Hilary Term
[2022] UKSC 2
On appeal from: [2020] EWHC 798 (Admin)

JUDGMENT

Pwr (Appellant) v Director of Public Prosecutions (Respondent)
Akdogan and another (Appellants) v Director of Public Prosecutions (Respondent)

before

Lord Lloyd-Jones
Lady Arden
Lord Hamblen
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
26 January 2022

Heard on 18 November 2021

Appellants (Rahman Pwr, Ismail Akdogan and Rotinda Demir)
Joel Bennathan QC
Jude Bunting
(Instructed by Birnberg Peirce Ltd and Morgan Has Solicitors (Stoke Newington))

Respondent
Louis Mably QC
Dan Pawson-Pounds
(Instructed by CPS Appeals and Review Unit)

LADY ARDEN, LORD HAMBLEN AND LORD BURROWS: (with whom Lord Lloyd-Jones and Lady Rose agree)

1 Introduction

1.
This appeal concerns whether section 13 of the Terrorism Act 2000 ("the 2000 Act") creates an offence of strict liability and, if it does, whether it is incompatible with article 10 of the European Convention on Human Rights ("the Convention").

2.
Section 13 provides that it is a criminal offence for a person in a public place to carry or display an article “in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation”. The offence is summary-only and carries a maximum sentence of six months imprisonment.

3.
On 3 September 2018, the three appellants, Mr Pwr, Mr Akdogan and Mr Demir, were convicted in the Westminster Magistrates’ Court of a section 13 offence for carrying a flag of the Kurdistan Workers Party (the Partiya Karkerên Kurdistanê - “the PKK”), an organisation proscribed under the 2000 Act. This occurred during a demonstration in central London on 27 January 2018 against the perceived actions of the Turkish state in Afrin, a town in north-eastern Syria. Mr Pwr and Mr Akdogan were given three-month conditional discharges. Mr Demir received an absolute discharge.

4.
The appellants brought appeals against their convictions to the Crown Court which were heard on 4-6 February 2019 before HHJ Bartle QC sitting at Southwark Crown Court with two lay magistrates. At the conclusion of the prosecution case the court rejected applications of no case to answer made on the basis that under section 13 the prosecution was required but had failed to prove mens rea in relation to each appellant. The court held that section 13 was a strict liability offence.

5.
In a judgment given on 8 May 2019 the Crown Court found the section 13 offences to be proved.

6.
On the application of the appellants, the Crown Court stated a case by which the High Court was asked to decide two questions:

“(1) If section 13 of the Terrorism Act 2000 creates an offence of strict liability.

(2) If section 13 of the Terrorism Act 2000 creates an offence of strict liability, is that compatible with article 10 of the European Convention on Human Rights?”

7.
The appeal by way of case stated was heard by the Divisional Court on 16 January 2020. In its judgment of 3 April 2020 ([2020] EWHC 798 (Admin); [2020] 1 WLR 3623) the Divisional Court (Holroyde LJ, giving the leading judgment, with which Swift J agreed) answered both questions affirmatively and dismissed the appeals. The Divisional Court refused permission to appeal but certified the following questions as points of law of general public importance pursuant to section 1(2) of the Administration of Justice Act 1960:

“(1) Is the offence created by section 13 of the Terrorism Act 2000 an offence of strict liability?

(2) If so, is it compatible with article 10 of Schedule 1 of the Human Rights Act 1998 for the offence created by section 13 to be one of strict liability?”

8.
Permission to appeal was granted by a panel of the Supreme Court on 6 November 2020.

2 The factual background

9.

This is fully set out in the case stated and is summarised at paras 2 to 8 of the judgment of the Divisional Court.

10.
In outline, the PKK was launched in 1984. It was proscribed by the United Kingdom as a terrorist organisation in March 2001 and has remained proscribed since that date. The PKK is also defined as a terrorist organisation by (1) the European Union (since 2002), (2) the United States of America, (3) the Netherlands, (4) Spain, (5) Austria, (6) Germany, (7) Canada), (8) Australia, (9) New Zealand, and (10) Turkey.

11.
The three appellants took part in a demonstration in central London on 27 January 2018 against the perceived actions of the Turkish state. The protesters assembled at around 12.30 outside the BBC at Langham Place. An assembly of flags was present while speeches were given before the march set off. The march proceeded down Regent Street to Piccadilly Circus and then on to Whitehall where the protest continued outside Downing Street.

12.
The evidence of PS Rooney was that: (1) he had been briefed about PKK flags; (2) he saw Mr Pwr and Mr Akdogan carrying a flag and considered each was showing support by carrying a PKK flag; (3) he heard the chanting: "We are PKK, we are PKK"; (4) neither Mr Pwr nor Mr Akdogan were involved in the chanting; (5) Mr Pwr was compliant when stopped; members of the march assisted as Mr Pwr did not speak English; (6) Mr Pwr did not say anything in support of the PKK; and (7) Mr Demir was stopped after the march.

13.
The evidence of PC Bray was that: (1) he had attended a briefing before the march on the police role as evidence gatherers, looking for people with PKK flags; and (2) he saw Mr Demir and his view was that he was supporting the PKK by waving the flag.

14.
Evidence was also given by Michael Stephens, an expert from the Royal United Services Institute. His evidence was that: (1) the flags which each defendant was carrying was a PKK flag which it adopted as its flag in 2005; (2) there are two versions of the flag; (3) there is no ambiguity in the organisations represented by the PKK flag; (4) the vast majority of observers of a Turkish / Kurdish background would recognise these flags as those of the PKK and know that this had been designated as a terrorist organisation; this would be particularly true of those politically aware enough to attend rallies of this nature; (5) given the plethora of political parties with three letter acronyms that exist in the Kurdish political space, Kurdish political parties make themselves more readily identifiable by the symbols and flags they adopt; as such, the adoption of flags and pictures of ideological forbears is central to the expression of political loyalty in Kurdistan; (6) many attendees at demonstrations of this type have chosen not to fly such flags; and (7) those at a march can express their sympathy by using flags which are not PKK flags.

