(1) The object of section 127(1)(a) is 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;

(2) 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. 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;

(3) There is binding authority in the form of *Collins* to the effect that the ingredients of the offence under section 127(1)(a) are as follows:

i. 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 a public electronic communications network. Provided that 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;

ii. 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;

(4) 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 Convention rights as apply. Depending on the circumstances, these rights may include Articles 10(1) and Article 8(1);

(5) In this case, Article 8(1) is not engaged but, even if it were, the interference with the Appellants' private lives was justified within Article 8(2);

(6) Article 10(1) is engaged and the interference with the Appellants' free speech rights was justified within Article 10(2).

## XI. Answers to the Questions

112. For the reasons given above, we answer the questions in the Case as follows:

(1) Q1: After the close of the evidence, was the District Judge right to direct that the particulars of Charges 1 and 4 against Joel Borders and Charge 2 against Jonathon Cobban be amended? NOT PURSUED.

(2) Q2: Was the District Judge wrong to conclude that the messages were "*grossly offensive*" in their nature, in light of her findings of fact that they were "*jokes*" and were not therefore intended to be taken seriously by the recipients? NO.

(3) Q3: In determining that the messages sent were of a grossly offensive nature, was the District Judge correct to disregard the fact that other members of the group were not offended by their contents and that the

messages only came to light as a result of an unrelated criminal investigation? YES.

(4) Q4: Is the *mens rea* requirement, for an offence of sending a grossly offensive message contrary to section 127 of the Communications Act 2003 ("the 2003 Act"), satisfied in circumstances where the Defendants did not reasonably expect that their messages would be read by person(s) who may be grossly offended by their contents? YES.

(5) Q5(a): In the particular circumstances of this case, should the District Judge have given a heightened meaning to the words "*grossly offensive*" in order to ensure that their convictions under section 127 of the 2003 act were compatible with the Defendants' rights under Articles 8 and 10 of the ECHR? NO. BUT THE JUDGE WAS OBLIGED TO CONSIDER WHETHER THE CONVICTIONS COMPLIED WITH SUCH CONVENTION RIGHTS AS APPLIED ON THE FACTS.

(6) Q5(b): Was the District Judge wrong to conclude, in the particular circumstances of this case, that the Defendants' convictions furthered a legitimate aim, namely, to prevent a public electronic communications network from being used to damage the rights of others? NO. BUT THE LEGITIMATE AIMS OF THE PARTICULAR INTERFERENCE WITH THE APPELLANTS' CONVENTION RIGHTS INCLUDED WIDER INTERESTS IN MAINTAINING PUBLIC CONFIDENCE IN THE POLICE.

(7) Q5(c): Was the District Judge required to carry out an individual proportionality assessment under Articles 8 and 10 ECHR? YES, AS REGARDS ONLY ARTICLE 10. ARTICLE 8 WAS NOT ENGAGED BUT, IF IT WAS, INTERFERENCE WITH THE APPELLANTS' PRIVATE LIFE WAS JUSTIFIED.

## XII. Sentence

113. Following their convictions, the judge sentenced each of the Appellants to a total of 12 weeks' imprisonment for each offence (the sentences to run concurrently). The Appellants seek to challenge the sentences on several grounds. However, there is no question in the Case concerning those sentences and we are constituted as a Divisional Court hearing an appeal by way of case stated. All parties invite us to nevertheless address the challenge to the sentences.

*Procedural issues*

114. The judge declined to state a case in respect of the Appellants' grounds of appeal against sentence. She explained, rightly in our view, that it was not appropriate to state a case when an appeal against sentence could be made to the Crown Court. She held that the application to state a case in relation to sentence was "*frivolous*" within the meaning of section 111(5) of the Magistrates' Courts Act 1980. However, having failed in their application to state a case, it would appear that the Appellants were precluded by operation of section 111(4) of that Act from appealing to the Crown Court.

115. The judge's refusal to state a case on the issue of sentence led to an interim application in the High Court by the Appellants seeking directions, and if necessary, an order under section 28A(2) of the Senior Courts Act 1981, that the judge amend the case to include a question on sentence. That application was considered by Sweeting J on the papers. By an order dated 12 February 2024, he refused the application and stated in his reasons that an amendment of the case was not necessary because "*there is a lengthy written judgment and case stated which provides the necessary context, factual findings and reasoning*" and that this would enable a hearing on the sentence issue. Sweeting J said that this was an instance when it would be sensible to proceed directly to the hearing as opposed to sending the case back to the judge for amendment. The parties prepared and made submissions on that basis.

