Neutral Citation No: [2022] NICA 5 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11716** *ICOS No:* **18/111795/A02** *Delivered:* **31/01/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE COUNTY COURT BY WAY OF CASE STATED PURSUANT TO ORDER 61 OF THE RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) 1981 AND ARTICLE 61 OF THE COUNTY COURT (NORTHERN IRELAND) ORDER 1980

Between:

LEE BROWN

Appellant

and

PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

Respondent

Ms Quinlivan QC with Mr Moriarty (instructed by Madden & Finucane Solicitors) for the Appellant
Dr McGleenan QC with Mr Henry (instructed by the PPS) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Sir Declan Morgan

KEEGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by way of case stated which involves consideration of a legal question as to whether the appellant's conviction for an offence under the Public Order (Northern Ireland) Order 1987 ("the Order") is lawful.

[2] The conviction can only be lawful if all of the ingredients of the offence are established and the conviction is compatible with the right to freedom of expression contained in Article 10 of the European Convention on Human Rights ("the ECHR"). This question requires consideration as to whether the facts of this case constitute

"hate speech" which can be punished by criminal sanction within the meaning of the case law of the European Court of Human Rights ("ECtHR").

[3] The term "hate speech" does not appear in the public order legislation under which the appellant was convicted. However, the term hate speech is understood to mean any kind of communication in speech, writing or behaviour that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor (*per* United Nations Strategy and plan of action on Hate Speech, May 2019). To come within the domestic criminal law the hate speech must also cause hatred or fear of those it is directed against. This can in extreme cases manifest itself as violence but it can also cause discrimination and intolerance. The fact that the expression in question involves hate speech and is intended or likely to stir up hatred or fear does not in principle preclude it from falling within the scope of Article 10, however whether the speech is protected by the Convention will depend on the specific facts and context of the case.

[4] In this case the conviction arises as a result of events on 20 October 2018. On that day the appellant assisted in the distribution of leaflets to households in Ballymena on behalf of a far right political party called Britain First. The first page of the leaflet contained some images of people from an ethnic minority background and the following narrative:

> "The people of Ballymena are furious at the massive influx of gypsy migrants from Eastern Europe. Anti-social behaviour has become common place and there have been attacks by migrants on local residents. Many local houses that could have been given to local people have been handed out to bus-loads of these migrants. Most of these migrants are given benefits draining council resources that could have been spent on the people of Ballymena. This is not just a few migrants, but a deluge of immigrants that has virtually changed the face of Ballymena. The local politicians, council and police are ignoring the complaints of local residents who are fed up of this enormous influx into the local area. Britain First is leading the campaign against this huge wave of immigration and we are demanding an immediate halt to any further migrant placement in Ballymena. Enough is enough, this is our town! It is time we forced the politicians to listen to the people of Ballymena!"

[5] The second page or back page of the leaflet was entitled "Britain First Ballymena Rally Saturday 27 October 3pm." This contained some images of a previous rally in Ballymena and the following narrative:

> "Britain First will be holding a residents' rally on Saturday 27 October to give a voice to local people. Everyone in Ballymena is welcome to attend! At our last rally in Ballymena, around 150 local residents attended (below). The rally was addressed by Britain First leader, Paul Golding, this time we want to increase the turnout to put pressure on the politicians to listen to the people of Ballymena! We are calling on the local residents of Ballymena to attend our rally – if you want things to change then attending a rally is the only option! See you next Saturday (27th), make sure to bring a friend or family member! Ballymena is our town, it is time to take it back! No surrender!"

[6] The appellant was subsequently arrested and charged with one offence, the particulars of which were as follows:

> "That you, on the 20th of October 2018, within the vicinity of Moat Road, Ballymena, distributed written material which was threatening, abusive or insulting, intending thereby to stir up hatred or arouse fear or having regard to all the circumstances hatred was likely to be stirred up or fear was likely to be aroused thereby, contrary to Article 10(1) of the Public Order (Northern Ireland) Order 1987."

[7] Another person Mr Paul Golding, was also charged with two offences of a similar nature in relation to distributions of the leaflets. Both the appellant and Mr Golding had their cases dealt with at Ballymena Magistrates' Court on 6 June 2019. At this hearing the appellant was convicted of the offence with which he was charged. On 25 July 2019 he was sentenced to a probation order for one year. Mr Golding was also convicted and received a suspended sentence.

[8] The appellant appealed his conviction and sentence as did Mr Golding. The appeal was heard in the County Court before Her Honour Judge McColgan QC ("the learned trial judge") on 3 March 2020. At this hearing the learned trial judge dismissed the appeal against conviction, however she varied the sentences of both Mr Brown and Mr Golding. On appeal Mr Brown, was fined £100 and given 26 weeks to pay. Mr Golding had his sentence varied to a total fine of £1,000 for the two offences he was convicted of. Mr Brown appealed this outcome by way of case stated. Mr Golding did not appeal.

