Statement of the facts and of the alleged violations of the convention and of the relevant arguments

1. Simon Sheppard was the web master of a web site called www.heretical.com ("the Site").

2. The Site contains a mass of material on many different subjects, notably Sheppard's controversial opinions on race relations.

3. His co-accused, Whittle, *alias* Luke O'Farrell, was a prolific contributor to the site in 2005 and 2006.

4. At all material times, Sheppard lived in Hull (England) and Whittle in Preston (England), but the Site is hosted on a web server at Torrance, California.

5. Complaint was made to the Police of a publication in hard copy form bearing Sheppard's post office box number, and, incidentally, the URL[1] of the Site.

6. Following an investigation, the Police "captured" an electronic copy of the Site.

7. Sheppard was arrested and charged with fifteen counts under s. 19 (1) (b) Public Order Act 1986 three arising out of "hard copy" publications and twelve ("the internet counts") out of articles posted to the Site, five of which (nos. 4 to 8) Whittle

[1] uniform resource locator, essentially, the internet address

had written. They are original material, and cannot be found elsewhere on the world wide web ("the Web").

8. Sheppard and Whittle were both convicted on five of the internet counts[2]. Never before (so far as any of the counsel in the case know) has anyone been convicted under the Public Order Act 1986 for a publication on a web site hosted on a server situate in a foreign country, in which the publication is undoubtedly legal.

9. Of the remaining internet counts, Sheppard was also convicted on nos. 9 and 10. They arose out of the republication in electronic form of two cartoons by Robert Crumb[3], who is one of the best known cartoonists in the world. His *oeuvre* enjoys world wide fame and an enormous dissemination in both electronic and hard copy form.

10. The very cartoons that were the subject matter of counts 9 and 10 circulate in hard copy form in main stream bookshops all over England (copies were shown to the jury), and can readily be purchased on line on the web site www.amazon.co.uk. It is not necessary to go to the American site www.amazon.com to purchase them. Sheppard was nevertheless convicted for republishing well known Crumb cartoons that otherwise circulate freely within England (and indeed the United Kingdom).

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[2] nos. 4 to 8

[3] (30th August 1943 -)

11. Crumb himself lives and works in France, and has never been prosecuted for drawing the cartoons complained of.

12. Count 12 (on which Sheppard was convicted) arose out of the republication in electronic form of two articles by George Lincoln Rockwell[4], an American Nazi leader who enjoyed considerable notoriety in his day. Rockwell's writings are also widely diffused on the Web.

13. It was common ground at trial that none of the material charged by the internet counts is illegal in the U. S. A., or the State of California.

14. On the contrary, the U.S. Department of Justice informed the CPS that it enjoys the highest degree of constitutional protection under the First Amendment[5] to the Constitution of the U. S. A., and that it would be "contrary to the essential interests" of the U. S. A. to assist the prosecution.

15. Similar provisions are included in the Constitution of the State of California[6].

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[4] (9th March 1918 to 25th August 1967)

[5] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[6] California Constitution, Article 1, Declaration of Rights, Sec. 2. (a) "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Statutory framework

16. Section 19 (1) (b) Public Order Act 1986 provides (so far as material) that:

> "(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—
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> > (a) he intends thereby to stir up racial hatred, or
> >
> > (b) having regard to all the circumstances, racial hatred is likely to be stirred up thereby.
>
> "(3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public."

17. Section 29 POA 1986 gives a non-exhaustive definition of "written material" as including “any sign or other visible representation”.

18. Section 47 POA 1986 provides that:

> “(1) The provisions of this Act extend to England and Wales except so far as they—
>
> > (a) amend or repeal an enactment which does not so extend, or

(b) relate to the extent of provisions to Scotland or Northern Ireland.

"(2) The following provisions of this Act extend to Scotland—

in Part I, section 9 (2) except paragraph (a);

in Part II, sections 12 and 14 to 16;

Part III;

Part V, except sections 38, F1. . ., 40(4), subsections (1) and (3) of this section and any provision amending or repealing an enactment which does not extend to Scotland.

"(3) The following provisions of this Act extend to Northern Ireland—

sections 38, 41, this subsection, and section 43".

19. There is no statutory definition of "publication".

Chronology of proceedings

20. Following Police raids on Sheppard's home on 30th March 2005 and 12th April 2006, Sheppard was brought before Beverley and the Wolds Magistrates Court on 29th September 2006, when he was committed for trial at the Crown Court.

