Judgments

Sube and another v News Group Newspapers Ltd and another

[2020] EWHC 1125 (QB)

Queen's Bench Division

Warby J

7 May 2020

Judgment

Mark Engelman and Luke Harrison (Solicitor Advocate) (instructed by **Debenhams Ottaway LLP**) for the **Claimants**

David Price QC (Solicitor Advocate) for the **First Defendant**

Christina Michalos QC (instructed by **Express Newspapers**) for the **Second Defendant**

Hearing dates: 5-7 February **2020**

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Approved Judgment

Mr Justice Warby:

Introduction

1. This judgment follows the trial of the claimants' claims against two **newspaper** publishers, for damages and an injunction in respect of alleged harassment contrary to the Protection from Harassment Act 1997 ("PHA"), and for remedies under the Data Protection Act 1998 ("DPA").

2. The claimants ("Mr and Mrs **Sube**") are a married couple with 9 children. They moved to this country from France in 2012. The first defendant ("**News Group**") is the publisher of *The Sun* and the operator of its website. The second defendant ("the **Express Group**") is the publisher of the *Daily **Express**,* the *Daily Star*, and the *Daily Star Sunday,* and the operator of two websites, www.**express**.co.uk ("the Daily **Express** website") and www.dailystar.co.uk ("the Daily Star website").

3. In the spring and summer of 2016, the Subes were in dispute with Luton Borough Council about the adequacy of the housing which the Council had offered the family, which at that time included 8 children. On 6 September 2016, an article about the matter appeared in a local free **newspaper**, the *MK Citizen*. Between 7 September 2016 and **2** November 2016, *The Sun*, the *Daily Star*, and the *Daily **Express*** carried articles, in print and online, about the claimants, of which the claimants complain ("the Articles"). In addition, user generated content ("UGC") in the form of a number of reader comments relating to the Articles appeared on the websites of **News Group** and the **Express Group**. The claimants complain of a number of these ("the Posts").

4. The claim against **News Group** relates to an article in *The Sun* for 7 September 2016, headed "*Are they serious? First picture of four-bed house that jobless couple with eight kids slammed council for offering*", 6 other articles published in *The Sun* or on its website, and a number of Posts on the Sun website relating to the online articles.

5. The claimants sue the **Express Group** over

(**1**) 5 *Daily Star* articles, the first published online on 7 September 2016 under the headline "*Jobless dad whines about £15k a year council home – and turns down five-bedroom house*", and a number of Posts on the Daily Star website;

(**2**) 7 *Daily **Express*** articles, the first being an article published in print and online on 8 September 2016, headed "*Shameless French family-of-10 demand MANSION: Benefits dad rejects 5-bed as 'too cramped'"*, and a number of Posts on the Daily **Express** website.

6. The harassment claims rely on the Articles and the Posts. They are brought pursuant to ss **1** and 3 of the PHA. Those sections, the terms of which are set out below, prohibit a person from engaging in a course of conduct that amounts to harassment, and provide for a civil remedy where harassment is established.

7. The data protection claims concern the Posts only. There is a claim under s 10 of the DPA, which confers a "right to prevent processing likely to cause damage or distress". The section of the Particulars of Claim that relates to data protection also contains a claim for compensation, and for the remedies of blocking and erasure under DPA s 14. Those remedies are, in principle, available in respect of data which the court is satisfied are false.

The main issues

Harassment

8. The main issues for trial are, in relation to each defendant:

(**1**) To what extent, if at all, is the publication of the Posts on the website(s) operated by the defendant to be treated as "conduct" of the defendant, for the purposes of s **1** PHA?

(**2**) Whatever the answer to (**1**), did the behaviour complained of (a) involve a course of conduct by the defendant which (b) amounted to harassment of one or both of the claimants and which (c) the defendant knew or should have known amounted to such harassment?

(3) If there was a course of conduct that *prima facie* amounted to harassment, was it one that "in the particular circumstances … was reasonable" within the meaning of PHA, s **1**(3)(c)?

(4) If it arises, damages and other relief.

The DPA claims

9. The main issues at the start of the trial were these:-

(**1**) To what extent did the Posts involve the processing of "sensitive personal data" within the meaning of DPA s **2**?

(**2**) Have the claimants made out a case for relief under DPA s 10(4)?

(3) In the light of the procedural history (to which I shall come), are the claimants entitled to advance any claim going beyond one for relief under DPA s 10?

Evidence

10. Mr **Sube** and Mrs **Sube** have each made two witness statements, and each has been cross-examined. **News Group** has relied on four witnesses: Beth Pearson, at the material times a reporter on the *MK Citizen*; Victoria Watson, Digital Managing Editor of *The Sun*; James Manning-Monro, *The Sun's* Head of Social Media in September 2016; and Paul Clarkson, Managing Editor of the paper since April 2016. All have given evidence and been cross-examined. The same is true of the three witnesses on whom the **Express Group** has relied: Charles Wade-Palmer, who is now an **Express** reporter but was working for Caters **News** agency at the material time; Geoffrey Marsh, who had overall responsibility for the digital content of the two **Express group** websites; and Daniel Townend, **news** editor on the *Daily **Express***.

11. In addition, I have a quantity of documentary evidence, the chief features of this being the *MK Citizen* article, the Articles, the Posts, some third-party publications, and some inter-party correspondence.

Factual background

12. There are some factual disputes which I shall have to resolve, but first I set out some background matters which are common to all the claims. The following matters are not in dispute, save for some of what the claimants say about the impact of the publications complained of.

*The **Sube** family and its dealings with the Council*

13. The family is originally from Cameroon, West Africa, but moved to France. Mrs **Sube** had French citizenship from birth. Mr **Sube** acquired it, in 2011. In 2012, the family moved to the United Kingdom. Mr **Sube** aimed to train as a psychiatric nurse, which he did between September 2014 and September 2017, when he qualified. Since then, he has worked as a psychiatric nurse in the NHS and acquired British citizenship.

14. The fees for Mr **Sube**'s training were met by the NHS, but the family's living and accommodation costs were not. Initially, Mr **Sube** rented privately a family home in Wauluds Bank Drive, Luton, funding this with savings of £15,000 from what he had earned working in a

French warehouse. There was a falling out with the landlord, and the family left. Mr **Sube** had been working part-time. Mrs **Sube** has looked after the children, and has not been in paid work. Their housing became a responsibility of Luton Council ("the Council"), albeit with contributions from Mr **Sube**. He had approached the Council about the family's housing situation as early as 8 September 2014.

15. From April to August 2015, the family was provided with temporary hotel accommodation. On 10 August 2015, they were provided with a 3-bedroom home in Melfort Drive, Milton Keynes. The Subes' view was that this was cramped accommodation, unsuitable for such a large family, and their evidence – unchallenged in these proceedings – is that the conditions had detrimental effects on the welfare of the parents and the children. Mr **Sube** complained to the Council, but was told that no alternative accommodation was available. He looked for help and support from third parties.

16. Mr **Sube** approached the homelessness charity, Shelter, and in September 2015 they asked the Council for a review of the suitability of Melfort Drive, on the grounds of location, affordability and size. On 10 November 2015, the Council upheld its original decision that the premises were suitable. At some point around this time, Mr **Sube** also approached the Citizens Advice Bureau. His evidence is that they told him they would contact the Council, but nothing happened. He also had some assistance from a Councillor, Hazel Simmons. By 8 December 2015, the Subes had instructed Abbott Solicitors to pursue the issue. Their efforts seem to have borne no fruit, and by 21 July 2016, Rodman Pearce solicitors had been instructed in their place. On 12 August 2016, Rodman Pearce submitted representations to the Council in support of a statutory review under s 202 of the Housing Act 1996. The Council responded on **2** September 2016. But in the meantime, Mr **Sube** had contacted Beth Pearson.

The MK Citizen

17. Ms Pearson was at that time a reporter at the *MK Citizen*. Mr **Sube** made contact with her on 25 August 2016, by phone. He called another number at the *MK Citizen*, and was put through to Ms Pearson. They spoke, and then had some email exchanges. She arranged for a photographer to attend the family home. The photographer attended, and took some photographs. Ms Pearson wrote an article for the *MK Citizen*, which was published at around 17:24 on Tuesday 6 September 2016, under the headline "*Milton Keynes family of 10 slate council over claims their five bedroom home is not big enough*."

18. The article contained quotations attributed to Mr **Sube**, complaining that the family had been neglected, the conditions were cramped and terrible, and they needed a bigger house. A Council spokesperson was quoted saying that, despite the difficulties, they had managed to find affordable housing that was large enough for the family. The article reported that the family had turned down a five-bedroom house, and Mr **Sube** was quoted explaining that there was not enough wardrobe or storage space. The article was illustrated by a photograph of the family on the settee at Melfort Drive. Over time, this article attracted 21 comments, the majority castigating the family as "*benefit scroungers*", who should be sent home and forced to repay the benefits provided to them, or similar. Some of the comments referred to other publications.

19. On 7 September 2016, the day after the publication of the *MK Citizen* article, Mr **Sube** and Beth Pearson had at least one phone conversation and then, between 10:24 and 10:59, some email exchanges. In an email, Mr **Sube** sought to correct aspects of the *MK Citizen* article, and provided some additional information for publication. Ms Pearson responded in some detail, concluding that she and her editor did "*not see that any changes needed to be made*".

Journalists visit the Subes' home

20. That same morning of 7 September 2016, Mr **Sube** was contacted by two other journalists. One was Charles Wade-Palmer, who then worked for Caters. He interviewed Mr **Sube**. The other was Robert Pattinson, then working for a **news** agency called Masons, also known as South West **News** Service or SWNS. By 9:54am Joanne Webb of SWNS had produced **news** copy under the heading "No room to manoeuvre". Within the hour, copy from SWNS had reached the *Daily Star* **news** list.

Articles complained of: September 2016

21. At about 10:48 on 7 September 2016, the first of *The Sun* articles complained of was published online. I have set out the headline at [4] above. The article is set out in full in the Annex to my judgment of 24 May 2018 ([2018] **EWHC** 1234 (**QB**), "the First Judgment"). The article included photo captions crediting SWNS. In the First Judgment, I held that: (**1**) the factual meanings complained of were not conveyed by this article; (**2**) the article did convey derogatory comments or opinions about the Subes; but (3) none of those comments or opinions was sufficiently harmful to either claimant's reputation to satisfy the serious harm requirement laid down by s **1** of the Defamation Act 2013: see First Judgment [13(**1**)], [34] and [38(**1**)].

22. The following further publications in this period are complained of. It is not necessary to set them all out in full. Appendix B to this judgment contains most of the text of one of them. This, and the headlines of the others, will give a fair summary of their gist. Some details of their content and the meanings attributed to them by the claimants can be found in the First Judgment, at the paragraphs identified below.

(**1**) In *The Sun*:-

(a) 8 September 2016, "*The Great British Rake-Off*". This was a print version of the first online article ("*Are they Serious?*"), and substantially identical save for the headlines (First Judgment [38(8)]).

(b) 9 September 2016, "*Benefits Dad's defiance Father of eight who turned down a four bedroom council house says he would accept one if it was 'spacious' enough*". This was an online article (First Judgment [38(**2**)]).

(c) 11 September 2016, "*'It's my right!' Shameless father-of-eight immigrant who turned down 'too small' five bed council house reveals he blew £15k within weeks of coming to Britain*": an online article (First Judgment [38(3)]): see Appendix B.

(**2**) In the *Daily Star*:-

(a) 7 September 2016, the online article already mentioned ("*Jobless dad whines about £15k-a-year council home – and turns down five bedroom house*": (First Judgment [48(19)]).

(b) 8 September 2016, an online article headed "*Shameless family of 10 who refused bigger home must move – or face being dumped on the streets*" (First Judgment [46] to [48(11)]).

(c) 11 September 2016, a print article credited to Mr Wade-Palmer, uploaded online headed "*'I blew £15k in weeks' Migrant splashed savings on arrival in UK*" (First Judgment [48(14)]).

(d) 11/12 September 2016, a print article uploaded online the night before publication, headed "*Shameless benefit migrant dad-of-eight wants more kids*" (First Judgment [48(15)]).

(3) In the *Daily* ***Express***:-

(a) 8 September 2016:

i. a print and online article headed "*Shameless French family-of-10 demand mansion: Benefits dad rejects 5-bed as 'too cramped'*", (First Judgment [48(16)]); and

ii. In the print edition, a leader article headed "*Jobless migrants do not deserve British handouts*" (First Judgment [48(17)]).

(b) 9 September 2016, an online article headed "*I'm not greedy! Father-of-8 who wanted bigger council house insists he has compromised*", (First Judgment [48(18)]).

(c) 11 September 2016, an online article headed "*REVEALED: benefits dad-of-8 demanding bigger council house splurged £15k savings*" (First Judgment [48(12)]).

23. Depending on how one counts it, this is a total of 12 or 13 articles. In the same period, the defendants published other material, which is not complained of: an article in *The Sun* on 9 September, an article by Nick Ferrari in the *Sunday* ***Express*** for 11 September, and a letter in the *Sunday* ***Express*** on 18 September 2016. In addition, articles about the Subes' situation were published elsewhere: by Associated **Newspapers** in the Mail Online (7, 10 and 17 September) and in the *Daily Mail* print edition (an article and leader comment, 9 September), in the *Mirror* titles (11 September, print and online), on the BBC online (8 September), and in the *MK Citizen* (8, 9 and 13 September 2016).

