Neutral Citation Number: [2022] EWHC 527 (Admin)

Case No: CO/919/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2022

Before :

LORD JUSTICE WARBY
and
MR JUSTICE HOLGATE

- -

Between :

(1) JESSICA LEIGH **(2) ANNA BIRLEY** **(3) HENNA SHAH** **(4) JAMIE KLINGLER**	**Claimants**
- AND -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**
-AND-	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Interested Party**

- -
- -

Tom Hickman QC, Adam Wagner and Pippa Woodrow (instructed by **Bindmans LLP**) for the **Claimants**
Monica Carss-Frisk QC and George Thomas (instructed by **Directorate of Legal Services, Metropolitan Police Service**) for the **Defendant**
Yaaser Vanderman (instructed by **Treasury Solicitor**) for the **Interested Party**

Hearing dates: 19 – 20 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on Friday 11 March 2022.

LORD JUSTICE WARBY:

Introduction

1. At around 9pm on 3 March 2021 Sarah Everard, aged 33, went missing while walking home from Clapham to Brixton Hill, in South London. There were fears that she had been abducted and killed. On 9 March, the defendant announced that a serving Metropolitan Police officer had been arrested on suspicion of her kidnap. This was Wayne Couzens. On 10 March, Ms Everard's remains were found. On 12 March, Couzens was charged with her kidnap and murder. All these events attracted widespread publicity. In June and July 2021, Couzens pleaded guilty to kidnap, rape, and murder. In September 2021, he was sentenced to a whole life order.

2. This claim is concerned with events on and between Wednesday 10 March and Saturday 13 March 2021. This was a week after Ms Everard's disappearance, at a time when Couzens had been charged but not convicted. It was also at a time when the ordinary civil rights and freedoms of citizens were restricted by Regulations imposed to protect public health during the Covid-19 pandemic. The conduct restricted by the Regulations in force at the time included holding a gathering of more than 30 persons in a public outdoor place in a Tier 4 area. The Regulations made it a crime to contravene these restrictions without a reasonable excuse and gave the police power to arrest and/or serve a fixed penalty notice ("FPN") imposing a fine of £10,000 on someone they reasonably suspected of committing such an offence. London was a Tier 4 area.

3. The claimants are members of an informal collective that goes by the name *#ReclaimTheseStreets* which planned to hold a vigil on Clapham Common, prompted by Sarah Everard's disappearance. The date set for the vigil was 13 March 2021. Its purposes were to highlight risks to women's safety and to campaign for changes in attitudes and responses to violence against women. The claimants advertised the event, and large numbers showed an interest in attending. In the event the claimants abandoned their plans. In this judicial review claim they allege that their plans were unlawfully thwarted by officers of the Metropolitan Police Service ("MPS") for whose conduct the defendant Commissioner is responsible in law.

4. The claimants say the officers adopted an interpretation of the Regulations that was legally wrong as it categorised the proposed vigil as "unlawful", meaning criminal, merely because it contravened the restrictions on gatherings. The police are said to have (1) ignored the possibility that the fundamental rights to freedom of expression and freedom of assembly might have supplied a "reasonable excuse" for contravening those restrictions on this occasion and (2) failed to carry out the fact-specific proportionality assessment which they were duty-bound to conduct in order to reach a decision on that point. It is on that legally mistaken basis, say the claimants, that officers made decisions and statements that prevented, or at the very least discouraged, the claimants from carrying out their plans.

5. As is common knowledge, a vigil and other events went ahead on Clapham Common that Saturday and, later in the day, arrests were made. These events were not organised by the claimants and this aspect of the matter has only tangential relevance to the issues in this case.

Issues

6. The first main issue is whether the police made decisions that unlawfully interfered with the fundamental rights relied on because they prevented the claimants from organising the vigil on grounds that were not prescribed by law. As I shall explain, concealed within that broad formulation is an issue between the parties as to how we should analyse the conduct of the police. The claimants' case is that over the three-day period with which we are concerned the MPS repeatedly decided that holding the vigil would be an offence or unlawful and liable to sanction. The defendant maintains that there was no such decision; all her officers did was to point to the legal restrictions and the possibility that there might be enforcement action, depending on how things turned out. The defendant argues that the real nub of the claimants' case is a complaint that officers declined to provide them with an assurance that they would *not* face enforcement action if the vigil went ahead. It is said that the police had no duty to provide such an assurance; and it therefore cannot be said that this was an unlawful interference with the claimants' human rights.

7. The second main issue arises only if we find that the defendant's officers did unlawfully interfere with the claimants' rights under the European Convention on Human Rights ("the Convention"). The issue is whether we would, even then, be required by s 31(2A) of the Senior Courts Act 1981 to withhold relief because it is "highly likely that the outcome for the applicant would not have been substantially different" if the decision-making had been on a basis prescribed by law.

The legal and policy context

Human rights

8. The right to freedom of expression is guaranteed by Article 10(1) of the Convention. It includes the right to receive and impart information and ideas without interference by a public authority. Article 11(1) of the Convention guarantees the right to freedom of peaceful assembly and association with others, which includes the right to organise, and the right to take part in, a protest, vigil or other gathering. Section 6 of the Human Rights Act 1998 ("the HRA") makes it unlawful for a public authority, which includes a police officer, to act in a way which is incompatible with these rights. To that end, s 3 of the HRA requires a public authority to interpret and apply the law compatibly with the Convention rights, where it is possible to do so. The claim before us relies on s 7 of the HRA, which allows a person who claims to be a victim of behaviour that is contrary to s 6 to bring proceedings against the public authority concerned.

9. The Strasbourg cases make clear that the concept of an interference with Article 10 rights is a broad one, particularly in the sphere of political speech and debate on questions of public interest. The notion of interference goes beyond conduct which directly prevents a person from exercising their rights, such as censorship, confiscation of written material or the apparatus required to publish that material, or physically preventing people from meeting one another. It extends to the imposition of sanctions after the event and encompasses conduct which has a tendency to "chill" the exercise of the right in question. An instance of this is conduct which falls short of prosecution but induces the citizen to exercise self-restraint for fear of a future investigation or prosecution: see *Miller v College of Policing* [2021] EWCA Civ 1926 [64]-[70], in particular at [73]-[76]. All of this applies equally to restrictions on Article 11 rights.

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Article 11 is regarded as a *lex specialis,* an elaboration of rights already protected under Article 10.

10. The right to be free from such interference or restriction is not absolute. Article 10(2) authorises interferences, and Article 11(2) permits restrictions, where these are prescribed by domestic law and necessary in a democratic society in pursuit of one or more of the legitimate aims specified in the relevant provision. For present purposes it is enough to say that an interference or restriction is "prescribed by" domestic law if it is in accordance or conformity with that law. The concept of necessity carries with it a requirement that the interference be proportionate, going no further than is necessary. This will require careful scrutiny. The importance of the rights protected by Articles 10 and 11 is clear from the Strasbourg cases. The jurisprudence was summarised by the Divisional Court (Singh LJ and Farbey J) in *DPP v Ziegler* [2019] EWHC 71 (Admin), [2020] QB 253 [48]-[50], in terms which were approved by the Supreme Court on the subsequent appeal: [2021] UKSC 23, [2021] 3 WLR 179. Key points are that the right to freedom of expression is one of the essential foundations of a democratic society; it is applicable to a wide range of information and ideas, including those that shock or disturb; it helps to maintain social peace by permitting people a 'safety valve' to let off steam, thus eliminating or at least reducing the risk of violence and disorder; and it extends beyond what might traditionally be regarded as forms of "speech", to include activities such as protests.

11. *Ziegler* was a case about political protest. The court analysed the relationship between Article 10 and 11 rights and the offence of wilful obstruction of a highway without reasonable excuse contrary to s 137 of the Highways Act 1980. It was held that a person obstructing the highway in the lawful exercise of Article 10 and 11 rights will not be acting "without lawful excuse". There will be no lawful excuse if an interference with those rights would satisfy the conditions in Articles 10(2) and 11(2). The outcome will ordinarily turn on proportionality. In other words, a person should only be convicted of this offence if the State establishes that, in the particular circumstances of the case, the conviction would be a proportionate and therefore legitimate interference with these Convention freedoms.

12. It will be obvious from what I have already said that the restrictions on gatherings laid down by the Regulations represented an interference with Article 10 rights and a restriction on the rights protected by Article 11. But they had the legitimate aim of protecting public health and there is no challenge to the necessity or proportionality of the Regulations themselves. As I have mentioned, the issue for us is whether the decisions of the police that are complained of amounted to an interference that was not prescribed by law. There is no suggestion that those decisions did not pursue a legitimate aim. Nor are we required to decide whether they were necessary and proportionate. We do however need to determine whether they reflected a proper understanding of the law, and in particular the relationship between the Regulations and the Convention rights. And in that context it is necessary to consider what is required to conduct a lawful proportionality exercise.

13. In *Ziegler* at [71]-[78], Lords Hamblen and Stephens JJSC set out a non-exhaustive list of factors that could, depending on the facts, be relevant to the evaluation of proportionality. Factors they listed included (1) the nature and extent of any potential breach of domestic law and (2) "whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of

considerable breadth, depth and relevance'". In this context it is worth recalling that the Strasbourg cases reveal a hierarchy of kinds of speech, such that (for instance) hate speech or other kinds of criminal speech carry little if any weight, but especial weight is given to expression on political topics, where there is little scope for legitimate interference. Other factors listed by the Supreme Court in *Ziegler* included (3) the importance of the location, which could have symbolic force; (4) the extent to which the protest would interfere with the rights of others; (5) the likely duration of the protest; (6) prior notification to, and co-operation with, the police; and (7) the nature of any precautions proposed or considered.

The Covid-19 Emergency legislation

14. The legal restrictions imposed during the pandemic have been enacted by way of regulations made under emergency powers conferred by the Public Health (Control of Disease) Act 1984. The Act confers power on the Secretary of State for Health and Social Care to make regulations with immediate effect subject to subsequent Parliamentary approval. The first set of such regulations came into force in February 2020, but the controls on freedom of movement and association which became familiar in England were first introduced on 26 March 2020, by the Health Protection (Coronavirus, Restrictions) (England) Regulations SI 2020 No. 350 ("the Initial Regulations").

15. The Initial Regulations contained restrictions on leaving home and restrictions on gatherings, save for certain specified reasons. They criminalised behaviour undertaken in contravention of these restrictions without "reasonable excuse". The Preamble referred to a "serious and imminent threat to public health" posed by the incidence and spread of coronavirus and stated that the Secretary of State "considers that the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to that threat." An Explanatory Note recorded the opinion of the Secretary of State that the Regulations were compatible with the Convention rights. These general structural characteristics were repeated in later Regulations. Other features of the Regulations which persisted throughout the months to March 2021 and beyond are enhanced police powers, including powers to disperse gatherings, give directions and issue FPNs.

