Neutral Citation Number: [2019] EWHC 9 (Admin)

Case No: CO/3306/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/01/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE NICOL

- -

Between :

CAMPAIGN AGAINST ANTISEMITISM	**Claimant**
- and –	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**
- and –	
NAZIM HUSSAIN ALI	**Interested Party**

- -
- -

Sam Grodzinski QC (instructed by **Sonn Macmillan Walker**) for the **Claimant**
John McGuinness QC (instructed by **CPS Appeals and Review Unit**) for the **Respondent**
The Interested Party neither appearing nor being represented

Hearing date: 18 December 2018

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. The Claimant ("the CAA") is a charitable organisation which seeks to counter antisemitism.

2. In this claim, the CAA challenges the decision of the Defendant ("the DPP") to take over and discontinue its private prosecution of the Interested Party ("Mr Ali") under section 5 of the Public Order Act 1986 ("the 1986 Act") for statements he made at a rally which he led in Central London on 18 June 2017. Under section 5, it is an offence to use abusive words within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. The DPP took the view that, in all the circumstances, the words used were not "abusive" within the meaning of that provision so that a prosecution was more likely than not to fail. As a result, under the DPP's policy in respect of private prosecutions, she was bound to take over the prosecution and discontinue it, which she did. The CAA submits that, on the undisputed facts, that decision was irrational. The DPP maintains that the decision was lawful.

3. Before us, Sam Grodzinski QC appeared for the CAA and John McGuinness QC for the DPP; and, at the outset, I thank them for their helpful submissions.

The Law: Freedom of Expression and its Limits

4. Article 10 of the European Convention on Human Rights ("article 10") provides, so far as relevant to this claim:

> "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….
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and 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."

5. Thus, the right is not absolute: freedom of expression may be restricted if and insofar as restriction is prescribed by law and is "necessary in a democratic society for the protection of the rights and interests of others" on one of the identified grounds which include "for the prevention of disorder or crime" and "for the protection of the… rights of others". Article 17 of the Convention – which states that nothing in the Convention

may be interpreted as implying a right to destroy or limit the Convention rights and freedoms to a greater extent than the Convention itself provides – informs the extent to which the freedom of expression may be relied upon (Norwood v Director of Public Prosecutions [2002] EWHC 1564 (Admin) at [40] per Auld LJ).

6. Nevertheless, freedom of expression enjoys a privileged status in the hierarchy of norms within a democratic society, and particularly so in respect of the freedom of political expression. Thus, as Lord Nicholls put it in his leading speech in Reynolds v Times Newspapers Limited [1999] UKHL 45; [2001] 2 AC 127 at pages 200D, 203 and 208A, in balancing interests of which freedom of expression is one, it is the "starting point". Consequently:

> "The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly construed" (Sunday Times v United Kingdom (1979) 2 EHRR 245; (1979) ECHR 1 at [65]).

7. Therefore, although it has been said that the proper meaning of an ordinary word such as "abusive" is a question of fact and not of law (see, e.g., Brutus v Cozens [1973] AC 854 at page 862E-F per Lord Reid; and Director of Public Prosecutions v Clarke (1992) 94 Cr App R 359 at page 366 per Nolan LJ), section 5 of the 1986 Act has to be read in the context of article 10.

8. As originally enacted, section 5(1) provided, so far as relevant to this claim:

> "A person is guilty of an offence if he… uses threatening, abusive or insulting words or behaviour, or disorderly behaviour…".

Section 6(4) provided:

> "A person is guilty of an offence under section 5 only if he intends his words or behaviour… to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly".

9. It was generally accepted that sections 5 and 6 of the 1986 Act, as so enacted and applied by the courts, maintained the necessary balance required by article 10 between the right of freedom of expression on the one hand, and the threat to public disorder and right of others not be harassed, alarmed or distressed by what might be said on the other hand; in that the phrase "threatening, abusive and insulting" was construed so that the right to freedom of expression was not compromised (see, e.g. Percy v Director of Public Prosecutions [2001] EWHC 125 (Admin) at [25] per Hallett J (as she then was)). However, that balance was shifted by Parliament, in favour of freedom of expression, in section 57(2) of the Crime and Courts Act 2013 which amended those sections of the 1986 Act by removing "insulting", so that, to be criminal, the words or behaviour now have to be "threatening or abusive".

10. The relationship between section 5 and article 10 was considered by this court in Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin), which concerned a public parade to mark the homecoming of a local regiment from its duties in Afghanistan and Iraq, and a counter-demonstration (of which the appellants were participants) to mark opposition to that war. During the appellants' protest, they were heard and seen to shout at the passing soldiers, amongst other things, "British soldiers murderers", "Baby killers", "Rapists all of you" and "British soldiers go to hell". The families and well-wishers of the soldiers were upset and distressed by these words. Trouble ensued. Five of the protesters were convicted of offences under section 5. The District Judge (Magistrates' Court) found that, in the circumstances, the words used in the protest were a "very clear threat to public order"; and were both abusive and insulting.

