Claim No. CO/919/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:-

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

Claimants

-and-

THE COMMISSIONER OF THE POLICE OF THE METROPOLIS

Defendant

-and-

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Interested Party

SKELETON ARGUMENT ON BEHALF OF THE DEFENDANT

Contents

I. INTRODUCTION

1. The Claimants' case is that the Defendant breached their rights under Articles 10 and 11 ECHR by failing to offer an assurance that their proposal to organise a gathering at

Clapham Common on 13th March 2021 would not result in enforcement action under the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ("**the Regulations**"). Their argument is that the Defendant's failure to offer such an assurance (which they describe as an effective "veto") was not "prescribed by law" for the purposes of Articles 10 and 11, because the Defendant's officers failed to appreciate that where persons gather to exercise their rights under those articles they may have "reasonable excuse", such that a breach of the Regulations does not amount to a criminal offence, or that enforcement of the Regulations would be disproportionate.

2. This argument is unsustainable. There is no dispute that a gathering of two or more persons would have been in breach of the Regulations, and that the Regulations provided no relevant exception. The Defendant's officers were entitled and obliged to bear this in mind in relation to the proposed gathering, which was liable to attract thousands of participants. Those officers were well aware that, as the Court of Appeal had made clear in the case of *Dolan v Secretary of State for Social Care* [2021] 1 WLR 2326, the fact that persons were seeking to exercise their rights under Articles 10 and 11 ECHR was relevant in considering whether such persons had "reasonable excuse" for breaching the Regulations, and the proportionality of enforcement. However, it emphatically did not follow that the Defendant was obliged to give the Claimants an assurance that the proposed gathering would not give rise to enforcement action. The question of whether anyone who organised or participated in a gathering which contravened the Regulations had "reasonable excuse" or should be the subject of enforcement action could only be assessed in all the circumstances prevailing at the time of the gathering: there was no obligation on the Defendant to reach a view on this in advance of the gathering or to "permit" the gathering to take place.

3. Nor can the Defendant legitimately be criticised for not carrying out an assessment of the risk to public health of the proposed gathering taking place. The Defendant was entitled to proceed on the basis that the Regulations reflected a public health assessment carried out on behalf of the Secretary of State with the benefit of expert scientific advice and endorsed by Parliament. The assessment of whether there was "reasonable excuse" for any breach of the Regulations and of the proportionality of taking enforcement action inevitably had to take place against that background.

4. It should be noted at the outset that the Claimants' case originally was that a peaceful gathering for the purpose of exercising Article 10 and 11 rights *automatically* involved "reasonable excuse" for any breach of the Regulations. That case is (rightly) no longer being pursued. As explained above, the Claimants' modified case rests on the unsustainable basis that the Defendant's officers did not appreciate that the exercise of Article 10 and 11 rights was relevant in the assessment of "reasonable excuse". That is simply not the case, as is demonstrated both by the contemporaneous documents and by the witness statements filed in response to the claim.

II. KEY POINTS

(i) Shifting basis for claim

5. As mentioned above, the Claimants have abandoned what was originally a key element of their claim. The original declarations sought in the application for interim relief included a declaration that, in relation to Schedule 3A to the Regulations, *"Persons who are exercising their right to protest in a reasonable manner will have a reasonable excuse for gathering under that Schedule."* (emphasis added) [CB/2/13, SB/1/12]. This argument was repeated in:
   (a) the oral submissions at the hearing of the application for interim relief, see [SB/2/23]: *"it is a reasonable excuse if you are lawfully exercising your Convention rights. That is a reasonable excuse.";*
   (b) the Amended Statement of Facts and Grounds ["**ASFG**"] at paragraph 103 [CB/6/81]; and
   (c) paragraph 6 of the Reply to the Defendant's Summary Grounds of Resistance [CB/9/112].

6. This was plainly an incorrect understanding of the Regulations and their relationship with Articles 10 and 11 ECHR: see paragraphs 21-22 of the judgment of Holgate J in the interim relief application [CB/4/43], following paragraph 103 of the Court of Appeal in *Dolan* . The Claimants' skeleton argument has quietly dropped this argument, see paragraph 5: *"they may have a "reasonable excuse" under the Regulations. Whether persons participating in protected gatherings would have a*

reasonable excuse would depend upon..."

7. This is a very significant shift: once it is acknowledged that the assessment of "reasonable excuse" and of whether enforcement would be proportionate cannot properly be made until the full circumstances are known, it must follow that the assurance sought by the Claimants could not have been given in advance of the gathering on 13th March.

(ii) Operation of the Regulations

8. At the relevant time, the effect of the Regulations for a Tier 4 area was as follows. This is thought to be common ground:
   (a) Under paragraph 4 of Schedule 3A, no person may participate in a gathering outside, consisting of two or more people, unless the gathering falls within one of the exceptions in paragraph 6 of Schedule 3A.
   (b) Those exceptions did not include protest. It is clear that protest was deliberately not included as an exception, having been included in both the previous regulations and continuing to appear as exception 13 in Tier 3 of the All Tiers Regulations [ref], see paragraphs 69-76 of the Claimants' ASFG [CB/6/71-74]. By amendment on 26 December 2020, conducting a picket was introduced into Schedule 3A as an additional exception, but protest was still not included. (Gatherings to commemorate a person who had died were permitted, provided they consisted of no more than six persons, see Exception 11 at [ref]).
   (c) Thus, a gathering of more than two people outside which was for the purpose of protest was unquestionably restricted by the Regulations. Paragraph 4 of Schedule 3A did not allow for any general exception from the restriction on a person participating in or organising[1] such a gathering on the basis that they might have a reasonable excuse. By contrast, there was such a general exception of reasonable excuse in the restriction on leaving home contained in

[1] The separate status of an organiser, rather than mere participant, only arises in relation to the organiser of 'relevant gatherings' of more than 30 people which meet the criteria in paragraph 5 of Schedule 3A. There is no additional defence other than 'reasonable excuse' available to an organiser of a relevant gathering. The Claimants have accepted that, unless the reasonable excuse defence did apply, they would have been organisers of a 'relevant event' for the purposes of paragraph 5, see ASFG at para 75 [CB6/75].

paragraph 1 of Schedule 3A. A very similar drafting structure (in relation to the previous lockdown regulations) was recognised by the Court of Appeal in *Dolan*, see paragraphs 19-21 [ref].