[9] The learned trial judge was asked to state a case on a point of law. This request was refused by the judge who said, *inter alia*:

> "The application, whilst ostensibly raising a matter of law, deals exclusively with the court's findings on the facts and does not raise a legal issue."

[10] This court required the learned trial judge to state a case pursuant to Article 61(6) of the County Court's (Northern Ireland) Order 1980. This decision is reported at [2020] NICA 55. The case stated was framed in the following terms:

> "Was the appellant's conviction under Article 10 of the Public Order (Northern Ireland) Order 1987 compatible with Article 10 of the European Convention on Human Rights and Fundamental Freedoms?"

Legal Framework

[11] Article 10 of the Order states as follows:

> **"Publishing or distributing written material**
>
> 10.—(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—
>
> (a) he intends thereby to stir up hatred or arouse fear; or
>
> (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.
>
> (2) In proceedings for an offence under this Article it is a defence for an accused who is not shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.
>
> (3) References in this part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public."

[12] Article 8 of the Order contains definitions of what is meant by fear and hatred as follows:

Acts intended are likely to stir up hatred and arouse fear

Meaning of fear and hatred:

> "8.—(1) In this Part—
>
> "fear" means fear of a group of persons … defined by reference to religious belief, sexual orientation, disability colour, race, nationality (including citizenship) or ethnic or national origins;
>
> "hatred" means hatred against a group of persons … defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins."

[13] Section 3(1) of the Human Rights Act 1998 ("the Act") provides that:

> "So far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Section 6 of the Act makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose pursuant to section 6(3)(a) as are the police and prosecuting authorities.

[14] The Convention right at issue is the right to freedom of expression which is contained in Article 10 of the ECHR and which reads as follows:

> "**Freedom of expression**
>
> 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."

[15] Article 10 of the ECHR recognises the importance of freedom of expression in a democratic society. Whilst a fundamental right, it is qualified which means that freedom of expression can be limited on the basis of the legitimate aims expressed in Article 10(2). Any interference must be prescribed by law, necessary in a democratic society and proportionate.

[16] In *Bank Mellat v HM Treasury No 2* [2013] UKSC 39 the questions that require to be answered in assessing the proportionality of any measure were formulated as follows:

(i) Is the aim sufficiently important to justify interference with a fundamental right?

(ii) Is there a rational connection been the means chosen to restrict the aim and the aim?

(iii) Was there a less intrusive alternative?

(iv) Has a fair balance been struck between the rights of the individual and the general interests of the community including the rights of others?

It is the fourth question which usually is critical in cases of this nature. This is illustrated by the fact that most of the domestic and European cases turn on whether a fair balance has been struck.

[17] Whilst Article 10 is a qualified right there is an absolute prohibition on expression which falls under Article 17 of the ECHR. Article 17 prohibits the destruction of and limitation on the rights and freedoms set forth on the Convention:

> "17. Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided in the Convention."

[18] Article 17 prevents applicants from relying on Convention rights in those circumstances for example where there is extreme hatred, violence, xenophobia and racial discrimination, anti-Semitism, terrorism and war crimes, negation of historical facts and totalitarian ideology incompatible with democracy.

[19] There are therefore two categories of hate speech namely the gravest form which falls in the scope of Article 17 and is excluded from Article 10 entirely and the second category which is considered less grave and may be restricted by the State. It has not been suggested that we are within the territory of Article 17 in this case and so we turn to the approach taken to Article 10 in domestic and European jurisprudence.

[20] One of the first freedom of expression cases was *Handyside v UK* [1976] 1 EHRR 737. This case highlighted the fact that freedom of expression constitutes one of the essential foundations of a democratic society. It also set a strong standard for examination of these cases and established the principle that:

> "freedom of expression … 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." (-paragraph 49)

[21] Tolerance and respect for all human beings are also part of the foundations of a pluralist society. Therefore, it may be necessary to sanction or prevent forms of expression which spread, incite, promote or justify hatred or fear based on intolerance. In addition the ECtHR has stressed the positive obligations on Member States in protecting this right which may be invoked by a wide range of persons including authors, journalists, politicians and members of the public. In consequence Article 10 is described as enjoying a very wide scope, whether with regard to the substance of the ideas and information expressed or to the form in which they are conveyed. We now turn to some of the decisions of the ECtHR with particular emphasis on the Article 10(2) considerations as those are central in this case.

[22] Alongside the positive obligation to protect freedom of expression there is a positive obligation upon States to take action against hate speech. This is reflected in European instruments, for instance the General Policy Recommendation No.15 on combatting hate speech adopted by the European Commission on 8 December 2015 which recommends that the governments of Member States:

> "10. Take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:

(a) ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;

(b) ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;

(c) ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;

(d) ensure the effective participation of those targeted by hate speech in the relevant proceedings;

(e) provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response;

(f) monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these;

(g) ensure effective co-operation/co-ordination between police and prosecution authorities..."

