IN THE HIGH COURT OF JUSTICE **Claim No. CO/919/2021**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:-

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

Claimants

-and-

THE COMMISSIONER FOR THE POLICE OF THE METROPOLIS

Defendant

-and-

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Interested Party

SKELETON ARGUMENT FOR THE CLAIMANTS

References in square brackets are to: Core Bundle (CB) Supplementary Bundle (SB) Additional Supplementary Bundle (ASB), Tab and page no.

A. INTRODUCTION

1. This is a claim under Human Rights Act 1998 ("HRA") brought by judicial review procedure for a declaration and just satisfaction under section 8 of the HRA marking a breach of the Claimants' rights under Article 10 and 11 of the Schedule 1 to the Act. The claim was originally commenced on an urgent basis seeking interim declaratory relief (see judgment of Mr Justice Holgate dated 12 March 2021 [CB/4/39]).

2. The claim concerns a vigil which had been planned to take place on Clapham Common on Saturday 13 March 2021 following the disappearance and murder of Sarah Everard. The vigil was to be held for Ms Everard and for all women who feel unsafe, who go missing from streets, or who face the fear of violence every day. It was intended to raise awareness and provoke change in attitudes towards and understanding of the pervasiveness of threats faced by women. It was intended to allow women's voices—which are too often silenced in society—to be heard by politicians, policy makers and the police authorities through a collective expression grief and anger at the fate of Sarah Everard and of other women in society (JL1§ 7 [CB/13/155]; JL2 §6 [CB/14/162]). Above all, the event they sought to organise was about collective physical presence of women coming together to feel safe, supported, and to reclaim public space for Ms Everard and other women who have lost their lives or been the victims of violence (AB1 §3 [CB/18/233])

3. The Claimants set out organising a vigil on Clapham Common in a responsible manner with the support of Lambeth Council and in liaison with the Defendant's officers. It was the Claimants' first priority to ensure that the gathering—which all parties acknowledged would occur in some form whether or not it was organised by the Claimants—could be managed safely. The organisers included women with significant experience of managing large events as well as elected officials experienced in working with police and local authorities. Extensive measures were proposed, facilitated by the local Council, to reduce risk of coronavirus transmission, and the Claimants also made clear they were flexible and open to any proposals or recommendations from the Metropolitan Police Service ("MPS") as to how to maximise health and safety. The Claimants repeatedly sought clarity from the MPS as to what it would consider necessary to ensure the vigil could go ahead.

4. However, despite a positive initial response from local officers, the vigil was effectively vetoed by central authorities at the MPS. The MPS made it clear that in its view the vigil would be an unlawful gathering under The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ("the Regulations") and that it would consider enforcement action against the Claimants as organisers. At 19:59 on 12 March 2021, shortly after Holgate J had delivered his judgment, the MPS issued a statement which warned people not to attend any vigil for Sarah Everard and making clear that the MPS considered them to be unlawful (JL2 §32 [CB/14/168]). As a result the Claimants were compelled to cease their efforts and urge people not to attend.

5. It is now clear that the MPS was acting pursuant to an established policy and/or practice that gatherings were prohibited and that there was no exception for protest. But neither the MPS policy nor the actions of the Defendant's officers on 11-12 March 2021 reflected the fact that the Court of Appeal in *R (Dolan) v Secretary of State for* Health [2020] EWCA Civ 1605, [2021] 1 WLR 2326 had held that where people participated in gatherings in the exercise of their Article 10 or 11 rights (referred to herein as "protected gatherings") they may have a "reasonable excuse" under the Regulations. Whether persons participating in protected gatherings would have a reasonable excuse would depend upon the necessity and proportionality of restricting a gathering, measures taken to reduce risks and engage responsibly with relevant authorities including the police.

6. It followed from *Dolan* that if the police were to enforce the prohibition on gatherings contained in the Regulations against protests, and if the police were to issue warnings to organisers and attendees about criminal sanctions (as they did to the Claimants), then it was incumbent on the police to reach a rational and informed view as to whether or not the organisers of a protest 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. However, the Defendant admits that she did not do this. She states in her defence that MPS officers "*were entitled to proceed on the basis"* that "*Parliament had assessed the risk to public health to be such as to require the restrictions contained in the Regulations*", and that Parliament had struck "*the requisite balance for the purposes of Articles 10/11"* (DGR §78(a) [CB/12/149]). That, however, is wrong in law because, as *Dolan* held, the prohibition on gatherings and the absence of an exception for protest does not determine whether

or not gatherings represent a lawful exercise of Article 10 and 11 rights. That balance is not struck by the general prohibition on gatherings (most of which gatherings will not be protected gatherings but social and other forms of gatherings).

7. The explanation for the Defendant's unlawful approach is also made explicit in her defence. She states that her officers "*were not in a position to assess the public health issues*" arising when groups wished to gather for protest (DGR §78(a)). That concession places the Defendant on the horns of a dilemma. On the one hand, if the health risks of the proposed vigil were not considered (as the weight of evidence shows they were not), then this demonstrates that the MPS have an unlawful policy that all persons organising or participating in gatherings for protest were committing criminal offences. It reinforces the fact that the MPS were not properly addressing the question of whether organisers and participants of protected gatherings could claim to have a reasonable excuse for gathering.

8. On the other hand, if the Defendant contends (as is suggested in some of the evidence (e.g. JC1 §15, §26-§27 [CB/15/179, 183]) that health risks were assessed by MPS officers, the assessment was not done on a properly informed basis. If officers did not have the expertise to conduct such an assessment –as the Defendant states they did not—then they should have considered available public health guidance such as publicly available reports relating to the holding of events including outdoor protest events, consulted Public Health England ("PHE") or local NHS bodies, taken into account information about local prevalence, and had guidance in place reflecting public health considerations that would allow them to police protests in a ***Dolan***-compliant manner. But the evidence is clear that the Defendant did none of these things.

9. There is no doubt that a combination of the pandemic, the manner that the Regulations were drafted, and the judgment of the Court of Appeal in ***Dolan*** posed challenges for police authorities and required them to undertake an unconventional policing role. The evidence in this case shows nonetheless that the MPS failed to discharge those responsibilities in the context of the exercise of Article 10 and 11 rights. Rather than starting from the premise that the vigil represented an important exercise of individual rights to freedom of expression and association and seeking to facilitate the lawful exercise of those rights, they adopted the stance that the proposed gathering was unlawful and that the police should actively deter those organising it and attending it from doing so.

10. The Claimants therefore ask the Court to make a declaration that their rights under Articles 10 and 11 of the HRA were breached by the MPS. The Claimants also claim modest damages under section 8 of the HRA which they will donate to a charity concerned with violence against women.

B. LEGAL FRAMEWORK AND FACTUAL CHRONOLOGY DOCUMENTS

11. In her DGR, the Defendant helpfully indicated that a significant number of paragraphs in the Claimants' SFG which set out the applicable legal materials and authorities were agreed, with minor additions or clarifications. The Claimants have therefore produced a Legal Framework (Annex A)

which contains those parts of its SFG together with the Defendant's additions and has sought the Defendant's agreement to file this as an agreed document for the assistance of the Court.

12. Annex B contains a detailed chronology which the Claimants are also seeking to agree with the Defendant.[1]

C. SUMMARY OF FACTS

13. At around 9pm on 3 March 2021 Sarah Everard went missing whilst walking home from a friend's house in Clapham. She was thought to have walked through Clapham Common. It was subsequently announced on 10 March that a serving MPS officer had been arrested in connection with her disappearance on suspicion of kidnap. The following day he was rearrested for Ms Everard's murder. These developments were widely reported and triggered intense discussions online, in the media and in Parliament about women's safety and attitudes to violence against women.

