SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 21

GE17011032

NOTE

by

SHERIFF S REID

in the complaint of

THE PROCURATOR FISCAL, GLASGOW

against

K, J & R

For the Procurator Fiscal: Ms L. McNeill, Crown Office & Procurator Fiscal Service
For the first accused: Ms V. Dow, Advocate

Summary

[1] In these summary proceedings, the three accused are alleged to have engaged in threatening and offensive behaviour at a regulated football match, contrary to the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1(1).

[2] Specifically, it is alleged that the first and second accused attended at Celtic Park Football Stadium whilst wearing shirts which displayed an image of a figure related to and in support of a proscribed terrorist organisation, namely the Irish Republican Army ("IRA"). The third accused is said to have done likewise and, in addition, is alleged to have displayed a banner bearing a similar image. The behaviour is alleged to fall within both sections 1(2)(d) and 1(2)(e) of the 2012 Act.

[3] Only the first accused (hereinafter referred to as "the accused") lodged a minute in compliance with rule 40.3 of the Act of Adjournal (Criminal Procedure Rules) 1996 raising a compatibility issue in terms of section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995.

[4] On 20 March 2018, the proceedings called before me at a diet of debate on the accused's compatibility minute.

The charge

[5] The charge against the accused is as follows:

> "(001) on 19th July 2017 at Celtic Park Football Stadium, Glasgow G43 RE you [K] ……. being a person within Celtic Park, a ground where a regulated football match is being held, did engage in behaviour of a kind described in section 1(2)(d) and section 1(2)(e) of the aftermentioned Act, which is likely or would be likely to incite public disorder in that you did attend at the said regulated football match whilst wearing a shirt which displayed an image of a figure related to and in support of a proscribed terrorist organisation namely the Irish Republican Army (IRA); CONTRARY to the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, Section 1(1)".

The legislation

[6] Sections 1 & 2 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act"), so far as material, provide as follows:

> "1(1) A person commits an offence if, in relation to a regulated football match –
> (a) the person engages in behaviour of a kind described in subsection (2), and
> (b) the behaviour –

(i) is likely to incite public disorder or
(ii) would be likely to incite public disorder

(2) The behaviour is - …
(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of
(i) a religious group,
(ii) a social or cultural group with a perceived religious affiliation,
(iii) a group defined by reference to a thing mentioned in subsection (4)
(b) expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of a group mentioned in any of the subparagraphs (i) to (iii) of paragraph (a),
(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those subparagraphs,
(d) behaviour that is threatening, or
(e) other behaviour that a reasonable person would be likely to consider offensive…

2(1) In section 1 and this section, 'regulated football match' –
(a) has the same meaning as it has for the purposes of Chapter 1 (football banning orders) of Part II of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (see section 55(2) of that Act)…

(2) For the purposes of section 1(1), a person's behaviour is in relation to a regulated football match if –
(a) it occurs –
(i) in the ground where the regulated football match is being held on the day on which it is being held,
(ii) while the person is entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or
(iii) on a journey to or from the regulated football match…"

Submissions for the accused

[7] The accused's minute challenges the compatibility of section 1(2)(e) of the 2012 Act with article 7 of the European Convention on Human Rights ("ECHR") on the

ground that the sub-section is "insufficiently precise in its definition". More broadly, the minute challenges the compatibility of the legislation (so far as it criminalises certain types of behaviour) with the accused's right to freedom of expression under article 10, ECHR. While it is conceded that the aims of preventing public disorder and crime are necessary in a democratic society, the alleged "criminalisation of expression at football matches" is said to be unnecessary and disproportionate.

[8] The oral submissions in support of the minute were brief. As regards the alleged incompatibility with article 7, counsel for the accused submitted that section 1(2)(e) was framed in "very general terms". It lacked the necessary certainty and foreseeability required by article 7. Counsel criticised the use of a hypothetical "reasonable" person to determine whether behaviour was offensive. It was said that no objective meaning could be attributed to the word "offensive". The circumstances in which a person might be "offended" were so variable that the point at which behaviour became criminal was incapable of objective determination. Besides, a sufficient remedy already existed in criminal law to deal with any perceived need to prevent public disorder, namely the common law offence of breach of the peace or the statutory offence under section 38 of the Criminal Justice & Licensing (Scotland) Act 2010. The creation of a new offence under section 1 of the 2012 Act was not necessary. Reference was made to *Donnelly* & *Walsh* v *Procurator Fiscal, Edinburgh* [2015] HCJAC 35, though the dicta in paragraph 13 thereof were said to be obiter.

