



HATE CRIME AND THE LEGAL PROCESS – PRACTITIONER GUIDE

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ABOUT THIS GUIDE

The term “hate crime” is used by the police, the Crown Prosecution Service (CPS), the Sentencing Council, and other criminal justice agencies, to describe offences that are motivated by, or which demonstrate, identity-based hostility. Although the words “hate crime” are not actually part of the lexicon of English criminal law, there is a framework of legislation prohibiting these offences. This guide provides an overview of hate crime laws and the key procedural issues that frequently arise during prosecution and sentencing of hate crime offences.¹

HATE CRIME LAW IN ENGLAND AND WALES

English law provides expressly for hate crime in three main forms: specific aggravated offences; penalty enhancement at sentencing; and hate speech offences.

1. AGGRAVATED OFFENCES

Sections 28 to 32 of the Crime and Disorder Act 1998 (CDA) create specific criminal offences aggravated by *racial* or *religious* hostility (referred to in this guide as racially or religiously aggravated offences, or RRAOs). These offences are more serious versions of pre-existing offences: each attracts a higher maximum penalty than the basic version of the offence.

Section 28(1) provides:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—

- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or*
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.*

The following offences can be charged as racially or religiously aggravated under the CDA 1998:²

- malicious wounding or inflicting grievous bodily harm contrary to s. 20 of the Offences Against the Person Act 1861;

¹ Information contained in this document is based on the findings of a 24 month study conducted at the University of Sussex on the legal process for hate crime in England and Wales. This document is intended as a guide for legal professionals only. It is not a live document and is up-to-date as of February 1st 2018. The guide is an output of the University of Sussex, Lifecycle of Hate Crime Project that was funded by the European Union *Rights, Equality and Citizenship Programme*. See Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp. 120-121. <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>>

² Crime and Disorder Act 1998 (CDA), ss. 29-32.

- assault occasioning actual bodily harm contrary to s. 47 of the Offences Against the Person Act 1861;
- common assault;
- criminal damage contrary to s. 1 of the Criminal Damage Act 1971;
- public order offences contrary to ss. 4, 4A and 5 of the Public Order Act 1986 (fear or provocation of violence, intentional harassment, alarm or distress, or recklessly causing harassment, alarm or distress); and
- harassment and stalking (including putting people in fear of violence) contrary to ss. 2, 2A, 4 and 4A of the Protection from Harassment Act 1997.

2. PENALTY ENHANCEMENT SENTENCING PROVISIONS

Sections 145 and 146 of the Criminal Justice Act 2003 (CJA) apply at the sentencing stage, and set out provisions for sentencing a defendant who has been convicted of a crime aggravated by *racial, religious, sexual orientation, disability or transgender* hostility. These provisions require an enhanced penalty (or sentence ‘uplift’), but there is no power to impose a penalty beyond the statutory maximum for the basic offence.

Magistrates have been directed that the court “should not conclude that offending involved aggravation related to race, religion, disability, sexual orientation or transgender identity without first putting the offender on notice and allowing him or her to challenge the allegation.”³ If the matter was not raised during trial, this may require a *Newton* hearing (discussed below).

Section 146 provides:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim, or*
- (ii) a disability (or presumed disability) of the victim, or*
- (iii) the victim being (or being presumed to be) transgender, or*

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation, or*
- (ii) by hostility towards persons who have a disability or a particular disability, or*
- (iii) by hostility towards persons who are transgender.*

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

³ Sentencing Council, ‘Magistrates’ Court Sentencing Guidelines: Explanatory Materials: Hate Crime’ (2017) <<https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/>>

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

Section 145 of the Act uses identical language to s. 146 and covers criminal offences aggravated by racial or religious hostility that are not specified under ss. 29-32 of the CDA 1998. Both ss. 145 and 146 may apply to *any* criminal offence.

Only the specific offences covered by ss. 29-32 of the CDA 1998 can be classified in criminal law as “aggravated offences” (e.g. “racially aggravated assault”). Those covered by the sentencing provisions will be recorded in law (and on an offender’s criminal record) as the basic offence (e.g. an assault).

