Neutral Citation Number: [2020] EWHC 225 (Admin)

Case No: CO/2507/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF HARRY MILLER	**Claimant**
- and -	
(1) THE COLLEGE OF POLICING **(2) THE CHIEF CONSTABLE OF HUMBERSIDE**	**Defendants**

- -
- -

Ian Wise QC (instructed by **Sinclairslaw**) for the **Claimant**
Jonathan Auburn (instructed by **GLD**) for the **First Defendant**
Alex Ustych (instructed by the **Force Solicitor)** for the **Second Defendant**

Hearing dates: **20 and 21 November 2019**

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. In his unpublished introduction to *Animal Farm* (1945) George Orwell wrote:

> "If liberty means anything at all, it means the right to tell people what they do not want to hear."

2. In *R v Central Independent Television plc* [1994] Fam 192, 202-203, Hoffmann LJ said that:

> "… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."

3. Also much quoted are the words of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, [20]:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ... "

4. In *R v Shayler* [2003] 1 AC 247, [21], Lord Bingham emphasised the connection between freedom of expression and democracy. He observed that 'the fundamental right of free expression has been recognised at common law for very many years' and explained:

> "The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated …".

5. Article 10 of the European Convention on Human Rights (the Convention) also protects freedom of expression. It provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

6. In *Handyside v United Kingdom* (1976) 1 EHRR 737 the European Court of Human Rights (the Court) considered an Article 10 challenge by Mr Handyside following his conviction for obscenity. The Court said at [49]:

> "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

7. I turn to the case before me. It concerns freedom of speech. It involves the lawfulness of the First Defendant's operational guidance on non-criminal hate speech and, specifically, how Humberside Police dealt with a complaint by a woman called Mrs B about things the Claimant had written on Twitter about transgender issues that offended her.

8. I suspect that American constitutional scholars would find this case surprising. There, the speech at issue would not have raised a flicker with the authorities. In his State of the Union address in 1941 President Roosevelt proposed four fundamental freedoms that people 'everywhere in the world' ought to enjoy, the first of which was freedom of

speech. In the United States that freedom is protected by the First Amendment. It is a bedrock constitutional principle that speech may not be legally restricted on the grounds that it expresses ideas that offend. The strength of that protection is illustrated by *Virginia v Black* 538 US 343 (2003), where the US Supreme Court held that a law which criminalized public cross-burning was unconstitutional as a violation of free speech – despite the offensive nature of that symbol which, the Court said, was 'inextricably intertwined with the history of the Ku Klux Klan'. Another example is *Snyder v Phelps* 562 US 443 (2011), where the Court upheld the right of members of an evangelical church to picket soldiers' funerals carrying signs celebrating their deaths and other messages which most people thought were grossly offensive.

9. The freedom of speech afforded by the common law and Article 10 does not go so far as the First Amendment. But it is worth keeping that constitutional provision in mind because it underscores the vital importance of freedom of speech to a thriving democracy – a principle which James Madison recognised as long ago as 1789 when he drafted the First Amendment, and which Lord Bingham reaffirmed in *Shayler*, supra.

10. Moving to the twenty-first century, I probably do not need to explain that Twitter is a popular microblogging and social networking service. In *Chambers v Director of Public Prosecutions* [2013] 1 WLR 1833, [7] – [10], Lord Judge CJ gave the following helpful description of how Twitter works:

> "7. … Twitter was not invented until 2006 … but, as is the way with modern means of communication, its daily use by millions of people throughout the world has rocketed.
> 8. Each registered user adopts a unique user name or 'Twitter handle' …
>
> 9. In very brief terms Twitter enables its users to post messages (of no more than 140 characters) on the Twitter internet and other sites. Such messages are called tweets. Tweets include expressions of opinion, assertions of fact, gossip, jokes (bad ones as well as good ones), descriptions of what the user is or has been doing, or where he has been, or intends to go. Effectively it may communicate any information at all that the user wishes to send, and for some users, at any rate, it represents no more and no less than conversation without speech.
>
> 10. Those who use Twitter can be 'followed' by other users and Twitter users often enter into conversations or dialogues with other Twitter users. Depending on how a user posts his tweets, they can become available for others to read. A public time line of a user shows the most recent tweets. Unless they are addressed as a direct message to another Twitter user or users, in which case the message will only be seen by the user posting the tweet, and the specific user or users to whom it is addressed, the followers of a Twitter user are able to access his or her messages. Accordingly most tweets remain visible to the user and his/her followers for a

> short while, until they are replaced by more recently posted tweets. As every Twitter user appreciates or should appreciate, it is possible for non-followers to access these public time lines and they, too, can then read the messages. It is also possible for non-users to use the Twitter search facility to find tweets of possible interest to them."

11. In that case the Divisional Court held that tweets are messages sent over a public electronic telecommunications network for the purposes of the Communications Act 2003. Section 127(1)(a) of that Act makes it an offence to send via such a network 'a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'. At [28] the Lord Chief Justice said:

> "The 2003 Act did not create some newly minted interference with the first of President Roosevelt's essential freedoms – freedom of speech and expression. Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation. Given the submissions by Mr Cooper, we should perhaps add that for those who have the inclination to use Twitter for the purpose, Shakespeare can be quoted unbowdlerised, and with Edgar, at the end of King Lear, they are free to speak not what they ought to say, but what they feel."

12. I understand that the Shakespeare quote which the Lord Chief Justice had in mind was, 'The first thing we do, let's kill all the lawyers' (*Henry VI, Part 2,* Act IV, scene 2). The King Lear quote is from Act V, scene 3, where Edgar, son of Gloucester, says that we should, 'Speak what we feel, not what we ought to say'.

13. As I have said, the Claimant's tweets related to transgender issues. This is a topic of current controversy. The Government's 2018 consultation on reforms to the Gender Recognition Act 2004 (the GRA 2004) (*Reform of the Gender Recognition Act – Government Consultation*, July 2018) proposed replacing the current requirements for obtaining a Gender Recognition Certificate with an approach that places a greater emphasis on the self-identification by a person of their gender. The Minister said this in her introduction to the consultation document:

> "Trans people continue to face significant barriers to full participation in public life. Reported hate crime is rising. Reported self-harm and suicide rates, particularly amongst young trans people, are extremely concerning. Trans people continue to face discrimination and stigma, in employment and in the provision of public services.
>
> One public service that we know trans people are concerned about is the legal process for changing gender as set out in the Gender Recognition Act 2004. This Act allows an individual

> to get their gender legally recognised, giving them access to the legal rights of the gender they identify with and a new birth certificate issued in that gender. Many of the trans respondents to our LGBT survey said they found the current system intrusive, costly, humiliating and administratively burdensome. Whilst many trans people want legal recognition, too few are able to get it. In too many cases the current system prevents them from acquiring legal recognition of who they are, denying them the dignity and respect that comes with it. It often leaves trans people in the difficult situation of living in one gender, and holding Government issued forms of identification, credit cards, driving licence and all other documents in that gender, but a birth certificate and legal status in another.
>
> This consultation seeks views on how the Government might make it easier for trans people to achieve legal recognition. The way this has been achieved in some other countries around the world is to remove the requirement for a medical diagnosis and to streamline other parts of the process. This is one option that the Government wishes to ask for views on but no firm decisions on our eventual approach have been taken. The legal recognition process is separate from the pathway that trans people follow to obtain medical treatment that they may wish to have, such as hormones or surgery. The questions about any removal of a requirement for a medical diagnosis in the context of this consultation is only with regard to the legal recognition process.
>
> We also want to be clear that this is an explorative consultation and we do not have all the answers. That is why, as we consult, we are mindful of the need to engage with all perspectives. We particularly want to hear from women's groups who we know have expressed some concerns about the implications of our proposals."

14. On one side of the debate there are those who are concerned that such an approach will carry risks for women because, for instance, it might make it easier for trans women (ie, those born biologically male but who identify as female) to use single-sex spaces such as women's prisons, women's changing rooms and women's refuges. On the other side, there are those who consider it of paramount importance for trans individuals to be able more easily to obtain formal legal recognition of the gender with which they identify.

15. Broadly speaking, the Claimant holds the first of these viewpoints. He posted a number of tweets which Mrs B reported to the police as 'transphobic'. Under the policy issued by the First Defendant, the Hate Crime Operational Guidance (HCOG), the messages were recorded by Humberside Police as a 'non-crime hate incident'. An officer went to the Claimant's place of work to speak to him about them. The Claimant was not present. He and the officer subsequently spoke on the phone. The details of what was said are disputed, and I will return to them later, however the Claimant subsequently

complained about his treatment by the police. He claims that the police's actions interfered with his right under Article 10(1) to express himself on transgender issues.

16. This application for judicial review challenges: (a) the legality of HCOG; and (b) how the police dealt with the Claimant under that policy. The Claimant's case is that HCOG is unlawful on its face as being in violation of the common law and/or Article 10 of the Convention. Further or alternatively, he argues his treatment by the police violated his Article 10(1) rights. In other words, he says that even if the policy is lawful, his treatment by the police was unlawful.

17. I should make two things clear at the outset. Firstly, I am not concerned with the merits of the transgender debate. The issues are obviously complex. As I observed during the hearing, the legal status and rights of transgender people are a matter for Parliament and not the courts. Second, the nature of the debate is such that even the use of words such as 'men' and 'women' is difficult. Where those words, or related words, are used in this judgment, I am referring to individuals whose biological sex is as determined by their chromosomes, irrespective of the gender with which they identify. This use of language is not intended in any way to diminish the views and experience of those who identify as female notwithstanding that their biological sex is male (and *vice versa*), or to call their rights into question.

The factual background

The Claimant

18. The Claimant is a shareholder in a plant and machinery company in Lincolnshire. He happens to be a former police officer. He holds a number of degrees and formerly taught in higher education. He is intelligent and highly educated.

19. In his first witness statement the Claimant says that over the years he has worked alongside many members of the lesbian, gay, bisexual and transgender (LGBT) community, and that prior to this case he had never been the subject of any complaints about transphobia. In [12], [17] and [18] he writes:

> "12. On Twitter, my account name (or handle) is @HarrytheOwl. For the past two years, I have tweeted extensively about proposed reforms to the Gender Recognition Act 2004 (GRA); the ontology of sex and gender; the potentially dangerous consequences of self-identification to existing sex based rights; the distortion of commonly understood biological concepts, such as male and female, via the introduction of enforced language, including pronouns; the apparent politicisation of the police in their open campaigning to support the proposed change of law to a policy of self-identification; the weaponization of the police by pressure groups in favour of the proposed changes to the law to the detriment of contrary voices.
>
> …

> 17. I believe that trans women are men who have chosen to identify as women. I believe such persons have the right to present and perform in any way they choose, provided that such choices do not infringe upon the rights of women. I do not believe that presentation and performance equate to literally changing sex; I believe that conflating sex (a biological classification) with self-identified gender (a social construct) poses a risk to women's sex-based rights; I believe such concerns warrant vigorous discussion which is why I actively engage in the debate. The position I take is accurately described as gender critical.
>
> 18. In this context (political reform) I want to raise awareness by stating that which used to be instinctively obvious – a biological man is a man and a biological woman is a woman. To claim otherwise is extraordinary. Extraordinary claims require both extraordinary evidence and extraordinary scrutiny prior to becoming law."

20. The Claimant goes on to say that he does not have, and has never had, 'any hatred towards members of the LGBT community in general, nor the transgender community in particular'. Nor, he says, does he have any interest in challenging the protection currently afforded to transgender individuals under either the GRA 2004 or the Equality Act 2010. He asserts that when tweeting, he typically uses 'sarcasm, satire and simple questioning' to challenge the beliefs that underpin the proposed reforms to the GRA 2004.

21. According to her witness statement, the Claimant's wife has similar views and concerns.

22. I grant permission to all parties to rely on the additional evidence that has been filed.

The Tweets

23. I turn to the Claimant's tweets which give rise to this case. There were 31 tweets in total. They were posted between November 2018 and January 2019. I will not recite them all, but will set out a selection which I think fairly expresses their overall tone and impact. Some of them contained profanity and/or abuse. Mr Wise QC for the Claimant preferred to describe them as 'provocative'. The meaning of some of them is not immediately clear, and so the Claimant has helpfully provided an explanatory note. Apart from Mrs B and another unnamed person, there is no direct evidence that anyone ever read them. I assume some of his Twitter followers would have done, but there is no evidence what they thought of them.

24. I begin on 16 November 2018 when the Claimant tweeted:

> "Just had son on from Oxford. The anti-Jenni Murray crowd were out baying, screaming and spitting at students who went to see Steve Bannon, and barricaded their way, not just

> to the meeting, but when they attempted to retreat to their rooms. Twats."

25. In his note the Claimant explains what this tweet meant:

> "This is an account, as relayed by my son, of what he witnessed at Oxford University. Dame Jenni Murray is Radio Four presenter of Woman's Hour. She wrote an article in March 2017 in the Sunday Times which headlined "Be trans be proud – but don't call yourself a 'real woman'". She was due to speak at Oxford University in November 2018 at an event called Powerful British women in History and Society, but cancelled after the Students' Union LGBTQ campaign objected to her Sunday Times comments which they said contributed to the 'harassment, marginalisation, discrimination and violence' faced by trans-people. The LGBTQ campaign had called on the History Society to either publicly condemn her views or cancel the event."

26. On 17 November 2018 he wrote in response to a tweet from someone called Dr Adrian Harrop which said, 'No idea what you're talking about':

> "Gloating bastard Harrop doing what he does best"

27. The Claimant explains this as follows:

> "This tweet identifies Trans Rights Activist, Dr Adrian Harrop, who appears to be taking delight at the permanent ban from Twitter by the Canadian feminist, Meghan Murphy. Harrop hints at being partially responsible for the ban.
>
> Meghan Murphy founded the feminist blog and podcast 'Feminist Comment' in 2012, which won the best feminist blog awards in the Canadian blog awards of the same year. Her work has appeared in numerous publications including the New Statesman, Al Jazeera and the National Post in Canada. She is gender critical.
>
> Harrop is currently the subject of a full GMC enquiry in relation to both online and off-line behaviour towards at least two women and towards me and my family."

28. On 20 November 2018 the Claimant tweeted:

> "Is Trans Day of Remembrance a thing, then ? Like, an actual one ?"

29. The Claimant explains that this was a comment on a tweet by the TUC about something called the Transgender Day of Remembrance which involves remembering

those murdered because of transphobia. He says that this was a genuine question because he had not heard of the event.

30. On 25 November 2018 the journalist Andrew Gilligan tweeted that Brighton had a group for 'trans or gender-questioning 5 to 11-year-olds'. The same day the Claimant commented on this as follows:

> "'Give me the child and I'll give you the man.' The reason there's no critical assessment is this: They're building an army."

31. The Claimant explains that Andrew Gilligan had exposed 'the rapid rise of primary school children identifying as 'trans'' and was speculating as to the possible causes of this. The Claimant says that the lack of critical assessment had been recently documented by endocrinologists, psychologists, and 'senior whistle blowers' at the Tavistock Centre. He says that the quote was from St Ignatius Loyola (founder of the Jesuits) and he was speculating as to the possible reasons for a lack of critical assessment. He says, 'this is satire, but satire with a purpose', because he had been alarmed by the transitioning of children for a long time.

32. On 26 November 2018 the Claimant posted a picture of a male athlete called Bruce Jenner who won the men's decathlon at the 1976 Olympics and wrote:

> "Dear @Twitter Given your rules on dead naming, could you please clarify who won gold at the 1976 Olympic men's decathlon, please ?"

33. The Claimant explains that 'dead naming' means using someone's name and identity prior to their gender transition. Twitter regards doing it as being a breach of its terms and conditions. The Claimant says that Bruce Jenner is now Caitlyn Jenner and that she 'not only claims to be a woman but to have always been a woman'. The Claimant says his question confronts the reconciliation of these apparently contradictory facts: 'If Jenner was always a woman, why was she competing in a men's event ?'

34. On 30 November 2018 he wrote:

> "Ah yes; the troubled 40s when my rainbow wearing non binary 1920's gran was made to choose between having a lady vagina or a lady penis. It really was Sophie's Choice."