(d) It follows that participation in a gathering (or organising a 'relevant gathering') was a breach of the Regulations, unless one of the specific exceptions applied. This remained the case even if the gathering involved the exercise of Article 10 and 11 rights, see *Dolan* paragraph 103. Identifying whether or not a gathering was in breach of the Regulations (as distinct from whether it involved a criminal offence) required no consideration of the ECHR.

(e) However, the exercise of Article 10 and 11 rights is relevant in the 4E process[2], including (but not limited to[3]) when the issue of enforcement and/or criminal sanction is considered:

i. A contravention of the Regulations does not amount to a criminal offence if the person had a "reasonable excuse" for being in contravention of the Regulations, see Regulation 10(1)(a).

ii. The exercise of Article 10 and 11 rights <u>may</u> amount to a reasonable excuse. It does not automatically do so, see *Dolan* at paragraph 103 [ref].

iii. The effect of the reasonable excuse defence is not, therefore, that the person organising or participating in a gathering was not in breach of the Regulations, rather the effect of reasonable excuse is that breach of the Regulations would not amount to an offence.

iv. Similarly, a person might have a reasonable excuse under Regulation 10(1)(b) for a refusal to comply with a direction given under Regulation 9(3) by a constable seeking to enforce the Regulations. Such a reasonable excuse might arise where:

1. The person was seeking to exercise their Article 10 and 11 rights;
2. In doing so they were in breach of the Regulations; <u>but</u>
3. In all the circumstances, the direction given by the constable (or a subsequent criminal process) constituted a disproportionate

[2] The 4Es being Engage, Explain, Encourage and Enforce, with Enforcement usually described as 'the last resort', see [CB/23/286].

[3] See paragraph 34 below.

interference with the exercise of those Article 10 and 11 rights, as per *DPP v Ziegler* [2021] UKSC 23 at paragraphs 57 and 70.

9. The above follows from the judgment of the Court of Appeal in *Dolan*, see paragraphs 15 and 19-21. While the adjective "unlawful" has been used both in the contemporaneous correspondence and in this claim, it is important to keep in mind the distinction between conduct that:
   (a) contravenes the Regulations (and may in that sense be described as "unlawful"), in circumstances which may or may not involve a reasonable excuse; and
   (b) criminal conduct, where the contravention of the Regulations was, in all the circumstances, without reasonable excuse.

10. Although the analysis of the lawful excuse defence by the Supreme Court in *DPP v Ziegler* is analogous to the analysis that applies in this case, there is a significant difference between how the Regulations operate and section 137 of the Road Traffic Act 1980. The latter provision states:
    137. Penalty for wilful obstruction
    (1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale.

11. An offence under s.137 is only committed where a wilful obstruction of the highway is without lawful authority or excuse; there is no intermediate position of a wilful obstruction of the highway which is contrary to s.137, but not an offence. There is an obvious reason for the additional 'stage' in the Regulations that applied in the present case: the Regulations are temporary public health measures, the principal aim of which is not to criminalise behaviour, but to ensure that the public act in such a way that the public health emergency posed by the Coronavirus epidemic is contained.

(iii) No obligation to undertake a public health risk assessment

12. The Defendant has made it clear that the Metropolitan Police did not attempt to conduct a public health risk assessment of either the underlying public health need to

restrict large-scale outdoor gatherings in general, or the specific transmission risk posed by the gathering being organised by the Claimants. This was acknowledged in the pre-action protocol response of 12th March, see [SB/18/82]: *"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."*

13. The Claimants argue that the Defendant could not be satisfied that enforcement measures were proportionate unless the Metropolitan Police conducted its own risk assessment of the transmission risks posed by the intended gathering. This cannot be correct:

    (a) There is no regulatory requirement, nor is there any government guidance, suggesting that the police ought to have been conducting such assessments.

    (b) If it were for the Metropolitan Police to undertake a pre-event public health risk assessment at command level, there would be a corresponding obligation on individual officers to conduct their own assessment when it came to enforcing the Regulations at an individual level[4].

    (c) The obligation contended for by the Claimants would not be confined to protest, it would arise in relation to most peaceful gatherings of two or more people outside that did not fall within an exception set out in the Regulations, in relation to which it is likely that Article 10 and 11 rights could be invoked. The weight to attach to those rights will vary, with particular weight to be attached to gatherings for the purpose of peaceful political protest (see *DPP v Ziegler* at paragraph 86), but in all cases, in order to conduct a balancing exercise, an officer would still have to balance the importance of the exercise of those Article 10 or 11 rights against the individual transmission risk assessment as conducted by that officer

[4] An individual police officer is personally liable for any unlawful acts during the course of their duty. It is only if an individual officer has acted unlawfully that the Defendant becomes vicariously liable for such acts under s.88 of the Police Act 1996. Regulation 9(7) requires the officer to consider it is necessary and proportionate in order to ensure compliance with a restriction before the enforcement powers in Regulation 9 can be used. Thus, a similar obligation would arise on every occasion an officer was considering enforcement at an individual level in a scenario where a person's qualified ECHR rights (i.e. Articles 8, 9, 10 or 11) were potentially engaged, albeit in a major or ongoing operation they may be able to rely on an assessment already carried out and communicated to them by a colleague.

