Neutral Citation Number: [2007] EWHC 237 (Admin)

Case No: CO/8492/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2007

Before :

LORD JUSTICE DYSON
And
MR JUSTICE STANLEY BURNTON

- -

Between :

Veronica Connolly	**Claimant**
- and -	
Director of Public Prosecutions	**Defendant**

- -
- -

Paul Diamond (instructed by **Messrs Mark Williams Associates**) for the Claimant
Mark Wall QC and Daniel White (instructed by Director of Public Prosecutions) for the Defendant

Hearing dates: 23rd January 2007

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Judgment

Lord Justice Dyson:

1. This is an appeal by way of case stated from a decision of His Honour Judge Cole sitting with magistrates at Coventry Crown Court on appeal from a decision of the justices for the Metropolitan Borough of Solihull, West Midlands on three informations preferred against Mrs Connolly by the DPP in respect of offences contrary to section 1(1)(b) and (4) of the Malicious Communications Act 1988 ("the 1988 Act").

2. So far as material, section 1 of the 1988 Act provides:

> "(1) Any person who sends to another person-
>
> (a) a letter or other article which conveys-
>
> (i) a threat; or
>
> (ii) information which is false and known or believed to be false by the sender; or
>
> (b) any other article which is, in whole or part, of an indecent or grossly offensive nature,
>
> is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.
>
> …
>
> (4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale."

3. The case against Mrs Connolly was that she had sent to three pharmacists "pictures of an aborted foetus which is (sic) indecent/grossly offensive with the purpose of causing distress or anxiety". On 6 October 2005, she was convicted on all three charges by the justices. Her appeal was dismissed by the Crown Court.

4. The Crown Court found the following facts:

> "5. The appellant during 2005 as alleged in the information, sent to various chemists in Solihull pictures of aborted foetuses. The appellant admitted that she had sent the pictures but maintained that such pictures were not indecent nor grossly offensive and that the purpose of sending them was not to cause distress or anxiety but merely to make a lawful protest and educate against the use of the 'Morning After Pill'.

6. The Appellant is a Christian of the Catholic denomination. She is a practising Christian and regularly attends her local Church. She believes that an unborn Baby is a child of God and abortion is a form of murder. She articulates [sic] the Repeal of the Abortion Act 1967. She believes that deformed foetuses should have additional protection from society.

7. In or about 2004, the Appellant commenced writing to pharmacists with photographs of aborted foetuses- having apparently been urged to do so by a newspaper; she would telephone some of the pharmacies prior to sending photographs to ensure that they stocked 'The Morning After Pill'.

8. All the letters appeared to have been opened by a Supervisor, Manager or Head Pharmacist. A more junior member of staff could open the post, and indeed one particular letter was opened by a member of staff whose relative had recently given birth to a still born child.

9. On the 10th February 2005, a complaint was received from Olton Pharmacy and the police attended. On 13th February 2005, the Appellant was arrested and taken to Solihull Police Station for questioning.

10. On the 13th July 2005, Mrs Connolly entered a plea of 'Not Guilty' at Solihull Magistrates Court. On 6th October 2005 Mrs Connolly was convicted of these offences contrary to the Malicious Communications Act 1988.

11. We found the following further facts:-

(a) The Appellant on each occasion sent the relevant letters which contained photographs which we found to be both indecent and grossly offensive.

(b) The Appellant sent such indecent/grossly offensive material (intending or with the purpose of) causing distress or anxiety to the recipients.

(c) Recipients of such material were actually offended by such material."

5. The case stated records the appellant's case in these terms:

"12. The Appellant's Case

(a) It was submitted on behalf of the Appellant that as current standards are so low the material did not therefore cross the threshold of being indecent or grossly offensive.

> (b) That the *Malicious Communications Act* should not apply to a lawful protest and to find otherwise would be a breach of the *European Convention of Human Rights* on issues pertaining to freedom of expression and in particular freedom of religious expression."

6. The following questions have been submitted by the Crown Court to this court:

> "a. Does the Malicious Prosecutions Act 1988 apply to the facts of this case;
>
> b. If the answer to question (a) is affirmative i) is the sending of pictures of aborted foetuses objectively 'indecent' or 'grossly offensive' and ii) does the Appellant satisfy the subjective elements of intending to cause distress or anxiety?
>
> c. Are the answers to the above questions affected by Articles 9 and 10 of the European Convention on Human Rights?"