11. In upholding the convictions in this court, Gross LJ, giving the lead judgment, stressed that whether words are abusive or insulting (which was then still included in the section) is a fact-specific issue, but at [49] he distilled the following relevant principles from the authorities:

> "(i) The starting point is the importance of the right to freedom of expression.
>
> (ii) In this regard, it must be recognised that legitimate protest can be offensive at least to some – and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful. [As Davis J (as he then was) added at [57]: '[F]reedom of speech extends to protect activity that others may find shocking, disturbing or offensive."]
>
> (iii) The justification for interference with the right to freedom of expression must be convincingly established. Accordingly, while article 10 does not confer an unqualified right to freedom of expression, the restrictions contained in article 10(2) are to be narrowly construed.
>
> (iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.
>
> (v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; sometimes it may be that protesters are to be protected. That said, in striking the right balance when determining whether speech is 'threatening, abusive or insulting', the focus on minority rights should not result in overlooking the rights of the majority.

> (vi) …
>
> (vii) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by 'ruling… out' threatening, abusive or insulting speech (Brutus v Cozens… at page 862 per Lord Reid)…".

Those principles are uncontentious, and I gratefully adopt them.

The Law: Prosecutorial Decisions

12. In relation to private prosecutions, the role of the DPP and those who work under (now) him in the Crown Prosecution Service ("the CPS") is set out in the Prosecution of Offences Act 1985 ("the 1985 Act"). Under the heading "Prosecutions instituted and conducted otherwise than by the Service", section 6(2) provides:

> "Where criminal proceedings are instituted in circumstances in which the [DPP] is not under a duty to take over their conduct, he may nevertheless do so at any stage".

13. Section 23(3) of the 1985 Act provides that, generally:

> "Where, at any time during the preliminary stages of the proceedings, the [DPP] gives notice under this section to the designated officer for the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice…".

14. The circumstances in which this court will intervene in respect of prosecutorial decisions by the DPP has been considered by this court in a long series of cases, most recently by Lord Burnett of Maldon LCJ and Jay J in R (Monica) v Director of Pubic Prosecutions [2018] EWHC 3508 (Admin) at [44] and following. It is unnecessary to consider these authorities in detail, because, as Sir John Thomas PQBD said in R (L) v Director of Public Prosecutions [2013] EWHC 1752 (Admin) at [3], the relevant law is very clear and uncontroversial.

15. The following propositions are relevant to this case.

    i) A prosecutorial decision is amenable to challenge by judicial review but only on conventional public law grounds, e.g. if the policy upon which the decision was based was unlawful or if the decision-maker did not follow relevant lawful policy or if the decision is irrational in the sense that it was a decision not reasonably open to the decision-maker on the available material (R v Director of Public Prosecutions ex parte C [1995] 1 Cr App R 136 at page 141C-E; L at [4]; and R (Purvis) v Director of Public Prosecutions [2018] EWHC 1844 especially at [75]-[81]). "Irrationality", as used in C and L, includes the raft of conventional Wednesbury grounds for public law intervention, including where the decision-maker incorrectly applies the law (e.g. R (F) v Director of Public Prosecutions [2013] EWHC 945 (Admin)) or where his approach is wrong as a

matter of law (R (B) v Director of Public Prosecutions [2009] EWHC 106 (Admin); [2009] 1 WLR 2072).

ii) If the decision-maker asks the right questions and informs himself properly, challenges to prosecutorial decisions will succeed "only in very rare cases" or "only in exceptionally rare circumstances" (L at [5] and the cases there referred to, and at [7]; see also Monica at [44], "rare indeed"). This is because Parliament has given the relevant function to the DPP as an independent decision-maker with particular experience and expertise in making such decisions which involve the exercise of judgment in relation to (e.g.) how disputed evidence is likely to be received at trial and whether a prosecution is in the public interest (R v Director of Public Prosecutions ex parte Manning and Melbourne [2000] EWHC 342 (Admin); [2001] QB 330 at [23] per Lord Bingham of Cornhill LCJ, citing C; and R (Corner House Research) v Serious Fraud Office [20018] UKHL 60; [2009] 1 AC 756 at [30]-[32] per Lord Bingham, cited with approval in Monica at [45]). Consequently, prosecutorial decision-makers have "a significant margin of discretion" (L at [43]; and Monica at [46(2)]). The result is that this court, whilst intervening if the decision is irrational or otherwise unlawful, has adopted a "very strict self-denying ordinance" (L at [7]).

iii) However, as Mr Grodzinski submitted, the margin allowed to the decision-maker (and, hence, the deference this court gives to his decision) depends upon the issues with which he has to grapple and the circumstances of the case. The issues in this context often involve disputed evidence of primary fact, where the decision-maker's experience and expertise in considering how that evidence will be received at trial and predicting the verdict at trial will be a particularly powerful factor; and this court will be slow to hold that the decision-maker's assessment is irrational. Similarly, where the issue involves an assessment of the public interest. However, if the issue is essentially one of law, the decision-maker's experience and expertise are of less force, and this court will more readily be prepared to find that his conclusion was wrong in law.

iv) Whilst the exercise of the court's power to intervene will always be exceptional, because a decision *not* to prosecute is final subject only to judicial review, the exercise of the court's powers will be less rare in those circumstances than in the case of a decision to prosecute because the defendant is then free to challenge the prosecutor's case in the criminal court (B at [52]-[53] per Toulson LJ).

v) Prosecutorial "decision letters should be read in a broad and common-sense way, without being subjected to excessive or overly punctilious textual analysis" (Monica at [46(3)]).