16. Regulation 7 of the Initial Regulations prohibited public gatherings of more than two people unless they came from the same household or for certain specified purposes such as work. From 1 June 2020, the permitted number was increased to six. From 13 June 2020, there was a further relaxation to allow a single-person household to "link" with a second household. There was no express exception for protest. In *R (Dolan) v Secretary of State for Health* a businessman, his wife and son sought judicial review of the Initial Regulations on the basis, among others, that they were incompatible with fundamental human rights, including Article 11. It was argued that in all or nearly all circumstances the Regulations would represent an unjustified restriction on rights of peaceful assembly and association. On 6 July 2020, permission to bring the judicial review claim was refused by Lewis J (as he then was): [2020] EWHC 1786 (Admin). The application was renewed and heard by the Court of Appeal on 29 and 30 October 2020, when judgment was reserved.

17. In the meantime, on 12 October 2020, the Secretary of State made three sets of "Covid-19 Alert Level Regulations" which did include an exception for protest. The Alert Level

Regulations set out restrictions designed for application to different areas of the country according to whether the "alert level" in that area was low, medium, or high. For each alert level there was an express exception which permitted gatherings of an unlimited number of individuals for the purposes of protest if two conditions were satisfied. The first was that the gathering was organised by "a business, a charitable, benevolent or philanthropic institution, a public body or political body". The second was that the organiser had taken "the required precautions", of which there were two. The organiser had to carry out a risk assessment that would satisfy the requirements of the Management of Health and Safety at Work Regulations 1999, and take "all reasonable measures to limit the risk of transmission of coronavirus, taking into account (a) the risk assessment … and (b) any guidance issued by the government which is relevant to the gathering."

18. On 1 December 2020, the Court of Appeal handed down its reserved judgment in *Dolan*: [2020] EWCA Civ 1605, [2021] 1 WLR 2326. The Court gave permission for judicial review on the issue of whether the Regulations were *ultra vires* and heard that claim but dismissed it. It refused the renewed application for permission for judicial review on human rights grounds. At [101] the Court referred to the Article 11 right to peaceful assembly and association and noted that "[o]n the face of it regulation 7 as originally enacted in March 2020 might be thought to have taken away this right altogether." But the Court went on to say this:

> "101. Nevertheless, it must always be recalled that regulation 9(1)(a) provided a general defence of 'reasonable excuse'.
>
> …
>
> 103. The first difficulty with [Counsel for the claimant's] submissions on article 11 is that he submits that the regulations must necessarily be regarded as being incompatible with article 11 in all, or nearly all, circumstances. It is difficult to see how that can be so when the regulations themselves include the inbuilt exception of 'reasonable excuse'. That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. In our view, the regulations cannot be regarded as incompatible with article 11 given the express possibility of an exception where there was a reasonable excuse. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March.
>
> 104. Furthermore, as [Counsel for the defendant] submits, the phrase 'reasonable excuse' is not materially different from the phrase 'lawful excuse', which is used in section 137 of the Highways Act 1980 and which was construed by the Divisional Court in *Director of Public Prosecutions v Ziegler* [2020] QB 253 as being capable in principle of embracing the exercise of Convention rights, in particular article 11, depending on the particular facts: see paras 58—65 in the judgment of the court (Singh LJ and Farbey J). In particular, we would emphasise the

way in which the Divisional Court concluded, at para 65: 'This is inherently a fact-specific inquiry."

19. The day after the *Dolan* judgment was handed down, a fresh set of Regulations came into force, imposing a new system of restrictions according to "tiers", with the restrictions applicable to each tier set out in a Schedule. The Health Protection (Coronavirus, Restrictions) (All Tiers) Regulations 2020, SI No. 1374 ("the All Tiers Regulations") had been made by the Secretary of State on 30 November 2020, and came into force on 2 December. At that time there were three tiers, the restrictions in which were set out in Schedules 1, 2 and 3. All three contained restrictions on gatherings with an express exception for protest in the same terms as the exception in the Alert Level Regulations.

20. Less than three weeks later, the Secretary of State made the Regulations which are central to the issues in this case. The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020, SI No. 1611 made amendments to the All Tiers Regulations by introducing a Tier 4 with enhanced restrictions set out in a new Schedule 3A. As many will remember, the amendment Regulations were made on 20 December 2020, and came into effect at 7am the same day. They were laid before Parliament on 21 December 2020 and approved on 30 December 2020. London was placed in Tier 4 immediately. Other areas followed between Christmas Day and 30 December. By 6 January 2021, the whole of England had been placed under Tier 4 restrictions.

The Tier 4 restrictions

21. Part 1 of Schedule 3A restricted a person's freedom to leave the place where they were living. Part 1A dealt with leaving the United Kingdom. Part 2 was entitled "Restrictions on Gatherings". Paragraphs 3 and 4 of Schedule 3A restricted participation in indoor and outdoor gatherings of more than two people. Paragraph 5 dealt with those organising or facilitating larger gatherings. The relevant parts said as follows:

> "5.— **Organisation or facilitation of gatherings**
>
> (1) No person may hold, or be involved in the holding of, a relevant gathering in the Tier 4 area.
>
> …
>
> (3) A gathering is a relevant gathering for the purposes of this paragraph if it falls within sub-paragraph (4) or (5).
>
> …
>
> (5) A gathering falls within this sub-paragraph if … it—
>
> (a) consists of more than 30 persons,
>
> (b) takes place—
>
> (i) in a private dwelling,
>
> (ii) on a vessel, or
>
> (iii) on land which satisfies the condition in sub-paragraph (6), and

> (c) is not a gathering in relation to which any of the exceptions set out in paragraph 6 or 7 (so far as capable of applying to the gathering) applies.
>
> (6) Land satisfies the condition in this sub-paragraph if it is a public outdoor place which is not—
>
> (a) operated by a business, a charitable, benevolent or philanthropic institution, or
>
> (b) part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution, or a public body. …"

22. It is common ground that the vigil which the claimants were organising and planned to hold would have been a "relevant gathering" for the purposes of Schedule 3A paragraph 5. It was going to bring together more than 30 persons in a public outdoor space within paragraph 5(6), and none of the exceptions in paragraphs 6 and 7 applied. Unlike those for Tiers 1, 2 and 3, the Tier 4 exceptions did not include gatherings for the purposes of protest.

23. The potential consequences for a person who contravened or was suspected of contravening the restrictions in Part 2 of Schedule 3A were set out in Part 3 of the All Tiers Regulations, headed "Enforcement". Regulation 9 conferred extended police powers as follows:-

> **"9.— Enforcement of restrictions and requirements**
>
> (1) A relevant person may take such action as is necessary to enforce any … Tier 4 restriction.
>
> …
>
> (2A) Where a relevant person considers that a person is outside the place where they are living in contravention of … paragraph 1 of Schedule 3A, the relevant person may direct that person to return to the place where they are living.
>
> (3) Where a relevant person considers that a number of people are gathered together in contravention of a restriction imposed by … paragraph 3 or 4 of Schedule 3A, the relevant person may—
>
> (a) direct the gathering to disperse;
>
> (b) direct any person in the gathering to return to the place where they are living;
>
> (c) where the relevant person is a constable, remove any person from the gathering.
>
> (4) A constable exercising the power in paragraph (3)(c) to remove a person from a gathering may use reasonable force, if necessary, in exercise of the power.
>
> …

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> (7) A relevant person may exercise a power under paragraph … (2A), … or (3) … only if the relevant person considers that it is a necessary and proportionate means of ensuring compliance with a restriction referred to in paragraph … (2A) … or (3) ...
>
> (8) A relevant person exercising a power under paragraph … (2A), … or (3) … may give the person concerned any reasonable instructions the relevant person considers to be necessary. …
>
> (9) For the purpose of this Regulation
>
> (a) …
>
> (b) "relevant person" means—
>
> (i) a constable,
>
> (ii) a police community support officer …"

24. Regulation 10 made provision for criminal offences and criminal penalties:

> "**10.-- Offences and penalties**
>
> (1) A person commits an offence if, without reasonable excuse, the person –
>
> (a) contravenes … a Tier 4 restriction …
>
> (b) contravenes a requirement imposed, or a direction given, under regulation 9,
>
> (c) fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 9, or
>
> (d) obstructs any person carrying out a function under these Regulations (including any person who is a relevant person for the purposes of regulation 9).
>
> (2) An offence under this regulation is punishable on summary conviction by a fine.
>
> …
>
> (5) Section 24 of the Police and Criminal Evidence Act 1984 applies in relation to an offence under this regulation as if the reasons in subsection (5) of that subsection included
>
> (a) to maintain public health…"

25. Regulation 10(5) extended the powers of arrest without warrant conferred on a constable by s 24 of the Police and Criminal Evidence Act 1984 ("PACE"). By s 24(4) of PACE the power of summary arrest is only exercisable if the constable has reasonable grounds for believing that it is necessary to exercise it for one of the reasons specified in s 24(5). Those reasons include such matters as facilitating prompt and effective investigation, preventing obstruction of the highway and causing physical injury to others. Regulation 10(5) added to the ordinary grounds.

26. Regulation 11 conferred powers on constables and police community support officers ("PCSOs") to issue an FPN to any person they reasonably believed to have committed an offence under the Regulations and to be aged 18 or over. Regulation 12 prescribed the amounts payable under such FPNs. For a first offence of leaving home or participating in a restricted gathering without reasonable excuse the FPN would be £100, with an exponential increase for subsequent offences, rising to £6,400 for a sixth or subsequent FPN. The penalty for any offence of breaching, without reasonable excuse, the Tier 4 restriction on holding or being involved in holding a "relevant gathering" was fixed at £10,000. The format of these regulations was a familiar one: a person served with an FPN would have 28 days to pay, and if they did so there could be no prosecution; failing payment they would be liable to prosecution. Such a prosecution could be initiated by the police themselves. The effect of Regulation 13 in conjunction with a designation by the Secretary of State was that the police could make charging decisions, a function normally reserved to the independent Crown Prosecution Service.

27. The provisions of Regulations 9 to 13 enabled the police to take various kinds of enforcement action in relation to a gathering restricted by the Tier 4 Regulations. At the most serious end of the scale were the issue of an FPN or a decision to charge a person with an offence contrary to Regulation 10. As is common ground before us in the light of *Dolan*, a person who participated in or held or was involved in holding a gathering in contravention of the restriction in Regulation 5 would not automatically be guilty of such an offence. Such a person would have a reasonable excuse, and so would not commit an offence, if their conduct was a lawful exercise of the rights protected by Articles 10 and 11. Whether that was so would depend upon a proportionality assessment that took account of relevant factors, based on a fact-specific enquiry. The burden of proving that there was no such lawful excuse lay on the prosecution. A lawful decision to prosecute or issue an FPN would require consideration of whether that burden could be discharged.

28. The Regulations conferred power to take measures short of prosecution or the issue of an FPN:-

    (1) A constable or a PCSO could give directions for the dispersal of the gathering and/or the return home of participants, coupled with instructions (Regulations 9(2A), (3)(a) & (b), (8)). That could only lawfully be done if the constable or PCSO "considered" that there was a contravention of a restriction on leaving home or those on taking part in a gathering and that the steps to be taken were "necessary and proportionate" to ensure compliance with the restriction (Regulation 9(7)).

    (2) Subject to those same conditions, a constable could use reasonable force to physically remove a person from a gathering, if that was necessary (Regulations 9(3)(c) and (7)).