35. The Claimant explains this was a comment on someone else's tweet which claimed that trans identified persons have suffered more than any generation in history, 'a claim which I find unfounded and a biased reporting of history.'

36. On 11 December 2018 the Claimant tweeted:

> "If we asked Holly and Jessica who murdered them, I imagine they wouldn't say 'A woman called Nicola'. #IanHuntleyIsAMan"

37. The Claimant explains that this was a comment on a report that Ian Huntley, the Soham murderer, was identifying as a woman called Nicola and that activists were supporting his right to do so. He says that 'this is not hate speech towards a community'. He said he was expressing concern by sarcasm that the horrific murder of Holly and Jessica was somehow being overshadowed by support for the murderer's transgenderism.

38. On 16 December 2018 the Claimant commented on the following tweet:

> "It's awful reading threads from parents who don't accept their kids are trans & are actively suppressing them. I just read one and I feel sick.
>
> What they're doing is inhumane, unscientific, and extremely dangerous. As the parent of a happy trans teen, it breaks my heart."

39. To that, the Claimant replied:

> "Had to read this crap pile twice to be sure it wasn't a parody account."

40. On 22nd December 2018 above a tweet about transgender participants in female sports, the Claimant commented 'proving once more that Sheffield women know the difference between lads n' lasses'.

41. The Claimant says that he cannot now recall the context of this tweet as the original tweet has been deleted.

42. The Claimant posted the following on 1 January 2019:

> "I was assigned Mammal at Birth, but my orientation is Fish.
> Don't mis species me. fuckers."

43. The Claimant describes this as 'existential humour', and says the point he was making was that if a biological male can become a biological female, 'then what boundary exists to separate fish from mammals ?'

44. On 3 January 2019 the Claimant posted:

> "You know the worst thing about cancer ? It's transphobic."

45. He explains this was a sarcastic tweet in response to a news report on medical evidence that a certain type of brain tumour is different in men than women. He says his comment was intended to demonstrate 'the obvious primacy of biology over gender.'

46. Also on 3 January, the Claimant posted a comment (above a picture of a transgender woman): 'Grow a beard, Hon … s'all the rage with the transwomen, appaz.'

47. The Claimant explains that the tweet he was responding to has been deleted, but he thinks this tweet was in response to a tweet from a trans activist who was arguing the NHS should provide more surgery for trans people.

48. On 6 January 2019 the Claimant tweeted to ask 'how do we categorise crime committed by 'women with penises'. Do they go in the M or the F column?'

49. He explains, 'This is a simple question exposing the absurdity of the assertion that women have penises'

50. On 11 January 2019 he wrote:

> "Transwomen are women. Anyone know where this new biological classification was first proposed and adopted ?"

51. He explains this was an enquiry as to the historical origins of the statement 'Transwomen are women'.

52. Later that day he posted this:

> "Seriously, do we know when this bollocks first appeared ?"

53. He explains that this tweet:

> "… makes an enquiry regarding the historical origin of the phrase 'transwomen are women'. Inclusion of the word 'bollocks' indicates my opinion of that statement. My opinion is not based on unconsidered prejudice; indeed I have offered a cash reward to anyone who can justify the statement without reference to tautology, gendered essence, reliance of sexist stereotypes, or by citing generally accepted science. My understanding is that gender is a social construct, that sex is a biological classification, that conflation between sex and gender is dangerously wrong."

54. On 13 January 2019 the Claimant tweeted:

> "Any idea why men aren't being more vocally GC ? I know there's a few of us, but I'd expect way more.
>
> And, could I ask @Glinner why you think there are not more GC voices on the box ? You'd think it would be ripe for satire."

55. The Claimant explains:

> "In this tweet I ask a question. Why are men not being more gender critical ? I direct a question to the writer Graham Linehan (@Glinner) who writes TV situation comedy. I suggest that the subject is ripe for satire."

56. As I shall explain in a moment, the post which most concerned the police was this verse, which Mr Miller said was written by a feminist song-writer. He re-tweeted it on 22 November 2018:

> "Your breasts are made of silicone/ your vagina goes nowhere/ And we can tell the difference/ Even when you are not there/ Your hormones are synthetic/And let's just cross this bridge/What you have, you stupid man/Is male privilege"

57. The Claimant says that he found this amusing and re-tweeted it and that 'it reveals the sentiment that many feminists feel – that male privilege is now encroaching on womanhood.'

Mrs B's complaint to the police

58. In early January 2019 the Claimant's tweets came to the attention of Mrs B. She has made a witness statement. Without objection from the parties I made an order anonymising her identity under CPR r 39.2. She lives somewhere in the north-west of England, some distance from the Claimant. They do not know each other. She describes herself as a 'post-operative transgender lady'.

59. In her statement Mrs B says that she did not see the Claimant's tweets herself but had them drawn to her attention by a friend. From this I conclude that Mrs B made a voluntary choice to read the tweets. They were not directed at her. Indeed, the conclusion which I draw from the evidence is that they were not directed at anyone in particular but were simply posted on Twitter to be read by the Claimant's Twitter followers or anyone else who might come across them, if they could be bothered to read them. They were certainly not specifically targeted at the transgender community. There is no evidence what Mrs B's friend thought of them. Mrs B does not say that anyone else read them. There is certainly no evidence that before Mrs B became involved anyone found the tweets offensive or indecent or in any way remarkable. They were merely moments lost in the Twittersphere (as I believe it is known).

60. However, Mrs B was offended by them. She writes in her statement that:

> "I was so alarmed and appalled by his brazen transphobic comments that I felt it necessary to pass it (*sic*) on to Humberside Police as he is the chairman of a company based in that force's area."

61. She goes on to describe the Claimant as a 'bigot' who 'eighty years ago … would have been making the same comments about Jewish people'. It is not clear what comments she is specifically referring to, but I understand she regards the Claimant as someone who eighty years ago would, by his writings, have contributed to the socio-political conditions in Germany which paved the way for the Holocaust and the murder of millions of Jews. She also says that over different decades he would have made offensive comments about gay people and black and Asian people.

62. She continues:

> "I doubt very much that Mr Miller has met any transgender people. Never even come across them. Never even interviewed them for a position with his firm. Never employed them. Never even sat down for a cup of tea with them. So, what makes him an expert suddenly in transgender issues ? In his interview with *The Spectator*, he claims he is 'concerned' with the introduction of self-ID. Self-ID has nothing to do with him. Doesn't affect him at all. I doubt he has even read the proposals behind it. In his interview with the *The Telegraph*, there is a desire to protect the female members of his family. Laudable, of course. But protect them from WHAT ? Does he, in his feverish imagination, honestly believe that transgender people are a threat ? Seriously ? He claims to be a 'feminist'. I'd like to ask him how many females he actually employs at his firm, outside of his secretary. He is NO feminist."

63. It therefore appears that Mrs B was just as exercised about what the Claimant had said in these interviews as she was about his tweets. The Claimant gave the interviews after his case received publicity in the media.

64. She goes on (emphasis in original):

> "He and his followers on Twitter honestly believe he has not done anything wrong. They say a crime has not been committed. (Clue: 'Hate CRIME'. Now maybe that might need to be reworded but it is clear he has still committed an offence).
>
> …
>
> All the transgender community want is to be LEFT IN PEACE. Transgender people ARE who they say they are. Trans women ARE women and Trans men ARE men. It NOT for the likes of Mr Miller to decide who is what, nor is it any of his God damn business.
>
> All they wish is to be treated with full and unswerving respect from their peers – respect should be automatic and, contrary to popular opinion, not earned. To be treated equally and fairly before the law. That is it. No more, no less. They are not monsters. They are not predators. They are not weirdos. They are not freaks. They are, in nearly every single case, decent, law-abiding people who cause harm to no-one. The amount of vitriol, abuse or worse they have to take on a daily basis from people like Harry Miller is an absolute disgrace and an affront to any society that calls itself civilised."

65. I should make clear that in none of the tweets did the Claimant use any of the words 'monsters', 'predators', 'weirdos' or 'freaks'.

66. Mrs B concludes her statement as follows:

> "I'll finish by addressing Mr Miller directly: Mr Miller, whether you or your followers like it or not, you have been served notice that your disgusting, bigoted, bullying, utterly reprehensible behaviour is NOT going to be tolerated any longer. That is NOT a threat either."

67. In a separate email to the police Mrs B wrote:

> "I do not think it is an exaggeration to state that, should this man and his organisation win this case, transgender people can kiss the few rights they have goodbye. It will be truly 'open season' on the transgender community, a community that has suffered more than enough from constant vile and unjustified attacks on them in real life, in the media and online. Do you know what it is like to be transgender in this country in 2019 ? To be denied your rights to be the person you want to be ? To be subject to disgusting and unwarranted attacks just for having the temerity to exist ? To be subject to the most awful discrimination ?"

68. The Claimant wrote a witness statement in response to Mrs B's evidence:

> "6. I completely reject any suggestion that I am racist, homophobic or transphobic. The suggestion that I am serves to show how ignorant the writer is, and that the writer simply does not know me or anything about me.
>
> …
>
> 8. The assertion that I would have been making 'the same comments' (clearly meaning bigoted comments) about Jewish people 80 years ago, about black and Asian people 40 years ago and gay people 30 years ago is simply gratuitously offensive."

Events following Mrs B's complaint

69. Mrs B made her complaint via an online system called 'True Vision'. It was passed to Humberside Police's Crime Reporting Team (CRT). They decided to record it as a hate incident pursuant to HCOG. The evidence from Steven Williams, Humberside Police's Crime/Incident Registrar is that a staff member reviewed Mrs B's complaint and created a non-crime investigation on the relevant computer system. He says [11]:

> "In this case and generally, the CRT staff member's assessment is based upon the initial account from the

> person reporting. There may be instances, where it is not considered appropriate to record a 'hate indicent' on the facts of a particular case. Staff will use a common sense and a proportionate approach to recording in all circumstances. It is not the case that report of a hate incident will be recorded as such."

70. It would therefore appear that the matter was recorded as a non-crime hate incident simply on the say so of Mrs B and without any critical scrutiny of the tweets or any assessment of whether what she was saying was accurate. As I shall show in a moment, what she told the police was not accurate.

71. After Mrs B contacted the police, they created a document called a 'Crime Report Print'. Given the common ground that at no stage did anyone (apart from Mrs B) think that the Claimant had committed a crime, the title is striking. It is also striking that throughout Mrs B is referred to as 'the victim' and the Claimant as 'the suspect'. Whether or not Mrs B was properly to be regarded as a victim, it was certainly inaccurate to describe the Claimant as a suspect.

72. The first entry is from 4 January 2019 and reads as follows:

> "Threat – low [REDACTED]
> Harm – emotional
> Risk – unlikely
> Investigation – named suspect, no factors for CSI, no known witnesses, no CCTV, twitter posts available
> Vulnerabilities – none known
> Engagement – passed to CMU"

73. Further on there is this:

> "I would like to report an individual by the name of Harry Miller who works for […] Immingham, South Humberside. Miller has been making transphobic remarks on his Twitter account under the handle @HarryTheOwl. These comments are designed to cause deep offence and show his hatred for the transgender community."

74. In my judgment there was no evidence that the tweets were 'designed' to cause deep offence, even leaving aside the Claimant's evidence about his motives. Mrs B's report was inaccurate. The tweets were not directed at the transgender community. They were primarily directed at the Claimant's Twitter followers. In *Monroe v Hopkins* [2017] EWHC 433 (QB), [36], Warby J remarked that it could be assumed in that case that the parties' Twitter followers (and visitors to their homepages) were likely to be sympathetic to their contrasting political stances (left wing v right wing). I assume the same to be true here. It can be assumed that the Claimant's followers are broadly sympathetic to his gender critical views, as are those others who read his tweets.

75. The Crime Report has this entry for 5 January 2019:

> "Victim states that she has not been contacted by the suspect. She was informed that the suspect had made comments about the transgender community by another person. Victim states they would like the suspect speaking to but on further research the victim has herself been making derogatory comments on [REDACTED] about people who are making comments about transgender people."

76. The matter was then referred to PC Mansoor Gul, a Community Cohesion Officer, for investigation. In his witness statement PC Gul writes:

> "9. Where I am assigned a hate incident to investigate, I review the report and decide whether it has been correctly classified as a hate incident. If, having reviewed the evidence available and spoken to the victim, I consider it to be more serious than a hate incident, then I can recommend that it be re-classified as a hate crime. Likewise, if having reviewed the evidence, I am satisfied that no action is required then I can close the matter without speaking to the alleged offender. Where I am satisfied, that an incident has been correctly classified as a hate incident then, as a bare minimum, I would speak to people involved. I do this for a number of reasons but in the main, it is to ensure I have information available from all parties, to make people aware of the impact of their behaviour on others and to prevent matters from escalating into hate crimes being committed."

77. PC Gul says that he spoke to Mrs B on 15 January 2019 and asked her to send him screen shots of the tweets. She did so, and PC Gul viewed them. He formed the view that they were properly treated as a hate incident. He says in his statement [10)]:

> "I did not identify any criminal offence but I was satisfied that there was a perception by the victim that the tweets were motivated by a hostility or prejudice against transgender people."

78. There is no suggestion in PC Gul's statement that he considered whether Mrs B was in reality a 'victim', given the tweets were not directed at her or the transgender community but that she had chosen voluntarily to read them, having previously been unaware of them. Nor is there is any suggestion that PC Gul considered [1.2.4] of HCOG, which provides that it is not appropriate to record a crime or incident as a hate crime or hate incident if 'it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive.' I will return to this later.

79. PC Gul says he considered what course of action to take, and after considering various matters, he decided to speak to the Claimant. PC Gul's rationale for speaking to the Claimant is explained at [11] of his witness statement. It was 'to ensure that I had as

much information as possible to hand so that I could make an informed decision as to what action to take in this particular matter'. He goes on:

> "Having reviewed the nature of the tweets, the impact on the victim and the risk of matters escalating to criminal offences being committed, I took the decision to speak with Mr Miller."

80. PC Gul does not say what criminal offences he had in mind or why he thought there was a 'risk'.

81. On 23 January 2019 PC Gul attended the Claimant's workplace to speak to him. He says that he deliberately did not go in uniform so as not to attract wider attention and because 'the fact that the purpose of my visit was simply to speak with Mr Miller rather than the exercise of any police powers that were available to me.' ([12]).

82. The Claimant was not present, and so PC Gul left his card with a director of the company with the request that the Claimant call him. The Claimant called him back the same day.

83. It is at this point that the evidence of the Claimant and PC Gul diverges.

84. PC Gul's primary account is contained in the Crime Report that I have referred to. The relevant entry is as follows (emphasis as in original):

> "Later on the same day PC GUL received a call from Mr Miller and discussion took place about the tweets. Mr Miller wasn't happy and asked if he had committed a crime, PC Gul clearly explained to him that although the tweets were not criminal, they were upsetting many members of the transgender community who were upset enough to report them to the police. PC GUL explained to Mr Miller that it had been recorded as a HATE INCIDENT and PC GUL wanted to let him know about it also get his side of the story. PC GUL's thought process was that all parties need to be spoken to make a fair and balanced assessment. This was done in line with national guide lines in terms of hate incidents. PC GUL further explained to MR MILLER that although his behaviour did not amount to criminal behaviour, if it escalated then it may become criminal and the police will need to deal with it appropriately. MR MILLER was not happy, conversation took place around human rights act and freedom of speech and opinion. PC GUL explained that he fully agree and understand (*sic*) that but if there is a criminal behaviour then it would be dealt with as such. MR MILLER was not happy and informed PC GUL that he would take this to the national media."

85. For reasons which I will explain later it is important to note that there is no evidence that the tweets 'were upsetting many members of the transgender community who were

upset enough to report them to the police'. There had been one complaint from Mrs B. PC Gul's statement that the Claimant had offended a significant section of the transgender community, who had then complained to the police, was not true. I note that in [10] of his statement PC Gul says that Mrs B told him that she had been contacted by other individuals who felt the same as her. However, given there is nothing in Mrs B's statement to that effect, I can place no weight on that assertion. She is quite clear that it was a friend who told her about the Claimant's tweets. It is certainly not the case that there had been a number of complaints: there had been one, from Mrs B. It may be that PC Gul wrongly thought Mrs B had been speaking on behalf of a number of transgender people, and that he laboured under that misapprehension in his dealings with the Claimant. But, for whatever reason, he misrepresented the facts.