16. Section 10(1) of the 1985 Act requires the DPP to issue guidance in the form of a Code for Prosecutors ("the Code"). The Code at the relevant time was the 7th edition (2013), but this was replaced in October 2018. The text of the relevant provisions did not change, and in this judgment I shall give the references in the earlier edition with the references in current, 8th edition in brackets. Paragraph 3.4 (now 4.1) of the Code provides that

> "Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test."

The Full Code Test is set out in Section 4 of the Code, and comprises two stages: the initial or evidential stage, and the second or public interest stage.

17. In relation to the evidential stage, paragraph 4.4 (now 4.6) of the Code provides:

> "Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be."

18. "Realistic prospect of conviction" is defined in paragraph 4.5 (now 4.7), as follows:

> "The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."

19. In respect of private prosecutions, the Code is supplemented by the CPS Policy on Private Prosecutions, which provides that:

> "A private prosecution should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met."

Therefore, if, upon review of a private prosecution, the DPP does not consider that it is probable (i.e. more likely than not) that a jury or magistrate(s) will convict of the charge alleged, his policy requires the prosecution to be taken over and discontinued. If the evidential test is satisfied, then the DPP must go on to consider whether a prosecution is in the public interest. The Full Code Test is met only if both limbs are satisfied.

20. The evidential test requires consideration of whether a prosecution in likely to succeed, which involves a predictive assessment but one which requires the decision-maker to ask himself whether, on balance, the evidence is sufficient to merit conviction (B at [49]-[50] per Toulson LJ); although, given the issues in this case, in my view it is unlikely that the result would differ from that that would derive from a purely predictive approach.

21. In R (Gujra) v Crown Prosecution Service [2012] UKSC 52; [2013] 1 AC 484, the Supreme Court by a majority (Baroness Hale of Richmond and Lord Mance JJSC dissenting) held that the DPP's policy of taking over and discontinuing private prosecutions which failed to meet the evidential test is lawful.

The Facts

22. On 18 June 2017, four days after the Grenfell Tower fire resulted in 72 deaths, the annual Al Quds Day parade took place. "Al Quds" is the Arabic name for Jerusalem. Al Quds Day is a pro-Palestinian day of protest. The parade has been an annual event in Central London since 1980.

23. Participants in the parade (which included Rabbis of the Neturei Karta, a group of Haredi Jews who are anti-Zionist), led by Mr Ali, marched from Duchess Street, along Regent Street, Oxford Street and Duke Street, to Grosvenor Square. During the parade, Mr Ali used a public-address system to address the rally at some length.

24. Some of the rally was captured on film. We have seen a transcript, which records over two and a half hours of Mr Ali addressing the rally, leading chants, and the chanting and comments of counter-demonstrators and other onlookers who did not share Mr Ali's views. The parties however agreed that it was not necessary for us to view that footage in order to determine the present claim, and we have not done so.

25. Mr Ali's address had a number of recurring themes. He repeatedly emphasised that the rally was a peaceful event. His address was, of course, pro-Palestinian, and supportive of a Palestinian state. It was equally antagonistic to Israel as a state, and to Zionists i.e. those who support the establishment and maintenance of Israel as a state. He repeatedly said and suggested that Israel is a "terrorist state", responsible for the deaths (the "murders") of Palestinian men, women and children. That antagonism extended to those who support – or those who Mr Ali perceived as supporting – Zionism. He referred to specific corporations and other states which he considered did so, and to the British Prime Minister and the President of the United States.

26. As I have indicated, the rally was only a few days after the Grenfell fire. During the course of the parade, Mr Ali held a minute's silence for those who lost their lives. A recurring theme in his address was that they were the "victims of Tory policies, the victims of policies of the Tory council and the Tory government, of Theresa May" (transcript, page 20); and the loss of life was "caused by corporate Tory greed" (page 21). In developing this theme, he said that, not only were many of the Prime Minister's "cronies" supporters of Zionism, but Zionist corporations were supporters of the Conservative Party. Zionists were thus "responsible for the murder of the people in Grenfell" (page 20).

27. Another theme that regularly recurred was, in seeking their own state, Zionists had been responsible for "murdering British soldiers" in the 1946 bombing of King David Hotel at a time when the hotel housed the British administrative headquarters for the mandated territories. Mr Ali referred to that bombing at the beginning of his address (transcript, page 2), and regularly thereafter.

The Proceedings

28. As I have indicated, the parade was on 18 June 2017. On 19 July 2017, the CAA wrote to the Metropolitan Police complaining about certain statements made by Mr Ali at the rally. On 11 December 2017, the police informed the CAA that the CPS considered that there was insufficient evidence to offer a realistic prospect of success with a prosecution, and thus it had been decided not to bring charges against Mr Ali.