14. The Claimants, three of whom live in the area where Ms Everard went missing, were greatly affected by the fact and circumstances of her disappearance. They were also distressed by messages received from police in the week following Ms Everard's disappearance encouraging women to modify their behaviour and stay inside for their safety. As a result, following the announcements on 10 March, the Claimants, along with a number of other women, set up #ReclaimTheseStreets ("RTS") an informal collective of women seeking to channel the collective grief outrage and sadness they, and many in their local community felt (JL1 §10 [CB/13/156]). On the evening of 10 March, the Claimants decided to organise a vigil for Ms Everard as well as "*all women who feel unsafe, who go missing from our streets and who face violence every day"* (JL1 §10 [CB/13/156]).

15. The Claimants were aware that various other groups had already begun advertising that they intended to gather together on Saturday 13 March (JL1 §5 [CB/13/155], AB §30 [CB/18/240] and [SB/28/119-129]) and were concerned to ensure that the proposed vigil could be held safely and lawfully, given the context of the ongoing coronavirus pandemic. Two of the Claimants (Ms Leigh and Ms Birley) are local Lambeth councillors, and the fourth Claimant (Ms Klingler) is a professional events and logistics organiser for large events in public spaces. They therefore felt that they were especially well placed to coordinate an event which best facilitated and ensured public safety and in co-ordination with police and local authorities.

16. It was intended from the outset that the event would have public health as a first priority and be in accordance with the law (AB §21 [CB/18/238], JL1 §§5, 13 [CB/13/155]). The vigil was initially scheduled to last one hour and would centre around a one-minute silence for Ms Everard and women who have lost their lives to violence and abuse. It would be held on Clapham Common both for

[1] The Defendant wishes to consider her position having served her skeleton argument. However, in the event agreement is not reached, the Claimants request permission for an extension of the word limit for skeleton arguments to include these two Annexes. The material very substantially reflects material contained in the SFG and DGR, and the hearing bundles but is intended to be presented in a manner that will be of greatest assistance to the Court.

symbolic reasons, but also because it provided a wide outdoor space enabling maximum social-distancing and ventilation and has multiple transport options (JL1 §9 [CB/13/156], AB §3 [CB/18/233] and map AB/1 [SB/26/109]). The event would be static, with people standing socially distanced from each other. A risk assessment was to be submitted to Lambeth Council and the Defendant police force for review and discussion (JL1 §12 [CB/13/157]). Marshalls had been recruited (including via the local council and experienced trade union organisers) who were to support social distancing and compliance with Covid-19 risk mitigation, in proportion to expected numbers (AB §§23-24 [CB/18/238], JL1 §12 [CB/13/157]). Participants would be encouraged to arrive and leave at staggered times and to avoid public transport. Masks and hand sanitiser were to be mandatory, with supplies made available at the event for any who did not bring them (JL1 §12 [CB/13/157]) and first aiders on site (AB §22 [CB/18/238]). A QR code for NHS Test and Trace had been set up for all attendees to register their attendance (AB §21 [CB/18/238]). The Claimants also sought assistance from Trade Union representatives with experience in managing gatherings for the purpose of picketing (AB §24 [CB/18/239]). Public statements 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."* (JS1 §10 [CB/13/156]).

17. In order to best ensure the event could be held safely, the Claimants took a collaborative approach and on the evening of 10 March 2021, contacted Lambeth Council [SB/6/59] and the Defendant police force [SB/7/60]. The Council were immediately supportive, offering to provide *"covid marshals"* and a *"public protection team"* to help ensure the event was managed to best protect public health [SB/13/71]. The Council remained supportive of the proposed vigil throughout, including in subsequent discussions with police (AB §27 [CB/18/240]). If the Council had considered the vigil gave rise to unacceptable risks, it no doubt would have said so bearing in mind its public health duties under s12 of the Health and Social Care Act 2012 and reg 8 of the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013.

18. Support (both public and private by way of direct correspondence with the Defendant) was also forthcoming from numerous MPs and other public figures recognising the importance of the need for such an event and stressing the inevitability of a mass gathering which would be wholly uncontrolled in the absence of facilitation by the Claimants (see for example emails from Bell Ribeiro-Addy MP and Helen Hayes MP [SB/11/65-66]).

19. The initial responses from local officers from the Defendant's police force were also positive. An email from C.I. Annemarie Cowley, the Chief Inspector of Neighbourhoods and Partnerships for Lambeth and Southwark, to the First Claimant (copying members of Lambeth Council and other MPS officers) at 11.28 on 11 March 2020 stated that the police, *"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…"* [SB/10/63].

20. The first two Claimants met representatives from Lambeth Council and MPS officers at 14.30 on 11 March ("First Meeting"). It was recognised by attendees that a large gathering in some form was very likely to occur at Clapham Common on 13 March whether it was organised or not.[2] However, Superintendent Ivey stated he was "*under pressure regarding allowing this event to go ahead"* [CB/28/348]. MPS officers indicated that in their view the vigil would be *"illegal"* and that their *"hands are tied"* by the Regulations [JS1 §19/13/158]. The Claimants were told that, as organisers of an unlawful gathering, they would be liable to be issued with £10,000 fixed penalty notices and to arrest for offences under s.44 and s.45 of the Serious Crime Act 2007 (which criminalise encouraging or assisting an offence) if they proceeded with their efforts to organise the vigil (JS1 §19 [CB/13/158]).

21. Following this meeting, the Claimants instructed Bindmans LLP to prepare an urgent application for judicial review as the contention that the Regulations tied the MPS's hands was wrong and the MPS were not adopting the approach required by *Dolan*.

22. Further planning meetings were held on the same day between senior police officers including DAC Jane Connors and DAC Matt Twist during which the MPS's view of the law (that it did not permit any non-exempt gatherings, including for protest) and its application to the proposed vigil (that the vigil was illegal) was re-affirmed. It was confirmed that messages would be conveyed to the Claimants to the effect that gatherings, including for protest, were prohibited [CB/27/332, 329] and organising the proposed vigil would be illegal, and organising such a gathering would make them liable to criminal justice enforcement. [CB/25/318]. DAC Twist as Covid Gold Commander had written the only relevant policy: "*Gold Strategy Op Pima – Covid-19, version 9*" [CB/22/259] ("Gold Strategy on Covid-19"). DAC Connors was at the time shadowing DAC Twist to assume Covid-19 Gold Command and was given responsibility for engagement with organisers to *"ensure … the regulations were explained"* to them (MT §11 [CB/16/202]). However, DAC Twist remained Gold Command with ultimate responsibility for policing the vigil (MT§26 [CB/16/207] and [CB/25/318]). The relevant meetings, and extracts of contemporaneous documents are set out in the chronology at Annex B.

23. Further meetings were held during the morning of 12 March [CB/15/31], after receipt of the Claimant's PAP letter, between MPS officers including DAC Connors and third parties such as the Policing Minister [ASB/A/36], NPCC [CB/25/319] and SCG/GLA London MPs [ASB/A/14] which again affirmed the MPS view that gatherings that did not benefit from an express exemption under the Regulations were not permitted and emphasised the need to encourage alternatives that did not involve gathering. Following those meetings, the NPCC wrote to all Chief Constables providing guidance on the legality of vigils planned across the country and encouraging police to deter those

[2] Minutes of the First Meeting taken on behalf of MPS record Kristian Aspinall (Assistant Director for Community Safety, Lambeth Council) stating for example *"it is going to happen – we have people in the room to allow us to shape it"* [CB/28/349].

seeking to organise or attend vigils on the basis that such events were not permitted in law [CB/37/410].