86. I have not overlooked the assertion by Mr Williams in [14] of his statement that 'the complainant reported other individuals had also told her that they had been affected by the Tweets …' I can place no weight on that assertion. There is no evidence that Mr Williams ever spoke to Mrs B and he provides no foundation for this statement. It might be he derived this from the Crime Report, which itself was not supported by any evidence. More significantly, in her statement Mrs B does not say that anyone else had seen the tweets. Her initial complaint to the police did not say that other people had seen them (besides the friend who told her about them). Given the strong terms in which she expresses herself in her statement, I would have expected her to say so if that had been the case.

87. The Claimant's account of the phone call is at [30] onwards of his first witness statement. He says that PC Gul told him that he had been contacted by a person from 'down south'. He called the tweets 'transphobic' and referred to 'the victim'. He says PC Gul said that the 'victim' had called to express concern for employees at the Claimant's place of work and was concerned it was dangerous for trans people. PC Gul explained that the Claimant had not committed a crime, but that his tweets had been 'upsetting to many members of the transgender community'. PC Gul told the Claimant that the lyric about silicone breasts had come closest to being a crime.

88. According to the Claimant in [34] of his witness statement, there was then this exchange:

> "I informed PC Gul that I was not the author of the verse and that it was simply expressing in verse the sense of imbalance of power between the sexes in the context of transgenderism. He said by Liking and Retweeting it on Twitter, I was promoting Hate.
>
> I again asked for, and received, confirmation that neither the verse, nor any of the other alleged 30 tweets, were criminal. I then asked PC Gul why he was wasting my time.
>
> PC Gul said 'I need to check your thinking'.

> I replied: 'So, let me get this straight, I've committed no crime. You're a police officer. And you need to check my thinking ?'
>
> PC Gul answered: 'Yes'.
>
> I said, 'Have you any idea what that makes you ? 'Nineteen Eighty-Four' is a dystopian novel, not a police training manual.'"

89. 'Nineteen Eighty-Four' is, of course, the 1949 novel by George Orwell which coined the term 'thoughtcrime' to describe a person's politically unorthodox or unacceptable thoughts. The Thought Police are the secret police of the superstate Oceania, who discover and punish thoughtcrime.

90. At [35] and [38] the Claimant says:

> "35. PC Gul explained that, on the basis of the third party complaint, a Hate Incident Record would be generated, regardless of there being no crime nor any evidence of hate. He warned me that continuing to tweet Gender critical content could count as an escalation from non crime to crime, thus prompting further police intervention. PC Gul did not elaborate on how such escalation might occur. However, the clear implication was that, in order to avoid such escalation into criminality, I would be strongly advised to cease tweeting gender critical content. At the time, I instinctively felt that the intervention by PC Gul was wrong, coercive and oppressive although I was not yet sufficiently cognisant in the European Convention on Human Rights to quote Article 10 at him.
>
> …
>
> [38] Finally, PC Gul offered his final words of advice, words that I will never forget as I was so stunned by them. He said, 'You have to understand, sometimes in the womb, a female brain gets confused and pushes out the wrong body parts, and that is what transgender is.
>
> I replied, 'You've got to be kidding me. Wrong body parts ? You have to know that is absolute bullshit. Is this really the official police line ?'
>
> PC Gul said, 'Yes, I have been on a course.'
>
> I ended the call shortly after this. The call lasted 34 minutes."

91. In the Crime Report under the heading '*Modus Operandi* Summary', PC Gul states that the 'suspect' was 'posting transphobic comments on Twitter causing offence and showing hatred for transgender community'.

92. PC Gul does not accept parts of the Claimant's account of their conversation. He denies telling the Claimant that he wanted to 'check his thinking' and denies the comment about 'pushing out' the wrong body parts. He also denies telling the Claimant not to tweet further on transgender issues. The Claimant is adamant that these things were said.

Subsequent events

93. The Claimant's evidence is that he experienced a deep sense of personal humiliation, shame and embarrassment on both his own behalf and for his family and employees, on learning about the recording of a hate incident in relation to his tweets. He says that as a consequence of the police's actions, he has withdrawn from all involvement with his company and has not returned to the office since the day he was first contacted by PC Gul. He says that he and his family have been the subject of threats and intimidation from a number of individuals, which caused the Claimant and his wife briefly to leave the family home. Nevertheless, after much deliberation and against the wishes of his wife, the Claimant has decided to continue tweeting about transgender issues. Indeed, he did so fairly promptly after speaking with PC Gul.

94. The press quickly picked up the story. This prompted a statement from Assistant Chief Constable (ACC) Young on 28 January 2019 which described the Claimant's tweets as 'transphobic', referred to the possibility of such incidents 'escalat[ing]', and stated that a 'correct decision was made to record the report as a hate incident'. Mr Young's statement included the following:

> "The actions taken by the individual and his comments around transgender caused someone distress. We take all reports of hate related incidents seriously and aim to ensure they do not escalate into anything further. The correct decision was made to record the report as a hate incident … and to proportionately progress (sic) by making contact with the individual concerned to discuss the actions on social media."

95. This statement therefore made clear that there had only been one complaint to the police and it therefore shows, as I have said, that PC Gul had been wrong to suggest the Claimant had upset 'many members' of the transgender community.

96. The Claimant lodged a complaint with the police about his treatment. He was subsequently contacted by Acting Inspector Wilson by telephone, and on 28 March 2019 he received a letter from him rejecting his complaint. The letter stated that the Claimant had been spoken to in order to help him:

> "… understand the impact [his] comments could have on others and to prevent any possible escalation into a crime'

and noted that

> '[w]hile it is your right to express your opinion, if future reports are received it is our duty to consider our role and proportionately look into them, to prevent any potential offences occurring'".

97. The Claimant appealed this decision to Humberside Police's Appeals Body. His appeal was rejected on 18 June 2019.

Facts: conclusions

98. No party invited me to hear oral evidence, and so I am unable to determine the disputes of fact between the Claimant and PC Gul as to what exactly was said during their conversation. However, the following facts are not in dispute, or I can conclude as follows on the evidence: (a) PC Gul visited the Claimant's place of work in his capacity as a police officer, albeit he did not think he was exercising any powers of a police officer; (b) he left a message requesting that the Claimant contact him; (c) they subsequently spoke on the telephone; (d) during that call PC Gul misrepresented and/or exaggerated the effect of the Claimant's tweets had had and the number of complaints the police had received; (e) PC Gul warned the Claimant that if he 'escalated' matters then the police might take criminal action; (f) he did not explain what escalation meant; (g) ACC Young also publicly referred to escalation; (h) when the Claimant complained, the police responded by again referring to escalation and criminal proceedings.

99. Specifically, I find that the only people who definitely read the tweets were Mrs B and the friend who told her about them, and that the only person who complained to the police was Mrs B.

100. On these facts I conclude that the police left the Claimant with the clear belief that he was being warned by them to desist from posting further tweets on transgender matters even if they did not directly warn him in terms. In other words, I conclude that the police's actions led him, reasonably, to believe that he was being warned not to exercise his right to freedom of expression about transgender issues on pain of potential criminal prosecution. At no stage did the police explain on what basis they thought that the Claimant's tweets could 'escalate' to a criminal offence. They did not indicate on what evidence they thought there was a risk of escalation. They did not indicate which offence they thought the Claimant's tweets might escalate into. I accept what the Claimant said in [52] of his first witness statement:

> "The initial intervention by PC Gul and the subsequent statements of ACC Young and A/Inspector Wilson cannot be interpreted as anything other than attempts to discourage me, and other interested parties from making such statements and to withdraw from national, political conversation."

The Hate Crime Operational Guidance 2014 (HCOG)

101. With that lengthy but necessary factual introduction, I now turn to the policy at issue in this case.

102. The College of Policing is the professional body whose purpose is to provide those working in policing with the skills and knowledge necessary for effective policing. The College's role is described in the witness statement of David Tucker, its Faculty Lead for Crime and Criminal Justice. He says that the College is a company limited by guarantee that is owned by the Secretary of State for the Home Department but which operates at arms-length from the Home Office. The College's work is limited to policy. It has no operational role.

103. Mr Tucker says that the College's purpose is to support the fight against crime and to protect the public by ensuring professionalism in policing. It has five principal responsibilities: (a) setting standards and developing guidance and policy for policing; (b) building and developing the research evidence base for policing; (c) supporting the professional development of police officers and staff; (d) supporting the police, other law enforcement agencies and those involved in crime reduction; and (e) identifying the ethics and values of the police. He explains that ss 123 – 124 of the Anti-social Behaviour, Crime and Policing Act 2014 give powers to the College to issue regulations and codes of practice. Additionally, the College issues manuals of guidance and advice called Authorised Professional Practice (APP). He says that APP is the type of document that the College uses to set out standards that police forces and individuals should apply when discharging their responsibilities. At [15] he says that HCOG was developed by the Association of Chief Police Officers (ACPO) and adopted by the College, although it has not yet been adopted as APP.

104. The evidence of Paul Giannasi, the Hate Crime Adviser to the National Police Chief's Council is that for a long time the police have recorded and responded to non-crime incidents. In his statement he says:

> "26. Throughout my career police have recorded all calls for service or deployments, not only to account for officer activity, but also due to the recognition of the need to play a role in solving societal problems rather than just responding to bring offenders to justice when they escalate to criminality
>
> …
>
> 70. It is often unclear from the initial contact whether a crime has been committed. A core purpose of policing is to prevent crime and protect citizens. Recording incidents allows the police to monitor and measure police deployments. As an operational police officer, I spent a considerable amount of time responding to non-crime incidents ranging from parking disputes, anti-social behaviour and community tensions … the policing role would include trying to mitigate risk, advise on and/or assess risk of escalation into more serious harm."

105. In 2014 the College published HCOG. The background is set out in Mr Giannasi's witness statement. I summarise it as follows. HCOG is the result of twenty to thirty

years of policy development concerning police responses to hate crime and non-crime hate incidents. Following the racist murder of Stephen Lawrence in April 1993, the Macpherson Report was produced in 1999. Many of the key features in contemporary hate incident policy (as set out in the HCOG) originate from the recommendations in the Macpherson Report, including perception-based recording, ie, that the basis for determining whether an incident was a 'racist incident' should be whether it was perceived as racist by the victim or another person (Recommendation 12) and encouragement of the reporting of non-criminal incidents as well as crimes (Recommendation 16).

106. The relevant parts of HCOG to this claim are [1.2], [1.2.4], [1.2.5], [6.1], [6.3] and [6.4].

107. A hate incident in relation to transgender people is defined in [1.2] as:

> "Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender."

108. As I shall explain later, [1.2.4] ('Other person') is important in this case. It provides:

> "Perception-based recording refers to the perception of the victim, or any other person.
>
> It would not be appropriate to record a crime or incident as a hate crime or hate incident if it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive.
>
> The other person could, however, be one of a number of people, including:
>
> • police officers or staff
> • witnesses
> • family members
> • civil society organisations who know details of the victim, the crime or hate crimes in the locality, such as a third-party reporting charity
> • a carer or other professional who supports the victim
> • someone who has knowledge of hate crime in the area – this could include many professionals and experts such as the manager of an education centre used by people with learning disabilities who regularly receives reports of abuse from students
> • a person from within the group targeted with the hostility, eg, a Traveller who witnessed racist damage in a local park.

> A victim of a hate crime or incident does not have to be a member of a minority group or someone who is generally considered to be vulnerable. For example, a heterosexual man who is verbally abused leaving a gay bar may well perceive that the abuse is motivated by hostility based on sexual orientation, although he himself is not gay. Anyone can be the victim of a hate incident or crime, including people working inside the police service."

109. Paragraph 1.2.5 (Malicious Complaints) provides:

> "Some people, particularly celebrities and political figures, have been subjected to malicious complaints from hostile individuals, often with a grudge against the person, their politics or their lifestyle. This, on occasions, can even be part of a stalking process. Sometimes these complainants will allege that the activity was based on hostility towards them because of their protected characteristics.
>
> Police officers should not exacerbate the harm caused to a genuine victim when dealing with such incidents. It is also important not to falsely accuse an innocent person and harm their reputation, particularly where the allegation is made against a public figure.
>
> In order not to harm an innocent party, the matter should be dealt with as swiftly and sensitively as is possible. In such circumstances investigating officers should seek support from senior colleagues and the CPS hate crime coordinator."

110. A non-crime hate incident is defined in [6.1] as:

> "… any non-crime incident which is perceived by the victim, or any other person, to be motivated (wholly or partially) by a hostility or prejudice."

111. Paragraph 6.3 provides:

> "6.3 Recording non-crime hate incidents
>
> Where any person, including police personnel, reports a hate incident which would not be the primary responsibility of another agency, it must be recorded regardless of whether or not they are the victim, and irrespective of whether there is any evidence to identify the hate element.
>
> The mechanism for local recording of non-crime hate incidents varies. Many forces record them on their crime recording system for ease of collection but assign them a code to separate them out from recordable crimes.

> Whichever system is used to record hate incidents, managers should have confidence that responses are appropriate and that crimes are not being recorded incorrectly as non-crime incidents. Records must be factually accurate and easy to understand. At an early stage any risks to the victim, their family or the community as a whole must be assessed and identified. The number of non-crime hate incidents is not collated or published nationally, but forces should be able to analyse this locally and be in a position to share the data with partners and communities. Police officers may identify a hate incident, even when the victim or others do not. Where this occurs, the incident should be recorded in the appropriate manner. Victims may be reluctant to reveal that they think they are being targeted because of their ethnicity, religion or other protected characteristic (especially in the case of someone from the LGBT community) or they may not be aware that they are a victim of a hate incident, even though this is clear to others."

112. Paragraph 6.4 (Opposition to Police Policy) provides:

> "The recording of, and response to, non-crime hate incidents does not have universal support in society. Some people use this as evidence to accuse the police of becoming 'the thought police', trying to control what citizens think or believe, rather than what they do. While the police reject this view, it is important that officers do not overreact to non-crime incidents. To do so would leave the police service vulnerable to civil legal action or criticism in the media and this could undermine community confidence in policing.
> The circumstances of any incident dictate the correct response, but it must be compatible with section 6(1) of the Human Rights Act 1998. The Act states that it is unlawful for a public authority to act in a way which is incompatible with a right conferred by the European Convention on Human Rights. Some of these rights are absolute and can never be interfered with by the state, eg, the freedom from torture, inhuman or degrading treatment or punishment. Some, such as the right to liberty, are classed as limited rights and can be restricted in specific and finite circumstances. Others, such as the right to respect for private and family life, the right to manifest one's religion or beliefs, freedom of expression, and freedom of assembly and association are qualified and require a balance to be struck between the rights of the individual and those of the wider community.
>
> Qualified rights are usually set out in two parts, the first part sets out the right or freedom, and the second part sets out the circumstances under which the right can be restricted.

Generally, interference with a qualified right is not permitted unless it is:

- prescribed by or in accordance with the law
- necessary in a democratic society
- in pursuit of one or more legitimate aims specified in the relevant Article
- proportionate."

113. The key points I draw from these provisions are :

a. Paragraph 1.2.4 and 1.2.5: there may be circumstances which make it inappropriate to record an incident, for example, a complaint by someone with no proper connection to the incident in question, or a maliciously motivated complaint.

b. Paragraph 6.1: (i) it is important to record non-crime incidents so that police understand tensions in communities and prevent these escalating into crimes; (ii) the police have limited enforcement powers to deal with non-crime incidents; (iii) most forces have separate systems for recording crimes and incidents.

c. Paragraph 6.3: (i) non-crime hate incidents should be recorded by police unless doing so is the responsibility of another organisation; (ii) early assessment of risk of harm to the person/communities reporting is required; (iii) police officers can identify hate motivation or hostility even if the target does not.

d. Paragraph 6.4: the general duty in [6.3] is subject to the following principles (i) the police should not over-react to reports of non-crime hate incidents; (ii) police must take account of s 6(1) of the Human Rights Act 1998 and the responsibility not to act in way that contravenes the Convention.

