A "Cardinal Democratic Freedom": High Court rules police's action "Orwellian" in a victory for freedom of expression

The Queen on the application of Harry Miller v (1) The College of Policing and (2) The Chief Constable of Humberside

References in square brackets are to paragraphs of the judgment

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Ian Wise QC acted for Mr Miller throughout the proceedings, instructed by Sinclairslaw. Michael Armitage assisted Ian in preparing the detailed legal submissions for the hearing.

Overview

On 14 February 2020, the High Court (Mr Justice Julian Knowles) held that Humberside Police had disproportionately interfered with the rights of free speech of the Claimant, Harry Miller, under Article 10 of the European Convention on Human Rights ("**ECHR**").

Mr Miller had posted a number of tweets which a member of the public had complained were "transphobic". Humberside Police recorded this as a "non-crime hate incident" and warned Mr Miller that he may face criminal prosecution if he continued to post similar tweets. The High Court, in an emphatic defence of freedom of expression in a democracy, ruled that the Claimant's tweets formed part of a legitimate public debate about proposed reforms to the Gender Recognition Act 2004.

The Facts

Between November 2018 and January 2019, Harry Miller, an ex-police officer, posted a number of tweets about transgender issues. A complaint was made to Humberside Police by an anonymous member of the public, Mrs B, who had been told about the tweets by a friend. Mrs B describes herself as a "post-operative transgender lady" [58]. Mrs B said that she was offended by

the tweets and considered them "transphobic". Mrs B was the only person to complain about the tweets.

The Claimant sees himself as taking part in the ongoing debate about reform of the Gender Recognition Act 2004. The Government's 2018 consultation on reforms to that Act 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 introduction to the consultation document states "*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.*" Mr Miller is critical of the Government's proposals for self-identification, but strongly denies being prejudiced against transgender people, and his evidence on that point was accepted by the Court [281]. The Judge did find that some of Mr Miller's tweets "*contained profanity and/or abuse*" [23].

The College of Policing publishes operational guidance for police forces in relation to hate incidents, called the Hate Crime Operational Guidance ("HCOG"). This requires police forces to record hate incidents whether or not they are criminal, and does not require there to be any particular evidence of "hate" beyond the perception of the complainant or any other person. In that regard, the HCOG defines a "non-crime hate incident" 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*".

Humberside Police recorded Mr Miller's tweets as a non-crime hate incident. A police officer visited the Claimant's place of work to discuss the tweets, but the Claimant was not present. There was a subsequent telephone call between Mr Miller and the officer. What was said was in dispute, but the High Court made a finding that the officer (and, subsequently, more senior officers who issued statements about the incident) gave the impression that Mr Miller was being warned to desist and that he may be prosecuted if he continued to post similar tweets[100].

The Claim

Mr Miller brought a judicial review challenge to the lawfulness of HCOG, arguing that it violates Article 10 and the common law principle of legality. Mr Miller also challenged the actions of Humberside Police in following that guidance in his own case, arguing that his treatment was a disproportionate interference with his Article 10 right to free speech. He pointed to the combination of the recording of his tweets as a non-crime hate incident under HCOG; the police going to

his workplace to speak to him about the tweets; the subsequent conversation with the police during which the police 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.

Relevant Law

Article 10 ECHR 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.*"

Whilst the police in this case did not identify any potentially relevant criminal offence in their discussions with Mr Miller, the High Court's judgment identifies that section 127(1)(a) of the Communications Act 2003 makes it an offence to send via a network such as Twitter "*a message or other matter that is grossly offensive or of an indecent, obscene or menacing character*". The Judge immediately went on to cite Lord Judge CJ in *Chambers v Director of Public Prosecutions* [2013] 1 WLR 1833, [28] who 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.*"

Judgment

Mr Justice Julian Knowles held that HCOG did not in and of itself involve a disproportionate interference with the Claimant's Article 10 rights [174]. He found that "*the mere recording – and I emphasise mere - of an incident itself has no real consequence for the individual such as the Claimant*" [177] and is not an interference. Further, even had there been an interference it would have

been 'prescribed by law' [186]. The Court found that the use of complainant perception in defining non-hate crime incidents does not contravene the requirement of foreseeability [206]. The Judge noted that HCOG draws upon many years of work on hate crime and hate incidents which began with the 1999 Macpherson Report into the murder of Stephen Lawrence in 1993 [105]. The Court held that HCOG serves legitimate purposes and is not disproportionate [230].

