Law Commission

Consultation Paper No 213

HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES

Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights

THE LAW COMMISSION

APPENDIX A: HATE CRIME AND FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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APPENDIX A

HATE CRIME AND FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

INTRODUCTION

A.1 The current English and Welsh law in relation to hate crime has three aspects, each of which we consider in detail in our consultation paper. The first aspect is the aggravated offences: these are certain "basic offences", such as assault or offences under the Public Order Act 1986 ("POA 1986"), which can be aggravated where there is hostility on the basis of race or religion.[1] The aggravated offences have longer maximum sentences than their basic versions. The second aspect is the offences of stirring up hatred, which can be committed on the grounds of race, religion or sexual orientation.[2] Thirdly, where an offence demonstrates or is motivated by hostility based on race, religion, disability, sexual orientation or transgender identity, the court can make use of the enhanced sentencing provisions under sections 145 and 146 of the Criminal Justice Act 2003 ("CJA 2003").[3] These provisions require the sentencing tribunal to treat such hostility as an aggravating factor in sentencing.[4]

A.2 This appendix to the consultation paper considers the relationship between the right to freedom of expression under article 10 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("ECHR") and certain parts of these aspects of the law on hate crime. In particular, the appendix focuses on the areas of the law which engage article 10, specifically in relation to the offences of stirring up hatred, the aggravated public order offences and the enhanced sentencing provisions, in so far as they might be applied to ordinary (non-aggravated) public order offences.

A.3 We recognise that article 10 might also be relevant to other aggravated offences. For example, in the case of an assault which is accompanied by racially abusive words, the words are a form of expression to which article 10 could be relevant. However, we think that in practice the courts will most often have to consider the impact of article 10 in relation to the public order offences. This is because arguments about article 10 will be at their strongest in that context – expression is the core of the conduct covered by the public order offences, unlike in our example of an aggravated assault, where the expression element (the words) is an adjunct to the assault.

A.4 The impact of the ECHR on the English and Welsh law in relation to hate crime is relevant because article 1 of the ECHR establishes that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms

[1] Crime and Disorder Act 1998 ("CDA 1998"), ss 28 to 32 and Anti-terrorism, Crime and Security Act 2001, s 39. See Ch 2 at para 2.5 and following.

[2] POA 1986, ss 18 to 23. See Ch 2 at para 2.51 and following.

[3] With the exception that s 145 does not apply when the court is sentencing for one of the aggravated offences under the CDA 1998.

[4] See Ch 2 at para 2.125 and following.

defined in … this Convention". The rights contained within the ECHR are incorporated into domestic law by the Human Rights Act 1998. It is therefore necessary to ensure that existing domestic law and any potential law reform is compatible with the Convention, and not at risk of successful challenge, either before the domestic courts or at the European Court of Human Rights ("ECtHR"). This section will draw on existing ECHR case law to determine the extent of such compatibility.

A.5 As we have explained, this appendix is focused on the right to freedom of expression under article 10. In addition, it examines the applicability of article 17 to instances of expression. Article 17 provides a "prohibition of abuse of rights" in that:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

A.6 This provision has potential relevance for the law in relation to hate crime given that the purpose of such criminalisation is to protect the rights and freedoms of those targeted because of particular characteristics such as their race, religion, sexual orientation, transgender identity or disability.

A.7 Article 10 is not the only ECHR right with relevance to the subject of hate crime. Undoubtedly, other rights, such as in relation to article 8 (the right to a private and family life), article 3 (the prohibition on torture, inhuman or degrading treatment) or even article 2 (the right to life), may be relevant in respect of certain specific offences which are committed on the basis of hostility towards a particular group. Article 6 (the right to a fair trial) also has relevance, for example, in relation to reverse burdens of proof imposed on the defence under the existing stirring up provisions.[5] Likewise, there are a variety of issues arising in respect of article 9 (freedom of thought, conscience and religion) in relation to both offences committed on the basis of hostility towards certain religious groups, and the right of religious people to criticise other people and/or their practices as being contrary to religious doctrine (views held by some religious people about some homosexual practices, for example). Whilst these human rights issues are evidently important, we have focused our discussion in this appendix on the impact of article 10 because the relationship between the existing hate crime offences and the right to freedom of expression is the one which has caused some of the most controversy in both the Parliamentary debates[6] and the academic commentary.[7]

A.8 In the following appendix, we consider first the scope of article 10 of the ECHR and the way in which it is applicable to instances of hate crime. We then consider the role of article 17 in removing from the scope of article 10 some types of expression. Subsequently, we examine interferences with those instances of expression which do fall within article 10 and the exceptions under article 10(2),

[5] See Ch 2 at para 2.76.

[6] See Appendix B at para B.61 and following; B.156 and following; and B.191 and following.

[7] See the theory paper by Dr John Stanton-Ife on our website: http://lawcommission.justice.gov.uk/areas/hate-crime.htm.

which requires that any interference with the right must be prescribed by law and must seek to meet one of a list of legitimate aims. This section then examines the issue of whether the interference is necessary in a democratic society and proportionate – requirements for ECHR compliance. We conclude that, broadly speaking, the current law is compatible with the ECHR but that the courts will be required to consider the impact of article 10 on a case-by-case basis.

ARTICLE 10: FREEDOM OF EXPRESSION

Introduction

A.9 This section examines the scope of freedom of expression within the ECHR jurisprudence and the question of what amounts to an interference with that right.

A.10 Article 10 provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10(1)

Who exercises article 10 rights?

A.11 "Everyone" has the right to freedom of expression, which means that article 10 covers both natural and legal persons.[8] In the latter case this means, for example, that media organisations or campaign groups have a corporate right to freedom of expression, not merely the right possessed by their individual journalists or members.

The definition of "expression"

FORM OF EXPRESSION

A.12 The type of expression falling within the scope of article 10(1) has been drawn widely in the ECtHR case law. It includes the right to impart information to others in almost all forms:

[8] A Lester, D Pannick and J Herberg (eds), *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8.

> In adopting a broad and purposive definition of protected speech, the Strasbourg court has held that speech through almost every known expressive medium … falls within the scope of article 10.[9]

A.13 In particular, expression clearly includes spoken and written words, including through the new media. The ECtHR has held that establishing a website or posting on an internet forum amounts to a form of expression for the purposes of article 10.[10] Indeed, the court's expansive definition goes as far as including acts of protest and performances by street musicians within the scope of the article.[11]

A.14 The provisions of English and Welsh law dealing with aggravated offences, in so far as relevant to considering the impact of article 10, cover conduct under the POA 1986 involving the use of "words or behaviour" or distribution or display of "any writing, sign or other visible representation".[12] Such conduct can clearly amount to the type of "expression" covered by article 10. Additionally, the aggravated forms of the offences of harassment; stalking; putting people in fear of violence; and stalking involving fear of violence (all under the Protection from Harassment Act 1997)[13] also potentially engage article 10, depending on the circumstances. For example, harassment of someone by the sending of menacing letters could amount to expression for the purposes of article 10.

