

IN THE DIVISIONAL COURT

QUEEN'S BENCH DIVISION

BETWEEN:

PAUL CHAMBERS

Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

and

ARTICLE 19

Intervener

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WRITTEN SUBMISSIONS OF ARTICLE 19

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1. These written submissions are made on behalf of ARTICLE 19, which has applied for permission to intervene. It does not seek leave to make oral submissions.
2. ARTICLE 19, the Global Campaign for Free Expression, is an international human rights organisation based in London with regional and national offices in Brazil, Mexico, Tunisia, Bangladesh, Senegal and Kenya. It takes its name from Article 19 of the Universal Human Declaration of Human Rights and works globally to protect and promote the right to freedom of expression, including the right to information.<sup>1</sup>

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<sup>1</sup> Among other things, ARTICLE 19 was responsible for convening the international group of experts that produced the Johannesburg Principles on National Security, Freedom of Expression and Access to Information in October 1995 (UN Doc. E/CN.4/1996/39 (1996)). These principles were subsequently endorsed by the OAS Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the UN Special Rapporteur on Freedom of Opinion and Expression in 2000, and cited by the House of Lords in *Rehman*

3. ARTICLE 19 submits in outline as follows:

- (i) any restriction on freedom of expression that involves criminal sanctions requires the strongest justification. To criminalise the making of a statement that (a) was not intended as a threat and (b) an ordinary reasonable person would understand to be a joke would plainly amount to a disproportionate interference with article 10(2) ECHR and article 19(2) ICCPR;
- (ii) the context of statements made on the internet includes the "fervent, if not florid" nature of its discourse, its tendency towards the "rapid and spontaneous exchange of comments", as well as its "broad range of tolerance for hyperbolic language";
- (iii) the comparative case law of three other common law jurisdictions - Australia, Canada, and the United States - makes clear the need to distinguish between mock threats and actual threats.

#### A. FREEDOM OF EXPRESSION

4. The freedom to express ideas and information, opinions and beliefs includes the freedom to do so using humour. It necessarily includes the freedom to joke, to make light of serious things, to jest, to exaggerate, to trivialise, to satirize, parody and mock. It does not matter that a person's attempt at humour is unsuccessful. As a US district court judge once noted:<sup>2</sup>

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v Secretary of State for the Home Department [2001] UKHL 47 (see the leading judgment of Lord Slynn at §14). More generally, ARTICLE 19 is an experienced third party intervener, both in the UK courts (see e.g. *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at §54 per Toulson LJ: "Article 19 provided the court with a helpful and interesting survey of the approach which has been taken by courts in other common law countries") and before the European Court of Human Rights (see e.g. *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229).

<sup>2</sup> *Yankee Publishing, Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) per Leval J, cited with unanimous approval by the US Supreme Court in *Campbell v Acuff-Rose Music* 510 U.S. 569 (1994).

The obscurity of [a] joke does not deprive it of First Amendment support. First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.

5. It is common ground between the parties that the offence in section 127(1) of the Communications Act 2003, prohibiting the sending of 'menacing' messages via a public electronic communications network, constitutes an interference with the right to freedom of expression under article 10 ECHR. However, the compatibility of this prohibition has not been considered by the higher courts.<sup>3</sup>
6. It is axiomatic that any restriction on freedom of expression under article 10(2) must:
  - i. be prescribed by law,
  - ii. be necessary in a democratic society,
  - iii. serve a legitimate aim, and
  - iv. be proportionate to that aim.
7. In particular, as the Grand Chamber noted in *Sürek and Özdemir v Turkey* (nos 23927/94 and 24277/94, 8 July 1999) at para 57(ii):

