Neutral Citation Number: [2021] EWHC 2012 (QB)

Case No: QB-2021-000742

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MAC COURT
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

LISA McNALLY	**Claimant**
– and –	
JULIAN SAUNDERS	**Defendant**

- -
- -

AILEEN McCOLGAN QC (instructed by **Sandwell Metropolitan Borough Council**) for the **Claimant**
RICHARD MUNDEN (instructed by **Patron Law**) for the **Defendant**

Hearing dates: 21 June 2021

- -

Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The Claimant, Dr Lisa McNally, is Director of Public Health at Sandwell Metropolitan Borough Council, a local authority in the West Midlands ("the Council").

2 The Defendant, Mr Julian Saunders, is a semi-retired former solicitor. He claims to be a "citizen journalist", in which capacity he publishes a blog called *In the Public Domain?*, also known as *The Sandwell Skidder*. He tweets using the handles *@SandwellSkidder* and *@CrowMultimedia* and runs a Facebook group called *The Sandwell Skidder – Speaking Truth to Power!*. Mr Saunders' blog and many of his other online posts are about the Council, its activities and its elected members and officers.

3 In a claim issued on 2 March 2021, Dr McNally alleges that, by publishing a series of blog articles and tweets about her, Mr Saunders pursued a course of conduct amounting to harassment contrary to s. 3 of the Protection from Harassment Act 1997 ("the 1997 Act"). She seeks an injunction to restrain Mr Saunders from continuing to harass her and damages for distress and injury to feelings. There was originally an additional claim under the General Data Protection Regulation and the Data Protection Act 2018, but that has now been abandoned. The claim is brought with the support of the Council.

4 This is Mr Saunders' application to strike out the Particulars of Claim on the ground that they disclose no reasonable grounds for bringing the claim and/or for summary judgment on the ground that the claim has no real prospect of success.

Background

Mr Saunders' blog

5 Mr Saunders first began to publish his blog in 2013 in response to the Council's decision to withdraw funding for an arts centre run by his wife. From 2014, however, he began to focus on the activities of the Council, and its members and officers, more generally.

6 Mr Saunders says that the blog is "directed at exposing corruption, cronyism and incompetence" at the Council. He describes it as "satirical and sensational" and says that it uses "terms that might cause raised eyebrows within the [Royal Courts of Justice] but would go down well in Tipton". Mr Saunders is an avid reader of *Private Eye* and aims to emulate its style. Whether he succeeds in that aim is another matter.

7 As at 1 April 2021, there had been a total of 743 posts on the blog. The average readership is over 2,500. It is rare for a post to have fewer than 1,000 readers.

The context of the claim

8 In her Particulars of Claim, Dr McNally says that Mr Saunders has "pursued a campaign of oppressive and unacceptable behaviour against the employees and officers of the Council since at least 2018". Particulars are given of other Council employees and officers who are said to have been the targets of unfair adverse comment by Mr Saunders. There is no need to summarise those particulars here.

9 In the witness statement supporting this application, Mr Saunders says that since 2014 the Council have "tried every trick in the book to close my Blog down and to destroy my reputation and finances". Mr Saunders considers that this claim has been brought with that objective.

10 I mention these wider allegations, by the Council on the one hand and by Mr Saunders on the other, because they are part of the background to this claim. The material before me does not enable me to form any concluded view about them. Nor would it be appropriate to do so. The present application requires a rigorous focus on the acts said to constitute harassment in this case, not on conduct alleged to have been directed by Mr Saunders against others, nor on the motivation for the steps the Council has taken against him.

Dr McNally's video

11 Mental Health Awareness Week is an initiative promoted by the charity Mind. People who have experienced mental health problems are encouraged to share their stories so that others can see that they are not alone in the challenges they are facing.

12 Dr McNally is a psychologist by training. She decided to make a 2-minute video to coincide with Mental Health Awareness Week 2020, in which she disclosed that she had struggled with mental ill health since childhood, had self-harmed and had once narrowly avoided being detained in a psychiatric ward on which she was due to work on the following day. She explained how she had used running as a therapeutic aid and finished with the statement that "as a community… we are much better at both asking for mental health support when we need it and also at offering help to other people who are having mental health problems and that has got to be a good thing".

13 The video was shared on the Council's Facebook page on 22 May 2020, where it remains. It has been very widely viewed.

The tweets, posts and emails complained of

14 On 4 June 2020, Mr Saunders tweeted this from @SandwellSkidder:

> "Noting your video outburst @Lisa_McNally1 did you make #sandwell council aware of your significant mental health issues at interview?"

15 On 5 June 2020, he wrote a long blog post dealing with a variety of issues. One of these had the sub-heading "Lisa 'Me, Me, Me,' McNally?". In it, Mr Saunders described some research he had done into some work she had published. He said this (the parts in square brackets and italics are not complained of in the Particulars of Claim):

> "Dr McNally in not the sort of doctor who asks gentlemen to cough whilst holding their balls – at least not in a diagnostic context but is a 'Chartered Psychologist'. *[I am not medically-qualified and, whilst not wishing to denigrate a fellow scribbler, I found her articles 'lightweight' to say the least. Stripped of the psycho-babble they constituted little more than the fare of countless newspapers and magazines ie we will be healthier if we eat less, stop smoking, take exercise etc. Yes, these are important messages - including for a lardarse like me - but this is hardly ground-breaking stuff. Do I detect a whiff of narcissism about this output? Who can say?*
>
> *But churning out this 'we'll all be better if we go jogging' guff does get one noticed to the extent that she boasts of appearing regularly on local radio down south and The Grauniad (no less) did a 'day in the life' feature on her*

in which she described 'dressing-up' to publicise various public health messages.

It has been a relatively good thing in recent years for many of us to be able to air mental health issues in public although this has unfortunately led to a stream of our pathetic 'royals' and other 'celebrity' figures saying how they once got a bit depressed when the cat died etc. There are many though who think the very public disclosure of mental health issues outside a 'controlled' context can be postively [sic] harmful - witness the suicides linked to 'Love Island' and the like. There are also many of us who approach health professionals for help and not to empathise with them in respect of their own medical issues.]