[9] I was invited to conclude that it was a "relevant factor" in the determination of the minute that the Scottish Parliament had recently voted to repeal the 2012 Act by a

resounding majority. I was told that the Parliament had been invited to repeal it specifically because of its lack of clarity and because it was not "fit for purpose". It was said that I should "find support" for the granting of the minute in that circumstance. I was invited to sustain the minute and desert the proceedings.

[10] In the alternative, counsel sought to rely upon a preliminary plea of oppression. Reference was made to directions that had allegedly been issued by the Lord Advocate to the effect that existing prosecutions under the 2012 Act were to continue until the Bill repealing the 2012 Act came into force. (I was not provided with a copy of the directions.) The gist of the submission was that the continuation of the present proceedings would be grossly unfair to the accused, in light of the imminent repeal of the 2012 Act. The test of oppression was said to be satisfied. Reference was made to *McFadyen* v *Annan* 1992 JC 53.

Submissions for the prosecutor

[11] For the prosecutor, the minute was opposed. It was submitted that section 1 of the 2012 Act was sufficiently precise to comply with article 7. Specifically, the dual principles of foreseeability and accessibility were complied with. Absolute clarity was not required by ECHR jurisprudence. The meaning of section 1(2)(e) of the 2012 Act could be objectively determined. Reference was made to *Donnelly & Walsh*, *supra,* paragraph [13]. Besides, each case turned on its facts. I was advised that the Crown intended to lead evidence (i) that the opposing team at the match was Linfield Football Club, a Northern Irish team traditionally associated with the protestant community

there and (ii) of the "irate" reaction of the Linfield supporters to the accused's behaviour. Reference was made to *Maguire v United Kingdom,* Case number 58060/13 which, though it concerned the common law offence of breach of the peace, was said to be analogous.

Discussion

[12] In my judgment, the submissions for the accused are not well-founded and the compatibility minute falls to be refused. I explain my reasoning below.

Alleged incompatibility with article 7, ECHR

[13] Article 7 of the ECHR, so far as material, states:-

> "No punishment without law
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed…"

[14] The guarantee in article 7 is an essential element of the rule of law. It is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: the article also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed (for instance by analogy) to an accused's detriment.

[15] The general principles enshrined in article 7 were recently re-stated in *Kononov* v *Latvia* (2011) 52 EHRR 21 and approved in *Maktouf* v *Bosnia & Herzegovina* (2014) 58 EHRR 11. An offence must be clearly defined in law. The concept of "law" implies certain qualitative requirements, notably the dual requirements of "accessibility" and "foreseeability". But absolute legal certainty is not required. The test is one of reasonable foreseeability. This qualitative requirement can be satisfied where the accused can reasonably know from the wording of the relevant provision – and, if need be, with the assistance of the court's interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable, and the punishment that may follow.

[16] The European Court of Human Rights ("ECtHR") has repeatedly acknowledged that, however clearly drafted a legal provision may be in the criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention states, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. So, article 7 of the ECHR should not be read as outlawing the gradual clarification of rules of criminal law through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably have been foreseen by an accused person (*Kononov, supra*, paragraph [185]). It is also worth observing that development of the criminal law by judicial interpretation is more likely to be tolerated where the development reflects Convention expectations or positive obligations, such as the Convention's concern for the protection of human dignity (*SW* v

United Kingdom [1995] A/355-B, paragraph 36) and for protection against threats to physical integrity (*G* v *France* (1995) A/325-B, paragraphs 24– 27).

[17] ECHR jurisprudence also specifically recognises that "the wording of statutes is not always precise" (*Camilleri* v *Malta* (2013) 57 EHRR 32). One of the standard techniques of statutory regulation is to use general categorisations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and their interpretation and application depend on practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as may remain. Whilst certainty is highly desirable, it may bring in its train excessive rigidity. The law must be able to keep pace with changing circumstances (*Camilleri, supra,* paragraphs [31] & [32]).