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<sup>3</sup> In *DPP v Collins* [2006] UKHL 40, Lord Bingham held that the criminalisation of 'grossly offensive' messages under section 127(1) was an obvious interference with article 10 but held that that particular interference was nonetheless justified under article 10(2) on the basis that it was clearly prescribed by statute, directed to a legitimate objective, and went no further than was necessary in a democratic society to achieve that end (para 14). The House in *Collins* did not address the 'menacing' limb of section 127(1)(a). On its introduction to Parliament, the Bill that ultimately became the 2003 Act did not receive a declaration of compatibility under section 19(1)(a) HRA because of concerns over the compatibility of the ban on political advertising with the judgment of the European Court of Human Rights in *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159 - See *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15 at para 13 per Lord Bingham: "On the introduction of the Bill which became the 2003 Act, the Secretary of State felt unable to make a statement pursuant to section 19(1)(a) of the Human Rights Act 1998 that in her view the provisions of the Bill were compatible with the Convention rights scheduled to the 1998 Act. Instead she made a statement under section 19(1)(b) of that Act that although unable to make a statement under section 19(1)(a) the government nonetheless wished the House of Commons to proceed with the Bill. The government's position was that it believed and had been advised that the ban on political advertising in what became sections 319 and 321 was compatible with article 10, but because of the European Court's decision in *VgT* it could not be sure". Animal Defenders International subsequently complained to the ECtHR and a hearing was held on 7 March 2012.

The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10.

8. In the present case, ARTICLE 19 does not dispute that the prohibition against 'menacing' messages under section 127(1) of the 2003 Act serves a legitimate aim, namely protecting members of the public from threats and menaces sent via a public communications network. As the Grand Chamber observed in *Öneryildiz v Turkey* (2005) 41 E.H.R.R. 20, the positive obligation under article 2 ECHR "entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life". In *Bevacqua and S v Bulgaria* (no 71127/01, 12 June 2008), the Court noted that a similar obligation could arise under article 8 "taken alone or in combination with Article 3 of the Convention" giving rise to "a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals" (para 65). However, as the Grand Chamber also noted in *Osman v United Kingdom* (2000) 29 EHRR 245 at para 116:

[N]ot every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime *in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action* to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention [emphasis added].

ARTICLE 19 submits the same point applies *mutatis mutandi* to the guarantees of Article 10: the State is not obliged to shield persons from being exposed to any

statement that could possibly be construed as a threat, but only those which are intended as such.

9. The need for restraint is underlined by the Court's own approach to expression involving parody and satire. As the Court noted in *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007), in relation to the public exhibition of a painting that had depicted a prominent Austrian politician performing indecent acts:

The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that *satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate*. Accordingly, any interference with an artist's right to such expression must be examined with particular care [emphasis added, para 33].

10. ARTICLE 19 submits that what is true of satire is equally true of other forms of humour. In *Nikowitz and Verlagsgruppe News GMBH v Austria* (no 5266/03, 22 February 2007), the applicant had been convicted of defamation under the Austrian criminal code following the publication of an "ironic essay on the reaction of the Austrian population and media scene to the road-traffic accident in which the Austrian ski-racing champion Hermann Maier had injured his leg some weeks before" (para 6). Among other things, the Austrian courts had held that an "unfocused reader" could "not have been expected to discern the satirical and humorous content of the article and impugned passage" (para 24). The Court, however, disagreed:

*The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text's satirical character and, in particular, the humorous element of the impugned passage about what Mr Eberharter could have said but did not actually say. This passage could at most be understood as the author's value judgment on Mr Eberharter's character, expressed in the form of a joke .... In sum, the Court considers that the impugned passage about Mr Eberharter remains within the limits of*

acceptable satirical comment in a democratic society [emphasis added, paras 25-26].

11. More generally, the right to freedom of expression under article 10 protects not only the freedom to express alarming ideas but also to express ideas in an alarming way. As the Grand Chamber held in *Zana v Turkey* (1997) 27 EHRR 667 at para 51(i):

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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*. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, *which must, however, be construed strictly, and the need for any restrictions must be established convincingly...* [emphasis added].

