

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand,
London, WC2A 2LL
23 August 2018

Before:

MR JUSTICE NICKLIN

Between:

DR RITA PAL

Applicant

- and -

C.O.P.

Respondent

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(Official Shorthand Writers to the Court)

**MR SHEPPARD appeared on behalf of the Appellant
The Respondent did not appear and was not represented**

HTML VERSION OF JUDGMENT (AS APPROVED)

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If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

1. **MR JUSTICE NICKLIN:** I will grant permission to appeal. This is an appeal that raises important issues of principle relating to harassment by speech.
2. Dr Pal, the appellant, is a former doctor. I do not need to go into the background of it but she and an individual called Andrew Bousfield, a journalist for Private Eye, had crossed paths. It is clear that Dr Pal had sent Mr Bousfield a number of emails. Those were unwanted on Mr Bousfield's part. He made a complaint to the police and, on 24 July 2011, Dr Pal was sent a prevention of harassment letter by email. The material parts of the letter warning her about alleged harassment were in the following terms:

"An allegation of harassment has been made against you. Details of the alleged conduct (specific actions that are cause for complaint): you have been constantly emailing Andrew

Bousfield and he has asked you to stop sending the emails as he is feeling harassed by their content."

What I infer is that a **pro forma** continues then, in bold:

"Harassment is a criminal offence under the Protection from Harassment Act, 'A person must not pursue a course of conduct which amounts to harassment of another, and which he or she knows or ought to know amounts to harassment of the other."

Then:

"Harassment can take many forms and examples can include wilful damage to property, assault, unwanted verbal or physical threats, abusive communication or repeated attempts to talk to or approach a person who is opposed to this.

It is important that you understand that, should you commit any act or acts either directly or indirectly that amount to harassment, you may be liable to arrest and prosecution. A copy of this letter which has been served on you will be retained by the police but will not be disclosed now to the alleged victim. However, a copy could be disclosed in any subsequent criminal proceedings against you as proof that police have spoken to you about this allegation.

This does not in any way constitute a criminal record and will only be referred to should further allegations of harassment be received."

3. The reason that I infer that the section started in bold, "Harassment is a criminal offence" is a **pro forma** is, firstly, because I have seen documents like this before and, secondly, because the definition of harassment is in general form and has not obviously been tailored to the particular circumstances of the individual complaint. It is interesting to note the definition of harassment that is given:

"Unwanted verbal or physical threats, abusive communication or repeated attempts to talk to or to approach a person who is opposed to this".

That clearly recognises that alleged harassment by speech needs caution because there is a difference between standing outside somebody's house and shouting at them or following them down the street shouting at them and waving placards, bombarding an individual with hundreds or thousands of emails or text messages, anything like that, which are direct efforts to interfere or intimidate or threaten, harass or distress. Those are easily recognisable as harassing acts.

4. What happened in this case was, after Dr Pal received that notice in 2011, Mr Bousfield made a subsequent complaint to the police in November 2014. His complaint concerned an article that had appeared on 1 July 2014 that had been authored by Dr Pal. I have read the article. It appeared on a website headed, "World Medical Times" and the article or relevant entry on the website was headed, "Andrew Bousfield of Patients First." I am not going to set out the entire text but, in summary, it is an account of activities of Mr Bousfield. I have no doubt that he might have regarded it (and it is clear from his witness evidence that he did regard it) as upsetting to him but it was not targeted at him. It certainly was not directed towards him. It could have appeared in a newspaper or anything like that and so it was not a form of communication that was akin to sending somebody an email. Looking back at the terms of the harassment letter that she received, she had been told to stop sending emails as he is feeling harassed by their content. That will be a point of importance later.
5. As I have said, following the article on 1 July, Mr Bousfield made a complaint to the police on 7 November. He subsequently attended a police station and gave a statement, which largely followed the same gist of the complaint that he made in his letter of 7 November. After that, there were some Tweets that Dr Pal posted. It is not clear on the evidence whether Mr Bousfield was a follower of Dr Pal but whether he was or not does not matter for present purposes. One of the Tweets made on 23 November, in fact a direct reply to another Twitter user, was in the following terms:

"The police recently gave Peter's friend a harassment warning on my behalf. Nice of them (?), I thought. It's what evidence does."

6. As a result of the complaints to the police, Dr Pal was arrested. She brought a claim for wrongful arrest and also some other remedies and claims, including assault as a result of handcuffing, and she brought

proceedings against the Metropolitan Police contending that her arrest had been unlawful. The trial took place. Evidence was given before the judge at trial, including from the officer.

