



Neutral Citation Number: [2023] EWHC 1090 (Admin)

Case No: CO/1169/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2023

Before:

LORD JUSTICE BEAN
and
MR JUSTICE CHAMBERLAIN

Between:

THE KING
on the application of
DEBBIE HICKS

Claimant

-and-

WESTMINSTER MAGISTRATES' COURT

Defendant

-and-

CROWN PROSECUTION SERVICE

Interested
Party

Hannah Thomas (instructed by **Murray Hughman Solicitors**) for the **Claimant**
James Boyd (instructed by **Crown Prosecution Service**) for the **Defendant**

Hearing dates: 26 April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

MR JUSTICE CHAMBERLAIN:

Introduction

- 1 This is a claim for judicial review of the decision of District Judge Snow (“the judge”), sitting at Westminster Magistrates’ Court, to refuse to state a case for the opinion of this court, pursuant to s. 111 of the Magistrates’ Courts Act 1980.

Background

- 2 The first Covid-19 lockdown was imposed on 26 March 2020 by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“the Regulations”: SI 2020/350). These contained a variety of restrictions on normal activities. Regulation 7 imposed a prohibition on participating in a gathering in a public place of more than two people. It was subject to a very limited list of exceptions, which did not include protesting. Constables (among others) were empowered, where they considered that three or more people were gathered together in breach of reg. 7, to direct the gathering to disperse or direct any person in the gathering to return to the place where they were living: reg. 8(9). By reg. 9, a person who without reasonable excuse contravened reg. 7 committed an offence. However, by reg. 10, powers were given to constables (among others) to issue fixed penalty notices (“FPNs”) to adults reasonably believed to have committed such an offence. The FPN was “a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty”: reg. 10(2). The penalty was £60, or £30 if paid within 14 days: reg. 10(6) & (7).
- 3 On 16 May 2020, there was a protest in Hyde Park against the lockdown. Debbie Hicks learned of the protest and decided to attend. She drove from Stroud to London and then took the underground to Hyde Park, arriving at about 12.30pm. At 1.10pm, Ms Hicks was standing on the edge of the crowd, which numbered over 100. Police Constable Casey of the Metropolitan Police approached her, explained that she was committing an offence under the Regulations and directed her to go home. She responded that she did not care and attempted to argue with the officer. PC Casey explained that failure to comply could lead to a £60 fine. She did not leave, so PC Casey issued an FPN for £60. She did not pay and was charged with contravening reg. 7 of the Regulations.

The judge’s findings of fact, conclusions and sentence

- 4 The judge found that Ms Hicks did not know who had organised the protest. She had been a politics lecturer for at least 30 years and had attended a significant number of protests on issues on which she felt strongly and had genuine views. She was protesting on this occasion because she regarded lockdown as tyrannical. She genuinely held that view. She attended the protest because she was anxious to assert her right to do so and to try to secure the overturning of the tyrannical restrictions. She travelled up from Gloucestershire to London by car to participate and travelled on the underground to Hyde Park not wearing a mask. She was at the protest for around 40-60 minutes before she was approached by PC Casey. She was at the fringe of a crowd numbering well over 100 people. Few in the crowd were wearing masks and there was no evidence of social distancing. PC Casey approached her. She asserted that he had approached her because she was a woman, but the judge rejected this. The officer was anxious to avoid criminalising Ms Hicks in any way. He engaged with her and attempted to explain she

was committing an offence under the Regulations by remaining at the protest. He then gave Ms Hicks a direction to go home, warning her that she faced sanction if she did not do so. She responded that she did not care. The officer issued an FPN, explaining that the penalty was £60 but if paid in 14 days would be reduced to £30. Ms Hicks did not pay the penalty notice but gave details to the officer allowing the notice to be issued to her. At the time when she was issued with the notice, the protest was peaceful, though it became less peaceful subsequently.

- 5 The judge reminded himself that he had to be sure that Ms Hicks did not have a reasonable excuse and noted that Ms Hicks' rights under Articles 10 and 11 were engaged. He concluded that, whilst she genuinely held her views, she had participated in a demonstration at a time when there was a pandemic for which there was no vaccination and in which thousands of citizens had died. The judge was sure that the restrictions imposed by the Regulations were prescribed by law and were necessary in a democratic society to protect public health. Ms Hicks had refused to leave the protest and go home and had refused to pay the FPN. He was satisfied that she had no reasonable excuse and found the matter proved.
- 6 As to sentence, Ms Hicks had filled in a means form disclosing no income but monthly outgoings of £3,000 endorsed with the words "I am out of work" and refused to provide further details. The judge deemed her to have an income of £460 and treated the offence as meriting a Band B fine given the risks posed to the public and the need to deter others. He imposed a fine of £230 and ordered her to pay the prosecution costs of £775 together with the victim surcharge of £34.