24. At 9:29 on 12 March the MPS provided an initial response to the Claimant's PAP letter making clear that the MPS considered organisation of the proposed vigil to be illegal [SB/17/78]. At 13:48, a full PAP response was received confirming that there was currently a general prohibition on gatherings in Tier 4 areas "*which would apply to gatherings of more than two for the purposes of protest*" and that *"[p]rotest can be made in ways that do not involve breaching the general prohibition on gatherings."* [CB/18/81]

25. The established MPS position was again communicated to the Claimants at a second meeting between the Claimants, the Defendant's officers and Lambeth Council at approximately 12:00 on 12 March 2021 ("Second Meeting"). The Gold Commander's note states that the key point made was that "*Gatherings not allowed under regulations*" [CB/25/319]. Clarity was repeatedly sought by the Claimants as to what, if any, form of gathering for the purpose of protest could be considered lawful but officers were unable or unwilling to provide any answer to this question and simply restated the MPS position that although enforcement would be a last resort, and would be avoided where possible, there were no circumstances in which liability would not arise if a large gathering for the proposed purpose took place (JL2 §13-15 [CB/14/164], notes of meeting [CB/31/363]).

26. Further meetings between senior officers including DAC Connors and DAC Twist were held during the afternoon of Friday 12 March whilst the High Court hearing was taking place (between 15:45 – 18:30) during which the MPS position (that non-exempt gatherings were not permitted and that the proposed vigil was therefore unlawful) was again reaffirmed, both internally and with the Home Secretary and the London Mayor (see Chronology). A personal request was made by the Defendant Commissioner for "*messaging from City Hall and other key partners regarding the fact that gatherings are illegal … The Met will be doing this, but we need stakeholders to do this also."* [ASB/A/38].

27. At a further "*Position Update Call with Covid Gold*" at 15:00 [CB/27/338] and a "*Gold Command Team*" meeting at 16:00, officers, including DAC Twist (Gold and Chair) and DAC Connors discussed the "*threats*" arising from the vigil [CB/27/335]. The most significant *"threat"* identified was not public health but the perceived reputational risk to the Defendant (including in the event they were perceived to be permitting or facilitating the vigil). Minutes from the meeting note record that, *"public confidence is the largest risk"* and that *"we are seen as the bad guys at the moment, and we don't want to aggravate this"* [CB/27/335-336]. Notes of that meeting also confirm that officers had already prepared a public statement intended to deter people from attending the vigil in the event the court ruling is *"on our side"* [CB/27/338-9].

28. Mr Justice Holgate delivered judgment at around 18:00 on 12 March 2021 [CB/4/39]. His Lordship recorded in his judgment (at §24) a concession made by the Defendant that she could not lawfully have—and, she maintained, she did not actually have—a policy that all protests taking the form of

gatherings are prohibited under the Regulations. That position is simply not consistent with what is recorded in the documents that have subsequently been disclosed.

29. Following the judgment, the Claimants re-engaged with Lambeth police in a third meeting (the "Third Meeting") in order to seek clarity on what form of gathering for the purpose of protest would or would not be considered proportionate, and would not expose them to criminal liability for an offence, in the hope of being able thereafter to organise a proportionate and lawful gathering.

30. Whilst the Third Meeting was ongoing, at 19:59 the MPS issued a statement signed-off by DAC Twist as Gold Commander for the vigil (JC2 §3 [ASB/3/63]). This statement made public and explicit the position that had been taken by the MPS throughout, namely that the vigil, as a gathering, was unlawful. The statement warned people not to attend any vigils for Sarah Everard including the planned vigil (JL2 §32 [CB/14/168]).

31. DAC Connors attended the Third Meeting (virtually) from about 19:30 and immediately made clear that the MPS's position had not changed. Whilst she was prepared to consider an arrangement which did not amount to a gathering between households, the vigil could not go ahead in any form which involved a large gathering of people even if socially distanced without breaching the criminal law and that consideration would be given to taking enforcement action against the organisers (JS2 §25 [CB/14/167], see also AB1 §§45-48, 51 [CB/18/244] and DAC Connors' notes at [CB/25/320]). Officers present, sought to encourage the Claimants to organise an online memorial and expressed some support for an event for an event that required people to move on rather than gathering together in remembrance and protest. The MPS was only prepared to countenance events that did not amount to gatherings and therefore did not allow the exercise of Article 11 rights. DAC Connors was not prepared to give any reassurance that even such an event would not result in prosecution of the Claimants.

32. The Third Meeting concluded without agreement. After the meeting, the Claimants were informed by email from SI Ivey of the public statement made by the MPS [SB/19/83]. The Claimants decided that given the risk of criminal liability, the vigil would have to be cancelled and that they as individuals could not attend at the time and in the form they had wanted for fear of still being held responsible for the gathering (JS §36 [CB/14/170], AB §54 [CB/18/246]). #ReclaimTheseStreets therefore urged people not to attend Clapham Common in public statements and on social media (JS2 §35 [CB/14/169]). The result was that the Claimants and supporters of #ReclaimTheseStreets were prevented from doing the very thing they came together to do.

D. BREACH OF ARTICLE 10 AND ARTICLE 11

(a) Legal principles

33. In *Dolan*, the Court of Appeal held, in relation to materially identical regulations, that whilst the regulations prohibiting outside gatherings *"might be thought to have taken away [the right of freedom of association] altogether"* this was not the case because they only criminalised

gatherings where there was no *"reasonable excuse"* (§101). Moreover, section 3 of the HRA required *"reasonable excuse"* to be interpreted in a manner which meant that the regulations did not infringe the right of freedom of association or expression. Indeed, as delegated legislation, the regulations could not impose any limitation on rights protected by the HRA.

34. The Court applied the reasoning in ***DPP v Ziegler*** [2019] EWHC 71 (Admin), [2020] QB 253 in which the Divisional Court[3] held that s.137(1) of the Highways Act 1980, which criminalises obstruction of the Highway, did not conflict with Articles 10 and 11 because legitimate exercise of such powers would give rise to a defence of *"lawful excuse"*. The Court in ***Ziegler*** held:

> *"The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of Articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'."* (§62)

35. In his judgment in this case, Mr Justice Holgate accepted that the reasoning in these cases applied to the Regulations and that finding is not disputed by the Defendant before this Court (Holgate J, §14). The effect of ***Dolan*** and ***Ziegler*** is therefore that the Regulations did not themselves set out the circumstances in which participation in or organisation of a protected gathering is a criminal offence. A person would have a reasonable excuse for participating in or organising a protected gathering unless preventing the gathering was, *"…necessary in a democratic society in the interests of … the protection of health"*.

36. It followed from ***Dolan*** that if police authorities wished to enforce or threaten to enforce the Regulations against protests once Tier 4 restrictions had been imposed, they would need to take a rational and informed view of whether persons organising or participating in a protest would have a reasonable excuse. That in turn entailed consideration of whether it would be necessary and proportionate for the protected gathering to take place (or take place in the form proposed).[4] It is only through such process of consideration that the police could determine whether persons organising or participating in protected gatherings would be committing a crime under the Regulations. The Regulations did not answer this question. Nor did they establish any presumption that it was necessary and proportionate to prevent a protected gathering.

37. The police are required by Article 10 as an aspect of the proportionality obligation to conduct a "*meaningful balancing exercise*", which includes a detailed examination of relevant factors that weigh in the balance (***Pal v United Kingdom*** [2021] ECHR 990 at §§59-62). Moreover, the police

[3] The Supreme Court allowed an appeal ([2021] UKSC 23) but the issues did not affect this part of the Divisional Court's judgment. Lord Sales (dissenting in part) with whom Lord Hodge agreed noted that nobody had questioned the Divisional Court's construction of s.137 and Lord Sales endorsed it.

[4] See also ***R (Laporte) v Chief Constable of Gloucestershire*** [2006] UKHL 55, [2007] 2 A.C. 105 in which Lord Rodger stated, *"the police must have regard to the rights to freedom of expression and freedom of assembly which protesters, such as the claimant, are entitled to assert under articles 10 and 11 of the Convention"* (at §85). Lord Carswell articulated the degree of detailed consideration necessary even in a fast-moving situation, in the context of freedom of expression in the same case at §105.

also cannot take a lawful decision as a matter of common law unless relevant information is taken into account. Police officers would need to take into account several obviously relevant considerations, including the degree of public health risk posed by the protected gathering, the measures that could be taken to mitigate that risk and how effective they would be likely to be, any alternative ways that objectives of the gathering could be achieved with less risk to public health (see e.g. *Ziegler* (SC) §§71-72). The police would need to consider relevant guidance on the holding of events.