Further articles: October/November 2016

24. The rest of September and most of October, a period of some 6 weeks, passed without any articles, of which the claimants complain, being published. In October 2016, the Subes moved to a council house in Braford Gardens, Milton Keynes. Mr Wade-Palmer found out about this, and on 30 October 2016 he visited the property and spoke to Mr **Sube**. A number of other journalists were present, waiting in cars to speak to the Subes. Mrs **Sube** asked everyone to leave. There then followed some further publicity. The following articles are complained of:

(**1**) In *The Sun*:

(a) 30 October 2016, online article headed "*'He played the system and won' Fury as benefits dad of eight who complained house was too small handed keys to plush £425,000 4-bed detached pad on posh street*" (First Judgment [38(4)]).

(b) 31 October 2016,

i. front page article, in the print edition, headed "*A house benefit for a king: Family of ten handed £425k pad and Dunmoanin?*" (First Judgment, [38(9)]); and

ii. online article "*Cul-de-spat Neighbours anger as benefits family of ten who complained their house was too small get £425,000 pad on posh street*" (First Judgment [38(5)]).

(c) **1** November 2016, "*TAKE YOUR PICK. Whingey benefits dad-of-eight given free choice on taxpayer-funded £425,000 home*" (First Judgment [38(6)]).

(d) **2** November 2016, "*NO MORE Fed up council funding migrant dad-of-eight's plus £425,000 plans tough new housing rules*" (First Judgment [38(7)]).

(**2**) In the *Daily Star* online, on 31 October 2016, an article headed "*Fury as benefits dad-of-eight moved into plush £425,000 house*" (First Judgment [48(20)]): see Appendix C to this judgment. This article contained a link to an online slideshow headed "*Benefits scroungers*

we love to hate" which contained a photograph of the family, seemingly one of those taken for the *MK Citizen* article (First Judgment [48(23)]).

(3) In the *Daily **Express***:-

(a) 31 October 2016, an online article headed "*Migrant dad-of- eight lands plush four-bed detached house property worth £425,000 – and YOU PAY*" (First Judgment [48(13)]).

(b) **1** November 2016, in the print edition:

i. A front-page article headed "*What a scandal*" (First Judgment [48(21)]);

ii. A leader column headed "*A family of 10 living on British taxpayers' money*" (First Judgment [48(22)]).

25. This is a total of 9 articles. Over these same few days, between 30 October and **2** November 2016, aspects of the same story were reported and commented upon in a *Sun* leader column of 31 October 2016, which is not complained of, and in the *Mirror* online (30 October), the *MailOnline* (31 October), the *MK Citizen* (31 October), *The Times* (**1** November), the *Daily Mail* print edition (**1** November), and in a letter published in the print edition of the *Daily **Express*** (**2** November 2016).

The feelings of the claimants and their family

26. Mr **Sube**'s first witness statement contains a section headed "*The impact of the press articles on my family and I*", running to 15 paragraphs. His evidence is that following the publication of the initial publications by the defendants he "*felt helpless, upset and felt like I had been betrayed by the MK Citizen*". He says he read "*a majority*" of the articles that were then published. He was shocked by the reaction of the public to the articles "*in both posts on the Defendant's (sic) website in the comments the articles they published and on social media*". He says he read "*most of the comments*" and that his wife spent a lot of time "*reading these comments*" and became "*extremely upset*". He refers to "*comments which threatened my family*" and to "*death threats*". He illustrates this by referring to a Tweet by Viscount Rhodri Colwyn Philipps, the 4th Viscount of St David's, offering cash to the first person to carve Mr **Sube** into pieces, describing Mr **Sube** as a "piece of shit". (The evidence shows that, for this and other threatening behaviour, the Viscount was sentenced to imprisonment).

27. Mr **Sube**'s statement speaks of events after the family's move to Milton Keynes. He says that, as a result of the move "*we were then followed again by the press*". He suggests that neighbours were offered money to provide information about the family. He complains of journalists hiding, and of intimidation by a photographer coming out of some bushes to take pictures of Mrs **Sube**. As for the further articles, Mr **Sube** says these had "*the same reaction by the public*" which made the couple "*very upset*". He alleges that, as a result of the articles, reporters went to Mrs **Sube**'s former home in Cameroon, took pictures and asked for interviews. He believes a former friend had provided the press within information, causing him a loss of trust in people.

28. Overall, Mr **Sube** says the experiences he had to endure had a detrimental effect on him and the family, at the time and in the long term. He was placed under investigation at the university and by the NHS. He lost friends at the university, and thought of leaving his course. He also lost many personal friends "*who no longer wanted to be associated with me*". His father, three of his four brothers and his sister no longer speak to him. His wife has been much affected. There has been an impact on the children. They have been bullied at school, though a school move associated with the new house changed this. Friends and family invited to the birthday of the family's younger twins did not turn up. He feels people had been "*made to be-*

lieve things about us which were not true". He speaks of a "*serious impact on my mental health*".

29. The written evidence of Mrs **Sube** is to similar effect. She confirms what her husband says. She speaks of having lost all her friends, and says most of her family are not talking to her. She says that the reporters who visited Cameroon cast doubt on whether all the children were hers, which caused serious illness to her father. She adds this:

(**1**) She says that "*following the articles being published, there were a number of occasions in which I received public racial abuse in the streets*". She cites two occasions. On one, three young boys spat at her and abused her and her family as "*dirty black people*" who had come from Africa to get a big house in England. On the other, she was pushed by a woman at a bus stop who said "*Look at her, you have nothing to say and you are all over the **news***".

(**2**) After the second round of articles, she became very depressed and thought of taking her own life. She feels haunted by what happened, and believes she will continue to be so for the rest of her life. She illustrates this: "*Only two weeks ago my cousin posted on Facebook the photo and a headline use by one of the defendants and it got more than 500 comments.*"

30. This written evidence was supplemented by oral evidence, in answer to questions from the claimants' Counsel in re-examination. Mr **Sube** re-affirmed what he had said about the impact on him and the family, and broke down in tears.

Procedural history

31. The key features for present purposes can be quite shortly summarised.

32. On 17 February 2017, the claimants' solicitors wrote a letter of claim to **News Group** pursuant to the Pre-Action Protocol for Defamation. It complained of 10 articles, identifying an overall "*false and defamatory meaning … that [the claimants] are greedy, ungrateful and lazy jobless scroungers*", and alleging that the articles had caused and were likely to continue to cause serious harm to the claimants' reputations.

33. On the morning of 21 February 2017, an internal email was sent to James Manning at *The Sun*, asking him "*Can we urgently switch off the comments*" upon six articles listed in the email. Mr Manning promptly passed this on to Victoria Watson. At 12:14 she replied, "*Comments off on all*". The six articles were all those that are now complained of, except for "*Take Your Pick*".

34. On 24 February 2017, Adam Cannon, Senior Editorial Legal Counsel, replied in detail to the letter of claim, describing it as "frivolous". His letter included the following:

"You highlight some specific comments. Comments are not routinely pre-moderated, and if you are concerned about particular comments, they do need to be flagged. We have now removed the comments from the articles."

35. On 29 August 2017, the claimants' solicitors wrote a letter of claim to the **Express Group**. The letter advanced claims in relation to 7 articles. The causes of action relied on were defamation and harassment. There was no complaint about any reader comments, nor did the letter invoke the DPA. There was some correspondence between the claimants' solicitors and the in-house lawyers for the **Express Group** about a "standstill agreement" to keep the claims alive, despite the imminent expiry of the limitation period in respect of some articles. No such agreement was reached.

36. On 5 September 2017, just before the expiry of the limitation period in respect of the earliest articles complained of, the claimants issued a claim form against **News Group**, the **Express Group** and MGN **Ltd**, the publisher of the Mirror titles. The claim form sought damages and other remedies for libel and harassment in respect of some of the Articles and some Posts. The proceedings were not served at that stage.

37. By 10 October 2017, the claim against MGN **Ltd** had been settled. Shortly before lunchtime on 11 October 2017, Adam Cannon emailed Victoria Watson, referring to the "*ongoing legal case*" involving the Subes, and asking her to remove comments on four articles. One was "*Take your Pick*". Three were articles that are not complained of now. Ten minutes later, Ms Watson replied "*all done*".

38. On **2** November 2017, Nicole Patterson, Head of Legal at the **Express Group**, wrote to the claimants' solicitors in response to the letter of claim. She declined to deal with the substance of the claim, save to say that the **Express Group** did not believe that the article was defamatory of the claimants, and accepted no liability. An offer was made to publish some **limited** corrections and to make a contribution to costs. The corrections offered related to statements that Mr **Sube** had worked in two part-time jobs whilst studying to be a psychiatric nurse, that the sum received in benefits was far lower than £100,000 and that the Subes were exercising their statutory rights in asking Luton Borough Council to provide suitable accommodation.

39. On 20 December 2017, the claimants' solicitors wrote to **News Group**'s solicitor, and to the **Express Group**, requesting that each publisher cease processing certain articles and reader comments upon them. Section 10 of the DPA was relied on. The letters said:

"Our clients are entitled to require that you as the data controller within 14 days of the date of this latter cease processing the data, on the ground that the processing of the Data in the publishing the same to readings (sic) of your **newspaper** and website and as widely as you have is causing and is continuing to cause substantial damage or substantial distress to our clients and their children [which] … is or would be unwarranted."

40. **News Group**'s response, by letter of 10 January 2018, was to say that the reader comments had ceased to be available on *The Sun* website in February 2017. The **Express Group**'s response has been a little confused. It first wrote on 8 February 2018, stating that **Express Newspapers** did not intend to comply with the s 10 notice. Subsequently, the **Express Group** has asserted that this was an error and that, in fact, it had already taken down and deleted all the articles and reader comments complained of as early as 16 January 2018.

41. In the meantime, on 22 December 2017, the claimants expanded their claims against **News Group** and the **Express Group** by amendment (the proceedings had yet to be served, so permission was not required). The amendments encompassed additional articles published by the **Express Group** and three additional causes of action: malicious falsehood, breach of the Equality Act 2010, and breach of duty under the DPA.

42. On 28 December 2017, the claimants served their Particulars of Claim, reflecting the amendments made on 22 December 2017.

43. In January 2018, the defendants applied for orders for the trial of meaning and other issues as preliminary issues, for most of the claimants' amendments to be disallowed, and for parts of the existing claims to be struck out. The claimants made cross-applications for permission to amend.

44. By the First Judgment, and a further judgment of 27 July 2018 ([2018] **EWHC** 1961 (**QB**)), I determined preliminary issues in the libel claims, and resolved the various applications

and cross-applications I have mentioned. The upshot was that the libel claims were dismissed, and the amendments to add malicious falsehood and Equality Act claims were disallowed or struck out, as was a claim for exemplary damages. Permission was refused for the proposed amendments to the DPA claim, without prejudice to a further application. The unamended DPA claims were stayed pending a determination by the Information Commissioner's Office ("ICO"). The harassment claim was not attacked at that stage, and was allowed to proceed, in an amended form.

45. On 13 August 2018, Amended Particulars of Claim were served, reflecting the outcome of the hearings before me. In September 2018, Defences were served. Disclosure and witness statements followed. On 27 October 2019, the **Express Group** served a Notice to Admit that "*the online articles complained of … were taken down on 16 January 2018*". No such admission was made.

46. By January 2019, the basis for the stay of the DPA claims had come to an end. The DPA claim against **News Group** had been stayed on the basis that, on the evidence before the Court, a stay was mandatory pursuant to DPA s 32(4), as previously interpreted by the High Court: see the First Judgment at [94-98]. In July 2018, the Court of Appeal clarified the law (see *Stunt v Associated **Newspapers Ltd*** [2018] EWCA Civ 1780 [2018] **1** WLR 6060). On 15 January 2019, in the light of that decision, the ICO made a written determination under DPA s 45(**1**)(b), that the data which are the subject of the pleaded claims were "*not being processed with a view to the publication by any person of any journalistic, literary or artistic material which had not previously been published by the data controller*". The effect was to bring an end to the stay in respect of **News Group**: see DPA s 32(5)(a). The stay against the **Express Group** was imposed on different grounds (see the First Judgment at [99]), but has also been lifted, by order of the Court.

47. Thus it is that the DPA claims have come to trial together with the claims in harassment. The DPA claims remain, however, as pleaded in the Particulars of Claim served on 28 December 2017. There has been no further application for permission to amend, in that or any other respect. Witness statements were exchanged in September and October 2019, on the basis of the issues as defined by the statements of case as they then stood.

48. On 23 January **2020**, Steyn J, DBE heard and dismissed an application by the claimants for specific disclosure. The Judge refused the claimants' application for "*copies of all social media shares of the articles and the replies and shares of those social media posts*" on the basis that there was no pleaded claim to which such documents were relevant. An application for disclosure of a recording and any transcripts of the interview between Mr Pattinson and Mr **Sube** was dismissed on multiple grounds. These included the fact that such an application had already been made to me, and dismissed, on the basis (among others) that the claimant's pleaded assertion that aspects of the articles were false was a "*loose end*", not anchored to any pleaded claim, and liable to be struck out unless it was somehow amended, for instance to advance a claim under DPA s 14(**2**): see the First Judgment at [42], [72], [107]. The pleadings never had been amended, and Steyn J said:

"It is now clear that there is no claim under section 14(**2**) of the Data Protection Act 1998 being pursued. Paragraph 10 of the Amended Particulars of Claim remains disembodied, unlinked to either the harassment or the Data Protection Claim."

