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Date: 22 April 2021

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By email ONLY to: Chief.Constable@gmp.police.uk and
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JUDICIAL REVIEW PRE-ACTION LETTER: RESPONSE REQUESTED BY 4pm on 3 May 2021

Dear Madam / Sir

Proposed application for judicial review on behalf of Karen Reissmann

We act for Karen Reissmann in relation to the following decisions, taken on behalf of the Chief Constable of Greater Manchester Police: (a) the adoption of a policy whereby all outdoor protest is treated as unlawful, (b) the decision of 7 March 2021 to prevent Ms Reissmann from protesting in St Peter's Square, and (c) the decision to issue Ms Reissmann with a fixed penalty notice ('FPN') on the basis of a purported breach of the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ('the Regulations').

These decisions were unlawful, *ultra vires*, and a breach of Articles 10 and/or 11 of Schedule 1 to the Human Rights Act 1998. The Chief Constable is respectfully invited to withdraw the FPN immediately and to take the steps set out below.

We have previously written to the Greater Manchester Police to explain why the decision to prevent the protest was unlawful. We requested that the FPN be withdrawn. In a response dated 8th April 2021, ACC Nick Bailey wrote that the FPN had previously been assessed as "*proportionate, legal, accountable and necessary in the circumstances.*" No explanation was given for this position.

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Given that the response does not address the legal position as set out in our letter, it has become necessary for Ms Reissmann to serve a Pre-Action Protocol letter. We would be grateful if you could please treat this letter as a pre-action letter sent in compliance with the Pre-action Protocol for Judicial Review.

Should we not hear from you by 4pm on 3 May 2021 we may commence proceedings for judicial review without further notice.

Proposed Claimant

The proposed Claimant is Ms Reissmann, who can be contacted at this office.

Please note that Emily-Jade Defriend and Jules Carey are the solicitors with conduct of this matter.

Proposed Defendant

Should proceedings become necessary, the Defendant in this matter will be the Chief Constable of Greater Manchester Police.

The Decisions under Challenge

By this claim, Ms Reissmann seeks to challenge: (a) the operation of an unlawful policy by the Greater Manchester Police, (b) the decision to stop her from protesting on 7th March 2021, and (c) the decision to administer her with an FPN.

Factual Background

Ms Reissmann is 61 years old. She is a mental health nurse. Ms Reissmann qualified as a nurse in 1985 and has worked in NHS-funded work since qualification. Since 1986 our client has worked in and around the Manchester and Bolton areas as a community psychiatric nurse with responsibility for her own case load. In 2015 she qualified as a Cognitive Behavioural Therapist and was upgraded to a band 7, having the equivalent clinical expertise of a ward manager. Ms Reissmann currently works part time at Bolton Primary Care Psychological Therapy Service assessing and providing therapy in the community for people with mental health problems.

Ms Reissmann is a non-medical prescriber allowing her to prescribe and adjust medications autonomously.

Ms Reissmann has worked as a nurse throughout the Covid-19 pandemic. In her working role, Karen sits on the risk assessment committee for her department alongside senior managers. The committee regularly holds

meetings to consider risks and solutions and to review the same. As a community nurse for over 36 years, with responsibility for her own cases, Ms Reissmann was at the forefront of liaisons with regional and local teams about how to make and keep the community safe during the COVID-19 pandemic. This included the implementation of government recommendations and safety protocols. She was the first to suggest the necessity for the wearing of face-masks by staff and patients when they had not yet been made compulsory.

Ms Reissmann is a member of the trade union, Unison. She is a steward and the vice chair at her local union branch. She holds an elected position on Unison's national executive council, representing the north west of England. She also sits as a health and safety representative for her union.

Ms Reissmann has been involved in a number of cases as a union health and safety representative. She has represented parties having to consider how they deal with Covid regulations and helped find workable solutions with an emphasis on keeping staff and patients safe.

Following Rishi Sunak's budget announcement on 3 March 2021, in which it was announced that the government would offer just a 1% pay rise to NHS staff, Ms Reissmann's union branch called for a protest against this. Ms Reissmann agreed to act as chief organiser for the rally which was to take place at 12pm on 7 March 2021 in St Peter's Square, Manchester. The location of the protest was important. St Peter's Square is not only an important public landmark in Manchester, but it also plays an important role in the history of protest, as the location of the Peterloo massacre in 1819.

In preparation for the protest, Ms Reissmann carried out a full Risk Assessment to ensure the safety of the participants. The Risk Assessment included the following:

- The protest would be outside in a spacious area with very few people in the area at that time.
- Attendees would not be permitted to attend if they have any symptoms of COVID-19 - such as a cough, high temperature, loss of taste and smell - or have been otherwise unwell.
- The protest would be small. It was anticipated that around 40 people would attend.
- Attendees would be required to socially distance from one another;

- Cones would be used as distance markers to ensure at least 2m social distancing between participants, with markers and rigorously enforced.
- All participants would be required to wear face masks, rigorously enforced.
- There would be a microphone and loudspeakers in use so that all participants could hear the speaking. This would mean that people would not group together in order to hear.
- Antibacterial wipes would be provided.
- Bottles of sanitiser would be provided and available for use.
- The protest would be taking place for a short period of time, no longer than 45 minutes;
- There would be 10 stewards present from the trade union to ensure that the participants obeyed the above rules.