A.15 In relation to the stirring up offences, these offences cover the use of words or behaviour; the display, publishing or distribution of written material; the public performance of a play; distributing, showing or playing a recording of sounds or visual images; broadcasting sounds or visual images; and possession of written material or a recording with a view to displaying, distributing, publishing or showing it.[14] Again, all these forms of conduct would, on their face, amount to expression for the purposes of article 10.[15]

A.16 As our consultation paper explains, our terms of reference for the potential reform of the law on hate crime relate only to the grounds for aggravation or the stirring up of hatred – that is to say whether the offences should be extended to cover groups targeted on the basis of disability, transgender status, or (in relation to the aggravated offences only[16]) sexual orientation. We anticipate that if the law were changed in this way, the existing forms of criminalised conduct would remain the same: such offences would still be committed by the use of words, by publishing

9 A Lester, D Pannick and J Herberg (eds), *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8 (footnotes omitted). See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.241.

10 *Fatullayev v Azerbaijan* (2011) 52 EHRR 2 (App No 40984/07); *Mosley v UK* (2011) 53 EHRR 30 (App No 48009/08); and *Times Newspapers Ltd v UK* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03). See also A Merris, "Can We Speak Freely Now? Freedom of Expression under the Human Rights Act" [2002] *European Human Rights Law Review* 750, 751.

11 *Steel and others v UK* (1999) 28 EHRR 603 (App No 24838/94) at [92] and *A v UK* (1984) 6 EHRR CD362 (App No 10317/83) (Commission decision).

12 POA 1986, ss 4, 4A and 5.

13 Protection from Harassment Act 1997, ss 2, 2A, 4 and 4A respectively.

14 POA 1986, ss 18 to 23.

15 Subject to the potential application of art 17 ECHR: see para A.28 and following below.

16 Stirring up hatred on the basis of sexual orientation is already criminalised: see Ch 2 at para 2.101 and following.

written material, by performance of a play etc.[17] Therefore, article 10 would be equally as applicable to any new grounds for aggravation or stirring up of hatred as it is to the existing grounds.

CONTENT OF EXPRESSION

A.17 In addition to considering the form of expression for article 10 purposes, it is also necessary to examine its content. Lester, Herberg and Pannick explains that "article 10 protects not only the substance of ideas or information expressed, but also the tone or manner in which they are conveyed".[18] Article 10 has also been held to cover both facts and opinions.[19] Again, this gives the notion of "expression" within the ECHR jurisprudence wide scope.

A.18 Additionally, article 10 includes a right to receive information, not merely to impart it. The ECtHR has held that the public has a right to be informed by the press of matters of important public interest.[20]

A.19 However, commentators on the jurisprudence of the ECtHR have suggested that some aspects of the content of the expression in question may determine how deserving it is of the protection of article 10.[21] In particular, so-called political expression is deemed especially prized by the court.[22] What amounts, in the ECHR case law, to political expression is not limited to discussion of politics in and of itself, but has been defined expansively to cover discussion of serious matters of public concern.[23] In *Thorgeirson v Iceland*, the respondent Government contended that "the wide limits of acceptable criticism in political discussion did not apply to the same extent in the discussion of other matters of public interest". The court rejected this assertion.[24]

A.20 It is possible that the sorts of expression which might be the subject of hate crime legislation would amount to "public interest" expression, since as Lester, Pannick and Herberg identifies, the public interest category is "broad".[25] It is certainly possible to conceive of some forms of expression which, although potentially

[17] See Ch 2 at para 2.53 and para 2.62 and following.

[18] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8 (footnotes omitted). See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.243.

[19] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) paras 15.247 to 15.248.

[20] See, eg, *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74); *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [50]; and *Worm v Austria* (1998) 25 EHRR 454 (App No 22714/93) at [50].

[21] See, eg, H Fenwick and G Phillipson, *Media Freedom Under the Human Rights Act* (2006) p 50; R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.281; and D Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (2nd ed 2009) p 455.

[22] *Thorgeirson v Iceland* (1992) 14 EHRR 843 (App No 13778/88). See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) paras 4.10.10 and 4.10.34.

[23] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.282 and following.

[24] (1992) 14 EHRR 843 (App No 13778/88) at [61] and [64].

[25] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.10.

hateful (in that they involve demonstrations of hostility, are motivated by hostility, or are likely to or intended to stir up hatred[26]), purport to contribute to a discussion of matters which are in the "public interest". Examples could include articles discussing immigration policy and impact, the state's responsibility to provide social care for those with disabilities or the use of state resources to pay for gender reassignment.

A.21 Cognisant of the fact that the member states of the Council of Europe are democracies, the ECtHR holds debate on matters of public interest in high regard.[27] Expression which relates to such matters, as opposed to, for example, private morality, is therefore deemed more worthy of protection.[28]

A.22 In consequence, where the court finds that the expression involved is political, any interference with it will be subject to more "searching scrutiny" and will necessarily require stronger justification in order to comply with article 10.[29] Furthermore, the state will be afforded a narrow margin of appreciation when the court assesses the proportionality of any interference with political expression.[30]

Expression which shocks, offends or disturbs

A.23 Delineating whether expression on important matters of public concern amounts to hate speech is made a more sensitive task by the fact that article 10 also covers expression which shocks, offends or disturbs other people.[31] This, again, is because the court has recognised the importance of freedom of expression in liberal democratic states. As the court explained in *Handyside v United Kingdom*:[32]

> The court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state

[26] On the definitions of these concepts, see Ch 2 at para 2.14 and following; para 2.27 and following; and para 2.53 and following respectively.

[27] *Lingens v Austria* (1986) 8 EHRR 103 (App No 9815/82) at [42].

[28] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.15 and S Vance, "The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles" (2004-2005) 14 *Transnational Law and Contemporary Problems* 201, 207, although this approach has been criticised: see Vance at pp 211 to 212. Compare, eg, the discussion in *Müller v Switzerland* (1988) 13 EHRR 212 (App No 10737/84) at [35] with *Lindon, Otchakovsky-Laurens and July v France* (2008) 46 EHRR 35 (App Nos 21279/02 and 36448/02) at [46] to [48].

[29] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.10 and H Fenwick and G Phillipson, *Media Freedom Under the Human Rights Act* (2006) p 60.

[30] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 51. See also para A.61 below.

[31] *Žugić v Croatia* (App No 3699/08) at [40]; *Prager v Austria* (1995) 21 EHRR 1 (App No 15974/90) at [38]; and *Thorgeirson v Iceland* (1992) 14 EHRR 843 (App No 13778/88) at [63].

[32] (1979) 1 EHRR 737 (App No 5493/72).