38. If they lacked relevant information then they had a public law duty—a "*Tameside* duty"—to engage in relevant inquiries, including consultation with outside bodies that have knowledge or expertise they lack; an obvious such body would be PHE (*R (Balajigari)) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at §99-§100) and local NHS bodies could also have been consulted.[5]

39. As also made clear in *Ziegler* (SC), *"[p]rior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious …"* as is the ability of the police to take *"general preventative measures"* (§78).

40. Where the police have failed to take a lawful decision, their conduct, where it frustrates the exercise of Article 10 and 11 rights, will not be *"prescribed by law"*. At a minimum, this requires that conduct that interferes with protected rights is lawful under domestic law: *R (AB) v Secretary of State for Justice & Anor* [2009] EWHC 2220 (Admin), [2010] 2 All E.R. 151; *The United Kingdom Association of Fish Producers v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959, [2013] 7 WLUK 263 at §56 §108, §117; *R (LW) v Sodexo Ltd* [2019] EWHC 367 (Admin), [2019] 1 WLR 5654 at §54.

(b) Interference with Article 10 and 11 rights

41. In the present case, the actions of the MPS meant that the Claimants could not continue to organise the planned vigil. The police made it clear that if they did so they would, in the police's view, be committing a criminal offence (JL1 §19 [CB/13/158]); JL2 §25 [CB/14/167]).

42. In addition, the police:
    (1) Warned the Claimants that the MPS would consider taking enforcement action against them as organisers and also suggested they might face action for breaching ss.43 and 44 of the Serious Organised Crime Act 2007 (see JS1 §19 [CB/13/158], [CB/33/376], JC Log of Second Meeting [CB/30/319]; notes of Third Meeting [CB/33/373-375] and JC Log of Third Meeting [CB/25/320]).

[5] *R (RB) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) at §239 ("*measures to reduce the risk of Covid infection which are consistent with PHE advice*").

(2) Warned the Claimants not to publicise the event (see note of Second Meeting [CB/28/348] per SI Ivey).

(3) Issued a press release following the judgment of Holgate J warning people not to attend the vigil, or other vigils planned, stating that doing so would breach the law:

> *"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 of find a lawful and safer way to express your views.*
> *... We continue to speak with the organisers of the vigil in Clapham and other gatherings in across London in light of this judgement and will explain the rules and urge people to stay at home."* (JS1 §32 [CB/14/168] (emphasis supplied)).

43. Such action by the MPS was particularly significant in the context of the Regulations because the MPS was itself empowered by the Regulations to issue fixed penalty notices of up to £10,000 and it is also the police (rather than the CPS) that commonly initiated prosecutions under the Regulations.

44. In these circumstances, the Claimants could not, as law abiding citizens, have gone ahead with the planned vigil. The Claimants were effectively forced to issue a statement which not only stated that the planned event had been cancelled but which stated that they, *"strongly encourage people not to gather this evening on Clapham Common"* (JL2 §35 [CB/14/169]). There is no doubt that the actions of the police represented a very substantial interference with the Claimants' rights under Articles 10 and 11: *Kudrevičius v Lithuania* (2016) 62 EHRR 34, §100-§102, §146; *Ollinger v Austria* [2006] ECHR 665 §§32-51; *Lashmankin & Ors v Russia* (2017) ECHR 130; (2019) 68 E.H.R.R. 1 §422; *R (Miller) v The College of Policing & Anor* [2021] EWCA Civ 1926; §70-§76. Indeed, the Defendant appears rightly to accept that the actions of the MPS represented an interference with Article 10 and that the Claimants were not able to exercise their Article 11 rights to any extent (DGR §78(c), §79 [CB/12/149]).

(c) MPS decision was not in accordance with the law

45. The MPS decision that the vigil would be unlawful, and its decision to seek to dissuade the Claimants from organising the vigil, were unlawful. The unlawfulness is addressed under two heads although they are closely related: (i) the MPS had a policy that all large gatherings were unlawful which was erroneous in law; and (ii) the MPS failed to consider whether organisers might have a reasonable excuse for organising and factors relevant to that question such as the public health risks of the event and acceptability of public health mitigations.

i. MPS policy was that all large gatherings were unlawful, even for protest

46. As the contemporaneous documents demonstrate, the approach taken by the police was that all large gatherings were unlawful and that protests had no special position under the law. This was a misunderstanding of the law:[6]

(1) The Gold Strategy on Covid-19 authored by DAC Matt Twist, provided the *"umbrella"* and *"overarching response"* to Covid-19 at the relevant time [CB/22/270]. It erroneously stated that, "*People are prohibited from gathering except for a limited set of circumstances"* [CB/22/262], *"Under national lockdown regulations, gatherings for the purposes of protest are not exempt, and therefore the policing response will need to respond to this…"* [CB/22/263]. It went on to state there is a "*clear need to [take] enforcement action to deal with any large groups."*. It made no reference at all to Articles 10 and 11. The decisions were in line with this policy throughout.

(2) The MPS' policy was reflected in a published advisory notice, "Open letter to persons organising and/or participating in public gatherings" [CB/20/256], published on 21 December 2020, which advised against participation in any gathering:

> *"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."*

(3) The MPS policy was also reflective of NPCC Guidance to the same effect [CB/23/294], as well as the directive issued to all Commissioners in relation to *all* vigils for Ms Everard after meetings with DAC Connors and others, stating "*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 … request that they conduct their vigil using alternative means in accordance with the law. […]"* [CB/37/410].

(4) Correspondence from SI Ivey and Inspector Blears on the morning of 11 March after receipt of the First Claimant's email notification of the event indicated their immediate reaction to learning of a vigil (without any particular information as its likely size, or other relevant circumstances) stating "*I can't see how the current legislation can support such an event"* [SB/8/61]; "*any gathering is still illegal and there will be pressure on me (and Kris and the Met) to ensure these regulations are adhered to"; "we aren't permitted to*

[6] The misunderstanding was in part a result of the fact that after the first national lockdown there had been an express exception to the gathering restrictions for protest, and this had also been contained in the Tier 3 restrictions. But this exception was not present when England entered Tier 4 on 16 December 2021.

have any type of large scale gathering, and we are being expected to prevent them from occurring" [SB/8/62]. Later communication with the Claimants articulated the view that "*that organising an event is still illegal"* [SB/13/69].

(5) At the First Meeting at 14.30 on 11 March 2021, the Claimants were told that the vigil would contravene the Regulations and that MPS's *"hands are tied"* by the law (JL1 §19 [CB/13/158]). They were informed that the organisers would be breaking the law, including ss.44 and 45 of the Serous Organised Crime Act 2007. Notes of the meeting confirmed that the Claimants were told that organisers *"would be committing and offence"*, and that *"it is a breach of the legislation to organise such an event"* [CB/28/348].

(6) DAC Connors' Gold Command log notes of an officers' internal meeting at 16:45 on 11 March, stated *"- protest is exclude[d] having been prev included."* It is clear that the removal of the express exception for protest under Tier 4 was thought to make clear that gatherings for protest were prohibited [CB/25/318].

(7) The MPS position was stated in terms by DAC Twist in his log setting out the approach to be taken on 11 March: *"gatherings for any purpose other than those which are specifically exempted are unlawful"* [CB/27/332], and that "*it is clear that the HPA [Health Protection Act (sic)] regulations prohibit a gathering for this purpose"* [CB/27/329]. His instruction was therefore that officers should "*outline to the councillors how the gathering will place people at health risk and <u>be against the law</u>."* (emphasis supplied) [CB/27/332].