[23] The Explanatory Memorandum to the recommendation, in its relevant part, provides as follows:

> "16. ... In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked): (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker

> or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a "live" event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination)."

[24] This is an area in which individual states have a wide, but not unlimited, discretion or "margin of appreciation." This margin of appreciation is also context specific. For instance, the scope for interference with the right is limited in cases such as political speech, greater in the "sphere of morals", especially religion and sexual morality. In *Wingrove v UK (Application no. 17419/90)*, the ECtHR held that "there is little scope under Article 10(2) … for restrictions on political speech or on debate of questions of public interest" and contrasted this with the "sphere of morals", where a wider margin of appreciation is applied.

[25] In *Re Jolene Bunting's Application* [2019] NIQB 36 Maguire J also highlighted the particular protection afforded to political speech at paragraph [42] and [43] of the judgment as follows:

> "[42] The domestic courts have on numerous occasions adopted a high degree of protection for freedom of political speech. As Lord Nicholls put it in ProLife Alliance, [2003] 1 AC 185 at [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."
>
> [43] Moreover, it is well established that 'political speech' is to be widely defined embracing communications on matters of public interest generally: see, for instance, the discussion of Beatson J, (as he then was) on this aspect at paragraph 64 of Calver v Adjudication Panel for Wales [2012] EWHC 1172 (Admin) amidst an erudite general discussion of Article 10 jurisprudence between paras [39]-[64] of his judgment."

[26] The most recent ECtHR case of *Lilliendahl v Iceland* of 12 May 2020 provides a useful guide to the law in this area. In that case the ECtHR found that the conviction of the applicant for homophobic comments posted in reply to an online news article did not amount to a breach of his freedom of expression under Article 10. The

ECtHR had to decide whether the interference which was established was prescribed by law and proportionate to the legitimate aim. The Court highlighted the State's margin of appreciation in determining the necessity of interference with the right citing *Steel and Morris v UK* ECHR [2005] 68416/01 and *Stoll v Switzerland* [GC] [ECHR [2007] 69698/01. The Court also highlighted Iceland's obligations under international law to take appropriate measures to combat discrimination on the basis of gender identity or sexual orientation.

[27] Having found that Article 17 did not apply to the speech at issue, the Court was satisfied with the comprehensive reasons provided by the State and upheld the Icelandic Supreme Court's view that the applicants comments were "serious severely hurtful and prejudicial "and constituted a crime under the Icelandic penal code and hate speech in violation of Article 10 of the Convention.

[28] At paragraphs [28] and [29] the Court sets out some general principles as follows:

> "28. The court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society." As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, inter alia, Von Hannover v Germany (No. 2) [GC], nos. 40660/08 and 60641/08, para 101, ECHR 2012, and Bédat v Switzerland [GC], no. 56925/08, 48, 29 March 2016).
>
> 29. The principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well-established in the court's case-law (see, among other authorities, Delfi AS, cited above, 131-132, with further references). The court must examine the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.' In doing so, the court has to satisfy itself that the national authorities

> applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts. Furthermore, 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 (see, inter alia, Ceylan v Turkey [GC], no. 23556/94, 37, ECHR 1999-IV, and Vejdeland and Others v. Sweden, no. 1813/07, 58, 9 February 2012)."

[29] This decision also provides a commentary on the different circumstances in which contravention of Article 10 may arise as hate speech does not necessarily require incitement to violence or criminal acts. This is explained as follows:

> "[36] Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression(see *Beizaras and Levickas v Lithunaia* cited above 125;*Vejdeland and Others v Sweden* cited above 55 and *Feret v Belgium* cited above 73). In cases concerning free speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute "hate speech", that conclusion has been based on an assessment of the content of the expression and the manner of its delivery."

[30] We refer to some other cases as follows to illustrate the fact specific nature of this area given the different outcomes which the ECtHR has reached depending on the circumstances of the particular case.

[31] *Baldassi and others v France*, 2016 is a case which concerns the criminal conviction of Palestinian activists for incitement to discrimination on the basis, in particular, of actions calling for a boycott of Israeli products by way of the distribution of leaflets and protests outside a hypermarket. The activists were convicted and lost their case on appeal. However, the ECtHR found on the facts that there was a breach of Article 10. Paragraphs [77]-[80] of this judgment are instructive because there the court determined that the judge had not established in the circumstances of the case that the applicant's conviction by reason of the boycott of products from Israel was necessary in a democratic society to achieve the legitimate aim pursued which was the protection of the rights of others within the meaning of Article 10(2).