29. On 14 December 2017, the CAA, exercising its right to bring a private prosecution, laid an information at Westminster Magistrates' Court alleging that Mr Ali had committed an offence contrary to section 5 of the 1986 Act, the charge being:

> "On the 18th day of June 2017, at the Al Quds Day procession in central London, Nazim Hussain ALI used threatening or abusive words or behaviour, or disorderly behaviour, within the hearing or sight of a person likely to be caused harassment, alarm or distress, contrary to section 5(1) of the Public Order Act 1986."

30. On 18 January 2018, a summons was issued for Mr Ali to attend court on 16 February 2018. He did so, and pleaded not guilty.

31. On 15 February 2018, Mr Ali's solicitors wrote to the DPP asking her to exercise her power to take over and discontinue the prosecution; and, on 12 April 2018, the CPS wrote to the CAA asking for material and information relating to the case, to which the CAA responded on 17 May 2018.

32. In the meantime, on 8 March 2018, further evidence and initial disclosure were sent by the CAA to Mr Ali's solicitors: witness statements were provided for the prosecution by Gideon Falter (the Chairman of the CAA), Sara Taukolonga (who attended the parade as a monitor for the CAA) and Binyomin Gilbert (Programme Manager for the CAA, who attended the parade in order to supervise the CAA's monitors). On 20 April 2018 a pre-trial review was held, and the trial was listed for 9 July 2018. On 2 June 2018, the CAA filed an Opening Note indicating the way in which the prosecution was to be advanced ("the Opening Note").

33. On 28 June 2018, two weeks before trial, Christian Wheeliker (a Senior Crown Prosecutor, CPS London South) ("the Decision-Maker") wrote to the CAA's solicitors stating that, pursuant to section 6(2) of the 1985 Act, the prosecution was being taken over by the DPP and discontinued ("the Decision Letter"). A notice of discontinuance under section 23(3) of the 1985 Act was served on the same day.

34. The only ground for the decision to take over and discontinue the prosecution was that the evidential stage of the Full Code test was not met. The Decision-Maker concluded that it was not more likely than not that Mr Ali would be convicted of the section 5 charge, on the basis that Mr Ali's statements were not "abusive". In the light of that negative conclusion as to the evidential stage of the Full Code Test, the public interest stage was not considered.

35. On 16 July 2018, the CAA's solicitors sent a pre-action protocol letter to the CPS on the basis that the reasoning set out in the Decision Letter was irrational. On 20 July 2018, Jonathan Storer (Deputy Chief Crown Prosecutor, CPS London South) responded on behalf of the CPS, denying that it was ("the PAP Response").

36. The claim for judicial review was issued on 15 August 2018; and, following service of Summary Grounds for Resisting the Claim and a Reply, permission to proceed was granted by Lang J on 9 October 2018.

37. The section 5 charge upon which the prosecution was brought focused on several specific statements made by Mr Ali during his address to the parade, which broadly fall into three categories:

    i) those in which Mr Ali blamed Zionists/Zionist corporations for the murder of those who died in the Grenfell fire ("the Grenfell murder accusations");

    ii) those in which Mr Ali accused Rabbis on the Board of Deputies of having "blood on their hands" and agreeing with the killing of British soldiers ("the Board of Deputies accusations"); and

    iii) those in which Mr Ali referred to Zionists and Israelis as "terrorists", "murderers" and, particularly, "baby killers" ("the baby killer accusations")

    In respect of each of these, Mr Grodzinski submitted that the conclusion of the Decision-Maker that the statements were not "abusive" within the context of section 5 was irrational.

38. I will deal with each in turn. However, before I do, it will be helpful to clear the decks.

    i) Given that the context in which the words were said is of first importance and a primary justification for invoking the criminal law is to prevent a threat to public order (see Abdul at [49(iv)] quoted at paragraph 11 above), it is worth briefly saying something about the circumstances in which the words were said.

    I have briefly described the rally. I understand that it has been an annual event for nearly 40 years, and it generally passes off peacefully although not without a counter-protest. It is clear from the transcript that, at the 2017 rally with which this claim is concerned, there were counter-protesters from both pro-Israel and other groups, who engaged in counter-chanting. At least one individual made a succession of offensive remarks to those in the rally, repeatedly shouting and suggesting that they were paedophiles (pages 59-60). The last several pages of the transcript comprise almost exclusively counter-protesters chanting slogans including "Terrorists off our streets" and "Shame, shame, shame on you". However, despite the opposing groups on the street at the time of the rally, there was no suggestion that there was in fact any risk of public disorder.

    ii) The Decision-Maker concluded that nothing Mr Ali said was threatening, either explicitly or implicitly; and Mr Grodzinski does not seek to challenge that finding. He submits that the words of which complaint is made were, in all the circumstances, "abusive" within the scope of section 5 of the 1986 Act.

    iii) In the Decision Letter, the Decision-Maker correctly set out and purported to apply the evidential stage test in appropriate terms, namely that "an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged"; and he expressly referred to article 10. However, Mr Grodzinski submits that, in applying that test, the Decision-Maker came to a conclusion that was irrational, i.e. a conclusion to which no decision-maker in his position could reasonably have

come. He was unflinchingly clear in his submissions: irrationality was the only basis of the challenge.