The application to state a case

- 7 Ms Hicks invited the judge to state a case posing seven questions:

"Conviction

1. Did District Judge Snow carry out a correct analysis of proportionality of interference with human rights in this case following on from *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 ('Ziegler')?

a. Did he take into account irrelevant considerations and fail to take into account relevant considerations as set out in the grounds of appeal?

b. Did he fail to assess the proportionality of the interference with human rights posed by the regulations, as opposed to only considering the proportionality of the court finding her guilty of the offence?

c. Did he fail to properly consider proportionality of the interference with Ms Hicks' human rights at all? In particular:

i. By failing to consider the specific circumstances of the protest which she attended;

ii. By failing to conduct an assessment of the fact that less restrictive measures (such as those set out in later Coronavirus regulations permitting protesting in specific circumstances) could have been put in place?

iii. By not conducting a sufficient ‘balancing exercise’ of the rights of Ms Hicks versus others as required by *Ziegler*?

2. Was District Judge Snow wrong to convict Ms Hicks of the offence by finding that she had no reasonable excuse for gathering under the Regulations when she was engaging in a protest in the specific circumstances of the case?

3. Can it be said that the interference by the Government with human rights (namely Articles 10 and 11 of the European Convention on Human Rights (‘ECHR’)) by restricting gathering to protest during periods of national lockdown was proportionate given that there were less restrictive measures available, such as requiring a protest to be conducted by a specific body and for risk assessments to be carried out beforehand, as in some versions of the Coronavirus regulations?

4. Does the lack of certainty (as understood by law enforcement and the public) as to whether protest was permitted under the Coronavirus regulations in force as at the time of this alleged offence render the regulations incompatible with human rights, specifically Articles 10 and 11 ECHR?

5. Is protesting during the Coronavirus pandemic during periods of national lockdown in a group capable of amounting to a reasonable excuse?

Sentence

6. Was District Judge Snow right to make a finding that Ms Hicks earned £460 per week without any evidential basis for doing so?

7. Would the appropriate sentence for somebody convicted of breaching coronavirus gathering regulations by attending a protest usually be a discharge and not a fine?”

- 8 The judge certified that the application to state a case was frivolous and refused to state a case. He gave written reasons for the refusal. He said that question 1 was misconceived. He had noted that Ms Hicks had travelled to the protest by public transport without wearing a mask, but this did not form part of his reasons. He did undertake an assessment of proportionality. Question 1(c)(ii) was a disguised attempt to suggest that the prosecution was an abuse of process, which was not an issue for the trial court. Question 2 was not a question of law. Question 3 amounted to a challenge to the Regulations, whose compatibility with Articles 10 and 11 had already been determined by the Court of Appeal in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326. There was no evidential basis for the issue raised by question 4. Question 5 misidentified the issue at a trial for breach of reg. 7 of the Regulations. What was required was an assessment whether the conviction was proportionate on the particular facts of the case: see *Dolan* at [103]. Question 6 was misconceived because s. 126(2) of the Sentencing Act 2020 provides that a judge can make such determination of weekly income as he feels appropriate where satisfied that he had not been given sufficient reliable information. He was so

satisfied, so proceeded based on Ms Hicks' outgoings. Question 7 was misconceived. The sentence was within the judge's discretion.

The claim for judicial review

- 9 Ms Hicks challenged the judge's refusal to state a case by a claim for judicial review. Permission was refused on the papers by Sir Ross Cranston sitting as a High Court Judge, but granted after an oral hearing before Murray J on 1 December 2022.
- 10 Both sides agree that, rather than confine ourselves to the question whether the judge should have stated a case, we should ask whether the conviction and/or sentence is vitiated by any error of law. If so, we should quash the conviction and/or sentence.