THE MEANING OF “HOSTILITY” IN THE CDA 1998 AND CJA 2003

Both the RRAOs and the penalty enhancements provide that “hostility” can be either “demonstrated” or form part of the offender’s motivation for the offence. The CPS states, in respect of “hostility”, that “[c]onsideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.”⁴

The Supreme Court has adopted a broad definition of the protected characteristics.⁵ In *R v Rogers*, Baroness Hale stated that “*the statute intended a broad non-technical approach, rather than a construction which invited nice distinctions*”.⁶ Furthermore, the defendant can be convicted of having demonstrated hostility towards someone they mistook to be a member of a protected group.⁷ Demonstrating hostility towards victims because they associate with (e.g. are married to) someone from a racial or religious group will also satisfy the relevant provisions.⁸ Hostility may be demonstrated against a person of the same (or similar) group identity as the defendant,⁹ although establishing evidence of this may prove difficult.¹⁰ In establishing that the defendant was motivated by hostility or demonstrated hostility towards a protected characteristic, it is not necessary to prove that the defendant is a ‘racist’ or in some other way a bigot.

MOTIVATED BY HOSTILITY

The legislation is clear that hostility towards the protected characteristic need not be the sole motivating factor for the offence. Section 28(3) of the CDA 1998 and s. 146(4) of the CJA 2003 state that “*[i]t is immaterial ...*

⁴ Crown Prosecution Service, ‘Disability Hate Crime and other Crimes against Disabled People – Prosecution Guidance’ (2017) <http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/>

⁵ “Racial group” and “religious group” are defined in ss. 28(4) and 28(5) of the CDA 1998. “Disability” and “transgender identity” are defined in ss. 146(5) and 146(6) of the Criminal Justice Act 2003 (CJA). The legislation does not define “sexual orientation”.

⁶ *Rogers* [2007] UKHL 8, [2007] 2 AC 62.

⁷ *Rogers* [2007] UKHL 8, [2007] 2 AC 62; *D* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

⁸ CDA 1998, s. 28(2). Note that there is uncertainty as to whether this applies to sexual orientation, disability and transgender identity as the provision is not replicated in s. 146 of the CJA 2003.

⁹ *White* [2001] EWCA Crim 216.

¹⁰ *Pal* [2000] Crim LR 756.

whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.”¹¹

Hence, a hostile motivation may also be accompanied by other reasons for committing an offence (e.g. the victim's other characteristics, the victim's perceived vulnerability, a parking dispute,¹² or a payment dispute¹³). A complete lack of evidence to prove motivation by hostility will mean that an offence cannot be aggravated under s. 28(1)(b).¹⁴ It should be borne in mind that, where multiple causes of an offence are identified, the other causes can sometimes mask the hostility element of the offence.

Charges under the CDA 1998 based on motivation are rare compared to those involving demonstrations of hostility, and there is scant case law providing examples. In *Kennedy v DPP*,¹⁵ the court held that the ownership and use of a poster with pictures of black men along with the words “Illegal Immigrant Murder Scum” was evidence of racial motive. The CPS' guidance on prosecuting racially and religiously aggravated offences also notes that in the absence of an admission whilst under caution, prosecutors may seek to adduce “evidence of membership of, or association with, a racist group, or evidence of expressed racist views in the past ...”¹⁶

Proof of “racist views” (as evidence of motivation) can also be established where there is evidence of past “demonstrations” of hostility. This was emphasised by May LJ in *G v DPP*: “The motive, in my judgment, is at least capable of being established by evidence relating to what the defendant may have said or done on another or other occasions.”¹⁷

DEMONSTRATION OF HOSTILITY

A demonstration of hostility is often easier to identify than motivation, as it usually takes the form of the utterance of words or gestures during the commission of a basic offence.¹⁸ The hostility must have been demonstrated at the time of committing the offence, or immediately before or after.¹⁹ Case law suggests that if the demonstration does not take place at the time, a connection needs to be shown²⁰ that indicates that the demonstration occurred in the immediate “context” of the offence.²¹

The reasons for committing the offence, or the fact that the offender mistakenly identifies the victim as belonging to a particular group, are not relevant. In *DPP v Green*, Rafferty J stated: “[s]ection 28(1)(a), as distinct from (b), creates a racially aggravated offence without the requirement to prove racist motive. Disposition at the time is irrelevant”.²²

¹¹ In accordance with s. 145(3) of the CJA 2003, s. 28 of the CDA 1998 applies for the purpose of the section.

