

Proportionate? The Metropolitan Police Service Response to the Sarah Everard Vigil.

Leigh v Commissioner of Police of the Metropolis [2022] EWHC 527 (Admin)

Dr. Ashley J. Lowerson

Northumbria University Law School, UK

Keywords

Freedom of Expression; Assembly and Association; Covid-19 Regulations; Unlawful Gatherings; Police Response

This judicial review case before the High Court of Justice concerned members of a collective called #ReclaimTheseStreets which planned to hold a vigil on Clapham Common on 13 March 2021, in memory of Sarah Everard. Ms Everard was murdered on the 3 March 2021 while walking home from Clapham to Brixton Hill, in South London. Wayne Couzens, a serving Metropolitan Police Service (MPS) officer later pleaded guilty to Sarah Everard's kidnap, rape, and murder. This case is about events on and between Wednesday 10 March and Saturday 13 March 2021, a week after Sarah Everard's disappearance, and before Couzens' conviction. The planned vigil on 13 March 2021 was to highlight risks to women's safety and to campaign for changes in attitudes and responses to violence against women.

The vigil was advertised by the claimants, with large numbers showing an interest in attending. At this time, the Covid-19 regulations in force restricted the holding of a gathering of more than 30 persons in a public outdoor place in a Tier 4 area, such as London was designated at the relevant time. The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020, SI No. 1611 introduced enhanced tier restrictions and made it a crime to contravene these restrictions "without a reasonable excuse" and gave the police power to arrest and/or serve a fixed penalty notice, imposing a fine up to £10,000 on someone they reasonably suspected of committing such an offence. However, any 'person would have a reasonable excuse, and so would not commit an offence, if their conduct was a lawful exercise of the rights to freedom of expression

and freedom of assembly protected by Articles 10 and 11 of the European Convention on Human Rights (ECHR).

Guidance issued by the National Police Chiefs' Council on Tier 4 Restrictions (8 March 2021), in Version 9 of the MPS's "Gold Strategy Op Pima" (8 January 2021) and in an "open letter" from the MPS (21 December 2020) outlined the direction officers should take regarding policing throughout the tier restrictions. Policing, particularly in relation to gatherings, would depend upon a proportionality assessment that took account of relevant factors, based on a fact-specific enquiry. The burden of proving that there was no such lawful excuse lay on the prosecution. A lawful decision to prosecute or issue a fixed penalty notice would require consideration of whether that burden could be discharged.

The claimants' case was that over the three-day period between 10 March 2021 and 13 March 2021 the MPS were incorrect in repeatedly deciding, based on the Covid-19 Regulations and supplementary guidance, that holding the vigil would be an offence or unlawful and liable to sanction. On Wednesday 10 March 2021 #ReclaimTheStreets organised and advertised the vigil for Ms Everard. After Ms Everard's remains were found on Thursday 11 March 2021, the police corresponded with the Council and engaged in internal consideration of the vigil, and its compatibility with the Covid-19 Regulations. An internal MPS intelligence assessment recorded that the vigil was "not being organised as a protest" and that "attendees were expected to gather in a socially distanced manner". However, the claimants were told that "all demonstrations and protests are currently prohibited and that the police must prevent these from occurring" and "whilst they would wish to facilitate the vigil, "our hands are tied" by the Covid-19 tier Regulations".

On Friday 12 March, after a Pre-Action Protocol letter was submitted, the High Court accepted the submission of Mr Hickman QC for the claimants that it was, therefore, "inappropriate to treat the Covid-19 Regulations as if they give rise to a blanket prohibition on gatherings for protest". A case-specific proportionality assessment by the MPS was a legal requirement, it was plainly incumbent on the police to engage with the organisers in exploring precautionary measures, to see whether the vigil could

go ahead in some appropriate form so the claimants could exercise their Article 10 and 11 rights.

The claimants alleged that their plans were being unlawfully thwarted by officers of the MPS for whose conduct the defendant Commissioner is legally responsible. The claimants argued that the officers' interpretation of the Covid-19 Regulations was legally wrong as it categorised the proposed vigil as "unlawful", meaning criminal, merely because it contravened the restrictions on gatherings. The implementation of such an erroneous policy or practice, that gatherings were prohibited, also meant there was no exception for protest, and no need to make any risk assessment. The claimants argued that with proper legal analysis this was not in accordance with the law.