But McNally has now produced and made public a video about HER mental issues. How she thinks this seemingly extreme egotism 'helps' fellow mental-health sufferers is beyond me but there have been the usual suspects who have saluted what is supppsed [sic] to be her 'bravery' for coming out with this solipsistic slop. And to use the word again - what a time to release this narcissistic garbage - right in the middle of the biggest public health crisis in living memory and at a time when she herself has said the Covid death toll in Sadders has been rising and bucking the national trend! Even if you are the peculiar type of moron… who likes this sort of whimpering confessional navel-gazing, the timing is a monumental misjudgement. She has placed self very firmly before selflessness.

Of even greater concern is the very serious nature of McNally's own professed mental illness. She states that her problems started when she was only '4 or 5' and that she was a self-harmer as a child. She makes the astonishing claim that she was 'nearly' sectioned onto a psychiatric ward in a hospital but that she was only allowed to go home because she was supposed to be working as a professional on that same ward the next day! WTF?

She says nothing in her video about her current state of health (she does tweet that she 'manages' her mental health by, yes you guessed it, jogging) and has yet to answer my query whether she actually disclosed the extent of her mental health problems when she applied for her £100k a year job at Sadders? Would that have rung alarm bells or not? We don't know.

Yes we must get folk who have been ill for whatever reason back into employment but they must be fit enough to do the job and handle the pressure. Indeed it is frequently inspiriting [sic] when we hear genuine tales of triumph over adversity. But simply spieling one's own sad medical history when large numbers of people are dying of a new and hideous disease is, in my humble opinion, simply not appropriate for a public health 'professional'.

THE SKIDDER SAYS:

You are very well paid person in a professional position in the middle of a major emergency McNally. Please shut the f*ck up about yourself and

> concentrate on the very real public health crisis engulfing Sandwell! That's your job."

16 On 10 June 2020, Mr Saunders wrote another post. As before, a number of topics were covered. One was Dr McNally. Mr Saunders said this:

> "A couple of days ago I wrote a piece which included comment on Lisa McNally's public video…
>
> [There was then a link to the earlier post.]
>
> Lisa McNally is the Director of Public Health at bent Sandwell and you might well imagine that Covid_19 was taking up rather a lot of her attention. But she took time out from a mere global pandemic to inform the world about her own seemingly very serious mental health issues. If you don't want to read the article now, I questioned whether this was (a) appropriate and relevant, (b) appropriate for a public health official in the middle of a major crisis and (c) whether she had informed Sandwell Council of her health record when applying for her £100k (plus) job."

17 Mr Saunders' tweet and blog posts caused Dr McNally to "block" him on Twitter. This elicited further comment. In a blog post on 2 July 2021, Mr Saunders said:

> "Meanwhile Super Mc [Dr McNally] has been blocking loads of people on Twitter including myself. This hitherto assiduous self-publicist (who took time out from Covid duties to 'courageously' make a video about her own seemingly very serious mental health history) appears to have a thin skin..."

18 On 1 August 2020, there was a further post, which included a section entitled "Blocked By McNally?", which contained this:

> "I wrote about the publicity-seeking chartered psychologist who is Sandwell Labour's 'Director of Public Health' and questioned whether Lisa 'Me, Me, Me' McNally might spend less time publicising herself and more on the Covid crisis. Since then she has gone into overdrive and has been plastered (unquestioningly) across the mainstream media…
>
> After my article appeared Super Mc blocked me on Twitter. But this sensitive soul has also started blocking anyone who follows me too. Thus lots of Twitter users have been posting that they have never had any contact with her whatsoever but have now been blocked by her! And so if you too want to join the 'Blocked by Super Mc Club' please follow MY twitter account 'lol' @SandwellSkidder!
>
> Meanwhile, under Super Mc's boastful stewardship, Sadders has become a major Covid hotspot..."

19 On the same day, Mr Saunders tweeted this comment about public statements of Dr McNally which Mr Saunders considered to be critical of Government policy on the handling of the COVID-19 pandemic:

> "This is a media-craving chartered psychologist at a bent @UKLabour Council opening taking on the government. Who is funding and operating McNally's 'scheme'?"

20 Mr Saunders tweeted again about Dr McNally, referring to her as on 2 October 2020 as a "braggart blocker", on 26 November 2020 as "weirdo Director of Public Health" and on 26 November 2020 as "weirdo #sandwell Director of Public Health McNally".

21 On 3 January 2021, Mr Saunders sent a complaint about Dr McNally to the Council's Chief Executive David Stevens, copied to Dr McNally. The complaint was marked "THIS IS NOT A PRIVATE AND CONFIDENTIAL COMMUNICATION", which Dr McNally says suggested to her that Mr Saunders was intending or threatening to share it publicly. The essence of the complaint was that Dr McNally, who occupied a "specified post" within the meaning of the Local Government Officers (Political Restrictions) Regulations 1990, had used her private Twitter account (on which she identified herself as the Council's Director of Public Health) to publish articles and information critical of the Conservative Government's handling of the COVID-19 pandemic and had been communicating with "virulently anti-Tory" local journalists. Mr Saunders complained in particular that Dr McNally had posted a link on her Twitter account to a petition against a COVID-related Government policy. This, Mr Saunders said, was "both politically-biased and an inappropriate attack on scientific experts without any reasoned counter-argument being posited".

22 On 4 January 2021, the Defendant sent an email to Dr McNally, asking for her CV. Dr McNally says that it went to her "junk" folder and she never received it. The email is not one of the documents complained of.

