

BETWEEN:-

(1) JESSICA LEIGH
(2) ANNA BIRLEY
(3) HENNA SHAH
(4) JAMIE KLINGLER

Claimants

-and-

**THE COMMISSIONER OF THE
POLICE OF THE METROPOLIS**

Defendant

**STATEMENT OF FACTS AND GROUNDS
FOR JUDICIAL REVIEW**

This claim includes a claim for urgent interim relief in the form of an **urgent** interim declaration. This is addressed in paragraphs 55-62 below.

Key reading:

Witness statement from the first Claimant Jessica Leigh dated 12 March 2021
Letter to the Metropolitan Police dated 11 March 2021 from Bindmans LLP; reply from the Metropolitan Police dated 12 March 2021
Dolan v Secretary of State for Health [2020] EWCA Civ 1605 §101-§107
DPP v Ziegler & Others [2019] EWHC 71, [2020] QB 253 (Divisional Court), §28-§65

A. INTRODUCTION

1. This application for judicial review and urgent interim relief concerns a vigil (“the Vigil”) planned to take place on Clapham Common on Saturday 13 March 2021. The Vigil is to be held for Sarah Everard and for all women who feel unsafe, who go missing from streets, or who face the fear of violence every day. It is intended to raise awareness and provoke change in attitudes towards and understanding of the pervasiveness of threats faced by women. The Claimants wish to proceed with it now, whilst what has happened to Ms Everard is at the forefront of their and other attendees’ minds as well as in those of the public nationally.
2. The event is being organised responsibly, with the support of Lambeth Council and in liaison with the Defendant police authority. It will be marshalled, socially-distanced and masks will be required in line with Government guidelines. It has been widely publicised on social media and reported by mainstream news outlets.

3. The Defendant police authority, although it initially appeared to support the Vigil, informed the Claimants on 11 March 2021 that it could not go ahead on the basis that, the police claimed, it is prohibited under the Health Protection (Coronavirus, Restrictions) (All Tiers) (“England”) Regulations 2020 (“All Tiers Regulations”) as amended. This change of position appears to have reflected legal advice taken by the Defendant police authority to the effect that all demonstrations and protests are prohibited under the current lockdown arrangements, a position reflected in the authority’s “Protest Policy”.
4. Officers of the Defendant police authority stated that although they may have wished to allow the vigil to take place, “*our hands are tied*”.
5. In response to a letter from the Claimants’ solicitors Bindmans LLP to the Defendant police authority, the latter responded on 12 March 2021 to confirm as follows:

“For clarity, it is the MPS position that participation in this gathering, as we understand it is currently proposed to be conducted, would be unlawful, contrary to the restrictions imposed by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020.”

6. That letter did not dispute the facts set out in Bindmans LLP’s letter including that (emphasis in original):

“Our understanding is that the MPS position is that all demonstrations and protests are currently prohibited and that the police must prevent these from occurring. We understand that the MPS position is that whilst they would wish to facilitate the vigil, “our hands are tied” by the All Tier Regulations (as it was stated to one of the organisers).

...

If anything in the above is incorrect please urgently clarify the MPS position.”

7. The position of the Defendant police authority is however erroneous in law. As recently made clear by the Court of Appeal in *Dolan v Secretary of State for Health* [2020] EWCA Civ 1605 at §101-§107 the coronavirus regulations do not prohibit the reasonable exercise of rights protected by Articles 10 and 11 of the ECHR as protected by the Human Rights Act 1998 (“HRA 1998”). Indeed, the regulations could not do so because such rights are protected by primary legislation—the HRA 1998—which trumps delegated legislation.
8. The Claimants therefore request a declaration to the effect that:
 - (1) Schedule 3A to the All Tiers Regulations 2020 insofar as it prohibits outdoor gatherings, is subject to the right to protest protected by the Human Rights Act 1998;

- (2) The Metropolitan Police Service's policy prohibiting all protests irrespective of the specific circumstances, is accordingly erroneous in law;
 - (3) Persons who are exercising their right to protest in a reasonable manner will have a reasonable excuse for gathering under that Schedule.
9. The Claimants further submit that such declaration should be made on an urgent interim basis pending final determination of the claim. This is addressed in paragraphs 55-62 below. If it is made, the Claimants will continue to fully inform the Defendant police authority and Lambeth Council of their plans and work co-operatively with them to ensure the Vigil takes place safely.