7. Judgment was given by the judge, HHJ Freeland QC, at Central London County Court on 23 January 2018. I have read the judgment. I can summarise the basis of the appeal that the appellant wishes to bring in the following way. The court was wrong to conclude that there was an objectively reasonable basis to support PC Barge's decision to arrest her on the suspicion of harassment. Put very simply, the writing of the article and the sending of the alleged Tweet could not amount to harassment objectively judged and it did not disclose the necessary oppressiveness or targeted nature as against the complainant.
8. There is a particular need for caution when harassment by speech is alleged. The right of freedom of expression, guaranteed by article 10, includes the right to "offend, shock or disturb". That is imbedded in the jurisprudence of article 10. In the memorable words of Sedley LJ, "freedom only to speak inoffensively is not worth having" (***Redmond-Bate -v- DPP [2000] HRLR 249*** [20]). s.7(2) Protection from Harassment Act 1997 provides: "*References to harassing a person include alarming the person or causing the person distress*". That produces an inherent tension in harassment law where speech is involved. Actions which cause people distress *may* be harassment, but not all acts which cause people distress are harassment. This is particularly important if the distress is being caused by speech. To amount to harassment, the speech alleged must have crossed the line between unattractive, even unreasonable, and conduct which is oppressive and unacceptable. There must be an element of oppression involved in the conduct before there could be any reasonable basis to conclude, objectively judged, that there was a foundation here for a complaint of harassment.
9. The point was made clearly by Elisabeth Laing J in the case of *Merlin Entertainments plc v Cave* [2014] EWHC 3036 (QB) and I recently myself had to consider this issue in the decision of *Khan v Khan* [2018] EWHC 241 (QB) earlier this year, but the decision of Elisabeth Laing J will suffice for these purposes. In paragraphs 40 and 41 of the decision, the judge said this:

"[40] Harassment can take different forms. Where the harassment which is alleged involves statements which a defendant will seek to justify at trial, there may be cases where an interim injunction will be appropriate. These are cases where such statements are part of the harassment which is relied on, but where that harassment has additional elements of oppression, persistence or unpleasantness, which are distinct from the content of the statements. An example might be a defendant who pursues an admitted adulterer through the streets for a lengthy period, shouting, 'You are an adulterer' through a megaphone. The fact that the statement is true, and could and would be justified at trial, would not necessarily prevent the conduct from being harassment, or prevent a court from restraining it at an interlocutory stage. The same point would apply to *Howlett*, if the banners flown from aircraft for several years over the claimant's house, instead of conveying abuse, had set out truthful allegations. I therefore reject Mr Strauss's submission that the rule in *Bonnard v Perryman* is in and of itself a complete answer to an application for an interim injunction in a harassment case, where the harassment consists of repeated statements which the defendant will seek to justify at trial. This conclusion appears to be consistent with the recent decision of Carr J in *Brand v Berkie* [2014] EWHC 2979 (QB), to which the parties referred me after the hearing.

[41] This means that the real question is whether the conduct complained of has extra elements of oppression, persistence and unpleasantness and therefore crosses the line referred to in the cases. There may be a further question, which is whether the content of the statements can be distinguished from their mode of delivery. The nature of the relief sought shows that what really concerns the claimants is references in Dr Cave's various communications to named individuals. But the fact that the conduct consists of, or includes, the making and repetition of statements which a defendant will seek to justify at trial means that a court must scrutinise very carefully claims that that line has been crossed in any particular case, and ensure that any relief sought, while restraining objectionable conduct, goes no further than is absolutely necessary in interfering with article 10 rights. I reject Mr Ashworth's submission that whether or not Dr Cave has genuine safety concerns is irrelevant to the claim under the PHA. I also reject the claimants' invitation to decide, at this stage, that his concerns are baseless."

10. I observed in *Khan v Khan* that it does not matter for present purposes whether the person who is exercising the right of freedom of expression is right or wrong. The right of freedom of expression is not conditional on proof that what you say is true or can be justified or is stated reasonably or in measured

terms. Article 10 does not work like that. If somebody believes that he or she has a complaint about something, then, subject to the law of defamation and also to the law of harassment as properly understood in that passage, the person can protest, can stand up at Speakers' Corner, can write articles, can post information on line, can write letters, can complain to his MP. All of those are comfortably within the ambit of article 10 and what is required, as made clear by Laing J, is a very intense focus on precisely what it is in the nature of the communication complained about that supplies that element of oppression, persistence and unpleasantness and indicates that the line has been crossed between lawful behaviour and unlawful behaviour.