116. In ordinary circumstances, a challenge to sentence should be made by appeal to the Crown Court. Lord Woolf in *Allen v West Yorkshire Probation Service* [2001] EWHC (Admin) 2 explained at [20]-[23] that appeals by case stated, or applications for judicial review, are not appropriate for appeals against sentence in the generality of cases. If the sentence imposed by a Magistrates' Court is wrong, the right place to go is the Crown Court. As Lord Woolf described, there are multiple reasons why the Crown Court is the appropriate forum, including the delay which will be caused while an appeal reaches the Divisional Court. In this case, the Appellants have now been on bail subject to conditions for over 18 months.

117. The procedural route that we propose to adopt, in circumstances where there is no case stated on sentence, is that set out in *Sunworld Limited v Hammersmith and Fulham LBC* [2000] 1 WLR 2102 ("*Sunworld*"*)* at pages 2106-2107. Where a court refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review, either (a) to direct it to state a case and/or (b) to quash the order under appeal. If the court below has already (a) given a reasoned judgment containing all the necessary findings of fact and/or (b) explained its refusal to state a case in terms which clearly raise the true point of law in issue, then the correct course would be for the judge, assuming they think the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all. This assumes there already exists sufficient material to enable the Divisional Court to deal with all the issues. Sweeting J has already found that to be the case.

118. The court in *Sunworld* underlined that the court should adopt whatever course involves the fewest additional steps and the least expense, delay, and duplication of proceedings. Because of the substantial delays in this case already, the fact that there is also an appeal against the convictions, and the fact that the DPP takes no point, we will exceptionally in this case deal with the challenge to sentence. In short, we will proceed as if this challenge had been brought by way of judicial review. We will grant permission to apply for judicial review, waive all procedural requirements, and treat the hearing as the substantive hearing of that claim.

*The decision on sentence*

119. In summary, the *Sentencing Council Guideline on Communication Network Offences* ("the Network Guideline") came into effect in 2017. It provides that factors indicating "*greater harm*" are "*[s]ubstantial distress or fear to victim(s) or moderate impact on several victims*". A factor indicating "*higher culpability*" within the Network Guideline

includes an "*offence motivated by, or demonstrating, hostility based on any of the following characteristics or presumed characteristics of the victim(s): religion, race, disability, sexual orientation or transgender identity*". Save in respect of the second of the messages we have set out above, the judge found "*higher culpability*".

120. The judge's reasons and findings in her decision to categorise the offences as involving "*greater harm*" were as follows:

(1) The term "*victim*" in the Network Guideline does not refer only to persons to whom the messages were sent directly;

(2) In terms of the wider harm caused by these offences, significant harm had undoubtedly been caused to public confidence in the police by these offences. The ability of any police force to function in the wider public interest is reliant in many respects on public confidence. If that is damaged in any significant way, the ability of the police successfully to carry out the task of protecting the public is also compromised;

(3) Even unintended disclosure can cause harm to the persons to whom the messages relate. Even if this were not properly to be regarded a statutory aggravating feature, it is a significant factor, which, together with the wider harm caused by these offences, would move these offences out of one bracket and into another;

(4) Offences of this nature are designed to mitigate the risk posed by the use of a public telecommunications network for grossly offensive purposes, in effect to protect against the risk of inadvertent disclosure and consequent harm being caused to the persons to whom those messages relate;

(5) The absence of an intention to cause harm does not preclude the case from falling into the category of greater harm within the Network Guideline (see *DPP v Bussetti* [2021] EWHC 2140 (Admin); [2021] Crim. L.R. 1087).

121. There is no complaint about the judge's findings on the level of culpability. However, the Appellants submit that:

(1) The judge's approach to the assessment of harm was wrong in law. This resulted in the judge wrongly placing the case in Category 1 of the Network Guideline (higher culpability and greater harm), moving upwards from a starting point of 9 weeks' custody to 12 weeks' custody, and declining to suspend the terms of imprisonment;

(2) No reasonable tribunal, properly directed as to the law, could have arrived at immediate custodial sentences. Reliance is placed on the *Sentencing Council's Imposition of Community and Custodial Sentences Definitive Guideline* ("the Community and Custodial Sentences Guideline") which requires that a custodial sentence should only be imposed where it is unavoidable.