39. I now turn to the passages the CAA relied upon in their prosecution.

The Grenfell Murder Accusations

40. The passages which are the focus of this submission are at pages 54 and 55 of the transcript, as follows (the passages to which exception are taken being in italics):

> "**Ali:** Brother and sisters, because we are humanitarians, because we love peace, because we love justice, this demonstration [inaudible] for justice, for Grenfell, the victims of corporate murders, the victims of Tory policies, the victims of policies of the Tory council and the Tory government, of Theresa May. Shame on you, Theresa May!".

This was the first reference to Grenfell by name; although, at the very start of his address, Mr Ali referred to the Prime Minister as someone "who has blood on her hands, if you know what happened last week", which was a clear reference to the Grenfell fire.

41. Then, in the transcript, there are chants of "Shame on you, Theresa May!". Mr Ali continues:

> "**Ali:** *As we know, in Grenfell, many innocents were murdered by Theresa May's cronies many of which are supporters of Zionist ideology. Let us not forget that. Some of the biggest corporations who are supporting the Conservative Party are Zionists. They are responsible for the murder of the people in Grenfell, in those towers in Grenfell. The Zionist supporters of the Tory Party. Free, free!".*

There are then further chants of "Palestine! Free, free!".

42. Mr Ali continues:

> "**Ali:** So, what you will see, you will see this leaflet, 'Justice for Grenfell'. This leaflet on Oxford Street, will be doing a minute's silence for the victims, for those poor souls who perished in that fire, caused by corporate Tory greed.
>
> **Individual:** ISIS! ISIS!
>
> **Ali:** [Inaudible]. So, we are going to raise this leaflet, which you should all be getting. If you haven't got one, ask one of the stewards. ♯justiceforgrenfell. These people wouldn't know what justice is, because it's their supporters who are supporting the Tory Party. That's who they are. It is the Zionists who give money to the Zionists. *It is the Zionists who give money to the Tory Party to kill people in high-rise blocks.*"

43. The Decision Letter dealt with those passages thus:

> "In relation to the Grenfell fire, Mr Ali stated that (1) it was murder (2) it was the fault of the Conservative Party, including Theresa May (3) it was the fault of the Zionists who fund the Tory party. However, Mr Ali did offer some qualifications to these claims. Mr Ali described the victims of the Grenfell fire as 'the victims of the Tory policies, the victims of the policies of the Tory council and the Tory Government'. I infer that Mr Ali is alluding to the policy of austerity as a cause of the fire. This is strident criticism of the Government, Mr Ali also described the victims as 'those poor souls who perished in that fire, caused by corporate Tory greed.' Again, another implied reference to the policy of austerity. I do not consider these comments are 'abusive' so as to bring them within the ambit of the criminal law."

44. Mr Grodzinski submits that the plain and obvious meaning of the italicised words is that Zionists/Zionist corporations were responsible for the murder of people in Grenfell; and that Zionists/Zionist corporations give money to the Conservative Party with the intention that people in high rise blocks will be killed. He accepts that, whether words are abusive for the purposes of section 5, is necessarily dependent upon the circumstances in which they were used; but, he submits, the words were manifestly abusive in the circumstances in which they were uttered by Mr Ali, and it was an error of law for the Decision-Maker to conclude that they were not.

45. The only justification provided on the face of the Decision Letter for concluding that these words were not abusive was that Mr Ali had "qualified" his statements by blaming the Grenfell tragedy on Tory Party policies; and this was an implied reference to the Tory policy of austerity, and that Mr Ali had thus merely engaged in strident criticism of the Government. But, Mr Grodzinski submits, that reasoning is irrational: Mr Ali stated in plain terms that Zionists were responsible for the murder of the people in Grenfell Tower, and the fact that he may also have made accusations against the Conservative Party was in no way a qualification of his distinct accusation against Zionists. Any criticism Mr Ali was implicitly making of Tory policies of austerity was not the same as, and cannot rationally be said to have qualified, the abusive statements he also made about Zionists being responsible for the murder of the people in Grenfell.

46. At the heart of these submissions – indeed, on the basis of his opening to us, the focus of the CAA's case which Mr Grodzinski considered had the most force – is the sentence: "It is the Zionists who give money to the Tory Party to kill people in high-rise blocks". Mr Grodzinski submitted that this meant – and could only mean – that Zionists financed the Conservative Party *with the intention* that people in high-rise blocks would be killed.

47. However, that single sentence has to be viewed in the context of the address as a whole. No other passage could be construed as importing such an intention – nor did Mr Grodzinski suggest otherwise. As the Decision Letter indicates, the other passages suggest that the Conservative Party at local and national levels are responsible for the Grenfell deaths because of their (austerity) policies; Zionists fund and otherwise support the Conservative Party; and, so, Zionists are to that extent responsible for the policies and deaths. The Decision-Maker clearly did not consider that that single sentence focused upon by Mr Grodzinski imported a deliberate and direct intention on

the part of Zionists to murder people in high-rise blocks. In my view, when that sentence is looked at in context, the construction favoured by the Decision-Maker – as one which magistrates might consider true – is certainly not perverse, i.e. one which no reasonable CPS decision-maker could have adopted.