23 On 6 January 2021, the Defendant wrote a blog post which included this section (the parts in square brackets and italics again being those that are not complained of in the Particulars of Claim):

> "**The Rise and Rise of Lisa McNally!**
>
> Since Covid started one figure in bent Labour Sandwell has been ubiquitous in the media - the Director of Public Health, 'Dr' Lisa McNally. *[This blog raised questions some time ago whether she could walk the walk as well as she talked the talk. The local media and the Labour comrades certainly think so as they have lionised her at every opportunity. She has major media rimmers... Certain Councillors cannot stop shrieking about what a 'great' job she is doing despite the statistics for Sandwell suggesting the exact opposite. This crew include the usual idiots… although even the sensible end of the market… have joined in.*
>
> *Such was the hubris of these Labour Councillors they boasted last August that they had Covid licked!*
>
> *The adulation of Super Mc extends to the wider Labour membership and she has a major and vocal group of supporters in Sandwell's schools (many of which are 'below average'). There has been a stream of teachers and even head teachers bigging her up and doesn't she love it!*

> *The Dr's love affair with the media does not extend to this blog and myself.]* She has been unable as yet to supply me with a short CV and has strangely declined to say whether she is one and the same person as Lisa Marina McNally (more on this anon but there is another Dr Lisa McNally currently practising in Ireland and I am trying to disentangle their respective histories).
>
> McNally's frequent media comments and appearances usually state her position as being an employee of bent Labour Sandwell Council but, on the face of it, she appears to be puffing her own ego and political bias on these occasions and it is not clear whether what she says as a Council representative is actually the view of the Council (if, indeed, the moronic and bitterly divided Labour 'comrades' are capable of forming an opinion on anything). She always refers to herself as 'Dr' McNally (and she does hold a PhD) but my belief is that she has had very limited clinical experience - and her medical 'expertise' is as a Chartered Psychologist…
>
> *[It may be coincidence given that she has a cohort of teachers praising her every utterance but just recently she started arguing - specifically in her capacity as an employee of Sandwell Council - that teachers (who have done their utmost not to teach in schools duing [sic] Covid) should get priority for vaccination.*
>
> *The roll-out of the vaccines has been agreed by very high-level scientists and real medical specialists via the Joint Committee on Vaccines and Immunology (JCVI).]* Ok it's at least supposed to be a free country and a Chartered Psychologist should be able to say that she knows better than these top experts but is it right that she does so on behalf of the bent Council? And was she doing this for the benefit of the people of Sandwell or to get yet more media coverage for herself?
>
> Having had her say, Super Mc went further and started actively pushing her/Sandwell Council's view on teachers getting priority vaccinations and even circulated a petition supporting it!
>
> Maybe a person like McNally with, seemimgly [sic], so little clinical experience and expertise in this field does actually know best *[but this is what Chief Medical Officer Chris 'Next Slide Please' Whitty said in last night's Downing Street briefing…*
>
> *At present Sandwell Council have declined to say whether they share the view of their outspoken employee and, if so, when they agreed with her recommendation that teachers should be prioritised over other groups…"]*

24 On 21 January 2021, Mr Saunders wrote again to the Chief Executive of the Council to complain about Dr McNally. Again, the complaint was headed "THIS IS NOT A PRIVATE AND CONFIDENTIAL COMMUNICATION". Mr Saunders referred to the fact that he had written to the Claimant asking for a CV and had not received a response. The essence of the complaint was that Dr McNally routinely used the title "Dr" when speaking on medical issues, which might mislead people into thinking she was a medical practitioner.

25 On 27 January 2021, Mr Saunders posted this on his blog:

> "**The 'Dr' Lisa McNally Mystery!**
>
> I believe that Dr Lisa McNally, the Director of Public Health in bent Labour Sandwell, is not a medical doctor and, if she ever was, that was only for a very short period of time. Strangely, this assiduous cultivator of media coverage has suddenly lost her tongue and refuses to answer questions about this. Hang-on you may say, she calls herself 'Dr' so she must be a medic musn't [sic] she? Well let's start with a little discussion about the term 'doctor' - which, of course, we also came across with the hapless Alison Knight - now, mercifully, no longer a Director at the corrupt Authority…
>
> In the case of Dr McNally she is a Chartered Psychologist (which one can become with a lowly-graded first degree only) but she did go on and undertake a PhD. And so… she can properly call herself 'Dr'. A problem arises, however, in that every single person I have been in communication with believes that McNally is some sort of actual medical doctor. And, of course, her ego is such that she takes every media opportunity to pronounce on medical issues always using the title 'Dr'.
>
> The General Medical Council (GMC) say quite clearly to me that even someone with a medicine-related PhD must not hold themselves out as being a practising medical practitioner if s/he is unregistered (indeed it is actually a criminal offence). I have not seen evidence of Super Mc doing this but she passively allows people to form their own conclusion - and most people are seemingly coming to the wrong one.
>
> The situation becomes a little complicated in that there are two folk called 'Dr Lisa McNally', one of whom practices in Ireland. But the GMC only have one listed on their books - Lisa Marina McNally. Sandwell's 'Dr' refuses to supply a brief CV for the benefit of Skidder readers and, indeed, refuses to even confirm whether she is Lisa Marina McNally or not. I suspect this is not 'our' 'Dr' McNally (and even if it is that opens a whole new can of worms which I will explain at a later date if it become applicable).
>
> Why might this be relevant? Well our Lisa McNally has frequently put up on social media articles from the likes of The Guardian knocking the Government response to Covid. Without wishing to denigrate the excellent and important work of Chartered Psychologists she is hardly in the same league as the likes of Professors Whitty and Vallance and it is important at this critical time that the public do not get the impression that she is a high-level medical expert. The public need to understand the limits of her medical knowledge and that she is specifically NOT a medical doctor.
>
> You might say, 'oh well she is still entitled to her opinion' but, alas, that is not correct insofar as she chooses to enter into political debate. Firstly, there is the question of whether attempting to undermine the national medical messages against Covid (as she at least gives the appearance of doing with her promulgation of 'knocking' pieces) is proper professional conduct in the