The law

- 11 The Regulations were conceived, drafted and made at great speed in response to a developing public health emergency. They imposed unprecedented restrictions on normal activities. In the following months there were a great number of amendments, which changed the substance of the restrictions. There were two sets of amending regulations before 16 May 2020: SI 2020/447 (which came into force on 22 April 2020) and SI 2020/500 (which came into force on 13 May 2020). These, however, did not materially alter the prohibition on participating in a gathering or the provisions for enforcement of that prohibition.
- 12 *Dolan* concerned a challenge to the compatibility of the Regulations with various Convention rights. One ground was that they were incompatible with Article 11 ECHR. This, the Court of Appeal held, was unarguable. It noted at [101] that reg. 9(1)(a) provides a general defence of "reasonable excuse". The Court then said this:

“103. That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. In our view, the regulations cannot be regarded as incompatible with article 11 given the express possibility of an exception where there was a reasonable excuse. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March.

104. Furthermore, as Sir James submits, the phrase 'reasonable excuse' is not materially different from the phrase 'lawful excuse', which is used in section 137 of the Highways Act 1980 and which was construed by the Divisional Court in *Director of Public Prosecutions v Ziegler* [2020] QB 253 as being capable in principle of embracing the exercise of Convention rights, in particular article 11, depending on the particular facts: see paras 58-65 in the judgment of the court (Singh LJ and Farbey J). In particular, we would emphasise the way in which the Divisional Court concluded, at para 65: 'This is inherently a fact-specific inquiry.'

105. There are also powerful arguments that the restrictions, time limited and subject to review as they were, were in any event proportionate.”

- 13 The reference to *Ziegler* was to the judgment of the Divisional Court. Since then, the Supreme Court has upheld the Divisional Court's view that, in considering the statutory defence of "lawful excuse", the court must conduct a fact-specific proportionality assessment. I have explained in more detail what *Ziegler* required, and the import of the more recent judgment of the Supreme Court in *In Re Abortion Service (Safe Access Zones) (NI) Bill* [2022] UKSC 32, [2023] 2 WLR 33, in my judgment in another case involving Ms Hicks which is being handed down today: *Hicks v DPP* [2023] EWHC 1089 (Admin), at [27]-[28].
- 14 *R (Leigh) v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin), [2022] 1 WLR 3141 was a claim for judicial review of statements made by the Metropolitan Police about a proposed vigil in memory of a woman murdered by a serving police officer. The Divisional Court (Warby LJ and Holgate J), applying the Supreme Court's decision in *Ziegler*, held that a person who participated in a gathering in contravention of the restriction in the regulations then applicable would not commit an offence if their conduct was a lawful exercise of the rights protected by Articles 10 and 11 ECHR. That would depend on a proportionality assessment taking account of all relevant factors based on a fact-specific inquiry. Moreover, the exercise by the police of enforcement powers required a prior assessment by them of the seriousness of the health risk and the balancing of that risk against the importance of the rights engaged.
- 15 At points during the pandemic (but not at the time of the protest on 16 May 2020), the regulations have contained an exception to the prohibition on participation in gatherings in cases where the gathering is for the purposes of protest and specific conditions are met: see e.g. the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374), which contained exceptions applicable to areas in Tiers 1, 2 and 3 for protests organised by certain bodies, providing the organiser took certain precautions.

The issues

- 16 Hannah Thomas for the claimant submitted that the claim raised three issues: first, the correctness of the judge's assessment of proportionality and his decision to convict (questions 1 and 2); second, the correctness of the decision as to sentence (questions 6 and 7); and third, compatibility of the Regulations with Articles 10 and 11 ECHR (questions 3, 4 and 5). Logically, it makes sense to consider issue 3 first, before turning to issues 1 and 2.

Issue 3

- 17 Ms Thomas submitted that the prohibition on participating in gatherings was incompatible with Articles 10 and 11 ECHR for two reasons: first, because the Government could have imposed a less restrictive alternative, making the prohibition subject to a conditional exception for protests; second, because the imposition of an absolute prohibition subject only to the absence of a reasonable excuse gave rise to unacceptable uncertainty. *Dolan* did not determine all issues relating to the compatibility of the Regulations, not least because, after that, the Supreme Court's decision in *Ziegler* was handed down and the Government made regulations containing a conditional exception for protests.