[32] Paragraph [79] of the decision also highlights the Court's view that detailed reasons were essential in a case where Article 10 of the Convention requires a high level of protection of the right of freedom of expression. The Court found that on the one hand the actions and statements held against the applicants concerned a matter of general interest, and were part of a contemporary debate in relation to the Israel/Palestinian question. On the other hand the Court commented that these actions and comments could be militant expression see for example *Mamair v France* No. 2697/03 ECHR 2006. The Court emphasised on several occasions that Article 10(2) does not leave much room for restriction on freedom of expression in the area of political speech or questions of general interest.

[33] In *Feret v Belgium* Application No. 15615 of 2007 the applicant was the Chair of Front National - National Front, a political party. He was also a member of the Belgium House of Representatives. Through a series of leaflets and posters distributed by his party in an election campaign the applicant was party to the dissemination of information which was offensive and made fun of ethnic minorities in Belgium. A range of complaints were raised in relation to the language used and it was argued that this was by way of incitement to hatred, discrimination and violence. This led to the applicant suffering the removal of his parliamentary immunity and criminal proceedings. The applicant did not persuade the domestic court that he should have absolute protection by virtue of his political status and he was made subject to criminal sanction and a 10 year period of ineligibility from office. The applicant complained that his Article 10 right to freedom of expression was breached however his complaint was dismissed. The Court found that the expressions were discriminatory and segregationist and it found that the electoral context in which they had been disseminated has amplified their circulation with a possible impact on public order and social cohesion. For those reasons the Court found that the interference with the applicant's right to freedom of expression was necessary.

[34] The case of *Vejdeland v Sweden* [2014] 58 EHRR 15 involved four applicants aged 18 to 26 who went to an upper secondary school and three other persons who placed 100 leaflets referring to homosexuality broadly as deviant sexual activity linked to Aids and HIV in pupils' lockers. They claimed that they intended this to stimulate a debate about lack of objectivity in education. This argument was rejected and the applicants were convicted of criminal offences. Their appeal was successful but the conviction was restored by the Swedish Supreme Court. Following the applicants' complaint to the ECtHR the Court found that the relevant Swedish law under which they were convicted was acceptable, that the impugned interference was sufficiently clear and foreseeable and was prescribed by law within the meaning of the Convention. In that case the Court considered that the interference served a legitimate aim, namely the protection of the reputation and rights of others within the meaning of Article 10(2) of the Convention and that it was a necessary interference with the right to freedom of expression as the Swedish Supreme Court had determined.

[35] The case of *Delfi AS v Estonia* [2016] 62 EHRR 6 concerned a company who owned a news portal on the internet in Estonia. On that portal comments were posted about the major shareholder of a shipping company which were found to be offensive and there was an argument about the applicant not removing the comments. On the facts it was found that there had been no violation of Article 10. This outcome was based, on the reasoning of the domestic courts which found that the imposition of liability on the applicant company was established on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the Court found that the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression.

[36] We are also aware of a recent case of *Standard Verlagsgesellschaft mbH v Austria* published on 7 December 2021 Application No. 393788/15. This case involved a request by a media company to disclose data of anonymous authors of offensive comments posted on its internet news portal in the context of a political debate. The ECtHR determined that prima facie examination sufficient for a balancing exercise in this context was available but the domestic court's failure to conduct any balancing between opposing interests at stake was problematic. The Court held unanimously that there had been a violation of Article 10 of the Convention and stated as follows:

> "94. The court finds that the Supreme Court's case-law does not preclude a balancing of interests. In fact, this case-law would have provided for a certain balancing between the opposing interests in respect of fundamental rights when requiring an assessment whether a finding of liability under Article 1330 of the Civil Code could not be ruled out. This applied all the more to the instant case, as it was obvious that the comments at issue were part of a political debate. However, the appeal courts and the Supreme Courts did not base their assessment on any balancing between the interests of the authors of the particular comments and of the applicant company to protect those authors, respectively, on the one side, and the interests of the plaintiffs concerned on the other side."

[37] Paragraph 96 of that decision also states:

> "96. The court finds that in the absence of any balancing of those interests the decisions of the appeal courts and of the Supreme Court were not supported by relevant and sufficient reasons to justify the interference. It follows that the interference was not in fact "necessary in a democratic society", within the meaning of Article 10(2) of the Convention."

[38] We also refer to the case of *Perincek v Switzerland* Application 27510/08 reported at [2016] 63 ECRR 6 as in that decision the parameters of political speech were examined. The case concerned the indictment for criminal offences of the Chairman of the Turkish Workers' Party for taking part in a number of events and making public statements about the genocide of the Armenians alleging that it was a lie and that there was no genocide. The Switzerland-Armenian Association lodged a criminal complaint and he was found guilty in a court in Switzerland of racial discrimination. The appeal was dismissed and a case was taken alleging violation of Article 10 to the ECtHR. This application was successful by 10-7 votes.