[18] Against that analysis of the legal background, I turn to consider whether the impugned provision (section 1(2)(e) of the 2012 Act) satisfies the qualitative requirements of accessibility and foreseeability implied in article 7, ECHR.

The requirement of "accessibility"

[19] In my judgment, the impugned provision satisfies the implied qualitative requirement of "accessibility" in terms of ECHR jurisprudence. The provision has a basis in domestic law. It can readily be found in section 1(2)(e) of the 2012 Act, with or without the benefit of informed legal advice.

[20] No submission to the contrary was advanced.

The requirement of "foreseeability"

[21] In my judgment, the impugned provision also satisfies the implied qualitative requirement of "foreseeability" in terms of ECHR jurisprudence. Specifically, I am satisfied that the accused can reasonably know from the relevant statutory wording – and, if need be, with the assistance of informed legal advice and the court's interpretation of it – what acts and omissions will make him criminally liable, and the punishment that may follow.

[22] In reaching that conclusion, I have had particular regard to four considerations: (i) the natural and ordinary meaning of the word "offensive"; (ii) the usual linguistic canons or principles of statutory interpretation that fall to be applied to assist in understanding the meaning of section 1(2)(e); (iii) the Scottish Parliamentary materials accompanying the presentation of this legislation to Parliament, prior to its enactment; and (iv) reported case-law on the judicial interpretation of the legislation and analogous common law offences.

[23] Taking each of these considerations in turn, firstly, the starting point of any exercise of statutory interpretation is to consider the ordinary meaning of the word or phrase in question. If there is more than one ordinary meaning, the most common and well-established is generally to be preferred (all other things being equal). In my judgment, there is no particular difficulty in identifying and understanding the ordinary meaning of the word "offensive". As an adjective, it describes something of the nature of, or pertaining to, or having the function of, attack; something aggressive, antagonistic,

designed, or having effect, to cause hurt, harm, injury (The New Shorter Oxford English Dictionary).

[24] True, in its ordinary signification the word "offensive" can also have a wider meaning. It can also be used to describe something that is merely displeasing, annoying, distasteful, or insulting. Counsel for the accused criticised the impugned provision on the basis that, due to its supposed uncertainty, section 1(2)(e) may have effect to criminalise as "offensive" behaviour that is merely rude or displeasing. In my judgment, that is not a reasonably foreseeable prospect given the remaining three considerations discussed below, namely the application of the ordinary linguistic canons of statutory interpretation and the assistance to be gleaned from contemporaneous Parliamentary materials and reported case-law.

[25] Secondly, well-established principles exist that can assist the court (as well as legal practitioners and ordinary persons having the benefit of legal advice) to understand the meaning of the impugned statutory provision. Most significantly, it is trite law that a word or phrase in an enactment must always be construed in light of the surrounding text. Words and phrases cannot be read in isolation: "their colour and their content are derived from their context" (*Attorney-General* v *Prince Ernest Augustus of Hanover* [1957] AC 436 per Viscount Simonds at 461). In the present case, the meaning of the word "offensive" in section 1(2)(e) of the 2012 Act is readily capable of being determined from its surrounding textual context. The sub-section forms part of a list of types of "behaviour"; the impugned provision is the residual category in that list; and perusal of the list discloses that a common theme runs through the entire section. The

list comprises the following: behaviour that expresses hatred of, or stirs up hatred against, particular groups (section 1(2)(a)); behaviour that expresses hatred of, or stirs up hatred against, an individual in any such group (section 1(2)(b)); behaviour that is motivated by hatred of such a group (section 1(2)(c)); behaviour that is threatening (section 1(2)(d)); and, finally, "*other* behaviour" that a reasonable person would be likely to consider offensive (section 1(2)(e)). The meaning of the impugned residual category (section 1(2)(e)) can readily be derived from a consideration of the associated preceding sub-clauses. This is the principle embedded in the Latin maxim *noscitur a sociis* (it is recognised by its associates). The associated clauses within section 1(2) all have the flavour of behaviour that is antagonistic. The word "offensive" in the residual category of section 1(2) draws its meaning from that associated context. Viewed in that light, it is plain that section 1(2)(e) has nothing whatsoever to do with offensive behaviour in the sense of mere rudeness, discourtesy, or minor slight. Drawing colour from its context, it is aimed at behaviour that is hostile or antagonistic, imbued with the notion of provocation or attack (implicit or otherwise), and calculated (or having effect) to cause harm, hurt or injury.