B. FACTS

10. The Claimants are women who wish to hold a static, socially distanced, hour-long vigil in Clapham Common on Saturday 13 March 2021 prompted by the disappearance and suspected homicide of Sarah Everard. The purpose of the Vigil, also known as #ReclaimTheseStreets is to highlight societal issues of women's safety and to campaign for change in attitudes and responses to violence against women.
11. The background to the Vigil will be familiar to the Court. At around 9pm on 3 March 2021 Sarah Everard, a 33 year-old woman, went missing whilst walking home from a friend's house in Clapham. She was thought to have walked through Clapham Common. Her disappearance and the subsequent investigation have been widely reported in the media. On Tuesday 9 March the Defendant announced that a serving Metropolitan Police officer had been arrested in connection with her disappearance on suspicion of kidnap. On Wednesday, 10 March the Defendant announced that human remains had been found by the team searching for Ms Everard in an area of Woodland in Kent. The police officer was subsequently re-arrested on suspicion of Ms Everard's murder. These developments again have been widely reported and have triggered intense discussions online, in the media and in Parliament about women's safety and attitudes to violence against women.
12. The Claimants (three of whom live in the area where Ms Everard went missing) have been greatly affected by the fact and circumstances of her disappearance. Following the announcements on 10 March the Claimants, along with a number of other women set up "#ReclaimTheseStreets", an informal collective of women seeking to channel the collective grief outrage and sadness they, and many in their local community have felt. They believe that *"it's wrong that the response to violence against women requires women to behave differently. In Clapham, police told women not to go out at night this week. Women are not the problem"*. The Claimants therefore decided to organise the Vigil for Ms Everard as well as *"all women who feel unsafe, who go missing from our streets and who face violence everyday."*

13. The Claimants were (and remain) concerned to ensure that the proposed Vigil could be held safely and lawfully, particularly in the context of the ongoing coronavirus pandemic. They were aware that various groups had already begun advertising and indicating an intention to gather in protest on Saturday 13 March. Two of the Claimants (Ms Leigh and Ms Birley) are local councillors and therefore felt that they were especially well placed to coordinate an event which best facilitated and ensured public safety and in coordination with policing and local authorities. They therefore contacted Lambeth Council and the Defendant police force (via C.I. Annmarie Cowley, the Chief Inspector of Neighbourhoods and Partnerships for Lambeth and Southwark) on the evening of 10 March.
14. The initial responses from both the Council and the Defendant police force were positive. An email from C.I. Cowley to Ms Leigh (cc members of Lambeth Council and other Metropolitan Police officers) at 11.28 on 11 March 2020 stated:

“Good morning Councillor Leigh and Councillor Birley

The shocking and disturbing circumstances around Sarah’s disappearance has sent waves of anger and dismay throughout our local BCU and the wider Met and our thoughts and prayers are with Sarah, her family, loved ones and friends.

I tried calling you both this morning and am now emailing you in regards to the Reclaim the Streets Vigil, planned for Saturday 13th March, Clapham Bandstand, Clapham Common and would be interested to know what the timings are for the event, estimated numbers and whether there will be any local stewards supporting the event. We are currently developing a local policing plan, but would be grateful for any additional information that you may be able to provide that will assist us with developing an appropriate and proportionate local response.

I look forward to hearing from you.”

15. Ms Leigh responded within minutes thereafter providing her phone number and stating:

“We will do anything we can to make sure this works as correctly as possible.”

16. Kristian Aspinall, on behalf of Lambeth Council responded to that email as follows:

“Might it be worth, just to save some time and make sure we’re all joined up, having a quick teams conversation? I’m thinking police, yourself cllr, me and possibly our lead person for the covid marshals and public protection team? That way we can all be on the same page?”