15.
The Crown Court was sure that each appellant carried a flag in such a way or in such circumstances as to arouse reasonable suspicion that he was a member or supporter of the PKK for the following reasons:

“First, each defendant was carrying the same PKK flag for a prolonged period: (1) Mr Pwr for over two hours, from 12:54 (Langham Place) to 14:55 (Piccadilly Circus), via Regent Street (14:34 and 14:42); (2) Mr Akdogan for over two hours, from 13:23 at the earliest (Langham Place) to some time before his arrest at 16:32; (3) Mr Demir was holding the flag aloft in Whitehall for a continuous period of at least five minutes (between 15:43 and 15:48).

Second, in respect of all three defendants: (1) He was part of a highly visible demonstration in central London; (2) The flag he was carrying was unfurled, held aloft and, on occasion, waved; in the case of Mr Demir, vigorously at 10:24, 12:20 and 13:20 of the timeline; (3) The flag that each was carrying was different from the vast majority of other flags at the rally.

Third, all three defendants looked up at the flag that he was carrying at the following times in the timeline: (1) Mr Pwr at 02:12, 02:44 and 03:14; (2) Mr Akdogan at 06:15, 06:27, 07:24 and 08:06; (3) Mr Demir at 10:32, 10:38, 10:44 and 10:59.

Fourth, as to Mr Pwr, (1) At 12.20, he took a ‘selfie’ image of himself carrying the flag, with the rally in the background; (2) His body language throughout the footage demonstrated pride in holding the flag; (3) At 01.33 he made a ‘V’ for victory gesture whilst carrying a PKK flag.

Fifth, the most natural and likely reason for a person to display a flag at a public rally is to demonstrate support for the organisation represented by that flag, and any objective, informed and reasonable bystander witnessing the conduct of the three defendants would have had a reasonable suspicion that he was a member or supporter of that organisation.”

16.
Consistent with the dismissal of the submissions of no case to answer, the Crown Court made no findings as to: (1) whether the appellants knew what the flags were; or (2) what their intention had been in carrying them.

3 The legislative framework

17.
Section 13 is contained within Part II of the 2000 Act (sections 3-13), under the heading “Proscribed Organisations”. Sections 3-10 make provision for a scheme of proscription in relation to organisations concerned in terrorism. Sections 11-13 create offences in relation to such organisations. The offences under sections 11 and 12 are indictable and, at the relevant time, carried a maximum term of imprisonment of ten years (subsequently increased, for offences committed after 29 June 2021, to 14 years). The offences under section 13 are summary only with a maximum term of imprisonment of six months.

18.
Section 11(1)-(2) provides:

“ **11. Membership**

(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) It is a defence for a person charged with an offence under subsection (1) to prove - (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.”

19.
At the material time, section 12(1)-(4) provided:

“ **12. Support**

(1) A person commits an offence if - (a) he invites support for a proscribed organisation, and (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is - (a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

(4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.”

The cross-reference to section 15 in section 12(1)(b) is to the separate offence of fund-raising for the purposes of terrorism.

20.
Section 13(1) provides:

“ **13. Uniform**

(1) A person in a public place commits an offence if he -

(a) wears an item of clothing, or

(b) wears, carries or displays an article,

in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.”

21.
With effect from 12 April 2019, section 13 was amended by the Counter-Terrorism and Border Security Act 2019. The amendments did not alter subsection (1) but included the insertion of new subsections (1A) and (1B):

“(1A) A person commits an offence if the person publishes an image of -

(a) an item of clothing, or

(b) any other article,

in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

(1B) In subsection (1A) the reference to an image is a reference to a still or moving image (produced by any means).”

22.
At the same time section 12 was amended by adding a new subsection (1A):

“(1A) A person commits an offence if the person -

(a) expresses an opinion or belief that is supportive of a proscribed organisation, and

(b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.”

23.
Having set out the offences under Part II of the 2000 Act, it is also helpful to set out here the definition of terrorism in section 1 of the 2000 Act.

“ **1. Terrorism: interpretation**

(1) In this Act ‘ terrorism ’ means the use or threat of action where -

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it -

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section -

(a) ‘ action ’ includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) ‘ the government ’ means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.”

24.
Article 10 of the Convention, incorporated into English law by section 1 of the Human Rights Act 1998 ("HRA") as article 10 of Schedule 1 of the HRA, 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."

4 Issue 1: Is the offence created by section 13 of the 2000 Act an offence of strict liability?

(1) Introduction

25.
Counsel for the appellants, Joel Bennathan QC, submitted that, applying the strong common law presumption of mens rea, section 13(1) is not an offence of strict liability.

26.
Before we turn to consider the law on the presumption of mens rea, it is important to emphasise, and is common ground between the parties, that a limited mental element is indisputably required under section 13(1) in the sense that the defendant must know that he or she is wearing or carrying or displaying the relevant article. On the facts of this case, each defendant had to know that he was carrying or displaying a flag. Put another way, the carrying or displaying of the flag had to be deliberate and not inadvertent. If a person were to stick a flag into or onto a defendant's backpack without the defendant's knowledge, so that the defendant is carrying or displaying the flag without knowing that he or she is doing so, the defendant would not be guilty of the offence. The words "wears, carries or displays" necessarily import knowledge of that limited kind.

(2) The law on the presumption of mens rea

27.
The frequently cited leading case on strict liability and the presumption of mens rea is Sweet v Parsley [1970] AC 132. The defendant had been convicted of the offence, under section 5 of the Dangerous Drugs Act 1965, of managing premises used for the purpose of smoking cannabis. The defendant did not know that the house, which she was sub-letting to tenants, was being used for smoking cannabis. It was held that her conviction should be quashed because the offence was not one of strict liability. Lord Reid explained, at p 148, that there was a presumption of mens rea:

"Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a

section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea."

