Neutral Citation Number: [2013] EWHC 3267 (Admin)

Case No: CO/5907/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2013

Before :

SIR BRIAN LEVESON
(PRESIDENT OF THE QUEEN'S BENCH DIVISION)
MR JUSTICE OPENSHAW

- -

Between :

STEPHEN PETER GOUGH **Appellant**

- and -

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

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- -

Steven Powles and **Andrew Pilkington** (instructed by **Bindmans**) for the Appellant
Duncan Penny (instructed by **C.P.S.**) for the Respondent

Hearing date: 15 October 2013

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Judgment

Sir Brian Leveson:

1. For some ten years, Stephen Gough (the Appellant) has walked naked through the highways and byways of the United Kingdom, from John o' Groats to Land's End. He has made it clear that arrests, prosecutions and convictions will not deter him from nude walking in the future. On 11 March 2013, he was convicted at the Calderdale Magistrates Court in Halifax, before District Judge (Magistrates Court) Lower, of a breach of s. 5(1) of the Public Order Act 1986 ('the 1986 Act') which is a summary only offence, the maximum penalty for which is a fine up to level 3 on the standard scale. He now appeals against that conviction by way of case stated.

2. Although the papers contain both the carefully crafted and detailed judgment of the District Judge and all the evidence placed before the court, the facts and arguments which can be deployed on this appeal can only be taken from the Case Stated: see Part 64.3(5) of the Criminal Procedure Rules 2012. If it had been thought that there was insufficient detail in the Case as drafted, it was open to the parties to ask the judge to amend that document.

3. In any event, the facts found by the judge, (which were not in dispute and evidenced by CCTV and film footage), can be summarised shortly in these terms:

   i) The appellant was released from Halifax Police Station at approximately 11.30 am on 25 October 2012 through the main public entrance; he was wearing only walking boots, socks, a hat, a rucksack and a compass on a lanyard around his neck. He was otherwise naked and his genitalia were on plain view. He then walked through Halifax town centre for approximately 15 minutes, filmed by a camera crew working for a company which had obtained his permission to do so (without making any payment for that privilege).

   ii) The appellant received a mixed reaction from others in the town centre, some of whom were heard to comment. At least one female member of the public veered out of his way. Evidence from two women was to the effect that they were "alarmed and distressed" and "disgusted" at seeing him naked. One of the women was with a number of children at least one of whom, 12 years old, she reported as "shocked and disgusted". The district judge found that it caused one of the women to feel at risk (see para. 18(iv) of the Case) and, further, based on the evidence, that it caused alarm or distress.

   iii) The appellant then entered a convenience store whereupon police officers attended and arrested him. On interview, the appellant said that he did not think that what he was doing was indecent and that the human body was not indecent; he did not know what the problem was. He had heard some of the comments directed to him; those who made such comments were entitled to their opinion. He said "It's their belief that the human body is dirty".

   iv) The judge found that the appellant foresaw the fact of alarm or distress as the consequence of his voluntary decision to walk naked through Halifax town centre and was at least aware that his behaviour may have been threatening, abusive, insulting or disorderly. He said that he would continue to walk naked until adverse reaction to this stops and that his aim was to be accepted as are others who campaign for human rights. Being nude allowed him to express what he fundamentally was: this was not indecent.

4. Although not the first question posed in the case, it is appropriate to deal with the rejected submission that the appellant should be allowed to call, first, Professor Ulrich Lehmann, Professor of Fashion at the University for the Creative Arts, Rochester, to give evidence of how public attitudes to nudity have changed within various cultures and, second, Joanna Beazley Richards M.Sc., the managing director of the Wealden Psychology Institute to speak of her research, her clinical experience and her observations of children witnessing adult nudity as to the way in which children would be likely to react to seeing a naked male.

5. The judge read the reports, accepted that both witnesses were experts in their respective fields and that the appellant's Article 10 rights were engaged (which he said that he did not require expert evidence so to conclude) but determined that both whether the imposition of a criminal sanction was necessary and proportionate and any issues of public harm were for the tribunal and not expert evidence.

6. Mr Powles, for the appellant, argues that the judge would have been assisted by examples where nudity is commonplace and accepted and he erred in not applying its commentary and conclusions to both the issues of reasonableness and whether the elements of s. 5 of the 1986 Act could be established. Similarly, the report of the psychologist highlighted the reality of the perception of such behaviour and was relevant to the reasonableness of the appellant's conduct. Mr Penny, for the Respondent, submits that the evidence of neither of these witnesses was admissible: the questions whether the offence was made out as a matter of law, or whether the conduct of the appellant was objectively reasonable were for the court: see *DPP v. Clarke* (1992) 94 Cr App R 359 following *Brutus v Cozens* (1972) 56 Cr App R 799, [1973] AC 854.