¹² *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar).

¹³ *M* [2004] EWHC 1453, [2004] 1 WLR 2758.

¹⁴ *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

¹⁵ [2008] EWHC 1848 (Admin).

¹⁶ Crown Prosecution Service, ‘Racist and Religious Crime – Prosecution Guidance’ (2017) <http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/>

¹⁷ [2004] EWHC 183 (Admin) [14].

¹⁸ *Pal* [2000] Crim LR 756 [16].

¹⁹ CDA 1998, s. 28(1)(a); CJA 2003, s. 146(2)(a).

²⁰ *Babbs* [2007] EWCA Crim 2737 [8].

²¹ *Dent* [2015] EWCA Crim 2095 [13]. See also *Parry v DPP* [2004] EWHC 3112 (Admin) and *R v Carpenter* 2000 WL 1480167.

²² [2004] EWHC 1225 (QB) [16].

Racist and other prejudiced remarks are often said unthinkingly and without premeditated motivation. *DPP v Woods* indicates that such expressions of prejudice should fall within the meaning of the law. Maurice Kay J explained:

“Section 28(1)(a) ... is designed to extend to cases which may have a racially neutral gravamen but in the course of which there is demonstrated towards the victim hostility based on the victim’s membership of a racial group. Any contrary construction would emasculate section 28(1)(a).”²³

The law is not yet settled as to whether the defendant must be aware or understand that any comments he has made during the commission of an offence demonstrate hostility, or whether it is sufficient for the jury to determine that his comments objectively demonstrate hostility. Common practice indicates that the courts will entertain explorations of the intended meaning of words spoken during the commission of an offence, especially where the words have a double meaning (such as where an ex-miner referred to two police officers as “black bastards”, perceived by one of the officers as a racial slur, but intended by the defendant as a common derogatory reference to the police that relates to the colour of their uniform).²⁴ There may also be circumstances in which there is good reason to include an assessment of the defendant’s *mens rea* in determining any demonstration of hostility, such as when a defendant with a learning disability offended or demonstrated hostility towards someone’s nationality or religion without being aware of this. Nonetheless, an attempt to understand the true intention of the defendant must not lead to conflating the requirements for demonstration of hostility with those of motivation.

3. HATE SPEECH OFFENCES

Sections 18-23 and 29B-29G of the Public Order Act 1986 create specific offences of stirring up hatred on grounds which are *racial, religious* or based on *sexual orientation*. These provisions are rarely used. They incorporate acts that are intended to, or in the case of race, are likely to, stir up hatred by:

- using words or behaviour or displaying written material;
- publishing or distributing written material;
- publicly performing a play;
- distributing, showing or playing a recording;
- broadcasting or including a programme in a cable programme service; or
- possessing racially inflammatory material.²⁵

The Football (Offences) Act 1991 proscribes indecent and racist chanting during football games. Section 3 of the Act states:

(1) It is an offence to [engage or take part in chanting of an indecent or racist nature at a designated football match].

(2) For this purpose—

²³ [2002] EWHC 85 (Admin) [12].

²⁴ See Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp. 120-121.

²⁵ Public Order Act 1986, ss. 18-23 (for racial hatred) and ss. 29B-29G (for hatred based on religion or sexual orientation).

(a) “chanting” means the repeated uttering of any words or sounds [(whether alone or in concert with one or more others)]; and

(b) “of a racist nature” means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins.

KEY PROCEDURAL ISSUES

There are a number of procedural complexities that arise specifically in relation to the hate crime provisions, particularly the RRAOs under the CDA 1998 and the enhanced sentencing provisions in the CJA 2003. The complexities pertain primarily to charging decisions and sentencing.

ALTERNATIVE CHARGES AND VERDICTS IN THE CROWN COURT (RACIALLY AND RELIGIOUSLY AGGRAVATED OFFENCES ONLY)

Where a defendant is tried for a racially or religiously aggravated offence in the Crown Court and there is insufficient proof of racial or religious hostility, the judge may allow the jury to return an alternative verdict regarding the basic offence.²⁶ (NB: this option is available only in the Crown Court because magistrates do not have the power to return alternative verdicts in hate crime cases.)