> or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[33]

A.24 In consequence, expression which amounts to criticism is protected under the ECHR. However, "the strength of the protection offered will depend on the extent to which the expression can be linked to the direct functioning of democratic society".[34] As we have explained, political expression is highly prized. However, expression which insults – that is to say, goes beyond expression which *merely* shocks, offends or disturbs – is deemed distinct from criticism.[35] In consequence, it may be easier for the state to justify interference with expression which is insulting.[36] However, even then, expression which is political requires a high threshold for interference, regardless of whether it is insulting. In the recent case of *Eon v France*,[37] in which the applicant was convicted of insulting President Sarkozy with the phrase "get lost, you sad prick", the Strasbourg court found the interference disproportionate because the phrase was used as part of political satire.

Hate speech

A.25 In a similar vein, hate speech may, in principle, fall within the remit of article 10, "but the ECtHR has generally provided a lesser degree of protection for such speech unless it can be seen as part of a wider public interest debate".[38] The court has held that:

> Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so … it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.[39]

A.26 For example, in the case of *Jersild v Denmark* it was held that the broadcast of a programme including racist remarks engaged the right to freedom of

[33] *Handyside v UK* (1979) 1 EHRR 737 (App No 5493/72) at [49]. See also *Vogt v Germany* (1995) 21 EHRR 205 (App No 17851/91) at [52]; *Lebideux and Isorni v France* (App No 24662/1998) (Grand Chamber decision) at [55]; and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8.

[34] L Wildhaber, "The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression Under the European Convention on Human Rights" [2001] *Irish Jurist* 17, 19.

[35] *Skałka v Poland* (2004) 38 EHRR 1 (App No 43425/98).

[36] *Skałka v Poland* (2004) 38 EHRR 1 (App No 43425/98) at [34] and [39] to [42].

[37] *Eon v France*, 14 March 2013 (App No 26118/10) (judgment not yet available in English), press release available at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4290315-5123724 (last visited 19 Jun 2013).

[38] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.14, although compare L Wildhaber, "The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression Under the European Convention on Human Rights" [2001] *Irish Jurist* 17, 19.

[39] *Gündüz v Turkey* (2005) 41 EHRR 5 (App No 35071/97) at [40].

expression.[40] Likewise, in *Soulas v France* "a book entitled 'The Colonisation of Europe' which contained a discussion in extreme terms of the claimed incompatibility of Islamic and European civilisations"[41] was held by the court to fall within the scope of article 10, despite the French Government's argument to the contrary.[42] Therefore, the mere fact that the expression in question involves hate speech (in that, for the purposes of English and Welsh law, it involves demonstrations of hostility, is motivated by hostility or is likely to or intended to stir up hatred[43]) does not in principle preclude it from falling within the scope of article 10, subject to the application of article 17, which we consider below.

A.27 It is important to note, however, that the approach of the ECtHR to whether article 10 is engaged by hate speech (but where the interference with it is justified under article 10(2)), or whether the speech is ousted from Convention protection completely by article 17, has been inconsistent.

Article 17

A.28 Article 17 appears in the Convention in the following terms:

> Prohibition of abuse of rights
>
> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

A.29 Article 17 was originally included in the Convention in order to prevent the misappropriation of ECHR rights by those with totalitarian aims.[44] The court's interpretation of it appears to have widened the scope of the article. In his concurring opinion in *Lehideux v France*,[45] Judge Jambrek explained that:

> In order that article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to

[40] *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision) at [27], although see below at para A.58.

[41] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.14.

[42] *Soulas v France* (App No 15948/03).

[43] On the definitions of these concepts, see Ch 2 at para 2.14 and following; para 2.27 and following; and para 2.64 and following.

[44] A consequence of drafting the Convention in the aftermath of Nazi atrocities in Europe: see the travaux préparatoires (preparatory work) on art 17 ECHR (DH (57)4) pp 2, 5 and 9, http://www.echr.coe.int/library/colentravauxprep.html (last visited 19 Jun 2013). See also the discussion in H Cannie and D Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, 56 and following.

[45] (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision).

> pursue objectives that are racist or likely to destroy the rights and freedoms of others … .[46]

Self-evidently, this has relevance for the law in relation to hate speech.

A.30 Unusually, and unlike the substantive rights contained within the Convention, article 17 can be invoked by the state against an applicant.[47] The article can therefore be used to justify interference by the state with freedom of expression where that expression seeks to destroy the rights of others.

A.31 The jurisprudence of the ECtHR on the application of article 17 is limited (by way of comparison with other Convention rights) and demonstrates no clear theme. In particular, different judgments appear to have taken different approaches to article 17, and its relationship to article 10.[48] It has been suggested that the early judgments of the Commission in relation to article 17 demonstrate a confused approach.[49]

A.32 For example, in some cases, article 17 appears to supplement the test provided under article 10(2), so both are considered at the same time.[50] In others, the application of article 17 is considered after the justifications under article 10(2) have been exhausted, which seems to be the wrong approach given that interference with anything subsequently falling foul of article 17 is likely to be justified under article 10(2).[51] By contrast, some cases consider whether the expression in question can mount the article 17 threshold before asking whether article 10 is engaged.[52] The more recent cases seem to adopt the latter approach.

[46] (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision) at [2]. For an international criminal law perspective on the persecution of particular groups, see, amongst others, J Rikhof, "Hate Speech and International Criminal Law" [2005] 3 *Journal of International Criminal Justice* 1121 and W K Timmermann, "The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law towards Criminalization of Hate Propaganda?" (2005) 18 *Leiden Journal of International Law* 257.

[47] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.197.

[48] I Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion From Attack" (2011) 17(1) *Res Publica* 55, 72.

[49] D Keane, "Attacking Hate Speech Under Article 17 Of The European Convention On Human Rights" (2007) 25 *Netherlands Quarterly on Human Rights* 641, 644 and following.

[50] See, eg, *Glasenapp v Germany* (1984) 6 EHRR CD499 (App No 9228/80) (Commission decision); *Kühnen v Germany* App No 12194/86 (Commission decision); *Vogt v Germany* (1993) 15 EHRR CD31 (App No 17851/91) (Commission decision); *Remer v Germany* App No 25096/94 (Commission decision); *Ochensberger v Austria* (1994) 18 EHRR CD170 (App No 21318/93) (Commission decision); *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v Germany* App No 25992/94 (Commission decision); and *Rebhandl v Austria* App No 24398/94.

[51] See, eg, *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121 (App No 19392/92) (Grand Chamber decision) at [32].

[52] See, eg, *Norwood v UK* (2005) 40 EHRR SE11 (App No 23131/03); *Leroy v France* App No 36109/03 (judgment available only in French and Serbian); *Vajnai v Hungary* (2010) 50 EHRR 44 (App No 33629/06); *Pavel Ivanov v Russia* App No 35222/04; and *Garaudy v France* App No 65831/01. See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.244.