Firstly, the claimants argued that the MPS ignored the possibility that the fundamental rights to freedom of expression and freedom of assembly under Articles 10 and 11 of the ECHR might have supplied a "reasonable excuse" for contravening those restrictions for organising or taking part in a gathering such as the vigil. Secondly, the MPS were duty-bound, but failed to, carry out a fact-specific proportionality assessment to reach a rational and informed assessment of whether the organisers could claim to have a reasonable excuse. Which in turn, required them to consider the public health risks and the steps to be taken by the organisers to mitigate such risks. The claimants submitted that such references as were made to Articles 10 and 11 in meetings and contemporaneous records reflected a mistaken view that these would be relevant if - but only if - reasonable excuse was raised by the claimants in the event of a prosecution.

It is on that legal basis that the claimants stated the discouragement made by the MPS unlawfully interfered with their Article 10 and 11 rights, by issuing statements that prevented or at least discouraged the claimants from organising the vigil and adopting a misconceived approach that the rights in question could be exercised in other ways that did not involve a gathering, which cannot be true of the right to assemble. It was claimed that the statements were, therefore, based on grounds that were not "prescribed by law" [4]. Thus, leading to the claimants abandoning their plans and cancelling the planned vigil. The claimants asked the High Court to determine whether

the decisions made by the MPS in March 2021 infringed their rights to freedom of expression and freedom of assembly under Articles 10 and 11 of the ECHR.

Held, finding the MPS's decision-making process and interventions that caused the planned vigil to be cancelled by the claimants represented an interference with their rights under Articles 10 and 11 and was not in accordance with the law. To read the Tier 4 restrictions on gatherings for the purposes of a protest compatibly with Articles 10 and 11, it was necessary for the MPS to apply the relevant principles laid down by the Court of Appeal in *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 and by the Divisional Court in *Director of Public Prosecutions v Ziegler* [2020] QB 253, as per the initial High Court hearing. This included the case-specific proportionality assessment whereby determination 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 [59]. The Supreme Court in *Ziegler* also stated that several factors must be considered, such as, the importance of the location, which could have symbolic force; the extent to which the protest would interfere with the rights of others; the likely duration of the protest; prior notification to, and co-operation with, the police; and the nature of any precautions proposed or considered. None of which were considered by the MPS throughout their conversations with the claimants from 10 March 2021 to 13 March 2021.

Observation of the three key guidance documents on policing the pandemic that had been relied upon by the MPS in dealing with the proposed vigil on 13 March 2021. It was noted that these had influenced a “strategy” that involved the MPS having insufficient regard to the principles on “reasonable excuse” and proportionality. “The decisions by the police in this case were all of a piece with the thrust of that guidance” (at [116]). The MPS had failed to engage properly with the claimants on measures which could have enabled a vigil to go ahead in some appropriate form, to assess the residual risk to public health and to carry out a case-specific proportionality exercise (at [119-122]).

Once it had been established during the initial High Court hearing that the principles in *Dolan* and *Ziegler* applied, and that a case-specific proportionality assessment by

the MPS was a legal requirement, “it was plainly incumbent on the police to engage with the organisers in exploring precautionary measures, to see whether the event could go ahead in some appropriate form. Instead, the documents showed that the MPS focused on issuing their press release, which did nothing to reverse their earlier stance, and on reiterating that they could not give assurances regarding enforcement” (at [120]).

The court finally alluded to the fact that the MPS must be capable in principle of embracing the exercise of Convention rights, in particular Article 11, depending on the particular facts (at [18]). Even in the context of the Covid-19 Regulations, the police generally have a positive obligation to facilitate peaceful protest which, depending on the circumstances, may include engaging with organisers to see whether there is a way in which a protest can proceed lawfully, applying the “reasonable excuse” provision together with Articles 10 and 11 (at [118]). Therefore, the obligation of the MPS was to engage with the organisers, to see whether they were proposing appropriate and adequate precautions, or to make additional suggestions, based upon the MPS’s vast experience of controlling large numbers of people at an event (at [119]).

Commentary

The facts of the present case highlight the potential for the decisions made by the MPS to have “a chilling effect” on the exercise of an individual’s Article 10 and 11 rights. This landmark decision regarding the impact of the Covid-19 Regulations on these fundamental rights and freedoms, highlight the already extensively documented attempts by government ministers and police forces to suppress the right to protest throughout the pandemic. Clearly, exercising these freedoms carries corresponding duties and responsibilities that may be subject to formalities, conditions, restrictions, or penalties that are prescribed by law and necessary in a democratic society per Article 10(2) and 11(2) ECHR. However, any decision to restrict such freedoms must be proportionate and there must be a legitimate aim. Although the court acknowledged that the Covid-19 Regulations impose obligations on police forces which can make their task of enforcement somewhat onerous (at [78]). The MPS’s failure to conduct a thorough, fact-specific proportionality assessment, demonstrated an inability to facilitate and uphold an individual’s right to protest.