122. In response, Ms Ledward argues that the judge did not err in law in her conclusion as to harm and correctly applied the Network Guideline on the facts. The judge was

entitled to draw the "*the common-sense inference*" that the public's exposure to the Appellants' messages through the media coverage would have undoubtedly caused "*substantial distress*" to, or "*moderate impact on several*", members of the groups targeted by the messages. In the alternative, to the extent that the factors in the Network Guideline indicating "*greater harm*" did not extend to the additional, but more significant indirect "*societal*" harm, caused by these messages, it was permissible for the judge to weigh this important consideration into the balance when identifying the starting point within the offence range. As to the second complaint concerning suspension, it was open to the judge to conclude that the only appropriate punishment for these offences was the imposition of an immediate custodial sentence, and to find that this factor outweighed all of the other factors.

*Harm*

123. We can take matters shortly. Even if there were force in the Appellants' submission that the judge was wrong to treat this as a "*greater harm*" case, applying the language of the Network Guideline, any error was immaterial. The stand-out feature, on the facts, 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 into account the significant indirect "*societal*" harm caused by the messages. This was a case where none of the categories in the Network Guideline sufficiently fitted the facts (see section 60(5) of the Sentencing Act 2020). Further, any sentence had to reflect the totality of the Appellants' offending, and the judge rightly referred at the outset of her sentencing reasons to the *Sentencing Council Guideline on Totality*. These were multiple messages sent over a period of months. There is no proper basis for us to interfere with an overall custodial term of 12 weeks for each Appellant.

*Suspension*

124. The Community and Custodial Sentences Guideline requires a balancing exercise to be performed between the factors tending towards, and against, suspension. It is possible that one factor tending against suspension can outweigh multiple factors tending towards suspension: see *R v Middleton* [2019] EWCA Crim 663; [2019] 2 Cr App R (S) 28 at [24]-[29]. An appellate court will be slow to interfere with an exercise of judgment as to whether or not to suspend where it was clear that all relevant considerations had been taken into account, including by reference to the Community and Custodial Sentences Guideline: see, for example, *R v Burnham* [2020] 2 Cr App R (S) 20 at [26]-[27]. That also reflects a classic public law approach to challenges to discretionary decisions.

125. The judge explained that she had considered the factors identified in the Community and Custodial Sentences Guideline before determining that this was not an appropriate case in which the sentence of 12 weeks' imprisonment ought to be suspended. She set out the factors against suspending the sentences of imprisonment and those in favour of immediate imprisonment. As to the factors against suspension the judge said:

> "Neither of the two Defendants had showed any genuine remorse. Not only had they had both been found guilty of these offences after trial, but I took the view that (based on the evidence which they had given at trial and the contents of their pre-sentence reports) that they still failed to appreciate the seriousness of this conduct and

> they continued to minimise their actions. In relation to Joel Borders in particular, this was supported by the contents of the probation report which concluded that he "struggled to accept that he had committed any offences" and continued to say that the messages were *"just a joke"*. The attitude towards their offending behaviour could best be described as *"indignant"* and *"frustrated"* about the fact that the messages had been released to the public, rather than about the fact that they had sent them in the first place. Whilst the covert nature of these comments meant that they had not intended for, nor expected, these messages to have been read by members of the public, it perpetuates and normalises a culture of prejudice towards some of the most vulnerable members of our society and is extremely difficult to tackle within the police force. The offending undermines public confidence in police officers and risks the promulgation of bias and prejudicial attitudes by police officers, whether as a result of conscious or unconscious bias. The sentence imposed should have due regard to the statutory sentencing purpose, enshrined at section 27(2)(b) of the Sentencing Act 2020, of reducing crime (including its reduction by deterrence)."

126. These remarks were supported by the pre-sentence reports. Given the wider societal damage caused, and the concomitant need for deterrence, it was open to the judge to conclude that the only appropriate punishment for these offences would be achieved by the imposition of an immediate custodial sentence, and to find that this factor outweighed all of the other factors brought into play by the Community and Custodial Sentences Guideline that might in other circumstances have justified suspension. It was for the judge to decide what weight to give each factor on the facts of this case, and there was no error in her approach. The rationality of her decision is evidenced by her clear and detailed reasons as set out in the Case at [30]-[32].

127. We accordingly reject the challenge made on the basis that the judge should have suspended the sentences. The demanding test of irrationality is not met.

128. The judicial review applications in relation to sentence are refused.

## XIII. Conclusion

129. The appeals in relation to conviction are dismissed and the judicial review applications in relation to sentence are refused. Each Appellant was convicted and sentenced lawfully.