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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL BY WAY OF CASE STATED PURSUANT TO ARTICLE 6(1) OF THE COUNTY COURT (NORTHERN IRELAND) ORDER 1981 AND ORDER 32 RULE 5 OF THE COUNTY COURT RULES (NORTHERN IRELAND) 1981

Between:

MATTHEW CAVAN

Plaintiff/Respondent

and

JOLENE BUNTING

Defendant/Appellant

_____

Mr Lavery KC with Mr McLean (instructed by Brentnall Legal Solicitors) for the Defendant/Appellant
Ms Quinlivan KC with Ms Rice KC (instructed by Phoenix Law Solicitors) for the Plaintiff/Respondent

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Before: Keegan LCJ, Treacy LJ and McLaughlin J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This appeal arises out of civil proceedings which took place in the county court and led to an interim and full injunction being granted against the defendant pursuant to Articles 3 and 5 of the Protection from Harassment (Northern Ireland) 1997("the 1997 Order"). Judge Harmer has stated two questions for this court by way of requisition, namely:

(a) Was I correct in law to make the order based on my findings of material fact, the legal test to be applied to the impugned conduct and taking into account the defendant's rights under article 10 of the European Convention on Human Rights ("ECHR") and section 12 of the Human Rights Act 1998?

(b) Was the order sufficiently particularised to be effective in law to bind the defendant to conduct herself in such a way so as to avoid breaching same?

[2] The case stated as currently framed followed a previous judgment of this court delivered on 21 January 2025 and 20 February 2025 unreported, which highlighted inadequacies in the first requisition. Now we have the benefit of a comprehensive requisition, agreed facts and the judge's finding of facts which we set out in the following sections of this judgment.

The agreed facts

[3] On 31 July 2022, Mr Cavan ("the plaintiff") was present at the MAC Belfast working at a children's storytime event in his stage drag persona "Cherrie Ontop." On the same date Ms Bunting ("the defendant") also attended at the MAC, along with members of "Parents against Grooming", to protest against the event.

[4] On 1 August 2022, the defendant told the Irish News the protest was in "opposition to child grooming" and "our message is simple … leave our kids alone." In this interview, the defendant did not reference the plaintiff or Cherrie Ontop.

[5] On 2 August 2022, the plaintiff gave an interview to Belfast Live in which it was reported "a Belfast drag queen says protestors who spoke out against an event on Sunday will not put him off." The plaintiff accepts that he did not come into direct contact with the defendant or any protestor at the MAC Belfast on 31 July 2022.

[6] The defendant posted a video on 2 August 2022 entitled "Share this Video (sic) far and wide!!" The plaintiff accepted the video involved the defendant in dialogue with a counter protestor. Within the video the defendant can be seen holding a poster that says, "Hey! Drag Queens leave those kids alone." The defendant remarks on the video that drag queens in London have been exposed as paedophiles. This was said to relate to reporting by the Daily Mail Online, on 20 July 2022, about inappropriate comments made by a drag queen in London, Sharon Le Grand, while performing at River Stage Festival.

[7] On 4 August 2022, the News Letter published a story entitled "Drag Queen: Storytime Libraries Northern Ireland praises practice of drag performers reading to children." Within the article it was referenced that "Northern Ireland Libraries has spoken warmly of the drag queen storytime movement, saying such events seemed to foster "positively, diversity and inclusion amongst children". It comes amid renewed focus on the practice of having drag performers read to youngsters, after objections were raised to one such event in Belfast MAC Theatre. The movement (also known as 'Drag Queen Storytime') has spread across America and the UK in the last several years, via gay/transgender/non-binary activists." Later in the article it refers to a previous incident of some notoriety which involved a different person who also performed in storytime reading as a drag queen but who had also been

recorded making comments and participating in off-stage activities which it was not disputed were of a shocking nature and were likely to be offensive to many people.

[8] On 4 August 2022, the defendant posted a tweet tagging @LibrariesNI, stating "Parents against Grooming: @LibriariesNI would need to be careful (sic) what they are seen to be supporting, or they will face a backlash from angry parents." On the same date, the defendant posted a tweet directed at Mr Jim Gamble, CEO of INEQE Safeguarding Group saying, "Surely this is a child safeguarding issue?"

[9] On 5 August 2022, the plaintiff gave an interview with UTV about the MAC event, in which he told UTV about the abuse he experienced following the event.

[10] On 7 August 2022, the defendant published a tweet on her Twitter account with text that read "kids should be learning their ABCs … not their LGBTs."