A.33 Keane explains that:

> Article 17 has a significant effect on the regulation of hate or xenophobic speech – it serves to remove that speech from the protection of article 10(1), purely on the basis of content. It eliminates the need for a "balancing process" that characterises the court's approach under article 10[(2)].[53]

A.34 In consequence, the use of article 17 to oust the expression in question from the scope of article 10 requires "strict scrutiny".[54] In particular,

> Article 17 should be seen as the option of last resort. Its application is closely linked with a government's derogation powers under article 15. It should only be relied upon when the activity engaged in threatens principles of democracy and/or democratic institutions. This is because in most circumstances the permissible qualifications in relation to rights should be sufficient to deal effectively with abuse of human rights standards. Any measures taken under article 17 should be strictly proportionate to the threat to the rights of others.[55]

A.35 In other words, because article 10(2) can be used to justify interference with many (if not all) instances of hate speech, resort to article 17 is unnecessary in most cases.

A.36 Either way, it seems that hate speech may be interfered with, either on the basis that the interference is justified under article 10(2) or because article 17 ousts the expression from the scope of article 10(1). The difficulty lies in defining whether the expression in question is so hateful that article 17 applies because the expression aimed to destroy the rights of others.

A.37 So, in *Norwood v United Kingdom*, the applicant displayed a poster showing the World Trade Centre aflame, with the words "Islam out of Britain – Protect the British People".[56] He was prosecuted for an aggravated offence under section 5 of the Public Order Act 1986, namely "displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it".[57] The applicant was convicted and fined £300. He argued that since article 10 covers offensive expression, the conviction amounted to an unjustified interference with that right. The ECtHR, in finding the application inadmissible, held that:

> [The poster] is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and

[53] D Keane "Attacking Hate Speech Under Article 17 Of The European Convention On Human Rights" (2007) 25 *Netherlands Quarterly on Human Rights* 641, 643. See also the case of *Glimmerveen and Hagenbeek v Netherlands* (1982) 4 EHRR 260 (App Nos 8348/78 and 8406/78) (Commission decision).

[54] *Lehideux v France* (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision) at [4] of the concurring opinion of Judge Jambrek.

[55] J Cooper and A Marshall Williams, "Hate Speech, Holocaust Denial and International Human Rights Law" [1999] *European Human Rights Law Review* 593, 605. See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.200.

[56] (2005) 40 EHRR SE11 (App No 23131/03) p 111.

[57] (2005) 40 EHRR SE11 (App No 23131/03) p 111.

> non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of article 17, which did not, therefore, enjoy the protection of article 10 … .[58]

A.38 The approach of the court to *Norwood* has been criticised on the basis that it would have been more appropriate to deal with the interference under article 10(2) rather than article 17.[59] Likewise, other commentators have argued that expression in all its manifestations should be dealt with under article 10(2) as this would "prevent … states from having abusive recourse to article 17"[60] when the purpose of the latter article was to avert totalitarianism rather than individual instances of racism. Professor Leigh suggests that dealing with cases under article 10(2) rather than article 17 would ensure that the jurisprudence of the court was more consistent and predictable in relation to hate speech.[61] It has also been advocated that ousting cases from article 10's scope by the use of article 17 leads to "superficial" examination of the legal issues and fails to provide for a proportionality assessment.[62]

A.39 Nonetheless, article 17 has also been applied in cases concerning statements of Holocaust-denial, "justifying a pro-Nazi policy, alleging the prosecution [sic] of Poles by the Jewish minority" and linking all Muslims with an act of terrorism.[63] There does not seem to be case law applying article 17 to instances of hate speech towards groups based on their disability, sexual orientation or transgender identity, although it seems that in principle the article could still apply.

A.40 This lack of clarity surrounding the application of article 17 makes it difficult to predict how the Strasbourg court might approach instances of hate crime in English law, *Norwood* notwithstanding. In light of this, we now consider the justifications for interfering with freedom of expression under article 10(2) in cases where article 17 does not oust the expression from the scope of article 10.

Article 10(2)

Interference

A.41 Article 10 limits interference with the right to freedom of expression. Clayton and Tomlinson explains that anything that "impedes, sanctions, restricts or deters expression constitutes an interference".[64] The imposition of a criminal penalty in

[58] (2005) 40 EHRR SE11 (App No 23131/03) p 113.

[59] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.245.

[60] D Harris, M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights,* 2nd ed (2009) p 450.

[61] I Leigh, "Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion From Attack" (2011) 17(1) *Res Publica* 55, 72.

[62] H Cannie and D Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, 69 and following.

[63] *Pavel Ivanov v Russia* App No 35222/04 at [1]. See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.244 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 3.11.

[64] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.267; see also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.17.

relation to conduct which falls within article 10(1) will amount to an interference with freedom of expression. Conviction and punishment for an aggravated or stirring up offence or for any other criminal offence will amount to an interference provided that the criminalised conduct engaged article 10. Likewise, the passing of an enhanced sentence[65] could also amount to an interference. Such interference therefore remains to be justified.

A.42 Whether this interference, or restriction, can be so justified depends on whether it comes within the terms of article 10(2). The *Sunday Times* case[66] explained that the relevant test is as follows:

(1) Is the restriction prescribed by law?

(2) Does it have a legitimate aim?

(3) Is it necessary in a democratic society?

(4) Is it within the margin of appreciation?[67]

A.43 An interference or restriction which cannot be justified under this test will not be ECHR compliant.

A restriction prescribed by law

A.44 Once it is established that a particular restriction has a basis in domestic law, the ECtHR has held that:

> The following are two of the requirements that flow from the expression "prescribed by law". First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[68]

A.45 It is therefore necessary that the law be adequately accessible and formulated in a manner which is foreseeable, although it is not necessary for the law to be

[65] Under the Criminal Justice Act 2003, ss 145 and 146.

[66] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74).

[67] See also A Nicol, G Millar and A Sharland, *Media Law and Human Rights* (2nd ed 2009) para 2.35 and following.

[68] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [49]. See also *Gaweda v Poland* (2004) 39 EHRR 4 (App No 26229/95) at [39].

absolutely precise.[69] In the case of *Sanoma Uitgevers BV v The Netherlands*,[70] the ECtHR stated:

> For domestic law to meet these requirements [of adequate accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise … .
>
> Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in articles 8 to 11 of the Convention, the court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it.[71]

A.46 Additionally, the court has established that there must be "legal procedural safeguards commensurate with the importance of the principle at stake",[72] which may include a duty to give reasons for decisions made interpreting the law.[73]

A.47 In relation to hate crime offences under domestic law, in particular the aggravated offences under the Crime and Disorder Act 1988 and the enhanced sentencing provisions of the CJA 2003, it seems clear that the restriction here is sufficiently "prescribed by law" for the purposes of article 10. The necessary elements of the offence and the relevant sentencing principles are laid down in statute, and have been subject to interpretation through case law. In addition, the application of the Code for Crown Prosecutors, and the specific CPS guidance on hate crime,

[69] See *Grigoriades v Greece* (1999) 27 EHRR 464 (App No 24348/94) at [37]; *Raichinov v Bulgaria* (2008) 46 EHRR 28 (App No 47579/99) at [44]; *Amihalachioaie v Moldova* (2005) 40 EHRR 35 (App No 60115/00) at [33]; *Worm v Austria* (1998) 25 EHRR 454 (App No 22714/93) at [38]; and *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94) at [94].

