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

BEFORE THE RIGHT HONOURABLE LORD JUSTICE WARBY and THE HONOURABLE MR JUSTICE HOLGATE

BETWEEN:-

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

Claimants

-and-

THE COMMISSIONER OF POLICE OF THE METROPOLIS

Defendant

-and-

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Interested Party

ORDER

UPON the Defendant's application for permission to appeal against the decision and order dated 11 March 2022

AND UPON reading the written grounds of appeal and written submissions of the Defendant dated 18 March 2022 and the written submissions of the Claimants dated 29 March 2022

AND UPON the parties having consented to the determination of the application without a hearing

WITHOUT A HEARING

IT IS ORDERED THAT:

Permission to appeal is refused.

REASONS:

1. None of the Grounds of Appeal has a reasonable prospect of success, and there is no other compelling reason for an appeal to be heard.

2. Generally:-

   (1) There were factual issues in this case which we resolved by reference to established principles. It is not arguable that we erred in principle and see no other reason to believe that the Court of Appeal would be prepared to adopt a different factual analysis.

   (2) Otherwise, the decision in this case involved the application of legal principles and a legal analysis that were not, for the most part, the subject of any material dispute. That includes the *Ziegler* principles, which reflected earlier jurisprudence.

   (3) It was not argued before us that the *Ziegler* principles require adaptation or modification when considering a stage prior to arrest. In our judgment, it would be contrary to principle to allow the defendant to advance such an argument for the first time on an appeal, depriving the claimants of the opportunity to meet the argument at first instance. In any event, we do not consider that any clear or tenable argument has been formulated as to why and how the *Ziegler* principles should be modified.

   (4) Such other points of law as are raised by the Grounds and submissions appear to us to be unarguable in law or to involve selective and misleading analysis of aspects of the judgment, which must be read as a whole.

   (5) This decision relates to the Covid-19 emergency regulations. Any wider significance it might have is limited to cases in which the law contains a "reasonable excuse" provision. In that respect, the court applied and followed principles laid down by the Supreme Court and Court of Appeal. We do not believe there is a need for any further or more authoritative guidance for the purposes of lawful policing of protest in such cases.

   (6) In the circumstances the application for a costs cap does not arise for determination.

3. The formulation of the Grounds is not compliant with PD52C para 5. This makes identification and enumeration of specific grounds more difficult. We have however analysed them as comprising in substance three main grounds.

<u>Ground 1: erroneous identification of the decision(s) under challenge</u>

4. In paragraphs 1 to 3 of the Grounds the defendant seeks to advance a pleading objection which was not relied on at the hearing. The objection has no merit. Counsel for the claimants clearly focused his written and oral argument on the chilling effect of the decisions made. The defendant did not contend that such a case was not open to the claimants. Rather, she advanced a different interpretation of events. If the pleading objection is put aside the contention that the court should have focused on 'decision 5' is primarily a disagreement with the court's analysis of the decision-making. That analysis was plainly open to the court on the evidence. The contrary is not arguable.

5. The defendant did also contend that proof that her decision was the cause of the claimants' decision to abandon organising the vigil was an essential ingredient of the claimants' case as a matter of law. But that was clearly wrong; the principle that a chilling tendency can be enough to amount to an interference with Article 10 and 11 rights is firmly established: see paragraph [9] of the judgment. In any event the court not only held that the defendant's decisions had a chilling effect, it also found a causal connection established between each of those decisions and the claimants' decision to abandon the vigil: see paragraphs [74]-[76], [99], [107]

<u>Ground 2: errors in relation to "reasonable excuse"</u>

6. We are not persuaded that the criticism in para 4 of the Grounds is arguable, but even if it were it would be misdirected. Paragraph [84] of the judgment does not turn on a fine legal analysis but addresses "the meaning of what was said" to the claimants in the context of discussions about whether or not the claimants would be liable to prosecution or FPNs. Paragraphs 5, 11 and 12 are hopeless attempts to challenge reasoned factual conclusions. Paragraphs 6 and 7 (need to evaluate the 'cause') involve a misreading of one passage of the judgment, ignoring the overall context. The court was doing no more than loyally following and applying the decision of the Supreme Court in *Ziegler* cited in [13(2)]. See also [103], [115]-[116]. Paragraphs 8 to 10 (need to carry out a health risk assessment) lack coherence and fail to address the court's reasoning as a whole, including all of [78]-[79]. The proposition that the police were entitled to take the existence of the Regulations "as a starting point" provides no answer to that reasoning. The court's finding of fact at [94] that the defendant ignored her *Tameside* duty is not amenable to challenge.

Ground 3: failure to apply s 31(2A) of the Senior Courts Act 1981

7. On analysis, this is another way of putting the complaints advanced in paragraphs 1 to 3, 11 and 12 of the Grounds, to the effect that the court should have accepted the defendant's case that there was only one decision and it was lawful and not causative of the detriment complained of. The court rejected the defendant's case on those points. For the reasons given above it is not arguable that in doing so the court erred in law or adopted a factual analysis with which the Court of Appeal may be prepared to interfere. Furthermore, because s 31(2A) only arises on the supposition that the defendant is unsuccessful on those matters, it is not permissible for the defendant to re-argue the same points in order to submit that it is highly likely that the outcome would have been the same.

Friday 8 April 2022

BY THE COURT