[**2020**] **EWHC** 358 (**QB**) [34]. There is therefore no context in which I could properly adjudicate on the allegations of falsity. Instead, I shall strike them out.

49. Another class of document of which the claimants sought disclosure was "*metadata, to include when the articles were taken down*". It was contended that such data were relevant to the DPA claim. The Judge dismissed that application on the basis that neither defendant still

held any such data. She noted that the defendants' uncontradicted evidence was that the Posts had all been taken down long ago, and doubted that there was any real issue for trial on that question: [11-13].

The DPA claims

50. Despite what Steyn J said about the pleaded claim under DPA s 14, that claim was still being floated when the trial began. By the end of the trial, however, that issue had fallen away; the claimants had made clear that their case was confined to claims for relief in respect of breaches of s 10. That was a wise decision: there has never been any adequately pleaded claim under DPA ss 13 or 14. As for the claims under s 10, the position remains substantially as it stood before Steyn J, and the claims must be dismissed.

51. Section 10 contains these relevant provisions:-

"10 - Right to prevent processing likely to cause damage or distress

(l) Subject to subsection (**2**), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons-

(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and

(b) that damage or distress is or would be unwarranted.

(**2**) Subsection (l) does not apply-

(a) in a case where any of the conditions in paragraphs **1** to 4 of Schedule **2** is met, or

(b) in such other cases as may be prescribed by the Secretary of State by order.

(3) The data controller must within twenty-one days of receiving a notice under subsection (**1**) ("the data subject notice") give the individual who gave it a written notice-

(a) stating that he has complied or intends to comply with the data subject notice, or

(b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.

(4) If a court is satisfied, on the application of any person who has given a notice under subsection (**1**) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit. …"

52. The relief claimed is an order under DPA s 10(4) in respect of the Posts. The claimants' case in support of that claim remains as pleaded in paragraphs 36-38 of the Particulars of Claim served on 28 December 2017. These allege, and it is not disputed, that the Posts were "data", and that the defendants were data controllers, within DPA s **1**. Nor is issue taken with the claimants' allegation that their solicitors' letters of 20 December 2017 amounted to "*notice in*

writing requiring [the defendants] at the end of 14 days to cease processing" the Posts complained of. The main issue relates to the contention in the Particulars of Claim that the defendants "*despite the terms of that notice, as of the date hereof, have failed to comply with the claimants' requests in breach of s 10 of the Data Protection Act 1998.*"

53. One difficulty with this contention will be immediately apparent: the 14-day period specified in the s 10 notices had not expired by the time the Particulars of Claim were served. There is a second problem of prematurity: DPA s 10(3) allows 21 days, not 14, to respond to such a notice. Accordingly, as Ms Michalos QC submits, the cause of action relied on had not accrued at the date of the statement of case. I would add that it had not accrued when the claim form was amended, let alone when the claim form was issued. Moreover, even the amended claim form contained no claim for relief under s 10(4); the only DPA claim was for damages.

54. **News Group** has a further, substantive answer to this claim: that it had ceased the processing which was the subject of the s 10 notice long before it received that notice on 20 December 2018. That is what **News Group** said via its solicitors' letter of 10 January 2018. The same case was advanced in **News Group**'s Defence of September 2018, and again in the application to strike out which came before me in May of 2019, when it was supported by evidence. I accepted the claimants' argument that the pleaded case should go to trial: see the First Judgment [56-61] and [91-93]. But the substance of the case previously advanced has now been firmly established by documents coupled with the evidence of Victoria Watson, which I accept.

55. Ms Watson's evidence is that what she said in her emails of 21 February 2017 and 11 October 2017 was true: she did indeed disable the comment function on the articles complained of, as requested. Cross-examined by Mr Harrison, Ms Watson illustrated how the process worked, by reference to events in February 2017: upon receipt of Mr Manning's email she used the content management system ("CMS") to go to the article, and go down to the box which disables comments, and ticked that box. She probably checked the publicly available website to see if it had worked. Ms Watson's evidence is that although the comments remained in existence, they were on a separate system, called Livefyre, and not publicly accessible. Her evidence was tested but not challenged, and there is nothing to cast doubt upon it. So far as it relates to February 2017, Ms Watson's account is of course corroborated by Mr Cannon's letter to the claimants' solicitors of 24 February 2017.

56. Accordingly, I find that the s 10 claim against **News Group** was premature; and that in any event **News Group** complied with its obligations under s 10(3) within the 21-day period allowed by that sub-section. Further, the data processing, which was the subject of the s 10 notice, had already ceased before 28 December 2017. It is true that the data were still being processed at that date, but only by holding them inactive and inaccessible on Livefyre. That **limited** processing was not and is not complained of, and for good reason: it could not be said to be causative of any damage or distress and, by the same token, could not provide a basis for a remedy under s 10(4).

57. The **Express Group**'s position is not quite the same, but I am satisfied not only that the claim against it was premature but also that any prospect of obtaining a remedy under s 10(4) had vanished within three weeks of service of the Particulars of Claim, and over two years before this trial began. The facts, as I find them, are these. The s 10 notice referred to seven articles. Two of these were among the articles now complained of and, by implication, the notice referred to the Posts associated with those two articles. I find that on 16 January 2018 all the online articles then complained of were taken down, which in practical terms means they were deleted. When that happens, at least under the system in place at the time, the UGC are also deleted. Publication ceases. Further, when an article and any associated UGC are deleted, the content is wiped from the CMS, which retains no record.

58. I make those findings on the basis of the written and oral evidence of Geoffrey Marsh, which I accept. This is the case that was pleaded in paragraph 29.4 and 29.5 of the **Express Group**'s Defence, on 21 September 2018. The claimants and their legal team can be forgiven for being a little sceptical of that assertion at first, given the absence of a timely response to the s 10 notice, and this defendant's letter of 8 February 2018, with its uncooperative approach. Again, my decision of May 2019 was to let the issue go to trial: see the First Judgment at [62]. But when Mr Marsh was cross-examined, he explained that he knew of the take-down from "Joe", meaning Joseph Lewis, the in-house lawyer, who told him that he (Joe) had taken down the articles. Mr Marsh was adamant that when an article is deleted the comments are deleted with it. He was clear that no records survive, except for hard copies retained for this case. He suggested, plausibly, that the **Express Group**'s letter of 8 February 2018 resulted from a failure of internal communication. The claimants had no other evidence to cast doubt on Mr Marsh's account, which I consider to be reliable hearsay.

59. In the light of these findings, I reject the claimants' pleaded case of non-compliance with the s 10 notice as at 28 December 2017. The deadline the claimants had set did not expire until 11 January 2018. The statutory deadline was 18 January 2018. What the **Express Group** should have done on or before the latter date is to make a statement as required by s 10(3). It did not do that, but the claimants do not complain of that failure. Their complaint is that the **Express Group** continued publishing the Posts. It did not. On 16 January 2018 it had ceased to process the data by publication. It held only hard copies, for archive purposes. Even if that amounts to processing (which it may not), the s 10 notice was not aimed at processing of that kind, which could not cause damage or distress and is not alleged to have done so. There is no basis on which I could be satisfied that the **Express Group** failed to comply with the notice, or that any remedy under s 10(4) should be granted.

60. These conclusions mean that it is unnecessary to resolve the issue about whether the data in the Posts complained of were sensitive personal data, as alleged in paragraph 36 of the Particulars of Claim. I am not sure that issue had any substantive importance anyway, as the rights conferred by DPA s 10 appear to be unaffected by the categorisation of the data. However, in case this aspect of the matter needs consideration later or elsewhere, I will deal with it, as I can do so briefly.

61. The pleaded allegation is that "*the Posts were 'sensitive personal data'*" (emphasis added). At the hearing in May 2019, however, Mr Engelman made clear that the intention was to **limit** this claim to such of the Posts as contained sensitive personal data within one of the two categories specified in the Particulars of Claim: see First Judgment [89]. The pleaded case asserts that Posts fell within DPA s **2**(a) "*as referencing the Claimants' respective racial or ethnic origin*", and within s **2**(g) "*as it concerned* (sic) *the commission or alleged commission by them of any offence in unlawfully claiming benefits*". There are three short points.

(**1**) First, I accept the defence submission that this aspect of the case was and is inadequately pleaded and procedurally unreasonable. The case was obscure to start with, as I have made clear. It was not until after the end of the trial, and then only at my direction, that the claimants provided any particulars of which Posts were complained of. They then provided an un-numbered and unpaginated list. Ms Michalos' description of the selection as representing "*a small fraction*" of the whole is not unfair. She has provided some statistics in relation to the Posts complained of as against the **Express Group**. The most commented upon article generated 603 Posts; the claimants now complain of 10 of these (**1**.66%). At the other end of the scale is an article which attracted 462 posts, of which 69 are complained of (14.94%). Even so, the claim relates to a large number of posts: 111 in relation to the **Express Group**. The claimants have not identified which of these are said to engage DPA ss **2**(a) or s **2** (g), or why. It is highly unreasonable to pursue a case in this way. It is a breach of the rules of pleading, which imposes an unacceptable burden on the defendants and the Court, and obstructs the due administration of justice. In my judgment, that would have been a sufficient basis on which to dis-

miss this seemingly unnecessary ingredient of the claim. In the light of those observations, I deal only in broad-brush terms with the case based on DPA s **2**.

(**2**) I would have accepted the case based on DPA s **2**(a), but to a **limited** extent only. **News Group** admits that "*a small number*" of the posts referred to the claimants' racial or ethnic origin. Rightly so. There are, for instance, some Posts which make sarcastic or sardonic use of the phrase "*Black lives matter*", in a way that undoubtedly refers to the claimants' race or ethnic origin. There are some other references to or implicit allusions to the claimants' race or ethnicity. But this is true of only a minority of the Posts complained of, which are in turn a minority of the total. I do not accept that Posts urging that the claimants be "*sent back to France*", or similar, (of which there were many) are arguably references to ethnic or racial origin. I shall have a little more to say about this aspect of the case when I come to the harassment claim.

(3) I suspect I would have dismissed the claim based on DPA, s **2**(g). In the First Judgment, I rejected the claimants' case that the articles complained of conveyed imputations of benefit fraud: see, for instance, [34], [38(**1**)(i)], [38(3)], [46], [48(11)], [48(12)]. For the reasons given above, I have not conducted an exhaustive analysis of those Posts that I now know are complained of, but I have conducted a brief review, and I have failed to identify any that convey an imputation of criminality. There are many that refer to the claimants as "*scroungers*" or make similar comments, suggesting that they are undeserving, or have taken undue advantage of an over-generous welfare system, or both. That, however, is not the same thing as fraud.

62. There are other pleaded issues that also become academic in the light of my findings of fact. One is consent, relied on as a legitimate basis for processing the data complained of. Further, the **Express Group** pleads in the alternative that the processing of the data which are the subject of this claim was exempt from s 10 because the data were processed with a view to the publication of journalistic material within the meaning of DPA s 32(**2**)(c). That issue is not resolved by the ICO's determination. These issues involve a number of factual and legal complexities which I do not need to resolve, and I do not intend to say more about them.

The harassment claims

The law

63. The PHA contains the following relevant provisions:-

"**1 – Prohibition of harassment**

(**1**) A person must not pursue a course of conduct-

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

…

(**2**) For the purposes of this section… the person whose course of conduct is in question ought to know that it amounts to … harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Subsection (**1**) … does not apply to a course of conduct if the person who pursued it shows-

…

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

…

2 – Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1(1) … is guilty of an offence …

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

3 – Civil remedy

(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment."

64. Section 7 contains interpretative provisions, among them:-

"(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person…"

65. The overall approach which the Court should take to the interpretation and application of these provisions is well-established.

(1) A person who causes another alarm and distress is not by that token guilty of harassing them:

"It does not follow hat because references to harassing a person include alarming a person or causing a person distress (section 7(2)), any course of conduct which causes alarm or distress therefore amounts to harassment… So to reason would be illogical and would produce perverse results …"

R v Smith [2012] EWCA Crim 2566 [2013]1 WLR 1399 [24].

(2) Harassment is a more nuanced and specific concept. Harassment is

"… an ordinary English word with a well understood meaning. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress."

Hayes v Willoughby [2013] UKSC 17 [2013] 1 WLR 935 [1] (Lord Sumption SC).

(3) In order to establish a civil claim for harassment the claimant must prove conduct on at least two occasions which is, from an objective standpoint, calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that it would sustain criminal liability: see *Dowson v Chief Constable of Northumbria Police* [2010] **EWHC** 2612 (**QB**) [142] (Simon J).

(4) The last point reflects the fact that the conduct prohibited by s **1** is not only a tort but also a crime. Hence:-

"[Where] the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section **2**."

Majrowski v Guy's and St Thomas's *NHS Trust* [2006] UKHL 34 [2007] **1** AC 224 [30] (Lord Nicholls).