[26] In a similar vein, a related principle of statutory interpretation leads to the same conclusion. The *ejusdem generis* principle is a rule of construction whereby words that would otherwise have a wide meaning (such as, for example, "offensive") are treated as reduced or restricted (or, indeed, altered) in their meaning by virtue of being associated, in the legislative text, with words forming an identifiable class or genus. The most common application of the principle is where a statute contains a list or string of terms

which describes a class or category of things (a genus), followed by a wider residuary or "sweeping-up" category. In that situation, the otherwise wide or general meaning of the residuary category is restricted in scope in order to bring it within the narrower meaning of the identifiable genus. The *ejusdem generis* principle applies in the present case, to further assist in the interpretation of section 1(2)(e) of the 2012 Act. On a proper interpretation, it can be seen to have nothing to do with offensive behaviour in its wider sense, that is, behaviour (as suggested by counsel) that is merely displeasing, unpleasant, rude or annoying. The meaning is restricted to the class or genus of behaviour (as described in paragraph [25], above) that is readily discernible from the preceding clauses.

[27] But the matter does not end there. Thirdly, the proper interpretation of section 1(2)(e) is also be aided by reference to the Scottish Government's policy memorandum which accompanied the pre-enactment bill upon its presentation to the Scottish Parliament (*Pepper v Hart* [1990] 1WLR 204). This sheds light on the mischief that the Act sought to address and the underlying legislative objectives. From this, it can be discerned that the legislation was not directed at behaviour that was merely rude, impolite or annoying. It was directed at something recognisably different. The policy memorandum noted that there were "serious social issues affecting Scottish football; including sectarianism, alcohol misuse and violence" (paragraph 8); it gives particular instances of the type of behaviour manifested in and around football matches in the period immediately leading up to the enactment of the legislation; and it goes on to record:-

> "There is a small often determined minority for whom *provoking, antagonising, threatening and offending* are seen as part and parcel of what it means to support a football team. Whatever their motivation, this Bill seeks to demonstrate that such a view is mistaken and will no longer be accepted" (my emphasis).

Again, in this way, the meaning of the word "offensive" in section 1(2)(e) (and of the residual type of behaviour that is being targeted) is readily capable of being understood. It is not so vague or uncertain as to leave persons, properly informed, in any material doubt as to what is being criminalised.

[28] Fourthly, the test of "foreseeability" envisages that assistance as to the meaning of an impugned "law" may be obtained from previous instances of judicial interpretation (*Kokkinakis* v *Greece* (1993) 17 EHRR 397, paragraph 52), even if the individual requires to take appropriate legal advice. Interestingly, there are two well-known and authoritative decisions in relation to section 1(2) of the 2012 Act. In *MacDonald* v *Cairns* 2013 SLT 929 a sheriff concluded, on a no case to answer submission, that the singing of a sectarian song (which expressed praise for Irish hunger strikers and contained a line about joining the IRA) at a football match between two Scottish football clubs on a Saturday afternoon in Dingwall was, if proved, behaviour which a reasonable person would be likely to consider offensive. No appeal was taken against that aspect of the sheriff's decision, nor was any criticism directed at that aspect of the decision by the High Court on appeal. Likewise, in *Donnelly & Walsh* v *Procurator Fiscal, Edinburgh* [2015] HCJAC 35 the appeal court stated that it was "firmly established in law, and incidentally very well-known, that singing songs of a sectarian nature at football

matches is likely to be a criminal act." In that case, the offending song celebrated the activities of the IRA and the INLA. The appeal court opined that:

> "It cannot come as a surprise that the singing of such a song by a significant group of fans at a match will be regarded by a reasonable person as being both threatening *and offensive*…" (my emphasis).

