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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 661 (Admin)



No. CO/919/2020

Royal Courts of Justice

Friday, 12 March 2021

Before:

MR JUSTICE HOLGATE

B E T W E E N :

(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

Mr T. HICKMAN QC, Mr A. WAGNER and Ms P WOODROW (instructed by Bindmans LLP)
appeared on behalf of the Claimants.

Mr G. THOMAS (instructed by Directorate of Legal Services, Metropolitan Police Service)
appeared on behalf of the Defendant.

Mr Y. VANDERMAN (instructed by Government Legal Department) appeared on behalf of the
Interested Party

J U D G M E N T

MR JUSTICE HOLGATE:

- 1 This is an application for urgent interim relief relating to the vigil proposed to be held on Clapham Common tomorrow evening for the late Sarah Everard, who unfortunately lost her life in the most tragic circumstances. One of the purposes of the vigil is to raise awareness of, and to provoke changes in, attitudes towards threats faced by women.
- 2 The claimants wish to hold a static, socially distanced, hour-long vigil on the common. They propose that location because it is directly relevant to the victim. Following announcements on 10 March, the claimants, along with a number of other women, set up Reclaim These Streets, an informal group seeking to channel the collective grief, outrage and sadness that they all share.
- 3 Their objective is to hold the vigil safely and lawfully, particularly in the context of the ongoing coronavirus pandemic. Two of the claimants are local councillors. They feel particularly well-placed to coordinate an event of this nature. The court understands that it is an event which is supported by the local council, according to the letter which the court received today from its Leader.
- 4 The organisers of the event have taken care to liaise with local police officers. They say that they understood from initial responses from those officers that their reaction was positive, in the sense that there would not be an objection in principle to the holding of the vigil. Steps were taken to organise a meeting with the police at 2.30pm yesterday to discuss arrangements for the vigil. That was confirmed by an email sent by the police at 12.05 p.m. which went on to add that there were “legal ramifications” to be confirmed and the police were attempting to find a way of navigating their way through the issues.
- 5 At some point yesterday afternoon the defendant, in a conversation with the organisers, communicated that they had altered their position. They now said that the vigil would be illegal and that their hands were tied by the COVID-19 regulations. The claimants were told that as organisers they could be liable to be issued with £10,000 fixed penalty notices and to arrest for offences under the Serious Crime Act 2007.
- 6 The claimants’ skeleton refers to a letter from the defendant responding to an earlier letter from the claimants’ solicitors, Bindmans LLP, dated 11 March which had set out their understanding of the defendant’s position that participation in the gathering proposed would be unlawful, that is contrary to restrictions imposed by the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020. The claimants make the point that the defendant’s letter did not dispute their solicitor’s summary of the defendant’s position, that all demonstrations and protests are prohibited and the police are obliged to prevent them from occurring by virtue of the Regulations. The solicitor’s letter had repeated the expression previously used by police officers, “our hands are tied”.
- 7 I say straight away that I am very grateful to counsel for the claimants, the defendant and the interested party, the Secretary of State for Health and Social Care, for their rapid provision of helpful submissions, both in writing and orally. They have been of very considerable assistance.
- 8 The application made for urgent relief today is in the unusual form of interim declarations. The court was told that the main object of the declarations is to state in clear terms that the 2020 Regulations must be read and applied compatibly with the Human Rights Act 1998 and,

in particular, the rights conferred by Articles 10 and 11 in relation to freedom of expression and peaceful assembly.

- 9 The statement of facts and grounds sets out the claimants' understanding of the policy of the defendant. I think it is fair to say that they have gathered together only extracts from a document. During the hearing I was shown a lengthy document called "Gold Strategy Op PIMA", as a response to the COVID-19 pandemic. This document is version 9 and it is dated 6 January 2021. Most of the passages in that document which I have been shown are really a summary of the secondary legislation. But Mr Hickman QC, on behalf of the claimants, emphasised a passage which appears on p.5 under para.1.4 entitled "Responding to Protest" in these terms:-