(d) It should also be noted that, on the Claimants' case, the obligation to conduct such a risk assessment arises even before the enforcement stage:

i. It is indisputable that, at the time of the evening meeting on 12th March, no steps to enforce the Regulations against the Claimants had been taken. No direction had been given under the Regulations. DAC Connors was at the stage of Engaging, Explaining and Encouraging, the first three of the "4 Es" [CB/15/192 at paras 60, 62 and 65].

ii. The Claimants criticise the Defendant's "warnings" of enforcement action and seek to categorise these as actionable breaches of their Article 10 and 11 rights, see para 64(2) of the Claimant's skeleton. However, the words used by DAC Connors, whether characterised as a warning or advice, do not fall within either the enforcement powers set out in Regulation 9, or any other coercive powers granted to the police.

(e) The notion that the police would be obliged to carry out a quantitative or comparative public health risk assessment is both unrealistic and contrary to the plain intention and effect of the Regulations:

i. It is unrealistic because police forces simply have neither the scientific /medical expertise, nor the resources to conduct sophisticated Covid-19 transmission risk assessments on a case-by-case basis. The Claimants acknowledge that this task might be "unwelcome and unusual" (see Claimants' skeleton at paragraph 56).

ii. However, it would be a great deal more than unwelcome and unusual, it would be practically impossible. It would also risk substituting for the Government's informed assessment (taking into account the highest degree of scientific expertise) of the public risks and benefits of various types of gathering, a rapid – in all likelihood more superficial and/or less informed – assessment of the individual risk.

iii. The Regulations themselves provide a clear indication that the police are not under any obligation in this regard. The pre-amble to the Regulations states,

These Regulations are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of

severe acute respiratory syndrome coronavirus 2 (SARSCoV-2) in England.

The Secretary of State considers that the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to that threat.

The Explanatory Memorandum to the Amending Regulations that introduced Tier 4 provides specific justification for the restrictions found in Schedule 3A:

7.3 Cases are rising rapidly in the country, especially in London and the south east and east of England. A high proportion of the infections are due to the new variant of Covid-19, which has multiple mutations. In response to this, the introduction of Tier 4: Stay at Home has been identified as a means of managing the spread of the virus in certain parts of England by introducing more stringent restrictions. All 32 London boroughs and the City of London as well as some local authority areas in the east and south east of England will move out of Tier 3 and into the new Tier 4…"

Thus, it is the Interested Party who had made the determination that it was necessary to restrict outside gatherings of two or more people, for the reasons summarised in the pre-amble/explanatory memorandum, and this determination was approved by Parliament.

iv. Nor is it, with respect, for the Courts to interfere with a matter that is *'quintessentially a matter of political judgment for the Government, which is accountable to Parliament'*, see paragraphs 89-90 of *Dolan*. Nor could the police take upon themselves such a role. The role of the police is in law enforcement, not public health. Even if the police received their own scientific advice about relative risks in different scenarios, it was a matter for the Government, not the police, to decide, for purposes of public health, what level of risk was acceptable.

v. If the police were to undertake their own transmission risk assessment, and to determine that, in all the circumstances, those organising a mass gathering could be given an assurance in advance that enforcement action would not be taken, they would be assuming for themselves a

role in disapplying the Regulations for which there was no lawful basis.

(f) It is also relevant to note that the restrictions imposed by the Regulations were time-limited and subject to regular review:

i. Every 14 days the Interested Party was required to review whether it was necessary for each area that was included in Tier 2, 3 or 4 to remain in that Tier;

ii. Every 28 days the Interested Party was required to review the need for each of the restrictions in each Tier; and

iii. The Regulations were due to expire in any event at the end of 31st March 2021 (Reg. 15(1))[5].

14. The Police did of course have to ensure that any action taken in enforcing the Regulations was proportionate. In doing so, they had to take into account that the risk of transmission, as assessed by the Government (and public health experts advising it), made it necessary to restrict gatherings of two or more people to those specific scenarios set out in paragraphs 6-8 of Schedule 3A, which did not include gathering for the purposes of protest.

15. The guidance by other bodies on safely organising outdoor events, relied on in paragraph 59 of the Claimants' skeleton, is not relevant. That guidance did not apply during either the first or second lockdown. It was aimed at organisers rather than the police and related to events at sites with controlled access where numbers attending would be limited (e.g. [SB/64/445] and SB/63/440]).

16. The analogy with picketing does not assist the Claimants: for the reasons set out in paragraphs 54-56 of the DSG [CB/12/142], a lawful picket was likely to be limited to just 6 persons (as it would for a vigil, to the extent that it might fall within exception 11 [ref]).

[5] The stepped exit from lockdown was actually governed by The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021

17. It is suggested by the Claimants that if the Defendant lacked relevant information, she had a 'Tameside duty' to engage in relevant inquiries/consultation. However, the Defendant did not lack relevant information; she and her officers knew that the balancing exercise undertaken by the Government had been as a result of the receipt of such detailed scientific, medical and epidemiological evidence as was available at that time. It was for the Government, not the police, to keep under review the analysis of risk arising from large-scale, outdoor gatherings, including the effectiveness of measures that might be undertaken at such events to reduce the risk of transmission to what the Government would regard as an acceptable level.

18. As a result, it may well be that in the great majority of cases, where the police have not been able to resolve the situation using the first 3 Es, in considering whether there is a reasonable excuse, the balancing exercise will result in the decision being that there is not a reasonable excuse and enforcement will be proportionate. The Court of Appeal recognised this in *Dolan* at paragraph 103:

"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."

19. The Claimants do not seek to argue that the Regulations are themselves unlawful. It follows from the structure and operation of the Regulations as set out at paragraph 8 above that it was lawful for the Defendant (like other forces nationally) to proceed on the basis that gatherings that did not fall within a specified exception were not permitted. It was entirely consistent with the Human Rights Act 1998 to adopt the general approach that:

(a) Articles 10 and 11 of the ECHR are not relevant when determining whether or not a gathering is <u>in breach</u> of the Regulations, but that

(b) The police <u>do</u> need to consider Articles 10 and 11 when considering the question of reasonable excuse and what (if any) enforcement action should be taken as a last resort.

20. While it does not explicitly refer to Articles 10 and 11, the general approach set out in the Metropolitan Police's Op Pima document ([CB/22/268] and [CB/22/271]) is consistent with this. Furthermore, the Policing Plan devised for the event in issue in this case does make specific reference to the 'right to protest', and the need to respond proportionately, see [CB/24/315].