28.
In B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428, the question was whether section 1(1) of the Indecency with Children Act 1960 is one of strict liability as far as the age element is concerned. That subsection makes it an offence to commit an act of gross indecency with or towards a child under the age of 14 or to incite a child under that age to such an act. On the facts, the defendant, aged 15, had repeatedly requested a 13-year-old girl sitting next to him on the bus to perform oral sex on him. She had refused to do so. It was held by the House of Lords that, although the statute was silent as to the required mental element required for the offence, the defendant was not guilty of the offence if he honestly believed that the girl was over the age of 14.

29.
In his leading speech, Lord Nicholls (with whom Lord Irvine LC and Lord Mackay agreed) explained that it is well established - as shown by Sweet v Parsley [1970] AC 132 - that, where a statute laying down a criminal offence is silent on the relevant mental element, the starting point in interpreting the statute is that there is a common law presumption of mens rea. Moreover, that presumption is a strong one so that it will only be rebutted by express words or by necessary implication. In a helpful passage, Lord Nicholls said at pp 463-464:

"In section 1(1) of the Act of 1960 Parliament has not expressly negatived the need for a mental element in respect of the age element of the offence. The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. 'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

30.
It is of interest to note that, in his concurring speech, Lord Steyn, at p 470, explained that the presumption of mens rea is an illustration of the principle of legality and that it is because one is dealing with a fundamental or constitutional right that the presumption is rebutted only by express words or necessary implication.

31.
More recently, in R v Lane [2018] UKSC 36; [2018] 1 WLR 3647, the Supreme Court discussed the presumption of mens rea in the context of interpreting section 17 of the Terrorism Act 2000. The question was whether, when the defendants sent money abroad, they had "reasonable cause to suspect" that it would or might be used for the purposes of terrorism. It was held that this was clearly imposing an objective and not a subjective requirement so that it was not open to the courts to interpret the provision as requiring that the defendants actually suspected that the money would be used for terrorism. Lord Hughes (with whom Lady Hale, Lord Burnett, Lord Hodge and Lord Mance agreed) said the following at para 9:

"Whilst the principle [ie the presumption of mens rea] is not in doubt, and is of great importance in the approach to the construction of criminal statutes, it remains a principle of statutory construction. Its importance lies in ensuring that a need for mens rea is not inadvertently, silently, or ambiguously removed from the ingredients of a statutory offence. But it is not a power in the court to substitute for the plain words used by Parliament a different provision, on the grounds that it would, if itself drafting

the definition of the offence, have done so differently by providing for an element, or a greater element, of mens rea. The principle of parliamentary sovereignty demands no less. Lord Reid [in Sweet v Parsley] was at pains to observe that the presumption applies where the statute is silent as to mens rea, and that the first duty of the court is to consider the words of the statute."

32.
Lord Hughes was clearly correct to clarify that the presumption of mens rea is a principle of statutory interpretation, but we agree with the thrust of Mr Bennathan's submission that that passage should not be read as, in any sense, casting doubt on the strength of the presumption of mens rea or on what was said by the House of Lords in B v Director of Public Prosecutions.

33.
More recently still, the Privy Council in Nurse v Republic of Trinidad and Tobago [2019] UKPC 43; [2021] AC 1 accepted that the presumption is a strong one. Nevertheless, it was there held that the presumption was rebutted so that the offences in question (making a false customs declaration, importing prohibited goods, and importing goods that did not correspond with a customs declaration) were offences of strict liability. It was therefore unnecessary for the prosecution to prove that the defendants knew the nature of the goods inside the relevant containers. Lady Arden giving the judgment of the Board (Lord Kerr, Lord Carnwath, Lord Lloyd-Jones, Lady Arden and Lord Kitchin) said at para 24:

"[T]here is a high hurdle to be overcome by the prosecution when it asserts that an offence is one of strict liability that does not require a mental element in relation to any particular ingredient of the actus reus. It must rebut the presumption that mens rea is required, and so clear words will be needed. But the presumption enunciated in Sweet v Parsley [1970] AC 132 is nonetheless one that can be rebutted."

And later Lady Arden said at para 38:

"[T]he presumption that Parliament intended that offences should require mens rea in relation to each element of the offence is a strong one."

34.
In the light of these authorities, and especially Lord Nicholls' analysis in B v Director of Public Prosecutions, the correct approach to determining whether section 13(1) is an offence of strict liability, given that the section is silent as to the mens rea, is to examine whether the strong presumption of mens rea is rebutted expressly or by necessary implication. Necessary implication is an implication that is compellingly clear. Whether that is so turns on the words used in the light of their context and the purpose (or mischief) of the provision in question.

35.
In our view, as explained in detail below, examination of the words, context and purpose of section 13(1) leads inexorably to the conclusion that the presumption of mens rea is rebutted and that the offence is therefore one of strict liability.

(3) Why is the presumption of mens rea rebutted?

(i) The words used: arousing reasonable suspicion

36.

Looking first and foremost at the words used, we consider that the objective formulation of the offence - arousing “reasonable suspicion” - indicates that there is no requirement of mens rea. As Louis Mably QC, counsel for the respondent, expressed it, there is difficulty marrying a subjective requirement, such as knowledge or intention, with the objective requirement of arousing “reasonable suspicion”.

37.
That difficulty was reflected in the immense difficulty that Mr Bennathan had in formulating the appropriate mens rea. His primary submission was that one should read into the offence “knowingly” so that the relevant words would read “so as to knowingly arouse reasonable suspicion”. That, however, makes little sense because whether reasonable suspicion is aroused may be said to be outside the control of the defendant so that it would be odd to require that the defendant knows that he or she is arousing that suspicion. Mr Bennathan submitted, alternatively, that the appropriate mens rea was an intention to express support for a proscribed organisation (and it was put in a similar way by the defendants in the Divisional Court: see Holroyde LJ’s judgment at para 39). But if one is going so far as to require such an intention, why would it be necessary to add that the carrying or displaying of the article must arouse reasonable suspicion that he is a supporter of a proscribed organisation? The carrying or displaying of the supportive article with the intention to express support for the proscribed organisation would surely be sufficient.