[39] In reaching its decision the ECtHR found that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, and also that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland. The statements were not to be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland. The ECtHR also found that there is no international law obligation for Switzerland to criminalise such statements and that the Swiss courts appeared to have censored the applicant by voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction. The court concluded that it was not necessary in a democratic society to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community.

[40] In this case the Court stressed that by its nature political discourse is

> "A source of controversy and often virulent. It remains of public interest unless it degenerates into a call to violence, to hate or to intolerance. It is the limit to not exceed."

[41] Obviously, all of these cases that we have discussed above are fact sensitive. However, they provide guidance as to the method to be applied by a deciding court tasked with establishing whether freedom of expression is protected by the Convention. The context of each case is clearly the most important factor. In this vein, in *Savva Terentyev v Russia* [2018] ECHR 675 the ECtHR said at paragraph [66] that:

> "It is the interplay between the various factors rather than any of them taken in isolation that determines the outcome of a particular case. The court will thus examine the case at hand in the light of those principles, with a particular regard to the nature and wording of the impugned statements, the context in which they were published, their potential to lead to harmful consequences and the reasons adduced by the Russian courts to justify the interference in question."

[42] It is also clear from the cases we have examined that States enjoy a margin of appreciation in determining whether interference with the right to freedom of expression is necessary. This is often the key consideration in cases of this nature. The nature of the punishment is often relevant particularly in cases involving politicians or journalists, however that issue does not feature in this case given the sentence imposed. A conviction must be proportionate to the legitimate aims pursued and the reasons adduced by the domestic courts must be relevant and sufficient.

The Evidence

[43] When this case was first heard at the District Judge's court the evidence was agreed and taken as read. The same procedure followed at the appeal which was heard on 3 March 2000. In addition to the agreed evidence written submissions were filed by the prosecution and defence and some brief oral submissions were made.

[44] The evidence comprised statements from Aidan McClean, a Detective Constable, who confirmed the arrest of the appellant and charge. A statement of Michelle Graham, a Detective Constable, proved the interview between police and the appellant on 2 November 2018. A statement of Neil Ferris, Sergeant, provided information about the events on the day in question. Sergeant Ferris said in his statement that he was attached to Ballymena Police Station and that he was in uniform and on duty as a member of a mobile patrol operating in the area at the time. He also stated as follows:

> "At approximately 12:40 hours we were patrolling Moat Road when I noted a group of males entering and exiting gardens and putting leaflets through the doors. We turned the vehicle and drove back down towards them and parked our vehicle. I exited the vehicle to engage the group and noted that some of the party were wearing green T-shirts with what I believe to be a Britain First logo. On the back of the T-shirts the following letters were printed "BFNI." The group informed me they were handing out leaflets in relation to a rally being organised the following Saturday."

[45] In the statement reference is then made to the leaflet and that at the scene a gentleman who was unidentified (the appellant) and Mr Golding reiterated that they were not there to cause any trouble and that they had not experienced any issues.

[46] During interview, the appellant (who was legally represented) accepted that he was handing out leaflets and he identified the leaflet. He also said:

> "I was there. I wasn't protesting against any Romanian, or any Bulgarians or anything. I was protesting against criminal elements who had entered, who had come into the town of Ballymena. Like if the UVF and the IRA were bombing the place, would I be sitting here being questioned? Know what I mean?"

[47] The appellant also referred to a previous protest and said:

> "Well it was outside, before this leaflet, as it stated on it there were 150 locals who attended. Paul had took a phone call to ask if he would come down and have a word with some locals. That there came off Facebook, a Concerned Residents' Group of Ballymena, and we went down and paid them a visit, and they were basically saying it is criminal elements coming into the town and we decided right well we will go ask the politicians to step up, ask the police to step up, ask the council to step up. That's basically what we were doing, that's basically what we were there to do. And as you see by the leaflet there, what you have, it says for the politicians, council and the police were ignoring what the locals had went and raised the concerns about, to the police, the politicians and the council. There was nothing being done. So then we decided to hold the rally. It was meant to be an inside rally but because the bar, can't remember the name of the bar, but the bar, where the picture of the rally is took, has an open fire. There was far too many people to hold the rally inside that bar, so that is why it came out onto the street. It was never planned to go in to the street. The protest was therefore regarding criminal elements that came into the city."

[48] During the interview the appellant also said that he was not at the first rally but he was at the one that the leaflet was provided for which was a subsequent rally. He said he had nothing to do with the production of the document. He said he had read the document and he was aware of the content. He repeated what it was for as he said to ask the politicians, the council and the police to do something about local issues.