114. The College is currently in the process of revising HCOG. This includes revision of the sections the Claimant is most concerned about in this case. The College issued a draft of the proposed new HCOG and held a consultation period between 8 October 2019 and 5 November 2019. The revisions include detailed guidance on malicious complaints and when not to record an incident; two entirely new sections titled 'Management of police information' and 'Disclosure and Barring Service checks'; further detail on responding to non-crime hate incidents; further guidance on ensuring responses are proportionate, as well as further separate guidance on contacting people alleged to have committed such incidents, and further guidance on recording non-crime hate incidents.

The parties' submissions

The Claimant's submissions

115. On behalf of the Claimant Mr Wise submitted that (a) HCOG is unlawful as contrary to the Claimant's right to freedom of expression under the common law and/or Article 10; (b) the actions taken by the police in recording the incident, and their subsequent

dealings with the Claimant, amounted to an unlawful interference with his rights under Article 10.

116. Mr Wise began by emphasising the importance of the freedom of expression at common law: see eg *Shayler*, supra, [21]; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, p125; *Central Television Plc*, supra, pp202-203

117. He submitted that the HCOG offends against the principle that the right to freedom of expression may not be curtailed except where the curtailment is authorised by statute, which is an aspect of the principle of legality, and that, secondly, even where a curtailment of the right is authorised in principle, the curtailment must go no further than is reasonably necessary to meet the ends which justify the curtailment.

118. In relation to Article 10, he said that consistently with the approach taken under English common law, the Court has often emphasised that the right to freedom of expression is 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment': see, eg, *Vogt v Germany*, supra, [52].

119. In the Article 10 context, he said that special protection is afforded to political speech and debate on questions of public interest: *Vajnai v Hungary* (No. 33629/06, judgment of 8 July 2008), [47]. He also said that domestic courts have similarly attached special importance to political speech and public debate in the Article 10 context: see eg *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, [6].

120. Mr Wise accepted that the protection afforded by Article 10 does not apply to cases of hate speech. Article 17 excludes the protection of Article 10 to speech which negates the fundamental values of the Convention. In *Erbakan v Turkey*, judgment of 6 July 2006, the Court said at [56]:

> "… [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance …, provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued."

121. However, Mr Wise said that it is critical to distinguish in this context between forms of expression which incite, promote or justify hatred based on intolerance and forms of expression which may be insulting or offensive to some sections of society but which nevertheless do not incite hatred and which form part of debate on issues of public interest.

122. No party suggested that Article 17 applies to the Claimant's tweets and that Article 10 was not in principle applicable to the Claimant's tweets, although the level of protection to be afforded them was in dispute.

123. In light of these principles, Mr Wise submitted that the HCOG is unlawful on any or all of the following bases:

    a. Firstly, it violates the common law principle of legality, in that there is no statutory authorisation for the interferences with the fundamental right to freedom of expression to which the Guidance gives rise. Further or alternatively, the approach taken in the Guidance to the mandatory recording of 'non-crime hate incidents' in the absence of any evidence of hate is disproportionate and hence unreasonable as a matter of common law, in that it goes further than is reasonably necessary to achieve the aims pursued.

    b. Second, it interferes with Article 10 a manner that is not 'prescribed by law' for Convention purposes;

    c. Third, and in any event, it is not 'necessary in a democratic society' within the meaning of Article 10(2), in that it is disproportionate and fails to strike a fair balance between the Article 10 rights of individuals and the interests of the community in relation to the recording of non-crime hate incidents.

124. Turning to the Second Defendant's specific actions in this case vis-à-vis the Claimant, Mr Wise said that for essentially the same reasons, the police's actions, in recording a non-crime hate incident in relation to the Claimant under HCOG and thereafter seeking to dissuade the Claimant from making similar online statements in the future, were also unlawful.

125. Developing these submissions, Mr Wise said the HCOG plainly interferes with the exercise of the common law right to freedom of expression because it is a hindrance or impediment to that right. He said that any utterances that are subjectively *perceived* as being motivated by hostility or prejudice towards transgender individuals, is plainly apt to hinder or impede free expression in relation to transgender issues, especially where such incidents may (subject to the discretion of the relevant local police force) be included on Enhanced Criminal Record Certificates (ECRCs), with potential consequences for employment in particular professions.

126. Likewise, a police force's decision to record a hate incident pursuant to the HCOG in relation to a particular expression of opinion, along with subsequent police action in relation to the incident concerned (in this case, interventions by police officers and express attempts to dissuade the Claimant from expressing similar views), self-evidently hinders/impedes the exercise of the right to freedom of expression.

127. If the HCOG contravenes the principle of legality, he said that followed inexorably that it was unlawful for the police to rely on it in recording the Claimant's tweets as as a hate incidents, and thereafter seeking to dissuade him from expressing similar views in the future.

128. Further or alternatively, Mr Wise submitted that HCOG, and consequently the police reliance upon it, constitute interferences with the Claimant's Article 10(1) rights that are not prescribed by law within the meaning of Article 10(2). He said that although the Guidance is publicly available, it is opaque and ambiguous in a number of crucial

respects including about what incidents will be reported. He emphasised that a 'non-crime hate incident' is defined in the Guidance entirely by reference to the subjective perception of the person reporting the incident. Consequently, a reasonable reader of the Guidance would not be able to foresee, with any reasonable degree of certainty, the consequences of making a given statement.

129. In relation to the interference not being necessary in a democratic society under Article 10(2) and/or not reasonably necessary as a matter of common law, Mr Wise said the Claimant accepted that the HCOG pursues a number of legitimate objectives. However, he submitted that the interference with the right of the Claimant and others to freedom of expression in relation to statements such as those made by the Claimant in this case is clearly disproportionate, failing to strike a fair balance between individuals' Article 10 rights and the interests pursued by the policy of recording non-crime hate incidents. He stressed the importance of the topic in question and that it was a hotly-contested public debate. Second, he accepted that some of the tweets were provocative but he denied they were hate speech The lyric which PC Gul was most concerned about had as its purpose the imbalance of power between the sexes in the context of transgenderism. He said the evidence shows that the HCOG has had a real and substantial chilling effect in relation to the expression of such views by the Claimant and others.

The First Defendant's submissions

130. On behalf of the First Defendant, the College of Policing, Mr Auburn submitted as follows.

131. The Claimant's first ground, concerning the common law principle of legality, is misconceived. This is a principle of statutory construction, applicable only to the exercise of statutory powers. It has no application in this case. The HCOG is not a statute, and nor is it statutory guidance. In any event this ground adds nothing to the Article 10 challenge.

132. The Article 10 challenge should also be dismissed. There is no interference with the Claimant's Article 10 rights. The records created have no real consequence for him. Recording is primarily an administrative process to build an intelligence picture based on statistics. It is not a sanction. Whilst a record exists of this incident within the records of the Humberside Police, no sanction has been imposed or threatened to be imposed on the Claimant. Nor would it be under the HCOG.

133. The record has not been disclosed by the Second Defendant, nor is there any realistic possibility that it could be disclosed. The assertions by the Claimant and his witnesses as to possible consequences (eg that it might be disclosed in criminal records check) are not borne out. There have been no such consequences, and no real likelihood of the consequences claimed.

134. The HCOG meets the Convention's requirement of being prescribed by law. The fact that non-crime hate incidents are defined by reference to complainant perception does not contravene the foreseeability requirement. There is a discretion to not record non-crime hate incidents. The discretion is sufficiently clear in scope. There are a significant number of safeguards in place to ensure both (a) that the consequences of a non-crime

hate incident being recorded are foreseeable, and (b) to protect against arbitrary interference.

135. If there has been any interference with the Claimant's Article 10 rights by the police, that does not call the HCOG itself into question. In any event the recording of a hate incident was proportionate. The aims pursued are extremely important in nature. Great weight should be attributed to them. They are very important to police protection of minorities and marginalised groups. Recording and the key features of the HCOG are effective and necessary to achieve the legitimate aims pursued. There is a good evidence basis for this. That may be set against the very low level of interference, if any, on the Claimant's rights; and the safeguards on recording, retention and disclosure of such information. The fact that this speech may occur in a political context does not lead to a different result.

136. Developing these submissions, in relation to the Claimant's common law claim and the suggestion that the HCOG breaches the principle of legality, Mr Auburn submitted that the principle of legality is a principle of statutory construction, and so was not in play here because the HCOG is non-statutory. It is not a free-standing ground of control of all types of action by public bodies, particularly the exercise of non-statutory power: *R (Youseff) v Secretary of State for the Foreign and Commonwealth Office* [2013] QB 906, [53]-[54]; *R (El Gizouli) v Secretary of State for the Home Department* [2019] [2019] 1 WLR 3463, [54]-[57]. Mr Auburn submitted that the College had the power at common law to issue HCOG and there was no infringement of the principle of legality. He said measures which violate rights such as privacy or free speech which have been held not to require legislation, and cited *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin) in support (facial recognition technology).

137. As to Article 10, Mr Auburn submitted that there had been no interference with the Claimant's Article 10 rights. If, in the alternative, that was such an interference, then the very low level of interference is a critical factor in the proportionality analysis which has to be undertaken in relation to Article 10(2) such that I should not find that there has been a disproportionate interference.

138. Mr Auburn said that there had been no interference with the Claimant's Article 10(1) rights because the recording of the hate crime incident had no consequence for him and did not inhibit his freedom to continue tweeting. Recording is primarily an administrative process to build an intelligence picture based on statistics. He said that applying the test in *Handyside v United Kingdom*, supra, [49], in this case there has been no 'formality, condition, restriction or penalty' imposed on the speech of the Claimant, his wife, or any of the witnesses. Also, he said there had been no real risk of any further consequences for the Claimant's rights arising from the recording of the incident, and in particular no disclosure and no risk of disclosure, even on an ECRC. Also, Mr Auburn submitted that there had been no chilling effect. The Claimant has continued tweeting in the same manner as he had done before, and nothing has happened.

139. Mr Auburn went on to submit that any restriction or interference imposed by the HCOG was prescribed by law because it had the necessary qualities of accessibility and

foreseeability. He said, in particular, that the perception-based definition of non-crime hate incidents does not contravene the foreseeability requirement.

140. Lastly, Mr Auburn said that any interference with the Claimant's Article 10(1) rights was proportionate. He submitted that I had to have regard to all of the work over many years by a number of different bodies which had led to HCOG. He said that I had to afford a margin of judgment to the First Defendant in assessing the proportionality of HCOG. He pointed in support to: (a) the very high level of importance of the aims pursued by HCOG, and the great weight that is attributable to them; (b) the very low level of interference, if any, on the Claimant's rights; (c) the safeguards on recording, retention and disclosure.

141. Overall, Mr Auburn submitted that the HCOG is lawful and capable of being applied compatibly with Article 10. He said the police's actions did not infringe Article 10, and in any event do not call the policy into question. The application for judicial review should be dismissed.

The Second Defendant's submissions

142. On behalf of the Second Defendant Mr Ustych focussed on those aspects of the claim relating to his client's actions, as opposed to the challenge to the HCOG itself.

143. He said that the Claimant had set out four grounds of challenge in respect of the police's actions in [37] of his Grounds, but in his Skeleton Argument, had distilled these to essentially two assertions, that (a) the HCOG and Humberside's recording of a 'hate incident' infringed the common law principle of legality; and (b) the Claimant's Article 10(1) rights were engaged and infringed (including on the basis that the operation of HCOG is not sufficiently foreseeable).

144. Mr Ustych said that the first ground is misconceived as against Humberside Police, because the common law principle of legality is applicable to the exercise of statutory powers only. In recording the 'hate incident', Humberside Police do not rely on statutory police powers. He said that in *Catt*, supra, [7] it was expressly acknowledged that the police have the power to obtain and store information for policing purposes. As to the second, he said that that should be dismissed because there was no sanction or restriction on the Claimant. He said the Claimant had not established the existence of a 'chilling effect' as the result of the recording, which is primarily an administrative matter. However, even if Article 10 was found to be engaged, he said the level of interference with it could only be trivial and (given the extremely important aims of recording non-crime incidents) plainly proportionate.

145. Mr Ustych said that the only decision of the police which is subject to challenge in this claim is the recording of a 'hate incident' in respect of the Claimant's tweets. He said this is how the matter had been put in the letter before claim and the claim form and he said I should proceed as against the police on the basis that only the recording decision is being challenged in this claim. He accepted, however, that the Claimant's Skeleton Argument at [5] put the police's specific actions in issue (Second Defendant's Skeleton Argument, [29]). His oral submissions addressed this issue and he did not strongly press the point that it was only the recording under HCOG that was in issue.

146. In relation to Article 10, even if Article 10 was found to be engaged, the level of interference was trivial and (given the extremely important aims of recording non-crime incidents) plainly proportionate.

147. He said that the witness evidence submitted on behalf of the Claimant paints a picture of a significant impact on the Claimant's life from the 'hate incident' recording and a vast array of fears arising from it. However, he submitted that a careful analysis demonstrates these effects/concerns to be unrealistic, exaggerated and/or caused by the Claimant's own actions rather than the fact of the recording. Furthermore, many of the effects complained of are said to be linked not to the fact of the recording but to the contact with PC Gul, which, as set out above, is a discrete and separate decision to that being challenged. He said that I should assess the expressed fears/concerns on an objective basis and with an eye on the reality of the situation: cf in *TLT and others v The Secretary of State for the Home Department* [2016] EWHC 2217 (QB), [35], where, in the context of data protection and privacy claims, the claimants expressed various concerns about the repercussions of the breach which (in some cases) the Court deemed not to be rational/realistic.

148. Mr Ustych said that in the absence of any sanction, legal restriction or other material consequence of the 'hate incident' recording, the Claimant had sought to establish engagement of Article 10 via a chilling effect. However he pointed to the Claimants continued tweeting and submitted there was no evidence of a chilling effect. He said there had been no interference under Article 10(1).

149. He accepted there is no dispute that expression which is provocatively worded and potentially capable of causing offence nonetheless attracts the protection of Article 10(1). He argued that in fact the Claimant's tweets were not truly political; he said on their face, they have little to do with legislative debate (reasoned or otherwise), but instead amount to a 'vehement attack'' on the legitimacy of transgenderism as a concept. He said they challenged the basic feature of the Gender Recognition Act 2004 that a person in receipt of a Gender Recognition Certificate is a person of the specified sex. He said they therefore do not qualify for particular protection. He said less protection is afforded by the Convention to expression which is abusive or attacking toward a group sharing a characteristic protected by Article 14 ECHR/Equality Act 2010.

150. Even if an interference with the Claimant's Article 10 rights is found, the extent of that interference would be trivial. However, even if the competing interests were more finely balanced, the application of margin of judgment would decisively favour a finding that the 'hate incident' recording was lawful.

151. Overall, Mr Ustych said that even if Article 10 is found to be engaged, the balancing exercise decisively favours the finding that Humberside's decision to record a 'hate incident' and its other actions did not breach the Claimant's right to express himself freely.

Discussion

The legality of HCOG at common law

152. I deal first with Mr Wise's contention that HCOG violates the common law principle of legality. He says that is because there is no statutory authorisation for the interference with the fundamental right to freedom of expression to which he says the Guidance gives rise. I reject that contention for the following reasons.

153. Amongst other things, HCOG provides a method of obtaining and recording data about hate crime and non-crime hate incidents with a view to the police providing an effective response. Paragraph 1.1 of HCOG states:

> "The police are responsible for collecting data on hate crimes and many hate incidents. Accurate data for hate crime is difficult to maintain as any hate crime fits into another crime category as well. This 'secondary' recording has led to inconsistency and contributed to the under-recording of hate crime, making the challenge of reducing under-reporting from victims more difficult. All criminal justice system (CJS) agencies share the common definition of monitored hate crime. A widespread understanding of this definition and compliance with crime recording rules helps to provide an accurate picture of the extent of hate crime and to deliver an intelligence-led response."

154. Steven Williams, the Second Defendant's Crime/Incident Registrar, says at [16] of his witness statement that:

> "The recording of a hate incident is primarily for administrative and intelligence purposes. The information is used to provide statistical data to the Home Office and other relevant agencies to ensure consistency and accuracy in terms of data relating to reporting of such incidents. The information is also relevant for intelligence purposes should matters escalate and information be required in any future investigation. The recording is not a sanction against the individual subject of the complaint and does not restrict the individuals from expressing themselves further."