48. Although Mr Gilbert in his statement (see paragraph 32 above) says that he heard Mr Ali accusing Zionists of "funding the Tory Government to *deliberately* burn Grenfell Tower down" (emphasis added), Ms Taukolonga's statement (again referred to in paragraph 32 above) does not refer to any such expression of intention. Ms Taukolonga condemns the responsibility Mr Ali placed on Zionists for causing the Grenfell deaths by funding the Tory Party whose polices were (in his view) responsible for the fire and thus the deaths. Her evidence supports the submission of Mr Grodzinski that this was not fair political comment, but gratuitous offence made worse by its exploitation of a recent, horrific and traumatic community event. As a result, she says, she feels more at risk of being set upon or shunned in society, at work and elsewhere because of her Jewish heritage. Mr Gilbert also says that he found the words to be frightening and threatening to him personally and to his community.

49. Mr Grodzinski submitted that, even if the statements by Mr Ali that Tory Party policies (and thus the Conservative Party) were responsible for the deaths ("murders") of those who died in the Grenfell fire were acceptable (if extreme) as political comment – such comment being particularly protected by article 10 – that was not the case in respect of allegations made against non-political persons, as were Mr Ali's statements about Zionists and Grenfell. I accept that the particular protection given by article 10 to political comment may not apply to Mr Ali's statements of which the CAA complain. But article 10 still offers very considerable protection.

50. I fully understand the distress that Mr Ali's words may have caused to some of those who were present as the counter-demonstrators or simply as passers-by, and not just those who were Jewish or who were sympathetic or supportive of the state of Israel. His words may have been intemperate and offensive. But it is not the task of this court to judge whether they were or may have been distressing or offensive. As the authorities stress, article 10 does not permit the proscription or other restriction of words and behaviour simply because they distress some people, or because they are provocative, distasteful, insulting or offensive.

51. We are only concerned with whether, in all the circumstances, the Decision-Maker's conclusion that it was not more likely than not that magistrates would convict of a section 5 offence was lawful. Whilst I accept Mr Grodzinski's submission that this was not a case in which there was disputed evidence for the Decision-Maker to assess, given the relevance of not just the words themselves but the circumstances in which they were said and the risk of public disorder and/or infringement of the rights and interests of the object of the words (including the counter-protesters and others at the rally to whom the words were directed), the Decision-Maker was required to exercise some judgment in assessing whether the evidential test was met.

52. In my judgment, it cannot be said that the Decision-Maker acted irrationally by concluding that, in relation to the Grenfell murder accusations, insensitive and distressing as they may have been, it was not probable that magistrates would find these words abusive within the scope of section 5 of the 1986 Act and convict on that basis.

The Board of Deputies Accusations

53. The focus of this part of the claim are on two sentences on page 23 of the transcript:

> "Careful, careful, careful, of those Rabbis who belong to the Board of Deputies, who've got blood on their hands, who agree with the killing of British soldiers. Do not allow them in your centres."

54. This passage appears in a lengthy series of chants led by Mr Ali, "Down, down! Zionism!" and "Free, free! Palestine!", broken only by Mr Ali saying some moments before the quoted passage (at page 22):

> "Be careful what those Rabbis who are Zionists try to tell you [inaudible]".

55. The Decision-Maker dealt with the quoted passage in the Decision Letter thus:

> "In relation to the comments regarding rabbis and the Board of Deputies, it appears that Mr Ali believes that the British Board of Deputies, which includes rabbis, does not do enough to condemn what he believes are disproportionate acts of violence against Palestinians by the State of Israel. In that sense Mr Ali believes they have 'blood on their hands'. Mr Ali is entitled to express that point of view albeit expressed in robust terms. A number of other speakers expressed very similar views…, one even describing some counter-protesters as apologists for murder by the State of Israel. I do not consider these comments are 'abusive' pursuant to s5."

56. Paragraph 5(d) of the PAP Response dealt with the issue more fully:

> "The CPS does not accept this submission. At page 2 [of the transcript] Mr Ali made a specific reference to the bombing of the King David Hotel before going on to make comments about 'those Rabbis who belong to the Board of Deputies, who've blood on their hands, who agree with the killing of British soldiers'. It would be artificial and illogical to ignore this reference. Applying Abdul, those words have to be viewed in the context of anti-Zionist rally against the state of Israel. There is no dispute that there were acts by Zionists in the British mandate of Palestine in which British soldiers were killed, including the bombing of the King David Hotel. The CPS view is that Mr Ali drew the tenuous conclusion that support for the existence of Israel necessarily correlates with support for all the actions which led to the creation of Israel. It is not true to say that anyone who believes the Jewish people deserve a homeland must support acts like the bombing of the King David Hotel. Nevertheless, it is not criminally 'abusive'. In the context of the unused material videos… and the transcript… it appears that Mr Ali believes that the British Board of Deputies does not do

> enough to condemn what he believes are disproportionate acts of violence against Palestinians by the State of Israel. In that sense Mr Ali believes they have 'blood on their hands'. He is not accusing them of literally having blood on their hands. Mr Ali is entitled to express that point of view. A number of other speakers at the protest expressed very similar views…, with one even describing the counter-protesters as apologists for murder by the state of Israel. The [CAA] did not seek to prosecute those individuals, which suggests that context is a relevant consideration."