21. The Tactical Plan (at [CB/35/384]) makes specific reference to the rights of those attending the event, including their Article 10 and 11 rights, see [CB/35/392]. The inclusion of specific sections on Articles 10 and 11 within the Defendant's Tactical Plan for this very event, including the observation *"Everyone has the right to peaceful assembly and freedom of association with others… any interference in the assembly is only as far as is necessary with regard to these regulations"* is a clear indication that the Defendant was fully cognisant of the Article 11 rights of those who might attend the gathering, and the need to take enforcement action under the Regulations only so far as was necessary and proportionate. At paragraph 46 of their skeleton argument, the Claimants seek to identify all the documents where the Defendant does not mention Articles 10 and 11. It is unfortunate that they ignore the contemporaneous documents in which it is plain that the Defendant's officers involved in coordinating the policing of this event were expressly taking those matters into account.

(iv) Misrepresentation of Defendant's case

22. The Claimants' skeleton argument repeatedly misstates the Defendant's case:
    (a) The most obvious example is the Claimant's repeated assertion that the Defendant's case is that participation in or organisation of the gathering on 13th March would be a criminal offence, see:
        i. Paragraph 4 of the Claimants' skeleton, "*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"* and paragraph 42(3) where it is alleged the Defendant 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."* This is not what the statement actually says, see [SB/19/84-85], *"…the High Court has confirmed that the Metropolitan*

Police may conclude that attendance at a large gathering could be unlawful." [emphasis added]

ii. Paragraph 41 of the Claimants' skeleton, *"…The police made it clear that if they did so they would, in the police's view, be committing a criminal offence."*

iii. Paragraph 51 of the Claimants' skeleton, "*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."*

iv. Paragraph 70(2) of the Claimants' skeleton, *"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."*

(b) This has never been the Defendant's case. The Defendant's position has consistently been that participation in/organisation of the gathering could amount to a criminal offence (rather than a breach of the Regulations for which there was a reasonable excuse). There is an obvious and significant difference.

(c) The Defendant explicitly states this position, see:

i. Skeleton argument for interim relief application, paragraph 16 at [CB/3/32] and paragraphs 25-26 at [CB/3/35-36];

ii. Summary Grounds of Resistance at paragraph 8 [CB/7/93];

iii. Response to Proposed Reply at paragraph 8 [CB/10/118] and paragraphs 10-11 [CB/10/119]; and

iv. Detailed Grounds of Resistance at paragraphs 1(c)(2) [CB/12/126], 5 [CB/12/128] and 74.

(d) This position is consistent with the contemporaneous documentation of the Defendant. At no point in her meetings with the organisers did DAC Connors equate contravention of the regulations with an automatic liability to receive a Fixed Penalty Notice (FPN) [CB/25/319-320, CB/31/368 and CB33/376].

23. The Claimants suggest that local officers' initial response was 'positive', see the Claimants' skeleton at paragraph 4. This is simply not correct. See the emails at [SB/8-9/61-62] and the evidence of Supt Ivey at paragraphs 9-19 [CB/17/221-224].

24. It is suggested at paragraph 86 of the Claimants' skeleton that the Defendant took a decision to 'prohibit' the vigil, but there is no basis for this assertion. The vigil was not prohibited by the Defendant; indeed, it went ahead. Nor did the Defendant's officers purport to 'prohibit' the gathering during their meetings with the Claimants. On the evening of 12th March, constructive dialogue was continuing about the potential for a more spread out event [CB15/192 at paras 62-63], the sticking point being the Claimants' wish to have the protection of an assurance that they would not be fined [CB/33/379].

25. Although the Second Claimant says that there was a statement of support for the vigil from Lambeth Council, the Defendant is not aware of any such statement being made and no public statement has been disclosed. It is accepted that there were individual councillors who supported the event, and there were staff members from Lambeth Council who were of the view that, as the gathering was going to happen anyway, it was better that it be organised [see the views of Kristian Aspinall at CB/28/348]. However, this is not the same thing.

III. KEY EVENTS

26. The Parties are endeavouring to agree a succinct chronology that will assist the Court, and the submission of a further interim draft chronology would not assist.

27. The particular events relevant to the Court's consideration of the lawfulness of any actions/decisions taken by the Defendant's officers are:

10th March

(a) Announcement that surge testing would be deployed in targeted areas in Wandsworth where a new variant (then called the 'South Africa' variant, now designated 'Beta') had been detected [SB/30/131]. This demonstrates that at the material time, there was particular concern about the public health risk from Covid-19 in the immediate area where the gathering was to take place.

(b) Shortly after 5.30pm, on 10th March 2021 the Claimants decided they would set up an event at 6pm on 13th March 2021 in response to the disappearance of Sarah Everard [CB/13/155].

(c) By the time the Claimants contacted Kristian Aspinall at 18:25 they had already started to promote the event on both Facebook and Twitter [SB/6/59].

The banner is at [SB/29/130]. It specifies a location (Clapham Common Bandstand) and a time (6pm) to meet. Although the date is initially incorrectly stated as 'Saturday 14 March', it does not appear that there was any confusion that it was going to take place at 6pm on Saturday 13th March. The date was corrected [SB/36/169] but the message was not otherwise changed before the Claimants announced they were no longer organising the event.

(d) It was a further 4 hours before the Claimants contacted the Metropolitan Police to notify them of the event at 22.36 on 10th March [SB/7/60].

11th March

(e) By the time the Metropolitan Police had an opportunity to consider the event the following morning (Thursday 11th March), the Second Claimant was on BBC 5Live promoting it [SB/8/61], at which point 1,000 were already showing as attending.

(f) The gathering gained rapid, widespread national press coverage [SB/32/159 – SB/36/169]. The Claimants continued to promote the event, including via an interview with the Second Claimant on Sky News.