[11] Also, on 7 August 2022, the defendant posted a video to Twitter and YouTube entitled, "WATCH & SHARE: Drag Queen Storytime Honest and Special." The following can be heard on the video. The plaintiff in his interview to UTV talking about his event at the MAC theatre, with commentary from the defendant in which she talked about the other drag queen performer who had engaged in shocking behaviour, together with a description of that behaviour. She also referred to other shocking comments made by a different individual who also performed as a drag queen who had been recorded as having made comments signifying sexualised behaviour towards children and whose show had subsequently been banned by the National Theatre. There was further footage of the plaintiff's interview to UTV in which he talked about his show, but which had been edited to include a deepening of the plaintiff's voice. The defendant then commented "Parents, drag queens don't just want to read stories to your children. Their agenda is clear for all to see. We must stand against the sexualisation of our children. Leave our kids alone." An image of the protest outside the MAC with pictures of people holding posters called "Parents against Grooming" and "Hey drag queens leave these kids alone" was included. Also included was a screenshot of the plaintiff's UTV interview with his name in a text box at the bottom followed by his stage name Cherrie Ontop. The same screenshot showed an image of the plaintiff in his underwear, and a similar image was overlaid with an image of a wolf. An image that is entitled "the dark side of the groom" which depicts light passing from the left through a prism labelled "normal child" and on the right a rainbow under the heading "groomers." Also included was a screenshot of the Cherrie Ontop Twitter account which "liked" postings with somewhat vulgar homosexual comments.

[12] The plaintiff gave an interview to Pink News two days after the event in the MAC. That interview was published on 19 August 2022 and in the interview the plaintiff referred to protests at the MAC event as anti-LGBT+ protests. The plaintiff more generally linked protests to storytime events to what was going on in United States and said that, in his personal opinion, it was fascist and extreme right-wing Christians that were fuelling the protest.

[13] Both parties gave evidence when the case proceeded to full hearing on 13 May 2023. Under cross-examination, when asked to explain the video of 7 August 2022 referred to above, the defendant stated, "well the plaintiff comes across in that video as if he is very innocent and sweet and nice and my point of the wolf is that don't trust everyone that looks nice, you know that wolf isn't implying that the plaintiff was anything, the wolf is implying that you shouldn't trust everyone who says nice things."

[14] The defendant accepted under cross-examination that the purpose of the video was to highlight to society the risk of paedophilia and children being groomed and that included the plaintiff's photograph and the image of a wolf. When asked whether she expected anyone watching that video to think that she was not pointing the finger at the plaintiff and saying paedophilia grooming equals him, her response was to state that the plaintiff was half-naked in the photographs. Thereafter, the defendant stated that the video was not about the plaintiff, it was about the safeguarding of children and what had been going on at drag queen storytime and that there were drag queens out there who did sexualised shows five days a week and one day a week were reading to children. When asked under cross-examination if someone looking at the video could make the connection that paedophile groomer equals the plaintiff, the defendant replied, no. The defendant also replied no when asked if she saw anything wrong with the video.

[15] When asked by the judge, "When did you first become aware that the plaintiff is a drag queen that is doing the story telling?" The defendant replied, "When UTV put his name up, I didn't actually know his name, however, I'd seen photos of him as Cherrie Ontop before then." When asked what her intention was of posting the video online, the defendant stated, "I simply wanted to let parents know what was going on with the plaintiff." She stated that having seen the UTV interviews, she had access to his social media accounts including his Instagram accounts

[16] During his evidence the plaintiff accepted that the defendant had never directly sent him hateful messages but said that he had received the death threats and nuisance calls which he attributed to the fact that she had posted the video "Watch and share: Drag Queen Storytime Honest and Special" He stated that the defendant has a large following who he believed sent him abusive messages. The plaintiff accepted that he did not bring defamation proceedings against the defendant. The plaintiff stated in evidence that when interviewed by Pink News he was talking about protesting drag shows in general which included the protest at the MAC.

Court proceedings

[17] On 9 August 2022, the plaintiff sought and was granted an *ex-parte* injunction before the judge to restrain the defendant, while acting on her own or as part of a group, from harassing him. The interim injunction required, inter alia, that she

remove immediately and refrain from posting a video entitled "Watch and share Drag Queen Storytime: Honest and Special" from YouTube and all other social media platforms.

[18] On 9 August 2022, the proceedings and *ex-parte* order were served on the defendant. However, the defendant continued to post and share the video of 7 August 2022 on a number of social media platforms from the date of the injunction until the date of committal proceedings.

[19] On 11 August 2022, after the grant of the injunction, the defendant posted a tweet stating, "Breaking news, I have been served legal papers, a drag queen is suing me for £5,000 in damages for exposing Drag Queen Storytime."