[29] The alleged behaviour in the present case involves, not the singing of a song in support of a proscribed terrorist organisation, but the alleged wearing of a shirt displaying an image in support of the same proscribed terrorist organisation (namely the IRA). The difference is immaterial. By analogy with existing case-law, it is not a significant leap in logic to conclude that, with the benefit of appropriate legal advice, it ought to be reasonably foreseeable to a person of ordinary intelligence that the wearing of apparel (like the singing of a song, or the flying of a banner) relating to and in support of a proscribed terrorist organisation such as the IRA at a Scottish football match is likely to be regarded as offensive (in the manner described in the impugned provision) and is therefore likely to be a criminal act. Such a conclusion would merely be reinforced if, in due course, it were to be established (as the Crown offers to prove) that the alleged conduct occurred in the context of a football match at Celtic Park between Celtic and a visiting Northern Irish club traditionally linked with the Protestant community in Belfast. Besides, such a development of the criminal law by judicial interpretation (if that is how it is to be characterised) is more likely to be tolerated where, as here, the development would reflect Convention expectations or positive obligations for the protection of human dignity (*SW* v *United Kingdom, supra,* paragraph 36) and for protection against threats to physical integrity (*G* v *France, supra,* paragraphs 24– 27).

[30] For the foregoing reasons, in my judgment the impugned provision (section 1(2)(e) of the 2012 Act) satisfies the implied qualitative requirement of foreseeability prescribed by ECHR jurisprudence.

[31] For completeness, I should record that counsel for the accused criticised the use of the hypothetical "reasonable person" in section 1(2)(e) as a device or standard by which to assess whether behaviour was offensive. She disputed that "offensive" behaviour was capable of objective determination. I disagree. The similar use of an objective test in a penal context is not uncommon. An objective test is used to determine whether conduct is "genuinely alarming" and disturbing to any reasonable person for the purpose of constituting the common law offence of breach of the peace (*Smith* v *Donnelly* 2002 JC 65). This device was approved by the ECtHR in *Lucas* v *United Kingdom* (2003) 37 EHRR CD 86 as sufficiently precise to be consistent with article 7. Applying an objective standard, the courts are well able to distinguish conduct which is "genuinely alarming" from conduct which is merely perverse or annoying (*David Wotherspoon* v *Procurator Fiscal, Glasgow* [2017] HCJAC 69). Likewise, counsel conceded that conduct that is "abusive" (for the purpose of constituting an offence under section 38 of the 2010 Act) is determined objectively. The courts are often called upon to interpret, by application of an objective standard, the meaning of other words and phrases which are otherwise properly capable of a wide range of subjective meanings, such as "obscene" (Civil Government (Scotland) Act 1982, section 47), "annoyance" (1982 Act, section 49), "indecent" (*Abrahams* v *Cavey* [1968] 1 QB 479), and "public indecency" (*Webster* v *Dominick* 2005 1 JC 65), to list but a few. The objective determination of behaviour as

"offensive" is no different, not least when, as here, the court is assisted in its interpretation by the recognised ordinary meaning of the word, the textual context, the parliamentary context, and reported analogous case-law.

[32] For the foregoing reasons, in my judgment section 1(2)(e) of the 2012 Act is compatible with article 7, ECHR.

Alleged breach of article 10, ECHR

[33] In his minute, the accused submitted "more broadly" that "the legislation criminalising behaviour" as defined in the 2012 Act breached his right of freedom of expression. The minute states that the "criminalisation of expression at football matches" is not necessary and proportionate to the aim of preventing public disorder. (I pause to observe that the accused's libelled alleged conduct is said to fall within both section 1(2)(d) (threatening behaviour) and section 1(2)(e) (offensive behaviour) of the 2012 Act. In her submissions though, counsel did not seek to address the sub-sections individually, or otherwise distinguish them.)

[34] In my judgment, the relevant impugned provisions (in this case, sections 1(2)(d) & (e) of the 2012 Act) are compatible with the accused's article 10 Convention right. I explain my reasoning below.

[35] Article 10 of the ECHR, so far as material, provides:

> "Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart

> information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Is article 10 engaged?

[36] The protection afforded by article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed. Therefore, the right to freedom of expression may include the right of a person to express his or her ideas through a chosen mode of dress. Thus, in *Donaldson* v *United Kingdom*, Case number 56975/09, the ECtHR found that the applicant's decision to wear an Easter lily (a symbol to commemorate the Irish Republican combatants who died during, or were executed after, the 1916 Easter Rising in Ireland) had to be regarded as a way of expressing his political views. In *Vajnay* v *Hungary*, Case number 33629/06, the ECtHR found that article 10 was applicable to the wearing of a red star on the applicant's jacket. And, of particular relevance to the present case, in *Maguire* v *United Kingdom*, Case number 58060/13, the ECtHR, without giving a formal ruling on the point, was prepared to proceed on the assumption that the applicant's decision to wear a black top to an Old Firm match emblazoned on the front, in bright green colours, with the letters "INLA" and on the back with the slogan "Fuck your poppy, remember

Derry", might be regarded as a way for him to express his political views; and, therefore, a conviction for such conduct engaged (but, in the circumstances, did not violate) article 10, ECHR.