Another option is for the prosecution to put separate counts on the indictment, one covering the aggravated offence under the CDA 1998 and one covering the basic version of the offence, rather than waiting until the end of the case to leave an alternative verdict to the jury. The preferred option for most practitioners is to put separate counts on the indictment, as it is felt that this creates transparency and may make it easier for the jury to understand the issues in the case.²⁷

CHARGE BARGAINING (RACIALLY AND RELIGIOUSLY AGGRAVATED OFFENCES ONLY)

It is not unusual for a defendant accused of a RRAO to accept liability for the basic offence, but dispute that the offence was aggravated by racial or religious hostility. Where a case is to be heard in the Magistrates’ Court, both the aggravated and the basic version of the offence should be charged in the alternative. This will avoid the defendant escaping liability for the basic offence should the aggravated element not be proven. However, alternative charges may create the potential for ‘charge bargaining’, whereby the charge for the aggravated offence is dropped in exchange for a plea of guilty to the basic offence.

²⁶ Criminal Law Act 1967, ss. 6(3) and 6(3A); Criminal Justice Act 1988, s. 40; Crime and Disorder Act 1998, ss. 31(6), 32(5) and 32(6).

²⁷ Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp. 89-92.

Charge bargaining should not occur. In hate crime cases, CPS policy is not to accept a guilty plea to the basic offence alone unless there are “proper reasons” for doing so, which do not include the aim of expediting court processes. In all cases before the Crown Court and in cases before the Magistrates' Court where the issues are complex or where there is scope for misunderstanding, however, the CPS states that it will provide a Plea and Sentencing document outlining a range of matters, which includes any relevant sentencing guidelines and guideline cases.²⁸

AVOIDING DOUBLE CONVICTIONS IN THE MAGISTRATES' COURT (RACIALLY AND RELIGIOUSLY AGGRAVATED OFFENCES ONLY)

Because alternative verdicts are not available in the Magistrates' Court, the CPS ordinarily charge both the aggravated and basic version of an offence in the alternative.²⁹ Although the offences are charged in the alternative, magistrates sometimes convict defendants of both offences. The main reason for this duplication is that, if there is a successful appeal against the aggravated element, the conviction for the underlying basic offence will still stand. However, a consequence is that the defendant will have two separate convictions on their record for the same crime, even if they receive only one sentence. This outcome is disproportionate and contrary to principle.³⁰ In *Henderson v CPS*, the Divisional Court held that, where a defendant faces two charges which are properly characterised as alternatives, there should not be findings of guilt on both charges.³¹ The proper course is to adjourn the lesser charge before conviction under s. 10 of the Magistrates' Courts Act 1980, so that if an appeal against the aggravated offences was successful, the lesser charge could subsequently be dealt with.

DETERMINING THE LEVEL AND CONTENT OF SENTENCE UPLIFT

There is no Sentencing Council Guideline on the general approach that should be taken to determining the level of uplift. However, the Council has provided partial assistance in the Explanatory Materials governing hate crime in the Magistrates' Court Sentencing Guidelines.³² These adopt the two-stage approach set out by the Court of Appeal in *R v Kelly and Donnelly*, and this applies to hostility based on all five protected characteristics:³³

²⁸ Crown Prosecution Service, 'Racist and Religious Crime – CPS Prosecution Policy' (n.d.)

<<http://www.cps.gov.uk/publications/prosecution/rpbcbook.html>>

²⁹ Crown Prosecution Service, 'Racist and Religious Hate Crime – Prosecution Guidance' (2017)

<http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/>

³⁰ *R (Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin).

³¹ *Henderson v CPS* [2016] EWHC 464 (Admin).

³² Sentencing Council, 'Magistrates' Court Sentencing Guidelines: Explanatory Materials: Hate Crime' (2017)

<<https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/>>

³³ [2001] 2 Cr App R (S) 73 CA. The Court of Appeal in *R v Higgins* [2009] EWCA Crim 708 reaffirmed *Kelly and Donnelly* and noted that the two-stage approach was now adopted by the Sentencing Guidelines for assault cases. See also, on intimidatory offences, the Sentencing Council, 'Intimidatory Offences and Domestic abuse guidelines Consultation' (2017) p.21

<https://www.sentencingcouncil.org.uk/wp-content/uploads/Intimidatory-offences-Consulation-Paper-WEB.pdf>

- sentencers should first determine the appropriate sentence, leaving aside the element of aggravation related to race, religion, disability, sexual orientation or transgender identity but taking into account all other aggravating or mitigating factors;
- the sentence should then be increased to take account of the aggravation related to race, religion, disability, sexual orientation or transgender identity.