Consideration of the issues without regard to the European Convention on Human Rights ("the Convention")

7. The genesis of the 1988 Act was the Law Commission Report on Poison Pen Letters Law Com No 147 (1985). The title of the report might give a misleading impression as to its scope. Its purpose was to recommend a new offence for any communication which is grossly offensive or indecent in nature sent for the purpose of causing anxiety or distress. It recommended that purely spoken communications made by one person to another without the intervention of any electrical, mechanical or other devices should not be covered. It noted that it was already an offence to send communications of the defined nature by telephone, telex or telegram. The report also recommended that articles which were grossly offensive or indecent, but which did not convey a message or information, should be subject to the new offence. At para 3.3 of the report, the example was given of an envelope containing human excrement being pushed through the letter-box of a private house. The recommendations of the Law Commission were substantially reflected in the 1988 Act.

8. Mr Diamond submits that the images sent by Mrs Connolly were neither indecent nor grossly offensive. He goes so far to say that, as a matter of law, a communication cannot be grossly offensive or indecent within the meaning of the 1988 Act if it is political or educational in nature. Alternatively, the adjective "grossly" implies a high threshold of offensiveness which it was not open to the crown court to find was crossed on the facts of this case. As regards indecency, he submits that the images were plainly not indecent: they did not offend against current standards of propriety. He refers to the decision of *R v Stanley* [1965] 2 QB 327, 333E where Lord Parker CJ sitting in the Court of Criminal Appeal with Marshall and Widgery JJ said:

> "This court entirely agrees with what Lord Sands there said. The words "indecent or obscene" convey one idea, namely, offending against the recognised standards of propriety,

> indecent being at the lower end of the scale and obscene at the upper end of the scale".

9. In my judgment, the phrase "indecent or grossly offensive" does not bear some special meaning such that communications of a political or educational nature fall outside its ambit. It is quite impossible to extract this limitation from the phrase itself or the context in which it appears in the statute. A person who sends an indecent or grossly offensive communication for a political or educational purpose will not be guilty of the offence unless it is proved that his purpose was also to cause distress or anxiety. In other words, the nature of the communication may shed light on the defendant's mens rea. But I do not see how the fact that a communication is political or educational in nature can have any bearing on whether it is indecent or grossly offensive.

10. It seems to me that the appellant faces an insuperable obstacle in this part of the case. The words "grossly offensive" and "indecent" are ordinary English words. They are not used in a special sense in section 1 of the 1988 Act. This is an appeal by way of case stated and it can only succeed if the appellant can identify a material error of law. On well established domestic law principles, that means that Mrs Connolly must show that the decision below that the photographs were indecent and grossly offensive was one which no court acquainted with the ordinary use of language could have reached: see per Lord Reid in *Cozens v Brutus* [1973] AC 854, 861 and Lord Hoffmann in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 paras 23-25.

11. We have seen the photographs. They are close-up colour photographs of dead 21 week old foetuses. The face and limbs are clearly visible. One of them is a close-up showing an abortion taking place. They are shocking and disturbing. That is why Mrs Connolly sent them to the pharmacists. In my view, it is impossible to say that no reasonable tribunal could have concluded that these images were grossly offensive within the meaning of section 1 of the 1988 Act. With more hesitation, I would say the same of "indecent". I did not understand Mr Diamond to challenge the court's finding that the photographs were sent for the purpose of causing distress or anxiety. In any event, it is clear that the court was entitled to make this finding on the facts of this case.

12. I conclude, therefore, that if the Convention is left out of account, this appeal must be dismissed. I shall consider the specific questions submitted by the crown court later in this judgment.

Consideration of the issues in the light of the Convention

13. Mr Diamond submits that, (i) by sending the photographs to the pharmacists, Mrs Connolly's rights under article 9 of the Convention (freedom of thought, conscience and religion) and/or article 10 (freedom of expression) were engaged; (ii) a prohibition on the sending of the photographs would interfere with her rights under article 9(1) and/or 10(1) which is not justifiable under article 9(2) or 10(2); so that (iii) section 1 of the 1988 Act can and should be construed as not applying to the sending of the photographs in the present case. He relies on section 3 of the Human

Rights Act 1998 ("HRA"): "so far as it is possible to do so, primary legislation…must be read and given effect in a way which is compatible with the Convention rights". He does not seek a declaration under section 4 of the HRA that section 1 of the 1988 Act is incompatible with articles 9 or 10 of the Convention.

