Free speech – harassment – proportionality – European Court of Human Rights

Pal v United Kingdom Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021

European Court of Human Rights

The facts and domestic proceedings

The applicant was a journalist, concentrating on whistleblowing issues within organisations such as the National Health Service. In or about June 2011, she became involved in a dispute with AB, a barrister and journalist who worked for "Private Eye", linked to *Patients' First*, a network of health professionals and their supporters working to protect whistle-blowers. The dispute led to a series of email allegations and counter-allegations between the two and a complaint by AB about the applicant's conduct to the Commissioner of Police for the Metropolis led to a Prevention of Harassment Letter being served on the applicant. The letter informed the applicant that an allegation of harassment had been made against her and that AB had asked her to stop sending him emails as he was feeling harassed by their content. She was also notified that if she committed any act or acts either directly or indirectly that amount to harassment she might be liable to arrest and prosecution.

In July 2014, the applicant wrote and published an article on her website, the *World Medical Times*, entitled '[AB] of Patients First'. The article detailed some of AB's alleged professional contacts and contained links to a judgment of the Bar Council concerning AB and a newspaper article concerning his representation at an Employment Tribunal, for which, according to the applicant, he was heavily criticised. The article ended with an invitation to readers to send the applicant any information they had about AB or *Patients' First*. In response, AB emailed the applicant on 30 July 2014, and the applicant subsequently complained to the West Midlands Police, who emailed AB on 1 August 2014 to say that if he wished to make any complaint about the article, he should do so via the World Medical Times and not to the applicant directly. In November 2014, the applicant posted a series of Tweets that suggested (incorrectly) that the police had issued a harassment warning against "Private Eye's journalist" and "Peter's friend". In December 2014, AB provided a detailed statement to the police in which he emphasised the acute anxiety that had been caused by the applicant's behaviour over a number of years. He described the information she had published about him as "largely false, twisted, spiteful and bizarre". He further claimed that the applicant's behaviour had affected his career and his employment prospects.

In December 2014, the Metropolitan Police arrested the applicant in Birmingham on suspicion of harassment contrary to s.2 of the Protection from Harassment Act 1997. She was handcuffed and driven approximately 185 kilometres to London, and interviewed under caution. She was then detained for approximately seven hours before being bailed, subject to conditions, to re-attend the police station on 22 January 2015. In January 2015, she was charged under s.2 of the 1997 Act. In March 2015, the applicant appeared at a Magistrates' Court and entered a plea of not guilty, but in August 2015, the Crown Prosecution Service discontinued the prosecution on the basis that there was insufficient evidence to establish a

realistic prospect of a conviction under the Act. An award of costs, including an amount in respect of her legal costs, was made in her favour.

In February 2016, the applicant issued proceedings against the Metropolitan Police seeking damages and declaratory relief for assault, unlawful arrest, false imprisonment, malicious prosecution and breach of Article 10 of the European Convention and on 24 January 2018 the County Court judge dismissed the claim on all causes of action. The judge found that the arrest had been lawful, accepting that the arresting officer had an honest suspicion that the applicant had committed the offence of harassment. He also found there to be ample evidence to support the reasonableness of that suspicion, namely the content of the article and the Tweets, and the witness statement made by AB detailing his distress at the applicant's conduct. The judge further found that there had been objectively reasonable grounds for believing that the arrest was necessary to allow for the prompt and effective investigation of her conduct. The judge also found that the use of handcuffs when arresting the applicant, and in transporting her to London, had been justified, and that there had been reasonable and probable cause to charge the applicant under s.2 of the Act.

With regard to the applicant's complaint under Article 10, the judge noted that the arrest was lawful, and the prosecution was made with reasonable and probable cause and not malicious. Therefore, the arrest and charge of the applicant, which did not interrupt, curtail and prevent the exercise of the fundamental right to freedom of expression, simply did not engage Article 10. The judge also found that the bail conditions did not engage Article 10; even if Article 10 was engaged, the judge considered the interference to be justified under paragraph 2, as it had a clear purpose, namely the prevention of crime, which was achieved by preventing any possible recurrence of the alleged offence.