66. This is a claim for harassment by publication. That is clearly legitimate, as a matter of principle. Although the PHA was primarily aimed at the problem of "stalking", it has been clear for some time that the tort and the crime encompass harassment by publication. Indeed, much harassment does involve the persistent publication of embarrassing or otherwise unwelcome statements, true or false, on the internet or on social media. But the tort and the crime can be committed by a course of conduct consisting of publication in or by the conventional **news** media. The Court of Appeal addressed the point in *Thomas v* ***News Group Newspapers Ltd*** [2001] EWCA Civ 1233 [2002] EMLR 4, declining to strike out a claim under the PHA in respect of a series of articles in *The Sun* which were said to constitute harassment by reference to the claimant's colour.

67. When presented with a claim of this kind, the Court must be especially mindful of the threshold of gravity required before a finding of harassment can be made; and it must be careful to ensure that its approach is compatible with the human rights engaged by the particular facts of the case. In this case, as in all or most cases of alleged harassment by publication, there is a tension. On the one hand, the claimants have Article 8 rights to respect for their private and family life and their home. On the other side are the publishers' Article 10 rights to convey information and ideas, and the rights of the public at large to receive such information and ideas. The PHA must be interpreted and applied in a way that upholds the Article 8 rights but avoids undue interference with Article 10 rights.

68. These points emerge from the authorities:

(**1**) It is for the claimant to demonstrate that the conduct complained of is unreasonable, to the degree required by the authorities cited above; and it is not a question of assessing the reasonableness of any opinions **expressed** in the publications complained of:-

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

Thomas v ***News Group*** [32] (Lord Phillips MR).

(2) The Court must test the "*necessity*" of any interference with freedom of expression by using the well-known three-part test:

"The test of 'necessity in a democratic society' requires the Court to determine whether the 'interference' corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given … to justify it are relevant and sufficient."

Nilsen and Johnsen v Norway (1999) 30 EHRR 878 [43].

(3) In general, the techniques of reporting, including the tone and editorial decisions about content, are matters for the media and not the Court to determine: see, for instance, *Jersild v Denmark* (1995) 19 EHRR **1** [31], *Fressoz & Roire v France* (1999) 31 EHRR **2** [52], *MGN **Ltd** v United Kingdom* [2011] 53 EHRR 66 [145], *Trimingham v Associated **Newspapers Ltd*** [2012] **EWHC** 1296 (**QB**) [85] (Tugendhat J).

(4) The court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant:

"[i]t would be a serious interference with freedom of expression if those wishing to **express** their own views could be silenced by, or threatened with, claims for harassment based on **s**ubjective claims by individuals that they feel offended or insulted":

Trimingham [267] (Tugendhat J).

(5) Applied to the tort of harassment, these principles mean that nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment:-

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

*Thomas v **News Group*** [50] (Lord Phillips MR).

(6) It will be a rare or exceptional case in which these criteria are satisfied, in relation to media publication.

"34 In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. …

35 … before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. … such circumstances will be rare."

*Thomas v **News Group*** (Lord Phillips MR).

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

([2010] NIQB 107, appeal dismissed [2011] NICA 8) and *Fulton v Sunday **Newspapers Ltd*** [2015] NIQB 100 (appeal dismissed, [2017] NICA 45).

The parties' contentions

70. The claimants' case is stated in paragraphs 20-26 of the Particulars of Claim, in terms which are relatively succinct. The essence of the pleaded, case re-ordering the allegations a little, is this:

(**1**) The Articles and the Posts which the defendants "*published and/or caused to be published*" amounted to "*a course of conduct and harassment of the claimants*" contrary to PHA s **1**(**1**). It is said that the Articles and Posts were "*numerous*" in respect of each defendant and that publication took place on each every day subsequent to the first date of internet publication.

(**2**) In support of the case that this amounted to harassment it is alleged that "*any reasonable person when reading the articles … would think the defendants' respective courses of conduct amounted to harassment of the claimants*". Three points are made in support of that case: that the articles were written "*in an indignant tone designed to incite… racial and/or xenophobic hatred*"; that the comments in the Posts demonstrated to the defendants and others that the articles did have that effect; and that the defendants continued to publish further articles and Posts. Reliance is place on the Brexit Referendum decision as a contextual factor, and it is said that "*the claimants did not have to be described … as arriving from Cameroon and/or as being French nationals, as migrants, or as jobless*".

(3) In support of the case that the defendants knew that the publications complained of amounted to harassment the claimants "*rely upon the Posts of various third parties that contained racially abusive comments directed at the claimants and each of them*". The allegation is that the articles generated "*approximately 5,000 Posts made by the general public, the majority of which **expressed** racist and xenophobic sentiments*". The content of these Posts, it is said, "*were entirely known to the defendants*". It is alleged that in publishing the Articles and Posts the defendants intended to

"(a) dissuade the claimants from applying for council house accommodation suitable [for the size of their family] and/or (b) encourage third parties to publish racial attacks upon the claimants and/or (c) to sell their respective **newspapers** thereby."

(4) The claimants and their family members are entitled to and claim damages "*for the anxiety caused to them by the said harassment and any financial loss resulting from the harassment*". Particulars allege distress including that caused by "*comments on social media platforms*", distress to the claimants due to bullying and abuse of their children, and verbal abuse and insults directed at the claimants themselves. It is also alleged that "*the actions of the defendants are likely to adversely affect [Mr **Sube**'s] prospects of employment.*"

71. Mr Engelman, for the claimants, opened his Skeleton Argument for trial with the same quotation relied on at the hearing in May 2018: "*Falsely shouting fire in a Crowded Theatre*". (This is taken from Justice Oliver Wendell Holmes, Jr.'s opinion in the US Supreme Court case *Schenck v. United States* in 1919, which held that the defendant's speech in opposition to the draft during World War I was not protected free speech under the First Amendment of the United States Constitution.) Counsel makes the following main submissions:

(**1**) The defendants published the Articles in the immediate aftermath of the Brexit Referendum, "*at a time when public sentiment and political sentiment in respect of immigration was highly charged*". By "*false shouts of 'dishonest migrants' in a theatre of racial hostility*" the de-

fendants "*lit the match in a tinder box*" causing the claimants and their children serious distress and anxiety.

(**2**) The online Articles were published in a manner that "*permitted the publication of a huge volume of abusive posts by third parties a number of which were racially abusive towards*" the claimants (emphasis added).

(3) The Articles and "*voluminous Posts*" constituted a "*course of conduct*" which amounted to harassment. Mr Engelman submits that the defendants repeatedly published substantially the same information. It is further submitted that the defendants foreseeably provoked their readers into racist and grossly unpleasant posts. He relies on a passage from paragraph [29] of the First Judgment as amounting to a finding or conclusion to that effect.

(4) The same passage of the First Judgment is relied on in support of the claimants' case that the defendants ought to have known their conduct amounted to harassment. In addition, Mr Engelman argues that **News Group** "*has been recognised for its racist content*". That submission was based on a report of October 2016 by the European Commission against Racism and Intolerance ("ECRI"), on which Mr Clarkson was cross-examined.

(5) It is further submitted that **News Group** had actual knowledge of the content of the Posts, through its moderators; that it has "*failed to give any detailed account or disclose any documents that evidence its editorial decision-making process*"; and that from this "*it can be readily inferred that the repeated publications were merely as a result of the popularity of the earlier articles amongst its readers which [**News Group**] had discerned from the Posts those Articles attracted*".

(6) In any event, it is argued, the defendants cannot escape responsibility for the publication of the Posts on the basis that they delegated responsibility for filtering offensive content to a computer system or a reactive system of moderation. The defendants are vicariously liable for the failure of those responsible for these systems to filter out racist Posts, and prevent their publication or continued publication. The role of those individuals is akin to that of someone who reads and edits text for publication, who is responsible as a joint author: *Watts v Times **Newspapers Ltd*** [1977] **QB** 650, 670.

(7) The defendants' Article 10 rights cannot or should not be held to prevail over the rights of the claimants because what is at play is the assertion of Article 10 rights "*balanced against*" the claimants' rights under Article 14 of the Convention. Those rights were clearly engaged, by discriminatory treatment based on "*race, colour, … national or social origin, association with a national minority, … birth*" or a combination of these. The discriminatory treatment included references to the claimants' country of origin, and to France, a photograph of the family and what is described as a "*Dad's Army style depiction of their migration (invasion) of the UK*", as well as by Posts saying "*send him back to France*", and similar.

(8) The defendants were responsible for "*Continuous, widely published, untrue, statements concerning [the Subes'] race and colour published together with photographs of [their] home and their 8 children …*" amounting to harassment which is "*grave in nature*". The defendants' conduct has the flavour of the criminal offences provided for by ss 4 and 29C of the Public Order Act 1986 (use of threatening, abusive or insulting words, and stirring up religious hatred).

(9) Any assessment of whether conduct amounts to harassment must take account of the vulnerability or otherwise of the target: *Levi v Bates* [2015] EWCA Civ 206 [4]. The defendants knew or ought to have known the Subes to be "*extremely vulnerable*", as young parents living in poverty with "*a severe housing problem*" and, in the case of Mrs **Sube**, pre-existing mental health difficulties. The **Express Group** had actual knowledge of the distress being caused to

Mrs **Sube**, through "*its agency reporter*", and both defendants had knowledge as a result of the letters of claim, yet continued to publish.

(10) The defendants cannot exclude liability on the basis that there were other possible causes of the harm caused. It is sufficient for the claimants to show that the defendants' actions materially contributed to the harm: *Bonnington Castings **Ltd** v Wardlaw* [1956], *Wilsher v Essex Area Health Authority* [1988] AC 1074. The defendants were the principal publishers of both Articles and Posts.

72. The claimants' Skeleton Argument addressed the defendants' case, that only a small number of Posts was racially abusive, thus: "*A version of the Posts underlined to show those racist in nature and those alleging criminal misconduct will be produced at trial*". This did not happen. But, as I have indicated, the claimants' case in relation to the Posts has now been particularised, pursuant to a direction by me. The schedule of Posts complained of, in its final form, runs to many pages. It has defects I have already mentioned. It is also not easy to analyse, as the articles are not listed chronologically, and there is no numbering, but I have done my own summary analysis, as set out in Appendix C to this judgment. This agrees with Ms Michalos' calculation that a total of 111 Posts are complained of against her client. It shows that all of these related to articles in the *Daily Star*. None related to an ***Express*** Article. In summary, a total of 93 posts are complained of against **News Group**. The grand total is therefore 204. Whether or not there were 5,000 Posts in all (as to which I make no finding), this plainly cannot be described as "*the majority*" of that number.

73. Mr Price QC, for **News Group**, and Ms Michalos QC, for the **Express Group**, have each urged me to analyse and assess the case against their clients separately from one another. But both make common cause on a number of points. They submit that the circumstances of this case are far from the "*exceptional*" and "*rare*" oppressive abuse of media freedom that could give rise to liability. The publications were legitimate reporting and comment; they do not cross the high threshold of seriousness required to sustain criminal liability; accordingly, the claimants have not proved a course of conduct amounting to harassment and the claim should be dismissed on that footing. Alternatively, the claimants have failed to prove the necessary state of mind. Alternatively, the Court should uphold the defence under s **1**(3)(a). Were the claim to be upheld, submits Mr Price, it would amount to a significant restriction on the editorial freedom of the media to report and comment on matters of legitimate interest to readers, effectively cast the court as censor and extend the PHA way beyond the intention of its framers.

74. Both Counsel are critical of the way the claimants' case has been pleaded and presented in argument and in evidence. Mr Price's skeleton argument for trial spoke of a "*casual attitude to the ordinary disciplines of litigation*". He returned to the theme in closing, devoting the first main section of his written submissions to "*Basic principles of litigation*". Counsel urge me to adhere to fundamental principles of pleading and evidence. They argue that it is particularly important to hold fast to these in a case which is novel, involves allegations of criminality, has a potentially harmful impact on freedom of expression. Both Counsel submit that, on a proper analysis, the issues for resolution are narrow in scope, and that there should be little difficulty in resolving the **limited** factual disputes that have any relevance, and dismissing the claim.

75. Mr Price QC advances the following main submissions on behalf of **News Group**:

(**1**) The claim is based solely on the content of the Articles and Posts. The claimants are not entitled to rely on any other conduct of the defendants.

(**2**) The claimants do not discharge the burden of proving oppressive and unreasonable conduct merely by alleging that there were a number of Articles, without any suggestion that any were without legitimate justification. As pleaded in **News Group**'s Defence, the frequency

and number of Articles and Posts is not capable of constituting or contributing to a course of conduct amounting to harassment.

(3) The relevant background facts, asserted in **News Group**'s Defence are these:

"On or about **2** September 2016, following a process of review initiated by the Claimants, Luton Council informed them that it was minded to uphold its decision that the house provided to them and their 8 children was suitable. At this point, the Claimants chose to involve the media in the hope that it would pressure the Council to offer a house that they regarded to be more suitable, which in the event, it did. On or about 6 September 2016 the First Claimant approached the *MK Citizen* and gave an interview in which he criticised the Council. The Claimants and their family posed for a photograph in their home to accompany the article. This led to widespread coverage in the media including statements made by the Council in response to the Claimants' criticisms and further statements made by the First Claimant."