    (3) A constable or PCSO could take "such action as is necessary" to enforce the restriction (Regulation 9(1)).

    (4) A constable who had reasonable grounds for believing that this was "necessary to maintain public health" could exercise powers of arrest under s 24 of PACE in respect of a person who was guilty of a Regulation 10 offence, or whom the constable had reasonable grounds for suspecting of having committed such an

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offence, or to be in the act of doing so, or to be about to do so (Regulation 10(5), read with s 24).

29. There was some discussion before us about the proper interpretation and application of some of these lesser powers. In my judgment, it is clear that an exercise of these powers would be likely to interfere with or restrict the exercise of the rights under Articles 10 and 11 and, if it did, such conduct would require justification by reference to the Convention requirements of necessity and proportionality. A lawful exercise of the power of summary arrest conferred by Regulation 10(5)(a) would, for instance, require the constable to have reasonable grounds for suspecting that such a step was necessary and proportionate in the interests of public health, even though the behaviour of the individual would otherwise represent a lawful exercise of the fundamental rights of free expression and assembly.

The 4 Es policy

30. At all relevant times during the pandemic the police in England and Wales operated a policy that became known as "the 4 Es". The policy was set out by the College of Policing (a professional body established by the Home Office for all those working in policing) in a policy document that was in force at the relevant time. The guidance of the National Police Chiefs' Council ("NPCC") entitled "Tier 4 National lockdown" dated 8 March 2021 contained the following:-

> **"Police and local authority enforcement**
>
> Police will lead enforcement in relation to breaches of requirements placed on **individuals in particular restrictions on movement and restrictions on gatherings.**
>
> Officers should continue to engage members of the public and explain changes. If necessary they should offer encouragement to comply. However if the individual or group do not respond appropriately, then enforcement can follow without repeated attempts to encourage people to comply with the law.
>
> We police by consent. The initial police response should be to encourage voluntary compliance.
>
> Policing will continue to apply the four-step escalation principles:
>
> - Engage
> - Explain
> - Encourage and only
> - Enforce as a last resort …"

31. Under the heading "Participating in outdoor gatherings" at page 15 of the College of Policing guidance there was a banner summarising the effect of the Tier 4 restrictions as follows:

> "These regulations permit participation in outdoor gatherings of up to two people in specific places in any area. Outside of these

> specified places, participation in gatherings is not permitted in any area unless an exception applies."

The general express exceptions to the restrictions were listed. At the foot of the page there was a second prominent banner saying "Note: Protests are not an exception in a Tier 4 area."

32. A later section (at page 16) dealt with "Restrictions on organisation or facilitation of gatherings". This recorded the Regulation 5 restriction on holding or being involved in holding a "relevant gathering", which it defined (so far as relevant) as:

> "… a gathering which …
>
> - consists of more than 30 persons
> - takes place …
>   - on land which is a public outdoor place …
> - is not a gathering to which any of the outlined exceptions apply".

33. In a section on "Enforcement Options" at page 19, the College of Policing guidance told the reader that it was an offence to contravene a Tier 4 restriction "without reasonable excuse". But the guidance did not tell the reader that protest might afford a reasonable excuse for holding a gathering that contravened the restrictions. It made no reference to any of the factors identified in *Ziegler* and *Dolan*.

The Operation Pima strategy

34. The Metropolitan Police had a Covid-19 strategy entitled "Gold Strategy Op Pima", the declared purpose of which was "to provide strategic direction to the Metropolitan Police Service response to the Coronavirus (Covid-19) pandemic in conjunction with partners across London." An amended version of this strategy was issued on 30 December 2020, after the introduction of the Tier 4 Regulations. The version in force at the relevant time was Version 9, dated 6 January 2021, and written by Deputy Assistant Commissioner Matt Twist who was, at that time the MPS's "Covid-19 Gold Commander".

35. Section 1.3 of the Op Pima strategy provided a summary of the All Tiers Regulations, including the following:

> "**National Lockdown Measures (from 0001 hrs on 6 January 2021 onwards)**
>
> … The National lockdown regulations outline:
>
> - Restrictions on gatherings
> - Restrictions on movement
>
> ….
>
> The Regs set out measures for enforcement of the restrictions and requirements … As during the National restrictions, there will not be an exemption for the purposes of protest where risk assessments are completed by the organiser.

> The new Regs outline the following restrictions;
>
> - No household mixing with anyone who is not in your support bubble.
> - No person may leave or be outside of the place where they are living without reasonable excuse and these are limited in number.
> - People are prohibited from gathering except for in a limited set of circumstances.
>
> …
>
> - Attendance at outdoor and indoor events is not permitted.
>
> …"

36. Section 1.4 of the Op Pima strategy listed "Additional Risks/Issues", which included the following about protest:

> **"Responding to protest** – Under National lockdown regulations, gatherings for the purposes of protest are not exempt, and therefore the policing response will need to respond to this, in what is a rapidly deteriorating position with a virus variant that will transmit much more easily. This means there are more risks associated with large groups, both to the groups themselves, communities and officers dealing. There is a clear need to enforcement action to deal with any large groups (sic)."

37. Section 2 of the Op Pima strategy was entitled "Metropolitan Police – Overall Aim". This section included the following relevant passage:

> **"Metropolitan Police – Overall Aim**
>
> …
>
> It is our intention to deliver our core policing responsibilities in line with the code of ethics. Any policing response or activity will be proportionate, seeking to use the least intrusive methods to achieve the lawful objectives and balance the needs and rights of all those involved. Our core responsibilities are:
>
> - The protection of life and property;
> - The prevention and detection of crime;
> - Maintenance of the Queen's Peace …"

38. Section 3 of the Strategy entitled "The Met Strategic Objectives" included the following:

> **"Operational (Op Pima, Overarching for wider events/ operations/ protest)**
>
> …

- Provide an effective and proportionate response to protest. In doing this we will take into account the HPA regulations for national lockdown that place significant restrictions on gatherings. If these are breached we will ensure that there is an effective, consistent and well-communicated response (which will include enforcement where appropriate) …"

39. Section 6 of the Op Pima strategy dealt with "Policing Style". It made clear that as a general rule the police would follow the 4Es approach, but there would be exceptions to this for certain kinds of event including not only Unauthorised Music Events ("UMEs") but also large gatherings:-:

> "Whilst the Met will seek to enforce the HPA regulations where appropriate, and as outlined in the strategic intentions, we will continue in most cases to follow the nationally agreed NPCC 4 E approach (The only exception to this is in cases of UME or large parties which are described in section below);
>
> 1. Engage
>
> 2. Explain
>
> 3. Encourage
>
> 4. Enforce (FPN or Arrest)
>
> ….
>
> **UME, Parties and large unlawful gatherings**
>
> As set out in the SI's, **The Met will take effective and timely enforcement action in cases of the most serious, wilful, deliberate or egregious breaches of the HPA regulations**. In considering this, we will take into account PHE advice re what are the most dangerous activities.
>
> **Given the current increased risk (both from a new C19 variant and the case rates/prevalence in London), there will be a presumption that enforcement activity will now take place at any UME, large party or large unlawful gatherings that are seriously breaching the HPA. This will include insofar as is practical enforcement against all of those attending as well as those individuals who are organising them.**
>
> **The approach to the 4 E's in this context will be different. In all cases, we will stop and speak to individuals where we in effect Engage and Explain the breach. There is then a presumption of moving straight to Enforcement where practical.**
>
> It is accepted there may be circumstances where enforcement is not practical due to weight of numbers or hostility of crowds, however this should be the exception and not the norm. …

> We will remain mindful of the corrosive impact of not taking action in serious cases could have on overall public compliance with the HPA Regulations (which are set in place to save lives), and also the serious health risk being posed as a result of the significantly more communicable variant of Covid 19.
>
> It is very clear now, that all of those attending a UME or a large party will know that they are in breach of the HPA and the law, and also it is clear that they are placing everyone at risk. Therefore on balance this move to quicker enforcement against all of those wilfully breaching the HPA, and placing others in significant danger, is both proportionate and necessary."

40. In all these quotations, the emphasis is in the original.

The relevant history

Wednesday 10 March 2021

41. Following the announcement of Couzens' arrest, the claimants and others formed *#ReclaimTheseStreets* and decided to organise a vigil for Ms Everard and "all women who feel threatened on our streets." They used a Facebook event page and a Twitter account to announce a vigil at the Bandstand on Clapham Common at 6pm on Saturday 13 March 2021, at which attendees would be required to wear a mask and observe social distancing and "strict Covid-19 safety guidelines". Those attending were encouraged to download and switch on the NHS contact tracing app. The claimants, two of whom were Lambeth Councillors, contacted Lambeth Council to inform them of the proposed vigil. They also contacted the police. On the same day, the government announced "surge testing in SW11", due to the discovery of a new coronavirus variant that became known as 'Beta'.

Thursday 11 March 2021

42. It was announced that human remains had been found, and Couzens was re-arrested on suspicion of murder. The second claimant appeared on BBC Radio 5 Live and Sky News where she promoted the proposed vigil. There was other media reporting, in the Guardian and on LBC radio. The police corresponded with the Council and engaged in internal consideration of the vigil, and its compatibility with the Regulations. An internal policing plan anticipated a one-hour event attended by people, the majority of whom were expected to be "peaceful and law-abiding members of the community who want … to exercise their right to protest as enshrined within common law and the HRA", although it was said "current government regulations impact that right." It was anticipated that attendees would disperse when the hour was up. An internal intelligence assessment recorded that the vigil was "not being organised as a protest" and that "attendees were expected to gather in a socially distanced manner". Threat assessments categorised the likelihood of disturbance, disorder, injury to an officer, or attracting counter protest as "very low". The risk of civil disobedience or non-violent action was assessed as "low". But the document noted that "[l]arge numbers of attendees may make adhering to coronavirus regulations more difficult".

43. At 14:30 there was a virtual meeting between the claimants and representatives of the police and Lambeth Council ("the First Meeting"). The senior police officer present

was Superintendent Daniel Ivey of Central South Command. He had earlier emailed a Lambeth Councillor, Jacqui Dyer, that "we aren't permitted to have any kind of large scale gathering, and we are being expected to prevent them from occurring". In an email sent to the first and second claimants and others shortly after midday he wrote that the police were "confirming all the legal ramifications", adding "we do need to bear in mind that organising an event is still illegal …". Minutes of the First Meeting show that Supt Ivey said, among other things, that

> "I am under pressure regarding allowing this event to go ahead. Law needs to be applied consistently under COVID 19 legislation…. College of Policing guidance is clear regarding organising such gatherings… I cannot give you dispensation for this event or give permission".

Acting Chief Inspector Richard Blears referred to the College of Policing guidance and said,

> "… it may be legal for individuals to attend … but guidance is clear that it is a breach of legislation to organise such an event … issue is around organisation … individuals would not be committing offences – organisers would."

The evidence of the first claimant is that officers said at the First Meeting that in their view the vigil would be "illegal" and that their "hands are tied" by the Regulations. The first claimant also says that officers told the claimants that the organisers might be breaking the law under sections 44 and 45 of the Serious Crime Act 2007. (Those sections create offences of encouraging an offence, whether or not it is eventually committed.)