[49] At one stage in the interview the appellant's solicitor who was present asked "can I just clarify did Sergeant Ferris have any concern about the leaflets?" The response from the police is as follows:

> "Sergeant Ferris went back and he was the one who initiated sending the leaflet to our legal advisors to see

> was there anything that they believed was breaking any laws as such. And then the legal advisors came back, they are the ones that advised that sections 9, 10 and 13 were breached by handing out the leaflet."

[50] The appellant's solicitor then queried whether Sergeant Ferris had an immediate issue with the leaflet as it was something he had to seek guidance on. The police response was that:

> "Sergeant Ferris was alarmed enough to do something about it, by sending it to the legal advisors. These are obscure offences and not something you would necessarily know off the top of your head."

[51] The appellant's solicitor also asked the question as follows:

> "Can I clarify if there have been any complaints from the Roma Community in relation to the leaflet?"

The reply from the police was:

> "I am not aware of that."

[52] The transcript of interview also references the fact that police had already released a statement saying that there has been no increase in criminality because of these minorities. In this regard the appellant also said:

> "We were contacted by the Concerned Residents' Group of Ballymena. They have their own page up and running on Facebook. There is about 100 members of them. They are the ones who have been sitting down and having meetings, yourselves haven't attended. The politicians haven't attended. But when I was, when I did bother with Britain First, I didn't attend the meetings either. It's what other people were telling me."

[53] The appellant was then asked about his associations as follows:

Q. "So you are not a member of Britain First anymore?"

A. "No, I'm not. No"

Q. "When were you involved with them, what was your involvement?"

A. "I've had done a bit of close protection work for Paul. Well not work as such."

[54] Written submissions were filed before the learned trial judge by counsel on behalf the appellant. In paragraph [12] of those submissions the appellant's case was articulated in terms that he disputed that his actions were intended to stir up hatred or arouse fear nor, having regard to all the circumstances, was hatred likely to be stirred up or fear aroused. Reference was also made to the fact that there was no evidence whatsoever of any complaints being made about the literature that was distributed, nor has there been any evidence of trouble of any sort ensuing as a consequence of the literature in question. In addition, at paragraph 13 of the written submissions the appellant maintained that the prosecution was inconsistent with Article 10 ECHR rights. The appellant made the case that the prosecution failed to establish the burden to the criminal standard that the offence was made out.

[55] The prosecution submissions refer to the fact that Article 10 of the ECHR is a qualified right and maintained that any interference was justified for the prevention of crime pursuant to Article 10(2). In summation, the prosecution suggested that:

> "The real question for the court is whether having regard to the deep-seated nature of the rights both at common law and under the Convention and interpreting the words with that in mind the accused have crossed the boundary. The prosecution submit that in the circumstances of this case the accused plainly have crossed the boundary into criminality."

The learned trial judge's ruling

[56] We have been provided with the transcript of the hearing on 3 March 2000. In that the submissions of both counsel are recounted. In addition, we observe that counsel for Mr Golding also made oral submissions which raised the issue of political speech in his case.

[57] The learned trial judge provided an *ex tempore* ruling. In that she said that she had read the leaflet in its entirety and the skeleton arguments. She identifies two questions as follows:

> 1. Is the leaflet or does it contain abusive or insulting material?
>
> 2. Did the defendants intend to stir up hatred or, having regard to all of the circumstances, hatred was likely to be stirred up or fear aroused thereby?

[58] In answering the questions she set herself the learned trial judge found as follows:

> "Having read the document in its entirety and – and applying normal common sense values to the language employed in the document, I answer both of those questions in the affirmative."
>
> The only issue, then, is for the court to determine are the contents of the leaflet protected by Article 10 of the European Convention on Human Rights?
>
> I am satisfied, having considered all of the material placed before me and heard the very helpful submissions of counsel, that, having regard to the rights of freedom of expression both at common law and under the Convention, the contents of the leaflet have crossed the boundary and therefore, in essence, I am in agreement with the conclusions of the District Judge. I, therefore dismiss the appeal – appeals against conviction."

[59] The learned judge then deals with the sentencing which we have set out above. In some cases the severity of the sanction is a relevant factor in determining whether there has been an interference with Article 10 rights however that is not at issue in this case.

[60] In her formulation of the case stated the learned trial judge said that she had not been referred to the decision of Maguire J in *Jolene Buntings' Application* "which contains between paragraphs [37] and [44] a careful analysis of the impact of Article 10 of the Convention on certain types of speech." She makes reference to the fact that this decision refers to "political speech" and she comments that:

> "None of the authorities this court was referred to dealt with exactly the same offence faced by the appellant in this case. They were however of assistance to me and illustrated the protection afforded by Article 10 of the ECHR."