> midst of an extremely dangerous pandemic. Secondly, she is actually in a politically-restricted post and is specifically not allowed to push her own political agenda.
>
> On her infamous mental health video [post passim] Sandwell's McNally stated, 'I am a psychologist. I trained as a psychologist ... I spent MANY YEARS as a professional offering support for mental health'. As above, she won't elaborate on this for your benefit.
>
> Despite the global pandemic Sandwell's egocentric McNally felt the need to share her personal medical history with us and recounted this weird tale:
>
> > 'I was nearly sectioned onto a mental health ward, a psychiatric ward in a hospital. One of the reasons they agreed to let me go home and be cared for at home was because I was supposed to be working in that mental health ward the next day.'
>
> It's all me, me, me stuff whereas this must have been terrifying for the poor, vulnerable, folk on the ward and very distressing for her professional colleagues who had to deal with her as well as their existing patients.
>
> And a look at her social media conjures up a curious image of a toddler constantly seeking affirmation. Many people have worked their butts off during Covid and you might imagine that a Director of Public Health would be one. And so she repeatedly tells us, she has. She regularly makes us aware she is working at weekends and a claque of admirers immediately tell her how marvellous she is…
>
> And so the logrolling goes on as McNally praises all and sundry from whom she seeks approbation… There has be a term for this sort of desperate self-regard. If only I knew a Chartered Psychologist!...
>
> … in a pathetic publicity stunt last week, McNally found time from her busy schedule to put up a 'joke' Twitter Poll taking the mick out of Covid-deniers. One of her main local media rimmers… had not one but TWO (metaphorical) orgasms about this 'brilliant' tweet and duly plugged it twice in one day!
>
> If there is a turd floating in the cesspit of local news you can be sure it will be fished out by the world's worst TV 'News Magazine' Midlands Today and, sure enough, McNally was soon boasting how she had been interviewed about this b*llocks…"

26 Mr Saunders placed a link to this post on the Sandwell Skidder Facebook group under the title "When is a doctor not a medical doctor?". This appeared immediately above a photograph of a street sign bearing the words "Bell End". He also shared the link on his Twitter account @CrowMultimedia, tagging the accounts of councillors, local MPs and journalists.

27 The final matter complained of is a tweet on 6 February 2021. In it, Mr Saunders "quote tweeted" a tweet from another user, who had called for the Claimant to be "fired instantly.

She has excluded residents from receiving vital information because they have questioned her on Twitter & she is crap at her job". Mr Saunders added his own comment: "She has a number of idiotic Cllrs cheering her on…".

The effect of this course of conduct on Dr McNally

28 In her Particulars of Claim, Dr McNally pleads that the course of conduct complained of has had an impact on her mental health. She has ceased to use Facebook for anything significant because she is afraid of the comments Mr Saunders might make about her. She is very reluctant to accept any invitations from the media for interviews for fear of Mr Saunders' adverse commentary. She has declined an invitation to one event and agreed that she will not participate in media interviews because of Mr Saunders' actions and their impact on her. This is a matter of importance in view of her role as Director of Public Health. She has indicated that she would not be comfortable attending face-to-face Council meetings because she fears being accosted by Mr Saunders. She describes feeling "crippling" anxiety about such meetings.

29 Mr Saunders' blog post on 27 January 2021 caused Dr McNally to decide to resign from the Council, though that decision was postponed after discussions with the Chief Executive. She has since sought counselling. There have been effects on Dr McNally's husband and family. Dr McNally also worries about her ability to do her job at a critical time for the Borough "if someone is publicly calling into question my qualifications and suitability for the job".

The law

30 Section 1 of the 1997 Act prohibits harassment. It provides materially as follows:

> "(1) A person must 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 section… the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.
>
> (3) Subsection (1)… does not apply to a course of conduct if the person who pursued it shows—
>
> …
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

31 Breach of the prohibition is an offence (by virtue of s. 2) and can be the subject of civil proceedings (by virtue of s. 3). In the latter case, the remedies include an injunction and

damages, including (by s. 3(2)) for "any anxiety caused by the harassment and any financial loss resulting from the harassment". Section 7 provides materially as follows:

> "(2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A "course of conduct" must involve—
>
> (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person…"

32 In *Hayden v Dickenson* [2020] EWHC 3291 (QB), Nicklin J reviewed and summarised the authorities. He said this at [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] AC 1 593 [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... 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)]."

33 Neither side criticised this as a summary of the applicable legal principles. I gratefully adopt it.

34 With the exception of the two complaint emails sent by Mr Saunders to the Council, the matters relied upon by Dr McNally as constituting harassment were all posts on public online platforms. The case law on harassment by publication is therefore relevant, as is Mr Saunders' claim that he is a journalist.

35 Section 12 of the Human Rights Act 1998 ("HRA") applies where the court is considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression. It provides materially as follows:

> "(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…"

36 The effect of s. 12 HRA in claims alleging harassment by publication was explained by Lord Phillips MR (with whom Jonathan Parker LJ and Lord Mustill agreed) in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 78. At [24], he said this:

> "Section 3 of the HRA requires the court, so far as it is possible to do so, to interpret and give effect to legislation in a manner which is compatible with Convention rights. Section 12 of the HRA emphasises the care which the court must take not to interfere with journalistic freedom unless satisfied that this is necessary… Both these sections are important when considering the ambit of the criminal offence and the civil tort of harassment created by the 1997 Act in the context of publications by the media. Harassment must not be given an interpretation which restricts the right of freedom of expression, save in so far as this is necessary in order to achieve a legitimate aim. When considering that question, the court is required by section 2 of the HRA to have regard to the Strasbourg jurisprudence."

37 At [30], Lord Phillips noted that harassment "describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable". He continued as follows:

> "32. Whether conduct is reasonable will depend upon the circumstances of the particular case. When considering whether the conduct of the press in publishing articles is reasonable for the purposes of 1997 Act, the answer does not turn upon whether opinions expressed in the article are reasonably held. The question must be answered by reference to the right of the press to freedom of expression which has been so emphatically recognised by the jurisprudence both of Strasbourg and this country.
>
> 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."

38 At [37], Lord Phillips recorded that it was also common ground that the publication of press articles calculated to incite racial hatred of an individual provides an example of conduct which is capable of amounting to harassment under the 1997 Act. Since the claimant had pleaded an arguable case that the defendant had harassed her by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause distress, the judge had been entitled to refuse to strike out the claim or give summary judgment for the defendant: see at [49]. At [50], he said:

> "On my analysis, the test requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed."

39 In *Trimingham*, at [53], Tugendhat J summarised *Thomas* as having decided that:

> "for the court to comply with HRA s.3, it must hold that a course of conduct in the form of journalistic speech is reasonable under PHA s.1(3)(c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10(2), including, in particular, for the protection of the rights of others under Art 8."

40 Tugendhat J observed that:

> "267… It would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted…
>
> 268. One circumstance which might make a course of conduct in the form of speech amount to harassment, when otherwise it would not be harassment, is when it is repeated excessively, so as, for example, to amount to taunting."