- 18 James Boyd for the CPS accepted that, if the Regulations were incompatible with Ms Hicks' rights under Articles 10 or 11, the judge would have been obliged to disregard them and to acquit: see *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430. As to the "prescribed by law" submission, the question is whether the legality of particular conduct is ascertainable with sufficient certainty in principle. It does not matter for these purposes whether the Regulations were misunderstood by the police on this or subsequent occasions. As to the "less restrictive means" submission, it is not surprising that earlier versions of the Regulations gave greater weight to addressing the risk of transmission given the gravity of the perceived public health risk at the time.
- 19 The argument that the reference to "reasonable excuse" fails to meet Convention standards of foreseeability and clarity, so that the interference with Articles 10 and 11 is not "prescribed by law", was not distinctly considered by the Court of Appeal in *Dolan*, presumably because the claimant in that case did not take the point. In *Ziegler*, it was common ground that s. 137 of the Highways Act 1980 (which made obstruction of the highway an offence, subject to a defence of "lawful excuse") gave rise to an interference with Article 10 and 11 rights that was "prescribed by law": see [58].
- 20 But although the point was not considered, the Supreme Court's analysis of the question of proportionality tells strongly against the suggestion that the defence of "lawful excuse" (which the Court in *Dolan* said was equivalent to "reasonable excuse") was so uncertain that the interference was not prescribed by law. As the Supreme Court made clear at [59], "[d]etermination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case". It would be impossible to capture in advance in a legislative provision all the circumstances in which an interference would be proportionate. The provisions introduced later in the pandemic, which created conditional exceptions for protest, do not, in my view, demonstrate the contrary. They reflect a legislative judgment, taken at a different point in time on the basis of different evidence, that protests satisfying certain conditions should be presumptively lawful. But even then, there was also a defence of reasonable excuse, showing that in some cases an interference with Article 10 and 11 rights might not be proportionate even where a protest did not meet the prescribed conditions.
- 21 At the start of the pandemic, the legislator decided not to make any protests presumptively lawful. This no doubt reflected the legislator's view, at the start of the pandemic, that a prohibition would be justified in nearly all cases. But, as the Court of Appeal said in *Dolan* at [103], "[i]t 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". *Dolan* decides that the prohibition enacted by reg. 7 was not disproportionate. The proposition for which the Court of Appeal cited the Divisional Court's judgment in *Ziegler* was affirmed rather than doubted by the Supreme Court. *Dolan* therefore binds us.
- 22 That being so, the legislator cannot be faulted for not seeking to circumscribe in advance the very rare cases where an interference with the right to protest would be disproportionate. Regulation 7 enabled Ms Hicks to foresee in advance that her actions would be likely to be unlawful unless the circumstances were so exceptional that, despite not having a reasonable excuse, the interference with Convention rights could

somehow be shown to be disproportionate. That was in my view sufficient for the law to meet the standard required in the Strasbourg case law: see e.g. *SW v United Kingdom* (1996) 21 EHRR 363, [45].

- 23 Moreover, it is important to bear in mind that the Regulations conferred enforcement powers short of instituting criminal proceedings (directions and FPNs) in the first instance. These powers are, in my view, important when considering whether an interference with Convention rights is “prescribed by law”, because they limit the jeopardy to which an individual is subject. A degree of uncertainty in the application of an open-textured legal standard may be more acceptable if the likely consequence of breach is simply that a police constable may issue a direction which, if not complied with, may lead to a modest fixed penalty, which if paid discharges the individual’s liability to conviction. I therefore reject the submission that the interference with Article 10 and 11 rights was not “prescribed by law”.

Issue 1

- 24 Ms Thomas submitted that the judge took into account irrelevant matters. The facts that Ms Hicks travelled to the protest on public transport, that she was not wearing a mask and that there was no social distancing in the crowd were not relevant to the proportionality of a protest. In any event, there was no legal requirement to wear a mask or socially distance. It is not plausible that the judge, having listed these matters, did not take them into account. The judge also failed to take into account relevant factors. He did not conduct the fact-specific proportionality assessment required by *Ziegler*. PC Casey’s evidence shows that no proportionality assessment was carried out by the police, contrary to the law as set out in *Leigh*. The judge should have found that a conviction would be contrary to Ms Hicks’ rights under Articles 10 and 11 ECHR because she was protesting peacefully on a matter of significant public importance, she was on the outskirts of the protest, less restrictive measures could have been employed (such as enforcing mask wearing/social distancing), the location (a public park) was of critical importance to the protest and the protest did not cause significant disruption to the rights of others, since those attending were like-minded individuals.
- 25 James Boyd for the CPS submitted that *Leigh* shows the factors relevant to the proportionality analysis. In that case, the factors included the deterioration in the public health picture that had led to the enactment of the Tier 4 regulations and the legislative decision that the exception for protest should not apply to Tier 4 areas, as well as the existence or otherwise of a robust risk assessment and the nature of any proposed precautions. These show that the factors the judge referred to in this case were relevant. In any event, both PC Casey’s conduct and the conviction were proportionate interferences with Ms Hicks’ Article 10 and 11 rights.
- 26 In my view, the analysis must begin with the action taken by the police. There is no evidence that any proportionality assessment was undertaken in advance. It is unclear whether the police can be faulted for this, because – unlike in *Leigh* – there is no evidence about whether the organisers informed the police in advance of their intention to hold a gathering. But in a case where the court is considering the legality of enforcement action that has already been taken, the key question is not whether the public authorities concerned asked themselves the right questions, but whether in substance they acted compatibly with Convention rights: see *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [29]-[31].