Consideration

[61] This case raises important issues in what is a complex and developing area of law concerned with hate speech. We note that the Law Commission in England & Wales has recently reported in this area. Chapter 10 of that report makes specific reference to the so called "stirring up" offences under public order legislation. It follows that cases of this nature require some considerable care and attention and application of the domestic and European case law which must be applied to the particular facts. We recognise that the parties and the learned trial judge did not have the benefit of some of the authorities we have mentioned as these have issued since the decision was made. Also, whilst domestic and European law applies, there

is clearly an overlap between these two sources of law given that a criminal offence in domestic law is synonymous to hate speech as defined by the ECtHR. That makes cases of this nature particularly difficult for courts to decide.

[62] We are dealing with this appeal by way of case stated. That is a method of appeal, long established, which is confined to determination of questions of law. The characteristics of a case stated appeal are well known in this jurisdiction. In *Emerson v Hearty* [1946] NI 35 the Court stated that "the task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the trial Judge. It does not fall within the province of this Court." This principle has been reiterated most recently in *James P Corey Transport Limited and Owen Jacobson v Belfast Harbour Commissioners* [2021] NICA 6. Of course we note that these cases did not involve Convention rights.

[63] In *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23 the Supreme Court determined the correct appellate test when Convention rights and issues of proportionality arise in a case stated. At paragraph [37] of that decision the court said that:

> "It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on questions of law."

[64] The Supreme Court also considered what the correct appellate test is in appeals by way of case stated involving Convention rights and issues of proportionality. The test in the House of Lords case *Edwards v Barstow* [1956] AC 14 was approved. Therefore, an appeal will be allowed where an error of law material to the decision reached was apparent on the face of the case or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts. (Reference paragraph 54 of *Zeigler*). Therefore, the Supreme Court decided that an appellate court should not conduct the proportionality assessment itself.

[65] The Court of Appeal's powers on a case stated are specified in section 38(f) of the Judicature Act 1978 ("the Judicature Act"). This provision specifically allows the court to remit or amend a case stated with "such declarations or directions as the court may think proper, for hearing and determination by the original court or for re-statement or amendment or for a supplemental case to be stated thereon." Although empowered by Section 38(e) of the Judicature Act to exercise wider powers on appeal including the power to "draw any inference of fact which might have been drawn" we do not consider that the utilisation of this power is appropriate in an appeal of this nature. Therefore, this court rejects the tentative suggestion made by counsel that we would make findings of fact or inferences ourselves. That is for the tribunal of fact in this instance the County Court Judge. We can only proceed on the basis of the facts found by the learned trial judge. It is on that basis we proceed to answer the question of law.

[66] The appellant has been convicted of a public order offence. The domestic law at issue, predates the Human Rights Act but it must be read in light of that legislation. By virtue of the domestic and European law there were a number of questions which the judge had to answer on the basis of the evidence before her. As we have already noted the evidence in this case was agreed. However, that fact does not absolve the judge of determining the salient issues applying the law to the facts of the case. Having considered the reasoning provided by the learned trial judge we are not convinced that she conducted an adequate analysis of all of the issues.

[67] The proper approach flows from the European cases we have discussed in this judgment. These cases highlight how the ECtHR has examined the domestic courts decisions in cases of this nature. The ECtHR affords a margin of appreciation to States but maintains a final supervisory jurisdiction. It is clear from the cases that a deciding court has to examine the case with a particular regard to the nature and wording of the impugned statements, the context in which they were published including whether they can be categorised as political speech, and their potential to lead to harmful consequences which in this case relate to both fear and hatred as defined in the Order in Article 8.

[68] We can see that domestic and Convention considerations overlap however we consider that the methodology adopted by the learned trial judge was broadly correct as she asked herself the core questions required to establish the offence under domestic law, and then she considered compatibility with the Convention. In our view the compatibility of the conviction with Article 10 depends on whether interference is necessary by virtue of a pressing social need which must be one of the legitimate aims found in Article 10(2). If that is established the cases demonstrate that an overall view of the case is required to determine whether the interference is proportionate to the legitimate aim taking into account context, intention, status of the perpetrator, form and likely impact of the speech and severity of the sanctions.

[69] The first part of the domestic statutory test under the Order is not at issue here, namely that the appellant distributed the leaflets in question. Thereafter the statute requires consideration of the content of the leaflet. As the evidence was agreed this is a matter of pure analysis for the judge. The subject matter of the leaflet refers to an ethnic group of Roma people who may be adversely affected by the material. Equally it may be established that hatred towards the Roma community has been caused by those who distributed the material. These are issues for the deciding court to determine having considered the evidence.

[70] The next part of the domestic statutory test requires the judge to decide whether the appellant intended to stir up hatred or arouse fear. The first limb is subjective which means that it must be established on the basis of the evidence that the appellant intended the action. If intention cannot be established there is another option as the offence may be established if a judge can find that that hatred is likely to be stirred up or fear is likely to be aroused "in all the circumstances." This second

limb involves the application of an objective test. There is an important distinction between the two limbs which is unanswered in the ruling of the learned trial judge as the judge has simply answered the question in the affirmative without explaining how the two limbs are or are not made out.

