The Miller's Tale continues: A second victory for freedom of expression

The Queen on the application of Harry Miller (Appellant) v The College of Policing (Respondent)

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Ian Wise QC and Michael Armitage acted for Mr Miller, instructed by Sinclairslaw.

References are to paragraphs of the Court of Appeal's judgment.

The judgment is available here.

Overview

On 20 December 2021, the Court of Appeal (Dame Victoria Sharp P giving the judgment of the Court) held that certain parts of the College of Policing's 'Hate Crime Operational Guidance' ("**HCOG**") were contrary to Article 10 of the European Convention on Human Rights ("**ECHR**").

The policy in question was that non-crime hate incidents were required to be recorded by police as such (against the named person allegedly responsible) if the incident is subjectively perceived by the *"victim or any other person to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender"* and irrespective of any evidence of the "hate" element.

The High Court had previously granted the application of the appellant, Mr Harry Miller, for judicial review of the Chief Constable of Humberside's recording of a non-crime hate incident (in respect of Mr Miller) under the HCOG, and the subsequent actions taken in relation to him by officers, including seeking to prevail on Mr Miller not to continue tweeting about

proposed reforms to the Gender Recognition Act 2004. The High Court granted Mr Miller a declaration that certain actions by officers interfered with Mr Miller's right to freedom of expression under Article 10(1) ECHR. See my case note on the High Court proceedings here. This was a challenge to the second part of Julian Knowles J's Order which dismissed the challenge in respect of the lawfulness of HCOG itself

The Facts

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

The Claimant sees himself as taking part in the ongoing debate about reform of the Gender Recognition Act 2004. The Government's 2018 consultation on reforms to that Act proposed replacing the current requirements for obtaining a Gender Recognition Certificate with an approach that places a greater emphasis on the self-identification by a person of their gender. The introduction to the consultation document states *"Trans people continue to face significant barriers to full participation in public life. Reported hate crime is rising. Reported self-harm and suicide rates, particularly amongst young trans people, are extremely concerning. Trans people continue to face discrimination and stigma, in employment and in the provision of public services."* Mr Miller is critical of the Government's proposals for self-identification, but strongly denies being prejudiced against transgender people. The High Court found that some of Mr Miller's tweets "contained profanity and/or abuse".

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

The Appeal

The High Court held that the mere recording of non-hate crime speech did not interfere with Mr Miller's right to freedom of expression within the meaning of Article 10(1). The secondary finding (in case the Court was wrong about the issue of interference) was that the interference, such as it was, was justified within the scope of Article 10(2) because it was sufficiently foreseeable and therefore prescribed by law and because it was necessary in a democratic society.

Mr Miller brought five grounds of appeal. These were:

(1) the judge was wrong to hold that the principle of legality is merely a principle of statutory construction, and therefore wrong to decide that the impugned provisions in HCOG are lawful in the absence of express statutory or established common law authorisation;

(2) the judge was wrong to hold that the approach in HCOG to the mandatory recording of 'non-crime hate incidents' in the absence of any evidence of hate is lawful as a matter of common law;

(3) the judge was wrong to hold that the impugned provisions in HCOG involve no interference with the right to freedom of expression under Article 10(1) of the Convention;

(4) the judge was wrong to hold that the impugned provisions in HCOG satisfy the Convention requirement of "foreseeability", with the consequence that he was incorrect to conclude that any interference with Article 10(1) of the Convention arising from those provisions is "prescribed by law" for the purposes of Article 10(2) of the Convention; and

(5) the judge was wrong to hold that the impugned provisions in HCOG are "necessary in a democratic society".

Relevant Law

Article 10 ECHR protects freedom of expression. It provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Judgment

The Court of Appeal found for Mr Miller on Grounds 3 and 5.