(4) Considering those facts, and the content of the Articles and Posts complained of, the Court should conclude that the claimants have failed to discharge the burden of showing a course of conduct that, considered objectively, amounts to harassment.

(5) As for the mental element of the crime and tort: (a) the claimants have not pleaded, and are not entitled to rely on, any case that **News Group** "*ought to have known*" that the Posts amounted to harassment; the pleaded case is confined to one of actual knowledge of the content of the Posts; (b) the allegation of knowledge is generally denied; it is admitted that some comments were drawn to the attention of a moderator and removed from view, but it is "*denied that any content was known more widely within the First Defendant until after receipt of the letter of claim dated 17 February 2017*"; (c) the allegation of knowledge must fail, as nobody has been identified as having the relevant knowledge, and **News Group**'s uncontroverted evidence supports its pleaded case.

(6) It should therefore be unnecessary to consider the legal position in relation to reader comments; or to analyse the Posts, to determine which could be categorised as racist or xenophobic or to consider whether, had the content of the Posts been "*entirely known*", **News Group** would have been obliged to cease publication of articles about the claimants, or tone them down, or else face liability in harassment. The claimants' allegations of motive are also immaterial and, moreover, inadequately pleaded, submits Mr Price. But if any of those issues does require consideration, Mr Price would argue that **News Group**'s role in facilitating the communication of UGC to the public should only be treated as "*conduct*" for the purposes of the PHA, to the extent it involved a conscious act, which was barely the case, if at all; the total number of Posts was not more than 500, which on the evidence is not unusual; relatively few could be classed as racist or xenophobic; the motive of selling **newspapers** could not be categorised as improper, and there is no evidence nor can it be inferred that **News Group** had either of the other motives alleged.

(7) Further and alternatively, the Court should accept **News Group**'s pleaded case under s **1**(3)(a), namely that it "*reported and commented on a developing story of legitimate interest to its readers, made public by the claimants, in a manner within the wide margin accorded to its editorial judgment*". That case is supported by the content of the Articles, taken at face value, and by the evidence of Mr Clarkson.

(8) The deficiencies of the claimants' case on liability cannot be made good by proof of distress or anxiety. Further, the claimants' evidence goes way beyond what is properly admissible in support of the harassment claim against **News Group**. Four "*main difficulties*" are identified: (a) the evidence goes beyond the pleaded case; (b) there is no evidence, nor even an allegation, of any causal link between the publications complained of and the events relied on (for instance, the activities of journalists in Cameroon); (c) much of the evidence is irrelevant as re-

lating to alleged reputational harm consequent on falsity; and (d) other evidence is unworthy of belief.

(9) I am invited to conclude, from the letter of claim, the subsequent history of the matter, and the way in which it has been presented in argument and evidence, that the real gravamen of the claimants' complaints is not harassment but reputational harm.

76. Ms Michalos advances arguments on similar lines to those of Mr Price. She makes some additional, distinct points:-

(**1**) To prove a course of conduct a claimant must not only identify conduct on two or more "*occasions*", they must also show "*a link between the two to reflect the meaning of the word 'course'*": *Hipgrave v Jones* [2004] **EWHC** 2901 (**QB**) [62] (Tugendhat J). Accordingly, two isolated incidents separated in time by a period of months cannot amount to harassment: *R v Hills* (*Gavin Spencer)* [2001] **1** FLR 580 [25].

(**2**) Here, the **Express Group** publications "*roughly divide*" into three "***groups***": (a) the First **Group**, on and between 7 and 9 September 2016, initial reporting arising from the *MK Citizen* brining the matter to public attention; (b) the Second **Group**, on 11 September 2016, arising from Mr Wade-Palmer's interview with Mr **Sube**, yielding further information; and (c) a Third **Group**, on and between 31 October and **1** November 2016, arising from *The Sun* report of the new fact that the family had been given a new home worth £425,000.

(3) Further, the *Daily Star* and the ***Express*** are separate **newspapers** and, on the evidence, they have entirely separate editorial teams. When considering the allegation of harassment, the conduct of the two papers should not be aggregated but analysed and considered separately.

(4) Leader articles published on the same day, in the same paper, as a **news** report should not be treated as separate acts of harassment.

(5) As for Posts, these are "*published by individual readers*" and should not be treated as part of any course of conduct by the **Express Group**; alternatively, a published article and the Posts on that article should be treated as a single act.

(6) The Court's assessment of whether, objectively, the conduct complained of amounted to harassment should take account of (a) the extent to which the claimants were themselves responsible for the fact that their dispute with the Council came into the public domain; (b) the extent to which the coverage was persistent, repetitive and taunting, as opposed to being prompted by some fresh newsworthy event; (c) the fact that the publications complained of took place in the context of "*wide media reporting and public comment*", in addition to the Articles and Posts; and (d) the fact that the complaint relates to the content as opposed to the manner of publication; Ms Michalos submits that in a claim for harassment by publication it is the latter that should be the focus of attention.

(7) This claim is about content; the origin of the content was Mr **Sube**'s own deliberate act in going to the *MK Citizen* to publicise the family's complaints against the Council; the subject-matter was of public interest; the tone and presentation of the Articles was well within the bounds of editorial latitude; references to the nationality and origin of the claimants were relevant to the themes of the Articles; and the defendant's conduct was not persistent or oppressive.

(8) As to state of mind, Ms Michalos adopts and supports the submission that the claimants are not entitled to an adjudication of whether her clients "*ought to have known*" that the Posts amounted or contributed to harassment. In relation to the Articles, again she submits that the two **newspapers** and their editorial teams should be considered separately. As a general rule,

in the absence of any direct complaint (and there was none), those responsible for a given **newspaper** can only reasonably be expected to consider whether their own output represents an abuse of press freedom.

Assessment

The true scope of the issues for resolution

77. I start by making clear that I accept the honesty and sincerity of the claimants' evidence about the feelings of distress and anxiety they experienced during the period September to November 2016. Following, and as a result of, the publicity which started with the *MK Citizen* article, the Subes found themselves at the centre of what can fairly be described, in its totality, as something of a media storm. That endured, albeit intermittently, over a period of some 8 weeks. I do not doubt that the publication of the Articles that are now complained of made a contribution to the claimants' distress and anxiety. I accept that each of them probably saw some of the Posts that are now complained of, at the time, and found them upsetting, I do not, however, accept that the claimants have established that they were the targets, or that they were victims, of harassment by **News Group** or by the **Express Group**. I shall set out the main reasons for that conclusion, and then elaborate where necessary.

78. It should go without saying that the conduct and state of mind of each publisher must be considered separately. The conduct of **News Group** cannot be part of a course of conduct by the **Express Group**, or vice versa. Nor can the state of mind of anyone working for **News Group** be attributed to the **Express Group**.

79. When assessing the case against and for each defendant, the boundaries of the conduct and state of mind that I can properly and fairly consider are set by that which has been alleged against that defendant in the Amended Particulars of Claim, or averred in the Defences, clearly and distinctly. These are fundamental principles, applicable to any case, but have recently been reiterated in the specific context of harassment by the Court of Appeal: see *Worthington v Metropolitan Housing Trust **Ltd*** [2018] EWCA Civ **1125** [2018] HLR 32 [59] (Kitchin LJ). As Steyn J held, relevance is not determined by what is contained in the witness statements.

80. I accept the defence submission that the claimants' evidence and argument have gone well beyond those boundaries in a number of respects. There has been a lack of rigour and discipline in the analysis and presentation of the claimants' case. Courts must not be overly rigid or formalistic in their approach to pleading requirements. But, as Mr Price has submitted, the rules about statements of case play a fundamental role in promoting the overriding objective of a fair trial at proportionate cost. I am satisfied that it would be wrong to rule on allegations that were not properly notified in advance, in accordance with the rules, in sufficient detail to enable the defendants to prepare to meet them. All the more so, given the gravity of some of allegations.

81. The pleaded case, on a proper analysis, is relatively confined. Some important features are these:

(**1**) The only claimants are Mr and Mrs **Sube**. There is no pleaded claim by any other member of the **Sube** family. The only conduct that can be taken into account as part of a course of conduct by a defendant is behaviour by that defendant which might amount to harassment of one or both of the claimants.

(**2**) There is no allegation that either defendant harassed either of the claimants by publishing anything (or by doing anything else) in Cameroon, or in any other foreign jurisdiction. Any such allegation would need to be spelled out, and would call for consideration of the applicable law. The pleaded claim is confined to conduct in England and Wales.

(3) In the case of each defendant, the course of conduct which is pleaded as amounting to harassment of Mr and Mrs **Sube** is the publication of Articles and Posts. There is no pleaded allegation that any other kind of behaviour formed any part of the allegedly harassing course of conduct.

(4) In relation to the Articles, the pleaded case relies on their number, their tone, their alleged tendency to incite racial or xenophobic hatred, and their alleged effect in doing so, via the Posts. There is no pleading that the Articles were harassing in any other way, such as by falsehood.

(5) The pleaded case in relation to the Posts relies on their number and their racist and xenophobic content. That aspect of the case is now confined to the Posts particularised following the trial: 93 in respect of The Sun and 111 in relation to the ***Express***.

(6) The state of mind alleged is that the defendants knew of the Articles and the Posts and knew or ought to have known that "*the publication of the series of Articles and Posts amounted to harassment*". There is no pleaded allegation that the defendants, or either of them, *ought* to have known of the Posts.

82. It follows from this analysis that there is much in the argument of Counsel for the claimants, the evidence of the claimants themselves, and in the cross-examination of the defendants' witnesses, that must be left out of account. Accordingly:-

(**1**) I cannot uphold Counsel's headline allegation, that the defendants were responsible for "*false shouts of 'dishonest migrants'*". The claimants' case that the Articles bore meanings to that effect was dismissed in May 2018. The statement of case was amended accordingly. Some allegations of falsity did remain, but they did not include a complaint that the claimants had been falsely portrayed as dishonest. In any event, there was no good reason for the allegations of falsity to remain on the record, and I have now struck them out. Cross-examination of defence witnesses about Clause **1** of the Code of Conduct of the Independent Press Standards Organisation (IPSO) was irrelevant.

(**2**) In determining what the defendants knew, or ought to have known, I cannot explore what they ought to have known about the Posts; but I am entitled to have regard to the content of the articles they published, that are said to have constituted harassment. That aside, however, I cannot uphold the contention that the defendants knew the Subes to be vulnerable, because no other basis for imputing such knowledge has been pleaded. And the claimants are not entitled to a finding on the question of what Mr Pattinson did or did not say or do at the meeting of 7 September 2016. That is not an issue in the case. Applications for disclosure of records of that meeting have been dismissed by me and again by Steyn J on that basis, among others: see [48] above and the judgment of Steyn J at [30].

(3) In the absence of any pleaded allegation that the defendants interfered with the claimants' Convention rights, and did so in a way that discriminated against them on the grounds of racial origin or other status, the submissions about Article 14 cannot be entertained. It may be legitimate to pursue a claim in harassment by publication on the basis that the defendant's conduct was directly or indirectly discriminatory on the grounds of race or some other characteristic (*Thomas v* ***News Group*** suggests that it is), but that cannot be done without clearly pleading such a case, with due particularity. In this case, a discrimination claim was pleaded by reference to the provisions of the Equality Act 2010, but it was struck out by me in May 2018. There has never been any, or any adequately pleaded case of that nature since then. Cross-examination about discrimination contrary to the IPSO Code was irrelevant.

(4) Counsel's allegation of racist tendencies, and reliance on the ECRI report to support that allegation, are illegitimate. I would need persuasion that it is permissible to advance, in support of a harassment case of this kind, an allegation that a publisher has a general bad character for racist publication, or a tendency to publish racist matter. As a rule, bad character evidence has only a **limited** role to play in civil litigation. But whatever the answer to that question, a case of that kind would need to be pleaded, and there is no pleaded allegation that **News Group** has such a general bad character or tendency, so the report is irrelevant to the issues for trial. I would add this:

(a) Reliance on the ECRI report is an invitation to treat it as hearsay evidence, without having served any notice in accordance with s **2** of the Civil Evidence Act 1995 and CPR 33.**2**(3) and (4), identifying the evidence to be relied on and explaining why the witness will not be called. This would have permitted me to give it little or no weight, or to leave it out of account as a matter of discretion.

(b) The report is not, in my judgment, admissible in any event. It is either expert evidence for which no permission was sought or granted, so that CPR 35.4(**1**) applies, or it is lay opinion evidence which does not fall within any of the exceptions to the general ban on evidence of that kind.

(5) The claimants' evidence about the impact on them of social media falls outside the scope of the pleaded issues. The Amended Particulars of Claim contain no allegation about any social media shares of the Articles, or about any social media publications that involved republication of, or were consequential upon, the allegedly harassing content of the Articles and Posts. Again, that is a point made by Steyn J when dismissing the pre-trial disclosure application: see her judgment at [15].

(6) Evidence that the Subes were harassed by journalists, or that misrepresentation was practised to obtain information from them, cannot make any legitimate contribution to their case, which relies on a course of conduct involving publication only.