7. For my part, I have no doubt that Mr Penny is correct. The court was not concerned with policy decisions or whether children should or should not have been affected by his nudity. The appellant conceded that people who saw him naked in public might be distressed or concerned and that there would be a reaction from those who did not share his views: that, he said, was due to their own prejudice. The expert evidence did not advance the case at all.

8. The remaining questions posed by the Case relate to the decisions of the judge to the effect that the elements of the offence were made out, the defence pursuant to s. 5(3) of the 1986 Act should be rejected and that the prosecution and conviction did not constitute an unlawful interference with the appellant's rights under Article 10 of the ECHR.

9. The relevant parts of s. 6 of the 1986 Act are as follows:

> "(1) A person is guilty of an offence if he –
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> Uses threatening, abusive or insulting words or behaviour, or disorderly behaviour ... within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. ...
>
> (3) It is a defence for the accused to prove –
>
> (a) That he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or ...
>
> (c) That his conduct was reasonable. ...
>
> (4) The defendant must intend his words or behaviour ... to be threatening, abusive or insulting or be aware that they may be threatening abusive or insulting or he must intend his behaviour to be, or be aware that it could be disorderly."

10. Based upon authority such as *Vigon v DPP* (1998) 162 JP 115 and *Hammond v DPP* [2004] EWHC Admin 69, the judge decided that the words 'insulting' and, by extrapolation, 'threatening', 'abusive' and 'disorderly' are not to be narrowly construed. He concluded that 'insulting' meant disrespectful or scornfully abusive, 'threatening' was behaviour that was hostile, had a deliberately frightening quality or

manner or which caused someone to feel vulnerable or at risk. 'Abusive' meant extremely offensive and insulting and 'disorderly behaviour' was behaviour that involved or contributed to a breakdown of peaceful and law abiding behaviour. A degree of passivity could amount to insulting behaviour and he expressed himself (at paragraph 18(iv) of the Case) to be satisfied (to the criminal standard) that:

> "Mr Gough's behaviour in walking naked was insulting and was also threatening in that it caused [one of the witnesses] to feel at risk. This behaviour could also be described as abusive and disorderly as it contributed to a breakdown of peaceful and law-abiding behaviour as evidenced by the reactions of the public to Mr Gough's public display of nudity."

11. He went on to conclude that the appellant foresaw this consequence of his voluntary decision to walk naked through Halifax town centre and was at least aware that his behaviour may have been threatening, abusive, insulting or disorderly. Thus the intent required by the legislation was proved.

12. As to s. 5(3), he did not doubt the sincerity of the appellant's beliefs and expressed the view that Article 10 of the ECHR was engaged on the basis that being naked in public was a form of expression. Reviewing the relationship between the s. 5 and Article 10 as described in *Abdul v DPP* [2011] EWHC 247 (Admin), he concluded that there was a pressing social need for the restriction of his right to be naked in the context of this case and that the restriction imposed as a consequence of s. 5 corresponded to this social need; as a summary only offence, it was a proportionate response to it. In his judgment (the reasoning in which he incorporated into the Case) he observed that although public nudity was not, of itself, a criminal offence, s. 5 was sufficiently clear and accessible and that Parliament had left it to the courts to consider the context of particular facts: "whether behaviour does or does not 'cross the line' is heavily fact dependent and not best criminalised on a 'catch-all' basis". Although the appellant's minority view had to be respected, it did not entitle him to "trample roughshod" over the rights of the majority "to enjoy a shared public space without being caused distress and upset".

13. Mr Powles argues that the appellant posed no threat to the public, was not abusive or insulting (in which regard he pointed to well-publicised naked bike rides and nudist beaches which were legal and not deemed offensive). He submitted that the disorder of those who witness behaviour does not mean that the behaviour they witness is disorderly and that the passive behaviour of the appellant could not be so categorised. Neither *Vigon* nor *Hammond* concerned passive behaviour: the former concerned the installation of a hidden video camera in a changing area and the latter an evangelical preacher who held up a sign reading "Stop immorality, stop homosexuality, stop lesbianism" in which it was held that it had not been perverse for the magistrates to find that the words used were insulting. Here, the appellant was doing no more than walking in his natural state without interfering with others, not promoting what he does or challenging those who may disagree; neither does he violate the private space of others whilst he adheres to his own beliefs.

14. Mr Penny submits that the conduct of the appellant was plainly "disorderly behaviour" within s. 5. He points to *Chambers v DPP* [1995] Crim LR 896 in which the appellant demonstrators persistently prevented a surveyor from using a theodolite

by blocking its infra-red beam; this court held that the Crown Court was entitled to conclude that the behaviour was likely to cause harassment to the surveyor and was disorderly: this is a question of fact for the trial court.