[70] [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision).

[71] *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [82] to [83].

[72] *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [88].

[73] *Glas Nadezhda EOOD v Bulgaria* (2009) 48 EHRR 35 (App No 14134/02) at [50] to [53]. Although Clayton and Tomlinson have argued that the requirement to give reasons is more properly an aspect of "necessary in a democratic society" than foreseeability: see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.304.

provides further information for the public and for potential defendants about the state's approach to prosecutions under these provisions.[74]

A.48 In respect of the stirring up offences under the POA 1986, again the necessary elements of the offence are laid down in statute, and have been subject to interpretation through case law, although there are limited authorities. In addition, the Code for Crown Prosecutors and the specific CPS guidance on hate crime both apply.[75] Unlike with the aggravated offences, the consent of the Attorney General is required in order to prosecute for the stirring up offences. We explain in the consultation paper the procedure by which the Attorney General's consent is sought by the CPS.[76] When deciding whether to give consent, the Attorney considers whether there is enough evidence to prosecute and whether the prosecution would be in the public interest.[77] Clearly, the Attorney General is bound by the Human Rights Act 1998 and therefore will have to consider whether a prosecution would be compatible with article 10.[78] We consider that the availability of the statute, case law and relevant guidance on stirring up is likely to mean that individuals can foresee the likely result of any particular course of conduct in most cases.

The relevant legitimate aims

A.49 In addition to being "prescribed by law", the interference with article 10 must be for a "legitimate aim". In relation to hate crime, the most relevant of the legitimate aims listed in article 10(2) are those of the interests of public safety, the prevention of disorder or crime and the protection of the rights of others.

PUBLIC SAFETY AND THE PREVENTION OF DISORDER OR CRIME

A.50 It has been held that disorder or crime for the purposes of article 10 includes "public disorder".[79] A conviction for the offence of incitement of violence has been held by the court to be a justified interference with freedom of expression, falling within the legitimate aims of ensuring public safety and preventing disorder or crime.[80]

[74] See, eg, Crown Prosecution Service, *Racist and Religious Crime – CPS prosecution policy,* http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a30 (last visited 19 Jun 2013) and Crown Prosecution Service, *Disability Hate Crime - Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/ (last visited 19 Jun 2013).

[75] See, eg, Crown Prosecution Service, *Sexual Orientation: CPS Guidance on Stirring up Hatred on Grounds of Sexual Orientation* (Mar 2010), https://www.cps.gov.uk/legal/s_to_u/sexual_orientation_/ (last visited 19 Jun 2013).

[76] See Ch 2 at para 2.122.

[77] Attorney General's Office, *Protocol Between the Attorney General and the Prosecuting Departments* (Jul 2009), para 4a.

[78] The Attorney will be bound by virtue of s 6 of the Act. See Ch 2 at para 2.127 and also evidence given on 16 Jan 2003 by the then Attorney General, Lord Goldsmith QC, to the Select Committee on Religious Offences, at paras 641 and 651.

[79] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.365.

[80] *Osmani v Former Yugoslav Republic of Macedonia* App No 50841/99. See also *Glimmerveen and Hagenbeek v Netherlands* (1982) 4 EHRR 260 (App Nos 8348/78 and 8406/78) (Commission decision).

A.51 This legitimate aim is particularly relevant to the stirring up offences under the POA 1986, since stirring up hatred of particular groups may lead to public disorder or threats to the safety of particular members of the group.

PROTECTING THE RIGHTS OF OTHERS

A.52 As to the legitimate aim of protecting the rights of others, one of the main aims of criminalising hate speech is to protect the rights of those groups who may be subject to such hatred. This legitimate aim therefore has relevance to the aggravated offences, the stirring up offences, and the enhanced sentencing provisions of the CJA 2003. The ECtHR has held that a conviction for incitement to racial hatred by publishing information which denied that Jews had been gassed in Nazi Germany fell within the legitimate aim of protecting the rights of others.[81] Likewise, a conviction for racially harassing or threatening an individual may seek to protect the rights of the individual targeted or others who may be affected by the conduct.[82]

A restriction necessary in a democratic society within the margin of appreciation

A.53 Assuming that one of the legitimate aims is engaged by the interference, that interference must still be necessary in a democratic society and within the state's margin of appreciation. Clayton and Tomlinson explains that the court should consider three things in addressing whether an interference with article 10 is necessary in a democratic society:

> Whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2).[83]

A.54 In relation to assessing the pressing social need and the proportionality of the interference, the state must establish a "rational connection between the public policy objective pursued and the means employed by the state to achieve that objective".[84] In addition, there should be a "fair balance" between the rights and needs of the individual and that of the community as a whole.[85] The court will look at all the circumstances of the case in analysing the proportionality of the interference.[86]

A.55 Interference with the right to freedom of expression by virtue of a criminal conviction – as in relation to hate crime – is of particular significance. The fact of criminal conviction (as opposed to, for example, civil damages) is relevant to the

[81] *Remer v Germany* App No 25096/94 (Commission decision). See also *Glimmerveen and Hagenbeek v Netherlands* (1982) 4 EHRR 260 (App Nos 8348/78 and 8406/78) (Commission decision) and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.38.

[82] *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision) at [27].

[83] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.306. See also *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [59].

[84] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.69.

[85] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.69.

[86] *Handyside v UK* (1979) 1 EHRR 737 (App No 5493/72) at [58].

assessment of whether the interference is proportionate to the legitimate aim.[87] The stigma of such conviction weighs heavily in this assessment.[88] Nonetheless, this does not of course mean that, in principle, criminal conviction is disproportionate. "A criminal sentence can be legitimate, particularly in the context of hate speech, as long as it is not being used in an excessive manner".[89]

A.56 In *Giniewski v France*[90] the ECtHR suggested that an interference with freedom of expression by way of criminal conviction where the expression incited hatred could be justified as necessary in a democratic society.[91] However, each case must necessarily be considered on a case-by-case basis as the assessment will be highly fact-specific. A case which usefully illustrates the limits of acceptable criminalisation of hate speech is that of *Jersild v Denmark*[92] which concerned a journalist (J) who produced a television programme about xenophobia. The programme broadcast a few minutes of an interview with a gang of young people who "made abusive and derogatory remarks about immigrants and ethnic groups".[93] The interviewees were prosecuted and convicted of making racist insults, whilst J was convicted of aiding and abetting them.