155. Data regarding non-crime hate incidents is collected and held locally by police forces rather than on the Police National Computer (PNC); witness statement of David Tucker, [19].

156. I conclude that HCOG is lawful under domestic law because the police have the power at common law to record and retain a wide variety of data and information. The cases make clear that no statutory authorisation is necessary in relation to non-intrusive methods of data collection, even where the gathering and retention of that data interferes with Convention rights.

157. A police constable is a creature of the common law. Police constables owe the public a common law duty to prevent and detect crime. That duty reflects a corresponding common law power to take steps in order to prevent and detect crime. As Lord Parker CJ said in *Rice v Connolly* [1966] 2 QB 414, p419:

> "[I]t is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal damage. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

158. This general power of the police includes the use, retention and disclosure of information, for example, imagery of individuals for the purposes of preventing and detecting crime. In *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123, the police took and retained photographs of the claimant in the street for the purpose of gathering evidence about possible disorder and criminal conduct. Laws LJ and Lord Collins held that this was lawful (see [50]-[55] and [98]-[100] respectively). That was even in the absence of statutory authorisation and the fact that taking photographs was capable of engaging Article 8 of the Convention.

159. In *R (Catt) v Association of Chief Police Officers* [2015] AC 1065, the Supreme Court considered the lawfulness of collecting and retaining personal information, including a photograph of an individual who had demonstrated against the operation of an arms manufacturer on a 'domestic extremism' database. In relation to the police's power to obtain and hold such information, Lord Sumption JSC held at [7]:

> "At common law the police have the power to obtain and store information for policing purposes, ie, broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry onto private property or acts (other than arrest under common law powers) which would constitute an assault. But they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals."

160. In *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin) the Divisional Court considered the legality of the use of Automated Facial Recognition technology (AFR) by police forces. The Claimant's first contention was that there had to be specific statutory basis for the use of AFR, ie, to permit the use of the CCTV cameras, and the use of the software that processes the digital information that the cameras collect. The Chief Constable and the Secretary of State relied on the police's common law powers identified in the cases I have cited as sufficient authority for use of this equipment, and the Court upheld this submission (at [78]).

161. There is a detailed and comprehensive legal framework regulating the retention of that data. This includes the Data Protection Act 2018; the Code of Practice for Management of Police Information; and the Authorised Professional Practice issued by the First Defendant on the Management of Police Information.

162. These cases and this material provide ample authority for the lawfulness of HCOG under domestic law, notwithstanding the absence of any statutory authorisation.

Collecting details of hate crimes and non-crime hate incidents forms one aspect of the police's common law duty to keep the peace and to prevent crime, and is lawful on that basis. Later in this judgment I will explain how the recording of non-criminal hate incidents aids in the prevention of crime.

163. I turn to the principle of legality. In *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131, Lord Hoffmann expressed the principle as follows:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

164. The Defendants were right to submit that the principle of legality is one of statutory construction and, as such, that it has no application in relation to common law powers such as the College of Policing was exercising when it issued its HCOG in 2014.

165. In *R (Youseff) v Secretary of State for the Foreign and Commonwealth Office* [2013] QB 906 the Court rejected an attempt to apply the principle of legality beyond statutory powers/statutory construction. Toulson LJ said [53]-[55]:

> "53. In making a decision whether to support or oppose the designation of an individual by the sanctions committee, the Foreign Secretary is not exercising a power derived from an Act of Parliament. He is acting on behalf of the Government in its capacity as a member of an international body, the Security Council.
>
> 54. Consequently, we are not in an area where the 'principle of legality' explained in such cases as *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 573–575 (per Lord Browne-Wilkinson) and 587–590 (per Lord Steyn) and *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, per Lord

> Hoffmann, is apposite. That principle applies in cases where a court is asked to construe legislation in a way which may be contrary to human rights embedded in the common law."
>
> 55. … there is sometimes a tendency on the part of lawyers (as there has been in this case) to seek to use the 'principle of legality' as a developmental tool providing an additional ground of challenge in a case purely involving questions of common law, ie, not a case where the defendant is seeking to justify his action by reference to a statutory power. That is to misunderstand it. The 'principle of legality' is a principle of statutory interpretation, derived from the common law."

166. In *AJA v Commissioner of Police of the Metropolis* [2014] 1 WLR 285, [23]-[27], the Court of Appeal reviewed the case-law relating to this principle, and concluded at [28]:

> "The principle of legality is an important tool of statutory interpretation. But it is no more than that."

167. In *R (Al-Saadoon) v Secretary of State for Defence* [2017] QB 1015, [198] Lloyd-Jones LJ said:

> "… the principle of legality is a principle of statutory interpretation. In the absence of express language or necessary implication to the contrary, general words in legislation must be construed compatibly with fundamental human rights because Parliament cannot be taken to have intended by using general words to override such rights."

168. Most recently, in *R (El Gizouli) v Secretary of State for the Home Department* [2019] 1 WLR 3463 Lord Burnett CJ and Garnham J rejected an attempt to apply the principle of legality beyond a principle of statutory construction, ie, beyond statutory powers to, in that case, prerogative powers. The Court said at [54]:

> "The principle of legality is deployed as a technique of statutory construction … operates to require express wording if such rights are to be overridden by statutory provisions".

169. After setting out passages from cases which limit the principle to one of statutory construction the Court said at [57]:

> "We respectfully agree with that analysis. Here, the Home Secretary exercised a prerogative, not a statutory, power and, in our judgment, the principle of legality has no application."

170. None of the cases relied on by the Claimant assist this aspect of his case. For example, *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 (the Employment Tribunal fees case) is relied on for an asserted proposition that any hindrance to a fundamental right can only be made by clear legislation. In fact the case does not say that. The Court primarily dealt with the issue as one of statutory interpretation ([65]). The issue was

whether the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893), was *ultra vires* s 42(1) of the Tribunals, Courts and Enforcement Act 2007.

171. As for the Claimant's argument that the approach taken in HCOG to the mandatory recording of 'non-crime hate incidents' in the absence of any evidence of hate is disproportionate and hence unreasonable as a matter of common law, in that it goes further than is reasonably necessary to achieve the aims pursued, I accept the Defendants' submission that this is reality is an argument about proportionality which is to be analysed as part of the Claimant's challenge to HCOG under Article 10.

172. I therefore reject the Claimant's challenge to HCOG at common law.

The legality of HCOG under Article 10

173. It was common ground that a four part analysis is required where it is alleged that a measure or action violates Article 10: see eg, *Wingrove v United Kingdom,* supra, [43]-[62]. The four stages are (a) firstly, has there been an interference with the right to freedom of expression that is enshrined in Article 10(1)(b) second, is the interference in question 'prescribed by law'; (c) third, does it pursue one or more of the aims set out in Article 10(2); and (d) fourth, is the interference 'necessary in democratic society' ? The last question brings in the issue of proportionality. As Baroness Hale said in *Catt*, supra, [49], this question involves considering whether the means used, and the interference it involves, are a proportionate way of achieving those legitimate aims.

174. In my judgment the Claimant's challenge to HCOG as being contrary to Article 10 fails for a number of reasons.

(i) Interference

175. Firstly, I reject the Claimant's submission that the mere recording of non-crime hate speech pursuant to HCOG interferes with the Claimant's right to freedom of expression within the meaning of Article 10(1). I accept that the Strasbourg court's general approach to protecting freedom of expression under the Convention is to provide very wide protection for all expressive activities. The Court has done this in part by forging a very broad understanding of what constitutes an interference with freedom of expression. The approach of the Court has essentially been to find any State activity which has the effect, directly or indirectly, of limiting, impeding or burdening an expressive activity as an interference. Thus, the Court has found an interference not only where a law establishes civil or criminal limits on what may be said, but also in cases involving disciplinary sanctions (*Engel and others v the Netherlands* (1979-80) 1 EHRR 647); the banning of books as obscene (*Handyside v the United Kingdom*, supra); the refusal to authorise videos for commercial release (*Wingrove v. the United Kingdom* (1997) 24 EHRR 1); the imposition of injunctions on publication (*Sunday Times (No 1) v the United Kingdom*, (1970) 2 HER 245); the dismissal of an employee (*Vogt v. Germany*, supra); a Head of State making a statement that he would not appoint an individual (*Wille v. Liechtenstein*, [1999] ECHR 207); the expulsion of someone from a territory (*Piermont v. France*, (1995) EHRR 301); a refusal to licence a broadcaster (*Informationsverein Lentia and others*

v. Austria (1994) 17 EHRR 93); a refusal to protect journalists' confidential sources (*Goodwin v. the United Kingdom* (1996) 23 EHRR 123); the conduct of a search which might lead to the identification of such sources (*Roemen and Schmit v Luxembourg*, 25 February 2003); a refusal to grant nationality (*Petropavlovskis v Latvia*, no. 44230/06 2008); a refusal to allow a protest vessel into territorial waters (*Women on Waves and others v. Portugal*, Application No. 31276/05, Judgment of 3 February 2009); and failing to enable a journalist to gain access to Davos during the World Economic Forum (*Gsell v. Switzerland,* judgment of 8 October 2009).

176. That broad approach notwithstanding, in my judgment in this case the mere recording by the police of the Claimant's tweets as non-crime hate speech pursuant to HCOG did not amount to a formality, condition, restriction or penalty (*Handyside* restrictions) imposed in response to his speech so as to amount to an interference within the meaning of Article 10(1). I recognise the argument that the mere act of recording speech may have a chilling effect on the speaker's right to freedom of expression. But in my judgment the mere recording without more is too remote from any consequences so that it can amount to a *Handyside* restriction.

177. I accept the First Defendant's submission that while the overall information obtained from recording is important to policing, the mere recording – and I emphasise mere - of an incident of itself has no real consequence for the individual such as the Claimant. The evidence of Paul Giannasi in his witness statement at [61] et seq and of Mr Williams at [16] of his statement is that recording is primarily an administrative process to build an intelligence picture based on statistics. The intelligence picture could include finding that an incident may be part of a jigsaw suggesting criminal activity. Mr Giannasi explains at [79] that HCOG does not mandate the police to take any form of action in response to a report of a non-criminal hate incident. As a result, where the police do decide to take any action following the recording of an incident, this is carried out on the basis of an operational decision by the police exercising their common law and statutory powers. Where that decision is taken, HCOG itself does not require a particular response, and expressly states that disproportionate action should not be taken. From this evidence I conclude there is no real risk of any further consequences for the Claimant's rights arising from the mere recording of his tweets pursuant to HCOG.

178. I do not accept the Claimant's submission that the recording of a an incident pursuant to HCOG is, or is analogous to the 'administrative warning*'* which was given in *Balsytė-Lideikienė v Lithuania,* Application no. 72596, 4 November 2008, to the publisher of material promoting ethnic hatred which the Court held was an interference with the publisher's Article 10 rights. At [70] the Court said that it

> "… finds it clear, and this has not been disputed, that there has been an interference with the applicant's freedom of expression on account of the administrative penalty and the confiscation of the publication, which were applied under Articles 30 and 214 of the Code on Administrative Law Offences."

179. Earlier, at [38], the Court explained that:

> "An administrative warning is a penalty under Article 30 and it can be used to replace a harsher penalty the Code prescribes for a particular offence; the administrative warning is also intended to serve as a preventive measure, in the same way as a suspended sentence in criminal law"

180. Hence, it is clear that the penalty imposed by the court in that case was a punishment which was accompanied by the confiscation of the publication in question. That was unquestionably an interference pursuant with Article 10(1). I accept the First Defendant's submission that it is not relatable to the kind of record-keeping prescribed by HCOG.

181. Mr Wise submitted that the recording of a non-crime incident against the Claimant's name was an Article 10(1) interference because of the risk that it might in the future be disclosed on an ECRC issued by the DBS were the Claimant to apply for a position which justified such a disclosure. The disclosure regime was described in *R(T) v Chief Constable of Greater Manchester* [2015] AC 49, [10]-[12]. The statutory provisions are contained in Part V of the Police Act 1997. An ordinary criminal record certificate contains only material held on the PNC. An ECRC contains both that information and by way of enhancement, information about the person held on local police records which the police believe may be relevant and ought to be included on it. Generally speaking, ECRCs are required where individuals are applying for positions which are especially sensitive, such as positions working with children or vulnerable adults. The broad protection of the Rehabilitation of Offenders Act 1974 does not apply to such individuals.

182. David Tucker explains at [18] of his witness statement that non-crime hate incidents are not recorded on the PNC but are only held by forces locally. In principle, they are therefore disclosable information. However, Mr Tucker's opinion in [57] of his witness statement is that he could not envisage any circumstances in which it would be found that the non-crime information recorded against the Claimant would be disclosed. That, I do not accept. One example which springs to mind where disclosure would almost certainly take place is if the Claimant applied for a job which would bring him into contact with vulnerable transgender individuals. I put this example to the Defendants' counsel in argument and, with respect, neither had a convincing explanation why the information about the Claimant would not be disclosed in those circumstances.

183. But if such a thing were to happen it would not be as a result of HCOG, which as I have said does not require any particular operational response to the recording of a non-crime hate incident. It would take place as the result of a decision taken under the Police Act 1997 and if and only if particular facts arose which made disclosure necessary. Whatever the theoretical possibilities, no-one suggested that in this case there is presently a foreseeable prospect of disclosure being made. Hence, to the extent it is argued that the prospect of such a disclosure has (or had) a chilling effect, I do not accept that occurs as a consequence of the policy itself. I acknowledge there is an argument that disclosure in such circumstances could only take place because of recording pursuant to HCOG. But in my judgment the recording would be secondary to the primary disclosure decision, and only part of the background factual context.

184. Moreover, the Defendants were right to submit that the legal framework relating to the disclosure of non-conviction data on an individual's ECRC is tightly drawn. The courts have on several occasions broadly upheld the human rights compatibility of this regime: *R (L) v Commissioner of Police of the Metropolis*; [2010] 1 AC 410 and *R (AR) v Chief Constable of Greater Manchester* [2018] UKSC 47; [2018] 1 WLR 4079; *In re Gallagher* [2019] 2 WLR 509.

185. They also pointed to the fact that the disclosure of information in an ECRC is subject to safeguards to prevent against arbitrary unfairness including the statutory framework under ss 112-127 of the Police Act 1997; the Statutory Disclosure Guidance issued by the Home Secretary under s 113B(4A) of the Police Act 1997; and the Quality Assurance Framework issued by the DBS. The Claimant would have the right to make representations about whether disclosure should take place were it ever to be contemplated. There is also a statutory right of appeal to the Independent Monitor under s 117A of the 1997 Act. The Independent Monitor can require the DBS to issue a new certificate omitting information considered to be not relevant for the purpose sought: s 117A(5).

(ii) Prescribed by law

186. My conclusion on interference is sufficient to dispose of the Claimant's broad-based Article 10 challenge to HCOG. But in case I am wrong, I turn to the second stage of the required analysis, namely whether – assuming HCOG does interfere with free speech - that interference is 'prescribed by law'. I find that it is, for the following reasons.

187. The requirements in Articles 5(1), 8(2), 9(2), 10(2) and 11(2) that any restriction with the right must be 'prescribed by law' or 'in accordance with the law' have the same meaning across the articles: *In re Gallagher*, supra, [14]. In that case at [16]-[20], Lord Sumption summarised the relevant Strasbourg case law:

> "16 It is well established that 'law' in the Human Rights Convention has an extended meaning. In two judgments delivered on the same day, *Huvig v France* (1990) 12 EHRR 528, para 26 and *Kruslin v France* 12 EHRR 547, para 27, the European Court of Human Rights set out what has become the classic definition of law in this context *Huvig*, para 26:
>
> > 'The expression 'in accordance with the law', within the meaning of article 8.2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.'
>
> *Huvig v France* and *Kruslin v France* established a dual test of accessibility and foreseeability for any measure which is required to have the quality of law. That test has continued to

be cited by the Strasbourg court as the authoritative statement of the meaning of "law" in very many subsequent cases: see, for example, most recently, *Catt v United Kingdom* CE:ECHR: 2019:0124JUD004351415.