[20] On 12 August 2022, the plaintiff initiated committal proceedings against the defendant.

[21] On 2 September 2022, the defendant posted a tweet "Update, I'm in court on Monday 5 September, things have escalated and I could be sent to prison. My crime exposing the sinister agenda between drag queen story events. I will stand my ground and voice my beliefs, and I will never never surrender."

[22] On 5 September 2022, the defendant removed the posts which she had been ordered to remove and accepted that she had breached the interim injunction order.

[23] On 12 September 2022, the judge found the defendant in contempt of court for breach of the interim injunction and imposed a four-month conditional discharge. The plaintiff appealed that order on the basis that the court had no power to impose a conditional discharge. On appeal the defendant accepted the judge had no power and consented to the case being remitted to the judge.

[24] On 22 May 2023, following the full hearing the judge made a permanent injunction to run for a period of five years in the following terms:

> "The court does order as follows:
>
> An injunction to restrain the defendant whether acting on her own or as part of a group of persons on her behalf or on her instructions or with her encouragement from:
>
> (a) Harassing, assaulting, molesting or otherwise interfering with the plaintiff, by doing acts calculated to cause him harm or distress whether directly or indirectly.
>
> (b) Keeping in hers or another's possession, any means including hard copy or digital, any data

belonging to the plaintiff, instead ensuring that the data is destroyed and deleted in its entirety with specific reference to, but not exclusively, all photos and images of the plaintiff.

(c) Misusing the plaintiff's data.

(d) Releasing and distribution aforementioned data belonging to the plaintiff.

(e) Threatening to release aforementioned data of the plaintiff or spreading mistruths about the plaintiff.

(f) Communicating with or about the plaintiff, directly or indirectly, by text, phone call, letter, email, social media, to include but not limited to Facebook, Twitter, SnapChat, Instagram or by any other means.

(g) Immediately remove and refrain from posting the video entitled "Watch and Share: Drag Queen Storytime Honest and Special" from YouTube and all other social media outlets and platforms that same has been posted and shared on."

[25] On 5 June 2023, the defendant was fined £750 by the judge in respect of the contempt. This sentence was subsequently appealed to the Court of Appeal where the sentence was affirmed.

Judge's finding of facts

[26] Having heard the evidence of both parties and having received legal submissions on the law the judge made the following findings as set out at paras [50]-[57] of the case stated:

"50. I accepted as fact that the defendant's initial intention, when attending the protest outside the MAC, was to express her general concerns about the event. I find that the defendant's posts and actions which followed the protest were targeted at the plaintiff, including:

(a) The article in the News Letter which specifically referred to the plaintiff and included his views on the benefits of the events at the MAC.

(b) The Tweet which the defendant posted implied that there was a link between the plaintiff and a drag queen at The MAC event and an offensive quote. I find the plaintiff was the target of this post.

(c) The video entitled, "Watch and Share: Drag Queen Storytime Honest and Special" from YouTube. The video makes no reference to The MAC. There is a mock interview where the defendant has used audio recordings of the plaintiff, and the defendant then makes statements in response to the recordings.

(d) The post in which the defendant utilised pictures of the plaintiff and the defendant and then superimposed a picture of the plaintiff giving the media interview. There is a picture of the plaintiff in drag, and it is followed with a picture of a wolf in make-up. I found the plaintiff to be the clear target of this post.

51. When commenting on the News Letter article in which the plaintiff was named, the defendant tweeted "Parents against Grooming @LibrariesNI would need to be careful what they are seen to be supporting, or they will face a backlash from angry parents. This is a quote from Drag Queen Storytime: Children need to open their minds, their hearts and their legs #leave our kids alone." I found that the defendant was linking this quote to the plaintiff's event and accusing him of grooming children.

52. In the video on 7 August 2022, the defendant states, "Parents Drag Queens don't just want to read stories to your children, their agenda is clear for all to see." The defendant then altered the plaintiff's images and his voice and I found that in doing so, she was linking him to child grooming and paedophilia.

53. The defendant uses answers the plaintiff gave in an interview to UTV live but then edited that

interview. The plaintiff's voice was deepened and edited which I found to be an effort to make the plaintiff sound sinister. The words "I just want to read books to kids" was repeated and then overlayed with older images taken from pictures of the plaintiff in his underwear. It was taken by the defendant from the plaintiff's Instagram account and linked to his reading of stories to children. This was then followed by several images of the plaintiff in make-up and then immediately follows with an image of a wolf in make-up.