44. Later that afternoon, the defendant had a short call with the Mayor of London in which she said the police would be messaging "that gatherings are illegal" and would welcome the same from City Hall. At 16:45, the police held a vigil planning meeting. It was attended by DAC Twist and Temporary DAC Jane Connors. DAC Connors had taken over from DAC Twist as Covid Gold Commander ten days earlier, on 1 March 2021. She was also Public Order Gold Commander for the week in question. DAC Connors made a record in her log in these terms:

> "Key messages re Pandemic & sit^{n} in London re infection & hospitals
>
> - Legislation Gatherings
> - Appeal to stay home
> - Message Gvt. Stay at home
> - Understand anger/sadness/loss & other ways
> - Ask for support from partners re pandemic & stay at home message
> - Consistency re can't choose a cause. Need to be measured.
>
> Also

- *Protest is exclude having been prev included*
- Regs laid before Parliament for the prot[n] health…"

45. At 20:16, the claimants' solicitors wrote and sent the MPS a Pre-Action Protocol ("PAP"letter. This set out their understanding of the MPS' position, namely "that all demonstrations and protests are currently prohibited and that the police must prevent these from occurring …" and "whilst they would wish to facilitate the vigil, 'our hands are tied' by the All Tiers Regulations (as it was stated to one of the organisers)." It was asserted that the MPS was operating "a policy which prohibits all protest and/or demonstrations in public outdoor spaces in Tier 4 areas" and that this was unlawful in the light of *Dolan.* The letter quoted from paragraph [103] of the *Dolan* judgment (see [18] above). Bindmans threatened an application the following day for an urgent injunction or declaration.

46. This prompted further internal consideration, recorded by DAC Twist in his log and an internal communication. The log entry included the following: "*It is clear that the HPA regulations prohibit a gathering for this purpose*, and that the police cannot take sides in what gatherings are allowed and what are not." The internal communication recorded DAC Twist's "Initial Thoughts", which included these:

- Striking the right balance here is going to be hugely important, and yet difficult. We remain in a public health emergency, and *gatherings for any purpose other than those which are specifically exempted are unlawful. …*
- Our approach needs to be consistent and it is not the role of the police to determine the merits of different *gatherings which are not permitted under the HPA. …*"

The emphasis in these and subsequent quotations is mine, unless otherwise stated.

Friday 12 March 2021

47. In the early morning, meetings took place between senior officers of the MPS and other forces under the umbrella of "Op Talla", and between the defendant and the Policing Minister. We have a record of the first of these meetings in the form of DAC Connors' log. This records "Reiterated MPS position re COVID Regs and mass gatherings and *this gathering would breach the regs. ... Mass gatherings are not permitted under regs*. … Other ways to express HRA 10/11." An email recording the second meeting contained this relevant passage:

> "Regarding the possible vigils
>
> - The law is clear. It is essential other partners say so. The MPS is doing all we can with the organisers so they understand the importance of finding other ways to express their horror, campaign on this important issue and support the family…"

48. Both these meetings were attended by Assistant Chief Commissioner Owen Weatherill of the NPCC. Following the second meeting, the NPCC circulated guidance to Chief Constables on the legality of vigils relating to Ms Everard's disappearance. It said:

> "We understand the strength of feeling and people's desire to come together mourn and show respect to Sarah Everard as well as to make a statement and organise on the issue of women's safety. *The Covid-19 regulations do not permit large gatherings* because of the very real risks of the spread of the virus. Police must take a consistent approach to policing the regulations and cannot wave (sic) the regulations for any one type of gathering."

49. At 09:29 the MPS sent an initial reply to Bindmans' PAP Letter recording the MPS position in this way: "… participation in this gathering, as we understand it is currently proposed to be conducted, would be unlawful, contrary to the restrictions imposed by [the All Tiers Regulations]." A record of an internal meeting attended by DAC Connors at the same time records her providing an update that "*The vigils break covid rules …*". Bindmans then filed and served these proceedings and an application for urgent consideration of the claimants' application for an injunction or declaration.

50. At 12:00 there was a further virtual meeting between the claimants, MPS officers and representatives of Lambeth Council ("the Second Meeting"). The senior MPS officer in attendance was DAC Connors. We have three records of the Second Meeting: a note made by Bindmans, one made by someone at the MPS, and a typed log of DAC Connors.

(1) Bindmans' note records DAC Connors saying this:

> "… I think the difficulty from my point of view is consistency across London, it's the consistency, the application of the regulations. The event in the format that you are proposing to have it, even with all the safeguards, *the safeguards don't negate the actual regulations.* And that won't be able to take away from it. so [sic] my urging again is, that this event shouldn't go ahead. We shouldn't be asking people to come together. *We shouldn't be bringing people together under the regulations* and that would be my sort of appeal to yourselves. … And there is alternatives that can be put forward…"

(2) The MPS note contains the following record of DAC Connors' contribution:

> "Need consistency across London. Safeguards don't mitigate risks. This event shouldn't go ahead. We don't want enforcement, but have obligation to work within regulations."

(3) DAC Connors' log says this:-

> "…Key points made:
>
> 1. Public Health emergency
> 2. *Gatherings not allowed under regulations*
> 3. *SD* [ie social distancing] *doesn't make a gathering allowed under regs*

> 4. Managed many protests over last 12 months. Many people passionate about causes
> 5. *This gathering far exceeds any level in regulations* and will be a serious health risk
> 6. People travelling
> 7. Other ways of expressing view & sorrow over Sarah's disappearance
> 8. *Will be breaching regulations as organisers & any attendees if it goes ahead in current forms*
> 9. Consistency as we have done this summer, take action over the breach regs
> 10. 4 E approach will remain & do all we can to not got [sic] to enforcement
>
> Key point on which we could not agree despite assurances on a SD protest & vigil respectful for Sarah. Group wished assurances from me that there would be no enforcement action against any attending or organising.
>
> I was not able to give that assurance as any gathering would need to be considered on the day & the circs on the day.
>
> …
>
> … to give them assurances re no action when I know that this may well turn into a huge vigil/gathering that would breach coronavirus regs & therefore involve enforcement action however long the engagement stage was. To give assurances that I would not be able to keep I felt was wrong & so reminded the group of the coronavirus Regs, Legislation & my position however unfair it seemed I acted in the best interests of those who were organising the event to inform them of the potential consequences & *it is an unlawful gathering.* …"

51. At 13:48 the MPS sent Bindmans a further and fuller PAP response. This acknowledged the obligation of the police not to interfere unnecessarily or disproportionately with the rights to freedom of assembly and expression. It went on,

> "However, … there are many causes about which people would wish to protest in public during the currency of the Tier 4 restrictions. The [MPS] are under a duty to apply the law consistently regardless of the sympathy that many (if not all) of its members would have for the current cause."

52. It was accepted that those organising felt anger, and it was understood that the timing and location of the proposed event were of central importance, but the Commissioner's position was put in this way:

> "… for the reasons set out below …
>
> 1) The proposed gathering does fall within the general prohibition on outdoor gatherings consisting of more than 2 people, imposed solely on grounds of protecting public health.
>
> 2) The fact that the purpose of the gathering is for the participants to exercise their Article 10 and 11 rights in the context of protest does not, in all the circumstances, constitute a reasonable excuse to gather in contravention of the general prohibition. These are qualified rights.
>
> 3) A binding assurance cannot be given that those who are in the process of organising the gathering would not face the prospect of being issued with a fixed penalty notice (FPN) or prosecution.
>
> While your clients' wish to seek a declaration that the gathering will be lawful is understood, it is not accepted that this is an issue that the Court will be able to determine in advance, as in respect of any offence that may be committed, applies will depend upon a highly fact specific assessment that can only be conducted in retrospect. Moreover, it would not be appropriate to seek to limit by way of injunction the freedom of the Metropolitan Police to enforce the general prohibition on gatherings under the current Regulations."

53. In the detailed reasons that followed it was said that in the Tier 4 Regulations

> "there is *a general prohibition … on gatherings* of more than two people in an outdoor place, *other than for specified exceptions, of which there is an exhaustive list. There is no exception for protest.*
>
> … the inclusion of protest as an exception for Tier 3, but not for Tier 4, makes it plain beyond any real debate, that *it was the deliberate intention of Parliament to include all gatherings for the purposes of protest within the general prohibition on gatherings when Tier 4 restrictions apply."*

54. The letter explained how the MPS saw the significance of *Dolan* as follows:

> "*…where a person is faced with a fine or prosecution* for participating in a gathering that does not fall within one of the permitted exceptions to the general prohibition, *they may seek to rely on the defence that they had a reasonable excuse*. It was, in part, for this reason that the Court of Appeal in [*Dolan*] found that a similar, previous restriction was not incompatible with ECHR Article 11 rights.
>
> However, the 'reasonable excuse' defence is primarily a defence to action taken against an individual. *It is for the individual to establish that they had a reasonable excuse* for what would

> otherwise be a criminal offence under regulation 10. It arises only at the point of enforcement by way of criminal sanction.
>
> It is not accepted that the existence of this potential defence means that, where a large gathering is widely publicised (albeit for the purpose of protest), it can be said in advance that the defence of reasonable excuse would necessarily apply to the offence of organising, or attending such a gathering, in clear breach of paragraph 4 or 5 of Schedule 3A."

55. The PAP response letter acknowledged that the Regulations interfered with Articles 10 and 11 but maintained that "enforcement so as to prevent a large gathering at Clapham Common" was (1) in accordance with (a) Schedule 3A to the All Tiers Regulations and (b) the legitimate aim of protecting health and (2) necessary in a democratic society. On this last point this was said:-

> "… it is not for the Metropolitan Police to decide for itself whether restrictions on large public gatherings are necessary for the protection of health. This decision has been taken by the Secretary of State and laid before Parliament when the Regulations were brought into force, in particular Schedule 3A."

56. Internal MPS records timed at between 15:00 and 16:00 show an update from DAC Connors that "Communications have been sent out to BCU Commanders to reinforce that *gatherings are unlawful under the coronavirus legislation* and to encourage engagement with the organisers in a bid to encourage alternatives to gatherings" and a log entry by DAC Twist that "[t]hese vigils are very likely to go ahead although *current regulations do not allow*." The MPS' understanding at the time remained that the vigils were likely to last about one hour.

57. The hearing of the claimants' application to the court began before Holgate J at 15:45 on Friday 12 March 2021. At some stage after nightfall that evening the defendant personally recorded a statement in the form of a short "piece to camera" from Clapham Common. This was evidently in readiness for publication if and when the time was considered appropriate. That time did not come until later the following day, after the claimants had abandoned their plans. Nevertheless, the piece to camera has some relevance to an assessment of the MPS decision-making before that happened. The defendant expressed her deep sympathy for the family and loved ones of Sarah Everard, and the profound shock and anger felt in London and beyond. She went on:-

> "Here, in South London, I know many people want to come together to express that sadness together in a gathering at a vigil. And I completely understand that desire, but we are still in a global pandemic, and such a gathering would be unlawful, and would be unsafe.
>
> So I do appeal to people to express their sadness and their solidarity and their really strong feelings about women's safety, for example, in other ways. Find a different way to express your condolences and your views on this occasion."