(g) At a meeting at 14.30 on 11th March, Supt Ivey made it clear that he was not in a position to give permission for the event to go ahead, and that enforcement could not be ruled out [CB28/3498].

(h) On the evening of 11th March, the Claimants' solicitors wrote the pre-action letter at [SB/14/73].

12th March

(i) Just before midday on 12th March the Claimants' application for urgent interim relief was lodged [CB/1/4].

(j) At midday on 12th the first meeting took place between the Claimants and the Metropolitan Police at which DAC Connors was present [CB/30/360, CB/31/363]. At this meeting, DAC Connors stated,

i. *" ...asking lots of people to come into an area and travel, you know, it doesn't meet the regulations that are there for a reason. And that is the situation that we face with yourselves."* [CB/30/364].

ii. In relation to a specific question about the potential for enforcement, *"We would, just like I've said, we do not want to have to go to enforcement. ...But I'm not going to say it's not going to happen because it's absolutely within the four E's. We have used it on various*

consistent protests and gatherings across the whole of the year, as you are all aware. But, it is not a stage that we want to get to. It really isn't. If we can do anything we can through engagement to avoid it." [CB/30/368]

(k) By 15.00 the intelligence assessment was that up to 4,000 people might be attending [CB27/339].

(l) From 15.45-18.30 the application for interim relief was heard, with judgment concluding at around 18.30 [CB4/39].

(m) At 19.05 a meeting between the Claimants and the MPS commenced, and was joined by DAC Connors at around 19.30 [ASB15/64]. During the meeting, an alternative format to the static gathering at 6pm was discussed. DAC Connors was asked if she were able to give an assurance that organisers would not face enforcement action, and was unable to do so [CB/33/379].

(n) While the meeting was ongoing, at about 19.55 Commander Roper gave the statement at [CB/14/167-168, ASB18/74] which had been approved by Gold Commander for 13th March 2021, DAC Twist [ASB17/69]. This included the statement that *"the Metropolitan Police may conclude that attendance at a large gathering could be unlawful….. Our hope has always been that people stick to the Covid rules, taking enforcement action is always a last resort."*

13th March

(o) At 07.17 on 13th March the Claimants announced they were cancelling the event and encouraging people not to gather that evening [CB/14/169].

(p) Numerous people attended at Clapham Common during the afternoon. Many attended, paid their respects and moved on. No enforcement action at all was taken until a large crowd started to gather at the bandstand after 6pm [CB/27/344-346].

IV. RESPONSE TO ADDITIONAL POINTS IN THE CLAIMANTS' SKELETON ARGUMENT

(i) Metropolitan Police policy was that all large gatherings were unlawful, even for protest

28. DAC Connors has explained carefully her understanding of how the Regulations operate, see paragraphs 11-17 of her statement [CB/15/177-180], in particular paragraph 16.

29. The Claimants' attempts to undermine the evidence of DAC Connors are contradictory and do not bear scrutiny. It is suggested that her account is of 'limited relevance' (Claimants' skeleton, paragraph 76) because she was merely applying the policy drafted by DAC Twist. This is a surprising argument to make in relation to the witness statement of the senior officer who took the decisions that are alleged to be the unlawful actions triggering this claim, namely, the refusal at the meeting during the evening of 12th March to consider alternative options proposed, or to give an assurance and/or a threat that the Claimants might face enforcement action as organisers – see paragraphs 6, 53-55, 98, 100, 101 of the AFSG [CB/6/53 et seq]. Plainly DAC Connors' evidence is relevant.

30. The Claimants' further argument that DAC Connors' evidence should not be accepted as it involves *ex post facto* embellishment can also be swiftly dismissed by the Court:

(a) Insofar as DAC Connors did not make specific reference to the ECHR in her notes of the 11th March, given that this was at an early stage in the Defendant's awareness of the event and engagement with the organisers, and that DAC Connors at that stage had no direct contact or communication with the organisers, it cannot be inferred that she was unaware of the potential role of Articles 10 and 11 in providing a reasonable excuse for contravening the Regulations.

(b) The note of DAC Connors made on the morning of 12th March prior to the Court hearing [CB/25/319] records her considering the impact of Articles 10 and 11, albeit in summary form (*"other ways to express HRA 10/11"*). This confirms that she was aware of the importance of considering the effect of Articles 10 and 11. There would be no reason for the reference to 'HRA 10/11' unless it were in the context of reasonable excuse for gathering in contravention of the Regulations, i.e. an understanding of *Dolan.*

(c) The contemporaneous notes of DAC Connors of the evening meeting on 12th March expressly record her taking account of the importance of Articles 10 and 11, and specifically the importance of the time and place of this particular

gathering, see [CB/25/321] and [CB/31/381]. This reference to time and place corroborates DAC Connors' evidence at paragraphs 21-22 of her witness statement [CB/15/181-182].

31. Despite paragraph 81 of the Claimants' skeleton argument coming close to asserting that DAC Connors is not telling the truth in her witness statement about her understanding of the reasonable excuse defence and the *Dolan* authority, no application has been made for any of the Defendant's witnesses to give oral evidence. Further, such additional information as has been requested by the Claimants has been provided and does not support any suggestion that DAC Connors' evidence should not be taken at face value.

32. It is agreed that the approach to take to the Defendant's evidence where there are areas of factual dispute is as summarised in *R (Soltany) v SSHD [2020] EWHC 2291 (Admin)* at paragraph 88, namely, where there is an outright dispute between the parties, the Court should accept the Defendant's evidence, unless it is internally contradictory, implausible, or inconsistent with other incontrovertible evidence. DAC Connors' account of her understanding of how the Tier 4 restrictions on gatherings interacted with Articles 10 and 11 is not internally contradictory, is not implausible and is consistent with her contemporaneous notes. The *Soltany* approach therefore provides no basis for the Court to do anything other than accept her evidence.