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

- 10 I will briefly summarise the legislation applicable. Schedule 3A to the 2020 Regulations sets out restrictions applicable in a Tier 4 area. Paragraph 3 deals with gatherings in private dwellings. We are concerned with para. 4, which deals with participation in gatherings outdoors. It provides in part that no person may participate in a gathering which takes place outdoors in a place satisfying the conditions in subpara.(4) and consists of more than two people. The court was told that those conditions are satisfied and this provision is engaged.
- 11 Paragraph 5 deals with the organisation or facilitation of a "relevant gathering". A relevant gathering, for this purpose, is one which consists of more than 30 persons taking place in certain defined circumstances, which include the event proposed here. Paragraph 5(1) provides that no person may hold or be involved in the holding of such a gathering. Paragraphs 6 and 7 contain various exceptions to the restrictions on gatherings, but, unlike the position for Tier 3 areas, there is no exception in a tier 4 area in relation to gatherings for the purposes of protest.
- 12 Regulation 10 of the 2020 Regulations provides in subpara.1 that "a person commits an offence if, without reasonable excuse, the person - (a) contravenes a...Tier 4 restriction". The court was told that a Tier 4 restriction would include the restrictions imposed by paras.4 and 5 of Schedule 3A. Regulation 10(5) goes on to apply s.24 of the Police and Criminal Evidence Act 1984 so as to give powers of arrest without warrant. Powers of enforcement are given to the police by Regulation 9 of the 2020 Regulations. For example, under Regulation 9(3) where a "relevant person" considers that a number of people are gathered together in contravention of a restriction imposed by *inter alia* para.4 of Schedule 3A, he or she may direct the gathering to disperse, or direct any person in the gathering to return to the place where they are living or, if they are a constable, remove any person from the gathering. Regulation 11 gives a power to an "authorised person" to issue a fixed penalty notice whom he reasonably believes to have committed an offence under these regulations. There is no right of appeal against a fixed penalty notice.
- 13 In *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, the Court of Appeal had to consider, amongst other things, the compatibility of an earlier version of the Regulations with provisions of the Human Rights Act. The court dealt with Article 11 at paras. 101 to 106. It is common ground between the parties in these

proceedings that the reasoning of the Court of Appeal in those passages applies equally to the regulations with which I am concerned today. The court rejected the submission that the regulations were inconsistent with the rights conferred by Article 11 to peaceful assembly and association. They did so on the basis that the regulations provided a general defence of “reasonable excuse” (para. 101).

- 14 In my judgment, it is clear, at least for the purposes of this application, that the same reasoning applies to Regulation 10(1) of the 2020 Regulations before the court. This affects whether a person may be in breach of para. 4 or 5 of Schedule 3A and, hence, whether they may commit an offence under Regulation 10(1), whether they are liable to be served with a fixed penalty notice, and also whether the power in Regulation 9(3), at least so far as paras. 3 and 4 of Schedule 3A are concerned, is engaged. The effect of the decision of the Court of Appeal is that the expression “without reasonable excuse” is the means by which effect is given to Article 10 and 11 in this legislation. But as was pointed out by the Court of Appeal in para.103 of its judgment, this necessarily focuses attention on the particular facts of a given case in the event of an alleged breach.
- 15 The other main authority referred to was *DPP v Ziegler* [2020] QB 253. This concerned a similar provision which applies where a person is accused of obstructing a public highway. In order to establish an offence, it is necessary for the prosecution to show that he or she acted “without lawful excuse”. The Court of Appeal in *Dolan* accepted that the two expressions were to be equated for these purposes (para. 104).
- 16 I rely upon paragraphs in *Ziegler* that I have been taken to during the course of this hearing, i.e. paras.48 to 49, 52 to 55 and 57 to 65. The Divisional Court gave a helpful rubric setting out the questions which will need to be considered when Articles 10 or 11 are applied in the context of s.137 of the Highways Act 1980. But I think that it is now clear that there is no real dispute here that that approach is also applicable when looking at the interaction between Articles 10 and 11 and Regulation 10(1) of the 2020 Regulations. So, for example, it is relevant to consider whether a person is exercising rights given by Article 10 or 11. It is also relevant to consider whether a public authority, in this case the police, would be interfering with those rights by enforcing the 2020 Regulations. Then, the legitimacy of the aim of those Regulations is a relevant consideration, together with the question whether the interference is necessary to achieve that aim. The 2020 Regulations are aimed at the protection of public health. All this gives rise to the proportionality exercise described in para.64.
- 17 Mr Hickman correctly accepted that, leaving to one side the facts of this case, the restrictions in the 2020 Regulations are, of course, capable of being applied to protests or demonstrations in general. It is possible that the outcome of applying the relevant tests in relation to Articles 10 and 11 is that a particular protest or demonstration should not go ahead. That is a matter to be considered in the circumstances of each case. He also submits, correctly, that it is inappropriate to treat the 2020 Regulations as if they give rise to a blanket prohibition on gatherings for protest, because that would fail to give effect to the law as laid down by the Court of Appeal in *Dolan* on the way in which the Regulations are to be read and applied compatibly with Articles 10 and 11.
- 18 The court is being asked to make the following interim declarations:-

“(a) Schedule 3A to the All Tiers Regulations 2020 insofar as it prohibits outdoor gatherings, is subject to the right to protest protected by the Human Rights Act 1998;

(b) the Metropolitan Police Service's policy prohibiting all protests irrespective of the specific circumstances is, accordingly, erroneous in law;

(c) persons who are exercising their right to protest in a reasonable manner will have a reasonable excuse for gathering under that schedule."