(8) Following the receipt at 07.17 on 12 March of the Claimants' PAP letter, there was an Op Talla Meeting which, DAC Connors records, *"reiterated the MPS position re covid regs & mass gatherings & this gathering would be in breach of the rgs & we will remind the organisers of this."* It records the MPS position as:

> -*<u>Mass gatherings are not permitted under regs.</u>*
> - *Outline given for event is mass gathering*
> […]
> - *Other ways* [i.e. than a gathering] *to express HRA 10/11*." [CB/25/319] (emphasis supplied)

(9) Shortly after this note was entered, at 11:57 on 11 March 2021, MPS Public Order Planning Team sent an email in very clear terms recording a consistent MPS position:

> *"Throughout the most recent lockdown, the Gateway Team have maintained a very clear and consistent approach when communicating the MPS position on protest and public gatherings – they are not permitted. Whether responding to organisers formally (following online submission) or informally if contacted by a contact within a known group) we have made it abundantly clear that no group will be exempt from the restrictions or treated differently."* [SB/16/77]

(10) At a 9.30 call with SCG/LGA London MPs, DAC Connors provided a policing update: *"[t]he vigil breaks the Covid rules and therefore the position they are taking is consistent with current regulations"* [ASB/A/14]. The emphasis in this and all meetings was on

deterring the Claimants from organising any form of gathering, and that they should "*try and encourage people to do something other than gather"* ([ASB/A/14], see also [ASB/A/36], [ASB/A/45]).

(11) At the Second Meeting at 12:00, DAC Connors' log records that she reiterated that protests, *"are not allowed under the regulations"*, that there were *"other ways of expressing sorrow"* other than a gathering, and that organisers will be *"breaching the regulations if it goes ahead in current forms"* [CB/25/319]. DAC Connors recorded her reasons as follows:

> *"I consider that the group are planning an unlawful gathering knowing the coronavirus regulations prohibit it. Protest is not included. It was included in Tier 3 it is not in Tier 4. It should not be included in gathering."* [CB/25/320]

(12) Notes of a meeting between the Defendant Commissioner herself and the Home Secretary at 13:24 on 12 March 2021 confirm their mutual view that attendance, even to lay flowers, would not be permitted unless people were otherwise out for reasons permitted by the regulations (i.e. exercising) and that travelling outside their locality for their purpose would not be permitted under the law [ASB/A/40].

(13) The MPS position was again set out on 12 March 2021 in the response to the PAP letter:

> *"there is currently a general prohibition on gatherings in Tier 4 areas which would apply to gatherings of more than two for the purposes of protest. While it is accepted that there is a significant interference with a person's article 11 right, it is not an absolute prohibition on all protests in outdoor areas. Protests can be made in ways that do not involve breaching the general prohibition on gatherings."* [SB/18/81] (emphasis supplied)

(14) The PAP response letter went on to recognise that persons gathering for protest might have a defence of reasonable excuse in some situations, but stated that this was not a matter for the MPS to consider:

> *"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 a 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."*
>
> *[…] 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."*(Emphasis supplied) [SB/18/81-82]

(15) Statements by the Defendant Police Commissioner herself on 12 March also confirmed her view that *"the law is clear, it is essential other partners say so"* [ASB/A/36]). At 15:47, she also informed the Mayor of London with respect to the vigil that "*gatherings are illegal"*, and requested consistent messaging from both the Mayor's office and the Home

Secretary to this effect (CPR 18 Response 21.12.21, doc 6 [ASB/A/38]). It was clear that a "*consistent*" (i.e. blanket) position was to be taken, regardless of the purpose or individual circumstances of such gatherings.

(16) At 15:00, whilst the hearing before Holgate J was taking place, DAC Connors updated an MPS meeting noting that about 4,000 people were expected to congregate at Clapham Common and that *"communications have been sent 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"* (emphasis supplied) (CPR 18 Response, 21.12.21 doc 8 [ASB/A/45]).

(17) The 15:00 "*Position Update Call with Covid Gold*" recorded DAC Connors contribution that *"the vigils are very likely to go ahead although the regulations do now allow"* (emphasis supplied) [CB/27/338], and the "*Gold Command Team meeting*" further identified key next steps as to "*wait for result from high court and we will be policing as gathering are unlawful"* (sic) (emphasis supplied) [CB/27/335].

(18) The approach set out above is also consistent with the approach taken by the MPS in the period January/February 2021 in which protests of all kinds and sizes were subject to enforcement action: TM2 §13-§19 [CB/151-152].

(19) The consistent position of the MPS, that the Regulations prohibited the vigil and that is why they told people not to attend continues to be reflected in public statements, such as the tweet dated 23 September 2021: "*COVID legislation prohibited mass gatherings for Sarah Everard's vigil; we are not deterring anyone from attending this vigil."* [SB/71/540]

47. It is therefore clear from the contemporaneous evidence that, prior to the ruling of Mr Justice Holgate, the MPS position was that a vigil in the form of a gathering as proposed would be illegal. At no stage had there been any consideration of Articles 10 and 11 as explained in *Dolan*, nor whether there would be a reasonable excuse for the vigil, nor of the proportionality of seeking to prevent it.

48. Following the judgment of Mr Justice Holgate, the Defendant accepts that there was no change in her approach. DAC Connors confirms that it was her view that *"the judgment did not alter the law or the MPS approach to the proposed event".* This is also consistent with the views expressed by other officers that, "*we are to a degree in the same space as before – our reading of the legislation is that this event cannot go ahead in the way it has been proposed*" (Kris Wright [CB/33/373]). It is clear that the MPS considered that Holgate J's ruling vindicated its position ("*supported [the] police*" [CB/25/320]), although in fact the Judgment emphasised the need for the police to consider every protected gathering on its own specific facts. There was no further consideration given after the judgment was handed down before DAC Matt Twist, following his own Gold Strategy on Covid-19, approved a public statement that announced the MPS position that the vigil would be unlawful and urged people not to attend.

49. It is clear from the evidence and documentation that DAC Connors' role had been to explain to the Claimants the effect of the Regulations (or more accurately, the MPS's view of their effect) and encourage the Claimants to find ways of expressing themselves that would not involve gatherings (e.g. MT §26 [CB/16/207]). DAC Connors joined the Third Meeting at about 19:30 and made it clear that if the vigil went ahead as a form of gathering, the Claimants as organisers faced being issued with FPNs of up to £10,000 or prosecution: *"In relation to organisers – organisers are calling together that event. Enforcement against organisers would have to be considered"* [CB/33/376].

50. DAC Connors made clear that only events that did not involve a gathering could be contemplated: *"But it can't be in a way that people come together and it breaches the regulations. We are saying it shouldn't go ahead, because it is likely to breach the regulations."* [CB/33/376] and "*There are other ways to express sec 10/11 via individual attendance with regs, online …not as an organised gathering …"* (emphasis in original) [CB/25/320].

51. The contemporaneous documentation referred to above paints a clear picture. DAC Twist and DAC Connors consistently applied MPS policy as set out in the Gold Strategy on Covid-19, that any non-exempt gathering would be unlawful and that there was no exception for protest.

ii. Failure properly to consider whether organisers might have a reasonable excuse

52. It is also clear that the MPS were not of the view that it was for them to consider whether there was a reasonable excuse for a large gathering by way of protest. This is explicitly stated in the MPS PAP response dated 12 March 2021 [SB/18/79] (see paragraph 24 above). It is significant that reasonable excuse, Articles 10 and 11 and proportionality are not mentioned in the Gold Strategy on Covid-19. Articles 10 and 11 are only mentioned in Gold Commander's log after the Claimants' PAP letter and then these are said to be complied with because of the existence of alternatives that do not involve persons gathering. As acknowledged in the DGR at §10(c), such alternatives do not provide alternatives ways to exercise Article 11 (as opposed to Article 10) rights [CB/12/149].

53. This fundamentally misunderstood the fact that the right to associate is expressly protected by the HRA so that expressing views in ways other than associating does not protect that right to any extent. Moreover, in *Tabernacle v SSHD* [2009] EWCA Civ 23, [2009] 2 WLUK 103 at §37 Laws LJ noted in the context of freedom of expression, that the manner and form in which people exercise their right to freedom of expression, *"may constitute the actual nature and quality of the protest"* itself. This was the case with vigil planned on Clapham Common.