41 In *Sube v News Groups Newspapers Ltd* [2020] EMLR 25, at [68], Warby J identified these principles as applicable to cases of harassment by publication:

> "(1) It is for the claimant to demonstrate that the conduct complained of is unreasonable, to the degree required by the authorities cited above; and it is not a question of assessing the reasonableness of any opinions expressed in the publications complained of…
>
> (2) The Court must test the 'necessity' of any interference with freedom of expression by using the well-known three-part test…
>
> (3) In general, the techniques of reporting, including the tone and editorial decisions about content, are matters for the media and not the Court to determine…
>
> (4) 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…
>
> (5) Applied to the tort of harassment, these principles mean that nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment...
>
> (6) It will be a rare or exceptional case in which these criteria are satisfied, in relation to media publication."

42 At [69], Warby J continued as follows:

> "Those observations appear to be borne out by history to date. *Trimingham* was the first claim for harassment by a media publisher to come to trial in England and Wales. It related to the content of 65 articles referring to the claimant's sexual orientation in what were said to be disparaging terms, 152 reader comments, said to taunt and lampoon her over her sexuality and appearance, and the conduct of journalists in gathering information for publication. The claim was dismissed. In the eight years since then there have been cases, such as *Hourani v Thomson* [2017] EWHC 432 (QB), involving campaigns of harassment using a variety of media. But no other case of harassment by a media organisation appears to have come to trial in this jurisdiction. Two such cases have been brought unsuccessfully in Northern Ireland, relating to series of articles alleging involvement in serious criminal activity: *King v Sunday Newspapers Ltd* ([2010] NIQB 107, appeal dismissed [2011] NICA 8) and *Fulton v Sunday Newspapers Ltd* [2015] NIQB 100 (appeal dismissed, [2017] NICA 45)."

43 *Hourani*, to which Warby J referred, involved a campaign targeting the claimant and denouncing him as responsible for the torture, drugging, beating, sexual assault and murder of a young woman in Lebanon. The campaign involved street protest, online publication and sticker distribution in the vicinity of the claimant's London home: see [1]. It caused the claimant and his family to spend most of their time out of the country: [152]. The defendants ought to have known and did in fact know and intend that the campaign they waged against the claimant would have a harassing impact on the claimant: [163].

44 In *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin) Hickinbottom J, having considered the Strasbourg case law on Article 10, explained at [38] that "enhanced protection" applies to political speech. At [42], he considered how that enhanced protection applies to civil servants:

> "(i) Civil servants are, of course, open to criticism, including public criticism; but they are involved in assisting with and implementing policies, not (like politicians) making them. As well as in their own private interests in terms of honour, dignity and reputation…, it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine public confidence in the administration. Therefore, in the public interest, it is a legitimate aim of the State to protect public servants from unwarranted comments that have, or may have, that adverse effect on good administration.
>
> (ii) Nevertheless, the acceptable limits of criticism are wider for non-elected public servants acting in an official capacity than for private individuals, because, as a result of their being in public service, it is appropriate that their actions and behaviour are subject to more thorough scrutiny. However, the limits are not as wide as for elected politicians, who come to the arena voluntarily and have the ability to respond in kind which civil servants do not…
>
> (iii) Where critical comment is made of a civil servant, such that the public interest in protecting him as well as his private interests are in play, the requirement to protect that civil servant must be weighed against the interest of open discussion of matters of public concern and, if the relevant comment was made by a politician in political expression, the enhanced protection given to his right of freedom of expression..."

Submissions for Mr Saunders

45 Mr Richard Munden began by noting that the course of conduct complained of here consisted of 5 blog posts (plus 3 more passing references), 7 tweets and 2 complaints to the Council. All were published in the context of Mr Saunders' activities as a citizen journalist. His publications were entitled to the same protection as those of the mainstream press.

46 The context was that each of the publications complained of were in response to a public act by Dr McNally as a senior official of the Council:

(a) In June 2020, the tweet and blog posts commented on the video Dr McNally had produced and posted online.

(b) The blog posts and 7 tweets from July to December 2020 commented on Dr McNally's practice of blocking individuals on Twitter. This was of significance because, as Dr McNally herself says in her evidence, she uses her Twitter account to disseminate public health information.

(c) The January blog posts and communications with the Council related to Dr McNally's use of the title "Dr" in what Mr Saunders considered was a medical

> context and her making what Mr Saunders considered to be political statements. Both were matters about which it was legitimate to comment and complain.

47 In context, it is clear that, taken alone or in combination, these publications cannot be a course of conduct which amounts to harassment under the 1997 Act. They are nothing like the "deliberate and persistent course of targeted oppression" or the "conscious abuse… of media freedom" necessary to constitute unlawful harassment.

48 The publications complained of were "occasional critical remarks about the public conduct of a senior local government official". Nor ought Mr Saunders to have known that such publications amount to harassment. Senior public officials should be open to scrutiny and criticism and the law provides that the limits of acceptable criticism are wider than for private individuals.

Submissions for Dr McNally

49 Ms Aileen McColgan QC submitted that Mr Saunders' conduct meets the threshold for harassment under the 1997 Act. She accepted that Article 10 ECHR is engaged, but not that Mr Saunders' activities attract the highest level of protection. Although he seeks to portray himself as a "citizen journalist", as an unregulated lone blogger, he is not entitled to the protection accorded by the authorities to journalism in the mainstream press.

50 Dr McNally had shared her history of mental ill-health in her capacity as a public servant. Mr Saunders' conduct has elements of oppression, persistence and unpleasantness which are distinct from the contents of the statements complained of and constitute at least a negligent – and more likely a conscious – abuse of the media freedom he claims. Ms McColgan drew an analogy with the racist content of the articles at issue in *Thomas*. As in that case, the publications here complained of targeted Dr McNally as a result of a protected characteristic: her mental ill-health.