12. This freedom to make statements which offend, shock or disturb is not, of course, a license to menace others. But it undoubtedly encompasses the freedom to say things which others may feel threatened by.

13. For this reason, ARTICLE 19 submits that the test adopted by the Respondent and the Crown Court at Doncaster - namely that a person commits an offence under section 127(1)(a) of the 2003 Act if they send a message "of a menacing character" (objectively determined) via a public electronic communications network and either intended the message to be menacing, or were aware that it might be taken to be so (Case Stated, para 38) - sets the bar too low. The inherent element of exaggeration involved in most humour taken together with the nature of internet communications (dealt with in Section B below) means that a reasonable person making a joke online will almost always be aware of the possibility that someone somewhere might not be able to find the humour in it. Where the joke in question takes the form of a mock threat, that awareness would be enough to turn an otherwise innocent statement into a criminal offence. ARTICLE 19 submits that such an outcome is plainly

disproportionate and outwith article 10(2). Whereas it is wholly legitimate to criminalise the making of threats online, it is not necessary to criminalise jokes in order to do so. As the Court held in *Nikowitz*, a democratic society should be reasonably expected to tell the difference between the two.

14. Moreover, as the Grand Chamber found in *Cumpănă and Mazăre v Romania* (no 33348/96, 17 December 2004), the chilling effect imposed by criminal sanctions "works to the detriment of society as a whole" and is "likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed". Similarly, in *Raichinov v. Bulgaria* (no 47579/99, 20 April 2006), the Court noted that "the assessment of the proportionality of an interference with [Art 10] will in many cases depend on whether the authorities could have resorted to *means other than a criminal penalty*, such as civil and disciplinary remedies" (para 50). In the present case, the Appellant's statement was investigated as a matter of procedure and found not to be credible. There is, therefore, no evidence to indicate that a criminal sanction of any kind was necessary to address whatever mischief was caused, on the facts of this particular case.

15. In addition to the requirement of section 3(1) HRA<sup>4</sup> and the principle of legality (the common law presumption that fundamental rights should not be overridden by general or ambiguous words),<sup>5</sup> ARTICLE 19 submits that the Divisional Court should also have regard to the UK's obligations under other international human rights instruments,<sup>6</sup> including the right to freedom of expression under article 19(2) of the International Covenant on Civil and Political Rights, as well as other relevant

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<sup>4</sup> Section 3(1) HRA requires that "so far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights".

<sup>5</sup> See *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, per Lord Hoffmann at 131; *Ahmed and others v HM Treasury* [2010] UKSC 2 at para 75 per Lord Hope). The common law right to freedom of expression is no less extensive than that under Article 10 ECHR (*Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 per Lord Keith at 551G; *Attorney General v Guardian Newspapers (no 2)* [1990] 1 AC 109, 283- 284 per Lord Goff).

<sup>6</sup> Although not unincorporated into domestic law, it is well-established that Parliament is deemed not to legislate contrary to the UK's international obligations: see e.g. *R v Lyons* [2003] 1 AC 976 at para 27 per Lord Hoffmann: "there is a *strong presumption* in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation" [emphasis added]; and the statements of Lords Phillips, Brown and Kerr in *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at paras 10, 98, and 112 respectively.

principles of international law, in particular principles 1.3 and 6 of the Johannesburg Principles on Freedom of Expression, National Security and Access to Information:<sup>7</sup>

*Principle 1.3: Necessary in a Democratic Society*

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) the restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) the restriction is compatible with democratic principles.

*Principle 6: Expression That May Threaten National Security*

Subject to Principles 15 and 16,<sup>8</sup> expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is *intended* to incite imminent violence;
- (b) it is *likely to incite* such violence; and
- (c) there is a *direct and immediate connection between the expression and the likelihood or occurrence of such violence*.