In relation to Ground 3, the Court of Appeal held that the impugned provisions of the HCOG infringed Mr Miller's Article 10(1) rights. The Court concluded that the recording of non-crime hate incidents is plainly an interference with freedom of expression and knowledge that such matters are being recorded and stored in a police database is likely to have a serious 'chilling effect' on public debate (at [73]).

The Court reasoned that *"the principles of law the protect freedom of expression and which underpinned much of what the judge said in support of his conclusion that the police had infringed Mr Miller's rights were matters that should have led to the same conclusion against the College"* (at [71]). Those principles and findings included: (1) Mr Miller's tweets did not even arguably amount to hate speech transgressing criminal law; (2) Mr Miller was contributing to a complex, multi-faceted and important debate; (3) Mr Miller expressed the sort of views also held by many academics; (4) Mrs B's reaction to the tweets was, at times, at the outer limit of rationality; (5) comparatively little official action is needed to constitute an interference with Article 10(1); (6) warning Mr Miller that he may find himself being prosecuted if he continued to tweet had a chilling effect on his right to freedom of expression (at [69] – [70]).

The Court found it instructive to consider Strasbourg' s approach in *Altug Tane Akcam v Turkey* (2016) 62 E.H.R.R. 12 which concerned an editorial opinion in a newspaper. It was held that the ongoing threat of criminal prosecution interfered with the applicant's Article 10 rights by having a chilling effect. Although the risk Mr Miller runs is not one of prosecution, there are nonetheless parallels since Mr Miller belongs to a group of people who could easily be stigmatised for their opinions.

In relation to Ground 5, the Court of Appeal held that the impugned provisions of HCOG were not proportionate because there existed less intrusive measures possible. The Court reasoned that the HCOG sanctioned or positively approved or encouraged conduct which violates Article 10 (at [106]). Whether the interference was justified was to be judged applying the four-stage test from *Bank Mellat v HM Treasury* (No 2) [2014] AC 700 (at [107]). Perception-based recording was held to have a legitimate aim, namely the prevention of disorder or crime and the protection of the rights of others., and there is a rational connection between the measure and its aims (at [108]). However, less intrusive means could have been used to achieve those legitimate aims without unacceptably compromising the achievement of them, which meant it followed in this case that the measure was disproportionate (at [109]). The scope of the conduct that fell to be recorded under the relevant part of HCOG was *"extraordinarily broad"* and the threshold for hostility was low (at [111]). An incident was required to be recorded as a non-crime hate incident based upon perception only, irrespective of whether or not there was evidence to support that perception (at [112]). This meant *"the net for non-crime hate speech is an exceptionally wide one"* (at [117]).

The Respondent revised the relevant parts of the HCOG prior to the Court of Appeal hearing, including such changes as a warning against disproportionate action by the police (at [119]). The Court found that the changes made demonstrate that there was scope for less intrusive measures and in any event did not go far enough (at [122]).

The Court was careful to stress that its judgment did not mean that *"perception-based recording of non-crime incidents is per se unlawful, but that some additional safeguards should be put in place so that the incursion into freedom of expression is no more than is strictly necessary"* (at [122]).

Comment

This judgment, another significant instalment in the Miller's Tale, serves to further emphasise the vital importance of free speech in a democracy.

The Court of Appeal has emphasised that *"the concept of a chilling effect in the context of freedom of expression is an extremely important one"* (at [68]). Dame Victoria Sharp made clear that whilst it often arises in the context of discussions of restrictions on journalistic activity it is *"equally important"* when considering the rights of private citizens to express their views within the limits of the law. It was noted that the right applies with

particular force when views are being expressed on "controversial matters" of public interest.

The judgment is a further reminder that speech cannot be robbed of the protection of Article 10(1) merely by reason of being "opaque, profane or unsophisticated" (see High Court judgment at [69]). Mr Miller captured this point whilst speaking outside of the Royal Courts of Justice stating, *"being offensive is not, cannot and should not be an offence"*.

The case has received significant media interest, including: The Times; The Telegraph; The Guardian; BBC; The Spectator.

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

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