51 Ms McColgan submitted that Mr Saunders' knowledge of Dr McNally's mental health history was relevant to whether he ought to have known that his conduct would cause her distress. The test in s. 1(2) of the 1997 Act was not entirely objective. In *Conn v Sunderland City Council* [2007] EWCA Civ 1492, Gage LJ said at [12] that what "crosses the boundary between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa". In that case, the complainant's mental health fragility could not form part of the relevant context because it was not known to the defendant. Here, by contrast, it was known. In *Hourani*, Warby J made clear at [161] that:

> "The information that is relevant when assessing what a reasonable person would think of the conduct in question includes, of course, any characteristics of the claimant which are known to the defendant: *Trimingham* [88]-[89]".

52 Ms McColgan submitted that the tests for strike-out and summary judgment were not met.

Discussion

The tests for strike-out and summary judgment

53 The tests for strike-out and summary judgment were summarised by Warby J (as he then was) in *HRH the Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch), where the application was made by the claimant.

54 CPR r. 3.4(2)(a) allows the court to strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim. Warby J noted at [11] that an application to strike out under this provision:

> "calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should 'grasp the nettle… but it should not strike out under this sub-rule unless it is 'certain' that the statement of case, or the part under attack, discloses no reasonable [grounds for bringing the claim]… Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment."

55 CPR r. 24.2 allows the court to give summary judgment against a claimant if it considers that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial. At [13], Warby J cited Lewison J's classic exposition of the correct approach to summary judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success;
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial';
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts

> of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;
>
> (vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

56 At [14] of his judgment in the *Duchess of Sussex's* case, Warby J noted that principles (vi) and (vii) "contain echoes of the law's traditional disapproval of a 'desire to investigate alleged obscurities and a hope that something will turn up'" as a basis for defending a summary judgment application. The focus has to be not just on whether something more might emerge, but on whether, if it did, it might affect the outcome of the case. At [15], however, Warby J cautioned that the court must be aware of the "cocky" litigant who urges the court to act on the ground of efficiency, which is not, on its own, a proper basis for the grant of summary judgment

What Mr Saunders has to demonstrate

57 In order to succeed in this application, Mr Saunders has to demonstrate that:

(a) there is no real prospect that Dr McNally will establish both:

(i) that the course of conduct complained of amounted to harassment; and

(ii) that Mr Saunders knew or ought to have known that his course of conduct amounted to harassment; and/or

(b) there is no real prospect that Mr Saunders will fail to establish that in the particular circumstances the pursuit of the course of conduct was reasonable.

58 In considering whether to "grasp the nettle" at this stage, I have to consider whether oral evidence might assist in a material way in establishing the context in which the conduct complained of occurred or whether the key relevant context is clear on the material now before me.

59 With a view to exploring that question, I noted that, on issue (a) in para. 58 above, the question is whether there is a real prospect of Dr McNally establishing a persistent and deliberate course of unacceptable and oppressive conduct, targeted at her, which is

calculated to and does cause her alarm, fear or distress. In the course of argument, I asked Ms McColgan whether it was part of her case that Mr Saunders did in fact know that the course of conduct he pursued amounted to harassment of Dr McNally. She said that it would be difficult, and unnecessary, to put her case on that basis; and she would not be doing so. Her case was simply that Mr Saunders *ought to have known* that what he was doing amounted to harassment. She relied in particular on the fact that Mr Saunders knew of her history of mental ill-health and carried on taunting her in circumstances where it would have been obvious to a reasonable person in possession of the same information that she would be distressed by his doing so.

60 This clarification is potentially significant, because it means that, at trial, the key questions for decision would depend on an objective assessment of the tweets, posts and emails, viewed in context, rather than on factual findings about Mr Saunders' motivation. This diminishes the extent to which oral evidence would add in a significant way to the materials now before the court.

The complaints emails

61 I begin by considering the emails of complaint sent to the Council and copied to Dr McNally.

62 I have considered the complaint emails both individually and against the background of the other conduct complained of. Pursuit of repeated meritless complaints can in principle constitute harassment: *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123, [2011] IRLR 428. But it is important to focus on the reason why it was said that the letters at issue here constituted harassment. Although Ms McColgan told me that the complaints have been rejected, the Particulars of Claim do not allege that they were obviously meritless. The main matter relied upon was the heading "THIS IS NOT A PRIVATE AND CONIFDENTIAL COMMUNICATION", which Ms McColgan said contained an implied threat to share the complaints publicly.

63 The difficulty with this is that the substance of the complaints *was* shared publicly, in blog posts about which Dr McNally complains. If these do not give rise to a harassment claim with a real prospect of success, the complaint letters do not add anything material, save to establish that Mr Saunders was sufficiently concerned about the matters complained of to submit them to a process of adjudication. That process has apparently vindicated Dr McNally. As Nicklin J put it in *Khan v Khan* (where the conduct consisted of the sending of some 70 complaint emails, copied to third parties), at [75]:

> "The receipt of repeated complaints from an individual could hardly be regarded as unusual; in public life it might be regarded as an occupational hazard for those that occupy a role of any prominence."

64 That observation applies with even greater force where the person about whom complaint is made is a senior officer in a local authority, rather than a businessman, as in the *Khan* case.

65 It follows that this claim must stand or fall on the content of Mr Saunders' blog posts and tweets. It follows that the course of conduct in issue consists materially of publications to the world at large.

Publication to the world at large

66 The authorities make clear that a course of conduct consisting entirely of publication to the world at large can constitute harassment. That was the position in *Thomas*. But the authorities also emphasise that "publication-only" harassment cases will be rare and exceptional. In *Thomas*, the factor which made the case exceptional was that the claimant had pleaded an arguable case that the defendant had published racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause distress.

67 As Warby J said at [69] of his judgment in *Sube*, *Trimingham* was the first claim alleging harassment by a "media publisher" to come to trial in England. That claim related to the content of some 65 articles referring to the claimant's sexual orientation in what were said to be disparaging terms and 152 reader comments said to taunt and lampoon her over her sexuality and appearance. The claim failed. No such claim had (or has) come to trial since.

68 The lack of success of claimants in harassment claims where the conduct consists entirely of publication to the world at large is not a coincidence. There are two reasons. The first is that harassment must be "targeted at another person": *Hayes v Willoughby*, [1]. Most publications to the world at large are not *targeted at another person*, even if they are *about* another person. The second reason is that publication to the world at large engages the core of the right to freedom of expression. Where publication to the world at large is accompanied by other activities (such as picketing at someone's home or workplace), the activity may attract the protection of the right, but what is in issue is not "pure speech", so it will be easier to justify an interference.