17 The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree.

18 This much is clear not only from the *Huvig* and *Kruslin* judgments themselves, but from the three leading decisions on the principle of legality on which the Strasbourg court's statement of principle in those cases was founded, namely *Sunday Times v United Kingdom* (1980) 2 EHRR 245, *Silver v United Kingdom* (1983) 5 EHRR 347 and *Malone v United Kingdom* (1985) 7 EHRR 14.

19 *Sunday Times v United Kingdom* was the first occasion on which the Strasbourg court addressed the test of legality. It was not a privacy case, but a case about freedom of expression in the context of the English law of contempt of court. The requirement of foreseeability was summarised by the court as follows at para 49:

> ‘A norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’
>
> 20 In *Silver v United Kingdom*, para 85, the Strasbourg court adopted this definition and applied it to a complaint of interference with prisoners’ correspondence, contrary to article 8. The court observed at para 88 that the need for precision in Sunday Times v United Kingdom meant that “a law which confers a discretion must indicate the scope of that discretion”. It was in that context that the court addressed the question of safeguards, at para 90:
>
> > ‘The applicants further contended that the law itself must provide safeguards against abuse. The Government recognised that the correspondence control system must itself be subject to control and the court finds it evident that some form of safeguards must exist. One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual’s rights should be subject to effective control. This is especially so where, as in the present case, the law bestows on the executive wide discretionary powers, the application whereof is a matter of practice which is susceptible to modification but not to any Parliamentary scrutiny.’”

188. Earlier, at [14] Lord Sumption emphasised that that the condition of legality is not a question of degree. A measure either has the quality of law or it does not. It is a binary test. This is because it relates to the characteristics of the legislation itself, and not just to its application in any particular case: see *Kruslin v France, supra,* [31]-[32].

189. The principles were recently set out in *Bridges,* supra, [80]:

> “(1) The measure in question … should comply with the twin requirements of ‘accessibility’ and ‘foreseeability’ …
>
> (2) … The measure must also be ‘foreseeable’ meaning that it must be possible for a person to foresee its consequences for them and it should not ‘confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself’ (Lord Sumption, *Re Gallagher*, [17]).

> (3) Related to (2), the law must 'afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise'
> …
>
> (5) The rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them (*Catt* at [11]).
>
> (6) The requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue (per Lord Sumption in *Catt* at [11])".

190. In *R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2010] 1 AC 345, [41] Lord Hope said that the Convention's concept of what is 'prescribed by law':

> "… implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable: see also *Gülmez v Turkey* (Application No 16330/02) (unreported) given 20 May 2008, para 49. The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary: *Goodwin v United Kingdom* (1996) 22 EHRR 123, para 31; *Sorvisto v Finland*, para 112."

191. Earlier, I held that HCOG has a basis in domestic law because it falls within the police's general common law power to collect, use, retain and disclose information, for the purposes of preventing and detecting crime.

192. HCOG also plainly satisfies the accessibility test. It is available to all with access to the internet on the College's website. It is therefore 'published and comprehensible': see *In re Gallagher*, supra, [17].

193. Mr Wise focussed his challenge under this head on the requirement of 'foreseeability', namely the second of the two requirements formulated in the Strasbourg case law namely that the relevant law' must be formulated with sufficient precision to enable the citizen to regulate his conduct and foresee, to a degree that is reasonable in the

circumstances, the consequences which a given action may entail. He made two main points: (a) the perception-based definition of non-crime hate incidents is such that people cannot foresee the consequences of making a given statement; and (b) it is uncertain whether there is a discretion not to record non-crime hate incidents, and, if there is a discretion, its scope is unclear.

194. I accept the broad thrust of the College's submissions in response. In particular, I agree that: (a) the perception-based definition of non-crime hate incidents does not contravene the foreseeability requirement; and (b) there is a discretion to not record reports of non-crime hate incidents that is sufficiently clear in scope.

195. Hate incidents and non-crime hate incidents are the subject of detailed definitions by reference to the five protected strands, namely disability; race; religion; sexual orientation; and transgender. I have already set out the definitions earlier in this judgment. To recap, [6.1] states:

> "A non-crime hate incident is defined as:
>
> > any non-crime incident which is perceived by the victim, or any other person, to be motivated (wholly or partially) by a hostility of prejudice,
>
> If the hostility or prejudice is directed at one of the five monitored strands … it should be recorded as a hate incident."

196. Whether a non-crime hate incident is recorded is, in my judgment, sufficiently foreseeable to satisfy the Strasbourg test. If someone behaves in a way which carries the possibility that another person may subjectively conclude that it exhibits non-criminal hostility or prejudice in relation to one of the five protected strands then it will be recorded. That is because HCOG requires in [6.1] and [6.3] such incidents to be recorded. This definition ensures all complaints are treated the same, and citizens know how a complaint will be processed.

197. I accept that the subjective and perception-based approach in HCOG means that the range of circumstances in which a 'non-crime hate incident' may be recorded against an individual is extremely wide in scope. However, a reasonable reader of HCOG would be able to foresee, with a reasonable degree of certainty (and with advice if necessary), the consequences of making a given statement, precisely because any statement that is reported as being motivated by hostility towards one of the monitored strands is to be recorded as a non-crime hate incident. Those who exercise their freedom of speech in a way that may come to the attention of the authorities via a complaint will generally have a pretty good idea of their motivation, and whether it is foreseeably going to be interpreted by others as motivated by hostility or prejudice. In my judgment it is sufficiently certainly the case that perception based reporting does not render HCOG uncertain.

198. The Claimant argues in his Skeleton Argument at [65(g)] that 'an individual who is considering whether to make a statement … about transgender issues simply will not know whether that statement will generate the kind of complaint that will result in the

recording of a 'non-crime hate incident'. However, as the First Defendant argues, the same could apply equally to any complaint of any incident or crime against any person. There is no reason to distinguish, for these purposes, between records of all incidents and records of hate incidents: all are triggered by reference to the subjective perception of the person reporting the incident.

199. During the hearing I queried with counsel the meaning of [6.3], and in particular the statement that a non-crime incident must be recorded '… irrespective of whether there is any evidence to identify the hate element'. I wondered how something could be regarded by someone (be it the victim or another person) as a hate incident if there was no evidence of hate. Having thought further, my conclusions are as follows. Mr Giannasi explains at [74] on his statement:

> "As with hate crime, there is no onus on the complainant to be able to 'prove' the hostility for a non-crime incident to be recorded. As noted above, the Macpherson Report specifically recommended that racist non-crime incidents should be recorded, and that the definition of a racist incident should be perception-based. Accordingly the HCOG has applied the same approach to the process of response to all hate crimes and non-crime hate incidents. It applies this for the purposes of assessing whether such hostilities are present, and for assessing levels of risk of escalation."

200. From this, what I take [6.3] to mean is that it is sufficient to qualify as a non-crime hate incident if the complainant perceives hate to be present (as that term is defined in [1.2] namely as prejudice or hostility on the basis of a protected strand) and that they are not required to be called upon to prove that that is in fact the case, or to provide evidence that that is so. That interpretation is reinforced by [1.2.3] which states:

> "For recording purposes, the perception of the victim, or any other person … is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. The victim does not have to justify or provide evidence of their belief, and police officers or staff should not directly challenge this perception. Evidence of the hostility is not required for an incident or crime to be recorded as a hate crime or hate incident."

201. Example A given straight after this paragraph I think illustrates what [1.2.3] and [6.3] mean:

> "Jon reports circumstances which amount to an offence under section 4 of the Public Order Act 1986. He was sworn at and threatened that he would be punched in the face by an attacker who moved toward him in an aggressive manner. Nothing was said about his sexual orientation but he perceives that he was targeted as he is openly gay and there was no other reason why he was chosen. He reports this to the

> police who should correctly record this as a hate crime based on sexual orientation."

202. The policy means that Jon should not be called upon to provide evidence that his attacker was *in fact* hostile to him because he is gay, or to prove that fact. His perception that he was attacked because is a gay man is sufficient and what matters for the purposes of recording the incident.

203. But it seems to me that this approach does not exclude that there must, on the facts narrated by a complainant, be some rational basis for concluding that there is a hate element. Suppose, for example, that a fat and bald straight non-trans man is walking home from work down his quiet residential street when abuse is shouted at him from a passing car to the effect that he is fat and bald. If that person went to the police and said the abuse were based on hostility because of transgender it cannot be the case that HCOG would require it to be recorded as such as a non-crime hate incident when there is nothing in the facts which remotely begins to suggest that was any connection with that protected strand. Vitally important though the purposes which HCOG serves undoubtedly are, it does not require the police to leave common sense wholly out of account when deciding whether to record what is or is not a non-crime hate incident.

204. This conclusion is consistent with the Second Defendant's evidence. Steven Williams says at [11] of his witness statement:

> "… [t]here may be instances, where it is not considered appropriate to record a 'hate incident' on the facts of a particular case. Staff will use a common sense and a proportionate approach to recording all circumstances. It is not the case that a report of a hate incident will always be recorded as such".

205. This interpretation is also consistent with Mr Giannasi's statement at [76]-[78]:

> "76. Although the HCOG provides that genuine non-crime hate incidents must be recorded as such, it does not follow that recording is mandatory in all circumstances irrespective of the context. In particular, para 1.2.4 of the HCOG (p6) provides that:
>
> 'It would not be appropriate to record a crime or incident as a hate crime or hate incident if it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive.'
>
> 77. We recognise that some complaints may be fuelled by political or even malicious motives, so this advice is provided to help reduce the potential for abuse of police recording and response. The HCOG leaves this to the discretion of

> individual forces, as it is not possible to predict all of the circumstances police may be called upon to address.
>
> 78. The full circumstances of the report and the parties involved need to be considered, and this will inform the appropriate response. Such response could include for example recording the allegation but taking no further action, other than to inform the complainant and to monitor for other indications of tensions. Even where a police officer take no action, he or she may be called upon to explain or justify the decision not to act. Therefore, it is important that the police maintain a record of the complaint and the rationale for the response. Being able to measure such complaints also allows the police to assess whether community tensions are increasing in severity or nature."

206. For these reasons, I conclude that the use of complainant perception in defining non-crime hate incidents does not contravene the requirement of foreseeability. Overall, the perception based approach in HCOG does not, in my judgment, confer a discretion so broad that it depends on the will of those who apply it, on the whim of those who may report incidents, nor are its terms so broadly defined as to produce the same effect in practice: *In re Gallagher*, supra, [17].

207. I also reject Mr Wise's argument that HCOG fails the test of foreseeability because it is uncertain whether there is a discretion not to record non-crime hate incidents, and, if there is a discretion, its scope is unclear. He says HCOG is uncertain because, on the one hand. it contains a mandatory requirement in [6.3] to record all non-crime hate incidents that are not the responsibility of another agency, but at the same time proceeds on the basis that the police have a discretion as to whether to record such incidents, to be exercised by reference to whether doing so would be an 'overreact[ion]' [6.4] and/or the considerations in [1.2.4].

208. I do not accept these submissions. There is nothing inconsistent in the way the policy is drafted. The mandatory duty to record in [6.3] has to be read as subject to the overarching duty which all public authorities have to abide by the Convention. That overarching duty is contained in [6.4], which is where the reference to the need not to overreact is to be found.

209. Further, I consider that [1.2.4] and [1.5] sufficiently clearly delineate (without being exhaustive) the circumstances in which a complaint will not be recorded. The Strasbourg Court has recognised that many legal provisions have to be drafted in general or vague terms, and applied in a way that involves questions of practice: *Sunday Times v United Kingdom*, supra, [49]. The Strasbourg court has found that where the interference in question may be applied in a large number of cases, it will often not be possible to formulate a discretion for every eventuality: *Silver v United Kingdom,* supra, [88]. I accept the submission that given the number of incidents which may constitute hate incidents is often so large that it is impossible in practice to draft guidance relating to whether or not each one is a hate incident and whether or not it should be recorded.

210. For these reasons, I conclude that HCOG, to the extent that it involves interfering with the right of freedom of expression, does so in a manner that is prescribed by law for the purposes of Article 10(2).

(iii) Legitimate aim

211. For reasons I will explain more fully when I come to consider the question of proportionality, I am satisfied that HCOG pursues the legitimate aim of preventing disorder and crime and protecting the rights and freedoms of others. These are both specified aims in Article 10(2).

(iv) Necessary in a democratic society/proportionality

212. I turn to the fourth analytical stage, namely whether HCOG is necessary in a democratic society, that is to say, a proportionate interference with the right to freedom of expression having regard to the aims pursued. A certain margin of judgment has to be afforded to the decision maker in this area: *R (Haq) v Walsall District Council* [2019] PTSR 1192, [73].

213. In relation to the term 'necessary' Lord Bingham emphasised in *Shayler, supra,* [23]:

> ""Necessary" has been strongly interpreted: it is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable': *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 , 277–278, para 62."

214. The Court has recently reiterated that the exceptions found in Article 10(2) must be 'construed strictly, and the need for any restrictions must be established convincingly' see eg *Mariya Alenkhina and others v Russia* (No. 38004/12, judgment of 3 December 2018), [198].

215. The most often cited formulation of the proportionality test is that of Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, [74], where he said that an assessment of proportionality involved four questions: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

216. The Claimant makes a systemic attack on HCOG as being unlawful because it is disproportionate. However, the Defendants correctly submitted that a systemic challenge must show more than that the policy is *capable* of producing an unlawful result. The test is that the policy must give rise to an *unacceptable risk* of unlawfulness. In *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), Wyn Williams J said at [137]:

> "I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further, it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy."

217. This is not, without more, established by individual instances of an unlawful result. In *R (Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin), [68(iii)], the Divisional Court said:

> "(iii) An administrative scheme will be open to a systemic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness."

218. The issue was considered most recently in *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872, [60]-[63]. Having considered a number of cases, Underhill LJ concluded:

> "I do not think that it is necessary or useful to analyse the various cases referred to. In my view the correct approach in the circumstances of the present case is, straightforwardly, that the policy/guidance contained in paragraph 55.3.9.1 of the EIG and the relevant parts of *Assessing Age* will be unlawful, if but only if, the way that they are framed creates a real risk of a more than minimal number of children being detained. I should emphasise, however, that the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular "aberrant" decisions – that is, individual mistakes or misjudgments made in the pursuit of a proper policy. The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated."

219. Applied in the current context, this means that in order to succeed on his broad challenge, the Claimant must show that HCOG creates a real risk of more than a minimal number of cases where Article 10(1) will be unlawfully infringed.

220. I begin with the first of Lord Reed's questions, namely the importance and weight of the aims said to be pursued by HCOG. As I have said, there are two relevant aims set

out in Article 10(2): (a) the prevention of disorder or crime; and (b) the protection of the … rights of others. I accept that these are important legitimate aims, which cumulatively provide weighty factors justifying any potential interferences in an individual's human rights in particular cases. Even if HCOG does involve an interference with freedom of expression (which, as I have found, it does not) it only does so at a low level. I shall return to this point shortly.

221. First, the evidence shows that the specific aims of HCOG are of preventing, or taking steps to counter, hate crime and hate incidents, and building confidence in policing in minority and marginalised communities. Paul Giannasi explains at [10] of his witness statement that HCOG should be viewed in the context of 20 to 30 years of policy development concerning police responses to hate crime and non-crime hate incidents. He says the current HCOG is informed by these prior policies and reports, which have their roots in the Macpherson Report into the murder of Stephen Lawrence. He points to s 95 of the Criminal Justice Act 1991, which introduced a focus on the recording of data relating to hate incidents. At [18] he says that the Macpherson Report (one of whose terms of reference was to 'identify lessons to be learned for the investigation and prosecution of racially motivated crimes) gave rise to key features of HCOG, including the definition of a racist incident; encouragement of the reporting of non-criminal incidents; perception based recording; and that criminal and non-criminal racist incidents should be recorded and investigated with equal commitment.