The materials then provide that:

- the increase may mean that a more onerous penalty of the same type is appropriate, or that the threshold for a more severe type of sentence is passed;
- the sentencer must state in open court that the offence was aggravated by reason of race, religion, disability, sexual orientation or transgender identity;
- the sentencer should state what the sentence would have been without that element of aggravation.

Subsequent case law has clarified that, where the aggravating feature of the offence is so inherent and integral to the offence that it is not possible sensibly to assess the overall criminality in such a discrete way (such as a public order offence where the entirety of the offending behaviour is a demonstration of racial hostility), the court must assess the seriousness of the conduct involved and its criminality as a whole.³⁴

The extent to which the sentence is increased will depend on the seriousness of the aggravation. The materials provide a non-exhaustive list of which factors could be taken as indicating a high level of aggravation, and which could be regarded as less serious.

ALTERNATIVE FORMS OF SENTENCE UPLIFT

At sentencing, all parties may wish to consider that an enhanced penalty does not necessarily require greater punitive sanctions. There are numerous community and custody-based interventions that utilise rehabilitative and reparative measures specifically aimed at addressing hate-based offending. These should be considered as a “smarter” way of uplifting sentence, where these are available.³⁵

SENTENCING DISABILITY HATE CRIMES

Where the victim has suffered disability hostility, this often leads to the Court assessing the victim’s “vulnerability” as an aggravating factor. However, it should be remembered that offenders who select a victim because they are perceived to be vulnerable often do so based also on a perception that the victim is less worthy of respect or because they are seen as less human. Where there is evidence that the defendant lacks respect for the victim or that they are specifically denied their human dignity, this shows that the victim is selected because

³⁴ *Fitzgerald* [2003] EWCA Crim 287.

³⁵ Examples include the Priestley One-to-One Programme; Diversity Awareness and Prejudice Pack; Smile Hate Crime Awareness Programme; Thinking First/Thinking Skills Programme; and the Promoting Human Dignity Programme available in parts of England and Wales: see Mark A Walters and Rupert Brown with Susann Wiedlitzka, *Preventing Hate Crime: Emerging Practices and Recommendations for the Improved Management of Criminal Justice Interventions – Final Report* (Sussex Crime Research Centre and the International Network for Hate Studies, 2016) <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=preventing-hate-crime-final-report.pdf&site=539>>

of a bias or prejudice that the defendant holds towards the victim. In such cases the court should carefully consider whether targeted victimisation of disabled victims is more appropriately classified as a hate crime and hence attract the sentencing uplift prescribed under s. 146 of the Criminal Justice Act 2003.

SENTENCING GUIDANCE FOR OFFENCES AGGRAVATED BY AGE, SEX OR GENDER IDENTITY HOSTILITY

The Sentencing Council includes information on hostility aggravation within specific offence guidelines. There are also specific Magistrates' Court Sentencing Guidelines covering the football-related offence of racist chanting³⁶ and the communications network offences when aggravated by the five main types of hostility against protected groups.³⁷

For example, the Council's *Assault Definitive Guideline* (Crown Court)³⁸ includes racial, religious, disability and sexual orientation (but not transgender) hostility under "Factors indicating higher culpability". Among other aggravating factors it includes offences "motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)". This list gives the courts the discretion to go beyond the five characteristics included under the CJA, to consider age, sex, and gender identity hostility as factors that might aggravate an offence. The key difference between these characteristics and the five characteristics that are covered by the CJA is that where there is hostility based on race, religion, sexual orientation, disability or transgender identity the court *must* aggravate sentence, whereas it is the court's discretion to aggravate sentence based on age, sex or gender identity hostility.