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. But that is not what happened here. Mr Saunders complained about being blocked by Dr McNally but it is not alleged that he sought to bring his tweets to her attention, whether by adopting a different Twitter handle or otherwise.

The Sandwell Skidder as journalism

70 *The Sandwell Skidder* is not part of the mainstream press or media. Its focus is narrow and local. It is not regulated. Mr Saunders is not a formally trained journalist. Although he is apparently assisted by others, there is nothing to suggest that his posts are reviewed by an editor. The content of the posts themselves suggests the contrary. Given their frequently puerile tone and style, a casual reader, whether in Tipton or anywhere else, might be surprised to discover that they are the work of a semi-retired former solicitor.

71 In my judgment, however, none of these features disentitles them to the protections afforded by the law to journalistic expression. 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.

72 Some of the older authorities refer to the importance of "the press" as "public watchdog": see e.g. *Observer and Guardian v United Kingdom* (1999) 14 EHRR 152, [92]. Over the last two decades, however, there has been a transformation of the media market. Print journalism has faced serious economic challenges. Many newspapers, and particularly local newspapers, have gone out of business. At the same time, there has been an explosion of online writing by individuals and groups fulfilling some of the same functions without the training or institutional structures of traditional print or broadcast journalism. The problems posed by this are well documented: see e.g. Rusbridger, *Breaking News: The Remaking of Journalism and Why it Matters Now* (Canongate, 2018). But the solution cannot be to restrict the law's enhanced protections to the dwindling number of outlets that make up the "traditional" media.

73 The European Court of Human Rights ("the Strasbourg Court") has recognised this. In the context of the Article 10 right to receive information, the Grand Chamber noted as follows in *Magyar Helsinki Bizottság v Hungary* (2020) 71 EHRR 2, at [168]:

> "The Court would also note that given the important role played by the internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by art.10 is concerned."

There is no reason why the position should be any different as regards the right to freedom of expression, the primary right guaranteed by Article 10.

74 This is consistent with s. 12(4) of the Human Rights Act 1998, by which Parliament conferred special protection on "journalistic material", which is left undefined. This formulation focuses attention on the nature of the material being published, rather than the credentials of the author. "Journalistic material" is to be identified by its subject matter, not its author, nor the process by which it comes to be published.

75 As I have indicated, a survey of the blog posts in which the material about Dr McNally appeared makes clear that she is one of the many individuals who have been subject to Mr Saunders' critical attentions. The factor linking these individuals is that each is connected in some way to the Council. In this case, the material published is said to be relevant to the exercise of Dr McNally's public functions. In these circumstances, the content falls within the category of "journalistic material" for the purposes of s. 12(4). That being so, the Court is required to have regard to the importance of the Convention right of freedom of expression and to the extent to which "it is, or would be, in the public interest for the material to be published".

Tone and style

76 A review of the blog posts in which the material complained of appears shows that Mr Saunders employs the same abrasive tone and style throughout, whomever he is criticising. This does not mean that his output enjoys any lesser protection than would be applicable to more moderately expressed prose. As Sedley LJ said in *DPP v Redmond-Bate* (1999) 163 JP 789, [2000] HRLR 249, [20]:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative

> provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having".

77 This echoes the Strasbourg Court's well-known statement that the right to freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb": *Nilsen v Norway* (1999) 30 EHRR 878, [43].

78 Caution is required before drawing from jurisprudence interpreting constitutional instruments framed in terms that differ from Article 10 ECHR. Nonetheless, the underlying justification for extending the right to freedom of expression to cover offensive speech was well explained by Justice Harlan, writing the majority opinion for the US Supreme Court in *Cohen v California* 403 US 15, 24-25 (1971):

> "To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.
>
> …Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."

79 Ms McColgan relied on the "manner" in which the posts were written as capable of supporting the harassment claim. I accept that, as Nicklin J said in *Khan v Khan* at [69], "the harassing conduct must come more from the manner in which the words are published than their content". But "manner" here refers principally to the means by which the words are directed at their target (for example, through a megaphone outside someone's house or some other intrusive method), and not generally to the words themselves. *Thomas* is a rare example where the words themselves supply the element of targeting, but that was an extreme case, where it was arguable that the language used foreseeably stimulated a volley of racist comments.

The content of the posts and tweets

80 Ms McColgan referred to what she described as "sexualised comments" in Mr Saunders' blog posts. That is a fair description of a few sentences of what he wrote – see in particular, the opening words of the post on 5 June 2020 (see para. 15 above) and some of the language describing those who had publicly praised her in the posts on 6 and 27 January 2021 (see paras 23 and 25 above). But it is important to consider the language of the posts and tweets as a whole. The dominant impression is that they contain trenchant criticism of Dr McNally, rather than just abuse or insults.

81 Mr Saunders' posts and tweets accused Dr McNally of: (i) over-sharing in an "egotistical" or "solipsistic" way in her video, when she should have been concentrating on addressing a major public health crisis; (ii) blocking Mr Saunders and others on Twitter, thereby depriving them of access to public health information; (iii) making statements critical of Government policy when she occupied a politically restricted role; and (iv) misusing the title "Dr" to give spurious authority to public health advice. There was also implicit questioning of Dr McNally's suitability to fulfil her role, given the

history of mental ill health which she had disclosed in the video and explicit questioning of whether she had made this history known to her employers at the time when she was first employed.

82 These latter elements, and the repeated references to her history of mental ill-health, come closer than anything else to tipping this case into the oppressive and unreasonable category. Superficially, it might be said that posts and tweets which cast doubt on someone's suitability for their job because of a history of mental ill health are akin to the racist comments which stimulated further racist abuse in *Thomas*. But, in my judgment, there are three important respects in which that case can be distinguished from this one.