57. The Decision Letter expressed the view that Mr Ali's words were simply an expression of his belief that "the British Board of Deputies… does not do enough to condemn what he believes are disproportionate acts of violence against Palestinians by the State of Israel…". Mr Grodzinski submitted that, even if that is Mr Ali's belief, the words used were abusive. However, he submits that is not what Mr Ali said; nor can it rationally be extrapolated from his statements. The Decision-Maker also relied on the fact that other speakers made similarly abusive statements; but that is irrelevant to the meaning of Mr Ali's own statements.

58. Whilst the PAP Response advances different reasons to justify the Decision Letter's conclusion, by reference to the events at the King David Hotel in 1946, Mr Grodzinski submitted:

    i) The Decision Letter itself made no mention of the King David Hotel bombing: this is *ex post facto* reasoning and thus to be treated with significant caution (R (Nash) v Chelsea College of Art and Design [2001] EWHC (Admin) 538 at [24]; and Caroopen v Secretary of State for the Home Department [2016] EWCA Civ 1307 at [30] per Underhill LJ).

    ii) In any event, shortly after the 1946 bombing, the Board of Deputies issued a public statement unequivocally condemning the bombing (see paragraph 4 of the Second Statement of Marie van der Zyl dated 7 August 2018: Ms van der Zyl is the current President of the Board of Deputies); so that new reasoning contains a fundamental error of fact and is thus flawed as a matter of law (E v Secretary of State for the Home Department Home Secretary [2004] EWCA Civ 49; [2009] QB 1044).

    iii) Insofar as the Decision Letter reasoning is concerned, he submitted that that too contains a fundamental factual defect, because the Board of Deputies is a secular body and the current Board does not include any Rabbis (see paragraph 5 of the First Statement of Ms van der Zyl dated 9 June 2018)

59. However, I am again unpersuaded that the conclusion of the Decision-Maker that a section 5 charge based on these two sentences would probably not succeed was unlawful.

60. It seems that Mr Ali's reference was to one of two things. The Decision-Maker considered it referred to a belief by Mr Ali that the British Board of Deputies does not do enough to condemn what he (Mr Ali) believes are disproportionate acts of violence against Palestinians by the state of Israel. The PAP Response also referred to this. In

my view, in the circumstances, if that is what was meant, such words would not have been arguably abusive, as the Decision-Maker concluded.

61. However, the PAP Response suggested a far more likely reference, namely to the 1946 King David Hotel bombing to which Mr Ali referred on numerous occasions including (by reference to "killing British soldiers") in the same sentence. I appreciate that this was not referred to in the original Decision Letter; but there is no suggestion that the CPS have at any time acted with less than good faith, and I am satisfied that the force of the reasoning in the PAP Response is not significantly undermined by the fact that it did not appear in the original reasons. It simply addressed a different possible view of to what Mr Ali was referring.

62. I accept the evidence of Ms van der Zyl that the Board of Deputies condemned the King David Hotel bombing in 1946, strenuously and unequivocally. Mr Ali therefore appears to have based his comment upon a false premise; but something said that is inaccurate as well as offensive is not necessarily abusive. In this passage, Mr Ali was clearly drawing a comparison between the Rabbis who were in the counter-protest with the Rabbis who were in the rally ("the ones in front of us. These are the ones that uphold justice"). Insofar as he was suggesting that Rabbis who were not in the latter group, but who rather supported the establishment and maintenance of the state of Israel, were associated with the King David Hotel bombing, that suggestion seems at best extremely tenuous if not completely misplaced. But, again, offensive statements based upon dubious or false premises are not necessarily abusive within section 5 of the 1986 Act.

63. In my view, the DPP was clearly entitled to conclude that a prosecution on the basis of these words would not likely succeed, because the magistrates would likely not be persuaded that the words relied upon – to whichever of the two apparent possibilities they referred – were abusive within the terms of section 5.

The Baby Killer Accusation

64. The statements of Mr Ali upon which this submission is based are in four separate passages:

> Passage 1: Page 67: "We'll be going past the BBC. We all know what the B stands for in BBC. [It was assumed before us that he meant that it stood for "biased"]. It's a shame that they never report on the murder of Palestinians. It's a shame that they never report on the killing of innocent men, women and children. The Zionists are known to go to dinner with the heads of the BBC to make sure they don't give us any exposure to the innocent victims of Zionism terrorism."
>
> Passage 2: Page 69: "… [W]e know what these Zionist baby killers are like. Go kill some babies. Go do your normal occupation."
>
> Passage 3: Page 76: "We will not be scared of the Zionist murderers. We will not be scared of Israeli murderers, we will not be scared of Israeli killers, Israeli baby killers."