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58. At 18:30, Holgate J gave an *ex tempore* judgment on the application. He recorded that it was common ground that the principle identified in *Dolan* applied equally to Regulation 10 of the All Tiers Regulations. Thus, in the event of a prosecution it would be "necessary for the prosecution to show" that there was no reasonable excuse for the conduct in question. This would give rise to the proportionality exercise identified by the Divisional Court in *Ziegler*. Holgate J accepted the submission of Mr Hickman QC for the claimants that it was therefore "inappropriate to treat the 2020 Regulations as if they give rise to a blanket prohibition on gatherings for protest". But the Court did not consider it necessary or convenient to make any formal declaration to this effect. It was sufficient that the law had been clearly expressed in *Ziegler* and *Dolan* and that the Judge had held that the same reasoning applied to Regulation 10(1). It would also be wrong to declare in advance that those protesting in a reasonable manner would have a reasonable excuse. That would be misleading because all would depend on the facts. Nor did the Judge consider it appropriate to make any declaration that the defendant had an unlawful policy. Mr Thomas, appearing for the Commissioner, had accepted that a policy would be unlawful if it imposed a blanket prohibition on protest irrespective of the specific circumstance and the application of Articles 10 and 11. But he had unequivocally stated that the MPS did not have such a policy, and the issue could not be resolved at that stage. It had not been shown that the MPS had made any "decision" that was amenable to challenge by judicial review. Having clarified the law, the Judge declined to grant relief. He encouraged the parties to engage in discussions about the practicalities.

59. Both sides seem initially to have treated the judgment as affording them at least a measure of vindication. At 19:35 *#ReclaimTheseStreets* issued a press release expressing satisfaction that

> "… the Judge has spelled out in a detailed ruling that the law does not prevent the police from permitting and facilitating protest in all circumstances. The law is now clear that it is up to the police to conduct a proportionality assessment and the circumstances of each case… the police must make their own decision about whether the protest can go ahead and that must include a proportionality balancing exercise."

For their part, the MPS initially prepared a draft press statement that included the words "… Today's ruling in the High Court has *made clear that this event would be unlawful* and cannot go ahead …". This was circulated and copied to DAC Connors at 18:42. At 19:10, DAC Connors recorded in her log, "Court judgment has proceeded & supported police. However, the judge has in effect ensured that police need to consider time, place, & Art 10/11 HRA." By 19:55 the MPS had consulted DAC Twist, modified its initial draft press statement, and published it in the name of Commander Catherine Roper. The published version said as follows (again, the emphasis is mine):

> "Today's ruling in the High Court has *confirmed that the Metropolitan Police may conclude that attendance at a large gathering could* be unlawful. In light of this ruling our message to those who were looking to attend vigils in London this weekend, including at Clapham Common, is stay at home *or find a lawful* and safer *way to express your views*.

> … Our hope has always been that people stick to the Covid rules, taking enforcement action is always a last resort.
>
> … We continue to speak with the organisers … in the light of this judgement (sic) and will explain the rules and urge people to stay at home."

60. Much of this happened whilst the claimants were in a post-judgment meeting with representatives of the MPS and Lambeth ("the Third Meeting") which lasted from 19:05 to 20:30. Supt Ivey and DI Blears were present. DAC Connors joined at around 19:30. Again, there are three records of what was said. It is clear that the claimants were maintaining that the Judge had made clear that each event needed to be considered on its own facts. Until DAC Connors' arrival the MPS representatives were indicating that the planned event at 6pm did not accord with their interpretation of the law, and exploring alternatives that would not bring large numbers together. When DAC Connors joined the Third Meeting her position was this (according to her log, which contains the emphasis):

> "With regard to time & place & HRA 10/11 a discussion was had as to having the vigil through the day, discussion using the chat bar also discussed having specific colours.
>
> …
>
> I could not agree to any assurance that no enforcement action would be taken as the organisers were fully looking to change the event to spread it out through the day however despite the best endeavours and intentions agreement could not be reached. The organisers were making preparations to bring what could easily be thousands of people to Clapham Common in an organised gathering that would breach coronavirus legislation. There are other ways to express sec 10/11 via individual attendance within regs, online as many were already doing not as an organised gathering which would place peoples health at risk & breach coronavirus regn.
>
> …
>
> Even with consideration to time and place and HRA 10/11 and the discussion over extending the vigil to the day I could not commit to no enforcement action <u>if</u> the vigil was in breach of the coronavirus Reg^{n} as I feared it would be and therefore I could not be in a position to commit to a course of action that would not be right <u>on the day</u> in the circumstances that would be present <u>on the day</u> and action would need to be appropriate to that set of circumstances as had been the case with all other events over the year. …"

61. There is no reference here to the issue of "reasonable excuse". Nor does Bindmans' note of the Third Meeting contain any such reference. Bindmans' note sheds some light on the references in DAC Connors' log to the vigil being "in breach of the coronavirus Reg^{n}". Their note records DAC Connors saying this (the emphasis is mine):

> "So the question is, how do we enable people to do what they want to do. *But it can't be in a way that people come together and it breaches the regulations*. … Officers will have to make decisions around the 4Es process. We support online platforms not the big gathering. … We can all read the regulations and say, if you go down this path you as organisers are organising an event that may be in breach of the regulations."

62. The Third Meeting was inconclusive. After it had closed, the claimants learned of the statement that the MPS had published just before 8pm. The claimants considered their position.

Saturday 13 March 2021

63. By about 01:00 the claimants had concluded that the vigil would have to be called off, to ensure they were not subjected to an FPN or prosecution. At 07:17 *#ReclaimTheseStreets* announced the cancellation of the vigil and issued a public statement urging people not to attend Clapham Common. They explained their position and reasoning as follows:

> "… We have made every effort to reach a positive outcome that applies proportionality, so that we could find an appropriate balance between our right as women to freedom of assembly and expression with the regulations set out in Covid regulations.
>
> We have been very disappointed that … those from Scotland Yard would not engage with our suggestions to help ensure that a legal, Covid-secure vigil could take place.
>
> It remains our view that with the appropriate mutually agreed measures in place, this evening's vigil on Clapham Common would have been safe and in line with restrictions and safety regulations.
>
> However, in light of the lack of constructive engagement from the Metropolitan Police, we do not feel that we can in good faith allow tonight's event to go ahead."

For much of the day there were peaceful expressions of condolence at Clapham Common, including the laying of wreaths. At around 6pm, when trouble was looming or had begun to break out, the MPS published the defendant's piece to camera.

The evidence

64. In addition to the contemporaneous records we have one statement from the first claimant ("Leigh 1") made on 12 March 2021 for the purposes of the interim hearing, and a second one ("Leigh 2") made on 19 March 2021 in support of this claim. We have three statements in response, from Supt Ivey, DAC Twist and DAC Connors, all made in August 2021. There are two statements in reply served by the claimants in September 2021: one from the second claimant ("Birley 1") and one from Theodora Middleton of

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Bindmans. We also have short statements from Samantha Brown for the claimants and Andrew Holt for the defendant, which really take the matter no further.

65. The witness statements contain a good deal of discussion and argument about the documentary material I have already summarised. It is unnecessary to refer to this. But the claimants' statements, in particular Leigh 2 and Birley 1, explain the claimants' understanding of what they were told by the defendant's officers, and how it affected their behaviour. And the officers' statements give accounts of the thinking that underlay the decision-making for which they were personally responsible. There has been no challenge to the claimants' evidence. The officers' evidence is not accepted in all respects; we are invited to treat some of it with caution, as I shall explain.

Submissions

The claimants' case

66. The claimants say that the records reveal the implementation of an erroneous policy or practice that gatherings were prohibited, there was no exception for protest, and no need to make any risk assessment. It is submitted that this was the basis on which Supt Ivey acted at the First Meeting, and the approach adopted in subsequent decisions was in substance the same. It is argued that on a proper legal analysis this was not in accordance with the law for two main reasons: (1) it was incumbent on the police to start from the proposition that the freedom of expression and assembly might provide a reasonable excuse for organising or taking part in a gathering such as the vigil; and (2) the police were then required to reach a rational and informed assessment of whether or not the organisers could claim to have a reasonable excuse, which in turn required them to consider the public health risks and the steps taken by the organisers to mitigate such risks. At best, submits Mr Hickman QC, such references as were made to Articles 10 and 11 in meetings and contemporaneous records reflected a mistaken view that these would be relevant if - but only if - reasonable excuse was raised by the claimants in the event of a prosecution. Moreover, the officers adopted the misconceived approach that the rights in question could be exercised in other ways that did not involve a gathering, which cannot be true of the right to assemble.

The case for the defendant

67. For the defendant, it is said that the decision-makers understood throughout that the question of whether holding the vigil amounted to a criminal offence would turn on whether there was a "reasonable excuse", and that this would require consideration of Article 10 and 11 rights. But it is said that this would depend on how things turned out on the day, which could not be predicted with any certainty. The defendant's officers had no duty to express or reach any view on that issue in advance and did not do so. They were not obliged to make any public health risk assessment; they were entitled to proceed on the basis that this had been done by Parliament when making the Regulations.

68. The defendant's case is that when she and her officers referred to the proposed vigil as "unlawful" they did not mean that it would be criminal. They merely meant that such a gathering would be unlawful in the sense that it would meet the threshold requirement of contravening the Tier 4 restrictions, so that holding it might turn out to be an offence or justify an FPN. Ms Carss-Frisk QC told us on instructions that this was what the

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defendant meant in her piece to camera. She submitted that this was a proper way to use the term "unlawful", because the Regulations were law, and holding a restricted gathering was contrary to the Regulations. In the light of the above, it is argued that the claimants have no justified complaint about the defendant's assessment of the position. It is said that the claimants' real case comes down to a complaint that their rights were interfered with by the defendant's failure, at the Third Meeting, to offer an assurance that their proposal to organise the vigil would not result in enforcement action under the Regulations. This is said to be an unsustainable argument.

The submissions of the Secretary of State

69. The Secretary of State has made submissions to assist the Court on the proper approach to the Regulations. On his behalf, Mr Vanderman makes four main points: (1) the main focus of the claim is on the restrictions placed on freedom of assembly; a blanket restriction on that freedom cannot be justified solely on the basis that other forms of protest were permitted; (2) it is not arguable, nor is it argued, that the Regulations are incompatible with Article 11; the focus must be on the particular facts and circumstances of the case; (3) in the light of *Ziegler* and *Dolan* a person involved in an assembly that contravened the Regulations would have a "reasonable excuse" for doing so where it would be a breach of Article 11 to prohibit or interfere with such involvement and "it was for police forces, such as the defendant, to undertake that analysis based on consideration of all the circumstances", on a case by case basis; (4) absence of a reasonable excuse was an element of the offence created by Regulation 10(1), which had to be proved by the prosecution.