17. A meeting was arranged thereafter for 14.30. A further email from DI Daniel Ivey, Superintendent of Neighbourhoods and Partnerships Policing for Lambeth and Southwark at 12.05 stated:

“Let/s aim for 2:30 we are just confirming all the legal ramifications for all this including the current COVID legislation and in gathering the police team together to discuss all the aspects for consideration – we do need to bear in mind that organising an event is still illegal and we are trying to navigate a way through at no notice, please bear with us.”

18. Having received positive indication from the relevant authorities the Claimants proceeded in planning and publicising the event, which has now been advertised widely online and reported in the press.¹ Public statements have emphasised that “[t]his vigil will observe strict Covid-19 safety guidelines, including compulsory mask-wearing and social distancing. We would also encourage anyone who comes along to download the NHS contact-tracing app and turn their Bluetooth on.” The Vigil is scheduled to last one hour and will centre around a one-minute silence for Ms Everard and women who have lost their lives to violence and abuse. It will be held on Clapham Common, and will be static. A risk assessment will be submitted to Lambeth Council and the Defendant police force for review and discussion. Marshalls have been recruited and will be present. Participants will be encouraged to arrive and leave at staggered times and to avoid public transport. Masks and hand sanitiser are to be made available at the event for any who do not bring them. A QR code for the NHS Test and Trace has been set up and attendees encouraged to use it.
19. Subsequent to the meeting at 14.30 the Defendant, in a conversation with the organisers, communicated that they had reversed their position. They now said the Vigil would be “*illegal*”, and that their “*hands are tied*” by the Covid-19 secondary legislation. The Claimants were told that, as organisers, they would be liable to be issued with £10,000 fixed penalty notices and to arrest for offences under s44 and s45 of the Serious Crime Act 2007 (which criminalise encouraging or assisting an offence) if they proceeded with their efforts to organise the Vigil.
20. Lambeth Council remains supportive of the Vigil.
21. Even if the vigil is prohibited by the police, it is quite possible that many people who will have seen the social media posts will still now attend Clapham common and seek to protest in an informal, uncoordinated, way. It is, however, not appropriate for this to occur under the threat of police action and without the co-ordination and management that would occur if the vigil were permitted to go ahead by the police and could be coordinated between the police, the Claimants and Lambeth Council.

¹ E.g. <https://twitter.com/ReclaimTS/status/1369723337648246789?s=20>
<https://www.theguardian.com/uk-news/2021/mar/11/sarah-everard-london-vigil-organised-to-reclaim-city-streets>;
<https://www.lbc.co.uk/news/londons-streets-are-not-safe-for-women-or-for-girls-sadiq-khan-tells-lbc/>

The Defendant's Policy

22. As set out above, the Defendant's position appears to be that all protest is criminal under the All Tiers Regulations regardless of whether or not there is any public health risk arising and regardless of the public health measures in place.

23. This is in accordance with her policy on policing protest ("Protest Policy"). The Protest Policy states, insofar as relevant as follows (emphasis in original text):

- a. *No gatherings of more than 1 person will be permitted except where exempted.*
- b. *The Health Protection (Coronavirus, Restrictions) (England)(No. 4) Regulations 2020 place specific... **Restrictions on Gatherings (with protest not exempted')***
- c. *As during the National restrictions, there will not be an exemption for the purposes of protest where risk assessments are completed by the organiser.*
- d. ***Responding to protest*** – *Under the T4 Regs 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 is more risks associated with large groups, both to the groups themselves, communities and officers dealing.*
- e. *Operation response to events to include: "Provide an effective and proportionate response to protest, taking into account the HPA regulations which place significant restrictions on gatherings. We will ensure that there is an effective, consistent and well-communicated response to this (which will include enforcement where appropriate)."*
- f. *Ensure there is an appropriate post-investigation strategy that differentiates responsibility for investigating large scale protest and Covid related breaches, and that individual event commanders have in place plans to investigate offences both on the day and subsequently to ensure offenders are brought to justice.*
- g. *teams will be mindful of the requirement for enforcement activity to be updated to Op Pima and CMT on the day, and for the overall approach to protest, events and incidents during this period will need to be coherent and consistent insofar as is possible to ensure public, community and stakeholder confidence.*
- h. *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.*

24. This policy makes clear that the Defendant police authority's position is that protests are not within any of the exemptions for gatherings under the All Tier Regulations. An open letter from the MPS

Commander for Public Order on 21 December 2020 further articulated the Defendant's policy as follows:

The MPS strongly advises people not to attend any gathering, for the protection of yourselves and others. We are still in the middle of a global pandemic.