54. When the defendant was asked to explain the relevance of the image of the wolf, she gave the analogy of a wolf in sheep's clothing. I found this was symbolic for someone who outwardly appears harmless or friendly but hides the fact that they are evil or hostile. The defendant was stating the plaintiff was the wolf and linking him to criminal acts such as child grooming and paedophilia.

55. I accepted the plaintiff's oral evidence that because of the defendant's posting he had received a number of serious threats which were being investigated by the PSNI, and as a result found this to be harassing conduct towards the plaintiff by the defendant.

56. I also accepted the plaintiff's evidence that he had fears for his safety and he been prescribed high dose anxiety medication by his GP which he had not been prescribed for a number of years. I found that this was a result of the actions of the defendant.

57. As a result of the postings, three gigs have been cancelled and organisations such as Library NI are now refusing to work with the plaintiff which I find to be as a result of the actions of the defendant."

The case stated – consideration of question 1

[27] There is no issue between the parties on this case stated as to the relevant law. Furthermore, there is no dispute that the judge was cognisant of and applied the

relevant law. This reality raises a real question as to whether a case stated was in fact the correct route to take in this case where a county court appeal was open to the applicant and would have provided a rehearing. However, we have proceeded to consider the arguments to determine the question whether the judge was correct to grant the injunction she did on the basis of the evidence before her. As to this, Mr Lavery KC expanded the case made in his skeleton argument and maintained before us that the judge was wrong, in fact, to find that there had been a "course of conduct" (a point never raised before), targeted at the plaintiff, of sufficient seriousness to meet the threshold for harassment. In addition, Mr Lavery submitted that the restriction on the defendant's article 10 ECHR rights to freedom of expression comprised in the finding of harassment, was disproportionate and unjustified.

[28] The reply to this argument made by Ms Quinlivan KC on behalf of the plaintiff was that the judge had made a decision on fact which this court should not reverse and, she had correctly applied the law. She contended that the judge had been entitled to find that there was a course of conduct and that it amounted to harassment, as the defendant had not only expressed her opposition to drag queen storytime in general or made comments of an offensive nature, but that her postings had linked the plaintiff personally with child grooming and paedophilia. Hence, she argued that any restriction on the defendant's article 10 ECHR rights was justified. Ms Quinlivan reminded this court of the exacting appellate test on review of factual findings explained in *DB v Chief Constable of Northern Ireland* [2017] UKSC 7 at para [78] and that "an appellate court should intervene only if it is satisfied that the judge was "plainly wrong." In addition, we bear in mind the particular focus of the case stated procedure set out in *Edwards v Bairstow* [1956] AC 14.

[29] In order to determine this first question, we turn to the relevant provisions of the 1997 Order, Articles 2, 3, 4 and 5:

> "**Interpretation**
>
> 2.—(1) The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.
>
> (2) In this Order references to harassing a person include alarming the person or causing the person distress.
>
> (3) For the purposes of this Order a "course of conduct" must involve conduct on at least two occasions and "conduct" includes speech.

(4) In this Order "statutory provision" has the meaning assigned by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

Prohibition of harassment

3.—(1) A person shall not pursue a course of conduct—

(a) which amounts to harassment of another; and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Paragraph (1) does not apply to a course of conduct if the person who pursued it shows—

(a) that it was pursued for the purpose of preventing or detecting crime;

(b) that it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Offence of harassment

4.—(1) A person who pursues a course of conduct in breach of Article 3 shall be guilty of an offence.

(2) A person guilty of an offence under this Article shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both; or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

Civil remedy

5.—(1) An actual or apprehended breach of Article 3 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where—

(a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment; and

(b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction,

the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under paragraph (3) may be made—

(a) where the injunction was granted by the High Court, to a judge of that court; and

(b) where the injunction was granted by a county court, to a judge of that or any other county court.

(5) The judge to whom an application under paragraph (3) is made may only issue a warrant if—

(a) the application is substantiated on oath; and

(b) the judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where—

(a) the High Court or a county court grants an injunction for the purpose mentioned in paragraph (3)(a); and

(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction,

he shall be guilty of an offence.

(7) Where a person is convicted of an offence under paragraph (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

(8) A person cannot be convicted of an offence under paragraph (6) in respect of any conduct which has been punished as a contempt of court.

(9) A person guilty of an offence under paragraph (6) shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both."

[30] In addition, article 10 of the ECHR is engaged. This is a qualified right given the terms of article 8(2).

"**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."