38.
We would add in similar vein that, if one instead thought that the relevant mens rea might be the intention to arouse reasonable suspicion, that too would be problematic. There would seem to be no point in the suspicion having to be reasonable if there was an intention to arouse suspicion.

39.
Mr Bennathan further submitted that the defendant would have to know that the organisation in question was a proscribed organisation. On these facts, the prosecution would therefore have to prove that the defendant knew that the PKK was a proscribed organisation under English law. There are at least two problems with that submission. First, it appears to run counter to the principle that ignorance of the law is no excuse. If Mr Bennathan were correct, it would be a defence that a defendant did not know that, as a matter of law, the PKK was a proscribed organisation. Secondly, it would render the provision a virtual dead letter because it would be very difficult for the prosecution to prove a defendant’s knowledge of such matters. We would add for completeness that in R v Choudhury [2016] EWCA Crim 61; [2018] 1 WLR 695, which dealt with the offence in section 12(1) of the Terrorism Act 2000 of inviting support for a proscribed organisation, it was common ground that, while inviting support did require knowledge that one was inviting support for the proscribed organisation, there was no requirement of knowledge that the organisation was proscribed (see at paras 4-5 and 48).

40.
Mr Bennathan argued that it was the role of this court to articulate an appropriate mens rea and that he was merely making suggestions as to possibilities so as to try to assist the court. We accept, of course, that it is the role of the court to interpret correctly what Parliament has enacted. But it is not the role of the court, in applying the law on the presumption of mens rea, to rewrite the statute, still less to do so in a way that contradicts the express words used. We also regard it as falling outside the judicial role for this court to accept Mr Bennathan’s invitation to embark on a speculative exercise to divine what Parliament may have intended as mens rea.

41.
We come back to the crucial point that the words used, arousing “reasonable suspicion”, which impose an objective standard, do not readily lend themselves to the importation of a subjective requirement of mens rea. We therefore agree with what Holroyde LJ said in the Divisional Court at para 50: “the language of section 13 is … entirely clear and unambiguous … nothing in the section requires any knowledge on the part of the wearer [or carrier] of the import of the item or article, or of its capacity to arouse the requisite suspicion.”

(ii) Context

42.
Section 13 is one of three sections in the Terrorism Act 2000 (the other two being sections 11 and 12) which lay down offences concerned with proscribed organisations. Under section 3, the power to list an organisation as a proscribed organisation lies with the Secretary of State who may exercise the power only if he or she believes that the organisation is concerned with terrorism. Terrorism for these purposes is defined in section 1 of the 2000 Act.

43.
It is clear from the words of section 11(1) and section 12(1)-(3) that the offences in those sections are not offences of strict liability. They require mens rea. For example, one cannot belong or profess to belong to a proscribed organisation (under section 11(1)) unless one intends to belong or to profess to belong to the organisation. “Belonging” or “professing to belong” cannot be inadvertent. Similarly, one cannot “invite support” (under section 12(1)) unless one knows that one is inviting support: see R v Choudary [2016] EWCA Crim 61; [2018] 1 WLR 695, para 48. The offence in section 12(2) expressly requires “knowledge” and section 12(3) expressly refers to “the purpose of his address” being to encourage support for the proscribed organisation.

44.
Looking across the proscribed organisation offences, a rational explanation for why section 13(1) creates a far less serious summary offence, punishable by a maximum of six months imprisonment rather than 14 years, is that, while the offences in section 11 and 12 require mens rea, section 13(1) creates a strict liability offence.

45.
If, moreover, mens rea were required for section 13(1), this would create a problematic overlap with sections 11 and 12. This is because, as Mr Mably submitted, if one is wearing an item of clothing or wearing or carrying or displaying an article, intending to show that one is a member or supporter of a proscribed organisation, one will almost inevitably be committing the more serious offences of professing to belong to a proscribed organisation or inviting support for a proscribed organisation. To interpret section 13(1) as requiring mens rea would therefore tend to render it redundant and, in any event, would render incoherent what can otherwise be viewed as a carefully calibrated and rational scheme of proscribed organisation offences.

46.
Mr Bennathan submitted that these points had no force for two reasons. First, the seriousness of the offences turned on the different nature of the actus reus involved and not the mental element. Secondly, it is well known that the 2000 Act contains numerous irrational overlaps and he here referred to comments about sections 57 and 58 of that Act made in R v Rowe [2007] EWCA Crim 635; [2007] QB 975, para 34. We disagree. The actus reus involved in relation to membership of a proscribed organisation, supporting a proscribed organisation and wearing a uniform of a proscribed

organisation (dealt with respectively in sections 11-13 of the 2000 Act) are not sufficiently distinct to merit the different treatment (in terms of procedure and maximum punishment) they are afforded by the criminal law. In our view, it is the mens rea involved in relation to the first two types of conduct, covered by sections 11 and 12, that can rationally explain why they are treated as so much more serious than the strict liability offence in section 13. And we do not accept that, at least in relation to the offences in sections 11-13, one should read the legislation as creating a scheme of offences that is irrational and incoherent. Moreover, the passage in R v Rowe referred to by Mr Bennathan does not support his submission. On the contrary, Lord Phillips CJ, giving the judgment of the Court of Appeal, was making the point that, while there is some overlap between sections 57 and 58, there are significant differences between them and he went on to say, at para 36:

"These differences between the two sections are rational features of a statute whose aims include the prohibition of different types of support for and involvement, both direct and indirect, in terrorism."

47.
There is a further point to be made about section 57 which creates an offence of possession for terrorist purposes.

" **57. Possession for terrorist purposes**

(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism."