> Passage 4: Page 95: "Andrew Dismore, the MP is addressing the Zionist crowd, he is another pro baby killer, he likes to kill children and support the killing of children."

65. These passages were not raised by the CAA in their prosecution – there is no reference to them in the pre-action protocol correspondence, or in the Opening Note, or in the supporting evidence. They were, however, raised by the Decision-Maker of his own motion in the Decision Letter, presumably as being potentially abusive. In the event, the Decision-Maker dealt with them shortly in his reasoning:

> "I have considered Mr Ali's claims that… (a) Tories and Zionists were to blame for the Grenfell Tower fire…. (b) the deaths in the fire were murder by Tories and Zionists… (c) that Zionists control the media output of the BBC… and (d) that Andrew Dismore MP 'likes to kill children'…. However, I do not consider these comments to be 'abusive' pursuant to s5."

66. Mr Grodzinski's focus was upon the statement by Mr Ali that Zionists were "baby killers"; and, in particular, the comments, apparently to identified individuals who were counter-demonstrating: "Go kill some babies. Go do your normal occupation." He submitted that this cannot rationally be interpreted as anything other than abusive; and the bald statements in the Decision Letter that "I do not consider these comments to be abusive" and the comments "were possibly at the limits of strident political discourse they were nevertheless an expression of views that he was free to hold in a free and democratic society" were entirely inadequate justification for the Decision-Maker's contrary view.

67. Mr Grodzinski relied upon Abdul for support. In the circumstances of that case, referred to above (see paragraphs 10-11), this court held that references to soldiers as "murderers", "baby killers" and "rapists" – terms which Mr Grodzinski submitted were strikingly similar to those used in the present case – were not "just generalised statements of views, vigorously expressed, on the morality of war but were personally abusive and potentially defamatory…." (per Davis J at [61]); and, in the circumstances of that case, the District Judge below was entitled to conclude that they crossed the line from legitimate protest into criminality. The protesters' convictions under section 5 of the 1986 Act were upheld.

68. However:

i) The Decision-Maker here was not responding to any assertion made by the CAA – only to his own apparent provisional assessment that these phrases were potentially within section 5 when they were not being relied upon in the private prosecution that the DPP was considering take over and discontinuance. He cannot be criticised for not dealing with them at length. It is noteworthy that the CAA did not seek to found the charge upon any of these statements in the private prosecution: they have only relied upon them for the first time in this claim.

ii) It cannot be argued that Passages 1 and 4 were abusive within the scope of section 5. Mr Grodzinski did not actively seek to argue to the contrary.

iii) Passage 2 is clearly the most offensive, and appears to have been aimed at particular individuals within the crowd. It was therefore potentially inflammatory. However, (a) it seems that Mr Ali was not the first person to refer to baby killers – whilst Mr Ali referred to Zionists "[celebrating] the murder of children, the murder of women, the taking of homes, the bulldozing of homes, and then the destruction of a whole civilisation" (page 2, see also pages 10, 12 and 13), the first reference to the killing of babies apparently came from, not Mr Ali, but another individual, apparently a counter-protester who shouted to those in the rally: "You kill babies!" (page 13); and, more importantly, (b) there is no suggestion here that there was in fact any risk of public disorder.

iv) Abdul is clearly distinguishable. As Gross LJ said (at [52(i)]), "context is of the first importance". In that case, the circumstances in which the term "baby killers" was used were very different. Notably, in Abdul, the District Judge found that the words used were undoubtedly inflammatory and, as a result of their use, there was a "very real threat" to public order. The families and well-wishers of the soldiers were upset and offended and "trouble arose" (see [61]). In that case, this court merely held that the District Judge did not err in concluding that the words used were both insulting and abusive. In this case, as I have indicated, there is no suggestion that there was a real risk of public disorder. Whilst Abdul includes a helpful summary of the legal principles, as is so often the case, the differences between the facts and contexts of two cases are too great for any meaningful lesson to be taken from them. In my view, the Decision-Maker was entitled to conclude that a prosecution on the basis of the statements in Passages 2 and 3 (as well as Passages 1 and 4) would not be more likely than not to conclude in a conviction.

Conclusion

69. As Mr McGuinness made clear, the DPP does not seek to condone or justify anything that Mr Ali said. Similarly, nothing in this judgment should be taken as condoning anything Mr Ali, or others at the rally whose words are recorded in the transcript, said. Clearly some things that were said were intemperate and deeply offensive and distressing to others, and not simply to those in whose direction they were aimed.

70. But, as I have already emphasised, this is a public law challenge, and this court can only intervene if the decision to take over the CAA's private prosecution and discontinue it made by the Decision-Maker was irrational, i.e. a decision to which no properly directed and informed CPS decision-maker could have come. In my judgment, it cannot be said that it was irrational.

71. For those reasons, subject to my Lord, Nicol J, I would dismiss this claim.

Mr Justice Nicol:

72. I agree.