[31] Section 12(4) of the Human Rights Act 1998 also provides:

> "(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

[32] Various authorities from England & Wales have been put before us but we have derived most assistance from three cases. The first is a decision of the Court of Appeal in England & Wales in *Thomas v News Group Newspapers* [2001] EWCA Civ 1233. It concerned an application to strike out a claim for harassment which arose out of three news articles about the plaintiff which were published in The Sun newspaper. The court considered the legal ingredients for a claim of harassment and analysed the approach to such a claim where the conduct complained of consisted of publications or words alone. It recognised that a person's rights under article 10 may include the ability to make comments which were offensive, shocking or even where it was foreseeable that they would cause distress. When assessing whether words alone might constitute harassment, the court identified the need for some exceptional circumstances. In the *Thomas* case, the court refused to strike out pleadings on the ground that the publications included racist criticisms of the

plaintiff which were likely to stimulate a racist reaction on the part of readers. It observed:

> "[33] Prior to the 1997 Act, the freedom with which the press could publish facts or opinions about individuals was circumscribed by the law of defamation. Protection of reputation is a legitimate reason to restrict freedom of expression. Subject to the law of defamation, the press was entitled to publish an article, or series of articles, about an individual, notwithstanding that it could be foreseen that such conduct was likely to cause distress to the subject of the article.
>
> [34] The 1997 Act has not rendered such conduct unlawful. In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading, which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.
>
> **[35]** It is common ground between the parties to this appeal, and properly so, that **before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare**." [our emphasis]

[33] The second case which we found to be of assistance was the more recent decision of *Hayden v Dickenson* [2020] EWHC 3291 (QB). It concerned a claim for harassment, defamation and misuse of private information and arose out of social media posts made by the defendant. Mr Justice Nicklin at para [44] helpfully summarises the relevant legal requirements for a claim of harassment which we think it useful to set out in full as follows:

> "[44] The principal cases on what amounts to harassment are: *Thomas -v- News Group Newspapers* [2002] EMLR 4; *Majrowski -v- Guy's and St Thomas's NHS Trust* [2007] 1 AC 224; *Ferguson -v- British Gas Trading Ltd* [2009] EWCA Civ 46; *Dowson -v- Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB); *Trimingham -v- Associated Newspapers Ltd* [2012] EWHC 1296 (QB); [2012] 4 All ER 717; *Hayes -v- Willoughby* [2013] 1 WLR 935; *R -v- Smith*

[2013] 1 WLR 1399; *Law Society -v- Kordowski* [2014] EMLR 2; *Merlin Entertainments LPC -v- Cave* [2015] EMLR 3; *Levi –v- Bates* [2016] QB 91; *Hourani -v- Thomson* [2017] EWHC 432 (QB); *Khan -v- Khan* [2018] EWHC 241 (QB); *Hilson -v- Crown Prosecution Service* [2019] EWHC 1110 (Admin); and *Sube -v- News Group Newspapers Ltd* [2020] EMLR 25. From these cases, I extract the following principles:

(i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; '*a persistent and deliberate course of targeted oppression*': *Hayes -v- Willoughby* [1], [12] *per* Lord Sumption.

(ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2: *Majrowski* [30] *per* Lord Nicholls; *Dowson* [142] *per* Simon J; *Hourani* [139]-[140] *per* Warby J; see also *Conn -v- Sunderland City Council* [2007] EWCA Civ 1492 [12] *per* Gage LJ. A course of conduct must be grave before the offence or tort of harassment is proved: *Ferguson -v- British Gas Trading Ltd* [17] *per* Jacob LJ.

(iii) The provision, in s.7(2) PfHA, that '*references to harassing a person include alarming the person or causing the person distress*' is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it: *Hourani* [138] *per* Warby J. It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results: *R -v- Smith* [24] *per* Toulson LJ.

(iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective: *Dowson* [142]; *Trimingham* [267] *per* Tugendhat J; *Sube* [65(3)], [85], [87(3)]. '*The Court's assessment of the harmful tendency of the statements complained of must always be objective and not swayed by the subjective feelings of the claimant*': *Sube* [68(2)].

(v) Those who are '*targeted*' by the alleged harassment can include others '*who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it*': *Levi –v- Bates* [34] *per* Briggs LJ.

(vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that they felt offended or insulted: *Trimingham* [267]; *Hourani* [141].

(vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes '*alarming the person or causing the person distress*'. However, Article 10 expressly protects speech that offends, shocks and disturbs. "*Freedom only to speak inoffensively is not worth having*": *Redmond-Bate -v- DPP* [2000] HRLR 249 [20] *per* Sedley LJ.

(viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom

of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality: *Hourani* [142]-[146]. The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the '*ultimate balancing test*' identified in *In re S* [2005] 1 AC 593 [17] *per* Lord Nicholls.