222. HCOG helps achieve these overall aims because, first, I accept that monitoring hate incidents helps inform police action to protect minorities and marginalised groups. That in turn assists in building confidence in policing in some communities, particularly ethnic or racial minorities and vulnerable individuals. The need to improve confidence in the police's attitude to hate incidents was a crucial part of the Macpherson Report. Paragraph 45.12 stated:

> "… police and other agencies did not or would not realise the impact of less serious, non-crime incidents upon the minority ethnic communities … The actions or inactions of officers in relation to racist incidents were clearly a more potent factor in damaging public confidence in the Police Service."

223. The Introduction to HCOG makes this point:

> "The police occupy an important position in protecting victims of hate crime, and have a valuable role to play in doing so. Above all, victims and communities need to have trust and confidence that the police will respond appropriately and effectively to their needs.
> This document contains many examples of innovative police work being developed and delivered across the country, and provides practical advice and instruction on how service delivery to hate crime victims might be further improved. The policing of hate crime has improved in many respects since the Stephen Lawrence Inquiry, and that is testament to the dedication of many police officers of all ranks across the

country, but there can be no room for complacency. There is still much to do.

224. HCOG also assists in the prevention of the escalation of hate-based hostility from low-level non-criminal activity to criminal activity. Mr Giannasi, who has extensive experience in the field of hate crime and hate incidents, explains at [72] of his witness statement the dynamic of escalating levels of behaviour which he regards as widely acknowledged in the criminal justice sector. In so doing, HCOG assists in the wider investigation and prevention of crime. The evidence of Mr Giannasi at [37]-[39] is that often low levels incidents are pieces in a local jigsaw of information and intelligence that enables policing to be aware of community tensions and take action to prevent minor issues or a series of minor issues escalating into something more serious.

225. Lastly, I accept that protected groups are particularly vulnerable and in need of protection. HCOG assists the police to fulfil their public sector equality duty under s 149 of the Equality Act 2010. Gender reassignment is one of the protected groups in s 149(7).

226. Overall, I am satisfied that the aims and objectives of HCOG justify the limitation it imposes on freedom of speech. That is because its aims are extremely important for the reasons I have given. As against that, the level of interference to freedom of expression by HCOG is low. The Strasbourg and domestic courts have consistently held that 'an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed': eg, *Tammer v Estonia* (2003) 37 EHRR 43. Further, the Convention itself gives only limited protection to hate speech (properly so called). There are two approaches. Article 17 of the Convention excludes entirely from the protection of Article 10 hate speech which negates the fundamental values of the Convention: see eg *Ivanov v Russia,* judgment of 20 February 2007 (ethnic hate); *Roj TV a/s v Denmark*, judgment of 17 April 2018 (incitement to violence and support for terrorist activity). To such speech Article 10 simply does not apply. Where Article 10 is not excluded by Article 17, then any restriction upon genuinely hateful speech has generally been easier to justify as necessary in a democratic society than other forms of speech: see eg *Murphy v Ireland,* judgment of 10 July 2003, [66]-[67]; Lester and Pannick, *Human Rights Law and Practice* (3rd Edn), [4.10.14].

227. I turn to the second of Lord Reed's four questions, namely whether HCOG, and in particular the recording of non-hate incidents, is rationally connected to the objectives it serves. Plainly, it is. For all of the reasons set out in the evidence of Mr Gianassi and Mr Tucker it is important that the police have adequate records of potential hate incidents to inform their work. I accept that the recording of non-criminal incidents is a basic and necessary aspect of policing. The evidence is that the recording of non-criminal incidents is provided for by the Home Office's National Standard for Incident Recording (NSIR). Among other things the NSIR calls for police to mark incident with qualifiers, and one such qualified is 'hate and prejudice'. In 2018 Her Majesty's Inspectorate said that recording non-crime hate incidents was a valuable source of information.

228. The third question is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. In my judgment it could not. As I have said, the recording of non-crime hate incidents barely encroaches on

freedom of expression, if it does so at all. I also take into account that key elements of HCOG have been derived from sources which should command great respect and weight. It can be concluded that they are what is thought necessary to achieve HCOG's aims. These include the Macpherson Report; ACPO Hate Crime Manuals; and Fulford J's (as he then was) Race For Justice Taskforce Report of 2006. That was a report on the handling of racist and religious crime by the police, the CPS and the courts. In response, in 2007 the Attorney General created a Cross-Government Hate Crime Programme and tasked it with agreeing a shared definition of hate crime and non-crime hate incidents. There was also an Independent Advisory Group which, as Mr Gianassi explains at [48] unanimously supported the inclusion of a response to non-crime hate incidents to effectively measure tensions and to prevent the escalation to more serious hostility. At [30] of his statement Mr Giannasi wrote:

> "… recording, measuring and proportionate response is vital to mitigate hate speech and non-crime hate incidents, and this is an important part the State's effective protection and promotion of human rights. Failure to address non-crime hate incidents is likely to lead to their increase, and ultimately increase the risk of serious violence and societal damage."

229. I turn, then, to the fourth of Lord Reed's questions which is whether, balancing the severity of HCOG's effects on the rights of the persons to whom it applies against the importance of the objectives it serves, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The question is whether the impact of the rights infringement is disproportionate to the likely benefits brought by recording non-crime hate incidents under HCOG.

230. The answer to this question is that that impact is not disproportionate to the benefits which HCOG brings to the achievement of the objectives it serves. That answer largely flows from my earlier conclusions. The mere recording of non-crime hate incidents arising out of speech barely impacts on the right to freedom of expression. Set against that, there is considerable evidence about both the necessity of HCOG's measures in relation to non-crime hate incidents and also the benefits which they bring. I have cited much of this evidence already. In addition, Mike Ainsworth of Stop Hate UK and the chair of the Government's Independent Advisory Group on Hate Crime wrote in his statement at [16] in relation to hate incidents:

> "16. Recording of hate incidents by the police is critical for a number of reasons:
>
> - Hate incidents often provide the evidence of motivation for subsequent hate crimes. Specifically where individuals are victims of harassment or stalking where individual acts may be sub-criminal.
> - Hate incidents can increase levels of fear in communities. Understanding what drives and affects community cohesion is essential for effective policing
> - Recording of hate incidents can prevent escalation into criminal behavior. For example we know through our work in schools that young children are now committing criminal

> acts online without understanding that their behavior online can lead to criminal convictions."

231. In addition, Nick Antjoule is a specialist in hate crime at a leading LGBT+ charity. He has experience of working in a police force as a specialist LGBT Liaison Officer, and in hate crime in a local authority. In his statement he has also provided detailed reasons explaining why perception-based recording is necessary and why monitoring of non-crime hate incidents is needed to prevent hate crime ([12-18]). Nathan Hall wrote the Introduction to HCOG and is an academic specialising in hate crimes and the legacy of the Stephen Lawrence Inquiry. He also holds posts on the Independent Advisory Group and the NPCC's Hate Crime Working Group. In his statement at [11]-[31] he explains in detail the need for perception-based recording; the dynamic of hate speech escalating into a hate crime**;** and detailed reasons why it is necessary to record non-crime hate incidents.

232. Accordingly, there is a wealth of evidence supporting the necessity of the key elements of HCOG.

233. In considering this question, it is also necessary to consider the safeguards that are in place in relation to how information recorded and retained under HCOG.

234. First, as I have explained, there is an element of discretion whether to record in HCOG. It has to be applied in a common-sense manner by police forces. Also, HCOG expressly provides that it must be applied in a proportionate and Convention compliant manner (at [6.1] and [6.4]). When Mr Giannasi trains police on hate crime he emphasises the importance of Articles 8 and 10 of the Convention.

235. In respect of retention, the police are subject to the Data Protection Act 1998 and other policies including the NSIR; the Home Office Counting Rules for Recorded Crime; the College of Policing's Authorised Professional Practice: Information Management – Retention, review and disposal.

236. Finally, there is the question of disclosure a non-crime hate incident in respect of an individual. There is a framework of laws and policies in place the legality of which has been upheld. Disclosure is only permissible in principle, therefore, where the need to protect the public is at its greatest, ie, where the individual may be in contact with vulnerable individuals and, because of the test of relevance, where those vulnerable individuals may belong to the group against whom it is complained the applicant was hostile. It is right that employers, who themselves must uphold their own equality duties in relation to their staff and service-users, may be informed about the potential prejudicial and discriminatory views of prospective employees. There are important safeguards in place to protect job applicants, who have the right to request that information held about them be removed from the police's record. Individuals have a right of appeal against decisions as to what is to be disclosed.

(v) Conclusion

237. I therefore reject the Claimant's broad-based challenge to the legality of HCOG under Article 10. In summary, I conclude that (a) the mere recording of a non-crime hate incident based on an individual's speech is not an interference with his or her rights

under Article 10(1); (b) but if it is, it is prescribed by law and done for two of the legitimate aims in Article 10(2); and (c) that HCOG does not give rise to an unacceptable risk of a violation of Article 10(1) on the grounds of disproportionality.

The legality of the police's treatment of the Claimant

238. I turn to the Claimant's narrower challenge. He contends that the combination of the recording of his tweets as a non-crime hate incident under HCOG; PC Gul going to his workplace to speak to him about them; their subsequent conversation in which, at a minimum, PC Gul warned him of the risk of a criminal prosecution if he continued to tweet; and the Claimant's subsequent dealings with the police in which he was again warned about criminal prosecution, interfered with his rights under Article 10(1) in a manner which was unlawful.

239. On behalf of the Second Defendant Mr Ustych took what might be called a pleading point, in as much as he contended that as against his client the only complaint by the Claimant was the recording of his tweets rather than the police's subsequent action. I do not accept this. It is clear from the pleadings and the Skeleton Arguments that everyone was alive to the way in which the case was being put by the Claimant. There is the broad challenge to HCOG which I have rejected, and there is also the focussed challenge on the facts as to how it was applied in the Claimant's case. Mr Ustych met the case on that basis during argument and that is how I propose to deal with it.

The Claimant's tweets: the context

240. It is vital to begin with the context of the debate in which the Claimant was writing. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548, 'in law, context is everything.' In *Vajnai v Hungary* (No. 33629/06, judgment of 8 July 2008), [53] the Court observed:

> "… it is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society."

241. It is very important to recognise that the Claimant was not tweeting in a vacuum. He was contributing to an ongoing debate that is complex and multi-faceted. In order to understand the contours of that debate I have been assisted by the first witness statement of Professor Kathleen Stock, Professor of Philosophy at Sussex University. She researches and teaches the philosophy of fiction and feminist philosophy. Her intellectual pedigree is impeccable. She writes:

> "4, In my work, among other things I argue that there's nothing wrong, either theoretically, linguistically, empirically, or politically, with the once-familiar idea that a woman is, definitionally, an adult human female. I also argue that the subjective notion of 'gender identity' is ill-conceived intrinsically, and *a fortiori* as a potential object of law or policy. In light of these and other views, I am

> intellectually 'gender-critical'; that is, critical of the influential societal role of sex-based stereotypes, generally, including the role of stereotypes in informing the dogmatic and, in my view, false assertion that – quite literally – 'trans women are women'. I am clear throughout my work that trans people are deserving of all human rights and dignity."

242. Professor Stock co-runs an informal network of around 100 gender-critical academics working in UK and overseas universities. Members of the network come from a wide variety of different disciplines including sociology, philosophy, law, psychology and medicine. She says that many members of the network 'research on the many rich theoretical and practical questions raised by current major social changes in the UK around sex and gender'.

243. Professor Stock then describes the 'hostile climate' facing gender-critical academics working in UK universities. She says that any research which threatens to produce conclusions or outcomes that influential trans-advocacy organisations would judge to be politically inexpedient, faces significant obstacles. These, broadly, are impediments to the generation of research and to its publication. She also explains how gender critical academics face constant student protests which hinder their work.

244. At [17] she says:

> "As also indicative, since I began writing and speaking on gender-critical matters: the Sussex University Student Union Executive has put out a statement about me on their website, accusing me of 'transphobia' and 'hatred'; I've had my office door defaced twice with stickers saying that 'TERFS' are 'not welcome here' …"

245. I understand that 'TERF' is an acronym for 'trans-exclusionary radical feminist'. It is used to describe feminists who express ideas that other feminists consider transphobic, such as the claim that trans women are not women, opposition to transgender rights and exclusion of trans women from women's spaces and organisations. It can be a pejorative term.

246. She concludes at [22]:

> "… there are also unfair obstacles to getting gender-critical research articles into academic publications, and in achieving grant funding. These stem from a dogmatic belief, widespread amongst those academics most likely to be asked to referee a project about sex or gender (eg those already established in Gender Studies; those in feminist philosophy) that trans women are literally women, that trans men are literally men, and that any dissent on this point must automatically be transphobic …"

247. Also in evidence is a statement from Jodie Ginsberg, the CEO of Index on Censorship. Index on Censorship is a non-profit organisation that campaigns for and defends free

expression worldwide. It publishes work by censored writers and artists, promote debate, and monitor threats to free speech. She deals with a number of topics, including the Government Consultation on the GRA 2004. She explains at [10]-[11]:

> "10. The proposed reforms to the Gender Recognition Act involve removing the gender recognition procedures described above and replacing them with a simple self-identification process (self-ID). Self-ID means the transitioner does not have to undergo medical or other assessment procedures.
>
> 11. Many in the UK are concerned that the proposed reforms for self-ID will erase 'sex' as protected characteristic in the Equality Act 2010 by conflating 'sex' and 'gender'. There are concerns that single sex spaces with important protective functions (women's prisons or women's refuse shelters for victims of domestic violence or rape) will be undermined. The UK government has said it does not plan to amend the existing protections in the Equality Act; however, this is not convincing to those who see self-ID in any form as fundamentally incompatible with legal protection for women and girls."

248. She goes on to address gender criticism and Twitter and explains that there is on-going concern that Twitter is stifling legitimate debate on this topic by its terms of service which apparently treat gender critical comment as hate speech. She then gives a number of examples where the police have taken action because of things people have posted on Twitter about transgender issues.

249. She concludes at [27]-[29]:

> "27. Index is concerned by the apparent growing number of cases in which police are contacting individuals about online speech that is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and - more significantly – further suppressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act.
>
> 28. The confusion of the public (and police) around what is, and what is not, illegal speech may be responsible for artificially inflating statistics on transgender hate crime … Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical voices are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category.

> 29. It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly. The journalist James Kirkup said in a 2018 report for The Spectator: "I know MPs, in more than one party, who privately say they will not talk about this issue in public for fear of the responses that are likely to follow. The debate is currently conducted in terms that are not conducive to – and sometimes actively hostile to – free expression. As a result, it is very unlikely to lead to good and socially sustainable policy."

250. I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.

251. The Claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1). I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg's evidence, which shows that many other people hold concerns similar to those held by the Claimant.

252. The Defendants submitted that this contextual evidence was not relevant to the issues in this case. I disagree. It is relevant because in the Article 10 context, special protection is afforded to political speech and debate on questions of public interest: see eg *Vajnai v Hungary* (No. 33629/06, judgment of 8 July 2008), [47], where the Court emphasised that that there is:

> "… little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest".

253. I turn to the required four-part analysis to determine whether the police unlawfully interfered with the Claimant's Article 10 rights.

(i) Interference

254. The first question is whether the police interfered with the Claimant's right to freedom of expression. I set out the case law on interference earlier. The issue of whether there has been an interference with the right to freedom of expression in Article 10(1) is

helpfully summarised in Clayton & Tomlinson, *The Law of Human Rights* (2nd Edn, Vol 1) at [15.267]:

> "In contrast to the position under some other Articles of the Convention, the question as to whether there has been an interference with an Article 10 right will usually be straightforward. Interferences with the right to freedom of expression can take a wide variety of forms and the [ECtHR] has, generally, considered that anything which impedes, sanctions, restricts or deters expression constitutes an interference..."