54. Indeed, the police were unable to give any sensible consideration to Articles 10 and 11 or the issue of proportionality given that they disclaimed any role in assessing the public health risk of a gathering or measures that sought to mitigate that risk:

(1) The PAP response letter dated 12 March 2021 was explicit that the police would not consider the risks of large gatherings to public health and that Parliament had conclusively determined that such gatherings could not be permitted on public health grounds (see paragraph 24 above).

(2) This is also the position taken in the DGR at §78(a) [CB/12/149], quoted in paragraph 6 above.

(3) In addition, the evidence of DAC Matt Twist acknowledges that the MPS did not carry out any health risk assessment. He states that *"[n]either the legislation, nor guidance requires or encourages the police to conduct such an assessment"*. He says it is "*not the role of the police to determine health risks of any event…".* He says, consistently with the MPS's PAP response, that the fact that Parliament had imposed restrictions on gatherings indicated that Parliament had decided that large gatherings were a risk to public health (MT §45 [CB/16/214]).

55. The approach of the MPS was however erroneous in law. ***Dolan*** established that it is only a criminal offence for persons to gather for protest where it is necessary and proportionate for such gatherings to be restricted *for the purposes of public health*. The Regulations did not themselves determine the circumstances in which it would be necessary and proportionate for gatherings for protest to be restricted: this could not be deduced from the Regulations as the MPS thought. If the police decided to take on the role of enforcing the Regulations against protests, and advising people that their proposed protests would be unlawful and risk FPNs or prosecution, the MPS had to assess the public health risks and proportionality of the gathering being prohibited. They could not lawfully avoid doing so.

56. The fact that there was no express statutory requirement for the police to undertake risk assessments or consult public health sources does not mean that they were not required to do so. Whilst this might have been an unwelcome and unusual function for the police to perform, it was a requirement of the law, if they were to exercise their powers under the Regulations against protests or threaten to do so, that they consider the public health risks and the way these could be proportionately minimised.

57. On 21 December 2021 in a CPR Part 18 response, the Defendant disclosed to the Claimants a risk assessment that she carried out in relation to the proposed vigil (CPR 18 Response, doc. 9). There was no statutory obligation on the Defendant's officers to carry out such an assessment, but they recognised that they ought to do so. The risk assessment assessed likelihood of disorder, or civil disobedience (including not complying with police instructions) to be low or very low. This assessment is highly relevant for several reasons. First, it makes clear that an organised gathering would have proceeded in an orderly manner in accordance with any public health instructions or measures adopted. Second, it demonstrated the need for the police to carry out risk assessments even if they are not required by statute as an element of informed policing. Third, it is striking

that there is no discussion of risk to health in this or any similar assessment, despite this being the only potentially legitimate basis on which the police could prohibit or restrict the vigil.

58. The ***Tameside*** duty requires the police to ensure that their decisions are properly informed and it required them to consider public health sources, if necessary seeking advice from PHE (by way of analogy, the Home Office in providing asylum accommodation must consider and act in accordance with public health advice[7]). But the MPS did not ask for guidance or advice from public health professionals.[8]

59. Nor did the MPS consider guidance published by other public authorities on holding events, which set out mitigations to minimise health risks. Such guidance commonly included measures to ensure social distancing, such as stewarding and signage, sound amplification to avoid overcrowding, venue selection, managing timings and travel, mask wearing and test and trace. See for example, Southwark Council, Delivering outdoor events safely during Covid-19 [SB/64/444]; London City Hall, Guidance for events during Covid-19: Events checklist [SB/63/438].

60. Nor did the MPS consider the analogy of picketing for which there was an express exception in the Regulations. Exception 17 to the Tier 4 restrictions provided an exception for picketing where organisers "*take the required precautions*". The "*required precautions*", as set out in Regulation 7, were that the gathering organisers have carried out a risk assessment and that all reasonable measures have been taken to limit the risk of transmission, taking into account the risk assessment and any guidance issued by the government which is relevant.

61. Moreover, the MPS had no published or unpublished guidance on how persons could conduct protected gatherings in a manner that would minimise health risks or how the MPS would assess whether protests could be carried out lawfully, let alone guidance that was informed by consultation with public health professionals. This was because the MPS did not consider that such gatherings could ever be lawful. Their only guidance – the Gold Strategy on Covid-19 – stated emphatically that gatherings for protest were prohibited.

62. In her evidence, DAC Connors states that certain factors were *"present in my mind"* when approaching discussions with organisers, namely that persons travelling across London and gathering *"presented a clear risk to health"* (JC1 §27 [CB/15/183]). She says this was based on *"Government advice in the public domain"*. Despite a CPR Part 18 request for the specific documents that DAC Connors had in mind, DAC Connors has been unable to identify any (CPR 18, Response, 21.12.21). DAC Connors' evidence demonstrates that she made no attempt to properly inform herself of the health risks and effectiveness of mitigations posed by protected

[7] ***R (NB and others) v Secretary of State for the Home Department*** [2021] EWHC 1489 (Admin)

[8] The Government's chief advisers had publicly stated that, based on past experience, outdoor gatherings presented a low risk generally [CB/6/69-70]. The police made no effort to identify learning, about the health impacts of protest gatherings, such as the Black Lives Matters protests in 2020.

gatherings in general or in relation to specific events. In any event, whatever half-remembered information might have been *"present in [DAC Connors'] mind"*, when she engaged with the Claimants, it is clear that the MPS position on policing protests, which was applied to the vigil, was not based on any public health assessment but rather was premised on the assumption that Parliament had already conducted such an assessment and it was the job of the police to explain to people that gatherings were prohibited, encourage them not to gather and, if necessary, enforce the Regulations against them.

(d) The Defendant's response to the claim

63. The Defendant raises five broad grounds of defence to this claim: (i) That there was no decision taken other than the refusal to provide an assurance that enforcement action would not be taken, (ii) it would have been unlawful for the MPS to have provided such an assurance in the light of *Pretty v DPP*, (iii) the MPS did not make a mistake of law, (iv) the MPS appropriately balanced and considered Article 10 and 11 rights, (v) relief should be refused under s.31(A) of the Senior Courts Act 1981.

(i) No "formal decision"

64. The Defendant first contends that there was no "formal decision" that is amenable to challenge by way of judicial review. Insofar as there was, the Defendant submits that it was a decision not to give an assurance *"not to enforce the Regulations against the Claimants"* (DGR §2, §4 [CB/12/127-128]). This is incorrect:

(1) The MPS decided that the proposed vigil would be unlawful (see explicit terms of PAP acknowledgment [SB/17/78], PAP response [SB/18/79], and numerous other references to the vigil being *"illegal"* or *"not permitted"* in contemporaneous documents both before[9] and after[10] the ruling of Holgate J) which was itself a reflection of the MPS's established policy. That is amenable to judicial review.

(2) In any event, this is a claim under the HRA and the decision and action of the MPS plainly represented an interference with the Claimants' rights under Article 10 and 11 since they meant that the Claimants could not sensibly proceed to organise the vigil. This included the actions of the police in: (i) informing the Claimants not to publicise the event; (ii) warning the Claimants that the MPS considered the planned vigil should not go ahead because it would breach the Regulations; (iii) warning the Claimants that enforcement action against the organisers including a £10,000 fine for each organiser and possible action under the Serious Organised Crime Act 2007 would be considered;

[9] Email from SI Ivey [SB/13/69]; Email from Public Order Planning team [SB/16/77]; First meeting [CB/28/348-49]; Gold Log preparation MT [CB/27/329-332]; Op Talla Meeting [CB/25/319]; NPCC letter [CB/37/410]; SCG/GLA London MPs call [ASB/14; Second meeting [CB/25/319, [CB/31/363]; Gold Command Team Meeting [CB/27/335]; Position Update Call with Covid Gold [CB/27/338]; Mayor call with Commissioner [ASB/38].