83 First, in *Thomas*, the claimant had done nothing to publicise the matter on which the newspaper had commented; and there was a pleaded allegation that the newspaper had invaded the claimant's right to privacy by publishing her name and her place of work. This exposed her to receiving racist letters, which caused her to be terrified to go to her place of work: see [46]. In this case, by contrast, the first subject of Mr Saunders' comments was the video which Dr McNally had herself chosen to publicise. There is no doubt that, in commenting on her mental ill-health, he was commenting on something intensely personal to Dr McNally. But the subject matter was in no sense private; it was something Dr McNally had herself decided to place in the public domain. For my part, I regard that decision as reflecting favourably on Dr McNally, because her disclosure was likely to have the effect she intended – i.e. to reassure others with mental health conditions that they are not alone and that it is possible to live with and recover from them. But someone who decides to make a public disclosure of this kind must expect that, while many people are likely to comment favourably, some may choose to make comments that are adverse. This is one of the reasons why those who make such disclosures are often aptly described as courageous.

84 Second, and relatedly, the claimant in *Thomas* was a clerk, not a senior officer. As Hickinbottom J said in *Heesom* at [42(iii)], "the acceptable limits of criticism are wider for non-elected public servants acting in an official capacity than for private individuals, because, as a result of their being in public service, it is appropriate that their actions and behaviour are subject to more thorough scrutiny". I accept that the limits of acceptable criticism will be narrower than in the case of elected politicians, but some public criticism is inevitable. In this case, the fact that Dr McNally occupied a public health role during a pandemic meant that her performance of the role was of particular public importance. The public interest in that performance being subject to scrutiny and criticism was commensurately greater. The extent of that public interest does not depend on the criticisms being justified. If it did, the court would be assuming for itself the role of deciding whether criticisms made of public officials were well-founded. Because that would not be knowable in advance, it would operate to disincentivise critical comment.

85 Third, the basis of the reasoning in *Thomas* was that the articles complained of were arguably racist. Here, the main thrust of Mr Saunders' criticism was of Dr McNally's decision to make a public disclosure during a pandemic. There was also explicit questioning of whether she had declared her history of mental ill-health to her employer when she was first employed. As I have said, it does not matter whether these criticisms were justified. They were criticisms related to the performance of her functions. The closest analogue of the racist content of the article in *Thomas* is the description of Dr McNally in two tweets as a "weirdo". But that, though certainly not pleasant, is a fairly

ubiquitous word. It is not obvious that its use is a reference to Dr McNally's history of mental ill-health rather than what Mr Saunders saw as her tendency to over-share.

The balancing exercise

86 It is plain from the authorities that the question whether conduct crosses the line to become oppressive requires consideration of many of the same factors as are relevant to the question of reasonableness within s. 1(3)(c) of the 1997 Act. They also indicate that, in considering the latter, it is necessary to balance the publisher's right to freedom of expression against the rights and interests of the claimant.

87 In some cases, a series of publications said to constitute harassment will be alleged to be untruthful in whole or in part. The authorities indicate that this is likely to be an important factor in the balancing exercise: *Hayden v Dickenson,* [44(xi)]. One reason for this is that the right to reputation can engage Article 8 interests: see e.g. *Pfeifer v Austria* (2009) 48 EHRR 8, [35], and the previous case law there set out. In this case, however, there is no allegation that anything said was factually untrue (as distinct from being unjustified comment).

88 In other cases, it may be said that a series of publications reveals matters that were always private, or matters that were once public but were now stale. In both cases, it may be said that Article 8 interests are engaged. Here, by contrast, Mr Saunders' criticisms were directed at things Dr McNally had chosen to say in public very recently. That being so, it is far from obvious to me that Article 8 is engaged at all. If it is (for example on the basis that the criticisms were about her mental health, which is an aspect of her "physical and psychological integrity": see *Pretty v United Kingdom* (2002) 35 EHRR 1, [23]), the weight to be attached to her Article 8 interests is significantly diminished by her own decision to put her history of mental ill-health into the public domain.

89 Separately from any Article 8 right of Dr McNally's, it is necessary to consider the public interest in Dr McNally being able to continue in her important public role without being subject to conduct which undermines her ability to do so. For these purposes, at the summary judgment stage, I am willing to assume that there is a powerful public interest in Dr McNally remaining in post, particularly given the importance of her role to the Council's response to the pandemic. I also assume the accuracy of what Dr McNally has said about the impact of Mr Saunders' words on her. However, even so, these public interests are outweighed by Mr Saunders' Article 10 rights, given that:

(a) the complaint letters do not add materially to the course of conduct complained of: see [61]-[65] above;

(b) the course of conduct therefore involved, materially, publication to the world at large and, at least after Dr McNally had "blocked" him on Twitter, there is no evidence that Mr Saunders took steps to bring the posts or tweets to her attention: see [66]-[69] above;

(c) even though Mr Saunders' blog is not part of the "mainstream" or "conventional" media, the posts and tweets were "journalistic material" for the purposes of s. 2(4) of the HRA and attract the enhanced protection given by Article 10 to journalistic expression: see [70]-[75] above;

(d) their puerile and abrasive tone and style did not disentitle them to that protection: [76]-[79] above;

(e) their content was not, on its own, such as to make them oppressive or such as to make it unreasonable for Mr Saunders to publish them: see [80]-[85] above; and

(f) Dr McNally's Article 8 interests were either not engaged at all or the weight to be given to those interest was significantly diminished by her own decision to put her history of mental ill-health into the public domain: see [86]-[88] above.

Conclusion

90 I have considered whether this is a case in which the balancing exercise might be materially affected by evidence at trial. In my judgment, however, this is one of those cases where – as in the *Duchess of Sussex's* case – the court ought to "grasp the nettle" at this stage. In my judgment the claim has no real prospect of success.

91 As I have sought to make clear, nothing I have said should be taken as implying that I consider any of the criticisms made by Mr Saunders of Dr McNally to be justified. Equally, nothing in this judgment casts any doubt on the effects which she says they have had on her. The only question for me is whether there is a real prospect that this series of unpleasant, personally critical publications could found a successful claim for harassment under the 1997 Act. In my view, the answer is "No".

92 I shall therefore grant summary judgment for Mr Saunders under CPR r. 24.2. In those circumstances it is not necessary to decide the application to strike out the Particulars of Claim under CPR r. 3.4(2)(a).