[37] As in *Maguire*, *supra,* without formally determining the point, for the purposes of the present discussion I am prepared to proceed on the assumption that the wearing of a shirt bearing the libelled image might conceivably be regarded as way of the accused expressing his views on an issue of political interest. To that extent, in respect that the 2012 Act seeks to limit that behaviour, article 10, ECHR is engaged.

[38] But the article 10 Convention right is not absolute. It is a qualified right. Interference may be justified in the circumstances described in article 10(2). This calls for scrutiny of three separate issues: (i) whether the interference pursues a legitimate aim; (ii) whether the interference is prescribed by law; and (iii) whether the interference is necessary in a democratic society.

Does the interference pursue a legitimate aim?

[39] In my judgment, the impugned measure (namely the criminalisation of the behaviour described in section 1(2) of the 2012 Act) pursues two legitimate aims, in the sense that it is aimed at protecting "public safety" and preventing "disorder or crime" (article 10(2), ECHR). These aims are evident from the second component limb of the offence: the specified behaviour is criminalised only if it is likely, or would be likely, to "incite public disorder" (section 1(1)(b), 2012 Act). The aims are also discernible from the contemporaneous supporting parliamentary materials, notably the Scottish

Government's policy memorandum which records the legislative objective as being to address "serious social issues affecting Scottish football including… violence" (paragraph 10) and the prevention of "serious harm to individuals and communities" (paragraph 12) caused by behaviour at football matches. Besides, it may be treated as a matter of general knowledge that public disorder at football matches is by no means uncommon (*Wilson* v *Brown* 1982 SLT 362; *Allison* v *Higson* 2004 SCCR 721; *MacDonald* v *Cairns*, *supra; Donnelly & Walsh*, *supra*) and that the risks to public safety and social cohesion had reached an "intolerable level" (see Scottish Government policy memorandum, paragraph 8) shortly prior to enactment of the 2012 Act.

[40] Counsel for the accused did not dispute that the impugned measures pursued a legitimate aim (of preventing disorder and crime).

Is the interference prescribed by law?

[41] In my judgment, the impugned interference with the accused's right to freedom of expression is "prescribed by law", in terms of article 10(2), ECHR.

[42] The criminalisation of the alleged behaviour, and resulting range of penalties, have a sufficient legal basis in domestic statute law. Further, the interference complies with the implied qualitative requirements of "law" in a democratic society, in that it is both adequately accessible and reasonably foreseeable. I refer to my reasoning in paragraphs [19] to [32], above. Any perceived uncertainty in the definition of component elements of the criminal behaviour in section 1(2) of the 2012 Act falls comfortably within acceptable parameters of linguistic imprecision inherent in a statutory penal code

of general application. By way of comparison, a purported criminal offence of "denigrating Turkishness" failed the foreseeability requirement due to its fundamental uncertainty (*Altug Taner Akcam* v *Turkey*, ECtHR, 25 October 2011). That is a far cry from the statutory wording in the present case, the meaning of which is readily capable of being discerned from its ordinary signification, its textual context, its parliamentary context, and analogous case-law.

Is the interference necessary in a democratic society?

[43] Lastly, in my judgment, the interference complained of can properly be said to be necessary in a democratic society. Specifically, it corresponds to a pressing social need; it is proportionate to the legitimate aim pursued; and it is justified by relevant and sufficient reasons.