33. Further in relation to the allegation of 'embellishment', it should be noted that this is not a judicial review based on lack of reasons given for a decision, thus the authorities in paragraph 76 of the Claimants' skeleton are not of direct relevance. Nevertheless, the authority of *Inclusion Housing Community Interest Company v Regulator of Social* Housing [2020] EWHC 346 (Admin), [2020] 2 WLUK 293 includes the observation at paragraph 78, *"So far as ex post facto reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons: Ermakov, pp. 325-6. Evidence of the former kind may be admissible; evidence of the latter kind is generally not."* A similar observation is made in *R (Shasha) v Westminster City Council* [2016] EWHC 3283 (Admin), [2016] 12 WLUK 479 at paragraph 41. Applying this approach, the witness statement of DAC Connors is neither

contradictory nor 'wholly new' when compared with her contemporaneous notes, or the notes of the meeting of 12th March at [CB/32-33/370-381] and is thus plainly admissible and credible.

34. Finally, the Claimants argue that the witness statement of DAC Connors does not support the Defendant's case, as DAC Connors "did not consider whether in fact" the proposed vigil might not be a breach of the Regulations (Claimants' skeleton, paragraphs 82-83). The reference relied upon in support of this assertion is paragraph 18 of DAC Connors' statement [CB/15/180]. However, that paragraph, together with paragraphs 19-20, plainly shows that DAC Connors did consider that there might (or might not) be a reasonable excuse for the vigil taking place in breach of the Regulations, and that this could only be decided in all the circumstances that prevailed on the day.

35. At paragraph 26 of her statement, DAC Connors explains the lack of reference to reasonable excuse in her contemporaneous log:
    (a) She anticipated that the sheer scale of the event meant that it would be unlikely that the exercise of Article 10 and 11 rights would outweigh the public health risk of the event; and
    (b) Such a determination would be made on the day. DAC Connors did not have an operational command role on 13th March.

36. Paragraphs 12 and 28 of the statement of DAC Connors [CB/15/178 and 183] explain that the Defendant's 4E process specifically recognized that at the first stage, 'engagement', a person's reasons for acting in apparent breach of the Regulations might emerge, and might potentially be regarded by the officer as a reasonable excuse. The Claimants' suggestion at paragraph 79 of their skeleton that the 4Es process is not appropriate at all unless a person is committing an offence both misunderstands the national policing approach to the lockdown Regulations since March 2020 and fails to recognise the distinction between contravening the Regulations and committing an offence. Engagement, and the opportunity it provides for a police officer to consider why a person is acting (or – perhaps for an organiser - is proposing to act) in apparent breach of the Regulations is an important element of a proportionate policing response. The Claimants' position that officers could not engage with a person in

order to establish whether or not they have a reasonable excuse (such as the exercise of Article 10 and 11 rights) would be more likely to lead to disproportionate intervention. Paragraph 79 of the Claimants' skeleton misunderstands DAC Connors' evidence at paragraph 28: in that paragraph she makes it clear that Article 10 and11 considerations apply throughout the 4E process, ensuring that an officer only considers enforcement where it is considered necessary.

37. The police officer due to take command on the day, DAC Twist, was of a similar view, see DAC Twist's statement at paragraphs 36-39 [CB/16/210-212]. When it came to the events of the day, DAC Twist has expressly recorded the consideration he gave to the Article 10 and 11 rights of those seeking to attend [CB/27/339-342]:
    (a) During the afternoon of 13th March 2021, no enforcement action was taken at all until after 18.30 [CB/27/342-35]; and
    (b) At 18.36, DAC Twist recorded [CB/27/346] that he had considered the Article 10 and 11 rights of those gathering, and the purpose behind the Regulations to keep the whole community safe and save lives. Engagement was required to consider whether those gathering had a reasonable excuse and, if they did not, to encourage the participants to leave and move to enforcement if they did not comply.

38. The policing response on 13th March 2021 was consistent with the indications given on the previous day to the Claimants. There was no mistake in the minds of DAC Connors or DAC Twist about the need to consider the Article 10 and 11 rights of those seeking to gather, and to balance those against the public health emergency and the Regulations the Government had put in place to prevent the spread of a deadly virus.

(ii) Inappropriate (or "unlawful") to give advance assurance

39. The Claimants assert that the Defendant has argued that it would be 'unlawful' to have given an advance assurance that there would be no enforcement of the Regulations, see Claimants' skeleton, paragraph 65. But the Defendant has not suggested this; it is the Defendant's case that it would have been inappropriate to have given such an assurance, see paragraphs 10-20 of the Summary Grounds [CB/7/94-97], 3-6 of the Response to the Reply [CB/10/117-1178] and 63-67 of the Detailed Grounds

[C/12/144-146]. The Defendant relies on but does not repeat those submissions. It would have been inappropriate both in principle, and by reference to the particular issues in this case, for an advance assurance to be given to the organisers that they could organise an event that might involve a large-scale gathering, perhaps of thousands, without being guilty of an offence.

40. Significantly, the Claimants now accept that a person who participates peacefully in a gathering for the purposes of exercising their Article 10 and 11 rights to protest does not automatically have a reasonable excuse to contravene the Regulations (see above). In light of this change of position, it is difficult to see how the Claimants can maintain the argument that it was unlawful to decline to give an advance assurance.

41. During the discussions at the 7pm meeting on 12th March, it is clear that the Claimants were considering the proposal to move from an event focussed at 6pm to a more spread-out event without a focal point in time. However, it remained the case that, as a result of how they had publicised the event up to that time, the Claimants would have no real control over how many people turned up, when, where they might gather, how long they might stay, their behaviour while present, what risk reduction measures they might take, or what form of transport they might use to arrive or leave.

42. The Claimants suggest that one of the reasons that the Defendant declined to give an advance assurance was that it was mistakenly believed that the organisers were seeking a non-enforcement assurance ("immunity") in respect of all those who were going to attend, citing paragraph 41 of DAC Twist's statement. However:

(a) Neither the Defendant nor any of her officers advanced this as a reason for declining to give the assurance sought at the time.

(b) Paragraph 41 of DAC Twist's statement does not address this point in any context.