48.
Although this offence, like section 13(1), uses the words, "give rise to a reasonable suspicion", this is plainly not a strict liability offence because section 57(2) goes on to provide a defence where the defendant can prove that the possession was not for terrorist purposes. One can therefore see that, within the same Act, there is a provision with some similarity to section 13(1) in relation to which it has been regarded as necessary to spell out a defence. The obvious inference is that that is necessary because otherwise the provision would have been regarded as imposing strict liability (which would have been inappropriate for a very serious criminal offence for which there is a maximum sentence of 15 years). As Holroyde LJ said in the Divisional Court at para 57:

"It is … relevant that Parliament provided a statutory defence to the offence created by section 57 of the 2000 Act … but has not made a similar provision for the offence created by section 13 … the distinctions drawn between the various offence-creating provisions must be deliberate, and are in my view indicative of an intent to create in section 13 an offence which does not require mens rea."

49.
We also regard it as of some relevance to consider the two new offences in sections 12 and 13 that were added by the Counter-Terrorism and Border Security Act 2019 (set out in paras 21-22 above). These offences were created subsequent to the events in this case. But they have some significance to the question on strict liability that we are answering. This is because section 12(1A) makes clear, by express words, the mens rea that is required (recklessness), while section 13(1A) creates a parallel offence for publication of images to that in section 13(1) - using exactly the same words of arousing

“reasonable suspicion” - without including any words importing mens rea (although analogously to section 13(1), as made clear in para 26 above, there must be the limited mental element of knowledge that one is publishing).

50.
While there is no suggestion that these 2019 reforms were influenced by the events of this case (and, as Mr Bennathan stressed, the reforms were made several months before the decision of the Divisional Court in this case) the importance of these two new offences is that they are consistent with, and in that sense support, the view put forward above that, while sections 11 and 12 require mens rea, section 13 imposes strict liability. As Holroyde LJ said in the Divisional Court at para 56: “They show Parliament drawing clear and deliberate distinctions between the ingredients of related but distinct offences.”

51.
Counsel on both sides drew our attention to the historical background to section 13. Section 13 re-enacted section 3 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and section 31 of the Northern Ireland (Emergency Provisions) Act 1996. Although there were minor linguistic changes, the substance of the offences remained the same. Section 3 of the Prevention of Terrorism (Temporary Provisions) Act 1989 can be traced back through Acts of the same name in 1984, 1976 and 1974. The 1974 Act had been enacted in response to numerous acts of terrorism, including the Birmingham pub bombings. There are no reported cases under the Prevention of Terrorism (Temporary Provisions) Acts or the Northern Ireland (Emergency Provisions) Acts. None of the predecessor sections contained any reference to the offences requiring mens rea and similarly those sections did not include a reasonable excuse, or similar, defence. And it is of some interest and significance that, in looking at section 2(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984, which was in substance identical to section 13(1) of the 2000 Act (although using the term “reasonable apprehension” rather than “reasonable suspicion”), Smith and Hogan, Criminal Law, 5th ed (1983), p 795 (repeated in the 6th ed (1988), pp 846-847) commented as follows:

“So long as the wearing etc gives rise to a reasonable apprehension of membership or support the offence is committed: there is no need to prove that D intended or foresaw that apprehension.”

52.
Prior to 1974, there was one similar but not identical offence to section 13(1). Section 1(1) of the Public Order Act 1936 created the offence of wearing a uniform signifying association with any political organisation or with the promotion of any political object in a public place or at a public meeting:

“ **1. Prohibition of uniforms in connection with political objects**

(1) Subject as hereinafter provided, any person who in any public place or at any public meeting wears uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence …”

53.
This provision was considered in O’Moran v Director of Public Prosecutions [1975] 1 QB 864. It was held by the Divisional Court that the berets and dark clothing worn by the defendants, either at a funeral or at a march, constituted the wearing of a uniform signifying association with a political organisation (Provisional Sinn Fein or the Irish Republican Army). There was no issue raised in the Divisional Court about mens rea. Nevertheless, Mr Bennathan drew our attention to the fact that the

stipendiary magistrate in that case (see at pp 870-871) had discharged one defendant because, although wearing a black beret, that was his usual headdress and he had not adopted it on that occasion in order to signify his association with the Provisional Sinn Fein. He submitted that this showed that the Public Order Act 1936, the predecessor of section 13(1), had always been understood as requiring mens rea in the sense that, in wearing the item in question, the defendant must intend to signify an association with the political association in question. But there was no mention by the Divisional Court of that decision by the magistrate so that this is a very slender basis on which to say that the need for a mens rea was always well-understood. In any event, we consider that the word "signifying" can be more naturally interpreted as importing "intention" than the words "arousing reasonable suspicion" in section 13(1).

(iii) Purpose

54.
In the Divisional Court, Holroyde LJ at paras 52-53 said the following as regards the purpose of section 13(1):

"52. … it is important to consider the purpose of section 13 and the mischief it aims to prevent. Parliament has legislated to proscribe certain terrorist organisations, and the purpose of section 13 is to give practical effect to such proscription. The mischief at which it is aimed is conduct which leads others reasonably to suspect the wearer of being a member or supporter of a proscribed organisation, that being conduct which gives rise to a risk that others will be encouraged to support that proscribed organisation or to view it as legitimate (and I would add, though it is not essential to my decision, that it also gives rise to a risk of public disorder resulting from a hostile reaction on the part of others). The risk arises whatever the understanding or intention of the wearer. A group of people waving PKK flags in Whitehall is a potent symbol of apparent support for the PKK, and therefore an encouragement of others to support the PKK, whether or not individual members of the group intend to express support for that proscribed organisation. In short, a person who commits the actus reus of the section 13 offence by his conduct creates the risk I have mentioned, whether or not he intends to do so or knows that he is doing so.