[10] Third Meeting [CB/33/373] [CB/33/375]; [CB/25/320]; Statement of Commander Roper (JS2 §32) [CB/14/167]

and (iv) publishing a statement advising people not to attend any vigils for Sarah Everard.

(ii) Unlawful to give an assurance

65. The Defendant contends that the MPS could not have given an assurance not to prosecute because it would have been unlawful for it to do so.[11] This ground of defence is largely irrelevant, however, because the police actively discouraged the Claimants from organising the vigil, made it clear to them that the police thought it would involve criminal offences being committed and warned them that the police would consider issuing FPNs or prosecution if the vigil went ahead.

66. Leaving aside the fact that this issue therefore fails to engage with nature of the claim, the position of the police is in any event wrong.

67. The Defendant relies on ***R (Pretty) v DPP*** [2001] UKHL 61, [2002] 1 AC 800 which concerned circumstances in which the DPP would not prosecute persons for assisting others to die a dignified death. Such persons indisputably commit a crime. As stated by Lord Bingham at §39, it was recognised in that case that it would have been unlawful for the DPP to have undertaken *"that a crime yet to be committed would not lead to prosecution…"* (emphasis supplied) The ECtHR noted in the subsequent application to that Court that such a position is consistent with the ECHR because it is contrary to the rule of law for *"the executive to exempt individuals or classes of individuals from the operation of the law"* ((2002) 35 EHRR 1 at §77).

68. The Defendant's reliance on this authority is wrong for a number of reasons.

69. First, as matter of fact, the reasons given by the MPS for not providing the Claimants with the reassurance that they sought was not because the police could not do so as a matter of law (i.e. the point the Defendant now raises based on ***Pretty***). Rather, it was because the police (i) thought the vigil would be unlawful, (ii) thought that whether the organisers would have a reasonable excuse for organising the vigil could only be determined after the event had taken place (JC1 §66 [CB/16/193]), and (iii) thought the Claimants were seeking "immunity" for all those attending, however they behaved (MT §41 [CB/17/213]).

70. None of these three reasons actually given by the MPS withstand scrutiny:

    (1) As to (i)—and most fundamentally—the MPS failed to take a lawful decision as explained in the previous section of the skeleton argument.

    (2) As to (ii), the MPS had no difficulty in indicating to the Claimants that their conduct in organising the vigil would be unlawful and would be liable to enforcement action. The

[11] This is addressed in two sections of the DGR at §63-§67 and §68-§71 [CB/12/144-147]. These two sections are addressed together.

police are plainly able to communicate the opposite message in circumstances in which they consider conduct is lawful. Indeed,

a. This is required by the "*four Es"* approach to policing the pandemic (see JC1 §17-18 [CB/15/180]) which requires the police to explain the Regulations, highlight action that breaches the Regulations and *"point out any consequences if they go ahead and breach Regulations".*

b. The MPS has a "Gateway Team" which addresses formal and informal approaches to the MPS for guidance on what is considered to be lawful and unlawful under the coronavirus regulations (see [SB/16/77]).

(3) As to (iii) the Claimants never sought assurances that persons attending the vigil would not face enforcement action regardless of how they behaved or events unfolded. It is obvious that the police could not give such an undertaking.

71. Second, the principle articulated in ***Pretty*** is not relevant because the Claimants did not seek an undertaking that a crime that they proposed to commit would not be prosecuted. On the contrary, they sought assurance from the MPS that their conduct was not considered unlawful by the MPS. That is an entirely different scenario.

72. Third, the factual situations of ***Pretty*** and the present case are also entirely dissimilar. In the present case the Claimants sought reassurance that organising a vigil—which was an activity that they were then currently engaged in—on certain agreed parameters would not result in enforcement action by the police. It is entirely unexceptional that a person organising an event should wish to have the reassurance of the police that it would not be unlawful if it was lawfully and properly organised (indeed it appears that the MPS has a process precisely for this purpose [SB/16/77]). That is entirely different from seeking an undertaking relating to a killing taking place in unknown circumstances in the future.

(iii) MPS did not misunderstand the law

73. The Defendant next contends that the MPS officers were "*aware of, and understood, the reasonable excuse defence, and that the exercise of Article 10/11 rights could, depending on all the circumstances, amount to a reasonable excuse"* (DGR §72 [CB/12/147]).

74. However, as explained in paragraphs 46-51 above, it is clear from the contemporaneous documents that the MPS officers – including DAC Twist, DAC Connors and the Defendant herself—did not in fact properly understand the law or the relationship between the reasonable excuse requirement, Article 10 and 11 and the prohibition on gatherings.

75. Reliance is placed by the Defendant on what DAC Connors says in her witness statement filed for these proceedings (DGR §72 [CB/12/147]). It is however clear that DAC Connors simply applied the MPS policy drafted by DAC Twist and that DAC Twist approved the published

statement that followed the judgment of Holgate J which effectively ended any remaining prospect of the vigil taking place.

76. DAC Connors' evidence on this point is therefore of limited relevance. It also needs to be treated with care. Insofar as it departs from the contemporary reasoning recorded in her own log and in other documents it represents an ex post facto embellishment of her reasons. Such embellishment is not admissible and should not be accepted (*R (Shasha) v Westminster City Council* [2016] EWHC 3283 (Admin), [2016] 12 WLUK 479 §41; *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin), [2020] 2 WLUK 293 §78).

77. The Court is also not required to accept evidence that departs from contemporary documents, or which is internally contradictory (*R (Soltany) v SSHD* [2020] EWHC 2291 (Admin), [2020] 8 WLUK 157 §88); and in any event where contemporary records are available these provide the best evidence and should generally be accepted (*R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) §39-§42;[12] *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, 431[13]).

78. The key paragraphs of DAC Connors' statement that are relied upon by the Defendant are paragraphs 12-16. However, in these passages DAC Connors does not dispute the Claimants' case that the MPS position was that all large gatherings were unlawful (a point she effectively acknowledges at §27).

79. Furthermore, the effect of DAC Connors' evidence at §12 and §28 is that she considered that the question whether a person had a *"reasonable excuse"* fell to be considered at the "*engagement stage*" and indeed at the final stage of the so-called "*4Es"*. However, the 4Es apply when a person is considered to be committing an offence. Their objective is to persuade a person to comply, with "*enforcement*" being the last resort (see [CB/23/286]). The 4Es process is not appropriate if a person is not committing an offence in the first place, which would be the case if they are legitimately exercising Article 10 and 11 rights. Yet DAC Connors is explicit that it is only at the enforcement stage, when the police are considering whether to take enforcement action against what they have already decided to be a criminal offence, that, in her view, Articles 10 and 11 are relevant:

> *"The use of the 4E approach, and the last stage—enforcement—is where the assessment of necessity would, in effect, come in. The point at which the police move to enforcement, specifically as a last resort, indicates our tolerance for the exercise of Article 10/11 rights and reflects our understanding of the importance of these rights, which may only be interfered with where necessary for specific purposes, including protection of health."* (§28 [CB/15/183]).

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[12] Quoting *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm) (per Leggatt J, as he then was).

[13] "*… a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."*

80. Therefore whilst DAC Connors attempts to say that she understood that whether a person had a reasonable excuse and whether Article 10 and 11 justified their actions was relevant, her identification of how such matters were relevant is seriously mistaken.

81. There are other difficulties with her statement. It is not easy to reconcile all the remarks in her statement (cf. §14, §15), and her suggestion that she had taken account of ***Dolan***/reasonable excuse/Article 10 and 11 (§12) is not supported by any contemporary documentation. There is no reference to any of these matters in the Gold Strategy on Covid-19. A reference to Article 10 and 11 first appears in Gold Commander's log only after the Claimants' PAP letter had been received. Had any MPS document or policy referring to such matters existed the court can be confident it would have been disclosed. DAC Connors does not explain how she knew of ***Dolan*** and does not say she received any advice, briefing or training on it. Her knowledge of the reasonable excuse requirement self-confessedly derived from the existence of a similar provision in the first lockdown regulations in Spring 2020 (JC1 §13 [CB/15/178]).