(ix) The context and manner in which the information is published are all-important: *Hilson -v- CPS* [31] *per* Simon LJ; *Conn* [12]. The harassing element of oppression is likely to come more from the manner in which the words are published than their content: *Khan -v- Khan* [69].

(x) The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amount to harassment: *Hilson v CPS* [31] *per* Simon LJ.

(xi) Neither is it determinative that the published information is, or is alleged to be, true: *Merlin Entertainments* [40]-[41] *per* Elisabeth Laing J. '*No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do*': *Kordowski* [133] *per* Tugendhat J. That is not to say that truth or falsity of the information is irrelevant: *Kordowski* [164]; *Khan -v- Khan* [68]-[69]. The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under s.1(3)), particularly when considering any application interim injunction (see further [50]-[53] below). On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger: *ZAM -v- CFM* [2013] EWHC 662

(QB) [102] *per* Tugendhat J. The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.

(xii) Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: *Thomas -v- News Group Newspapers* [34]-[35], [50] *per* Lord Phillips MR; *Sube* [68(5)-(6)]."

[34] In the course of his judgment, Nicklin J also made some additional observations about the type of self-help measures which a person might reasonably be expected to take in response to unwanted social media posts which they found to be distressing or offensive. He considered that the availability and effectiveness of these measures would form an important part of any proportionality assessment. In particular, at [73]–[76], he emphasised the need for some level of personal self-resilience and the use of any available social media blocking functions to minimise further exposure.

[35] The third authority of assistance was *McNally v Saunders* [2021] EWHC 2012 (QB). Like *Thomas*, it concerned an application to strike out a claim for harassment arising out of a blog posted by the defendant on a Facebook group and on Twitter. The judgment of Mr Justice Chamberlain repeats the law as stated in *Hayden v Dickenson* and *Thomas* but also refers to the protection afforded by article 10 of the ECHR, replicated in section 12(4) of the Human Rights Act 1998, which we address below.

[36] At para [44] of *McNally*, Chamberlain J referred to the enhanced protection which applies to political speech as follows following from *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin). Para [69] also refers to the modern context where freedom of expression issues arise:

"69. In the social media context, it can be more difficult to distinguish between speech that is 'targeted' at an individual and speech that is published to the world at large. A series of tweets which are directed 'at' someone might be regarded as conduct targeted at them. But the ability to 'block' a user means that users can avoid being 'targeted' in this way. A user who seeks to evade a

'block' by adopting a different handle might be regarded as 'targeting' the individual…
…"

[37] Again reflecting modern world realities, at paras [71] and [79] the judge states that "the enhanced protection which Article 10 gives to such expression is not limited to those in the mainstream or conventional press or media. Even if it were possible reliably to identify outlets falling into this vague category, there is no reason of principle why publications that fall outside it should, for that reason, receive lesser protection from the law." At para [79], he recognised that the "manner" in which a distressing communication was made, rather than the content of the words used, may also be relevant to an assessment of whether the relevant publication was sufficiently exceptional and hence whether any restriction on the right of freedom of expression was justified. In striking out the pleadings in that case, Chamberlain J. distinguished the facts from those in *Thomas* where the racist wording of the publication and the foreseeable reaction to it amongst readers supplied the element of personal targeting which was found to be sufficiently exceptional.

[38] Returning to the facts of this case, the judge had to decide whether harassment was made out and then whether the granting of an injunction was proportionate and justified given the article 10 ECHR rights of the defendant, also reflected in section 12(4) of the Human Rights Act 1998.

[39] The core question is whether having considered the law the judge correctly applied the law and made findings of fact which resulted in her ultimate outcome. We have considered her analysis of the issues which is found at para [71]-[78] of the case stated. Having done so it is clear that the judge found that the defendant engaged in a course of conduct by virtue of two activities. The first event in the course of conduct was the tweet posted by the defendant on 4 August 2022, after publication the same day of an article in the Belfast News Letter about the practice of drag queen storytime reading to children. The article had referenced offensive comments and actions by other persons associated with the practice and also the recent event at the MAC at which the plaintiff had performed. The News Letter article referred to the fact that Libraries NI had spoken warmly of the practice of drag queen storytime. The defendant's tweet of 4 August 2022 referenced the position adopted by Libraries NI but also referenced some of the offensive comments made by others associated with the drag queen storytime practice. The judge found that the tweet implied that there was a link between the event at the MAC where the plaintiff had performed and offensive comments by the other person. She concluded that the plaintiff was the target of the tweet and that the defendant had linked the plaintiff to the offensive comments and had thereby accused him of grooming children.