(c) It is clear from the Claimants' record of the 7pm meeting on 12th March, at [CB/33/379] that there was a degree of inconsistency from the organisers' side as to whether or not they were seeking an assurance on behalf of the attendees as well as the organisers:

i. The First Claimant was seeking an assurance principally on behalf of the organisers, but also referred to attendees *"... me agreeing to do a*

longer event is fine, as long as I know that people who are attending at what we have been talking about and the organisers will not be subject to a £10k fine. No point in doing any compromise without that. … I need to know the organisers are not going to be subjected to £10k fine…";

ii. The Claimants' barrister (PW) suggested the assurance sought would not apply to attendees, *"If that event turns into something else, it is not an event for which they are responsible… If there are people who breach the regulations, they can be subject to a separate decision, but you will know in advance the parameters of the event that is organized, and whether or not that comes within the regulations and whether the organisers will be liable to a fine."*

iii. The Claimants' solicitor (JH) then returned to the question of assurances for attendees, see p380, *"…we need you to go away in the same spirit and come back and say if it were organized like that that is not going to lead to enforcement action against people who participate on that kind of basis."*

43. Despite these references to those who might attend the event, it is clear that DAC Connors was primarily considering the request for an assurance for the organisers, *"…I cannot give you assurances as organizers…"* [CB/33/279]

44. There was clearly a real danger (if not an inevitability) that any assurance offered to the organisers would be interpreted by those attending as an assurance that the restrictions in the Regulations would also not be enforced in relation to them. In the context of a declaration rather than an assurance, the danger of this consequence was anticipated by Holgate J in the interim relief application, [CB4/23].

45. In a similar (albeit not identical) way, if participants were to learn that those organising the event had been given an assurance that they would not face enforcement action, it is highly likely - if not inevitable - that they would be led into anticipating that they would also not face enforcement action, regardless of the manner of peaceful protest in which they engaged.

46. To the extent that declining to offer an advance assurance could properly be described as an interference with the Claimants' Article 10 and 11 rights, it would be at the very lowest end of actions engaging a person's ECHR rights: no steps towards enforcement had been taken, nor had any concrete threats of enforcement been made (indeed, it was repeatedly stressed enforcement would be a 'last resort'). In undertaking its assessment of whether the interference with a person's ECHR rights is proportionate, the Court must weigh this low-level of interference with the extremely high need to protect public health that applied at that time, and which justified the restrictions imposed under Article 11(2) during the epidemic and public health emergency. In doing so, the Court must also apply a correspondingly wide margin of appreciation to the police in how to conduct sensitive and difficult negotiations with organisers of protests in the challenging medical, social and legal environment of early March 2021.

47. In these circumstances, applying the principles in paragraphs 63-64 of the Divisional Court decision in *DPP v Ziegler* [2020] QB 253 (endorsed in the Supreme Court) it is extremely difficult to see how declining to give the assurances sought could, in the circumstances, amount to an unnecessary or disproportionate interference with the Claimants' Article 10 and 11 rights.

V. "INEVITABILITY" OF THE EVENT

48. The Defendant does not accept the Claimants' proposition that the Metropolitan Police ought to facilitate an event about which it had serious misgivings, and which was likely to contravene the Regulations, potentially without reasonable excuse, because the event was likely to go ahead in some form, whether or not they facilitated it.

49. It is entirely self-serving for the Claimants to argue that the Defendant ought to have provided them with the assurance sought because the gathering would go ahead in any event, when they had been instrumental in publicising that event as widely as they could (see above at 27(b), (c), (e), (f)).

50. The Second Claimant asserts that, "I am certain that, if we had not publicised the Vigil, others would have called for a similar event." See [CB18/240] at paragraph 30. However:

(a) There is no basis for this expression of certainty. The material relied upon by the Second Claimant does not support the assertion.

i. At [SB/28/119, top tweet] social media posts from the Fourth Claimant demonstrate that she was initially uncertain about whether it would be helpful to have a gathering during the pandemic. It was then the Fourth Claimant who, having initially suggested an event in Trafalgar Square, began to promote the gathering at Clapham Common on 13th March [SB/28/119, 5th tweet]. In doing so, she posted a tweet that gave incorrect information about what the Regulations allowed, *"the rules here are we are allowed to assemble in masks and socially distanced as long as we aren't stopping traffic and it is a peaceful demo".* [SB/28/119, bottom tweet]

ii. It may be that the Claimants were all sharing the Fourth Claimant's misapprehension of the law. The Tier 4 restrictions had been in place for over two months by 10th March 2021. It is unclear (as none of the Claimants address the point) if any of them sought to establish whether or not the gathering might be in breach of the lockdown regulations before they chose to publicise it. It appears to be agreed that they did not seek the views of the Metropolitan Police.

iii. There can be no doubt from the tweets exhibited by the Claimants at [SB/18/120-130] that, while there were many people who felt they should do 'something', it was the Claimants who took the lead in marshalling these individuals, by organising and promoting a gathering to provide an outlet for these feelings. This was their avowed intention. They actively and energetically promoted the gathering. It is unrealistic now to suggest that such a large-scale, focussed gathering would somehow have taken place spontaneously, if nobody had taken on a similar leadership role.

(b) The fact that a large-scale gathering took place shortly after 6pm on 13th March, despite the Claimants disavowing any organisational role that morning, was a consequence of the significant publicity that the Claimants had generated prior to their withdrawal (no doubt in conjunction with the understandable outrage that the crime had generated).

(c) More significantly, this provides no excuse for the Claimants taking it on themselves to organise a large-scale gathering that would so plainly be in breach of the restriction on gatherings set out in the Regulations.

VI. OUTCOME THE SAME IN ANY EVENT

51. Assuming that it could be shown that DAC Connors' decision making process was flawed, on the basis that she failed to give appropriate consideration to the issue of reasonable excuse of the Claimants organising a gathering for the purposes of holding a vigil following the murder of Sarah Everard, consideration would have to be given to the outcome, i.e. what might have happened, if appropriate consideration had been given.