53. There is good reason for Parliament to have criminalised such conduct. It must be remembered that by section 3(4) of the 2000 Act, an organisation can only be proscribed if the Secretary of State believes that it is concerned in terrorism; and by section 1, terrorism means the use or threat of action which involves serious violence against a person or serious damage to property, endangers life, creates a serious risk to public health or safety or is designed seriously to interfere with an electronic system, and which is designed to influence the government or intimidate the public for the purpose of advancing a political, religious, racial or ideological cause. In short, conduct which falls within section 13 is conduct which arouses reasonable suspicion of membership of or support for an organisation involved in violence designed to influence the government or intimidate the public."

55.
We agree with that very clear reasoning of Holroyde LJ. The strict liability interpretation of the offence in section 13(1) is supported by the purpose (or mischief or policy) behind the offence. Although there is nothing to assist in the explanatory notes to the Terrorism Act 2000, the offence is concerned with the effect on other people not the intention or knowledge of the defendant. It is designed to deny a proscribed organisation the oxygen of publicity or a projected air of legitimacy. It seeks to avoid others becoming aware of, and potentially becoming supporters of, proscribed organisations. It may also be regarded as having a role in avoiding public disorder that may result

from reaction against displays of support for proscribed organisations. More generally, the offence is part of a rational counter-terrorism strategy to stymie the operation of proscribed organisations. At root the strategy rests on the Secretary of State's listing of an organisation as a proscribed terrorist organisation.

56.
Although her Ladyship was looking more generally at all three proscription offences, we also agree with the observations of Sharp LJ, giving the judgment of the Court of Appeal in R v Choudary at para 38:

"As is clear from the statutory framework, the regime of proscription in Part II of the 2000 Act is integral to the measures that Parliament has considered necessary to combat organisations concerned with terrorism. No one doubts … the competence of Parliament to legislate to proscribe organisations concerned with terrorism, as so defined; nor we would add, its competence to make proscription effective by inhibiting activities associated with such organisations. In short, statutory proscription is of no value or effect if the legislature does not also provide the means to enforce it, or put it into effect."

(iv) Absurd and unfair consequences?

57.
Mr Bennathan submitted that there would be absurd and unfair consequences if section 13(1) were to be interpreted as imposing strict liability. He gave the hypothetical example of a person carrying a flag or placard who cannot read the English on the flag or placard or is partially-sighted and cannot see what is on the flag or placard; or the police officer who is carrying a flag or placard that has been seized as an exhibit. Such people, he submitted, might be guilty of the offence, if interpreted as being one of strict liability, which would be absurd and unfair. We have some doubts as to how helpful it is to speculate about hypothetical situations that are far removed from the facts of the case with which we are concerned. In at least some of the hypothetical situations postulated by Mr Bennathan, further facts may show that the objective circumstances would be insufficient to arouse the relevant reasonable suspicion (for example, if the police officer carrying away the exhibit is in police uniform). In any event, strict liability offences almost inevitably have unfortunate consequences for what have been termed "luckless victims" (see the discussion in Nurse v Republic of Trinidad and Tobago [2021] AC 1, paras 41-44). And if there are harsh but unlikely consequences, that are not resolvable in practice by prosecutorial discretion, we regard that as an insufficiently strong reason to override the reasons we have set out above for why section 13(1) should be interpreted as imposing strict liability.

(4) Conclusion on Issue 1

58.
Our conclusion is that section 13(1) is a strict liability offence. There is no extra mental element required over and above the knowledge required for the wearing or carrying or displaying of the article to be deliberate. The strong presumption as to mens rea is rebutted by necessary implication - in the words of Lord Nicholls in B v Director of Public Prosecutions the implication is "compellingly clear" - because of the words used, the context and the purpose of the provision.

5. Issue 2: is it compatible with the right to freedom of expression guaranteed by article 10 of the Convention for an offence under section 13 to be one of strict liability?

59.

It should be noted at the outset that, without affecting its substance, we consider it marginally preferable to formulate Issue 2 in the way just set out (compare the formulation of the Divisional Court at para 7 above).

60.
The appellants submit that article 10 is another reason to regard section 13 as not being a strict liability offence on the grounds that to criminalise the mere carrying of a flag of a proscribed organisation, without requiring relevant mens rea, is an unjustified interference with the right guaranteed by article 10. Indeed, both article 10 and the common law attach considerable importance to freedom of expression. However, it is not suggested that the common law would go further than article 10 in this regard in the circumstances of this case. It is common ground that section 13 is an interference for the purposes of article 10(1) - the question is: was it justified for the purposes of article 10(2) of the Convention?

61.
To be justified under article 10(2), an interference with the right to freedom of expression must have been (i) prescribed by law, (ii) intended for one or more of the legitimate aims set out in article 10(2) and (iii) necessary in a democratic society to achieve that aim or aims: see Perinçek v Switzerland (2015) 63 EHRR 6 (Application No 27510/08, 15 October 2015, para 124). It will be seen from para 66 below that the concept of necessity in a democratic society includes the concept of proportionality.

62.
As to the first requirement, section 13 is of course set out clearly in the Terrorism Act 2000, but the Strasbourg Court has made it clear that the requirement also entails, among other things, a requirement of foreseeability:

“ A norm could not be regarded as a ‘law’ unless it was formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able - if need be with appropriate advice - to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail. However, the Court went on to state that these consequences did not need to be foreseeable with absolute certainty, as experience showed that to be unattainable.” (Perinçek v Switzerland , para 131)

63.
The appellants submit that section 13 did not meet this requirement because a person could commit the offence without any intention to do so. But that does not mean that the offence is not prescribed by law. The law clearly stated what they must not do, and a legal adviser would have been able to explain it to them. Moreover, the list of proscribed organisations is published so that they would have been able to discover that the PKK was a proscribed organisation.