- 19 It is important for it to be made clear publicly that the court is not being asked to grant an injunction against the police with regard to the exercise of their powers tomorrow in relation to the proposed vigil. Nor is the court being asked to make any ruling on the legality of that proposed event or on what the police may or may not do in relation to it. There is no decision by the defendant on those matters before the court for it to be asked to rule upon. The issues in this application for interim declarations have arisen because of the change of stance on the part of the police, as it appears, and the perception it gave rise to that they considered their hands to be tied by the 2020 Regulations and so for that reason the event could not take place. The claimants also rely upon the absence of any reference to Articles 10 and 11 in the policy document to which I have referred.
- 20 This hearing has provided a helpful opportunity for these issues to be ventilated with the skilful assistance of counsel. It has been confirmed by Mr Hickman that, effectively, para.(a) of the proposed declarations seeks to encapsulate the principle laid down by the Court of Appeal in *Dolan* and to apply it to the 2020 Regulations.
- 21 For my part, I see no need, with all great respect, for the court to make a formal declaration of that nature because it is sufficient that firstly, the Court of Appeal has expressed the law in clear terms in *Dolan*; secondly, that is accompanied by the clear exposition of the law by the Divisional Court in *Ziegler*; and thirdly, I have concluded that the reasoning in those decisions is applicable to Regulation 10(1) of the 2020 Regulations. There would be a danger in trying to encapsulate in an interim declaration what has been said more clearly by others in reserved judgments. Furthermore, the draft has had to be prepared at short notice and under pressure.
- 22 I turn to the declaration in para. (c). This, as Mr Hickman accepted, is an attempt to express more particularly the *Dolan* principle by applying it to protests generally and in advance of any event being held. One concern with para. (c), as I explained during the hearing, is that it understates the law, in the sense that it gives the impression that someone participating in a protest, in effect, any protest, would have a reasonable excuse for the purposes of Regulation 10(1), so long as they behaved in a reasonable manner. That is an incomplete analysis of the law, with respect. For example, it assumes that a particular protest may take place at all once the Regulations are applied together with Articles 10 and 11. As I pointed out, it is one possible and lawful outcome in a specific case that such a protest may not lawfully take place.
- 23 So, I would not be prepared to grant a declaration in the terms of para. (c) in any event. It is inaccurate. In the particular context in which this case comes before the court, it would be particularly inappropriate for the court to make an order which could end up as a piece of paper which members of the public, acting in good faith, might understand to be completely stating the legal position as it affects them. Potentially it would be misleading. I do not mean that word in any pejorative sense, but just simply to say that the *effect* of the language would be misleading. It would lead to false expectations on the part of members of the public. That is not something that the court could possibly be a party to.
- 24 The last declaration in para. (b) focuses on the defendant's policy. Mr Thomas, who appeared at very short notice, candidly and rightly accepted that if a police force has a policy which imposes a blanket prohibition on protest irrespective of the specific circumstances and irrespective of the application of Articles 10 and 11, then that would be unlawful. His

contention is that the Metropolitan Police does not have such a policy. This is not an issue on which it would be appropriate for me to comment authoritatively. This application, for understandable reasons, has come on at very short notice and there has been only a short opportunity to look at a part of one document.

25 I take Mr Hickman's point that the passages he showed the court, and indeed those to which Mr Thomas referred, do not mention Articles 10 and 11. They appear to focus rather more on summarising what appears in the Regulations.

26 For my part, the requirements of the law have been clearly stated, particularly in *Dolan* and in *Ziegler*, and I have sought to explain how they apply to these particular Regulations. I bear in mind the unequivocal statement which Mr Thomas has made on instructions on behalf of his client. In these circumstances I do not think it appropriate for the court to go any further at this stage.

27 The letter which the defendant sent to the claimants' solicitors today sets out in very brief terms a view about how the law would apply to the proposed event tomorrow. It would be inappropriate for me to comment on that. First, as I have explained already, the issue as to whether the police are entitled to enforce the Regulations in relation to tomorrow's event is not before the court. The current proceedings do not identify a particular decision on that aspect which is the subject of challenge. Secondly, it has not been shown that this letter does in fact represent a decision. Any decision would have been taken, if it has been taken, by the officer authorised to do so, a senior officer no doubt. The court does not know in what form any such decision may be expressed or taken. There is not yet before the court a suitable "decision" for the purposes of a challenge by judicial review.

28 Given what has happened in the hearing, it may well be that there will be further communications between the claimants and the solicitors they instruct and the police to deal with the application of the Regulations and Articles 10 and 11 to this particular event, the vigil. But that is not a matter upon which the court should comment.

29 So, for those reasons, I decline to grant the interim relief sought. But I hope that in this *ex tempore* judgment I have clarified the application of the law insofar as it is appropriate for me to do so at this stage.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.