14. Mr Mark Wall QC accepts that article 10 is engaged. He is right to do so. The sending of the photographs was an exercise of the right to freedom of expression. It was not the mere sending of an offensive article: the article contained a message, namely that abortion involves the destruction of life and should be prohibited. Since it related to political issues, it was an expression of the kind that is regarded as particularly entitled to protection by article 10.

15. Mr Wall submits, however, that the interference with Mrs Connolly's freedom of expression is justified as being "for the protection of health" and/or "for the protection of the rights of others" within the meaning of article 10(2).

Article 10

16. Article 10 provides:

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

17. The meaning of section 3 of the HRA has been considered by the House of Lords on a number of occasions. It is perhaps sufficient to refer to what Lord Nicholls of Birkenhead said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557:

> "30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the

legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to

> make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

18. In the light of this guidance, I consider that it is possible to interpret section 1 of the 1988 Act in a way which is compatible with article 10 of the Convention. This can be done by giving a heightened meaning to the words "grossly offensive" and "indecent" or by reading into section 1 a provision to the effect that the section will not apply where to create an offence would be a breach of a person's Convention rights, ie a breach of article 10(1), not justified under article 10(2). Since the 1988 Act also applies to the sending of articles which do not engage any article of the Convention (for example, the sending of excrement in the post), it must follow that effect will be given to section 1 differently according to the nature of the communication that the article represents. The same article may be an expression in one case, and not an expression in another. To the eyes of someone schooled in the orthodox English domestic law rules of statutory interpretation, this seems quixotic. But in my view, it is the inevitable consequence of section 3 of the HRA.

19. Prima facie, therefore, to convict Mrs Connolly of sending the photographs is a breach of her rights under article 10(1) unless it can be justified under article 10(2). It is to article 10(2) that I now turn. In *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 para 23, Lord Bingham of Cornhill said:

> "It is plain from the language of article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277-278, para 62."

20. It seems that there was little or no analysis during the argument in the court below of the application of article 10(2). The case stated contains no findings which indicate how the court approached the article 10 issue or why it decided, as it must impliedly have done, that the conviction of an offence contrary to section 1 of the 1988 Act did not amount to an unjustified interference with Mrs Connolly's article 10(1) right. I shall return to the significance of these shortcomings later in this judgment.

21. Lord Bingham explained that the first question is whether the interference is "prescribed by law". Since the interference derives from the 1988 Act as interpreted by the courts, it is sufficiently precise and foreseeable to meet this requirement. The

second question is whether the interference is in furtherance of one of the legitimate aims set out in article 10(2). If it does not further one of these aims, the interference will constitute a breach of article 10(1). If it does further one or more of these aims, the third question is whether the interference is necessary in a democratic society.

22. Would the conviction of Mrs Connolly further a legitimate aim? As I have said, Mr Wall submits that it would protect the health of others and/or protect the rights of others. There was discussion during the argument before us as to whether, by sending the photographs to the pharmacists, Mrs Connolly was putting anyone's health at risk. It is not clear whether this suggestion was made in the court below. In my view, however, that is not the relevant question. Nor is it relevant to ask whether, in sending the photographs, Mrs Connolly's purpose was to injure the health of the recipients. The relevant question is whether the purpose of the *statute* is the protection of the health of those to whom indecent or grossly offensive letters or other articles are sent. The mens rea of the offence is that the letter or other article be sent for the purpose of causing distress or anxiety to the recipient. There is no requirement that the purpose of the sender should be to damage the health of the recipient. It is true that some psychologically vulnerable persons who suffer distress or anxiety may, as a result of their distress or anxiety, suffer injury to their health. But most persons who suffer distress or anxiety in consequence of their receiving indecent or grossly offensive material through the post do not suffer injury to their health. It is clear from the language of section 1 of the 1988 Act that its aim is to protect persons from the risk that they will suffer distress and anxiety if indecent or grossly offensive letters or other articles are sent to them, no more and no less. I reject Mr Wall's submission that the aim of the statute is the protection of health.

23. What about "for the protection of the rights of others"? Little case-law was cited to us as to what this phrase means. In *Chassagnou v France* (1999) 29 EHRR 615, 687 para 113, the ECtHR said that the "rights of others" included, but were not restricted to, the Convention rights of others. They said:

> "It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right".