255. The Strasbourg case law shows that comparatively little official action is needed to constitute an interference for the purposes of Article 10(1). In *Steur v Netherlands*, Application 39657/98, judgment of 28 January 2003, a lawyer complained that Bar disciplinary proceedings had interfered with his Article 10(1) rights. At [29], [44] the Court said:

> "27. The Government argued that the applicant had not been the subject of any 'formalities, conditions, restrictions or penalties' …
>
> 29. The Court acknowledges that no sanction was imposed on the applicant – not even the lightest sanction, a mere admonition. Nonetheless, the applicant was censured, that is, he was formally found at fault in that he had breached the applicable professional standards. This could have a negative effect on the applicant, in the sense that he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases. It is therefore reasonable to consider that the applicant was made subject to a 'formality' or a 'restriction' on his freedom of expression.
>
> 44. It is true that no sanction was imposed on the applicant but, even so, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile with his duty as an advocate to defend the interests of his clients and could have a "chilling effect" on the practice of his profession …"

256. For the reasons I explained earlier, although what was said between PC Gul and the Claimant is disputed and I cannot resolve that dispute, the undisputed facts plainly show that the police interfered with the Claimant's right to freedom of expression. PC Gul's actions in going to the Claimant's place of work and his misstatement of the facts, his warning to the Claimant, coupled with the subsequent warnings by the police to the Claimant that he would be at risk of criminal prosecution if he continued to tweet (the term 'escalation' was never defined or explained) all lead me to conclude that the police did interfere with his Article 10(1) rights even though he was not made subject to any

formal sanction. There is also the point that the police created a Crime Report which referred to the Claimant as a 'suspect'.

257. I bear in mind the Defendants' submission that I should regard the Claimant's evidence about his reaction with caution. However, I accept what he said in [40] of his witness statement about what he felt following his conversation with PC Gul:

> "I felt a deep sense of both personal humiliation, shame for my family and embarrassment for my Company, its customers, suppliers and employees. I also felt anxious as to what this might mean for me, the family and the business. What did a hate incident say of me and what would happen if it escalated ? How could it escalate ? How would I cross the line into criminality ? Where was the safe place to engage in critical comment about deeply concerning legislative possibilities …"

258. It seems to me that this would be the reaction of anyone who had been exercising their free expression rights and then received a visit from the police as a consequence.

259. Mr Auburn and Mr Ustych both sought to play down the police's actions. They said that there had been no interference with the Claimant's free expression rights or, if there had, it was at a trivial level. In my judgment these submissions impermissibly minimise what occurred and do not properly reflect the value of free speech in a democracy. There was not a shred of evidence that the Claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.

260. It is nothing to the point that the Claimant subsequently gave interviews to various media outlets, or that he soon continued to tweet on transgender issues, and that both of these generated further publicity. That, in my judgment, does not mean that what the police did was not an interference under Article 10(1). The paradigm case of an Article 10(1) interference is where someone suffers a criminal punishment as a consequence of exercise their right to freedom of speech. The fact that they may continue to speak following their punishment does not stop that punishment from being an interference.

261. Warning the Claimant that in unspecified circumstances he might find himself being prosecuted for exercising his right to freedom of expression on Twitter had the capacity to impede and deter him from expressing himself on transgender issues. In other words, the police's actions, taken as a whole, had a chilling effect on his right to freedom of expression. That is an interference for the purposes of Article 10(1).

(ii) Prescribed by law

262. Were the police's actions 'in accordance with law' ? In principle they had the power to record the tweets under HCOG, although whether it was proper to do so I will consider later in connection with proportionality. ACC Young had the power to issue his

statement and Acting Inspector Wilson had the power to write to the Claimant in response to his complaint.

263. PC Gul's evidence about what power he was exercising when he visited the Claimant's workplace and subsequently spoke to the Claimant is confused. He does not identify the power in his statement. His confusion is illustrated by [12] of his statement, where he said that 'the purpose of my visit was simply to speak with Mr Miller rather than the exercise of any police powers that were available to me.'

264. Despite his confusion, I am prepared to assume that PC Gul was acting within the scope of his common law power to prevent crime when he went to the Claimant's workplace and later spoke to him in order to warn him about 'escalation'. But I should make clear, as I have already said, that there was no evidence that the Claimant either had, or was going to, escalate his tweets so that they potentially would amount to a criminal offence so as to require police action. The contrary conclusion is irrational. From November 2018 until January 2019 the Claimant's tweets had followed a fairly random pattern, raising subjects relating to transgender which were probably only of interest to obsessives (such as who won a particular event at the 1976 Olympics). There is no evidence that they were, for example, becoming increasingly offensive and intemperate, or that the Claimant was beginning specifically to target transgender people, or that increasing numbers of people were being offended by them.

265. No-one can forget the despicable language recorded by the police during their investigation of the Stephen Lawrence murder. But the Claimant's tweets were a world away from that. As I have explained, he expressed the sort of views that are also held by many academics as part of a complex multi-faceted debate.

266. At this point I should refer to the second witness statement of Professor Stock. In it she discusses the differences between speech perceived as racist, and utterances that are frequently perceived by hearers as motivated by transphobia, or understood as hostility or prejudice against a person who is transgender, eg, 'Trans women aren't women'. She says at [5]:

> "5. Where an utterance is perceived to be racist, it usually contains some identifiable pejorative element which explains that perception, so that it is not reasonably interpretable merely as straightforward, non-evaluative description. For instance, racist utterances might involve: a slur, such as the N-word, conventionally expressing contempt; mocking epithets designed to ridicule; or other statements expressing personal disapproval …

267. In contrast, she says expressions such as 'Trans women aren't women':

> "… contain no pejorative, expressive, mocking, or disapproving elements. In the mouths of many people, these utterances are intended to convey, and be heard as simple descriptions of observable facts; that is they are intended to be fact-stating and non-evaluative utterances,

along the lines of 'water boils and 100 degrees' or 'pillar boxes in the UK are red.

6. For many English speakers, 'woman' is strictly synonymous with 'biologically female and 'man' with 'biologically male'. For these speakers, therefore, given the accompanying true belief that trans women are biologically male, to say that 'trans women are men' and 'trans women aren't women' is simply to neutrally state facts'"

268. During the hearing I asked Mr Ustych what criminal offences the police had in mind when they warned the Claimant about escalation and further tweeting. He suggested the offence under s 127 of the Communications Act 2003 which, to recap, makes it an offence to send 'a message or other matter that is grossly offensive or of an indecent, obscene or menacing character' via a public telecommunications system. He also suggested the offence under s 1 of the Malicious Communications Act 1988. In my judgment the suggestion that there was evidence that Claimant could escalate so as to commit either offence is not remotely tenable.

269. The s 127 offence was considered by the House of Lords in *Director of Public Prosecutions v Collins* [2006] 1 WLR 2223. The defendant telephoned his Member of Parliament and spoke or left messages using offensive racial terms. None of the people whom the defendant addressed or who picked up the recorded messages was a member of an ethnic minority. The defendant was tried for sending, by means of a public telecommunications system, messages that were grossly offensive contrary to s 127 of the Communications Act 2003. The justices held that, although the conversations and messages were offensive, a reasonable person would not have found them grossly offensive; accordingly, they acquitted the defendant. The Divisional Court dismissed the Crown's appeal by way of case stated. The House of Lords allowed the Crown's appeal. It held: (a) that the purpose of s 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 contravened the basic standards of society; (b) that the proscribed act was the sending of the message of the proscribed character by the defined means, and the offence was complete when the message was sent; (c) it was for the court, applying the standards of an open and just multiracial society and taking account of the context and all relevant circumstances, to determine as a question of fact whether a message was grossly offensive; (d) that it was necessary to show that the defendant intended his words to be grossly offensive to those to whom the message related, or that he was aware that they might be taken to be so.

270. It held that that the defendant's messages were grossly offensive and would be found by a reasonable person to be so, and that although s 127(1)(a) interfered with the right to freedom of expression under Article 10, it went no further than was necessary in a democratic society for achieving the legitimate objective of preventing the use of the public electronic communications network for attacking the reputations and rights of others; and that, accordingly, since the messages had been sent by the defendant by means of a public electronic communications network, he should have been convicted of an offence under s 127(1)(a).

271. The Claimant's tweets did not come close to this offence. No reasonable person could have regarded them as grossly offensive, and certainly not having regard to the context in which they were sent, namely, as part of a debate on a matter of current controversy. Nor could they be reasonably regarded as indecent or menacing. The lyric which apparently most concerned PC Gul used the words 'breasts' and 'vagina'. The use of such words in twenty-first century United Kingdom is not indecent, or at least not in the satirical context in which they were deployed. Nor was the use of the words 'penis' in one of the other tweets. Nor was there any evidence that the Claimant intended to be grossly offensive: he regarded himself as simply using sarcasm and satire as part of the gender recognition debate in tweets to his Twitter followers. As I have held, apart from Mrs B, there is no firm evidence about who read the tweets, or what their reaction was. I infer from this that apart from her, no-one else was remotely concerned by them. However, the Claimant had no reason to know that Mrs B would read them and be offended.

272. Section 1 of the Malicious Communications Act 1988 provides:

> "Any person who sends to another person - (a) a letter, electronic communication or article of any description which conveys - (i) a message which is indecent or grossly offensive … 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."

273. The Claimant's tweets did not amount to this offence for essentially the same reasons they did not constitute the s 127 offence: they were not grossly offensive or indecent and the Claimant did not intend to cause anyone anxiety or distress.

(iii) Legitimate aim

274. I am prepared to assume for the purposes of argument that the police's actions taken as a whole were aimed at two of the purposes specified in Article 10(2), namely for the prevention of crime or the protection of the rights and freedoms of others. As I have explained, there was in fact no risk of any offence being committed by the Claimant, but I am prepared to accept that PC Gul's acted as he did because he thought there was such a risk, and that he believed he was protecting Mrs B's right not to be offended.

(iv) Necessary in a democratic society

275. I turn to the question of 'necessary in a democratic society' and proportionality. I set out the four questions to be considered earlier in this judgment. Proportionality is always fact specific and the facts have to be closely scrutinised: *Bridges,* supra, [100], [108].

276. The first question is whether the objective of the police's actions in warning the Claimant was sufficiently important to justify restricting his freedom of speech. I remind myself that there is little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest: see eg

Vajnai v Hungary, supra, [47]. In *R (Prolife Alliance) v British Broadcasting Corporation*, supra, [6], Lord Nicholls said:

> "6. Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts. The courts, as independent and impartial bodies, are charged with a vital supervisory role."

277. I also remind myself, as Lord Bingham said in *Shayler*, supra, that the test of necessity is a stringent one. Strong justification is therefore needed to justify a restriction on such speech. In my judgment, there was no such justification in this case.

278. The two legitimate aims in question were the prevention of crime and the protection of others. For the reasons I have given there was no rational basis on which PC Gul could have believed that there was any risk of the Claimant committing a criminal offence. There was accordingly no need for him to visit the Claimant's workplace and then warn him about the danger of being prosecuted if he escalated. Nor was there any need for ACC Young and Acting Inspector Wilson to say the same thing. As I have already said but emphasise again, there was no firm evidence that anyone had read his tweets and been upset, apart from Mrs B. There was no evidence anyone would read any future tweets and be upset by them. As I have pointed out, PC Gul was wrong to say that the tweets had upset 'many members' of the transgender community. There was no evidence of that and Mrs B does not say that in her witness statement.

279. The Claimant's tweets were not targeted at Mrs B, nor even the transgender community. They were primarily aimed at his 900-odd Twitter followers many of whom, as I said earlier, can be assumed to be of a like mind. Mrs B chose to read them. Until she got involved, there is no evidence anyone had paid any attention to the Claimant's tweets. No-one had been bothered by them. No-one had responded to them. No-one had complained about them. Some of them were so opaque I doubt many people would have understood them even if they had read them.

280. I hesitate to be overly critical of Mrs B, given she has not given evidence, but I consider it fair to say that her reaction to the Claimant's tweets was, at times, at the outer margins of rationality. For example, her suggestion that the Claimant would have been anti-Semitic eighty years ago had no proper basis and represents an extreme mindset on her behalf. Equally, her statement that if the Claimant wins this case, transgender people will have to 'kiss their rights goodbye' was simply wrong. The Equality Act 2010 will remain in force. The evidence of Professor Stock shows that the Claimant is far from alone in a debate which is complex and multi-faceted. Mrs B profoundly disagrees with his views, but such is the nature of free speech in a democracy. Professor Stock's evidence demonstrates how quickly some involved in the transgender debate are prepared to accuse others with whom they disagree of showing hatred, or as being transphobic when they are not, but simply hold a different view. Mrs B's evidence would tend to confirm Professor Stock's evidence.

281. Although I do not need to decide the point, I entertain considerable doubt whether the Claimant's tweets were properly recordable under HCOG at all. It seems to me to be

arguable that the tweets (or at least some of them) did not disclose hostility or prejudice to the transgender community and so did not come within the definition of a non-crime hate incident. HCOG rightly notes at [1.2.2] that 'hate implies a high degree of animosity …'. Professor Stock has explained that expressions which are often described as transphobic are not in fact so, or at least necessarily so (unlike racist language, which is always hateful and offensive). I acknowledge the importance of perception-based reporting for all of the reasons I set out earlier and I am prepared to accept that Mrs B had the perception that the tweets demonstrated hostility or prejudice to the transgender community. But I would question whether that conclusion was a rational one in relation to at least some of them. It is striking that no-where in their evidence did Mrs B or PC Gul specifically identify which tweets amounted to hate speech, or why. It is just asserted that they did, without further discussion. In my view many of them definitely did not, eg, the tweet about Dame Jenni Murray. That, it seems to me, was a protest against those who were seeking to curtail freedom of speech, and was not about transgender issues at all. Calling Dr Harrop a 'gloating bastard' was not very nice, but it was not displaying hatred or prejudice to the transgender community. Asking why gender critical views were not more represented in the media was a perfectly reasonable enquiry, as was asking what the Trans Day of Remembrance was. The Claimant's evidence, which I accept, is that he is not prejudiced and that his tweets were sent as part of an ongoing debate. Whilst I am prepared to accept Mrs B's indignation, I question whether Mrs B fell into [1.2.4] as someone who was responding to an internet story or who was reporting for a political motive, making the recording of her complaint not appropriate. The Crime Report shows she herself was not above making derogatory comments online about people she disagrees with on transgender issues; in other words, Mrs B is an active participant in the trans debate online.

282. I readily accept, of course, that a single victim can be the subject of hate speech that is properly recordable under HCOG. But I do think that it is significant in this case that the Claimant was tweeting to a large number of people, and yet only Mrs B complained, and did so in terms that on any view were extreme and, as I have explained, not wholly accurate. That is a factor that has to be taken into account when the proportionality of the police's response is assessed.

283. Overall, given the importance of not restricting legitimate political debate, I conclude that Mrs B's upset did not justify the police's actions towards the Claimant including turning up at his workplace and then warning him about criminal prosecution, thereby interfering with his Article 10(1) rights.

284. The answer to the second question, whether the measure was rationally connected to the objective, flows from the first question. It was not. It was not rational or necessary to warn the Claimant for the reasons that I have given.

285. The third question is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. If some of the tweets were in fact a non-crime hate incident because of their effect on Mrs B then the police could simply have recorded them pursuant to HCOG and taken no further step. In his statement PC Gul accepts that one option that was open to him was to take no further action. They could also have advised Mrs B not to read any subsequent tweets. Both of those things would have served the objectives in question.

286. The fourth question is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure. I am quite satisfied that it is. The Claimant's Article 10(1) right to speak on transgender issues as part of an ongoing debate was extremely important for all of the reasons I have given and because freedom of speech is intrinsically important. There was no risk of him committing an offence and Mrs B's emotional response did not justify the police acting as they did towards the Claimant. What they did effectively granted her a 'heckler's veto'. As to this, in *Vajnaj v Hungary,* supra, the Court said at [57]:

> "In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto."

287. What the Claimant wrote was lawful. The Claimant was just one person writing things which only one other person found offensive out of however many read them. Mrs B chose to read the Claimant's tweets. The tweets were not directed at her. If the Claimant's tweets had been reported in a newspaper and Mrs B had complained as a consequence, then I seriously doubt it would have been recorded as a hate incident. He would have been expressing himself in a public forum (as he did on Twitter) for people to read, or not, what he had to say. What happened in this case was not in my judgment meaningfully different.

Conclusion

288. In his treatise *On Liberty* (1859) John Stuart Mill wrote:

> "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

289. For the reasons I have set out, whilst Mrs B made a complaint that was recorded under HCOG, the police's treatment of the Claimant thereafter disproportionately interfered with his right of freedom of expression, which is an essential component of democracy for all of the reasons I explained at the beginning of this judgment.