16. More generally, ARTICLE 19 submits that, when considering the scope of permissible restrictions on the right to freedom of expression, it is appropriate for the Divisional Court to have regard to broader concern at overbroad restrictions on freedom of expression on the internet expressed by the Council of Europe,<sup>9</sup> the

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<sup>7</sup> Emphasis added.

<sup>8</sup> Principles 15 and 16 deal respectively with the disclosure of secret information and the disclosure of information obtained through public service

<sup>9</sup> See e.g. principle 1 of the Council of Europe Declaration on freedom of communication on the internet: "Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery". In its Internet governance strategy 2012 – 2015 (CM(2011) 175 Final), the Council of Europe identified Freedom of expression and information "regardless of frontiers" as "an overarching requirement because it acts as a catalyst for the exercise of other rights, as is the need to address threats to the rule of law, security and dignity".

Committee of Ministers,<sup>10</sup> the CoE Human Rights Commissioner,<sup>11</sup> the UN Human Rights Committee<sup>12</sup> and the UN Special Rapporteur on Freedom of Expression.<sup>13</sup> It is also appropriate to note concern of the International Commission of Jurists<sup>14</sup> and the Eminent Jurists Panel on Terrorism, counter-terrorism and human rights<sup>15</sup> at the increasing tendency since 9/11 for overbroad restrictions to be imposed in the name of national security.

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<sup>10</sup> Recommendation (2012)4 of the Committee of Ministers on the protection of human rights with regard to social networking services (adopted 4 April 2012), recognised that freedom of expression includes the freedom to impart and receive information which may be shocking, disturbing and offensive.

<sup>11</sup> In a recent discussion paper (CommDH (2012)8), the Council of Europe Human Rights Commissioner criticised the extensive margin of appreciation given to member states in relation to the right to freedom of expression: "In view of the crucial need to preserve the Internet's openness, neutrality and limited regulation (principles strongly supported by the Council of Europe), we feel the Strasbourg Court's current approach is too accommodating to member states and cannot be retained without modification in the context of the Internet; it leads inevitably to those "unlimited and unsolvable conflict[s]". Member states should no longer be given the excessive protection of overgenerous application of the "margin of appreciation" on the Internet."

<sup>12</sup> See e.g. General Comment No. 34 of the UN Human Rights Committee (CCPR/C/GC/34, adopted 21 July 2011) makes clear that Article 19(2) ICCPR protects all forms of expression and means of communication, including all forms of electronic and internet-based modes of expression (para 12); and that, when assessing the necessity of any restriction on the right to freedom of expression in Article 19(3) ICCPR, a state party is obliged to demonstrate in "specific fashion the precise nature of the threat" to any of the specified grounds upon which it has based its restriction (emphasis added) (para 36).

<sup>13</sup> In May 2011, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, expressed his concern that "legitimate online expression is being criminalized in contravention of States' international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalize expression on the Internet. Such laws are often justified on the basis of protecting an individual's reputation, national security or countering terrorism, but in practice are used to censor content that the Government and other powerful entities do not like or agree with" (para 34). See also e.g. Four Special Mandates' Joint Declaration on freedom of expression and the internet (June 2011): "Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the 'three-part' test)". In particular, "approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it".

<sup>14</sup> See e.g. article 8 of the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism: "*Fundamental Rights and Freedoms*: In the implementation of counter-terrorism measures, states must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to self-determination; as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate". The Berlin Declaration was cited with approval by Lord Bingham in his judgment in *A and others v Secretary of State for the Home Department* [2005] UKHL 71 at para 44.

<sup>15</sup> See *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists, February 2009), pp 127-132.