AVOIDING DOUBLE-COUNTING OF HOSTILITY AT SENTENCING

Sentencers must not use hostility to enhance penalties twice. Where an aggravating factor is already reflected in the penalty for the offence, it cannot be used as justification for increasing the sentence further, and, when applying aggravating factors, "care needs to be taken to avoid 'double-counting'."³⁹

The risk of double-counting is particularly prevalent in the following three circumstances:

- racial or religious hostility may influence the judge when determining the starting point for a RRAO and then be used to uplift the sentence, as in *R v Letchford*;⁴⁰
- a judge may be asked to apply s. 145 of the CJA 2003 to a RRAO which already has a sentence uplift; or
- a judge may uplift a sentence for a basic offence based on aggravating factors set out in Sentencing Guidelines and then apply ss. 145 or 146.

³⁶ <<https://www.sentencingcouncil.org.uk/offences/item/football-related-offences-revised-2017/>>

³⁷ <<https://www.sentencingcouncil.org.uk/offences/item/communication-network-offences-revised-2017/>>

³⁸ Sentencing Council, 'Assault: Definitive Guideline' (2011) <http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf>

³⁹ Sentencing Guidelines Council, *Overarching Principles: Seriousness Guideline* (2004) para 1.21 <https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf>

⁴⁰ [2014] EWCA Crim 1474.

There may be a particular risk of double-counting for disability hate crime, where the victim's vulnerability is treated as an aggravating factor under Sentencing Guidelines, or as part of an offence,⁴¹ and s. 146 is then applied to uplift the sentence. At the same time, there is a risk of ss. 145 or 146 being side-lined where the aggravated element is also covered by Sentencing Guidelines. In this latter situation, the hostility element of an offence might be applied to the sentence, but not announced in court in the way that is required by ss. 145 and 146. It is, therefore, necessary that the hostility element of the offence is used to increase the sentence only once, but also that the sentencer makes clear that the sentence has been uplifted because of the hostility.

APPLICATION OF S. 145 CJA 2003 TO OFFENCES THAT CAN BE CHARGED UNDER THE CDA 1998

There are cases where the CPS could have, but did not, charge the defendant with a RRAO under the CDA 1998 (e.g. a common assault which was not charged as a racially aggravated common assault). This does not always preclude the alleged aggravation being introduced as a factor at sentencing.

Section 145 states that the provision "applies where a court is considering the seriousness of an offence *other than* one under sections 29 to 32 of the Crime and Disorder Act 1998" (emphasis added). This means that:

- (a) s. 145 cannot be applied where the defendant was *convicted* of a racially or religiously aggravated offence under the CDA 1998;
- (b) s. 145 cannot be applied to a basic offence where a racially or religiously aggravated form of the offence was *charged* but resulted in an acquittal.⁴²

Magistrates' guidance also suggests that s. 145 should "not normally" be applied to basic offences which could have been, but were not, charged as aggravated offences.⁴³ However, in *R v O'Leary*, the Court of Appeal held that s. 145 does not necessarily exclude the basic offences.⁴⁴ The precise circumstances in which s. 145 can be applied to a basic offence which could have been, but was not, charged as a RRAO remain unclear.⁴⁵ In *O'Leary*, in finding that s. 145 could be applied to a sentence for unlawful wounding, it was relevant that:

- the indictment at no point included an aggravated form of the offence in question;⁴⁶
- the defence had an opportunity to challenge the issue of racial aggravation at a trial;⁴⁷
- the sentencing judge concluded to the criminal standard that the offence was racially aggravated; and
- the judge's finding was not inconsistent with a jury verdict.

⁴¹ See, for example, the sexual offences against persons with a mental disorder under the Sexual Offences Act 2003.

⁴² *McGillivray* [2005] EWCA Crim 604; Sentencing Council, 'Magistrates' Court Sentencing Guidelines: Explanatory Materials: Hate Crime' (2017)

<<https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/>>

⁴³ Sentencing Council, 'Magistrates' Court Sentencing Guidelines: Explanatory Materials: Hate Crime' (2017)

<<https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/>>

⁴⁴ [2015] EWCA Crim 1306.

⁴⁵ See Abenaa Owusu-Bempah and Mark Walters, 'Racially aggravated offences: When does section 145 of the Criminal Justice Act 2003 apply?' [2016] 2 Crim LR 116.

⁴⁶ See also *McGillivray* [2005] EWCA Crim 604; *Kentsch* [2005] EWCA Crim 2851.

⁴⁷ See also *O'Callaghan* [2005] EWCA Crim 317.