24. In *Jersild v Denmark* (1994) 19 EHRR 1, the ECtHR held that there had been a violation of article 10 when three youths were prosecuted for taking part in a television programme about racism in Denmark. The youths made racist remarks during the course of their television interview. The ECtHR found that the programme was not made for the purpose of propagating racist views. The court acknowledged that the remarks would have been "more than insulting to the targeted groups" (para 35) and was clearly of the view that the prosecution by the Danish authorities was aimed at the protection of the "rights of others" ie the victims of racist remarks. The prosecution was to further this legitimate aim. But the court concluded that it was not necessary in a democratic society. This can be seen clearly at para 37:

> "Having regard to the foregoing, the reasons adduced in support of the applicant's conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means

> employed were disproportionate to the aim of protecting "the reputation or rights of others". Accordingly the measures give rise to a breach of Article 10 of the Convention".

25. The protection of the right not to be insulted by racist remarks was a legitimate aim within article 10(2). It was a "right of others" which, by implication, must have been considered to be an "indisputable imperative" (to use the language of *Chassgnou*). The state's attempt to invoke article 10(2) failed at the third stage of the argument.

26. I have found assistance on the question whether the prosecution of Mrs Connolly was to further the protection of the rights of others in *Regina (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185. That case concerned the decision by the BBC not to transmit a party political broadcast which showed an abortion and images of aborted foetuses on grounds of taste and decency, since they would be offensive to public feeling and thus contravene, inter alia, a provision of the Broadcasting Act 1990. The Pro-Life Alliance accepted that the offensive material restriction was not in itself an infringement of Pro-Life Alliance's article 10 right. Lord Scott of Forscote said at para 91:

> "It was not contended by counsel for the Alliance that a restriction barring the televising of a programme likely to be offensive to public feeling was, per se, incompatible with article 10. Nor should it have been. The reference in article 10(2) to the "rights of others" need not be limited to strictly legal rights the breach of which might sound in damages and is well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the privacy of their homes had switched on the television set and been confronted by gratuitously offensive material."

27. Lord Walker of Gestingthorpe made the same point at para 123:

> "Nevertheless the citizen has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home. It is not necessary to consider whether that is a Convention right (Mr Pannick made a brief reference to article 8, but did not seek to develop the point). Whether or not it is classified as a Convention right, it is in my view to be regarded as an "indisputable imperative" in the language of the European Court of Human Rights in *Chassagnou v France* (1999) 29 EHRR 615, 687, para 113.
>
> …."

28. In my judgment, the persons who worked in the three pharmacies which were targeted by Mrs Connolly had the right not to have sent to them material of the kind that she sent when it was her purpose, or one of her purposes, to cause distress or anxiety to the recipient. Just as members of the public have the right to be protected from such material (sent for such a purpose) in the privacy of their homes, so too, in

general terms, do people in the workplace. But it must depend on the circumstances. The more offensive the material, the greater the likelihood that such persons have the right to be protected from receiving it. But the recipient may not be a person who needs such protection. Thus, for example, the position of a doctor who routinely performs abortions who receives photographs similar to those that were sent by Mrs Connolly in this case may well be materially different from that of employees in a pharmacy which happens to sell the "morning after pill". It seems to me that such a doctor would be less likely to find the photographs grossly offensive than the pharmacist's employees. To take a different example, suppose that it were Government policy to support abortion. A member of the Cabinet who spoke publicly in support of abortion and who received such photographs in his office in Westminster might well stand on a different footing from a member of the public who received them in the privacy of his home or at his place of work.

29. It seems to me that the position of the employees of the three pharmacists who were targeted by Mrs Connolly for the specified statutory purpose was closer to that of ordinary members of the public than that of the doctor or the politician in the two examples that I have given. In my view, the fact that they are employed by pharmacists that sell the "morning after pill" is not of itself sufficient to deny to them the right to be protected from receiving grossly offensive photographs of abortions at their place of work, where the photographs are sent for the purpose of causing distress of anxiety. I would hold that the right not to receive such material when sent for such a purpose is a "right of others" within the meaning of article 10(2) of the Convention.