## B. THE RELEVANT CONTEXT

17. It is common ground between the parties that the context of the remark is highly relevant to determining both criminal liability under section 127(1)(a) and the compatibility of the Appellant's conviction with article 10. As Sedley LJ noted in Collins [2005] EWHC 1308 (Admin) at para 9:

*The same content may be menacing or grossly offensive in one message and innocuous in another. As was pointed out in argument, counsel in the present case are unlikely to have exposed themselves to prosecution by discussing its facts on the telephone. A script writer e-mailing his or her director about dialogue for a new film is not likely to fall foul of the law, however intrinsically menacing or offensive the text they are discussing. In its context, such a message threatens nobody and can offend nobody. Here, as elsewhere, context is everything.*

Lord Bingham similarly agreed that "the words must be judged taking account of their context and all relevant circumstances", the relevant test being "whether a message is couched in terms liable to cause gross offence to those to whom it relates" (para 12). As the Grand Chamber itself held in *Erdogdu and Ince v Turkey* (2002) 34 EHRR 50:<sup>16</sup>

*The Court will have particular regard to the words used in the interview and to the context in which it was published. In this latter respect the Court takes into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism [emphasis added, para 51].*

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<sup>16</sup> See also Holmes J's locus classicus in *Schenck v United States*, 249 U.S. 47 (1919) at 52: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. *But the character of every act depends upon the circumstances in which it is done.* ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force .... *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent*" [emphasis added].

18. The Respondent submits that Doncaster Crown Court was entitled on the evidence before it to accept that "the context in which the message was sent was sufficient to establish the *mens rea* of the offence" [Case Stated, para 38]. Specifically, the Respondent submits that the central issue in the appeal is 'whether the Court was entitled to find that reasonable members of the public, upon reading [the Appellant's] message *in the context of its publication*, were likely to be alarmed by the fear that this threat would or might be carried into effect' [CPS skeleton, para 2.7; emphasis added].

19. For the avoidance of doubt, ARTICLE 19 agrees with the Appellant that the question of whether the statement was menacing is properly a matter for the prosecution to prove as part of the actus reus. Even if this submission is not accepted, however, ARTICLE 19 respectfully submits that Doncaster Crown Court erred in failing to take proper account of the context in which the Appellant made his statement, namely via his Twitter account and, more generally, via the internet.

20. As Eady J noted in *Smith v ADVFN Plc and others* [2008] EWHC 1797 (QB), in an interlocutory ruling on alleged defamatory statements made in various internet forums and bulletin boards:

13. It is necessary to have well in mind the nature of bulletin board communications, which are a relatively recent development. This is central to a proper consideration of all the matters now before the court.

14. This has been explained in the material before me and is, in any event, nowadays a matter of general knowledge. Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject-matter; *they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take"*.

15. The participants in these exchanges were mostly using pseudonyms (or "avatars"), so that their identities will often not be known to others. *This is no*

*doubt a disinhibiting factor affecting what people are prepared to say in this special environment.*

16. When considered in the context of defamation law, therefore, communications of this kind are much more akin to slanders (this cause of action being nowadays relatively rare) than to the usual, more permanent kind of communications found in libel actions. *People do not often take a "thread" and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it.*

17. It is this analogy with slander which led me in my ruling of 12 May to refer to "mere vulgar abuse", which used to be discussed quite often in the heyday of slander actions. It is not so much a defence that is unique to slander as an aspect of interpreting the meaning of words. *From the context of casual conversations, one can often tell that a remark is not to be taken literally or seriously and is rather to be construed merely as abuse. That is less common in the case of more permanent written communication, although it is by no means unknown. But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious. [emphasis added]*

21. A very similar analysis was put forward by Blair J in the Court of Appeal for Ontario in *Baglow v Smith* (2012) ONCA 407, again concerning an action in defamation over comments made on the internet, in which he noted that commentators "engaging in the cut and thrust of political discourse in the internet blogosphere can be fervent, if not florid, in the expression of their views" (para 1):

27. In this case, the parties have put in play a scenario that, to date, has received little judicial consideration: an allegedly defamatory statement made in the course of a robust and free-wheeling exchange of political views in the internet blogging world where, the appellant concedes, arguments "can be at times caustic, strident or even vulgar and insulting." Indeed, some measure

of what may seem to be a broad range of tolerance for hyperbolic language in this context may be taken from the apparent willingness of the appellant to absorb the slings and arrows of the “traitor” and “treason” labels without complaint.