(7) Mrs **Sube**'s evidence about the conduct of unidentified journalists in Cameroon and its effects on her father falls outside the boundaries of the pleaded case, and cannot be relied on. (For what it is worth, the defendants' case is that the evidence shows or suggests that this conduct involved journalists from another publication entirely).

83. I should also correct a misapprehension about paragraph [29] of the First Judgment. The words repeatedly cited in the claimants' Skeleton Argument appear in a passage of the judgment explaining my conclusion that the claimants could not rely on the Posts to satisfy the statutory threshold requirement of showing that the publications caused or were likely to cause serious harm to their reputations. I said this:

“I have considered again in this context the claimants' reliance on the fact that the articles complained of were published in the aftermath of the Brexit Referendum. I believe that their case is, in part, that *by publishing in the wake of the Referendum inflammatory articles casting the claimants in the role of ungrateful foreign benefits scroungers the defendants foreseeably provoked their readers into racist and otherwise grossly unpleasant Posts of the kind I have quoted*. For the reasons just given, I think this is misconceived as an argument on s **1**(**1**) of the Defamation Act 2013.”

Counsel have relied on the words I have emphasised. As is clear from the context, these were not a finding, but no more than a summary of what I took to be the claimants' case.

Decision

84. Turning now to my conclusions on the issues that are properly before me for determination, I have considered the conduct of each defendant in publishing the articles complained of, and its conduct in relation to the publication of the Posts complained of. Having done so, I hold that neither claimant has succeeded in proving that either defendant is guilty of a course of conduct amounting to harassment. The standard of proof in these proceedings is the civil standard, but the task that confronts the claimants is to establish conduct that represents an abuse of media freedom so serious that it deserves the label of criminality. That means that the burden on them is a heavy one. They have not discharged that burden.

85. I have addressed my mind to the pleaded allegations of actual and imputed knowledge, and the evidence relevant to those. My conclusion is that even if, contrary to that conclusion, either defendant did engage in a course of conduct by publication which, objectively considered, was harassing in its nature, to such an extent that it represented a criminal abuse of its rights of freedom of expression, the claimants have not established that either defendant knew or ought to have known this was so.

86. It is not necessary to go further than this, but having read and heard the evidence and argument I would make the further finding that, on the evidence before me, each of the defendants has made out the justification under s **1**(3)(c) of the PHA.

Reasons

The right analytical approach

87. I have borne in mind six general points.

(**1**) I give myself the routine jury direction to consider the case against and for each defendant separately. The pleaded case is advanced compendiously. The term "*the defendants and each of them*" is used, but the substance of the case is pleaded against both defendants, without drawing clear distinctions between the conduct, or the effects of the conduct, of **News Group** and that of the **Express Group**. There is no basis in the pleading or the evidence for treating any conduct or knowledge of one defendant as conduct or knowledge of the other. Nor is there any allegation or evidence that one defendant knew about publications made by the other. I must assess whether **News Group** engaged in a course of conduct, if so whether it was harassing in nature, and if so whether **News Group** knew or ought to have known this. Similarly in the case of **Express Group**.

(**2**) The conduct to be considered in the case of each defendant is, and is only, the publication of the articles I have mentioned as complained of, and the publication or hosting of the relatively small number of Posts that have now been identified as the subject of complaint.

(3) I must put the claimant's evidence of actual distress out of my mind, when assessing whether the case on liability is established. The test is an objective one.

(4) I must pay careful attention to the nature and content of the publications, individually and collectively, including where in the **newspaper** or website they appeared, so far as appears from the evidence. I must be sure to focus on whether the publications satisfy the definitions or descriptions of harassment to be found in the authorities, rather than on any tendency to defame. Given the claim for libel, there can be no doubt that the claimants' motives for bringing this claim included an intention to vindicate their reputations, but my dismissal of that claim means that this cannot form a legitimate element in the claim for harassment.

(5) There is no dispute that **News Group** published *The Sun* articles, and knew it was doing so. Likewise, the **Express Group** knew what it was publishing in its **newspapers**. That is obvious. But there are issues about the extent to which the publication of the Posts should be

considered to be publication, or otherwise part of a course of conduct engaged in by the corporate defendant in question. If so, there are issues about whether that defendant knew what was in the Posts. I must pay close attention to the evidence about those points.

(6) I must assess the case against each defendant without regard to any publication by any other publisher. Mr **Sube**'s evidence made clear that he was affected by the report in the *MK Citizen*. There were other, national, publications here, and Mrs **Sube**'s evidence made clear that she was aware of and affected by some of them. No doubt, in appropriate circumstances, a defendant who takes part with others in concerted action targeted at a single individual can be sued or prosecuted for harassment on the basis that he bears responsibility for the collective actions of the **group**, which amount to the crime or tort. That, however, is not the case advanced here. It may be that, as a matter of principle, a case could be pursued on the basis that the conduct complained of amounted to harassment because it took place in a context of seriously distressing third-party conduct of which the defendant was or ought to have been aware. But the claimant has not pleaded reliance on any such context.

Findings of fact

88. There are only four main issues on which findings of fact are required. The first area of dispute concerns the defendants' contentions as to the relevant background facts ([75(3)] above). The issue was identified by Steyn J at [28]:

"The defendants have alleged that the claimants put their housing situation in the public domain by giving an interview and having photographs taken by a local **newspaper**, the MK Citizen. It is not in dispute that the claimants did so. What they dispute is that they did so knowingly, that is knowing that it was a **newspaper**."

89. That issue has been explored at the trial, mainly through the evidence of Mr **Sube** and Beth Pearson.

(**1**) Mr **Sube** said in his witness statement that "*I did not know they [the MK Citizen] were a **newspaper***". His evidence was that he thought they were like Citizens Advice, and that the photograph of his family was "*for the use of sending to the Council … for evidence of overcrowding.*" He maintained this position under cross-examination. He expanded on the content of his witness statement, specifically recalling a conversation on **2** September 2016, in which Ms Pearson had told him that she was going to be publishing something online and he indicated to her that he objected.

(**2**) In her first witness statement Ms Pearson said that Mr **Sube** approached her and

"… told me that he wanted an article published in the local **newspaper** so the council would move him and his family into a larger house. He agreed with me to a photographer attending his home to photograph him and his family to illustrate the article."

(3) The case presented in the claimants' skeleton argument, though not in any statement of case, was that Ms Pearson had misled Mr **Sube**. This led to a second witness statement in which Ms Pearson said she felt like she was on trial, and said she had no idea how Mr **Sube** could claim that he did not know she was a reporter. She elaborated, saying that Mr **Sube** had "*specifically asked for a story to be published, to help him gain a larger house and make the council 'listen'*". She referred to the emails which had passed between her and Mr **Sube**, stated that when he called she would have answered "*Hello, **news** desk*", and said that her email signature described her as, "*Beth Pearson, Reporter…*" She observed that the photos were of the family lined up inside, and not of the outside of the house.

(4) She was cross-examined by Mr Harrison. Her evidence was tested but not, initially, challenged as false. The case put was that Mr **Sube** could have made a mistake. At the end of the cross-examination Mr Price made the point that it could not be submitted that her evidence of what Mr **Sube** said to her was untrue, unless she was challenged about it. In further cross-examination it was suggested that Ms Pearson's evidence was a false recollection based on all the facts. I raised the question of the alleged conversation of **2** September 2016, and Mr Harrison asked her whether there could have been some confusion on that day, about what exactly was going to happen. She did not agree. She did not recall a time when she told Mr **Sube** she was going to publish something, and he objected.

(5) Ms Pearson was also cross-examined by Mr Engelman. He referred to Mr **Sube** saying in an email "*We need someone to stand for us!*" He asked, in a challenging tone, whether she had done that. Mr Price objected. I asked about the relevance of such questions. Mr Engelman did not pursue them.

90. I am not entirely sure that, on a proper analysis, it was necessary for **News Group** to plead a case, or that it is necessary me to make a finding about, what actually happened between Mr **Sube** and Ms Pearson. The issue is whether one or both of the defendants engaged in a course of conduct which was, and which they knew or ought to have known to be, harassment. The conduct of Ms Pearson is not relied on by the claimants. She was not working for either of the defendants. The truth or falsity of the article is not in issue now. There is no allegation, nor was it put to any of the defendants' other witnesses, that they knew the truth about what passed between Ms Pearson and Mr **Sube**. It seems to me that the main if not the only relevance of the *MK Citizen* article is that it was source material for the defendants, which appeared to them to show that the Subes had deliberately gone public with complaints about the Council. There is no reason to doubt that this was the state of mind of the relevant journalists and editorial staff at each of the three **newspapers** with which I am concerned.

91. But the truth about Mr **Sube**'s conduct in consenting, or not, to publicity in the *MK Citizen* may be relevant to the objective assessment of whether it was harassment for the defendant to publish stories about him. *Trimingham* indicates that the circumstances to be considered include the status of the claimant, whether he or she was a public figure, and whether the claimant placed the subject-matter before the public. For those reasons, and also in fairness to Ms Pearson, I shall record my findings. In short, wherever the evidence of Mr **Sube** and Ms Pearson differs I accept the evidence of Ms Pearson. Mr **Sube** approached her and asked her to publish an article, to help the family. I do not accept that Mr **Sube** was ignorant of her role and status as a journalist. That is too improbable. As I have noted, the submission that Ms Pearson misled Mr **Sube** was not pursued in cross-examination. I reject it. I accept that she answered the phone using the words "***news*** *desk*". It is likely that at least one email from her to him carried the designation "*Reporter*". I find that Mr **Sube**, acting in this respect on behalf of his wife, knew what he was doing.

92. Mr **Sube**, at the time, was seeking to explore every avenue to press his case with the Council. He knew Ms Pearson intended to publish. He provided her with information and access for the taking of photographs in the knowledge that both would be used for the purposes of media publication, and with that intention. He never **expressed** any objection, before she did so. The publicity he secured was not to his liking. It was not what he was after. He complained. That is clear. But whatever he may now believe, my conclusion is that he deliberately and knowingly sought press publicity. I also find that Mrs **Sube** was aware of and approved his conduct in doing so.

93. Those findings are supported not only by the evidence of Ms Pearson but also by the contemporary documents, which are clearly more consistent with Ms Pearson's evidence than that of Mr **Sube**, and by the evidence of Charles Wade-Palmer.

(**1**) The documents include emails in which Mr **Sube** complains, after the event, about the content of the *MK Citizen*, but betrays no sign of surprise at finding that Ms Pearson had written an article at all.

(**2**) The documents also include notes from Mrs **Sube**'s medical file that record this, in March 2017:-

"Jeanne is feeling low and has informed *** (health visitor) that 3 months after she had *** that they had gone to the **news** paper to try to get there case heard regarding there need for housing and Jeanne feels that the papers took the story and reported it inaccurately …"

Mrs **Sube** denied that was an accurate record of what she told the health visitor. That is implausible, and I cannot accept that she is right about it. The record is consistent with the evidence as a whole.

(3) Mr Wade-Palmer's evidence, which I accept, was that when he visited Mr **Sube**'s house with a photographer he said he was a reporter from Caters, and Mr **Sube** "*said he was expecting a journalist from Masons, another **news** agency*", but invited him and the photographer in, where they spoke for 20 minutes. Waiting outside, he observed another journalist arrive and be let in. Later, he knocked, was let in and found Mr **Sube** was "*quite irritated*" about reports on the *MK Citizen* article, and wanted the stories taken down "*as he thought they would damage his position with the council … It was clear that Mr **Sube** thought that the **news** coverage would help him get a better place.*"

94. The second main area of factual dispute concerns **News Group**'s system for dealing with Posts. At the end of the evidence, however, there is very little of relevance that is in issue.

(**1**) Mr Manning-Monro described the system, in terms which were not challenged:

"Reader comments are not subject to prior editorial control, other than by operation of a profanity filter, which automatically deletes a comment if it contains a word on our banned list. Readers are able to flag a comment by clicking an icon, which will draw it to the attention of a moderator, who will decide whether it should be removed from view. The Sun's website's publicly available Community Guidelines (part of the site's Terms of Use) set out the categories of comments that will not be tolerated and state that abuse can lead to an account being banned. This process for dealing with offensive comments is common practice in the industry.

Nor was Mr Manning-Monro challenged on his evidence that there were fewer than 500 comments in total; that this was not an unusual number for a series of **news** stories; and that all offensive posts that were flagged were removed.

(**2**) Mr Manning-Monro's witness statement said that apart from these flagged comments there was "*no reason to believe that any of the comments … would have been seen or known about within The Sun prior to the letter of complaint*". The cross-examination related principally to the adequacy of the profanity filters, the compliance of the system with the IPSO Code, whether it would be practicable and proportionate to have a different system, and whether readers could have and did share the articles. All of those are matters that fall outside the scope of the pleaded issues, as I have said. The main issue here is whether the defendant, and in particular the journalists and editorial staff responsible for the articles complained of, knew the content of the Posts.

(3) Mr Harrison did explore this, but only tangentially, questioning the witness about whether the analytics available to **News Group** personnel to show an article's degree of popularity are used as a prompt for decisions about what its journalists should write. He suggested that would be "*a no-brainer*". Mr Manning-Monro conceded that some journalists would be interested in

seeing the analytics; they could get basic information such as the number of page views. It is possible, he agreed, that some journalists might resort to social media to see what people were saying about their articles. In answer to a question from me, Mr Manning-Monro said that journalists at *The Sun* have no information about reader comments.