A.57 It was accepted before the ECtHR that the convictions of the interviewees was a justifiable interference with their article 10 rights. What was in dispute was whether the conviction of J was necessary in a democratic society.[94] The court held that the

> conviction was not a proportionate means of protecting the rights of others when the speech occurred in the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive.[95]

The court was particularly concerned that such conviction would "seriously hamper the contribution of the press to discussion of matters of public interest",[96] such as the public interest in exposing and condemning racism.

87 *Raichinov v Bulgaria* (2008) 46 EHRR 28 (App No 47579/99) at [50] and *Amihalachioaie v Moldova* (2005) 40 EHRR 35 (App No 60115/00). See also R Ó Fathaigh, "Article 10 and the Chilling Effect Principle" [2013] 3 *European Human Rights Law Review* 304, 308.

88 *Lehideux v France* (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision) at [57].

89 M Oetheimer, "Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Right's Case Law" (2009) 17(3) *Cardozo Journal of International and Comparative Law* 427, 443.

90 *Giniewski v France* (2007) 45 EHRR 23 (App No 64016/00).

91 *Giniewski v France* (2007) 45 EHRR 23 (App No 64016/00) at [52] to [55].

92 *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision).

93 *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision) at [10].

94 *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision) at [27].

95 A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.14.

96 *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) (Grand Chamber decision) at [35].

A.58 In consequence of this decision, it has been argued that the conviction of journalists under English and Welsh law for "repeating racist views for a non-racist purpose" would be incompatible with the ECHR, and that "the 1986 [Public Order] Act does not make a clear enough distinction between the two groups" of journalists and non-journalists.[97] However, it has also been argued that the *Jersild* case does not illustrate that journalists warrant different treatment in respect of the application of hate crime law, but that anyone who in good faith repeats racist (or other hateful language) in order to expose the racist views of others should not be prosecuted.[98]

A.59 To this extent, the Code for Crown Prosecutors, in requiring consideration of the public interest in proceeding with a prosecution, should work to filter out cases where the aim of the expression was to highlight in good faith the hate speech, rather than to further such views. We are not aware of any cases in which a prosecution has succeeded despite the defendant arguing that they acted in good faith to expose the hateful expression of others. Indeed, there are notable cases of the repetition of hateful language by the media with a view to exposing that behaviour – the airing of the surveillance videos in which those subsequently convicted of the murder of Stephen Lawrence were shown making extremely racist statements and demonstrating the use of weapons, for example – which did not result in a prosecution given the evident public interest in such exposure.

MARGIN OF APPRECIATION

A.60 Finally, when assessing proportionality, the ECtHR may take into account the margin of appreciation. This doctrine allows "latitude" to states in performing their obligations under the Convention.[99] It encompasses both "an *interpretative obligation* to respect domestic cultural traditions and values when considering the meaning and scope of human rights"[100] and

> a *standard of judicial review* to be used when enforcing human rights protection; with the margin of appreciation entailing the idea that national authorities are generally in a better position than a supervisory court to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual.[101]

A.61 The deference that the ECtHR will show to the national authorities will vary depending on the circumstances of the case in question. As we discussed above, under article 10, "the 'type' of expression involved and … the extent to which

[97] M Mazher Idriss, "Religion and the Anti-Terrorism, Crime and Security Act 2001" [2002] *Criminal Law Review* 890, 900.

[98] This was the view of then Attorney General Lord Goldsmith in his evidence to the Parliamentary Select Committee on Religious Offences in England and Wales (16 Jan 2003) at para 645, http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/3011604.htm (last visited 19 Jun 2013).

[99] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.42. On account of its role in delineating the relationship between the ECtHR and the national authorities, the margin has no direct application in domestic case law: see *R v DPP ex parte Kebilene* [2000] 2 AC 326, 380 to 381.

[100] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.45 (emphasis in original).

[101] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.45 (emphasis in original).

there is common ground between different Member States" will influence the width of the margin of appreciation afforded to the state.[102] In general, a narrow margin of appreciation is given in instances of political expression[103] which ensures that the state's interference is more closely circumscribed. However, state interference with expression which is not political, but in fact amounts to hate speech, may be given a wide margin of appreciation. This is because of the degree of consensus which exists amongst the member states of the Council of Europe against racism and the need to protect racial groups from it.[104]

A.62 For example, in *Soulas v France*,[105] the ECtHR held that the French authorities were acting within their margin of appreciation in fining the author of the book which made extreme comments about Islam. The court held that the "specific problems linked to the settlement of immigrants in France justify a wide margin of allowance".[106]

A.63 However, this decision has been criticised by Lester, Pannick and Herberg, who argue that:

> The correct approach would have been to grant protection to this form of speech even though it was clearly in a form likely to offend certain groups. Absent a direct threat to order, even extreme views on a matter of serious public interest such as the reception of Islamic communities into western democracies deserve protection. By deferring to the French domestic courts and invoking the ever-flexible concept of the margin of appreciation, the Strasbourg court failed in its duty to recognise the importance of promoting a plurality of opinion.[107]

A.64 The court has taken a similar approach to that in *Soulas* in other cases involving expression which was said to encourage feelings of hatred towards particular groups. It found no violation of article 10 in relation to convictions for distributing electoral leaflets exhorting Belgians to "Stand up against the Islamification of Belgium" and "Send non-European job-seekers home"[108] and convictions for distributing leaflets outside a school describing homosexuality as "morally destructive" and responsible for the spread of HIV/AIDS.[109]

[102] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.308.

[103] *Wingrove v UK* (1997) 24 EHRR 1 (App No 17419/90) at [58] and *Bowman v UK* (1998) 26 EHRR 1 (App No 24839/94) (Grand Chamber decision). See also H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 50 to 51.

[104] D McGoldrick and T O'Donnell, "Hate Speech Laws: Consistency with National and International Human Rights Law" (1998) *Legal Studies* 453, 469.

[105] App No 15948/03.

[106] S Sottiaux, "'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence" (2011) 7(1) *European Constitutional Law Review* 40, 44.

[107] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.14.

[108] *Féret v Belgium* App No 15615/07 (judgment only available in French, Serbian and Russian).

[109] *Vejdeland and Others v Sweden* App No 1813/07.

A.65 By contrast, in *Gündüz v Turkey*,[110] the applicant was convicted after criticising the state's secular democracy and arguing that Sharia law should be introduced. The ECtHR considered that the expression contributed to important public debate and since it did not encourage violence or amount to hate speech, the applicant's article 10 rights had been violated. Accordingly, the conviction did not fall within the state's margin of appreciation.

A.66 In consequence, drawing the boundary between what amounts to racist or other hate speech, and what amounts to legitimate but controversial or offensive public debate is crucial but, as the differing outcomes from the above cases illustrate, also extremely challenging.