Although the Court of Appeal clarified that, “in the majority of cases where the evidence supports an aggravated form of [the offence], then it should be placed upon the indictment”,⁴⁸ the judgment also confirms that s. 145 can (at least sometimes) be applied to basic offences which the prosecution chose not to charge under the CDA 1998.

NEWTON HEARINGS

If the hostility element of an offence is not dealt with at trial, or (more likely) the defendant pleaded guilty to an offence and disputes that it was aggravated by hostility, either a *Newton*⁴⁹ hearing must be held “or, at the very least, plain and adequate notice must be given by the sentencer that he is considering sentencing on an enhanced or aggravated basis”.⁵⁰ Where a *Newton* hearing is held, CPS revised guidance advises that oral evidence should be called to help the judge resolve issues of fact that are substantially disputed.⁵¹

Newton hearings rarely take place in hate crime cases.⁵² One reason is that a *Newton* hearing is not without risk for defendants. In particular, it risks the loss of credit for a guilty plea.⁵³ Under the 2017 Sentencing Guidelines, where the defendant’s version of events is rejected at a *Newton* hearing, “the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction.”⁵⁴

Newton hearings are also uncommon in hate crime cases because the judge is only obliged to hold such a hearing if the difference between the two versions of the facts is material to sentence.⁵⁵ Frequently, the penalty for cases prosecuted in the lower courts is sufficiently small that a finding of an aggravating factor would not make a substantial difference to the sentence.

PROTECTION OF DEFENDANTS’ RIGHTS AND INTERESTS

For defendants who are accused of hostility-based offending, it might be thought preferable for the hostility element to be determined by a judge at sentencing, rather than be prosecuted under the CDA 1998. This is because, if a defendant is convicted of a specific aggravated offence under the CDA 1998, they face a higher

⁴⁸ *O’Leary* [2015] EWCA Crim 1306 [18].

⁴⁹ *Newton* (1983) 77 Cr App R 13.

⁵⁰ *O’Callaghan* [2005] EWCA Crim 317.

⁵¹ Crown Prosecution Service, ‘Legal Guidance on Newton hearings’ (n.d.) <http://www.cps.gov.uk/legal/l_to_o/newton_hearings/>

See also *Sheard* [2013] EWCA Crim 1161; Una Morris, ‘Lessons to Be Learned from Sheard v. R’ (2013) 177(32) *Criminal Law and Justice Weekly* 540.

⁵² Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) 163.

⁵³ See, on this, Law Commission, *Hate Crime* paras 2.90 and 4.150; Lyndon Harris, “Newton Hearings – A Procedure Stacked Against the Defence” (2013) 177 *Criminal Law and Justice Weekly* 423.

⁵⁴ Sentencing Council, ‘Reduction in Sentence for a Guilty Plea Definitive Guideline’ (2017) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf>

⁵⁵ If it is not material to the sentence, the defendant’s version must be adopted: *R v Hall* (1984) 6 Cr App R (S) 321.

maximum sentence than they would for the basic offence. Also, the aggravated element of the offence shows on their criminal record.

However, the interests of the defendant may be better served by the CDA 1998 than the CJA 2003. Where a defendant is charged under the CDA 1998, it is clear from the outset that racial or religious aggravation will be an issue at the trial, and the defence can prepare to challenge the evidence of hostility.

The CDA 1998 also safeguards defendants by enabling jury trials, unless the charge is a racially aggravated s. 5 public order offence which can only be tried in the Magistrates' Court. The prosecution bears the burden of proving the hostility element of a hate crime beyond reasonable doubt, regardless of whether it is dealt with at trial or sentencing. Research suggests that juries are more open to defence evidence, and that it is more appropriate for juries to determine the presence of hostility than judges.⁵⁶

VICTIMS' RIGHTS AND SPECIAL MEASURES

The EU Victims' Rights Directive introduced minimum standards on the rights, support and protection of victims.⁵⁷ Article 22(3) focuses on hate crime, providing that particular attention should be paid to victims who "have suffered a crime committed with a bias or discriminatory motive, which could notably be related to their personal characteristics."