28. Nonetheless, although the respondents come close to asserting – but do not quite assert – that “anything goes” in these types of exchanges, is that the case in law? Do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet? For that matter, do different considerations apply even within publications on the internet – to a publication on Facebook or in the “Twitterverse”, say, compared to a publication on a blog?

29. These issues have not been addressed in the jurisprudence in any significant way. The responses may have far-reaching implications. They are best crafted on the basis of a full record after a trial – at least until the law evolves and crystallizes to a certain point – in my view. A trial will permit these important conclusions to be formulated on the basis of a record informed by the examination and cross-examination of witnesses and quite possibly with the assistance of expert evidence to provide the court – whose members are perhaps not always the most up-to-date in matters involving the blogosphere – with insight into how the internet blogging world functions and what may or may not be the expectations and sensibilities of those who engage in such discourse in the particular context in which that discourse occurs.

22. The ECtHR too has noted that the internet 'is not and potentially will never be subject to the same regulations and control' as the print media (*Editorial Board of Pravoye Delo and Shtekel v Ukraine* (no 33014/05, 5 May 2011), at para 63). Although the Court expressed concern that this lack of regulation gave rise to a correspondingly greater risk of harm to certain rights, in particular the right to privacy, it also referred to the 'importance' of the Internet 'for the exercise of the right to freedom of expression generally' (para 64).

23. More generally, the ECtHR has repeatedly stated that "heated debate" is a relevant factor when considering the proportionality of measures aimed at restricting freedom of expression. In *Fuentes Bobo v Spain* (no. 39293/98, 29 February 2000), the applicant was an employee of the state television network who made abusive comments about network executives during a live radio broadcast and while in the midst of a labour dispute. In considering the applicant's complaint that his subsequent dismissal violated his rights under article 10, the Court took account of the context of his statements:

Pour se prononcer sur cette question, la Cour tiendra compte en particulier des termes utilisés dans les déclarations, du contexte dans lequel celles-ci ont été rendues publiques et de l'affaire dans son ensemble, *y compris le fait qu'il s'agissait d'assertions orales prononcées lors d'émissions de radio en direct, ce qui a ôté la possibilité au requérant de les reformuler, de les parfaire ou de les retirer avant qu'elles ne soient rendues publiques...*

"In deciding this question, the Court will consider in particular the terms used in the statements, the context in which they were released and the whole case, *including the fact that it was of oral statements made during a live radio broadcasts, which the applicant had no possibility of reformulating, refining or remove before they were released*" [para 46, emphasis added].

And:

Néanmoins, les propos en question ont été employés d'abord par les animateurs des émissions de radio, le requérant se bornant à les confirmer, et ce, *dans le cadre d'un échange rapide et spontané de commentaires entre le requérant et les journalistes.*

"Nevertheless, the remarks in question were used first by the radio hosts, the applicant merely confirmed them *as part of a rapid and spontaneous exchange of comments between the applicant and journalists*" [para 48, emphasis added].

Accordingly, the ECtHR found there was "no reasonable relationship of proportionality between the punishment imposed on the applicant and the legitimate aim pursued" (*qu'il n'existait pas de rapport raisonnable de proportionnalité entre la sanction imposée au requérant et le but légitime visé*, para 50).

24. In *Palomo Sanchez and Others v. Spain* (nos 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011), by contrast, the Grand Chamber noted that the publication of offensive cartoons suggested a high degree of deliberation and planning, and "did not constitute an instantaneous and ill-considered reaction, in the context of a rapid and spontaneous oral exchange, as is the case with verbal exaggeration" (para 73).