On 28 August 2018, the High Court granted the applicant permission to appeal (*Pal v COP* [2018] EWHC 2837 (QB)). The judge – Nicklin J - considered that Article 10 of the Convention governed the entirety of the decision and it should have been at the forefront of the consideration of the issues that arose. In his view, an analysis of harassment and whether there was an objectively reasonable basis to suspect the commission of an offence in a case involving speech required a very careful consideration of what, objectively judged, amounted to harassment in the communications complained about (at [8-10]). It was arguable, in his view, that the acts relied upon did not, as a matter of law, provide an objectively reasonable basis of the suspicion that an offence had been committed (at [27]).

On 9 November 2018, the High Court dismissed the applicant's appeal *(Pal Commissioner of Police of the Metropolis* [2018] EWHC 2988 (QB)). In the judge's view, the County Court judge had been entitled to find that the arresting officer had an honest objectively justified suspicion that the applicant had committed an offence of harassment (at [24]). Further, there was evidence to support the County Court judge's conclusion that the arrest was necessary (at [25]). The High Court also agreed that there had been no breach of Article 10. The applicant enjoyed a qualified right to freedom of expression, both as a journalist and as an ordinary citizen, since the right could be restricted or subject to penalty for the prevention of disorder or crime. Her arrest had been found to be lawful, and where that was the case, it was difficult to conceive of circumstances that could give rise to a breach of Article 10. Accordingly, the judge was correct to find no arguable claim that the applicant's Article 10 rights had been breached by her arrest [at 27-29].

The applicant had argued specifically that her Article 10 rights should have been considered before the decision to arrest her was made. While Goose J accepted that her Article 10 rights were relevant at that stage, he noted that the County Court judge had considered Article 10 as part of the objective justification test. Accordingly, the County Court judge had not been wrong to conclude that Article 10 was not engaged, in the sense that it had not been breached by the applicant's arrest [at 31-32].

The applicant applied unsuccessfully to the Court of Appeal, and then the Supreme Court for permission to appeal, and then lodged application to the European Court, complaining that her prosecution, the manner in which her arrest was carried out, and the conditions of bail imposed on her, breached her rights under Article 10.

The decision and the European Court of Human Rights

The application was declared admissible (*Pal v United Kingdom*, Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021), the Court accepting that that her arrest and prosecution on suspicion of an offence under the Protection from Harassment Act 1997 was a plain interference with her rights under Article 10 of the Convention at [42].

Turning to the merits of the application, the Court accepted that any interference with the applicant's Article 10 rights was prescribed by law and that it pursued a legitimate aim of either preventing disorder and crime or protecting AB's rights at [51-52]. On the question of whether it was necessary in a democratic society in order to achieve that aim the Court referred to the principal case law concerning the proportionality and necessity of an interference with freedom of expression (at para 53). It then stressed that the test of necessity requires the Court to determine 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 authorities to justify it are relevant and sufficient (at [54]). Referring to the margin of appreciation, it then stated that where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, it would require strong reasons to substitute its view for that of the domestic courts (at [54]).

The Court recognised that it had identified a number of criteria in the context of balancing the competing rights under Articles 8 and 10 of the Convention. This included the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned and the content, form and consequences of the publication (at [54]). In particular, and of relevance to the case in hand, the Court reiterated that a distinction needed to be made between statements of fact and value judgments. Thus, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof, and the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which a fundamental part of the right secured by Article 10 (at [54]). Although value judgments must often have a factual basis for them to be considered proportionate, in order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks. Further, in doing so it should bear in mind that assertions about matters of public interest might, on that basis, constitute value judgments rather than statements of fact (at [55]).

Applying those principles, the Court stated that when examining the necessity of an interference in the interests of the protection of the reputation or rights of others, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting freedom of expression and the right to respect for private life (at [57]). In the present case, the arresting officer stated that she had considered the applicant's Article 10 rights when forming her honest and reasonable suspicion that the arrest was necessary, but then discounted them because AB found that what was written about him affected his privacy. There was no record of such consideration, but nonetheless the High Court judge accepted the evidence of the arresting officer (at [58]). Taken at its highest, her conclusion appears to have been based on the subjective viewpoint of AB himself, without any acknowledgment of the fact that the right to freedom of expression extends to information or ideas that offend, shock or disturb. Moreover, there was no evidence that the criteria identified by the Court as being relevant to the balancing of the respective rights were taken into account prior to the applicant's arrest (at [59]).