Under the UK's updated Code of Practice for Victims of Crime (2015), enhanced entitlements are available for those who are deliberately targeted, or whose quality of evidence is likely to be diminished by intimidation or their vulnerability due to a physical or mental disability.⁵⁸ The CPS can apply for special measures for complainants and witnesses, or the court of its own motion may raise the issue.⁵⁹

Special measures can involve screens or curtains to shield a witness from the defendant while giving evidence in court; examination of a witness via a live-link; giving evidence in private; the removal of wigs and gowns by legal professionals; and video-recorded evidence-in-chief.⁶⁰ In addition, special communication aids, such as alphabet boards and Registered Intermediaries are also available to witnesses who are eligible for special measures on the basis of age or incapacity.⁶¹

Alongside the legislative provisions for special measures, courts have inherent powers to make trial adjustments in order to assist vulnerable witnesses.⁶² These include adjustments to cross-examination, such as, for example,

⁵⁶ 1998, ss. 31(6), 32(5) and 32(6).

⁵⁶ Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp.189-90.

⁵⁷ The Directive 2012/29/EU of the European Parliament and of the Council replaced the previous Council Framework Decision 2001/220/JHA.

⁵⁸ Ministry of Justice, *Code of Practice for Victims of Crime* (Ministry of Justice, 2015)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF>

⁵⁹ The criteria for eligibility and granting a special measures direction are set out in ss. 16-22A of the Youth Justice and Criminal Evidence Act 1999.

⁶⁰ Youth Justice and Criminal Evidence Act 1999, ss. 23-28.

⁶¹ Youth Justice and Criminal Evidence Act 1999, ss. 29-30.

⁶² See Criminal Practice Directions 2015 [2015] EWCA Crim 1567, General Matters 3D-3G.

a prohibition on leading questions or putting the case to the witness.⁶³ Defence counsel should be aware that the implementation of special measures or trial adjustments may impact on traditional means of challenging the prosecution's case.

Particular care should be taken not to add to the intimidation of vulnerable or intimidated complainants of hate crime. In particular, both prosecution and defence counsel should avoid making irrelevant, incorrect and offensive assumptions about an individual based on their personal characteristics. For example, witnesses with disabilities should not unthinkingly be treated as or spoken of as weak or vulnerable, which can be inaccurate and marginalising. The sexuality of Lesbian, Gay, Bisexual and Transgender (LGBT) complainants or witnesses should not be given inappropriate prominence in circumstances where it is not relevant. Consideration should also be given to whether an LGBT complainant or witness fears being "outed" during court proceedings, and whether this can be avoided. The CPS guidance on prosecuting homophobic, biphobic and transphobic hate crime includes a section on "appropriate language", which states that "it is essential that prosecutors adopt a style of address or reference that demonstrates respect for the sexual orientation, gender identity and lifestyle of the individuals concerned."⁶⁴

CPS GUIDANCE

The CPS has published a substantial body of legal guidance to prosecutors on charging decisions and the prosecution of racist and religious hate crime,⁶⁵ disability hate crime and other crimes against disabled people,⁶⁶ and homophobic, biphobic and transphobic hate crime.⁶⁷ This may be useful to others representing parties in hate crime cases, as it covers relevant legislation and case law, definitions and the elements that need to be satisfied to prove the case. In addition, the guidance documentation provides information on alternative charges and verdicts, CPS policy on not accepting pleas in hate crime cases, enhanced sentencing powers and sentencing duties, and maximum penalties for different offences.⁶⁸

⁶³ On developments in cross-examination, see generally Emily Henderson, 'All the Proper Protections: The Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses' [2014] 2 Crim LR 93.

⁶⁴ Crown Prosecution Service, 'Homophobic, Biphobic and Transphobic Hate Crime – Prosecution Guidance' (2017) <http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/>

⁶⁵ Crown Prosecution Service, 'Racist and Religious Hate Crime – Prosecution Guidance' (2017) <http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/>

⁶⁶ Crown Prosecution Service, 'Disability Hate Crime and other Crimes against Disabled People – Prosecution Guidance' (2017) <http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/>

⁶⁷ Crown Prosecution Service, 'Homophobic, Biphobic and Transphobic Hate Crime – Prosecution Guidance' (2017) <http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/>

⁶⁸ Crown Prosecution Service, 'Racist and Religious Hate Crime – Prosecution Guidance' (2017) <http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/>