25. In light of the above, ARTICLE 19 submits the Appellant's statement must be seen in its proper context. Had the Appellant been standing in a queue for the metal detector while waiting to board a plane, and made his remarks aloud to a security attendant, he could not have reasonably complained that the airport authorities did not have a sense of humour. The Appellant did not make his statement in the security zone of an airport, however, but on Twitter. In particular, ARTICLE 19 submits that Doncaster Crown Court failed to have proper regard to:

- i. the highly ephemeral nature of comments on Twitter, a medium typically characterised by the same "rapid and spontaneous exchange of comments" that the ECtHR found to be decisive in *Fuentes Bobo*; and
- ii. the robust nature of comments on the internet in general, with what the Ontario Court of Appeal found to be a "broad range of tolerance for hyperbolic language".

As Eady J noted, public conversations on the internet "are rather like contributions to a casual conversation" and the comments are "often uninhibited, casual and ill thought out". In particular, an ordinary reasonable person, having proper regard to this context, could be expected to recognise that a person threatening to blow up an airport on Twitter was far more likely to be joking than serious.

## C. COMPARATIVE LAW

26. ARTICLE 19 submits that it is also instructive to consider the position in relation to jokes and threats in three other common law jurisdictions: Australia, Canada and the United States. Although none of the provisions provide an exact analogy with the offence under section 127(1)(a), each of them make clear the importance of distinguishing between intentional threats and mere hyperbole.

### *Australia*<sup>17</sup>

27. Section 474.17 of the federal Criminal Code Act 1995 (Cth) provides that it is an offence to use a carriage service ('a service for carrying communications by means of guided and/or unguided electromagnetic energy')

in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

28. In *Crowther v Sala* [2007] QCA 133, the appellant had been convicted of an offence under section 474.14 after she phoned the Department of Employment to complain about its hand delivery of an envelope. Among other things, she threatened to "get a gun and shoot everybody" unless the Department identified the employee responsible. In her defence, the Appellant had maintained that she was only using "Australian colloquialisms" and that in consequence the words used were not, objectively speaking, menacing, harassing or offensive (para 8). This submission was rejected by the magistrate and he found that the words used were menacing.

29. On appeal, the appellant submitted that the magistrate erred in finding that a reasonable person would in all the circumstances have regarded the words used as menacing. Among other things, it was submitted that the Appellant's language was "hyperbole to reinforce [her] insistence on being given information as to how the protocol had been breached" and that her statement concerning what she would do with the gun was an "anatomical impossibility" (para 11).

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<sup>17</sup> ARTICLE 19 is grateful to Baker & Mackenzie LLP for this information.

30. For its part, the Queensland Supreme Court held that "what had to be proved in this case was that the applicant was at least aware of a substantial risk that *a reasonable person would regard her conduct as menacing and that it was unjustifiable to take that risk.* That would require at least the proof that she realised that her words could be sensibly understood as a genuine threat" (para 45 per McMurdo J, emphasis added). Since the magistrate had not considered the fault elements of the offence, the Supreme Court allowed the appeal on the basis that the appellant did not have a fair trial (para 53). However, no new trial was ordered on the basis that the appellant had already served the period of probation ordered.
31. It is noteworthy that Australia is the only common law jurisdiction without explicit constitutional protection for freedom of expression.

### *Canada*

32. Freedom of expression is one of the fundamental freedoms listed in section 2 of the 1982 Canadian Charter of Rights and Freedoms.
33. There is no direct analogue in Canadian criminal law to the offence in section 127(1)(a) of the 2003 Act. However, section 264.1(1)(a) of the Canadian Criminal Code (RSC 1985, C-46) provides every person commits an offence "who, in any manner, knowingly utters, conveys or causes any person to receive a threat to cause death or bodily harm to any person".
34. The provision was considered by the Canadian Supreme Court in *R v McCraw* (1991) 3 SCR 72, in a case in which the appellant wrote anonymous, sexually explicit letters to three women. Among other things, the Supreme Court noted that the purpose of the offence was "to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society" (p82). The Supreme Court framed the relevant test as follows:

Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?