70. Mr Vanderman identifies a number of factors that would be relevant to the proportionality assessment, including (i) the deterioration in the public health picture that led to the Tier 4 Regulations; (ii) the legislative decision that the exceptions for protest contained in Schedules 1 to 3 of the All Tiers Regulations should not apply to Schedule 3A and Tier 4 areas; (iii) the importance of the subject-matter, and how close it was to the core of the right; (iv) the numbers due to take part; (v) the importance of the precise location; (vi) the existence or otherwise of a robust risk assessment; (vii) the nature of any proposed precautions; (viii) the likelihood of assembly taking place in any event; and (ix) the potential effects on the rights of others. Mr Vanderman submits that significant weight should be given to factors (i) and (ii) in particular.

Assessment

What decisions are the subject of the claim?

71. It is necessary to begin by identifying the decisions under review. The Amended Claim Form describes them as "the decisions made by the defendants on 11 and 12 March 2021 that prevented the claimants from organising and participating in [the vigil]." That is not an especially helpful description, for two reasons. First, it identifies the decisions only by their impact on the claimants, which is a matter in issue. Secondly, the way that impact is described is not the same as the way the case has been put by Mr Hickman, who has laid emphasis on the element of "chilling". This formulation does make clear, however, that the claim relates to decisions that involved or led to some communication to the claimants which had some influence on their attitudes or behaviour. Written policies, statements, logs, notes, or other records that did not become known to the claimants until later on are not themselves under challenge. They

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are relevant only as evidence of the reasoning that underlay the decisions that are impugned.

72. By the end of the hearing, it was evident that the challenge is to six decisions, each of which is said to have had at least a chilling effect on the claimants' exercise of their fundamental freedoms. They are (1) the decision of Supt Ivey to say what he did at the First Meeting; (2) the decision to write to the claimants in the terms set out in the first PAP response letter; (3) the decision of DAC Connors to say what she did at the Second Meeting; (4) the decision to write to the claimants in the terms of the second PAP response letter; (5) the decision of DAC Connors to say what she did at the Third Meeting; (6) the decision to issue the press statement of Commander Roper in the terms set out in the version published at 19:55 on 12 March 2021. These are all affirmative decisions, not failures or omissions. Although Mr Hickman made some reference to authority that suggests there may be a duty to facilitate protest, it is not the claimants' case on this judicial review that there was a breach of any such duty. The claimants do not complain of DAC Connors' failure to provide assurances.

73. Consideration of this decision-making must begin by resolving the threshold issue of whether any of it amounted to an interference with the Convention rights relied on. If so, we must address the substance of the decision-making, and whether it was in accordance with the law.

Was there an interference with the claimants' rights?

74. In my judgment, neither the claimants' analysis nor that of the defendant is an entirely accurate reflection of what was going on. The evidence does not fully bear out the claimants' case that there was a single decision made by Supt Ivey at the First Meeting, the substance of which was adhered to without modification in all the subsequent decision-making. But nor do I accept the argument of Ms Carss-Frisk, that the claim turns on the legitimacy of DAC Connors's decision to refrain from providing assurances. In my judgment, this was a series of individual decisions, taken by different individuals in differing circumstances, but of a broadly similar nature and effect.

75. I have carefully reviewed the contemporary records and the claimants' evidence. There is clearly some force in Ms Carss-Frisk's submission that the claimants were strongly influenced by the refusal to give them an assurance that they would not face an FPN or prosecution. But in my judgment that is not the full picture. The issue is sufficiently addressed by Leigh 2 and Birley 1. Ms Leigh makes clear how she and her co-claimants understood and responded to the statements made to them by the police. Officers had "made it clear" that "no circumstances can be identified in which such gatherings are considered lawful if they consist of more than two people and action will be taken to end them", and that "the Commissioner does not believe that any gathering of more than two people can" be lawful, save for those covered by specific exemptions in the Regulations. The vigil was cancelled because, as a consequence of their communications with the police, the claimants were "anxious" that if the event went ahead they would be fined. Ms Birley expressly denies that the claimants' complaint relates to a failure to provide assurances. She confirms that her understanding of the position taken by the police was "that our vigil was illegal and we were acting unlawfully by organising it." The stance she describes is an unqualified one. According to her evidence, the impression the police gave the claimants was that their conduct would inevitably be a criminal offence leading to an FPN or prosecution.

76. Not only is this evidence unchallenged it is also a reasonable interpretation of at least some of the words used by the officers concerned. This is not a case in which the claimants adopted an unreasonable interpretation of what they were told. Ms Carss-Frisk did not suggest as much. The right conclusion from the evidence overall is that each of the decisions under review amounted to an interference with the claimants' Convention rights, because each decision had a chilling effect within the meaning given to that term in the cases. By that I mean that each decision had its own deterrent impact. Further, in my judgment, each decision made at least some material causal contribution to the claimants' ultimate decision to cancel the vigil. The refusal to provide an assurance must be seen by us as it was seen by the claimants, in the context of what had been decided and said by the MPS beforehand.

Were the decisions prescribed by law?

77. It follows from what I have said already that the legitimacy of each decision calls for separate analysis. The first step is to identify the legal obligations of the police.

The legal effects of the Regulations

78. I have already set out much of the legal analysis: see in particular [27]-[29] above. I accept Mr Hickman's two main submissions as to the duties imposed on the police ([66] above). I also accept the Secretary of State's legal submissions, as summarised at [69] above. And I agree with Mr Vanderman's list of factors relevant to the proportionality assessment that fell to be made in this case ([70] above). It remains to consider the issue of whether, when, and how the police are obliged to engage with the proportionality assessment described in *Ziegler* by conducting a risk assessment. I agree with Ms Carss-Frisk that such a duty, in the context of Regulations designed to protect public health, is somewhat onerous. The primary functions of the police are concerned with public safety and public order. They do not possess public health expertise. The Tier 1, 2 and 3 Regulations expressly place a duty to conduct a risk assessment on those holding events, not the police. But in my view no enforcement decision can lawfully be made without a proportionality assessment. It seems to me an inescapable conclusion that the police must make some assessment of the health risk, and that this duty has to be discharged when any form of enforcement is under consideration.

79. The need to evaluate health risk seems clear when one considers the express exception for those holding protests in Tiers 1, 2 and 3. This exception applied if the organisers had performed a risk assessment and "taken all reasonable measures to limit the risk of transmission of coronavirus" (see Regulation 3 of the All Tiers Regulations). The onus was on the organisers to do these things, but in order to determine whether there was a contravention the police would have to assess whether the "required precautions" had been taken. When it came to Tier 4, it follows from *Ziegler* and *Dolan* that an officer deciding whether to charge an individual with an offence under Regulation 10 would have to consider the prospect of making the court sure that there was no reasonable excuse for holding the gathering or – put another way – that a conviction would be a necessary and proportionate measure in pursuit of the aim of protecting public health. The extended power of arrest conferred by Regulation 10(5)(a) raised a similar question, as it could only be exercised where necessary to maintain public health. An officer deciding whether to exercise lesser powers of enforcement such as dispersal of a gathering would also need to consider whether that intervention had a public health justification.

80. I agree with Mr Vanderman that the deliberate omission from the Tier 4 Regulations of any express exception for protest provides a clear legislative steer. Parliament considered that protest might supply a reasonable excuse for contravening the Tier 4 restrictions; but the intention must have been that in Tier 4 areas greater weight should be attached to the protection of health and less to Article 10 and 11 rights. I would also readily accept the general point made in *Dolan,* that the answer to such a proportionality question may sometimes be clear. That would be likely in the case of a UME or another large gathering with a purely social purpose. But the need for a fact-specific proportionality assessment would remain. And if the gathering was for the purposes of protest on a political issue or some form of commemoration the answer would not always be clearly against the holding of a gathering. The police had a duty to weigh up the competing considerations. I am not persuaded by Ms Carss-Frisk that in doing so they had no duty to "calibrate" health risks but were entitled to confine themselves to looking at the Regulations and taking it as a fixed and given starting point that any "relevant gathering" would pose a serious risk to public health.

81. As Mr Hickman submits, the MPS had a public law duty to take reasonable steps to inform themselves about relevant considerations (the "*Tameside"* duty). I do not think it can be said that this duty was discharged by merely noting the purpose of the Regulations. That approach would be at odds with the legal context I have identified. The seriousness of any health risk had to be considered and balanced against the rights engaged. I think the practical burden of applying the proportionality principle has been considerably overstated. Indeed, the evidence shows that in practice it was shouldered, to some extent. I have referred to the announcement of surge testing in Wandsworth. That was common knowledge at the time, and so was a good deal more about the day-to-day evolution of the pandemic. The MPS documents from which I have quoted contain some broad assessments of the public health risks arising from the newly discovered and more transmissible variant. The statement issued in the name of Commander Roper on 12 March 2021 seems to make clear that the health risks had been addressed in a way that went beyond merely noting that health risk was the reason for the Regulations.

82. I therefore cannot accept that the police were entitled in law to ignore altogether the question of what the available evidence might show about the gravity of current public health risks. The defendant's better argument is that the onus of establishing a breach of the *Tameside* duty is a heavy one. The key points were summarised by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 [70] (omitting internal citations):

> "… First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge … it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken … Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make

> further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. …"

The decision-making

83. I turn to consider each decision under challenge and whether it was in accordance with the duties I have identified. At this second stage, the starting point is what was said or written to the claimants. But to determine whether the decision to make that communication in those terms was in conformity with the law we must go further. We must look at what was said or written by the decision-maker in the context of the other contemporary records. We should bear in mind that the documents are not carefully drafted decision letters. Officers were, at times, having to react under pressure and may not have weighed their language with precision. We must also consider and assess the value of any relevant explanations given by the officers in their witness statements.

84. The defendant's case is that whenever she and her officers used the term "unlawful" they were using it in the limited sense I have identified, and that this is how the ordinary listener would have understood what they said. That is certainly not how the claimants understood what they were told. In any event, when it comes to the meaning of what was said, I share the view of the claimants. In my view it is incorrect and misleading to describe conduct as "unlawful" simply because it amounts to an act restricted by regulations such as these. Whether or not that is correct as a general proposition, the context here was a discussion between the police and *#ReclaimtheseStreets* about whether the claimants and others would be liable to criminal prosecution or FPNs if they went ahead with the vigil. Used by the police in that context, the word "unlawful" indicates behaviour that would expose a person to one or other of these sanctions. I add that the narrative above shows that on occasion officers described the proposed vigil as "illegal" or "a breach of legislation".

85. It remains however to consider what was said in its wider evidential context. Mr Hickman's submission is that the contemporary records provide the best evidence of the police's reasoning; after-the-event explanations, and in particular those of DAC Connors, should be approached with caution; and to the extent her evidence differs from and embellishes the reasoning she gave at the time, it is inadmissible. He relies on *Inclusion Housing CIC v Regulator of Social Housing* [2020] EWHC 346 (Admin) [78] (Chamberlain J). On the other hand, Ms Carss-Frisk notes that Mr Hickman has made no application to cross-examine. She submits that we must apply the well-established general rule in judicial review, that the defendant's written evidence is to be accepted unless it is inherently contradictory, implausible, or inconsistent with other incontrovertible evidence: see *Soltany v Secretary of State for the Home Department* [2020] EWHC 2291 (Admin) [77]-[78] (Cavanagh J).