95. In the light of this evidence, it is impossible to conclude as a fact that any of those responsible for writing and publishing the articles complained of had actual knowledge of the content of any of the Posts complained of. Whether they should have done is not an issue for determination. Nor are issues about the adequacy of the systems described by the witness, or whether they comply with the IPSO Code.

96. The position is similar when it comes to the evidence about the **Express Group**'s approach to Posts, which is the third main area of factual dispute.

(**1**) As I have found, all the Posts were taken down on 16 January 2018. The evidence is that the **Express Group** was not put on notice of the Posts that were objected to until 28 December 2017, that being the date on which it received the claimants' solicitors' letter of 20 December 2017.

(**2**) As for the period before that, evidence about the system that the **Express Group** had in place was given by Mr Marsh. His witness statement contained the following:

"At the time UGC was not manually moderated prior to it appearing in an online article, The sheer volume of comments means that human moderation is not practical or physically possible; for example, in 2016 **Express**.co.uk and Dailystar.co.uk published roughly 12,000 articles per month. It is not unusual for **news** stories to receive between 250 and **1**,000 comments."

(3) The automated system then in use by the **Express Group** was "*a moderation product provided by Gigya*" which was "*very basic*", using a very large list of banned or blocked words. UGC posts containing those words would be filtered out, those that did not would automatically be allowed. In addition, the defendant had terms and conditions which governed readers' behaviour. Readers could complain about Posts by clicking on an icon, which would cause the Post to be "*flagged*". Three flags led to automatic removal, but "*the sheer volume of posts*" meant that no examination of each post was conducted".

(4) Cross-examined, Mr Marsh accepted that there were some horrible comments, that Gigya didn't stop that, and that the defendant knew its profanity filter system was basic and imperfect. Of course, it might be said that if a publisher uses a moderation system that cannot adequately control all the content which it is making public, or contributing to making public, it should not provide a comment facility at all. But, again, that is not the issue. I am concerned with an allegation of actual knowledge.

(5) As to that, Mr Marsh's statement is clear:

"It is simply unrealistic to suggest that any employee at **Express Newspapers** whether an editor or a journalist would have knowledge of the individual comments on any article… There is no reason to believe that any of the comments would have been seen or that they were known about prior to our being notified …by the claimants."

(6) Cross-examination of Mr Marsh on these topics followed the same general themes as that of Mr Manning-Monro, and was largely irrelevant for the same reasons. It was not directly put to the witness that, contrary to the passages I have just quoted, any editorial staff had actual knowledge of any of the content of any of the Posts that are now complained of. No fact or document was put to the witness that lent any real support to that conclusion.

97. Again, in the light of this evidence, I could not uphold the claimants' case that this defendant had actual knowledge of the content of the Posts complained of.

98. The fourth area of dispute on which I should say a little more concerns the content of the Posts complained of, that is to say those posted on *The Sun* website and the ***Express*** website. For reasons I have already given when dealing with the DPA claim, I do not propose to examine and make findings about each of the 204 Posts listed in the claimants' schedule. But I will say this much.

(**1**) **News Group** is right to concede that some of the Posts are racially abusive. Comments made on the "*Are they serious?*" article include "*Offer them a **1**-way ticket back to Bongo-Bongo land*" and "*You need to be sent back to the jungle*" and "*the neighbourhood will slum they will bring more in*". The **Express**'s "*REVEALED*" article attracted a similar Post, writing of "*feckless, lazy, scrounging blicks*" (sic). These Posts, and others referring to "*mud huts*" use offensive stereotypes to refer to the claimants in a demeaning way, on the basis of their racial or ethnic origins. There are other Posts that refer to the claimants as "*black scum*".

(**2**) But the great majority of the Posts say nothing about the claimants' racial or ethnic characteristics, as opposed to their foreign origins or nationality. Most do not use words like those I have quoted. They **express**, in one way or another, the view that the claimants are unwanted scroungers from abroad, who do not deserve what they have claimed, and should go or be sent back somewhere else. The places to which readers urge them to go or be sent include "*up north*", Calais, Paris, France, Cameroon, "*home*" and "*their fucking country*". The main theme is that it is unreasonable and unfair for the claimants, who are foreigners who have not lived, worked and paid tax in the UK, to complain about the benefits provided at the expense of UK taxpayers. Views will differ about those opinions, and about the use of such language. But this is a different category of expression from the few Posts I have quoted above. It is not right, in my judgment, to describe Posts on these lines as **expressing** "*racial hatred"* or *"xenophobic hatred*".

*The case against **News Group***

99. In my judgment, the 7 articles complained of do not constitute a single "*course of conduct*" by **News Group**. They fall into two **groups**: those of September, and those published in the three-day period, from 30 October to **1** November 2016. The first **group** appeared over four or five days, essentially rehearsing the story from the *MK Citizen*, and Mr **Sube**'s angry response. This set of articles, although it was in substance a **group**, was not all on the same theme. There was an additional feature, when Mr Wade-Palmer reported on how Mr **Sube** had spent his savings. The second **group**, however, was quite separate and distinct. It followed many weeks later, prompted, on their face, by new events and new information, and they had different content. The publication of these two **groups** of articles is properly analysed, for present purposes, as two "*courses of conduct*".

100. The Posts would likewise fall for consideration in two **groups**. But I do not consider that, for the purposes of harassment, the Posts are properly treated as part of the same "course of conduct" as publication of the Articles. In ordinary language the Posts were "*published*" on *The Sun* website. But when considering the Posts, I do not consider it necessary or helpful to address the rather abstract and potentially complex question of whether the conduct of **News Group** (or that of the **Express Group**) in relation to the Posts amounts as a matter of law to "*publication*" by it, or publication for which it is responsible. That may be so. There are cases in Australia that so hold (see *Voller v Nationwide **News** Pty **Ltd*** [2019] NSWSC 766 (Rothman J)) and the defendants did not submit that they could not or should not be regarded as publishers of the Posts in law. In my view, however the real question in the present context is not whether those labels or categories are apt, but one of fact: what was the nature and quality of the defendant's *conduct,* in this respect?

101. The defendants provided a platform which enabled readers to post comments on the defendant's articles. At the minimum, this allowed or facilitated the communication of some such comments to other readers and to the general public via **News Group**'s website. But I cannot make a finding that the defendant did this, knowing the content of all or any of the Posts complained of, let alone with actual knowledge that some of them were racist and offensive. That would be entirely contrary to the evidence, as I have made clear.

102. The Posts were written by the readers, and the process by which they appeared online was initiated by the readers and semi-automatic. The readership was primarily, if not exclusively, other readers. The Posts were not addressed to, or aimed at the defendants' journalists, nor were they read by those journalists. The Posts were not edited or vetted by the defendant, other than in the ways I have identified.

103. I have not overlooked the claimant's pleaded case about the "*indignant tone*" of the articles, or their allegation that the Articles were "*designed to incite*" racial hatred. The tone was indeed indignant, to an extent. But I reject the remainder of this allegation. The word "*designed*" is not a very happy one to use in a pleading; it could mean "*intended*" or merely "*framed in a way that was liable to*". But in paragraph 23 of the Particulars of Claim, the case is spelled out: it is squarely alleged that "*the defendants intended to encourage third parties to publish racial attacks upon the claimants*". I could not make a finding that there was any such intention. As Mr Clarkson said in his evidence, the claimants do not identify anyone at *The Sun* who had such intention. He said that he had seen no evidence to suggest that any of the articles were motivated by anything other than the wish to report and comment on a story of legitimate interest to readers. I find myself in the same position. In my judgment, it is not reasonable to maintain that the content of the Articles was designed to stir up racial hatred, in the sense that it was likely to do so. That conclusion cannot be drawn from the existence of a handful of Posts which do **express** ugly, racist sentiments.

104. So the conduct to be considered, so far as the Posts are concerned, is unwittingly allowing or facilitating the communication by some readers to some other readers of a relatively small number of Posts, some of which were racist and offensive to the claimants. Whatever might be said about that conduct, and the adequacy of the controls put in place by the defendant, I do not believe this behaviour is properly regarded as part of a course of "*targeted*" conduct by the defendant, that has an "*oppressive*" character, and is criminal in character.

105. Even if this analysis was wrong, I would conclude that the nature of the publications under consideration, including the articles and the Posts, was not harassment within the meaning of the PHA, as elucidated in the authorities. This is because, in short, (a) the subject-matter of the Articles was of legitimate interest to the public, and the reporting could only be held to be tortious if that was an interference with freedom of speech that is necessary in order to protect the rights of the claimants; (b) the content and the manner of publication of the Articles and Posts, even considered as a single course of conduct, was not offensive, insulting, alarming or distressing to the degree that would be necessary to sustain criminal liability.

106. The nature of the tort of harassment means that, in a publication case, this assessment will include, but should not be confined to the informational content of the publication: what is said, and the meaning(s) it conveys. That would be the focus in a defamation case. A claim in harassment requires a holistic review, encompassing the way in which the information is presented: how it is said. That will always include the number of occasions that make up the alleged course of conduct. But the Court must take account of the right to speak, and to speak robustly, on topics of public policy and other matters of legitimate interest to members of the public. In this regard, two points of importance emerge from *Trimingham*:

(**1**) As Tugendhat J pointed out at [90], the publication of words that are defamatory, but true, can cause a person distress. So may the publication of what I have held these Articles to be, namely non-defamatory, comment and opinion based on non-defamatory facts. People can be very upset when people **express** hostile opinions about them. But in this case the claimants have failed to show that the expression of such opinions was unlawful, from the perspective of defamation law, or discrimination law, or data protection law. So, Article 10 of the Convention requires a cautious approach to a claim in harassment based on the same conduct.

(**2**) In a publication case, the Court should take account of the extent to which the coverage complained of is repetitious and taunting, as opposed to being new, and prompted by some fresh newsworthy event. The imposition of liability in respect of coverage that falls in the latter category will be harder to justify: *Trimingham* [268-269] and *Lisle-Mainwaring v Associated* (21 July 2017, HHJ Moloney QC, sitting as a High Court Judge) at **2**.6(b).

107. In his witness statement Mr Clarkson said this:

"10. All **newspapers** cover stories that are of interest to readers in a way that is consistent with their position and attitudes. *The Sun* has a consistent and long history in covering stories relating to the benefits system in such a manner. By and large our readers are hard-working, but not highly paid or living in luxurious housing. In 2016, the average salary of a reader nationally was around £17,000 a year. In general, our readers believe there is a legitimate need for a safety net, but that people should be grateful and not take unfair advantage of it.

…

12. There are a number of elements to the story which were of legitimate interest to our readers once the Claimants went public with their complaints: The fact that the Claimants had chosen to criticise the Council. The claim of the Council, in response, that suitable accommodation had been offered and declined. The statements of politicians on the subject. The Claimants' apparent expectation that they were entitled to have a large number of children and a comfortable lifestyle which the taxpayer was expected to subsidise. The fact that they were able to come to the UK as a result of the NHS funding degrees in nursing. As the coverage illustrates, the costs involved are much greater than the £27,000 cost of the degree. The apparent attempt to pressurise the Council into giving them the accommodation that they wanted by going public with their complaints, thereby getting priority over those who are more patient and wait their turn. The house that the Claimants obtained. The large amounts that the Claimants have received directly or indirectly, having only recently arrived in the UK."

108. This is more in the nature of comment or submission than evidence, and may not have needed challenge by way of cross-examination, as opposed to argument. Mr Clarkson was however cross-examined about the composition and content of the article, but he was not challenged on these points. It is not appropriate for me to make findings about whether Mr Clarkson is right to speak of "*the Claimants' apparent expectations*" or "*the apparent attempt to pressurise the Council*", in these terms. The question is whether these are interpretations, points of view, or assessments which it was not only tortious but also criminal for **News Group** to publish. Not so, in my judgment.

109. I repeat that I do not doubt that the Subes suffered distress. I am not persuaded that it was all attributable to *The Sun* articles, or those published by the **Express Group**. The strong impression I gain from the evidence is that the *Mail* coverage was a main cause, if not the main cause. It is plain that reputational concerns loomed large. The test is an objective one, which excludes any element of defamation. Focusing on the coverage in *The Sun*, it was reporting on matters of proper interest to the readership of *The Sun*. It was done in a colourful fashion typical of tabloid journalism, of which some may disapprove, but it did not represent an abuse of press freedom that entered the realm of harassment. The pleaded complaint that the publica-

tion of some details about the claimants was not necessary does not affect my conclusion. It cannot be (and is not) said that the details are such that nobody could regard them as relevant. Accordingly, this is an invitation to conduct a judicial critique or vetting of the editorial process, in contravention of the principles identified above.

110. The content of the Posts that are complained of does not take the case across the line. It necessarily follows that in my view neither of the two sets of Articles could sustain a finding of harassment as a matter of fact, if considered separately.