For the purposes of s 264.1(1)(a) of the *Criminal Code* "serious bodily harm" means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim. To determine whether spoken or written words constitute a threat to cause serious bodily harm *they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed and the circumstances in which they were uttered. They should be viewed in an objective way and the meaning attributed to the words should be that which a reasonable person would give to them* [p 83, emphasis added].

35. In the subsequent appeal of *R v Clemente* [1994] 2 SCR 758, the appellant had been convicted under section 264.1(1)(a) of making various threatening statements concerning his former social worker, including death threats. On appeal, the appellant submitted that it must be established that the words were uttered with the intent to intimidate or instil, while the respondent contended that it was sufficient if it is shown that the threat was uttered with the intent that it be taken seriously. Dismissing the appeal, the Court reiterated that:

Section 264.1(1)(a) is directed at words which cause fear or intimidation. Its purpose is to protect the exercise of freedom of choice by preventing intimidation. The section makes it a crime to issue threats without any further action being taken beyond the threat itself. Thus, it is the meaning conveyed by the words that is important. *Yet it cannot be that words spoken in jest were meant to be caught by the section* [p 762, emphasis added].

36. The Supreme Court went on to conclude that:

Under [section 264.1(1)(a)] the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken or

written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.

To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them objectively, and review them *in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.*

*Obviously words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat [p763, emphasis added].*

### ***United States***

37. As is well known, the First Amendment to the US Constitution provides, among other things, that Congress shall make no law 'abridging the freedom of speech, or of the press'.

38. The US Supreme Court has, over time, developed an extensive jurisprudence distinguishing various kinds of excited or hyperbolic statements protected under the First Amendment from so-called "true threats". In *Watts v United States*, 394 U.S. 705 (1969), for instance, the appellant was convicted under 18 U.S.C. 871 of making threats against the President for making the following statement at a small rally against the Vietnam War:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. They are not going to make me kill my black brothers.

39. Quashing the appellant's conviction, the Supreme Court held that while the statute in question certainly pursued a legitimate aim, its application in the applicant's case was plainly disproportionate:

Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence .... Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. *What is a threat must be distinguished from what is constitutionally protected speech* [emphasis added].

40. Specifically, the Supreme Court held that it was necessary for "the Government to prove a true 'threat'", whereas it did not believe that "the kind of political hyperbole indulged in by petitioner fits within that statutory term":

For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v Sullivan*, 376 U.S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, see *Linn v United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966), is *often vituperative, abusive, and inexact*. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President" [emphasis added].

41. The 'true threats' doctrine was affirmed most recently by the US Supreme Court in *Virginia v Black* 538 US 343 (2003), when the Court considered whether a Virginia statute criminalising the burning of crosses as prima facie 'threats of intimidation' contravened the First Amendment. Writing for the majority, Roberts CJ noted that "the First Amendment also permits a State to ban a 'true threat'", which he went on to define as:

those statements where the speaker *means to communicate a serious expression of an intent to commit an act of unlawful violence* to a particular individual or

group of individuals. See *Watts v. United States, supra*, at 708 ("political hyperbole" is not a true threat); *R. A. V. v. City of St. Paul*, 505 U. S., at 388. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death* [emphasis added].

## CONCLUSION

42. For the reasons above, ARTICLE 19 submits that the offence under section 127(1)(a) of the 2003 Act must not be interpreted or applied in such a way as to criminalise legitimate free expression contrary to article 10(2) ECHR and article 19(2) ICCPR.

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22 June 2012

CO/2350/2011

IN THE DIVISIONAL COURT  
QUEEN'S BENCH DIVISION

BETWEEN:

PAUL CHAMBERS

Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

and

ARTICLE 19

Intervener

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WRITTEN SUBMISSIONS  
OF ARTICLE 19

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