The Court also held that HCOG did not interfere with the common law principle of legality, notwithstanding the lack of any statutory authorisation. It was lawful under domestic law since the police have the power at common law to record and retain a wide variety of data and information [156].

However, the Judge found that Humberside Police had disproportionately interfered with the Claimant's rights under Article 10 ECHR in taking specific action under the HCOG in relation to the Claimant. The police's warning that the Claimant may face criminal prosecution if he continued to tweet on the same subject had the capacity to impede and deter him from expressing himself on transgender issues [261] even if he was not in fact deterred. The High Court gave weight to the fact that the Claimant's tweets formed part of a "*complex and multi-faceted*" public debate about proposed reforms to the Gender Recognition Act 2004 [241]. The Judge found it to be relevant that "*[u]nsubtle 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*" [251] since special protection is afforded to political speech and debate on questions of public interest [252].

The Court was prepared to assume for the purposes of argument that the police's actions were aimed at legitimate purposes, namely the prevention of crime or the protection of the rights and freedoms of others [274]. However, the police's actions were not rationally connected to those objectives, since it was not "*rational or necessary*" to warn the Claimant as a result of the tweets [284]. Mr Justice Julian Knowles concluded that Mr Miller's tweets did not amount to an offence and that there was no risk that he would commit a criminal offence by continuing to tweet in the same way [271]-[273]. Whilst he did not need to decide the point, the Judge noted that he entertained "*considerable doubt whether the Claimant's tweets were properly recordable under HCOG at all*" [281]. The Judge found it relevant that Mrs B was the only person who complained, that she did so in terms that were extreme and not wholly accurate [282] and that "*she herself was not above making derogatory comments online about people she disagrees with on transgender issues*" [281].

Further, less intrusive measures than those taken by the police were available, such as recording the tweets under HCOG but taking no further steps, or simply advising Mrs B not to read any subsequent tweets [285].

The judge was "quite satisfied" that the impact of the rights infringement was disproportionate to the likely benefit of the police's actions because freedom of speech is "intrinsically important" [286].

Comment

This is a significant judgment which emphasises the vital importance of free speech in a democracy. Mr Justice Julian Knowles begins his judgment by quoting George Orwell's unpublished introduction to *Animal Farm*, in which he wrote "*[i]f liberty means anything at all, it means the right to tell people what they do not want to hear*" [1].

In response to the Defendants' submissions that any interference with the Claimant's rights was trivial and justifiable, the Court was emphatic:

> "*The effect of the police turning up at [the Claimant's] 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.*"

The High Court has reminded us that free speech incudes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, and that the freedom only to speak inoffensively is not worth having [3].

This high-profile case has been described by leading legal commentator Adam Wagner as the "*most important judgment on free speech and social media for years*".

The High Court made the interesting observation that the speech at issue "*would not have raised a flicker with the authorities*" in the United States, highlighting cases including Virginia v Black 538 US 343 (2003), in which the US Supreme Court held that a law which criminalised public cross-burning was unconstitutional as a violation of free speech – despite the offensive nature of that Ku Klux Klan symbol.

The judgment includes a detailed analysis of the Strasbourg and domestic jurisprudence on Article 10, and will no doubt form an important precedent in future cases involving freedom of expression. Notably, in recognition of the public importance of the issues raised, the High Court has granted a "leapfrog" certificate permitting Mr Miller to appeal directly to the Supreme Court in relation to the Judge's dismissal of his challenge to the HCOG itself (and granted permission to appeal to the Court of Appeal in the event that the Supreme Court declines to hear the appeal under the leapfrog procedure). The High Court's

judgment is therefore not the last word on Mr Miller and his tweets.

The case has received significant media interest, including: BBCNews; The Times; The Guardian; The Evening Standard; The Telegraph.

The judgment is available here.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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