Please be advised that you may also be at risk of committing a criminal offence. Under the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (as amended) no person in a tier 4 area may participate in a gathering of more than 2 persons in a public outdoor place (or 2 or more persons in any other outdoor place, such as the outdoor area of any private premises), unless certain exemptions apply.

There are exemptions that apply to gatherings, for example those that are necessary for the purposes of work, providing emergency assistance or escaping the risk of harm. This open letter does not contain all the provisions.

...

If you attend a gathering that breaches the Regulations, you may be committing an offence, which is punishable by a fine. In certain circumstances, if you hold a gathering of over 30 persons and you do not meet the requirements of the Regulations you might be committing a different offence, which is also punishable by a fine. It is also an offence to encourage others to unlawfully participate in a gathering (contrary to s44 or 45 of the Serious Crime Act 2007). Police officers will take appropriate enforcement action where necessary.

It is your responsibility to check the current position and ensure you are not committing an offence by being involved in a gathering. We urge anyone arranging a gathering to inform your local police.

C. LEGAL FRAMEWORK

Covid-19 Emergency Legislation

25. Since 26 March 2020 various sets of restrictions on everyday life have been in place as a result of the ongoing COVID-19 pandemic. The restriction regulations have been made under s.45C of the Public Health (Control of Disease) Act 1984.
26. The changing regulations have, at different times, criminalised actions including gathering in groups of varying sizes and leaving or being outside of home except for certain reasons and/or without other "reasonable excuse".
27. For most of this period the listed examples of "reasonable excuses" for leaving one's home, or gathering in a group larger than that otherwise permitted, have not explicitly included protest. However, during the period that protest was not a listed exception, Prime Minister Boris Johnson

publicly confirmed on 3 June 2020 that he supported “*the right to protest*” provided such protests are “*carried out lawfully*” and “*in accordance with our rules on social distancing*”.²

28. On 12 October 2020, protest was, for the first time, listed as an explicit exception to restrictions on gatherings under the new tiered restrictions that were then introduced. Under each tier, gatherings of an unlimited number of individuals were permitted providing:

“the gathering is for the purposes of protest and—

- a) it has been organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and*
- b) the gathering organiser takes the required precautions in relation to the gathering.”*

29. The All-Tiers Regulations currently apply Tier 4 restrictions to the whole country. Schedule 3A sets out the restrictions under Tier 4.

30. Paragraph 1 concerns restrictions on leaving home. Paragraphs 3 and 4 prohibit gatherings, both indoors and outdoors respectively, of more than two people.

3 — Participation in gatherings in private dwellings and other indoor spaces

(1) No person may participate in a gathering in the Tier 4 area which—

- (a) consists of two or more people, and*
- (b) takes place in a private dwelling or in any indoor space.*

(2) No person living in the Tier 4 area may participate in a gathering outside that area which—

- (a) consists of two or more people, and*
- (b) takes place in a private dwelling or in any indoor space.*

(3) Sub-paragraphs (1) and (2) do not apply if any of the exceptions set out in paragraphs 6 or 7 apply.

[...]

4.— Participation in gatherings outdoors

(1) No person may participate in a gathering in the Tier 4 area which—

- (a) takes place outdoors in a place which satisfies the conditions in sub-paragraph (4) and consists of more than two people; or*
- (b) takes place in any other outdoor place and consists of two or more people.*

(2) No person living in the Tier 4 area may participate in a gathering outside that area which—

- (a) takes place outdoors in a place which satisfies the conditions in sub-paragraph (4) and consists of more than two people; or*
- (b) takes place in any other outdoor place and consists of two or more people.*

² <https://hansard.parliament.uk/Commons/2020-06-03/debates/BD52C1B9-0DB7-42FB-9169-ED5E912E4156/Engagements> (at column 840).

(3) *Sub-paragraphs (1) and (2) do not apply if any of the exceptions set out in paragraph 6, 7 or 8 applies.*
[...]