82. It is however clear that DAC Connors approached the policing of the proposed vigil on the basis that the vigil would be a breach of the Regulations and did not consider whether in fact it might not be (§18 [CB/15/180]). The only alternatives that she says she considered were those that would not constitute gatherings under the Regulations (§22-§23, §25 [CB/15/182]).

83. DAC Connors' evidence therefore needs to be treated with care. It does not contradict the Claimants' case and does not support the Defendant's assertion that DAC Connors "*understood*" the reasonable excuse defence and the role of Article 10 and 11 (DGR §72 [CB/12/147]).

(iv) Appropriate balance undertaken

84. The Defendant contends that DAC Connors *"undertook, and continued to review, a balancing exercise between Article 10/11 rights"* (DGR §78 [CB/12/148]). This point is addressed above: DAC Connors did not undertake such a balancing exercise and she did not correctly understand the relevance and role of Article 10 and 11.

85. In addition, the police were required to assess the public health risks in order to consider whether gatherings were permitted by Articles 10 and 11. Yet the Defendant acknowledges that the police were *"not in a position to assess public health risks"* (DGR §78(a) [CB/12/149]). Insofar as DAC Connors sought to consider public health risks and mitigations (cf JC1 §14, §27 [CB/15/179, 183]; MT §20 [CB/16/205]) she was not in a position properly to do so. If she did so, it had no material impact on the MPS position that the vigil was unlawful, as finally determined by DAC Twist following the judgment of Holgate J.

86. The Defendant also relies on the fact that at the Third Meeting DAC Connors considered the importance of the time and place of the vigil and that there were other ways that people *"could exercise their Article 10 rights"* (DGR §78(b), (c) [CB/12/149]). However, by this point, the decision to prohibit the vigil had already been taken. In any event, the only option contemplated

by DAC Connors was one that would not constitute a gathering and therefore would not be caught by the Regulations at all (and would not protect the Claimants' Article 11 rights to any extent).

(v) Section 31(2A), Senior Courts Act 1981

87. Section 31(2A) provides that the High Court must refuse to grant relief in an application for judicial review "*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".* The Defendant contends that even if the MPS had acted lawfully then it would be highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred.

88. This is not correct. First, s.31(2A) needs to be applied in a manner that takes into account that this is a claim under the HRA for a breach of protected rights and for a declaration that such rights have been breached and for damages. It needs to take into account that the Claimants contend that their Article 10 and 11 rights were breached because the conduct of the police was not "*prescribed by law*". The Claimants contend that the conduct of the police was not prescribed by law because it was legally flawed in the various respects set out above.

89. The fact that the Claimants rely on the "*prescribed by law*" requirement within Articles 10 and 11 does not change the basic legal analysis that they contend that they have been subject to a violation of Article 10 and 11. It is the breach of Article 10 and 11 that they ask to be reflected in relief in the form of a declaration and damages.

90. It is in this context that section 31(2A) falls to be considered. The section requires the Court to ask itself whether the *"outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"*. If the conduct complained of in this claim –the failure of the MPS to act in accordance with the law—had not occurred, then the violation of the Claimants' Article 10 and 11 rights would not have arisen. That is a *"substantially different outcome"* whether or not the vigil ultimately went ahead.

91. Second, the Court cannot in any event conclude that had MPS acted lawfully it is highly likely the vigil would not have gone ahead in any form. One of the key aspects of the claim is that the police failed to take appropriate public health advice and failed to assess public health risks. The Court is no better placed, and the Defendant has adduced no evidence about the ability of events to take place in a responsible manner at the time. Nor has the Defendant adduced any evidence showing what PHE's advice would have been at the time. Moreover, since the Defendant accepts that her officers had formed the view that a large gathering was going to take place whatever the Claimants did, the proper and proportionate decision for the police to have reached was to permit and encourage the Claimants to organise the gathering in the safest possible way.

92. The Court of Appeal (Lindbloom, Singh, Haddon-Cave LLJ) made clear in ***Plan B Earth v Secretary of State for Transport*** [2020] EWCA Civ 214, [2020] 2 WLUK 372 at §273 that

s.31(2A) had not altered the constitutional principle that the Court must not assess the merits of a decision and therefore it will often be extremely difficult or impossible for a court to conclude the same result was highly likely. The courts have been warned of the dangers of speculation in other cases (e.g. *R v DPP, e p C* [1995] 7 Admin LR 385, 393De-E (Kennedy LJ: *"What conclusion [the decision-maker] would have reached if he had regard to [certain matters]… is not a matter which in my judgment should be speculated upon in this court…"*).

93. Thirdly, the Court should in any event grant a remedy given the exceptional public interest in the matters addressed by this claim.

E. REMEDIES

94. The Claimants seek a declaration that their rights under Articles 10 and 11 have been breached and, in addition, damages under section 8 of the HRA which they will donate to a charity concerned with violence against women.

95. Section 8 of the HRA relevantly provides that where a court finds that the act of a public authority was unlawful it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The court may award damages if, taking into account all the circumstances of the case, it is satisfied that the award is necessary to afford just satisfaction. In determining whether to award damages or the amount of award, the court must take into account the principles applied by the ECtHR in relation to the award of compensation under Article 41 ECHR (section 8(1)-(4)).

96. A declaration would not be sufficient to afford just satisfaction, taking into account the following factors:
    (1) The significant distress caused to the Claimants by feeling their voices, their grief and anger, had been silenced at the very moment they needed to be heard by police and politicians (see AB §52 [CB/18/246], JS2 [CB/13/162]).
    (2) The stymying of the Claimants' right to hold the vigil in relation to an issue of pressing social significance – the protection of women from violence. The need to "*reclaim*" public space for Sarah Everard and other women who had lost their lives or had been the victim of violence was the aim of the vigil, which was why its format and location was so important (JL1 §4 [CB/13/155], AB §3 [CB/18/233] and AB §30 [CB/18/240]).
    (3) The loss of the opportunity for the Claimants to capture the public mood and build an enduring mass movement to protect women from violence (JL2 §§6-7 [CB/14/162] and §49 [CB/14/173]).
    (4) The chilling effect which prevented the Claimants organising further events during the period in which the coronavirus regulations were in place (JL2 §6 [CB/13/162]).

97. The following examples of compensation awarded by the ECtHR are of relevance:
    (1) In *Pal v United Kingdom*, supra, the ECtHR awarded €2,500 in respect of non-pecuniary damages in respect of a journalist who was arrested and charged for harassing another

journalist. The UK authorities failed to carry out an appropriate balancing exercise. The court took into account that the applicant had experienced "*a certain degree of frustration and inconvenience as a result of her arrest and prosecution*".

(2) In *Gafgaz Mammadov v. Azerbaijan* [2015] ECHR 900 at §114 the ECtHR awarded €15,600 in respect of non-pecuniary damage after the application was arrested, prosecuted and sentenced to five days' detention for attending a peaceful protest.

(3) In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* [2001] ECHR 567, a political association was awarded 40,000 French francs (around £4,000, RPI uplifted to today c. £7,250) after aa political association was repeatedly refused authorisation to hold an event commemorating an historical event.

(4) In *Primov and Others v. Russia* [2014] ECHR 808, the ECtHR awarded €7,500 in non-pecuniary damage after the authorities refused to pre-authorise a demonstration. When it was held, one applicant was arrested and held in detention for two months. The ECtHR concluded that the government authority should not have banned the protest.

98. In the circumstances, it is submitted that a declaration and damages of £7,500 in respect of the three claims on a global basis, which sum will be donated to women's charities, would afford just satisfaction.

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