86. I have reviewed all the evidence about the six decisions under scrutiny, bearing in mind these principles and the need to avoid an unduly strict interpretation of things that may have been said or written in some haste, under pressure. My conclusion is however that none of the decisions complained of was in accordance with the Regulations, properly interpreted in the way that I have identified. I would uphold both the claimants' grounds of challenge in relation to each of those decisions.

87. The First Meeting. The claimants have established that the decision-making of Supt Ivey and DI Blears on 10 March 2021 was legally misinformed. Those officers proceeded on the mistaken footing that a breach of the restriction on holding a relevant gathering would be illegal, because it would be an offence. This is the ordinary meaning of what the officers said in the passages quoted at [43] above. It is clear, in my view, that the language they used was an accurate reflection of their state of mind. Both officers referred to the College of Policing Guidance. That Guidance contained an account of the legal position that was incomplete and misleading because it positively asserted that there was no exception for protest, made only passing reference to the requirement of no reasonable excuse, and failed to reflect the *Ziegler* and *Dolan* principles. Supt Ivey's witness statement makes clear that he took his understanding of the law from that source. His evidence is that his determination was based on the Regulations as he "knew large gatherings were not permitted, unless certain exceptions applied". His view was that the proposed vigil was "fundamentally … in contravention of the restrictions". He does not say, nor is there any other evidence, that he knew that a breach of the restrictions was only an offence if there was no reasonable excuse. Unsurprisingly, there is no evidence that he gave any consideration to the question of whether the freedom to speak and gather might supply such an excuse in this instance. There is no statement from DI Blears.

88. I would add that the reference to the Serious Crime Act that was evidently made at this meeting (see [43] above) is likely to have been made by Supt Ivey, and to have been prompted by the content of an open letter from the MPS dated 21 December 2020 which itself made no reference, direct or indirect, to the freedom to protest.

89. The first PAP response. Bindmans' PAP letter was a broadly accurate summary of the stance with which the claimants had been presented by the MPS thus far. It clearly set out the central flaw complained of, citing the key passage of *Dolan*. The MPS's initial PAP response contains no indication that the author(s) had understood and appreciated the significance of this. The bald assertion that "participation in this gathering … would be unlawful" appears on its face to reflect the same simplistic approach as had been taken by Supt Ivey and DI Blears at the First Meeting. We have no evidence about who gave the instructions on which the first PAP response letter was based. The evidence we do have contains nothing to show that Bindmans' key points had been appreciated or properly understood by any MPS officer at this time. There is no reflection of the *Dolan* point in DAC Twist's internal record of 11 March 2021, or in DAC Connors' log of 12 March 2021, or in the NPCC circular of the same date.

90. The statement of DAC Twist says that he was aware of the *Dolan* judgment and its effects when he drafted the Op Pima strategy document in January 2021. He also maintains that his strategy document "adequately reflected that [*Dolan*] judgment and the principles underpinning it." As will be clear, I disagree with that second assertion. Whatever may have been DAC Twist's state of mind, his writings of January and 11 March 2021 mis-stated the legal position. There is, moreover, no evidence that DAC Twist conveyed any different account of the legal position to those responsible for the first PAP response letter, or that he said or wrote anything to them. The content of the first PAP response letter indicates otherwise. DAC Connors' statement also says she "was aware" of the *Dolan* decision and familiar with Articles 10 and 11. But she does not say clearly when she came by knowledge of the *Dolan* case; the first written records made by her that contain any reference to these rights was made at 08:00 on 12 March,

after receipt of Bindmans' PAP letter; and there is no evidence that DAC Connors had any input into the drafting of the first PAP response letter either. Hence my conclusion that this letter reflected a continued misunderstanding of the law. Those responsible for writing it had failed to appreciate or understand the reasonable excuse requirement and its potential significance.

91. The Second Meeting. My conclusions as to this meeting are substantially the same, and for similar reasons. DAC Connors' evidence makes clear that she was aware by this time of a legal challenge, but she does not state that she had read Bindmans' PAP letter, or for that matter the MPS' initial response. There is no evidence that she was involved in that aspect of the matter. The words she used contain no indication that the factors which *Ziegler* and *Dolan* show she was obliged to consider and weigh up were present to her mind at that time. There is no other contemporaneous document that contains any such indication. The natural interpretation of the language she used at the Second Meeting, read in context, is that she had decided, without reference to those considerations, that the event as proposed would breach the Regulations and be unlawful (that is, criminal or at least such as would justify an FPN).

92. None of the three separate records of the Second Meeting contains any reference to *Dolan* or "reasonable excuse". DAC Connors's statement acknowledges this is the position, as far as her own log is concerned. She does not claim to recall why that is but surmises that the reason is that she could see no way in which there could be such an excuse. I do not think that is likely. The probable reason why DAC Connors' lengthy log entry made no reference to those factors is that the significance of *Dolan* had been overlooked by her up to this point. The statement recorded by the defendant herself later in the day while the hearing was going on before Holgate J is not complained of, but appears to reflect this same mistaken legal analysis.

93. The second PAP response letter. Again, we have no evidence about how this letter came to be drafted. None of the MPS witnesses claims to have had any input into it, or indeed to have read it. There can be no doubt that the authors of this letter had addressed their minds to *Dolan* and some of its implications. But it is clear, and the defendant accepts, that this letter mis-stated the legal position to the following extent. Reasonable excuse is not "a defence … which it is for the individual to establish". Absence of reasonable excuse is an ingredient of the offence created by Regulation 10; to succeed in a prosecution the state would have to establish to the criminal standard that there was no such excuse. Further, for the reasons I have given, it is not correct to say that the possibility that Article 10 or 11 might justify the holding of a restricted gathering only falls for consideration "at the point of enforcement by way of criminal sanction". It is for the law enforcement agencies to consider these issues for themselves before exercising the powers conferred upon them.

94. The letter contained two further errors of law. The first reflects an error in the Guidance that also runs through the decision-making with which we are concerned. In the name of equal treatment and "consistency", the MPS refused to take account of the nature of the claimants' "cause", and the attitude of the public to that cause. This was wrong. As *Ziegler* shows, law enforcement bodies considering enforcement action must evaluate the "cause" at stake in a protest and may need to give greater weight to some causes than to others. That may not be easy, but it is not the same as displaying favouritism. In the present case this was clearly a matter of importance. The second legal error is a refusal to consider whether, in the particular circumstances of the case, the enforcement

of the restrictions would be necessary and proportionate in pursuit of the legitimate aim of protecting health. That, I think, is the implication of the passage quoted at [55] above. That passage cannot have been a defence of the Regulations themselves: the claimants had mounted no challenge to the Regulations, and such a challenge had been rejected in *Dolan*. Nor does this passage reflect a rational and lawful discharge of the *Tameside* duty. Rather, it amounts in substance to a denial that the police owed any such duty.

95. In all these ways, the decision reflected in the second PAP response letter was discordant with the true legal position. All of these, in my judgment, are important errors of law. They undermine the assertion in the letter that the fact that the gathering is for protest "does not in all the circumstances, constitute a reasonable excuse". Although that has the superficial appearance of a decision on the particular facts, it was in reality a blanket decision.

96. The Third Meeting. This, of course, post-dated the hearing before Holgate J. By the time of that hearing, or at least by the time it ended, the MPS's position had shifted significantly. It was no longer advancing any of the legally mistaken propositions it had advanced just hours beforehand in the second PAP response. Those errors had been identified and exposed. The judgment made clear that the burden on the issue of reasonable excuse lay on the state and that any decision about this vigil would need to involve a tailored proportionality assessment. But I do not consider that the decisions made by the MPS thereafter fully reflected these points, or that they put right the other errors of law to which I have referred.

97. The initial draft of the MPS press statement was sent to DAC Connors about half an hour before her initial log entry at 19:10, and some 50 minutes before she joined the Third Meeting. The terms of the draft press statement do not accurately reflect the judgment, or the applicable law. They indicate a pre-determined view about what the outcome of any further decision-making would be. Again, there is nothing to indicate that the importance of the cause had been factored in, and every reason to believe it had been deliberately left out of account. There is no indication that the author(s) considered whether mitigations could make it reasonable and hence lawful to conduct the vigil, even if large numbers turned out on the day.

98. DAC Connors' log entry of 08:00 indicates that she saw Articles 10 and 11 as rights that could be given effect in ways other than a protest gathering of 30 or more. It is her log entry timed at 19:10 that contains the first written indication that she may have realised that those rights could make such a gathering lawful. The entry does reflect some of the core ingredients of a lawful decision-making process: that Articles 10 and 11 are relevant, and that the police are obliged to consider them. But the entry contains no indication that DAC Connors properly appreciated at the time the significance of the reasonable excuse provision. The log entry identifies only two relevant factors, namely "time and place". The log makes no reference to the importance of the cause in support of which the claimants wished to hold the vigil. The explanation for this, I infer, is that it was established MPS policy to disregard that factor. Nor does the log entry mention any other relevant consideration. And she records that the judge had "supported police", which is not an accurate reflection of the judgment.

99. The records of the Third Meeting are consistent with the earlier log entry. They do not mention the "reasonable excuse" issue. They suggest that DAC Connors' view was that a contravention of the regulations would be unlawful, leaving it to the MPS to exercise

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its discretion on the question of enforcement, applying the 4Es approach. In my judgment the record shows that she and other officers present did not engage meaningfully with the claimants on how attendance by the public could be managed by them. The issue of protective measures was highly relevant and not simply a matter for the claimants as organisers. It was one for the police to discuss and consider, all the more so given the chilling effect of the first four unlawful decisions of the police (and the combined effect of that course of conduct).

100. DAC Connors' witness statement does identify the task for the police: to make "an assessment of whether an individual may have a reasonable excuse for contravening the Regulations". She makes clear that she understood that the factors specifically mentioned in the log ("time and place") would have to be considered. But again she makes no reference to the importance of the cause or to any other relevant factors. I do not question the sincerity of the officer's statement but I consider the contemporary records to be a safer guide. My conclusion is that the MPS' decision-making continued to be legally flawed in the ways I have mentioned.

101. The Press Statement. The final version was different from the initial draft. It had been watered down. Again, I caution myself against taking too strict a view of the language used, which may represent a compromise arrived at in haste. But in my judgment, the evidence as a whole points to the conclusion that in substance the MPS was still following an unlawful approach. The revised version of the statement was issued very swiftly. It was modified, not re-drafted from scratch. The amendments were of the semantic or tinkering variety rather than matters of real substance. It failed accurately to reflect the law as stated in the judgment. The encouragement to stay at home "or find a lawful ... way to express your views" implies that travel to and attendance at the vigil would be *un*lawful. References to "sticking to the rules" lend support to that view.