[71] The conviction of the appellant also represents an interference with the right to freedom of expression in Article 10 and so any consideration must analyse the Convention requirements. The interference is prescribed by law, namely the public order legislation. However, any interference must be necessary by virtue of a legitimate aim and proportionate to that aim. The legitimate aims for necessary interference are exhaustively set out in Article 10(2).

[72] It is for the State represented by the prosecution in this case to convince the court of the need for interference. The prosecution in its written submissions argued that the justification for interference with the right was protection from crime and disorder. The learned trial judge has not analysed this justification in any respect and needed to do with the benefit of evidence about the effects and impact of this speech. During this appeal reference has been made to an alternative justification namely protection of the rights and reputation of others however that has not been examined by the deciding court.

[73] We also point out that consideration of the question whether or not the speech was political speech was also required in this case. This is because determining the extent to which the speech may contribute to a debate of public interest is a core criterion in analysing whether an interference is proportionate. There is also limited scope under Article 10(2) for restrictions on political speech or on questions of public interest. Whether a restriction is justified will depend on the facts of each case.

[74] The decision of Maguire J in *Jolene Bunting's Application* to which we have referred provides an excellent analysis which is likely to be of assistance in examining this issue alongside the decisions of the ECtHR we have discussed above. The subject matter of the leaflet refers to an ethnic group of Roma people who may be adversely affected by the material. Equally it may be established that hatred towards the Roma community has been caused by those who distributed the material. These are issues for the deciding court to determine having considered the evidence.

[75] The cases highlight the fact that the concept of political speech is broadly interpreted. It can mean speech on a matter of general political interest. It is not confined to politicians and can therefore cover matters of general concern and public discourse. In this case the prosecution maintained that the speech went beyond an acceptable boundary given the highly pejorative wording of the leaflet directed against the alleged actions and characteristics of an ethnic minority group of people living in the local area. The appellant's case was that his actions were based on a call by concerned residents to discuss matters of public importance associated with immigration into the local area having been allegedly failed by local politicians and

police. He was clearly associated with a political group albeit he said that he was not a member of Britain First. Unfortunately, there is no consideration and balancing of these competing perspectives in the judgment of the learned trial judge. Rather, she has made an assessment of the leaflet which is fine but she has not considered the context in which the speech was delivered or the impact and consequences flowing from it. The learned trial judge has focussed on the form and tenor of the speech without analysing it in context and without attempting to assess the potential of the speech to provoke any harmful consequences with due regard to the political and social background in which the speech was made and the scope of its reach.

[76] Having failed to take into account all factors the reasons currently provided cannot be regarded as relevant and sufficient to justify the interference with the appellant's freedom of expression. The question whether the individual actions of the appellant are outweighed by wider community interests has not been answered. Consequently, the proportionality of any interference with the Article 10 Convention right to freedom of expression has not been properly assessed.

[77] The context of each case will determine the outcome. In cases where there clearly are competing interests as here, there is a strong imperative to carefully consider the arguments and analyse the facts in order to strike a fair balance and reach a Convention compliant outcome. Whether or not offending speech is criminal will depend on a careful analysis of the facts of each case applying the law and crucially any interference with this fundamental Convention right must be supported by relevant and sufficient reasons.

[78] Accordingly, having examined the decision of the learned trial judge we have concluded that the conviction is not compatible with Article 10 of the Convention as relevant and sufficient reasons have not been provided to justify the conviction.

Disposal

[79] We answer the question posed in the case stated as presented to us – No.

[80] In light of our answer to the case stated we consider that the proper course is to remit the case to the learned trial judge with a direction that she provide relevant and sufficient reasons. We trust that this judgment will provide guidance as to what is required. The learned trial judge will be able to consider the relevant European case law. We direct that counsel prepare updated legal arguments and apply for a date to appear before the learned trial judge to make submissions dealing with the legal issues we have raised.

[81] In our view the following matters remain to be dealt with by the learned trial judge. We set this out by way of the following questions:

(i) Whether the material was threatening, abusive or insulting.

(ii) Whether under the first limb of the statutory test the appellant intended to stir up hatred or arouse fear.

Or, under the second limb whether hatred was likely to be stirred up or fear aroused in all of the circumstances.

(iii) Whether this was political speech.

(iv) Whether or not any interference with freedom of expression, which would be occasioned by conviction, was necessary on the basis of a legitimate aim found in Article 10(2) of the Convention.

(v) Whether any interference was proportionate, balancing individual rights against the public interest bearing in mind the entire context and the severity of the sanction.

(vi) In addition to the above the learned trial judge must provide relevant and sufficient reasons to justify any interference with the right to freedom of expression.