In particular, the Court noted that no consideration appeared to have been given to the subject matter of the applicant's article and tweets, and whether they could be said to have contributed to a debate of general interest. Neither had any consideration been given to the prior conduct of AB, and whether the nature his activities, as a fellow journalist, were private or public in nature; with the consequence that he could be subject to wider limits of acceptable criticism than ordinary citizens. Further, there was no investigation as to whether the information in the article or tweets was true; or whether the attack on AB's reputation attained a sufficient level of seriousness and caused prejudice to his personal enjoyment of the right to respect for his private life (at [59]).

The Court then noted that notwithstanding this, these criteria were central to the subsequent decision of the CPS to discontinue the prosecution, the CPS not being satisfied that the material published by the applicant justified restricting her Article 10 rights. Nevertheless, when the applicant brought her claim against the Metropolitan Police, neither the County Court nor the High Court considered the criteria. Further, while the judge who heard the appeal accepted that Article 10 was engaged, he found that there was no violation, principally because the applicant's arrest had been lawful and because the arresting officer confirmed that she had considered the applicant's rights when forming her honest and reasonable suspicion that the arrest was necessary. This conclusion appears to have been based solely on the subjective viewpoint of AB himself, and did not entail any assessment of the relevant criteria identified by the European Court as relevant to the balancing of the rights (at [61]). Accordingly, the Court concluded that the reasons given by the national authorities to justify the interference with the applicant's Article 10 rights were neither relevant nor sufficient, and that there has been a breach of Article 10 (at [62-3]).

Commentary

The decision of the European Court in *Pay* might be regarded as a simple one-off, where both the police and the courts gave little or no consideration to free speech rights, the High Court in particular ignoring the pleas of Nicklin J to confront the appeal from an Article 10 standpoint. If that is the case, the judgment does little but provide just satisfaction to the applicant for the injustice suffered by her in this particular case, and the courts will take greater care in the future to consider all the relevant factors and give greater attention to free speech values.

However, what happened in this case might be indicative of a more worrying trend with respect to the recognition of free speech norms in harassment cases. Two things are of concern here. First, as the defendant is accused of an act of harassment, both the police and the courts might start with a presumption that the act is unlawful and unreasonable. Instead, both the police, and to a greater extent the courts, should investigate all the circumstances and decide whether the interference with the defendant's free speech is justified as necessary and proportionate, as required by the jurisprudence of the European Court, and noted by Nicklin J when granting leave to appeal. Such a presumption of unreasonableness is - in general - not evident in misuse of private information or defamation cases, and the courts are well versed in balancing the claimant's rights with the prima facie right of the defendant to publish.

Responding to the warning shots from the European Court in *Pal v United Kingdom*, we are entitled to conclude that the Article 10 rights of defendants are, in the main, adequately safeguarded in harassment proceedings. This is the situation provided there is some discernible public interest in that speech, and that this public interest has not been lost by the unreasonable and gratuitous actions of the defendant. That protection will not always be as favourable as offered in cases involving privacy and defamation cases, as an allegation and a finding of harassment indicates that the conduct and speech has gone beyond the acceptable. Further, when that speech has little public interest merit – and pursues instead a mainly private grievance - it is likely that the court's finding that the defendant's conduct amounts to harassment will be followed by its rejection of the reasonableness defence under s.1(3).

The decision in *Pal* has highlighted the need to apply the principles of free speech and proportionately consistently and appropriately to cases which justify the recognition of essential principles of free speech and public debate. The domestic proceedings in *Pal* witnessed a number of essential errors, by the police and the courts, leading to unnecessary action taken against the journalist, and the dismissal of a legitimate private claim because of the courts' failure to follow the essential principles of free speech and proportionality.

What the judgment in *Pal* has done, however, is to concentrate the minds of the police and the courts, at first instance and on appeal and review, on the importance of human rights in the interpretation and application of domestic law, both generally and in the area of free speech, more specifically the law of harassment. It has also clearly reminded us of the role of campaigners and bloggers in the dissemination of public interest speech and the encouragement of public debate. Such protection should not be lost simply because allegations of harassment have been made, and the complainant has been insulted or inconvenienced. The 1997 Act should only be used in cases where the rights of others have been affected disproportionately, account being taken of the need for tolerance and the characteristics of open debate. A departure from those norms, concentrating on public order and the right of individuals to be free from irritation will lead to injustice, and more claims to the European Court.

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