64.
As to the second requirement, the aims of proscribing organisations are at least two of the matters expressly referred to in article 10(2), namely, the interests of national security and the prevention of disorder. The offences created in Part II of the 2000 Act, which are those set out in sections 11 to 13, are designed to make the proscription of terrorist organisations effective to safeguard national security and ensure order. This is apparent from the provisions of the 2000 Act which set out when the Secretary of State can proscribe an organisation and the definition of terrorism. The Secretary of State cannot declare an organisation to be proscribed unless he or she believes that it is concerned in terrorism. For this purpose, an organisation is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism or is otherwise concerned

in terrorism (section 3(4) and (5)). “Terrorism” is widely defined in section 1(1) and (2) of the 2000 Act, set out in para 23 above. As a result of these provisions, an act of terrorism may relate not simply to the risk of violence or damage to property but also to a risk to public health or the disruption of an electronic system. While the actions when said to be terrorist must attain a certain level of seriousness, it is apparent that there is a link between the two article 10(2) aims identified above and the provisions for proscribed organisations viewed as a whole.

65.
Membership of, or support for, a proscribed organisation (as dealt with in sections 11 and 12 of the 2000 Act) is a serious matter. If a refugee is convicted of the offence of membership or support of a proscribed organisation there is a presumption that he or she has been convicted of a serious offence for the purposes of article 33(2) of the Refugee Convention 1951 and that he or she constitutes a danger to the community of the United Kingdom, justifying expulsion from the United Kingdom: Nationality, Immigration and Asylum Act 2002, section 72 and the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (SI 2004/1910), paragraph 2 and Schedule 1. The offences in sections 11 and 12 of the 2000 Act have been specified for this purpose but not the offence under section 13 of that Act. This is a clear indication, in addition to the fact that the offence is summary only and carries a maximum penalty of six months’ imprisonment (see para 44 above), that, while concerned to combat terrorism by proscription of organisations, the offence under section 13 is regarded as less serious than other offences concerned to achieve the same aim.

66.
As to the third requirement, that the interference should be necessary in a democratic society, the Strasbourg Court in Perinçek set out, at para 196, the correct approach to be adopted and, in so doing, stressed that necessity is not to be lightly found and that the interference must be proportionate to the legitimate aim pursued:

“ 196. The general principles for assessing whether an interference with the exercise of the right to freedom of expression is ‘necessary in a democratic society’ within the meaning of article 10(2) of the Convention are well-settled in the court’s case law. As noted by the Chamber, they were recently restated in Mouvement raëlien suisse v Switzerland and Animal Defenders International v United Kingdom , and can be summarised as follows:

(i) freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to article 10(2), it applies not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in article 10, this freedom is subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly.

(ii) the adjective ‘necessary’ in article 10(2) implies the existence of a pressing social need. The High Contracting Parties have a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the law and the decisions that apply it, even those given by independent courts. The court is therefore empowered to give the final ruling on whether a ‘restriction’ can be reconciled with freedom of expression.

(iii) The court’s task is not to take the place of the competent national authorities but to review the decisions that they made under article 10. This does not mean that the court’s supervision is limited

to ascertaining whether these authorities exercised their discretion reasonably, carefully and in good faith. The court must rather examine the interference in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient. In doing so, the court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in article 10 and relied on an acceptable assessment of the relevant facts."

67.
It also follows that an offence may not be demonstrably wider than is necessary. As the Strasbourg Court very recently put it in Yefimov v Russia (Application Nos 12385/15 and 51619/15, 7 December 2021):

"43. It is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms …"

"46. … the containment of a mere speculative danger, as a preventative measure for the protection of a democracy, cannot be seen as pursuing a 'pressing social need'."

"62. … severe measures limiting Convention rights must not be resorted to lightly; more particularly, the principle of proportionality requires a discernible sufficient link between the application of such measures and the conduct and circumstances of the individual concerned. The authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question."

68.
Section 13(1) of the 2000 Act restricts criminal liability to the case where the relevant acts are done "in such a way as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation". This makes clear that a central purpose of the provision is to deprive the organisation of the benefits to it of publicity (see para 55 above). Publicity would not be in the public interest because, for example, it is damaging to national security; and the provision is consistent with the least prejudicial means of achieving this purpose. Although the appellants submit that imposing strict liability cuts across the requirement for the interference to be the minimum necessary, it is our view that a fair balance has been struck between the position of the participants in the prohibited activity and the proper interest of the community in its security. This is primarily because the criminal sanctions are comparatively minor and the offence requires that the relevant conduct must arouse the reasonable suspicion that the person is a member or supporter of a proscribed organisation. There are also the procedural safeguards for the defendants of a criminal process and trial. Furthermore, there is a procedure for securing the deproscription of a proscribed organisation by an application to the Proscribed Organisations Appeal Commission and a right of further appeal to the courts (sections 4 to 6 of the 2000 Act). If, like the PKK, the organisation originates outside the jurisdiction deproscription may involve relations with another state (with hostility and potential for violence) and thus engage the rights of others in the UK for the purposes of article 10(2) (see generally R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2015] AC 945, para 7). If there is a successful appeal from the Secretary of State's refusal to deproscribe, there will be no criminal liability for actions taking place after the date of the Secretary of State's decision (the 2000 Act, section 7).

69.
We have followed above the methodology adopted in the relevant Strasbourg jurisprudence. That approach has, in turn, been adopted by this court in past decisions. For example, in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700, in the context of the application of non-absolute

Convention rights and judicial review, Lord Sumption (with whose judgment the majority agreed) said, at para 20:

“The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

See also the (dissenting) judgment of Lord Reed at para 74 referring to the same four elements.

70.
We have considered each of those four requirements (or elements) in our analysis above. It is helpful to bear in mind that, as explained in Bank Mellat, the facts relevant to the different requirements may merge into one another. In the present case, it can be seen that, in so far as “least onerous means” is identifying a requirement, the facts relevant to that requirement merge into those relevant to the fourth requirement of proportionality and both requirements are satisfied for the reasons given above. An alternative way of thinking about this relationship might be to recognise that “least onerous means” is here identifying an element to be considered rather than an essential requirement to be satisfied.