THE APPLICATION OF ECHR PRINCIPLES IN DOMESTIC CRIMINAL COURTS

A.67 In light of the jurisprudence of the ECtHR, what approach should the domestic courts take in considering cases of aggravated offences, stirring up offences or the application of the enhanced sentencing provisions when article 10 or article 17 may be relevant? Turenne argues that, when considering verdict and sentence in relation to an allegation of hate crime which potentially engages article 10, the court must undertake a three step process. First, it should ascertain whether the defendant is guilty under ordinary principles of domestic criminal law.[111] If, for example, the defendant lacked the requisite mental element for the offence charged, the defendant should obviously be acquitted without need to consider article 10.

A.68 Secondly, if the court finds that the defendant is guilty under ordinary criminal law principles, it should then consider whether article 10 is engaged by the defendant's alleged conduct. If so, the court should ask whether the conduct prohibited by the criminal law is prescribed by law (within the meaning of that phrase in the ECHR jurisprudence) and whether the prohibition serves one of the legitimate aims listed under article 10(2).[112] If the answer to both of these questions is positive, the court should consider whether the penalty to be applied is proportionate. If necessary, the court can convict the individual but reduce the punishment in order to make the interference with article 10 proportionate.[113]

A.69 Thirdly, if, however, "the court decides that *no* punishment would be necessary and proportionate, then the conviction would be incompatible" with article 10.[114] In such a case, the court would need to read down the relevant statute in order to find a wording which is compatible with article 10. This could, for example, involve finding that the mental element must be interpreted as one of intention rather than recklessness.[115] If the relevant legislation cannot be interpreted so as

[110] (2005) 41 EHRR 5 (App No 35071/97).

[111] S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 869.

[112] S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 869.

[113] S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 870.

[114] S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 870 (emphasis in original).

[115] On the reading down of legislation generally, see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 4.29 and following.

to be ECHR-compliant, the court will need to make a declaration of incompatibility. In such cases, which have been extremely rare since the enactment of the Human Rights Act 1998, Turenne suggests that the court should grant the defendant an absolute discharge in order to continue to apply the law (because a declaration of incompatibility does not render the law invalid[116]), but attempt to avoid a breach of the defendant's convention rights.[117]

A.70 In practice, Turenne's approach may be best suited to cases tried in the magistrates' court where there is a combined tribunal of fact and law, and where the same tribunal determining the verdict also passes the sentence. This will allow the court to weigh all of these matters in the balance.

A.71 The situation in the Crown Court may be more complicated given the split roles of judge and jury. We think that, in all likelihood, there are a number of options which could be employed in trials on indictment to ensure the protection of the defendant's article 10 rights. First, it would be open to the defence to argue that, if conviction on the basis alleged by the Crown amounted to a violation of article 10, then the prosecution is an abuse of process and should be withdrawn from the jury by the judge. It would be for the judge to assess the article 10 implications of the prosecution in question, and the relevance of article 17. Secondly, the defence could apply to the judge for a ruling that, as a matter of law, article 10 is engaged by the relevant conduct. Therefore, either the elements of the offence could be read-down (as explained above) or a "freedom of expression defence" could be read into the statute and be deployed by the defence for consideration by the jury.[118] If so, it would be for the jury to decide whether, on the facts, the defence is made out. Again, the judge would need to consider the relevance, if any, of article 17 in giving such a ruling.

PROPORTIONALITY OF DOMESTIC HATE CRIME LAW

A.72 Having considered the ECtHR jurisprudence and the process of applying article 10 (and article 17) in the domestic courts, we now consider the proportionality of domestic hate crime law as an interference with article 10. We focus here on article 10 because this is the article upon which those accused of hate crime will seek to rely and is the article which the state has an obligation to protect.[119] It is no easy task to assess the proportionality of the aggravated offences, the stirring up offences or the enhanced sentencing provisions in the abstract. This is because determining the proportionality of an interference with article 10 is heavily fact-specific, and therefore differs on a case-by-case basis.[120]

A.73 Nonetheless, in general, various factors can be identified in the existing hate crime law which would need to be considered by the domestic courts when weighing up the proportionality of a conviction or sentence. We consider that

[116] See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 4.91.

[117] S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 871.

[118] In accordance with s 3 of the Human Rights Act 1998.

[119] Although in a particular case the prosecution and the court may still need to consider the impact of article 17.

[120] It should be noted that proportionality is an element of the Code for Crown Prosecutors to be considered when deciding whether to prosecute: the Code is available at http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf (last visited 19 Jun 2013).

many of these factors will be relevant when assessing whether the aggravated offences should be extended to cover hostility on the basis of sexual orientation, transgender identity or disability, and stirring up offences to hatred on the basis of transgender identity or disability, and if they were so extended, how the law might be applied in practice.

A.74 First, the court would only convict for either an aggravated offence or a stirring up offence once satisfied to the criminal standard of proof, with the burden of proof resting on the prosecution (with the exception of some of the defences in respect of the stirring up offences which reverse the legal burden of proof, which the defendant must discharge on the balance of probabilities).[121] In relation to the enhanced sentencing provisions of the CJA 2003, again, the criminal burden and standard of proof would apply. Any factual dispute between the parties after a guilty plea, which would make a material difference to sentence, can be resolved by a Newton hearing where again, the criminal standard and burden of proof would apply.[122]

Aggravated offences

A.75 Secondly, in relation to the aggravated offences, these offences require either a demonstration of hostility (on the basis of race, religion and, if extended, disability, sexual orientation or transgender identity) by the defendant or that the offences were motivated by such hostility. In respect of the first option, the hostility must be demonstrated towards the victim of the offence, which clearly brings the aggravating element within the legitimate aim of protecting the rights and freedom of others. In relation to the second option, the requirement that the offences were motivated by hostility is also likely to fall within the legitimate aim of protecting the rights and freedom of others.

A.76 The court would therefore need to consider whether a conviction would be proportionate, bearing in mind both the elements of the basic offences – such as using abusive or threatening words or behaviour likely to cause harassment, alarm or distress under section 5 of the POA 1986 – and also the aggravated element of the offence. For example, the court would need to examine what it was that amounted to a demonstration of hostility and whether it was serious enough to justify the interference with article 10.

A.77 The court may also need to consider the definition of the protected group relevant to the particular case in order to establish that the application of the definition of that group meets a pressing social need. Definitions which are too expansive may not meet a pressing social need if it is questionable whether those incorporated into the group are in need of the special protection over and above that for the basic offence which applies to all members of society. To that extent, it may be arguable that if the definition of sexual orientation for the purposes of any new aggravated offences were to cover homosexuality, heterosexuality and bisexuality, the pressing social need would be weaker. That definition of sexuality will cover nearly all of the population (asexual people aside), yet that section of the population at large is already protected by the basic (non-aggravated) offence

[121] See Ch 2 at para 2.76.

[122] In accordance with the rules laid down by the Court of Appeal in *Newton* (1982) 77 Cr App R 13. See also A Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2013) para D12.73.

versions. It might be argued that there is no pressing social need for the aggravated offences to apply to such a wide group.