The Covid-19 Regulations that were enacted via emergency powers conferred by the Public Health (Control of Disease) Act 1984 first came into force in February 2020. However, the controls on freedom of movement and association which became familiar in England were first introduced on 26 March 2020, by the Health Protection (Coronavirus, Restrictions) (England) Regulations SI 2020 No. 350. The various amendments and updated guidelines regarding restrictions on leaving home and on gatherings criminalised behaviour undertaken in contravention of these restrictions without “reasonable excuse”. The requirements imposed by these Regulations were noted as having to be “proportionate to what they seek to achieve, which is a public health response to that threat”. The subsequent amendments regarding the number of people prohibited from gathering publicly, has fluctuated throughout the pandemic. The Regulations concerned with this case, that were imposed for the purpose of organising a tiered system in England, contained restrictions on gatherings with an express exception for protest. In *Dolan*, it was established that in all or nearly all circumstances the Regulations would represent an unjustified restriction on rights of peaceful assembly and association.

At all relevant times during the pandemic the police in England and Wales operated a policy known as “the 4 Es”. At the time of the planned vigil, the guidance of the National Police Chiefs’ Council entitled “Tier 4 National Lockdown” was published (Tier 4 National Lockdown, The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, 20 January 2021). The policy noted that the general express exceptions to the Covid-19 restrictions did not include “protests in a Tier 4 area.” The “Enforcement Options” guidance highlighted it was an offence to contravene a Tier 4 restriction “without reasonable excuse”. But the guidance did not stipulate that protest might afford a reasonable excuse for holding a gathering that contravened the restrictions. The guidance made no reference to any of the factors identified in *Ziegler* and *Dolan*. For that reason, exercising such police powers “would likely interfere with or restrict the exercise of the rights under Articles 10 and 11 and, if it did, such conduct would require justification by reference to the ECHR requirements of necessity and proportionality” (at [29]).

The concept of necessity carries with it a requirement that the interference be proportionate, going no further than is necessary and there should be a legitimate aim if any rights are to be restricted. In this case, there was no challenge to the necessity or proportionality of the Covid-19 Regulations themselves; their aim being to protect public health. Instead, it was the decisions of the MPS that it was argued that amounted to an interference that was not prescribed by law. The determination of whether the decisions reflected a proper understanding of the Covid-19 Regulations, the factors laid down in *Dolan* and *Zeigler*, and in particular, the relationship of those with the claimants' ECHR rights. It is in that context, the MPS were required to conduct a lawful proportionality exercise and failed to do so (at [12]). No enforcement decision regarding the vigil could have been lawfully made without a proportionality assessment by weighing up the competing considerations of the Covid-19 Regulations and the competing ECHR rights. From the case of *Ziegler*, it is now clear that it is up to the police to conduct a proportionality assessment and in the circumstances of each case, the police must make their own decision about whether the protest can go ahead and that must include a proportionality balancing exercise. The MPS felt entitled to confine themselves to look at the Covid-19 Regulations and taking it as a fixed and given starting point to conclude that any "relevant gathering" would pose a serious risk to public health (at [80]).

Failing to engage with the suggestions of the claimants to help ensure that a legal, Covid-secure vigil could take place, led to the MPS's decisions being legally flawed. The MPS did not give proper effect to the exercise of Article 10 and 11 rights that could constitute a "reasonable excuse" for what might otherwise contravene the Covid-19 Regulations and failing to conduct a fact-specific proportionality assessment when interfering with the rights enshrined in Article 10 and 11 (at [107]). The law intends to provide consistency, and in this case and the others that followed, it would have been achieved by applying the relevant legal principles that were laid down in *Zeigler*. If that consistency is achieved correctly, the process of a case-specific evaluation may produce similar outcomes in many instances, but it certainly will not produce the same outcome for all gatherings (at [117]). It is that fluidity that demonstrates the importance of a proportionality assessment in all cases where there are competing individual and state interests cannot be overstated. Given the controversial changes to the way police will be able to control protests proposed as part of the Police, Crime, Sentencing and

Courts Bill (2019-22) it is essential that a full assessment is conducted to achieve a fair and proportionate outcome.