21. On 6th September 2007 at Leeds Crown Court HHJ Grant (in substance) ruled against Sheppard after three days of argument on a plea to the jurisdiction.

22. The trial began on Monday, 2nd June 2008. On Friday, 11th July 2008 Sheppard (who was present in court, as was his co-accused, Stephen Whittle) was convicted on nine counts (nos. 4, 5, 7, 8, 9 and 12 to 15) unanimously. Whittle (who was jointly charged with Sheppard on five of the counts) was convicted on four (nos. 4, 5, 7 and 8) of the five counts with which he was charged.

23. On Sunday, 13th July 2008, Sheppard and Whittle left England for the Irish Republic, where they boarded an aeroplane bound for Los Angeles International Airport. On arrival at Los Angeles, they claimed political asylum in the United States of America. They were immediately placed in detention by the U.S. Immigration and Naturalisation Service.

24. On Monday, 14th July 2008 Sheppard was convicted in his absence on two further counts (nos. 6 and 10) by a majority of ten to one (the jury having been reduced to eleven at an early stage in the trial). Whittle was also convicted on count no. 6.

25. The jury were unable to agree on the remaining counts. The prosecution decided to seek a re-trial of Sheppard on counts 1, 2, 3, 16, 17 and 18 of the re-re-amended indictment. The re-trial took place at Leeds before HHJ Grant over thirteen days between 5th December 2008 and 8th January 2009.

26. At the re-trial, Sheppard was convicted on all the counts except no. 2, in respect of which he was acquitted on the judge's direction, after some of the exhibits were found to be missing, so that continuity could not be proved.

27. In April 2009, U. S. Immigration Judge Rose Peters rejected the claims of Sheppard and Whittle for asylum. Neither Sheppard nor Whittle appealed, so both were returned to England on 17th June 2009, and brought before HHJ Grant at Leeds Crown Court on the afternoon of that day. They were remanded in custody and sentenced on 10th July 2009 to terms of imprisonment of four years and ten months and two years and four months respectively (four months of which in each case related to Bail Act 1976 offences, in respect of which they pleaded guilty).

28. Sheppard applied for leave to appeal within the time limited after conviction. Rafferty J refused leave on the papers on the sole ground that Sheppard had fled the jurisdiction, but after his return, the full Court (Richards LJ, Jack J and HHJ Baker QC) granted leave on 14th July 2009, after a half day long hearing. The appeal against conviction only concerned the internet counts.

29. The appeal was heard by Scott Baker LJ, Penrey-Davey J and Cranston J on 26th and 27th November 2009, and dismissed on 29th January 2010.

30. On 17th March 2010 the Court of Appeal certified three points of law, but refused leave to appeal further.

31. On 17th June 2010 the Supreme Court of the United Kingdom ("SCUK") refused leave to appeal.

32. On 22nd June 2010 the decision of the SCUK was communicated to Sheppard's counsel.

Statement of alleged violations of the Convention and/or Protocols and of the relevant arguments

33. Article 7 of the Convention provides that:—

> "No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations."

34. HHJ Grant's reasoning is set out at pp. 5-9 of his ruling. HHJ Grant dealt with some of Sheppard's arguments fully. Others however are treated very briefly, even opaquely.

35. First, HHJ Grant found that[7]:

> "what is displayed on the computer user's screen is, first of all, in writing, or written, and secondly . . . electronically stored data which is transmitted comes within the definition of written material because it is written material stored in another form."

36. Next, HHJ Grant found that the POA "is not limited to England and Wales[8]", "that the material which is complained of was prepared in England and Wales[9]", that it "was uploaded on to the web site in[10] England and Wales[11]" and that it "was made generally accessible and available in England and Wales" and any *novus actus* in California was "that of an agent acting on behalf of [Sheppard][12]".

37. So, in the judge's view "a substantial measure of the activities constituting a crime took place in England[13]", and it would not be a breach of comity to try them here.

38. Finally, he disposed of the argument that there cannot be a publication without a publishee by saying that "the difference

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[7] Ruling, page 5, lines 11-14

[8] Ruling, Page 6, line 18

[9] Ruling, Page 8, lines 18-19

[10] *Sic, sed quaere* whether "from" would not be more accurate?

[11] Ruling, Page 8, line 20

[12] Ruling, Page 9, lines 1-2

[13] Ruling, Page 9, lines 4-5

between this criminal offence and the tort of libel is such, or the differences are such, that the analogy fails".