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 (not falling within sub-paragraph (4)) 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.*
- [...]

31. Paragraphs 6 and 7 contains various exceptions to the restrictions on gatherings. There is no mention of protest.

32. Regulation 10 of the All Tiers Regulations provides that (emphasis added):

(1) *“A person commits an offence if, **without reasonable excuse**, the person –*
(a) *Contravenes a Tier 1 restriction, a Tier 2 restriction, a Tier 3 restriction or a Tier 4 restriction...”*

(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 section included—*

- (a) *to maintain public health;*
- (b) *to maintain public order.*

33. On 26 December 2020, an exception to the gatherings restrictions for picketing, which had been omitted from the Tier 4 Restrictions, was re-introduced into Schedule 3A by the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment (No. 3) Regulations 2020. Paragraph 6(25) of Schedule 3A was amended to provide:

“(25) Exception 17 (to the prohibitions on gatherings) is that:

- (a) *the gathering is for the purposes of picketing which is carried out in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992, and*
- (b) *the gathering organiser takes the required precautions in relation to the gathering.*

34. Police powers of enforcement under the All Tiers Regulations are set out in Regulation 9. Insofar as relevant to the Tier 4 restrictions on movement gatherings it provides that:

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 [...] or [paragraph 3 or 4 of Schedule 3A](#)]⁵, 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.*

[...]

(7) *A relevant person may exercise a power [under paragraph [(1B), (1D),]⁷ (2A), (2B) or (3)]⁶, (5) or (6) only if the relevant person considers that it is a necessary and proportionate means of ensuring compliance with a restriction referred to in [paragraph (1C), (2A), (2B) or (3)]⁸.*

(8) *A relevant person exercising a power under [paragraph [(1B), (1D),]¹⁰ (2A), (2B) or (3)]⁹, (5) or (6) may give the person concerned any reasonable instructions the relevant person considers to be necessary.*

[...]

(9) *For the purpose of this Regulation*

- (b) *"relevant person" means—*
 - (i) *a constable,*
 - (ii) *a police community support officer,*
 - (iii) *subject to paragraph (10), a person designated by a local authority for the purposes of this regulation, or*
 - (iv) *a person designated by the Secretary of State for the purposes of this regulation.*

(10) *A local authority may designate a person for the purposes of this regulation only in relation to [...]*

- (d) *a Tier 4 restriction imposed by [Part 3 of Schedule 3A](#).*

35. Section 24 of the Police and Criminal Evidence Act 1984 (referred to in Regulation 10 as set out above) provides further powers of arrest as follows:

- (1) A constable may arrest without a warrant—*
 - (a) anyone who is about to commit an offence;*
 - (b) anyone who is in the act of committing an offence;*
 - (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;*
 - (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.*

- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.*

- (3) If an offence has been committed, a constable may arrest without a warrant—*
 - (a) anyone who is guilty of the offence;*
 - (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.*

- (4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.*

- (5) The reasons are—*
 - (a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);*
 - (b) correspondingly as regards the person's address;*
 - (c) to prevent the person in question—*
 - (i) causing physical injury to himself or any other person;*
 - (ii) suffering physical injury;*
 - (iii) causing loss of or damage to property;*
 - (iv) committing an offence against public decency (subject to subsection (6)); or*
 - (v) causing an unlawful obstruction of the highway;*
 - (d) to protect a child or other vulnerable person from the person in question;*
 - (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;*
 - (f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.*

- (6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.*

36. Regulation 11 concerns the power to issue Fixed Penalty Notices (“FPN”s). It provides that an ‘authorised person’ (which mirrors the definition of a ‘relevant person’ for the purpose of Regulation 10 may issue a fixed penalty notice to any person over 18 that the authorised person “reasonably believes has committed an offence under these regulations”. Subsection (2) of Regulation 11 explains that “[a] fixed penalty notice is a notice offering the person to whom it is

issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to an authority specified in the notice.” Where an FPN is issued no proceedings may be commenced for a period of 28 days following the date of the notice and a person may not be convicted if the FPN is paid within that time. Various requirements are including in relation to the information to be contained within a valid FPN, and for the means by which the FPN may be paid.