A.78 It would be for the state to establish that a pressing social need is met by prosecuting the aggravated offences, with their particular label and increased maximum sentences, for example on account of the importance of social cohesion and preventing social division on the grounds of sexual orientation. The same point arises in relation to the current aggravated offences where the definitions of race and religion are expansive.[123] The more limited definitions of disability (which, in our proposals would not include able-bodied people) and of transgender identity (which would not include non-transgender people) are more likely to meet a pressing social need given that the protected groups may be disproportionately targeted as victims of crime.

A.79 As the consultation paper explains, a key feature of the aggravated offences is that the maximum sentences are longer than for the non-aggravated basic offences.[124] Whilst the starting point for sentence in relation to an aggravated offence will generally be higher than in relation to the non-aggravated version, the sentencing court will be required to consider (other) aggravating and mitigating factors as it would when passing any other sentence. In a case where article 10 is engaged by the criminalised conduct, it will be necessary for the court to ensure that the sentence passed is proportionate.

Stirring up offences

A.80 In relation to the stirring up offences, the offence dealing with racial hatred can be committed by way of *threatening, abusive or insulting* words, behaviour, written material, visual images, and so on. The offences covering religious hatred and hatred based on sexual orientation can only be committed by way of *threatening* words, behaviour, written material, visual images, sounds and so on.[125] Since threatening conduct is more serious than that which is merely insulting, it is more likely that a conviction for stirring up religious hatred or hatred based on sexual orientation will be a proportionate interference. On the other hand, it might be more difficult to justify a conviction in relation to conduct which is merely insulting,[126] depending on the circumstances of the case (although, of course, the insulting conduct would have to be likely to stir up racial hatred. It is perhaps difficult to envisage behaviour which is insulting but not abusive or threatening and yet is still likely to stir up hatred). This is a relevant factor to consider when assessing which model any new stirring up offences should adopt.[127]

A.81 These stirring up offences will often fall within the legitimate aim of protecting the rights and freedom of others, particularly where other people are present and threatened by the conduct. However, there is no requirement for anyone in fact to be threatened in order to commit the offence. This might suggest that this legitimate aim is less likely to be relevant in such cases, although the impact that the behaviour might have on other people (those in the community who feel less safe because of the conduct, for example) could also be considered. In any

[123] See Ch 2 at para 2.37 and following and para 2.40 and following.

[124] See Ch 2 at para 2.47 and following.

[125] See Ch 2 at para 2.107 and following.

[126] See para A.24 above.

[127] See Ch 4 at para 4.71.

event, the legitimate aim of preventing public disorder could also be engaged by these offences where, for example, the stirring up of hatred could lead to civil unrest.

A.82 All of the stirring up offences can be committed by intention, ie where the defendant intended to stir up hatred. In such a case, it is not necessary to show that hatred was in fact stirred up. The racial hatred offence – but not that dealing with religion or sexual orientation – can also be committed without intention. In such cases, the prosecution must prove that it is likely, having regard to all circumstances, that hatred would be stirred up.

A.83 In cases where the defendant has the requisite intention, but the hatred was in fact not likely to be stirred up, it might be more difficult to justify that the interference with the defendant's freedom of expression was for a legitimate aim. CPS guidance explains that a prosecutor has to consider whether a prosecution would be "in the interests of public safety, to prevent disorder and crime, … [or] to protect the rights of others".[128]

A.84 There is also a dwelling defence which protects expression between two or more individuals which takes place in private. Any criminalised conduct will therefore probably take place in public or be overheard by those outside of the dwelling.[129] This is another factor tending towards justifying the interference with article 10, since it is difficult to see what legitimate aims would be engaged by expression which takes place purely in private.

A.85 In addition, as with the aggravated offences, the court may also need to consider the definition of the groups protected from hatred, in order to establish that the application of those definitions met a pressing social need. Definitions which are too expansive may not meet a pressing social need if it is questionable whether those incorporated into the group are in need of special protection. That said, the pressing social need may be easier to justify in respect of the stirring up offences than in respect of the aggravated offences, because the stirring up offences criminalise conduct which is not already criminal (unlike the aggravated offences which supplement their non-aggravated basic versions). Nonetheless, it will still be for the state to justify the pressing social need of protecting a particular group from a certain form of conduct. This may be easier to do where the definition of the protected group is narrower, because people covered by it may be in need of special protection, than where the group is wider and encompasses most of the population (in respect of sexual orientation, for example).

A.86 There are also, of course, the "protection of freedom of expression" provisions in respect of the stirring up offences in relation to religion and sexual orientation.[130] Both of these provisions seek to carve out areas of conduct which are prevented from falling within the scope of the offences.

A.87 The religious hatred provision states that:

[128] Crown Prosecution Service, *Racist and Religious Crime – CPS Guidance,* http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a06 (last visited 19 Jun 2013).

[129] We say probably because the application of the dwelling defence to circumstances where the internet or social media is used is currently unclear.

[130] Although it should be noted that the clauses appear to address both freedom of expression under art 10 and, in certain forms, freedom of thought, conscience and religion under art 9.

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[131]

A.88 This provision clearly allows for a significant degree of expression, and even abuse, to be directed at the religion itself or religious practices. It also allows those following particular religions to be instructed to leave them (and/or join others).

A.89 The provision in respect of hatred on the ground of sexual orientation provides that:

> In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.[132]

A.90 This section again focuses on discussion or criticism of particular conduct undertaken by people on account of their sexual orientation, rather than hatred of those individuals themselves, although distinguishing between these matters may be no easy task. In respect of both provisions, the principles of articles 10 and 17, which we have set out above, would apply in any event, regardless of whether the expression in question was covered by these "protection of freedom of expression" provisions.

A.91 Whilst it is not clear that these sections necessarily add anything to the article 10, article 17 (and indeed, article 9[133]) assessment which the court would be required to undertake, they do at least have a role in establishing in clear terms what conduct is not prohibited, potentially preventing the legislation from having an (unintended) "chilling effect" on freedom of expression.

A.92 Finally, in respect of the stirring up offences, the maximum sentence for the offence is seven years' imprisonment. The court is required to consider aggravating and mitigating factors as usual in reaching sentence, and must also take into account proportionality under article 10 when deciding what sentence to pass, if article 10 is engaged by the criminalised conduct.

[131] POA 1986, s 29J. Even in a case where the savings clause did not apply, the court would have to consider whether the defendant's conduct was motivated by their own religious belief and therefore the impact that conviction would have on their art 9 rights. For example, proselytising is an aspect of manifesting one's religion which is protected by art 9: see P Edge, "Extending Hate Crime To Religion" (2003) 8 *Journal of Civil Liberties* 5, 24; K Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" (2007) 70 *Modern Law Review* 89, 107; and *Kokkinakis v Greece* (1994) 17 EHRR 397 (App No 14307/88).

[132] POA 1986, s 29JA. Again, art 9 would also be relevant to the conduct and the application of the savings clause in some cases: see above at n 131.

[133] See Ch 4 at para 4.59.