On the morning of the protest, Ms Reissmann arrived at St Peter's Square at 11am. She met with the stewards to discuss the safety measures put in place to ensure that the protest would be safe and that they would make sure that those participating would follow the rules.

At approximately 11.30am, Ms Reissmann was approached by police officers who said they did not want to stop the protest and supported her cause but wanted to know what the plan was for the protest. Our client explained what the protest was about and that it would be static protest. She offered the police officers a copy of her Risk Assessment (which she had). The officers declined to see the Risk Assessment. She informed the officers that they expected around 40 people to attend the protest.

The officers then left Ms Reissmann and returned after approximately 10 minutes. They informed Ms Reissmann that their police sergeant had informed them that the protest was unlawful and not permitted by the "Covid-19 regulations". Ms Reissmann explained to the officers all of the measures which had been put in place to ensure that the protest was safe and lawful. The officers reiterated that their sergeant's position had been that the protest was not permitted but that they would take her phone number and ask the sergeant to call her. They asked Ms Reissmann for her name, which she gave.

The sergeant called Ms Reissmann at 11:44am. During this call Ms Reissmann stated that the overall risk inherent in the protest was low (given the measures they had put in place). The sergeant maintained his position on this call that he did not believe the protest to be permitted and informed Ms Reissmann that she risked being issued with a fine and

her employer and the Nursing and Midwifery Council would be notified. He said he would consult Silver command and call her back. Ms Reissmann said she would inform the attendees what was happening using the microphone.

Following this call, Ms Reissmann explained to those who had now arrived for the protest that the police said that the protest could not go ahead because it was not lawful and that she was waiting for Silver Command to get back to her.

Ms Reissmann received a further call from the sergeant at 12.02pm who told her firmly that the protest could not go ahead. He communicated that silver command had decided it was not permitted. Ms Reissmann offered to reduce the time of the protest to 10 minutes only, but this compromise was rejected. Given the firm position of the police, Ms Reissmann had no choice but to close down the protest.

Ms Reissmann informed those at the protest that she was forced to cancel to protest because of the police's decision. The stewards then began packing up the items which had been brought for the protest (see above).

An officer approached Ms Reissmann and asked her to speak with him. She was walked towards a police tactical aid van. Ms Reissmann was concerned she was going to be placed in the van but the officer confirmed he was not going to do this. She was however surrounded by six police officers, which made Ms Reissmann feel intimidated and uncomfortable. She therefore asked a friend to join her (who was also a nurse). Ms Reissmann was informed by the officers that she would be issued with an FPN of £10,000. Out of shock, Karen shouted out to her friends that she had been issued with the fine. An officer told Karen that she would have to get in the back of the police van because she was 'making a scene'. Her friend grabbed Ms Reissmann's arm and said to her 'don't let them put you in the van'. An officer then handcuffed her friend. It is understood that the friend was arrested and removed.

Ms Reissmann was surround by officers who requested all her details. She gave those details to the officers. They asked that she provide them with her ID. Ms Reissmann stated that she did not have ID with her. An officer informed Ms Reissmann that he would need to "officially caution" her and that anything she should "would be taken down and could be used in evidence" against her. She was informed again that she would be issued with an FPN for organising a protest and she would be receiving this in the post.

In an email dated 22 March 2021 at 13:25, Assistant Chief Constable Nick Bailey stated (with emphasis added):

I am responding to the correspondence you have sent regarding the policing of the protest in Manchester City Centre on Sunday 7th March

2021. You will understand that I am unable to speak directly regarding a matter involving a third party, however I will outline my position and that of Greater Manchester Police.

For context I am the force lead for Public Order and Events, I was also the Gold Commander for the NHS Protest in question. [...]

Throughout the Covid pandemic Greater Manchester Police have sought to support the efforts of all partners to reduce the spread of infection, this has at time been enforcing a series of decisions and legislation changes made by parliament, whereby a balance of options have been considered and decisions made that have sought to provide some freedoms and limit others, which have throughout the past year divided the effected communities dependent on how it impacts. Despite this GMP have continually tried to follow the national policing position of the 4E's (Engage, Explain, Encourage, Enforce), with enforcement being a last option.

During this period of lockdown, as with the last the lockdown, the legislation prevented gatherings of persons from multiple households, subject to a limited number of exemptions. **Consciously the legislation during both the recent lockdowns did not allow for protests to be exempt, effectively making protests of more than one person unlawful within the period of the lockdown.** As a consequence when GMP became aware over social media and radio that a protest against the government decision to give the NHS a 1% pay rise was being arranged on the morning of Sunday 7th March my staff sought to engage with the organisers and explain and encourage them **not to organise a protest or participate as this would be unlawful.**

I can confirm that my staff always seek to contact those organising events, and point out that their intentions are unlawful regardless of any mitigating action put in place (it is worth noting that the legislation was 'Stay at Home' and only essential journeys were allowed and gatherings of two people were only allowed for the purpose of exercise) and that it could lead to any person organising the events risking enforcement - the penalty for breaches is pre-determined and not open to change by the police, in regard to protest the levels set are £200 for participation and £10,000 for organising a protest of over 30 persons. [...]