37. Regulation 12 provides for the amounts of FPNs issued under Regulation 11. In respect of a Tier 4 Restriction on gatherings under Paragraph 5 of Schedule 3A (organising a gathering of over 30 people without reasonable excuse) the amount of the FPN is fixed at £10,000. In respect of offences including leaving home or participating in a gathering without a reasonable excuse FPNs will be £200 for a first FPN (£100 if paid within 14 days); and thereafter amounts increase exponentially for further FPNs up to £6,400 for a sixth and any subsequent FPN.
38. There is no right of appeal against an FPN. Those issued with an FPN are that if they wish to challenge the FPN they can do so by way of defending themselves in criminal prosecution which may be commenced against them in the magistrates court for an offence under Regulation 10.

The Human Rights Act 1998

39. Section 1 of the HRA 1998 gives effect to “the Convention rights” which are set out in the Schedule 1 to the Act.

40. The Convention rights include the right to freedom of expression and freedom of assembly protected by Articles 10 and 11 of the ECHR respectively.

41. Section 3 of the HRA 1998 provides,

“3 Interpretation of legislation.

- (1) *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
- (2) *This section—*
- (a) *applies to primary legislation and subordinate legislation whenever enacted;...*”

42. Section 6 provides that no public authority may act incompatibility with a Convention right.

43. The fundamental role of freedom of expression and assembly as “one of the essential foundations” of a democratic society has been repeatedly underscored by the European Court of Human Rights (for example, *Handyside v United Kingdom* (1979-80) 1 EHRR 737). Protest is a right protected under both Article 10 and Article 11 and applies to both those participating in, and organising a gathering (*Yılmaz Yıldız and Others v. Turkey*, (Application no 4524/06), 2014, §41). A peaceful

demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (*Kudrevičius v Lithuania* (2016) 62 EHRR 34, §146).

44. In *DPP v Ziegler* [2019] EWHC 71 (Admin) Singh LJ and Farbey J stated:

48. *The right to freedom of expression in article 10 of the ECHR is one of the essential foundations of a democratic society. This has long been recognised by the European Court of Human Rights. It has been recognised by the courts of this country, both before and since the introduction of the HRA. It has also been recognised by the highest courts of other democratic societies, for example in the United States, where freedom of speech and freedom of assembly are protected by the First Amendment to the US Constitution.*

49. *The jurisprudence, which is too well known to require citation here, discloses the following essential bases for the importance of the right to freedom of expression:*

(1) *It is important for the autonomy of the individual and his or her self-fulfilment. It is clear that the right extends far beyond what might ordinarily be described as “political” speech and includes, for example, literature, films, works of art and the development of scientific ideas. It is also clear that the right protects not only expression which is acceptable to others in society (perhaps the majority) but also that which may disturb, offend or shock others.*

(2) *It is conducive to the discovery of truth in the “marketplace of ideas”. History teaches that what may begin as a heresy (for example the idea that the earth revolves around the sun) may end up as accepted fact and indeed the orthodoxy.*

(3) *It is essential to the proper functioning of a democratic society. A self-governing people must have access to different ideas and opinions so that they can effectively participate in a democracy on an informed basis.*

(4) *It helps to maintain social peace by permitting people a “safety valve” to let off steam. In this way it is hoped that peaceful and orderly change will take place in a democratic society, thus eliminating, or at least reducing, the risk of violence and disorder*

50. *It is also clear from the jurisprudence of the European Court of Human Rights (like that of other democratic societies such as the United States) that the right to freedom of expression goes beyond what might traditionally be regarded as forms of “speech”. It is thus not confined, for example, to writing or speaking as such. It can include other types of activity, even protests which take the form of “impeding the activities of which they disapproved”: see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 28. ...”*

D. GROUNDS

45. The Defendant’s decision not to permit the protest and to threaten criminal justice enforcement is premised on the erroneous view, which also finds expression on the Defendant’s Protect Policy, that because there is no express exemption for protests in Schedule 3A of the All Tiers Regulations, that therefore protests are prohibited.