[44] First, the concept of a "pressing social need" suggests a compelling reason rather than one which is merely admissible, ordinary, useful, reasonable or desirable, but the test is not as high as to require an "indispensable" reason (*Handyside* v *United Kingdom* (1976) A/24, paragraph 48). In this case, the "pressing social need" as well as the "relevant and sufficient reasons" for the interference are recorded in clear, explicit and unflinching terms in the Scottish Government's policy memorandum. The memorandum noted that there were "serious social issues affecting Scottish football" (paragraph 10) which had reached:

> "…an intolerable level, with sectarian and offensive behaviour, misconduct from players and managers, death threats, and live ammunition and bombs sent to prominent figures directly and indirectly associated with football." (paragraph 8)

The legislation was enacted in the wake of these grave and escalating incidents in the 2010/2011 football season. They were overwhelmingly regarded by the Scottish Parliament at that time as demanding "a serious and immediate response". The 2012 Act was said to form "a central part of that response". The ECtHR itself has acknowledged that sectarian football-related misconduct is "recognised as a societal problem in Scotland" (*Maguire* v *United Kingdom*, *supra*, paragraph 54). Indeed the 2012 Act initially proceeded as an Emergency Bill, so pressing was the perceived need.

[45] Second, the interference must be proportionate. To satisfy this test, consideration must be given to the relationship between the means selected (to pursue the aim) and the stated aim. The proportionality of that measure involves a complex consideration of the particular circumstances, including "the nature of the restriction in question, the degree of interference, the nature of the type of opinions or information involved, the societal or political context of the case, the persons involved, the type of medium involved, and the public involved" (Reed & Murdoch, *Human Rights Law in Scotland* (4th ed.), 7.71).

[46] In the present case, in my judgment the means selected to address the pressing social need (namely, the "intolerable level" of escalating sectarian-related violence and misconduct around football matches) was focused, measured and carefully honed to lance that social boil. It is important to observe that the impugned provision does not seek to criminalise the expression of views generally. The impugned interference is much narrower in scope. As was explained by the Appeal Court in *Donnelly & Walsh*,

supra, section 1(2)(e) does not impose a "blanket ban" on expressing views that may be contentious, even offensive to others. That is not a crime. If the accused is indeed expressing some kind of view on an issue of public, political or historical interest (which remains to be seen), he is at liberty to indulge his desire to do so at many alternative locations, on many alternative occasions. The impugned interference merely criminalises *particular* conduct, at a *particular* time, in a *particular* place.

[46] Further, article 10(2), ECHR explicitly acknowledges that the exercise of freedom of expression "carries with it duties and responsibilities". It is, explicitly, a qualified right. The ECtHR has held that a person who purports to exercise freedom of expression is under an obligation:

> "…to avoid as far as possible expressions that are *gratuitously offensive to others* and thus an infringement of their rights, *and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs*",

a responsibility which is recognised as being of particular relevance in the context of discussion of religious opinions and beliefs (*Otto-Preminger-Institut* v *Austria* (1994) A295-A, paragraph 49).

[47] In my judgment, the alleged wearing of a shirt bearing an image in support of the IRA to a Scottish football match (*a fortiori* against a visiting team from Belfast with associations to the Protestant community there) cannot conceivably be regarded as contributing, in any material, intelligible or relevant way, to any public debate capable of furthering progress in human affairs. On the contrary, if proved, it would, viewed in context, be more akin to conduct of a hostile, antagonistic and "gratuitously offensive"

nature (per *Otto-Preminger-Institut*, *supra*), imbued with the notion of provocation or attack, and calculated (or having effect) to cause harm, hurt or injury; conduct which the Scottish Parliament, in the exercise of its margin of appreciation, was entitled to restrict (within defined parameters) in the pursuit of nobler, legitimate aims, for the benefit of Scottish society as a whole.

[48] For the foregoing reasons, in my judgment section 1(2) of the 2012 Act is compatible with article 10, ECHR.

The imminent repeal of the 2012 Act

[49] In her submissions, counsel for the accused placed significant reliance on a recent vote by the Scottish Parliament to repeal the 2012 Act. Indeed, she indicated that, but for that legislative development, the minute might have been unarguable.

[50] In my judgment, this development is of no material significance to the judicial function that I require to perform in relation to the compatibility minute.

[51] Firstly, the constitutional role of the court is to interpret and apply the law as it stands. Its decisions are essentially legal in nature. The constitutional role of the Scottish Parliament is quite different. It makes new law and (if it wishes) repeals existing law. Its decisions are essentially political in nature. Whether or not a majority of the Scottish Parliament, as presently constituted, has decided, for any number of reasons, that the 2012 Act is not "fit for purpose" (whatever that may mean) is of no relevance to the judicial function that I have to exercise, namely to determine whether, as a matter of law,

certain provisions of an Act of the Scottish Parliament are compatible with two specific articles of the ECHR.