52. Paragraphs 272 of the decision of the Court of Appeal in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] 2 WLUK 372 confirms that, following the amendments contained in s.31(2A):

(a) Unless there is exceptional public interest, the Court must refuse relief if it is highly likely that the outcome for the Claimants would not have been substantially different

(b) The threshold is not 'inevitably the same', merely 'highly likely;

(c) The outcome need not be exactly the same, provided it would not have been 'substantially different.'

53. While the Court of Appeal noted at paragraph 273 that the threshold remains a high one, there will be occasions on which it is met. This is one of those occasions.

54. The 'outcome' that the Defendant contends would not have been substantially different is that the assurance sought by the organisers would not have been given.

55. The Claimants contend that the outcome would have been that:

(a) If the Metropolitan Police had not failed to act in a manner that was "prescribed by law", then the violation of the Claimants' Article 10 and 11 rights would not have arisen (paragraph 90 of the Claimant's skeleton). Thus, there was a violation whether or not the protest went ahead.

(b) The Metropolitan Police would have permitted and encouraged the Claimants to organise the gathering in the safest possible way (paragraph 91).

56. However, the first of these 'outcomes' is not an outcome, it is no more than saying if the Defendant had not acted unlawfully, it would have acted lawfully. It begs the question posed in s.31(2A) of the Senior Courts Act 1981 of what the outcome of the police acting lawfully would have been.

57. The second 'outcome' proposed is that, if they had properly considered the Claimants' reasonable excuse, the Metropolitan Police would have both **permitted** and **encouraged** the gathering (paragraph 91). This is fanciful, and plainly wrong. The unambiguous restriction, imposed by the Government was that, other than for specific exceptions, gatherings of more than two should not take place. It is inconceivable that, faced with this unambiguous restriction in the Regulations, the outcome of any lawful decision making process would have been that – completely contrary to the restriction - the police would have both permitted and encouraged a large-scale gathering of an unlimited number of people.

58. To be clear, even if an agreement could have been reached on the evening of 12th March that the Claimants would try to spread the event out, the event being organised by the Claimants:

(a) was large scale, potentially very large scale, as a result of energetic efforts by the Claimants to maximise the publicity the event received;

(b) had no limit on the numbers attending, nor could a limit be imposed or enforced;

(c) likely to result in pressure on indoor toilet facilities and public transport;

(d) involved little scope for real control over the actions of people attending, particularly in relation to reduction in risk of transmission.

59. It is surprising that at no point in the witness statement of the Second Claimant, Anna Birley [CB/18/232-247], does she expressly acknowledge the risk to public health arising from a large-scale gathering during the pandemic. Instead, at paragraph 7, the Second Claimant discusses aspects of the advice on the Metropolitan Police website

that do not relate to protest during lockdown.

60. Ms Birley accepts that, by the time that the decision was taken by the Claimants that they would withdraw from organising the event, they had not completed a risk assessment, even in draft form (paragraph 20). Any risk assessment by the Claimants would have had to include consideration of how the organisers could actually control numbers, behaviour, arrival and departure etc. On Ms Birley's evidence, the Claimants' approach was to publicise the event, seek to gain maximum publicity and attendance, and only then – less than 24 hours before the event took place - to conduct a risk assessment. While Ms Birley refers to potential mitigation measures such as contact tracing (which would have no impact on transmission during the event), and masks and social distancing, at no point does any of the Claimants suggest that they had considered how these measures might actually be enforced, other than via the voluntary stewards.

61. Ms Birley's reference at paragraph 23 to the use of a PA system so that people did not need to crowd around the bandstand confirms that the bandstand would be a focus for those attending. The presence of a PA system would inevitably raise the prospect of someone seeking to address the crowd (as in fact occurred on 13th March). It is unrealistic to assume that this would not cause people to become concentrated around a speaker at the bandstand, even if there were a PA system.

62. Having started to publicise the event during the early evening of 10th March, by 14.30 on 11th March the Claimants were already anticipating 1,000-2,000 people would attend [CB/28/438]. On the basis that the Claimants had decided they might need 100 stewards in order to maintain a proportion of 40 stewards per 1,000 attendees (see [CB/18/239] at para 24), it is clear that the Claimants were anticipating at least 2,500 people might attend. However, throughout 11th and 12th March the number expressing an interest in attending were inexorably rising. The intelligence assessment by the time the report was prepared on 12th March were 4,200 going and 6,200 interested, see [CB/29/354].

63. For these reasons, it would be completely unrealistic to conclude that the Defendant's officers would have "permitted" and "encouraged" the organisation of a gathering of

unlimited numbers, with so little real opportunity to control the evolution of events the organisers had set in train.

VII. REMEDY

64. No enforcement action was taken against the Claimants. The Defendant did not prevent the Claimants from continuing to organise the event. If any of the Claimants' arguments are correct, it would follow that, had they continued to organise the event, and had enforcement action ultimately been taken in the form of a Fixed Penalty Notice, any prosecution that might have followed a refusal to pay such a fixed penalty would have resulted in an acquittal on the basis that they had a reasonable excuse to organise the gathering in breach of the Regulations.

65. It follows that, if successful, the Claimants' Article 10 and11 rights can only have been infringed as a result of a 'chilling effect' of the Defendant declining to give an assurance they would not face enforcement.

66. In these circumstances, a declaration that the Defendant's actions in refusing to "permit" and "encourage" the Claimants to organise the gathering breached their Article 10 and11 rights would afford just satisfaction.

67. The four Claimants seek a sum of £7,500 compensation, which corresponds to £1,875 per Claimant. Comparison with cases in which claimants were arrested and/or charged are of little assistance. By comparison with the facts in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* [2001] ECHR 567, this would be an excessive amount, particularly in the context of the pandemic in which the legal restrictions had been imposed and within which the police were operating. The Defendant's primary case in relation to the claim for damages is, however, that they are not necessary to afford the Claimants just satisfaction.

MONICA CARSS-FRISK QC

GEORGE THOMAS

5th January 2022