[40] The second event in the course of conduct was the video posted by the defendant on 7 August 2022, in which the defendant included a mock interview between her and the plaintiff, by editing his UTV interview, including a deepening

of the plaintiff's voice. In the video, the defendant also made comments to the effect that drag queens do not just want to read stories to children, that their agenda was "clear for all to see" and that it was necessary to stand against the sexualisation of children. When this video was combined with the post the same day by the defendant which depicted a picture of the plaintiff with an image of a wolf superimposed and rainbow colours, the judge concluded that, by this conduct, the defendant had stated that the plaintiff was the wolf and had thereby linked him to criminal acts such as child grooming and paedophilia. Both of these actions took place prior to commencement of proceedings. To our mind there was also a number of further events which formed part of the relevant course of conduct and which took place after the interim injunction had been granted, namely the continued re-posting of the video on social media platforms. It was this conduct which led to contempt proceedings. However, the judge's factual finding in relation to the first two events is sufficient to satisfy the legislative requirement that there be two or more incidents to establish a course of conduct in Article 2 of the 1997 Order.

[41] Next, the judge found that the behaviour of the defendant had targeted the plaintiff. Again, we consider that this was a factual finding which she was entitled to reach based on the connections made through a series of the defendant's actions from the tweet of 2 August 2022 to the video of 7 August 2022 and related newspaper and TV coverage. This is all amply explained at paras [51]-[53] of the judge's ruling (which we have set out at para [26] above). The height of the defendant's case was that she did not directly tweet that the plaintiff was a paedophile. However, that is not determinative in circumstances where the defendant made associations with paedophilia and grooming which anyone reading the tweets would have easily worked out and these could be connected to the plaintiff. The case of *Levi v Bates* [2015] All ER D 139 is not a comparable authority that can be relied upon. We consider that the judge was entitled to reach the conclusion which she did concerning the meaning which was to be inferred from the defendant's actions and comments and that it had been targeted at the plaintiff.

[42] The judge then found that the requisite degree of seriousness had been reached, namely that the defendant's conduct had been oppressive and unreasonable. She also found that the plaintiff had been adversely affected by the defendant's actions. He had received threats and had also experienced fears for his own safety, to the extent that he sought treatment from his General Practitioner. These are factual findings which the judge made having heard evidence and which she explains at [54]-[57] of the case stated (at para [26] above) and at [73]-[76]. There is no reason for us to interfere with these findings. The core question was whether the behaviour crossed between that which is unattractive, unreasonable or offensive to that which was oppressive and unacceptable. Since the conduct involved the posting of words and images and associated manipulation of the plaintiff's image and distortion of his voice the behaviour did so cross the line. As noted at para 44 (ix) in the judgment of Nicklin J in *Hayden,* "the context and manner in which the information is published are all-important … The harassing element of oppression is likely to come more from the manner in which the words are published than their

content." In our view, bearing in mind the content and manner of publication of the words and imagery the judge's finding is unimpeachable in circumstances where the defendant has been found to have targeted the plaintiff and suggested that the plaintiff's activity was connected to child grooming and paedophilia.

[43] We consider it to be entirely foreseeable that such conduct was likely to attract public revulsion, hostility and even threats to be directed towards the plaintiff. Indeed, the judge found that this ultimately occurred. We, therefore, consider that the judge was entitled to conclude that the defendant's course of conduct amounted to unlawful harassment. It was clearly the type of abusive behaviour which had been identified in the authorities as capable of supporting a harassment claim. In addition, it is clear that the manner in which the defendant communicated her views, namely editing his interview, abusing his image and distorting his voice, contributed to the assessment that her behaviour crossed the line from mere expression of her views about the practice of drag queen storytime into unlawful harassment and also appears to us to be an exceptional type of case.

[44] The judge then considered article 10 of the ECHR and referred to section 12 of the Human Rights Act. It contains an express domestic statutory recognition of the high level of protection which the Convention places upon the freedom of the press and the freedom of individuals to make public commentary upon matters of public importance.

[45] It is clear from the reasoning set out in the case stated that the judge did not expressly state that the defendant's right to express her opinions about the practice of drag queen storytime enjoyed an enhanced or high level of protection by virtue of article 10 ECHR and/or section 12(4) of the Human Rights Act. However, it is also clear that article 10 is a qualified right and that restrictions on the defendant's rights may be justified where they are proportionate to objectives such as prevention of disorder and crime and the protection of the reputation or rights of others.