46. This however is erroneous in law. In *Dolan v Secretary of State for Health* [2020] EWCA Civ 1605 the Court of Appeal (Lord Burnett CJ, King and Singh LJJ) held that an earlier version of the coronavirus regulations applicable during the first lockdown period had to be read as subject to the Convention rights and specifically to Articles 10 and 11.

47. The Court of Appeal held that, (1) the HRA 1998 as primary legislation prevails over the coronavirus regulations made under s.42C of the PH(CD)A 1984 cannot cut down the Convention rights, (2) there is an obligation under s.3 HRA 1998 to read subordinate legislation compatibility with the Convention rights so far as it is possible to do so, and (3) it is possible to read the regulations compatibly with the Convention rights because of the general exception to the restrictions where a person has a “reasonable excuse”: the reasonable and proportionate exercise of Convention rights is a reasonable excuse.

48. The relevant part of the Court of Appeal’s judgment is worth quoting at length:

“101. Article 11 guarantees the right to peaceful assembly and association. On the face of it, regulation 7 as originally enacted in March 2020 might be thought to have taken away this right altogether. Nevertheless, it must always be recalled that regulation 9(1)(a) provided a general defence of “reasonable excuse”.

102. In R (JCWI) v Secretary of State for the Home Department [2020] EWCA Civ 542; [2020] HLR 30, Hickinbottom LJ summarised the applicable principles. He noted that a distinction must be made between challenges under the HRA to legislation and challenges to the application of that legislation to a particular case. At para. 118, he said that “legislation will not be unjustified (and, so, not unlawful) unless it is incapable of being operated in a proportionate way in all or nearly all cases”.

103. The first difficulty with Mr Havers' 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 Sir James 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 DPP v Ziegler [2019] EWHC 71 (Admin); [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 to 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”.

...

49. 106. Finally, Sir James reminds us that the HRA is primary legislation, whereas the regulations are subordinate legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right: see Poplar Housing and Regeneration Community Association Ltd [2001] EWCA Civ 595; [2002] QB 48, at para. 75, in particular at sub-para. (a) (Lord Woolf CJ).”

50. The duty to interpret delegated legislation in a manner that is consistent with the Convention rights is not a duty that is imposed on courts alone. It applies to anybody interpreting legislation. In other words, s.3 sets out a generally applicable rule for identifying the meaning of legislation, including delegated legislation.
51. The police are therefore required to interpret the All Tiers Regulations in a manner compatible with the Convention rights, but they have not done so. Instead, they have looked only at the terms of the regulations themselves and not at the content of and protections afforded by the HRA 1998.
52. The Defendant police authority is therefore wrong to consider that the All Tier Regulations have prohibited gatherings. They have not and could not set aside the rights protected by the HRA 1998 and what constitutes a reasonable excuse must be taken to include the reasonable and proportionate exercise of Article 10 and 11 rights.
53. It is moreover self-evident that a blanket policy which proceeds on the assumption that protest is banned *per se* is in conflict with the legal position as described in *Dolan* and in the paragraphs set out above. The Defendant police authority is, in other words, acting pursuant to a policy—the Protest Policy—that is unlawful and erroneous in law.
54. For these reasons, the position of the Defendant authority is erroneous in law and contrary to the Claimants’ rights protected by section 6 of the HRA 1998.

E. INTERIM DECLARATION

55. Given the urgency of this matter, the Claimants request an interim declaration pursuant to CPR 25.1(b), which provides that the Court may grant “an interim declaration”.
56. Such declarations are recognised as being especially appropriate in judicial review cases.³
57. Where an interim declaration is granted, a public body will be expected to conduct itself in accordance with the law as stated in the declaration pending final determination of proceedings (Judicial Review, *Principles and Procedure*, J. Auburn J. Moffett, A. Sharland, OUP 2013 at §29.59 and §29.61, pp.738-739). For a selection of cases in which interim declarations have been granted: Fordham, *Judicial Review Handbook*, Hart 2021 §20.1.15 p.288.