[52] Secondly, for the time being at least, the 2012 Act remains fully in force (and for certain limited purposes will continue to have a legal effect even after its anticipated repeal).

[53] To explain, the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill ("the Bill") was passed by the Scottish Parliament on 15 March 2018. It does not come into force until it receives the Royal Assent. As far as I am aware, it has not yet received the Royal Assent.

[54] Besides, while the Bill bears to repeal the 2012 Act (section 1) and to prevent the conviction of any person of an offence under the 2012 Act after it comes into force (section 2), it does not have absolute retrospective effect. The Bill explicitly provides that the repeal of the 2012 Act does not affect the liability of a person to criminal sanction under the 2012 Act if that person is so convicted prior to the Bill receiving Royal Assent. Indeed, a person who (prior to the repeal) is acquitted of an offence under the 2012 Act may yet still be convicted (after the date of repeal) of an offence under the 2012 Act, by virtue of an appeal by the Crown against that acquittal (section 2(3)).

[55] In simple terms, the 2012 Act remains in force for the time being, and will continue to have some (albeit limited) legal force even after the date of its repeal. The parliamentary vote on 15 March 2018 neither determines the legal question in the compatibility minute, nor wholly extinguishes the legal effect of section 1 of the 2012 Act.

[56] In any event, the case law of the ECtHR does not require Contracting States to undo all the consequences of a national law which is later held to be incompatible with the Convention, at least insofar as the implied qualitative requirements of the law in question are otherwise met (*Interfact Limited* v *Liverpool City Council* [2011] QB 744).

[57] For all of the foregoing reasons, I refuse the accused's compatibility minute.

Plea of oppression

[58] Counsel advanced an alternative submission. Even if the compatibility minute was refused, I was invited to sustain a common law plea of oppression.

[59] Normally, any objection to the competency or relevancy of a summary complaint or proceedings thereon should be stated before the accused pleads to the charge (Criminal Procedure (Scotland) Act 1995, section 144(4)). On cause shown, and with leave of the court, a late objection may be allowed. In this case, the accused's plea of oppression first emerged in the course of counsel's submissions at the diet of debate on 20 March 2018, long after the accused had tendered a plea of not guilty on 28 September 2017 and in the context of a diet of debate that had been assigned to address a separate issue entirely, namely the compatibility minute.

[60] Nevertheless, I consider that the preliminary plea can competently be raised now as it is, in nature, a plea in bar of trial founded upon an alleged prejudice that is said to have arisen only recently, after the first calling (per *Roselli* v *Vannet* 1997 SCCR 655).

[61] The alleged prejudice is said to arise from the Crown's insistence on the present prosecution, notwithstanding that the Scottish Parliament has voted to repeal the 2012

Act. In my judgment, counsel's submission in this respect is not well-founded. For the reasons explained above, the 2012 Act remains in force for the time being; it will continue to have some (albeit limited) legal force generally even after the date of its repeal; and, if the accused is convicted or acquitted, depending upon the date of that disposal (and other circumstances), the accused might yet be subject to the residual legal force of section 1 of the 2012 Act. Neither the parliamentary vote on 15 March 2018 nor the coming into force of the Bill wholly extinguishes the legal effect of section 1 of the 2012 Act.

[62] For the time being at least, the accused remains snared in the grip of the 2012 Act, even in its death throes.

[63] In those circumstances, the Crown is merely acting within the law as it presently stands, and in compliance with the declared will of the Scottish Parliament. It cannot be said that the continued prosecution of the accused under section 1 of the 2012 Act, while it remains in force, constitutes such grave prejudice to the accused as to amount to oppression. The stringent test in *McFadyen* v *Annan* 1992 SCCR 186 is not satisfied.

[64] If the accused has a grievance at all, it is with the Scottish Parliament's drafting of the transitional provisions of the Bill (notably sections 3(1) & 2(3)), not with the Crown's insistence on a relevant charge under an extant law of the land.

[65] Accordingly, I repel the accused's preliminary plea of oppression.

GLASGOW, 29th March 2018