[46] The requirements of both the Convention and section 12(4) of the Human Rights Act in the context of harassment claims have been considered in detail in the domestic caselaw which we have identified above. They express the test for determining whether a restriction on free expression in the form of a claim for harassment may be justified. The judge below expressly referred to and applied the decision in *Hayden* and the decision of this court in *King v Sunday Newspapers Ltd* [2011] NICA 8. She also referred to the leading Strasbourg decision of *Nilsen & Johansen v Norway* (1999) 30 EHRR 878 in which the Court emphasised the high level of protection given to the content of political speech and commentary on matters of public interest. Accordingly, we do not find that any failure to refer expressly to the Convention standards in those terms was fatal as it is clear from para [77] that the judge conducted the correct balancing exercise.

[47] This case is framed by its facts. The defendant was quite entitled to participate in a protest against the Drag Queen Storytime event which took place in

the MAC. It is also entirely legitimate for her to express her opposition to the practice of drag queen storytime as a concept, and to repeat those views, even in forceful or shocking terms through other media, including social media. However, she was not entitled to associate the plaintiff with grooming of children and paedophilia by linking him with an individual in England who made an inappropriate comment when engaging in similar activity. The plaintiff cannot be tarred with same the brush. To cast the plaintiff in the same light was a serious slur on his reputation which was not evidenced. It was targeted at him, in a particular manner and as such it is precisely the sort of public commentary from which it is foreseeable that the plaintiff may be the subject of public revulsion, hostility and even threat.

[48] Thus, whilst we reiterate the fact that objection and peaceful protest against this type of activity, as the plaintiff himself recognised, is perfectly valid in a democratic society where there are different views held, the freedom of expression which is engaged cannot cross a certain line. Overall, we consider that the judge's analysis of the law applied to the facts was sound and her decision to order an injunction to restrain further harassment of the plaintiff does not reveal any error of law. Therefore, we answer question 1 of this case stated in the affirmative.

Consideration of question 2

[49] The arguments on this question were not developed either in writing or in oral submissions in any detail. The judge had previously been asked to state a case on the duration of the injunction but declined to do so. We do not see any merit in revisiting that consideration. However, during the hearing, Mr Lavery expanded his case to say that the restrictions and obligations contained within the order were too wide and disproportionate. Helpfully, Ms Quinlivan was prepared to accept that, two and a half years on, some relaxation could potentially be made of the order. We consider this to be an appropriate concession and commend such a pragmatic approach. However, we do wonder why the appellant's position could not have been canvassed in correspondence. More importantly, the injunction order makes express provision for the defendant to have liberty to apply to the county court to vary or discharge the order. We consider that this was the appropriate mechanism by which any dispute about the scope or duration of the injunction ought to have been pursued, at least in the first instance, without the need to bring a case stated to the Court of Appeal with all the consequent cost and time involved.

[50] As to question 2, the order which was made came after a breach of an interim order and ensuing committal proceedings. Hence, we can well see why the judge imposed the terms that she did when she did. We have not heard or read any convincing argument to the contrary. We also consider that the order was proportionate when it was made given the circumstances. We, therefore, answer the specific legal question posed by question 2 in the affirmative.

Conclusion

[51] In conclusion, we note that this case has now been before the Court of Appeal four times in circumstances where a county court appeal by way of rehearing was open to the defendant. In addition, as we have said, there was no issue raised as to the applicable law. In any event, on a case stated, we must follow the factual findings of the trial judge and apply those facts to the law which was not in dispute. Our conclusion is based on facts which were clearly and cogently found and conscientiously applied to the law by the judge. Ultimately, the judge conducted a balancing exercise mindful of the need to make an injunction only when necessary and proportionate given the Convention rights of the defendant. We find no error in her reasoning. In addition, as a proportionality evaluation is under review we have considered the matter ourselves and having done so, we also find that the balance falls in favour of the plaintiff and that the order was proportionate.

[52] To recap the law in this area, members of the public can lawfully object and protest about matters of public interest such as those arising in this case and in which different views will be held, but they cannot cross the line into unacceptable, oppressive and targeted behaviour in a manner such as occurred in this case which involved the dissemination of information suggesting that the plaintiff was involved in child grooming and paedophilia. That clearly goes too far and is a serious attack on anyone's reputation. It is foreseeable that such targeted public commentary and conduct is liable to attract public revulsion, hostility and even threat. This case is an example of the sort of exceptional type of expression which is capable of amounting to harassment.

[53] We will hear the parties as to costs. We will also allow the parties three weeks from today to agree any variation of the order before we finalise this appeal to avoid the necessity and cost of applying back to the county court. If the parties could inform the court of the position, we will deal with this administratively before the final order of this court is issued.