39. Scott Baker LJ delivered the only judgment in the Court of Appeal. He agreed with HHJ Grant that publication in electronic form constitutes "written material" (para. 29) that the POA extends beyond England and Wales (para. 31) that the "substantial measures" test governs the case (para. 33), that publication consists of making the material "generally accessible to all" (para. 34) and that there is no need for the prosecution to prove that anyone actually read it (para. 35).

40. None of the substantial measures taken in England, whether writing, editing, collating or uploading the material to the foreign server, is of itself unlawful in England.

41. Publishing the material to the Web is not merely lawful in the United States of America (and the State of California), but enjoys the highest degree of constitutional protection under both the Federal and State constitutions.

42. The Court of Appeal has accordingly found that a series of actions, each of which was of itself lawful in the country where it was done, together constitute a criminal offence.

43. The leading cases do not explicitly support the view that it is a criminal offence to take substantial measures in the jurisdiction, not unlawful in themselves, towards the doing of a constitutionally protected act in a foreign country.

44. There are essentially three jurisprudential theories about publications on the internet.

45. The first is that a publication is only cognisable in the jurisdiction where the web server upon which it is hosted is situate (described in *Smith on Internet Law and Regulation*[14] as the "country of origin" theory[15]).

46. The second is that a publication on the internet is cognisable in any jurisdiction in which it can be downloaded, from Afghanistan to Zimbabwe (described in *Smith* as the "country of destination" theory[16]).

47. The third is that, while a publication is always cognisable in the jurisdiction where the web server upon which it is hosted is situate, it is also cognisable in a jurisdiction at which the publication is targeted. *Smith* calls this theory the "directing and targeting[17]" theory; see further "Directing and Targeting - the answer to the Internet's Jurisdiction Problems?" G. J. H. Smith, *Computer Law Review International* 5/2004, pp. 145 *& seq.*

48. Each of these three theories has its advocates. The arguments in favour of country of origin are summarised (very cogently, it

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[14] 4th ed., 2007 *("Smith")*

[15] at para. 12-034, p. 938

[16] at para. 12-036, p. 940

[17] at para. 12-038, p. 940

is submitted) at para. 12-035 of *Smith*. Those arguments are adopted.

49. What is more, the European Community's Electronic Commerce Directive[18] has adopted the test of the place of establishment of the service provider, that is to say, a country of origin test. It would be strange if forum in a case engaging civil liability for fraud committed in the course of internet commerce is localised where the web server is situate, while criminal liability for the same fraud is localised somewhere else (or indeed, everywhere, which is what HHJ Grant's ruling appears to signify).

50. The real question, which the English Courts have avoided, is whether the publication of the material on an American web server is illegal merely because the material can (relatively) easily be accessed by users of the internet in England and Wales (a country of destination test), even though the *situs* of the web server is in California (the country of origin), and the Crown did not take upon itself the burden of showing targeted publication.

51. Country of destination should be rejected as the test. Its adoption involves the assertion of simultaneous jurisdiction by every country in the world over every freely available web site in the world, even though the site is quite legal in the country of origin.

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[18] 2003/31/EC

52. If the Crown's case were well founded, it must follow that publication in, say, Torrance, Ca., by an American citizen of a web page that infringes s. 19 POA 1986 is indictable in England, merely because it can be downloaded in England, regardless whether it is downloaded in England, and even though it is lawful under American law. Such an assertion of "long arm" jurisdiction would be grotesquely extravagant.

53. Accordingly, there has been a violation of Article 7.

54. Article 10 of the Convention provides that:—

> "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."

55. The restrictions permitted under article 10 (2) are to be narrowly construed "against the background of a presumption

against restriction" (Starmer, *European Human Rights Law*, Legal Action Group, 1999, para. 4.62, p. 178: paras. 4.56 to 4.62 of this work are adopted as part of D2's argument).

56. The prosecution made no attempt to show that anyone at all, anywhere in the world, has ever read any of the web pages charged by the internet counts. Sheppard has been sentenced to a long term of imprisonment without the prosecution showing any reason within Article 10 (2) for placing limits on his freedom of expression. That cannot be right.

57. What is more, HHJ Grant acceded to the Crown's submission that the truth of what Sheppard wrote is irrelevant; *Reg. v. Birdwood*[19], a ruling that Scott Baker LJ upheld on appeal.

58. It can never be a proportionate response compliant with Article 10 (2) to hold that the truth of published words is no defence.

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[19] (Court of Appeal, 11th April 1995)

59. It is a scandalous violation of Article 10 that the English Courts should hold that the truth of published words is no defence.

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