71.
We appreciate that the effect on the appellants may turn out to be considerable in personal terms because this is a terrorist offence but that is part and parcel of the effect of the criminal law. Those who are convicted under section 13 but are refugees will not, however, be exposed by reason of their conviction to a presumption in favour of expulsion. In any event, the appellants’ convictions may well not require any disclosure to any prospective employer after a period of say two years: Rehabilitation of Offenders Act 1974.

72.
Mr Bennathan’s principal submission on behalf of the appellants is that the requirement that the interference be necessary in a democratic society is not satisfied because there was no justification for making the offence one of strict liability. He submits that, on the basis of the authorities decided by the Strasbourg Court, this offence unnecessarily and disproportionately interferes with freedom of expression unless it requires an incitement to violence. If the mere waving of a flag is criminalised without requiring mens rea, a violation will occur.

73.
The appellants’ argument is in reality an attempt to run, in relation to section 13, the argument run in R v Choudary [2016] EWCA Crim 61; [2018] 1 WLR 695, in relation to section 12 of the 2000 Act, that “Strasbourg jurisprudence discloses a ‘bright line’ rule that criminalisation of speech infringes article 10 of the Convention unless the speech advocates or encourages violence” (para 62). The Court of Appeal in that case (Sharp LJ, William Davis J and Judge Stockdale QC) concluded that the offences in sections 11, 12 and 13 of the 2000 Act were essential to the proscription process because they were the means by which proscription is put into effect, which is to the same effect as the view we have already expressed. The Court of Appeal regarded the narrow scope of section 12 (offence of belonging

to a terrorist organisation) as relevant to proportionality, since it did not criminalise the expression of opinion only the invitation of support for the proscribed organisation (para 70). Having considered, at paras 74-89, a substantial number of cases involving the criminalisation of expression in connection with terrorism, the Court of Appeal concluded, at para 89, that:

"… contrary to the principle contended for, it has been held permissible in article 10 terms to criminalise speech which does not involve any incitement to violence albeit in rather different circumstances. See, for example, Hoare v United Kingdom [1997 EHRLR 678 (obscenity) and Wingrove v United Kingdom (1996) 24 EHRR 1 (blasphemy)."

74.
As to the results of reviewing this jurisprudence, we agree with the Divisional Court in this case that "the case law of the [Strasbourg Court] on which the appellants rely certainly shows a need to consider whether the accused was inciting violence, and the fact that he was not has been a factor in finding a breach of article 10 in some cases" (para 66). We also agree with the Divisional Court's further holding that: "The appellants have not been able to point to any unequivocal statement of principle to the effect that a restriction on freedom of expression can only be justified where expression includes an incitement to violence" (para 68). We do not think it is necessary for us to go through the 20 or so cases relied on to show that: it is sufficient for us to refer to one of those cases, Alekhina v Russia (2018) 68 EHRR 14, in para 76 below. Furthermore, the "bright-line" issue was addressed very recently in Yefimov. This was a case where a human rights activist was exposed to a severe criminal penalty for critical comments that he had made about the Russian Orthodox Church in Karelia. The Strasbourg Court made it clear, as one would expect especially given the way in which terrorism has been defined at least in the 2000 Act, that incitement to violence was one of the factors in a multi-factorial assessment of whether the restriction was justifiable under article 10. That means that it is not a determinative factor and that there are many other factors to be taken into account. As explained in Perinçek (see para 66 above) the function of the Strasbourg Court is to examine the case as a whole. Thus, in Yefimov the Strasbourg Court said as follows:

" 43. The court's assessment of the necessity of interference in cases concerning allegedly extremist speech takes into account a number of factors: the existence of a tense political or social background; the presence of calls for - or a justification of - violence, hatred or intolerance, the manner in which the statements were made, and their potential to lead to harmful consequences. It is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances (see Perinçek , cited above, paras 205-208). "

75.
As the Strasbourg Court explained in Perinçek, at para 208:

"In all of the above cases, it was the interplay between the various factors rather than any one of them taken in isolation that determined the outcome of the case. The court's approach to that type of case can thus be described as highly context-specific."

76.
In support of their "bright-line" submission, the appellants relied, for example, on Alekhina v Russia, but, in that case too, the Strasbourg Court made the point that incitement to violence was only one factor in a multi-factorial assessment (see paras 220-221). The Strasbourg Court also referred to the policy guidance issued, and recommendations made, by the UN Human Rights Committee and ECRI (the European Commission against Racism and Intolerance), which were "in similar vein" (para 222).

It also noted that some international bodies gave greater protection to freedom of expression and permitted interference with it only if there was an incitement to violence (para 223), but the Strasbourg Court did not adopt this approach.

77.
The essential point about section 13 is that it is a highly focused provision aimed at ensuring that proscribed organisations do not obtain a foothold in the UK through the agency of people in this country. It is about a restriction, or deterrence, designed to avoid violence, not the prevention of a situation in which there is an immediate threat of violence or disorder. We consider that this is a sufficient justification for the restriction on freedom of expression involved in section 13. Accordingly, we take the same view in relation to section 13 as the Court of Appeal did in R v Choudary in relation to section 12 of the 2000 Act, and reject the argument that incitement to violence is necessary if a violation of article 10 by section 13 is to be avoided. We consider that section 13 is Convention-compliant.

78.
For completeness, we should add that Mr Bennathan went even further with his principal submission on article 10 and argued that, even if mens rea were required for section 13, there would still be a violation of article 10 unless the speech or conduct in question was inciting violence. It follows a fortiori from what we have said above that, if mens rea were required, there would be no violation of article 10.

79.
We therefore agree with the conclusion of the Divisional Court in this case on Issue 2 essentially for the reasons given by Holroyde LJ. As he said in summary, at para 73:

“the section 13 offence is compatible with article 10. It imposes a restriction on freedom of expression which is required by law; is necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights of others; and is proportionate to the public interest in combating terrorist organisations.”

6 Overall conclusion

80.
For the reasons we have given, we would dismiss the appeal.