11. It is clear from the judge's judgment that this issue was not addressed in the judgment. In fairness to the Judge, it appears that it was not argued. The main authority considered by the Judge on the issue of harassment was *Majrowski v Guy's & St Thomas's NHS Trust* [2007] 1 AC 224. That is, of course, an important decision in harassment law but provides only limited assistance on the issues that arise in harassment by speech cases. *Majrowski* was not a harassment-by-speech case. The court needed to address more fundamental questions and to analyse very carefully what it was in the nature of the speech that could give rise to the suspicion that it amounted to harassment. The decision whether that there was an objectively reasonable basis for PC Barge's suspicion that the appellant had committed an offence under the Harassment Act, required a very careful analysis of the publications complained of and whether they met the exacting test for harassment by speech. That analysis has not been carried out and, in my judgment, it follows that there is a real prospect of success in demonstrating that, when assessed properly against the authorities that I have identified and the principles that I have identified, it is arguable that the judge would have found that there was not an objectively reasonable basis for the officer's suspicion that an offence under the Harassment Act had been committed.
12. Put very shortly: it is arguable that the acts relied upon against the appellant did not (as a matter of law) provide an objectively reasonable basis of the suspicion that an offence had been committed. There was not persistence in the conduct that had led to the warning in 2011; the events were three years later; the article was a different form; it was not targeted; it was not, objectively judged, written in offensive terms. In relation to the Tweets that are complained of, there does not appear to be any evidence that they were targeted at Mr Bousfield. These communications are significantly different from somebody sending emails directly to another person, protesting outside somebody's house, making repeated telephone calls or sending hundreds of text messages, all of which are directed at the individual. I do consider that there is a real prospect of success in contending that the judge has erred in the conclusions that there was an objectively reasonable basis supporting the officer's suspicion that an offence under the Harassment Act had been committed.
13. Mr Sheppard, on behalf of the appellant, has also submitted that permission ought to be granted in relation to the issue as to whether, even if the court were to find against the appellant on the first ground (which is in essence that there was an objectively reasonable basis on which to suspect that an offence had been committed), at the next stage it was necessary to arrest the appellant. I first thought that that was a difficult point to argue once an officer has reached a conclusion on objectively reasonable grounds that there was suspicion of the commission of an offence under the Harassment Act for various reasons, not least the fact that under the Harassment Act there is a potential defence available where it is the pursuit if the course of conduct is found to be reasonable. It is in most cases, where the first stage had been crossed, it is important to obtain the account of the suspect. However, in this case, the evidence is that the appellant had volunteered to attend for interview in relation to this matter. It therefore seems to me to be arguable that, given the offer of voluntary attendance, it was not necessary to arrest her.
14. Arrest is a step that is usually taken either for reasons of practical expediency at the scene of the commission of an alleged offence in order to detain the suspect. But, in a case like this where there has been an investigation prior to any issue of arrest arising, and where a suspect indicates that he or she is willing to attend a police station, there must be a very good reason why it is necessary nevertheless to arrest that person. Apparently, it was argued below that voluntary attendance at a police station means just that; in other words, the suspect or person being interviewed could decide to leave. That of course is true but, at that point, it might then become necessary to detain the person and arrest them in order to complete the interview that had been started and so the question of necessity might arise at that subsequent point, when the suspect indicated that he or she is no longer willing to remain at the police station as a voluntary act.
15. There are separate grounds that have been advanced as free-standing grounds in relation to article 10 but, for the reasons I have explained, article 10 governs the entirety of this decision. It was and should have been at the forefront of the consideration of the issues that arose. An analysis of harassment and whether there is an objectively reasonable basis to suspect the commission of an offence in a case involving speech requires a very careful assessment of what, objectively judged, amounts to

harassment in the alleged communications that are complained about. It is arguable that this has not been carried out and, for those reasons, I have granted permission to appeal.

16. Mr Sheppard, at the beginning of his submissions, has very sensibly concentrated on what he regards (no doubt in discussion with Dr Pal) as the key aspects of issues for the appeal. There are a number of other issues that were raised in the application for permission to appeal but which are no longer pursued, in particular malicious prosecution. That is a very sensible course of action because this appeal can properly be limited in the ways that Mr Sheppard has set out and will be reflected in the order that is drawn up to concentrate on the issues that I have dealt with and to which he has made submissions today. I will deal now with the questions of directions for the appeal but, for the reasons I have given, permission to appeal will be given on those grounds that I have identified and not on the grounds that Mr Sheppard has indicated clearly at the beginning of the hearing are no longer pursued in relation to the appeal.