30. The third stage of the article 10(2) enquiry is to consider whether it has been shown convincingly that the prosecution of Mrs Connolly in furtherance of the protection of the rights of others was "necessary in a democratic society". As Lord Scott pointed out at para 93 of his speech in *Pro-Life Alliance*, this issue is fact-sensitive. In that case, he identified six facts that were relevant to the exercise. The court has to determine whether the interference at issue is proportionate to the legitimate aim pursued and whether the reasons adduced to justify the interference are relevant and sufficient. In carrying out the balancing exercise, the court must take into account the fact that freedom of expression is one of the essential foundations of a democratic society and that "it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population": see *Muller v Switzerland* (1988) 13 EHRR 212 para 33.

31. There is nothing in the case stated to indicate that the crown court considered whether the prosecution of Mrs Connolly was necessary in a democratic society. It seems to me that the facts that are relevant to this exercise include the following: (i) Mrs Connolly is opposed to abortion; (ii) by sending the photographs, she was expressing her strongly held views about abortion; (iii) the issue of whether abortion should be prohibited is one of public importance; (iv) the photographs were (I assume) of real cases and not fictitious; (v) they were sent to people who were likely to be shocked and upset by receiving them in order to cause them distress and anxiety; (vi) they were sent to persons who had not taken up a public position on the abortion issue and who, unlike, for example, politicians, could have no influence on what is ultimately a political debate; (vii) disseminating material of this kind to a number of pharmacists because they sell the "morning after pill" is hardly an effective way of

promoting the anti-abortion cause. Although I respect Mrs Connolly's opinion that the effect of the morning after pill is not different in kind from that of an abortion after, say, 21 weeks, I believe that most people would say that they are fundamentally different.

32. I have had to consider whether to remit this fact-sensitive aspect of the case to the crown court for further consideration. This is not a course that was suggested by either party during the course of argument. In my view, it is not necessary to do adopt it. This court is in as good a position as the crown court to decide whether the interference with Mrs Connolly's article 10(1) rights is proportionate to the legitimate aim pursued. I would hold that it has been convincingly shown that the conviction of Mrs Connolly on the facts of this case was necessary in a democratic society. Her right to express her views about abortion does not justify the distress and anxiety that she intended to cause those who received the photographs. Of particular significance is the fact that those who work in the three pharmacies were not targeted because they were in a position to influence a public debate on abortion. The most that Mrs Connolly could have hoped to achieve was to persuade those responsible in the pharmacies for their purchasing policies to stop selling the "morning after pill". But it was always likely that the photographs would be seen by persons who had no such responsibility and it was by no means certain that they would be seen by the persons who had that responsibility. In any event, even if the three pharmacies were persuaded to stop selling the pill, it is difficult to see what contribution this would make to any public debate about abortion generally and how that would increase the likelihood that abortion would be prohibited.

33. I would, therefore, dismiss the appeal in so far as it is based on article 10 of the Convention.

Article 9

34. Article 9 provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others."

35. Mr Diamond submits that religious speech is a particular type of speech. It is "sincere moral speech" that many find offensive for a variety of reasons. He relies on the majority judgment in *Kokkinakis v Greece* 17 EHRR 397, para 31

> "31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious

> dimension; one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching,' failing which, moreover, 'freedom to change [one's] religion or belief,' enshrined in Article 9, would be likely to remain a dead letter."

36. The importance of freedom of thought, conscience and religion is not in doubt. But I can find no support in the decision in *Kokkinakis* for Mr Diamond's submission that freedom of religious expression is of a higher order and is regarded by the ECtHR as more worthy of protection that the freedom of secular expression enshrined in article 10. I am prepared to assume that, because she is a devout Roman Catholic, Mrs Connolly was exercising her freedom of thought, conscience and religion when she sent the photographs to the three pharmacies. But it seems to me that article 9(2) is as fatal to her appeal as is article 10(2) and for precisely the same reasons.

Conclusion

37. It follows that I would dismiss this appeal. It will be apparent from what I have said that I do not consider that the three questions submitted to this court are as focused on the real issues as they should have been. It makes little sense to ask whether the 1988 Act applies to the facts of this case. The real issue is whether, on the facts as found, Mrs Connolly was guilty of an offence contrary to section 1 of the 1988 Act. That issue in turn raises the question whether she was guilty (i) on the basis of the statute interpreted without regard to the Convention, and (ii) on the basis of statute interpreted having regard to the Convention. For the reasons that I have given, I would answer each of these questions in the affirmative.

Stanley Burnton J:

38. I agree.