102. There is no evidence that the MPS had in mind at this time the need to consider the *Ziegler* factors discussed above, apart from time and place. Indeed, DAC Twist's evidence undermines that view. He makes clear that in his mind the police could not afford the claimants "a different status, based on their cause". They could not be "seen to treat one cause differently from other causes which other people might feel equally strongly about". He further asserts that any attempt to factor in and weigh up the nature of the claimants' cause would have placed the MPS in "an impossible position when confronted with other organisations wishing to hold their own events in support of other causes." Importantly, the same thinking was recorded in DAC Twist's log for 8.54am on 13 March. As he saw it, this formed part of the rationale for the "strategy" adopted by the MPS in relation to protest. In my view, further, the defendant's evidence fails to disclose a lawful approach to the other *Ziegler* factors I have mentioned above. DAC Twist suggests that the claimants had "lost control over the numbers who would attend". He does not appear to have addressed his mind to the fact that, as all agreed, some form of vigil or the like was inevitable, or to the detail of the mitigations which the claimants had put in place and proposed.

Relief

103. For these reasons and those to be given by Holgate J, with which I agree, I would grant declaratory relief in appropriate terms in respect of each of the six decisions under review. I would not award any damages.

104. In reaching these conclusions I have considered but rejected the defendant's contention that relief must be refused by reason of s 31 of the Senior Courts Act 1981. Section 31 contains the following relevant provisions:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application [ie, in this case an award of damages],
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

105. I am prepared to assume that this is an application for judicial review within the scope of these provisions, even though it has become a claim under s 7 of the HRA. The first question is whether the statutory threshold is met. We have been referred to the explanation of the statutory provisions provided by the Court of Appeal in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446. The court pointed out that the threshold test is "highly likely" not "inevitable", and that the section does not require that the outcome should be exactly the same. But the defendant has not persuaded me that the threshold test is satisfied here. It is therefore unnecessary to consider the exceptional public interest proviso.

106. Section 31(2A) requires us to focus on the "outcome for the applicants" and to compare what actually happened as a result of the unlawful decisions with what would (or would very likely) have happened if those decisions had not been taken. Here, the actual outcome for the claimants is clear: they decided to abandon the vigil. It is possible that this would have happened anyway if the defendant's officers had taken lawful decisions rather than the unlawful ones they did take, but I am not persuaded that this is highly likely. The defendant's evidence does not engage with the hypothetical scenario that we are required to consider. Her argument is simply that the claimants would not have been given the assurances they sought. That may be so, but I do not think it adequately addresses the issue. The policing plan of 11 March 2021 shows that the MPS were then anticipating a short and peaceful event. The defendant's evidence does include DAC Twist's assessment that those who attended on Clapham Common between midday and 6pm on 13 March 2021 to lay flowers and pay their respects at the scene of an awful attack in a socially-distanced manner could in all the circumstances have had a reasonable excuse for contravening the restrictions. That tends to undermine rather than to support the defendant's case under s 31(2A).

107. In [12] above I said that it is unnecessary for us to decide whether the decisions taken by the MPS were necessary and proportionate. In *Plan B Earth,* the Court of Appeal emphasised at [273] that s 31(2A) has not altered the fundamental relationship between the courts and public bodies. The courts must be cautious about straying into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. This, however, is not a case where a public authority has reached a

decision after carrying out an apparently complete proportionality exercise and the court is asked to review that decision. Here, the decisions of the MPS were legally flawed in that they did not give proper effect to the "reasonable excuse" provision in the Regulations and the MPS failed to carry out a fact-specific proportionality assessment in accordance with *Ziegler*. Those decisions had a chilling effect on the exercise by the claimants of their rights under articles 10 and 11, which have been violated. The claimants have been deprived of a decision by the MPS in accordance with the law. They are entitled to a decision from the court which vindicates their position in relation to the unlawfulness which I find to have occurred. It would be inappropriate for the court to avoid that outcome by purporting to carry out itself the proportionality exercise which the MPS was responsible for undertaking and failed to do.

108. The damages claim is made under the HRA. Section 8 of the HRA gives the court power to grant such relief or remedy within its powers as it considers just and appropriate, but no such award may be made unless the court is satisfied that it is necessary to afford just satisfaction. A decision on that issue must take account of all the circumstances, including any other remedy granted, and the principles applied by the European Court of Human Rights in relation to Article 41 of the Convention. Here, the claim is for a total of £7,500. There is no claim for material loss. The European Court awards compensation for non-pecuniary loss when it considers this to be just and equitable. It quite often concludes that the finding of a violation is a sufficient response to state interferences with Article 10 and 11 rights that fall short of punitive measures. Here, I do not doubt that the claimants suffered distress and anger at the conduct of the MPS, but in all the circumstances I would regard this judgment coupled with an appropriate declaration that the defendant's decisions were unlawful as sufficient to afford the claimants just satisfaction.

MR JUSTICE HOLGATE:

109. I entirely agree with the judgment of Warby LJ.

110. In the judgment given on 12 March 2021 I held that, in order to read the Tier 4 restrictions on gatherings for the purposes of a protest compatibly with Articles 10 and 11, it was necessary for the MPS to apply the relevant principles laid down by the Court of Appeal in *Dolan* and by the Divisional Court in *Ziegler*. That included the need for a case-specific proportionality assessment by the MPS, the structure of which had been summarised in *Ziegler* at [64].

111. The judgment of the Supreme Court in *Ziegler* was not handed down until 25 June 2021. However, the relevant factors summarised at [71] – [78] had previously been well-established by the authoritative case law to which Lord Hamblen and Lord Stephens JJSC referred.

112. As my Lord has shown, insufficient regard was had to those principles in the guidance issued by the National Police Chiefs' Council on Tier 4 Restrictions (8 March 2021) and in Version 9 of the MPS's "Gold Strategy Op Pima" (8 January 2021) or, indeed, in the earlier "open letter" from the MPS (21 December 2020). Unfortunately, this series of guidance influenced the "strategy" (to use DAC Twist's word) adopted by the MPS throughout their dealings with the claimants in relation to the vigil planned for Sarah Everard on Clapham Common.

113. For example, section 6 of the Pima Guidance focused on the largeness of certain gatherings as regards their impact on the risk to public health. Because of that risk, there was a "presumption" that enforcement activity would take place "at *any* UME, large party or large unlawful gatherings" (emphasis added) that seriously breach the Regulations, including enforcement against those attending as well as the organisers. The guidance added that for such events the approach to the "4Es" would be different. The police would speak to individuals and explain the breach: "there is then a presumption of moving straight to enforcement where practical". It was stated that the "move to quicker enforcement" against persons "wilfully breaching" the Regulations "and placing others in significant danger, is both proportionate and necessary".

114. The contemporaneous documentation and the evidence on the decision-making by the police in this case is all of a piece with the thrust of that guidance. The MPS have repeatedly emphasised the large size of the gathering, the location, and how people attending would travel to and from it, as if those matters were sufficient to determine the risk to public health and the issue of proportionality.

115. The Pima Guidance did not distinguish between UME, large parties or *any* "large unlawful gatherings". Section 6 of the Guidance did not consider whether the purpose of a gathering would be to exercise rights under Articles 10 and 11, let alone *Ziegler* factors, such as whether a protest would involve "very important issues" or "views which many would see as being of considerable breadth, depth and relevance", the nature of the location of the event, or the mitigation or precautionary measures proposed to be put in place.

116. Similarly, in their discussion with the claimants and others the MPS assumed that because of a need for consistency, the police could not "choose" or "favour" a cause or take into account "the merits" in this case of the vigil. However, in my judgment, although the law does not expect the police to engage in choosing between different viewpoints or to approve or disapprove of a particular viewpoint (see e.g. the Divisional Court in *Ziegler* at [55]), it does expect the police to distinguish between on the one hand, a musical event, a party or some other form of entertainment and on the other, the making of a serious protest or an act of commemoration. Furthermore, in this latter category the nature of the issues raised are capable of being an important factor. Here, there could be no real dispute that the vigil concerned matters of considerable public importance. In addition, they were directly linked to the proposed location. Of course, such factors are not themselves "trump cards" in a proportionality assessment. But they are factors which should be evaluated by the decision-maker in that assessment, so that they may properly be weighed in the balance with all other factors, whether for or against enforcement.

117. What the law regards as appropriate consistency is achieved by applying relevant legal principles to each case (notably here the *Ziegler* factors). If that is done the process of case-specific evaluation *may* produce similar outcomes in many instances, but it certainly will *not* produce the same outcome for *all* gatherings. The Report of HM Inspectorate of Constabulary and Fire Services on the Sarah Everard Vigil (dated 30 March 2021) recognised this very point (at page 24): -

> "this need for consistency cannot substitute for an individualised proportionality assessment that considers the specific facts of each case".

If that is not done, "the concern for consistency" may "lead to an approach of treating all protest activity as invariably unlawful" (p.27).

118. The Report also recognised that even in the context of the Regulations, the police generally have a positive obligation to facilitate peaceful protest which, depending on the circumstances, may include engaging with organisers to see whether there is a way in which a protest can proceed lawfully, applying the "reasonable excuse" provision together with Articles 10 and 11. In my judgment, those observations by the Inspectorate accord with the principles to which Lord Mance referred in *R (Laporte) v Chief Constable for Gloucestershire* [2007] 2 AC 105 at [136] and [149]. But the Inspectorate also point out that the obligation of the police to facilitate peaceful protest does not involve giving a "blanket assurance" that a person attending a particular planned protest would necessarily have a "reasonable excuse", irrespective of how events unfold (Report at pp.11 and 18-19). Those two matters should not be confused or elided.

119. In the present case the MPS stated that they could not give assurances in advance of the vigil that no enforcement action would be taken, for example, against individuals attending. But that should not be seen as detracting from the obligation of the MPS to engage with the organisers, to see whether they were proposing appropriate and adequate precautions, or the police could make additional suggestions, based upon their vast experience of controlling large numbers of people at an event. As the Inspectorate stated in its Report (p. 18), whether adequate social distancing could be observed and maintained was one important factor for the police to take into account in deciding whether the protest was likely to be lawful.

120. It is plain from my Lord's judgment, that the first four decisions of the MPS had a chilling effect on the claimants in relation to the exercise of their Article 10 and 11 rights. It was for that reason that they made the urgent application to the High Court on 12 March 2021. Once it had been established during that hearing that the principles in *Dolan* and *Ziegler* applied and that a case-specific proportionality assessment by the MPS was a legal requirement, it was plainly incumbent on the police to engage with the organisers in exploring precautionary measures, to see whether the event could go ahead in some appropriate form. Instead, the contemporaneous documents show that the MPS focused on issuing their press release, which did nothing to reverse the chilling effect of their earlier stance, and on reiterating that they could not give assurances regarding enforcement. Against the background of what had taken place prior to the High Court hearing, the police failed to engage properly with the claimants on the issue of appropriate measures to mitigate health risks of the public attending a vigil on Clapham Common and then to assess the *residual* risk taking such measures into account.

121. In making these criticisms of the police guidance documents and of the decisions by the MPS in this case, I do acknowledge, like Warby LJ, that the Regulations impose obligations on police forces which can make their task of enforcement somewhat onerous (see [78] above). But any such effect is the consequence of Parliament's decision to enact the legislation which the court must apply.

122. For the reasons given by my Lord, the six decisions of the MPS were unlawful. Those reasons include their failure to carry out a case-specific proportionality assessment which took into account all the relevant *Ziegler* factors.