15. In my judgment, it is not necessary to decide whether the judge was right to conclude that the appellant was threatening, abusive or insulting: the district judge was clearly entitled to conclude that, by walking through a town centre entirely naked, he was violating public order or, in the language of the case contributing "to a breakdown of peaceful and law-abiding behaviour as evidenced by the reactions of the public": he was thus disorderly. There was nothing passive about his conduct in that he knew full well (not least from his past experience) that many members of the public would both be alarmed and distressed by sight of his naked body whether or not others would take a more benign view and whatever the origins or psychological reasons for that alarm and distress. Furthermore, he was being deliberately provocative in order to support his own stance. The existence of nudist colonies and naturist beaches are not to the point: they are in areas marked out, clearly identifiable and are thus avoidable. Neither does the unchallenged existence of naked cycle rides determine the matter: each case will be fact sensitive and will fall for consideration on its own merits.

16. As for the appellant's intention, the submission that the reaction of those whom the appellant may pass would be temporary and unlikely to reach a level of emotional significance to satisfy the threshold of harassment, alarm or distress ignores the evidence that the judge accepted. In my judgment, it is beyond argument that, at the very least, he was aware that his behaviour could be disorderly.

17. I turn to the defence which Mr Powles argues was open to the appellant pursuant to s. 5(3)(c) of the 1986 Act, namely that his conduct was objectively reasonable (which is the test identified in *DPP v Clarke* (1991) Cr App R 359). This argument also incorporates or overlaps with the further submission that to pursue the appellant for this offence in these circumstances contravenes his rights under Article 10 of the ECHR which provides everyone with the right to freedom of expression albeit subject to such conditions or penalties as are prescribed by law and are necessary in a democratic society (among other reasons for the prevention of disorder and the protection of health or morals).

18. Mr Powles submits that public nudity is a clear form of public expression which is not prescribed by law; its restriction is not in pursuit of any of the aims set out in Article 10(2) and there is no pressing social need to restrict it. He goes on to argue that any restrictions are not proportionate to the stated aims, underlining that the reasons must be "relevant and sufficient" (*Buckley v UK* (1997) 23 EHRR 101 at para 77 and *Jersild v Denmark* (1995) 19 EHRR 1 at para 31): although his nakedness may be viewed by some as distasteful or unpleasant, it is a viewpoint to which he is entitled to give public expression such that a criminal sanction is a disproportionate means of addressing any social need.

19. Mr Penny, on the other hand, was not prepared to concede that Article 10 was engaged based on the fact that a conviction under s. 5 of the 1986 Act did not regulate or interfere with the appellant's right to express his views, to hold opinions or to receive or impart information and ideas but he noted that the point was presently before the European Court (in relation to an earlier incident involving Mr Gough) and, for the purposes of this case only, was prepared to proceed on the premise that it was

engaged. He pointed to the reasoning of the judge, which he adopted, and submitted that there was no burden on the Crown to prove that the prosecution was proportionate (see *DPP v Bauer* [2013] EWHC 634 (Admin) per Moses LJ at para 40); further, this was not a case of an individual who has been restricted in the exercise of "offensive speech" or whose ideas have been restricted (see *Redmond-Bate v DPP* [2000] HRLR 249 per Sedley LJ at para 20): the facts proved deliberate conduct which, at the least, constituted disorderly behaviour in a busy town centre in the middle of the day which, as the appellant was fully aware was likely to cause (and, in fact did) cause harassment, alarm and distress.

20. In the stated case, the judge concluded that being naked was a form of expression such that Article 10 was engaged but that there was a pressing social need for the restriction of his right to be naked in the context of this case. He went on (at paragraph 18):

> "(xii) Mr Gough was not prevented from being naked in certain public contexts where nudity is expected or tolerated. However, those adults and children in Halifax town centre on 25 October 2012 had no expectation of seeing Mr Gough naked and as such had no opportunity to avoid him until they had already seen him and decided to take avoiding action.
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> (xiii) The restriction imposed by s. 5 corresponds to this social need and the restriction is a proportionate response to that need.
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> (xiv) Given that this is a summary-only offence with a maximum penalty being a level 3 fine, that is a maximum fine of £1,000 subject to consideration of the means of the defendant ..., the prosecution for said offence was a proportionate response to the appellant's behaviour."

21. In my judgment, that analysis of the evidence and the law cannot properly be challenged; it was open to the district judge to reach these conclusions and, indeed, having regard to the evidence, it is difficult to see how he could have decided otherwise. Neither the facts that, on occasion, the police have helped the appellant, while naked, to leave urban areas (doubtless in order to avoid confrontation and potential disorder) and that they have on occasion declined to arrest or prosecute nor the reality that some people have not adversely reacted to his nudity or are not affected by it are not to the point. To say that the adverse reaction to the appellant's nudity is not his problem or the result of his behaviour (which is how the Appellant articulated it) is to ignore reality.

22. The five questions posed by the district judge all start with the words "did I err"; I answer each in the negative and would dismiss this appeal.

Mr Justice Openshaw:

23. I agree.