111. Turning to the issue of knowledge, the allegation that **News Group** had actual knowledge that its conduct amounted to harassment is untenable on the evidence called at the trial. It was not clear from the Particulars of Claim on what basis that allegation was made; the pleading was inadequate. The claimants plainly could not give evidence to establish such an allegation. Nor could a finding be made merely as a matter of inference. Such evidence as there was came from the defendant's own witnesses, and its effect was as already indicated: that they considered the articles to be reasonable journalism on matters of legitimate interest and concern to their readers. I accept Mr Price's submission that an intention to sell **newspapers** cannot be put forward as improper. The claimant's allegation that **News Group** intended to dissuade the claimants from claiming appropriate council house accommodation is not credible on its face. It is credibly denied by Mr Clarkson.

112. I uphold **News Group**'s reliance on the defence or exception of reasonableness for essentially the same reasons as those I have given for rejecting the claimants' case that this was harassment, which the defendant knew or ought to have known to be such.

*The case against the **Express Group***

113. Having said what I have, I can deal more shortly with the case against the **Express Group**. This, in my judgment, is weaker than that against **News Group**. My assessment is this:

(**1**) It would be wrong to regard the publication of all the articles complained of as a single course of conduct by the **Express Group**. There are two **groups** of articles, that are separated in time and in subject-matter: those of 7-12 September 2016, and a second **group** of 31 October and **1** November 2016, prompted as they plainly were by the **news** that the Subes had been provided with new accommodation.

(**2**) Further, on the evidence in this case, Ms Michalos is right to submit that, for the purposes of the tort and crime of harassment, the conduct of those responsible for the content of the ***Express*** and the *Star* should not be aggregated. This is not to say that this defendant is not vicariously responsible for the conduct of all the individuals in question. It can be inferred that they were all employees or agents of the defendant company. My approach is based on the evidence, which is clear and barely challenged or questioned, that the two papers have wholly separate editorial teams which do not collaborate, share information, or otherwise work together. Mr Townend's evidence was that the **news** teams were in different locations within the same building. The hard copy **news** teams were separate from the online **news** teams. It would be artificial, given that evidence, to treat the separate editorial decisions of one **newspaper** and those of another, as part of a single "*course of conduct*".

(3) At one level, all the articles complained of against the **Express Group** can be considered together as part of a course of conduct by that defendant, in the sense that it established and organised, furnished, and equipped each **newspaper**, engaged and paid their staff, and is vicariously liable for their tortious conduct, and responsible – as Mr Engelman submits – for choosing to operate its comment facility, and to do so in the way I have described. But viewed at that level of generality, the corporate defendant's conduct cannot be regarded as "*targeted*" or "*oppressive*" so as to amount to harassment.

(4) On this analysis, the ***Express*** engaged in a course of conduct that in substance amounted to five acts (because two publications in single edition of the paper count as a single act for this purpose). The *Daily Star* engaged in another five acts (the two publications of 31 October 2016 counting as one). Those are the acts that are candidates for a course of conduct.

(5) The publication of the Posts complained of against the **Express** is not to be treated as part of a course of conduct on its part, for this purpose. That is for the reasons I have given when dealing with the case against **News Group**, and those at (3) above. No Posts are complained of as against the Daily Star.

(6) Considered objectively, the content of the articles that form part of the course of conduct in the case of each **newspaper** falls well short of the standard required to establish the crime and tort of harassment.

(7) The claimants have not established actual or imputed knowledge that the publication of the articles amounted to harassment. To do so, it is in principle necessary to identify one or more individuals who knew had such or should have known this, and to identify and prove facts from which knowledge can be inferred. As with fraud, or dishonesty, knowledge can only be brought home to a corporate body by identifying an employee or agent who had the knowledge. On my analysis, this would have to be, in the case of each **newspaper**, a journalist or editor or other member of staff who was involved in or knew of all the articles. No such individual has been identified.

(8) Even if the analysis at (**1**) to (7) above were wrong, and all the Articles and all the Posts complained of fall to be considered as a single course of conduct, the case of harassment would not be made out. That is for two reasons. The first is that the conduct did not amount to harassment. Taken as a whole, this was publication of an upsetting character, which would naturally have caused distress. But the articles were not "*designed*" to incite racial or xenophobic hatred. The case that it is necessary, for that reason, to interfere with the rights relied on by the defendant is not established. The second reason is that it has not been shown that the corporate defendant knew, or that it should have known, that its conduct amounted to harassment. Actual knowledge of the Posts complained of has not been established; on the contrary. And in relation to the Articles, the claimants have not identified any individual who had or should have had the knowledge alleged, let alone proved the pleaded case in that respect. The analytical points about knowledge that I have already made apply equally to the allegation that this defendant intended to incite racial or xenophobic hatred; it needed details, and supporting evidence, and there were none. I share Mr Townend's assessment, that he could see "*no evidence that the articles were motivated by anything other than the wish to report and comment on a story with legitimate interest*".

(9) Finally, I would, if necessary, hold that the conduct of this defendant was reasonable within the meaning of PHA s **1**(3)(c). That is to say, it was a legitimate exercise of press freedom that did not interfere so gravely with the rights of the claimants that it deserves to be categorised as a crime and a tort.

114. The **Express Group**, like **News Group**, did not call evidence from any of the editors or journalists involved with the stories that are said to have been harassing. That has been commented on by Counsel for the claimants, but in view of the very general nature of the pleaded case, I do not think it right to draw any particular inferences from it. It does mean that the evidence of Mr Townend, about the elements of the stories that he considers to have been of legitimate interest to readers of the **Express Group newspapers** has an element of comment or advocacy. He does, however, have a good deal of experience and in any event, in my judg-

ment, the following passages set out standpoints which cannot be classed as unlawful, and which support the conclusions at (6), (8) and (9) above.

"… these sorts of stories - where you are looking at a big family with lots of children that needs housing from a council - come up on a regular basis and are of interest to our readers… As it is public money that is being spent, and because councils have finite resources, the public has the right to know how their money is being spent.

…

The story would be newsworthy because of the issues of the spending of taxpayer money, the pressure on local authorities with **limited** resources and the issue of to what extent is there a personal responsibility that people have for providing for their family. If we do not publish stories that are of interest to our readers, we would no longer exist as a publisher. The coverage of the story reflects the interest we believed our readers would have in the story."

115. Of course, general observations of this kind have to be assessed in the light of the actual subject-matter and content of the articles complained of, and the manner of their publication. I have done that. I do not consider that, even taking all the matter complained of as a course of conduct, the content, tone and presentation of the Articles and Posts complained of amounted to harassment.

Disposal

116. For the detailed reasons given above, there will be judgment for each defendant in relation to the claims of each claimant, under the DPA and the PHA. The issue of damages does not arise.

APPENDIX A

Daily **Express** online article of 11 September 2016 (extract)

"**REVEALED: Benefits dad-of-8 demanding bigger council house splurged £15k savings**

A MIGRANT dad who complained a five-bedroom council house was not big enough for the family had a five-figure savings account when he moved to the UK, it has been revealed.

Dad-of-eight Arnold **Sube**, 33, revealed he had £15,000 saved up from his job at a warehouse in Paris – but stopped work when he moved to Luton in 2012.

He splurged the sum in weeks trying to keep up the lifestyle he had enjoyed in a posh Paris suburb, renting a large five bedroom house in Luton."

…

But before long, his cash ran out, and he turned to the British taxpayer to pick up the tab.

Mr **Sube** said: "I came with £15,000, and I paid by myself but after a few months I applied for a house on benefits.

'I love working. I have been working for the last 13 years, my intention was just to live and study while my family were still in France but my wife couldn't do it."

…

'I rented a five bedroom house to give my kids the same standard of life but I couldn't keep it.

'Everything I own I bought before moving to England. In Paris we lived a very different life.'

And he claims that he and wife Jeanne haven't ruled out having even MORE children.

When asked if he planned to add to their eight-strong brood, he replied: 'You never know.'

Mr **Sube** worked as a warehouse worker in France and managed to save what he thought would be enough when he moved to fulfil his lifelong ambition of studying to become a psychiatric nurse."

…

He said: 'When my eight children are working how much will the government be collecting in taxes from them? The government will benefit from us living here in better conditions.

'We used to live more than comfortably, now my children ask me why did we leave our house in France and I feel guilty.

'They have to live like any other children not in this kind of condition. It is like they're being ignored by the authority, like any other children they deserve respect and dignity, it's their right.

'I want to make a contribution to society, I don't like lazy people – my dad told me to work hard and I have always been.

'People should take responsibility when they're supposed to and Luton council had a responsibility to find us accommodation suitable for our needs.'"

…

Mr **Sube** claims an English family moving to Paris would be welcomed with open arms by French authorities and does not understand why people are so angry at him.

Mr **Sube** said: 'Where I'm from they would give houses to English people easily and treat them very fairly so I this expect fair treatment from any country I move to.

'It is my right to live a normal life like any other normal family, these conditions are not good for the children who did not want to go to school today as they're traumatised by this whole situation.

'I don't see why the fact I'm French should make any difference, all families should be put first by the council.'

…

'The council did not give us the opportunity of viewing the property, they took advantage of our lack of understanding of the housing situation.

If we viewed it, we would never have accepted the property because we found that it was a three bedroom only after one room had been split into two.'"

APPENDIX B

Daily Star article of 31 October 2016 (extract)

“Fury as benefits dad-of-eight moved into plush £425,000 house

A MIGRANT dad who complained a five-bedroom council house was not big enough for the family had a five-figure savings account when he moved to the UK, it has been revealed.

Dad-of-eight Arnold **Sube**, 33, revealed he had £15,000 save up from his job at a warehouse in Paris – but stopped work when he moved to Luton in 2012.

He splurged the sum in weeks trying to keep up the lifestyle he had enjoyed in a posh Paris suburb, renting a large five-bedroom house in Luton.”

…

But before long, his cash ran out, and he turned to the British taxpayer to pick up the tab.

Mr **Sube** said: 'I came with £15,000, and I paid by myself but after a few months I applied for a house on benefits.

'I love working, I have been working for the last 13 years, my intention was just to live and study while my family were still in France but my wife couldn't do it.”

…

'I rented a five bedroom house here to give my kids the same standard of life but I couldn't keep it.

'Everything I own I bought before moving to England. In Paris we lied a very different life.'

And he claims that he and wife Jeanne haven't ruled out having even MORE children.

When asked if he planned to add to their eight-strong brood, he replied: 'You never know.'

Mr **Sube** worked as a warehouse worker in France and managed to save what he thought would be enough when he moved to fulfil his lifelong ambition of studying to become a psychiatric nurse.”

…

He said: 'When my eight children are working how much will the government be collected in taxes from them? The government will benefit from us living here in better conditions.

'We used to live more than comfortably, now my children ask me why did we leave our house in France and I feel guilty.

'They have to live like any other children not in this kind of condition. It is like they're being ignored by the authority, like any other children they deserve respect and dignity. It's their right.

'I want to make a contribution to society, I don't like lazy people – my dad told me to work hard and I have always been.

'People should take responsibility when they're supposed to and Luton council had a responsibility to find us accommodation suitable for our needs.'”

…

Mr **Sube** claims an English family moving to Paris would be welcomed with open arms by French authorities and does not understand why people are so angry at him.

Mr **Sube** said: 'Where I'm from they would give houses to English people easily and treat them very fairly so I this expect fair treatment from any country I move to.

'It is my right to live a normal life like any other normal family, these conditions are not good for the children who did not want to go to school today as they're traumatised by this whole situation.

'I don't see why the fact I'm French should make any difference, all families should be put first be the council.

'The council did not give us the opportunity of viewing the property, they took advantage of our lack of understanding of the housing situation.

'If we viewed it, we would never have accepted the property because we found that it was a three bedroom only after one room had been split into two."

…

One woman said: 'If you have eight kids you should not expect to be bailed out. The father has played the system and won.

'They are extremely fortunate. This is a lovely estate. Parents are desperate to mover here.'

Luton Council told the Sun it does not provide updates on individual cases to protect residents' privacy."

APPENDIX C

Analysis of Posts complained of

Articles complained of	117. **Posts complained of**		
Newspaper	**Date**	**Headline** ***Italics denote print article***	
The Sun			
1	07.09.16	Are they Serious?	25
		The Great British Rake-Off	0
2	07.09.16	Benefits dad's defiance	5
3	09.09.16	It's my right!	23
4	11.09.16	He played the system and won	23
5	30.10.16	Cul-de-spat	10
6	31.10.16	Take your pick	3
7	01.11.16	No more	4
Sub-total	93		

The Express			
1(a)	08.09.16	Shameless French family-of- 10	0
1(b)		Jobless migrants do not deserve British handouts (leader)	19
2	09.09.16	"I'm NOT greedy!'	13
3	11.09.16	"REVEALED: Benefits dad .."	70
4	31.10.16	"Migrant dad-of-eight lands plush four-bed detached .."	10
5(a)	01.11.16	*What a scandal*	0
5(b)		*A family of 10 living on British taxpayers' money (Leader)*	0
Sub-total	111		
The Daily Star			
1	07.09.16	Jobless dad whines ..	0
2	08.09.16	Shameless family-of-10 who refused bigger home ...	0
3	11/12.09.16	Shameless benefit migrant dad …more kids	0
4	11.09.16	I blew 15k in weeks	0
5	31.10.16	"Fury as benefits dad-of-eight moved into plush £425,000 house"	0
		Benefit scroungers we LOVE to hate [slideshow]	0
Sub-total	0		
GRAND TOTAL	**204**		