- 27 In answering that question, the factors relevant to the proportionality of action in general to curtail a protest on 16 May 2020 were these: the protest was taking place at the start of the pandemic, less than 2 months after the introduction of the first lockdown; at that stage, little was known about the virus other than that it had killed many thousands in other countries; there was no vaccine; there was a real fear that the volume of critically ill patients might overwhelm the hospitals; it was believed that many people could be infected at a large gathering; the protest involved a relatively large gathering (over 100 people); it was at a location (in central London) that made it likely participants would travel by public transport; and there were no precautions taken. I would not place reliance on the fact that participants were not wearing masks, since there was no legal requirement or even any consistent public health guidance to wear masks at that time (even inside). Nonetheless, the absence of any social distancing or other precautions is, as *Leigh* shows, a matter of relevance.
- 28 Alongside these general factors, there are some factors specific to the action taken against Ms Hicks, which are also relevant to an assessment of proportionality here: that Ms Hicks had already been at the protest (and thus had been able to express her view) for 40-60 minutes before she was approached by PC Hicks; that the first enforcement action was a direction to leave; that, if she had complied with that direction she would have been able to protest for some time without being subject to any penalty whatsoever; and that even when she refused to comply with his direction, the next form of enforcement was the issue of an FPN requiring payment of a modest penalty.
- 29 Notwithstanding the high importance attached by the Strasbourg and domestic authorities to the expressive rights conferred by Article 10 and 11, particularly in the context of political speech, these factors taken together make it impossible to stigmatise PC Casey's interference with Ms Hicks' Article 10 and 11 rights as disproportionate.
- 30 The conviction was, of course, a separate interference with Ms Hicks' Convention rights and the judge had to consider whether it was proportionate. But if the conduct of PC Casey was proportionate, it is difficult to see how the conviction could be anything other than proportionate. It flowed from Ms Hicks' decision not to pay the FPN. The availability of an FPN as an alternative to conviction was a feature which contributed to the proportionality of the regime overall, but no FPN regime could be workable if those to whom FPNs are issued were free to refuse to pay them without consequences. It follows that, in my view, the conviction was a proportionate interference with Ms Hicks' Convention rights for the same reasons that PC Casey's conduct was. Although the judge's proportionality analysis was slightly more truncated than ours, it was in my view correct in substance.

Issue 3

- 31 I can deal with the issues relating to the fine of £230 fine shortly. There are two reasons why these issues are not suitable for resolution in these proceedings.
- 32 First, appeals by case stated from the magistrates' courts lie where a party seeks to "question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction". The challenge to the judge's decision on this point was presented as raising a point of law about the judge's power to "make such determination as it considers appropriate" under s. 126(2) of the Sentencing Act 2020 in circumstances where Ms Hicks' had said on the relevant form that she was out of work. However, it is

plain from the judge's written reasons for refusing to state a case that he considered that she had "refused to provide further details". If so, there can be no doubt that s. 126(1)(b)(iii) was engaged and the judge had the power to make such determination as he considered appropriate. In reality, this issue does not, therefore, raise a point of law or jurisdiction: it raises a question of fact about what happened below. An appeal by case stated is not the proper vehicle for resolving such a dispute.

33 Second, even if the point could in principle have been raised by case stated, this is a claim for judicial review, which is a remedy of last resort. A complaint about the determination of an offender's financial circumstances ought to be raised either by application back to the judge under s. 127 of the Sentencing Act 2020 or by way of appeal against sentence to the Crown Court under s. 108(1)(b) of the Magistrates Courts Act 1980.

34 I therefore decline to consider issue 3.

Conclusion

35 For these reasons, I would dismiss this claim for judicial review.

LORD JUSTICE BEAN:

36 I agree.