³ *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2004] EWHC 1279 (Fam) at §38:
“Although the notes to [Part 25](#) make clear that this form of relief was recommended by the Law Commission in the context of proceedings for judicial review the power has not been so limited by [Part 25](#) and therefore in my view in these [Part 8](#) proceedings I have the power to make an interim declaration.” (Charles J)

58. In *R (TvDanmark I Ltd) v Independent Television Commission* [2000] EWHC 389 Admin, Mr Jack Beatson QC (as he then was) granted an interim declaration in a case concerning the Independent Television Commission's refusal to grant consent to the broadcast of Danish World Cup away matches live into Denmark. The matter came before the Judge the day before the first match was to be played. Applying the principle articulated in *R v Kensington Royal LBC, ex parte Hammell* [1989] QB 518 that interim relief can be granted in judicial review where there is a strong prima facie case and the balance of convenience favours the grant, the Deputy High Court Judge granted an interim declaration and reserved his judgment. He reasoned as follows:

*“Mr Leaver submitted that the risk of injustice equated favoured such relief since if no order was granted TVD would suffer damage and a large proportion of the Danish population would be deprived of following the match, whereas if an order was made the ITC and the United Kingdom would suffer no damage (on the application of the principles in judicial review, see *R v Kensington and Chelsea Royal London Borough Council, ex parte Hammell* [1989] QB 518). I considered that, on the evidence before me, there was a prima facie case that the ITC in refusing its consent had misdirected itself in law or otherwise committed a reviewable error. In view of the fact that even if the application succeeded the matter would be sent back to the Commission for reconsideration, and it might properly decide to refuse its consent, there was no question of an order to the Commission to grant consent for the broadcast on the 2 September, and indeed TVD did not seek such an order. In view of the prejudice to TVD I made an interim declaration pending judgment that on the evidence before me there was a strong prima facie case that to grant consent to TVD's application would not breach the requirements of Article 3a(3) of Council Directive 89/552/EEC as amended by *Directive 97/36/EC*. ”*

59. The Deputy Judge continued:

*“I have in mind the need to afford some comfort to TV D from action against them by the ITC in respect of the broadcast of the first match and the knowledge that the ITC would take the interim declaration into account in considering any disciplinary proceedings against TV D. ... ”*⁴

60. In another context, in *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2004] EWHC 1279 (Fam), Mr Justice Charles granted an interim declaration, “with effect until the substantive hearing of this matter or further order” that “it is lawful for the Claimant its servants or agents to administer a blood transfusion and any other treatment necessary to stabilise her condition, using such minimum force as may be necessary...”.

61. In the present case granting the declarations sought on an interim basis is appropriate:

- (1) There is a strong prima facie case that the Defendant police authority is acting erroneously in law and that its hands are not tied, as it believes that they are.

⁴ This sentence was added to the judgment as appears from the discussions with Counsel post-judgment.

- (2) There is a very strong case that the declarations are accurate and justified statements of the legal position.

62. The balance of convenience strongly favours the making of an interim declaration:

- (1) There is a need to ensure that the police act in accordance with the law and seek to facilitate the Vigil in a manner that is reasonable and safe;
- (2) The declaration would give those who attend the Vigil some comfort that the police will not take enforcement action to disperse the Vigil or return them to their homes or issue them with Fixed Penalty Notices;
- (3) It is likely that many people will attend Clapham Common whether or not the Claimants organise and co-ordinate the event. It is eminently better that that this is facilitated and properly managed in co-ordination with relevant authorities.
- (4) This is not a case in which the Claimants could seek a positive or negative injunction against the Defendant police authority on an interim basis. Therefore the ability for the court to grant an interim declaration is all the more important to ensure that the Claimants' rights (and the rights of many other people) are respected.

F. CONCLUSION

63. The conduct of the Defendant police authority in prohibiting the planned vigil from taking place is based on a misunderstanding of the law. The police consider that all protests are banned by Schedule 3A of the All Tiers Regulations. However, the reasoning of the Court in *Dolan* makes clear that this is not correct.

64. The Court is therefore invited to grant permission to apply for judicial review and an interim declaration in the terms proposed. It is also asked to list a trial on an expedited basis given the pressing public importance in the issues raised. In short, people need to know whether or not it is lawful for them to protest, and the police need to know the circumstances in which they should be taking enforcement action.

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PIPPA WOODROW

Doughty Street Chambers

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12 MARCH 2021