All decisions and actions will seek to balance the legislation, but also fundamentally the Human Rights Act, in which I as the Gold Commander and my Silver Commander will balance our priority to Article 2, Right to Life, against Article 9, 10, 11 the rights to freedom of speech and protest. On this balance the right to life will always be the overarching aim, which may see the limitation on other rights, and in this scenario during a Covid pandemic, in a City where the levels of infection are not yet under control, this means that gatherings represent a threat to the life of members of our community. [...]

*I do hope this explains further our position, which whilst conditions, size of crowd, the mood of a crowd will all be factors in whether we intervene, but **we are consistent that protest is unlawful, we cannot plan facilitation**, we will keep a situation peaceful and not escalate tension through our action, as long as the protest remains peaceful and when appropriate and where we can identify those who are breaching we will take enforcement action. [...]*

The decision has been reviewed independently, as requested by the Mayor, and is in accordance with previous decisions and in accordance with legislation, I therefore hope that you can be assured that the decision was not taken lightly. [...]

The FPN

On 26 March 2021, Ms Reissmann received a letter from ACRO. The letter explained that PC Bolton, an officer of the Greater Manchester Police, had to decide to issue her with an FPN in the sum of £10,000. It suggested that:

“On 07/03/2021, at St Peter’s Square, Manchester at 12:35 you were found to be in contravention of the Regulations as you;

Contravened requirement not to hold, or be involved in holding, a gathering of more than thirty people - land (certain public outdoor spaces).

The particular circumstances relating to the contravention of the Regulations are as follows:

Organised a protest in Manchester City Centre, whereby more than 30 persons attended.”

On 1 April 2021, this firm wrote to the Greater Manchester Police to explain why the decision to prevent Ms Reissmann’s protest on 7th March 2021 was unlawful. The Greater Manchester Police was requested to withdraw the FPN.

On 8 April 2021, ACC Bailey responded to this letter. He wrote that “GMP legal services have previously reviewed the position and legality of the fixed penalty notice and are satisfied that the issue of such was proportionate, legal, accountable and necessary in the circumstances. They reviewed this in light of the legislation in place at the time of the offence.” He did not suggest that the FPN had been reviewed in the light of the contents of the letter of 1 April 2021. He suggested that the Greater Manchester Police “now feel that this is a matter for the ”CPS”. Whilst the CPS can decide whether or not to prosecute Ms Reissmann for non-payment of the FPN, the CPS will not decide whether: (a) the GMP

was operating an unlawful policy at the relevant time, (b) the GMP unlawfully breached Ms Reissmann's right to protest, or (c) the FPN was unlawfully administered.

Legal framework

Since 26 March 2020 various sets of restrictions on everyday life have been in place as a result of the Covid-19 pandemic. The restriction regulations have been made under s.45C of the Public Health (Control of Disease) Act 1984.

The changing regulations have, at different times, criminalised actions including gathering in groups of varying sizes and leaving or being outside of home except for certain reasons and/or without other "reasonable excuse".

For most of this period the listed examples of "reasonable excuses" for leaving one's home, or gathering in a group larger than that otherwise permitted, have not explicitly included protest. Indeed, during one such period, when protest was not a listed exception, the Prime Minister, Boris Johnson, publicly confirmed on 3 June 2020 that he supported "the right to protest" providing that such protests are "carried out lawfully" and in "accordance with our rules on social distancing".

On 20 December 2020, the Regulations came into force.

At the material times, an FPN could only be issued where an authorised person "*reasonably believes*" that a person has "*committed an offence under these Regulations*" and is aged over 18 (regulation 11).

A person committed an offence if, "*without reasonable excuse*", the person contravened a restriction or requirement imposed under the Regulations (regulation 10(1)).

Schedule 3A, §4 of the Regulations prohibited the participation in gatherings of more than two people outdoors. Schedule 3A, §5 prohibited the organisation or facilitation of a gathering of more than 30 persons on public outdoor space.

Accordingly, Ms Reissmann could only commit an offence under the Regulations if she organised or facilitated a relevant gathering "*without reasonable excuse*".

The phrase, "*reasonable excuse*," in the public health context, is "*largely, if not entirely, a question of fact*".¹ The phrase can include the exercise of rights under the European Convention on Human Rights ("Convention"). As the Court of Appeal has made clear, this is "*inherently a fact-specific*

¹ *Morris v Beardmore* [1981] AC 446 at 461.

inquiry”: *R (Dolan) v Secretary of State for Health and Social Care* [2021] 1 All ER 780, §104.

On 12 March 2021 Holgate J delivered judgment in *Leigh v Commissioner of Police of the Metropolis* [2021] EWHC 661 (Admin). This was a case about a proposed protest under the Regulations.

At §13, Holgate J noted the finding of the Court of Appeal in *Dolan*, at §104. He held that, *“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).”* At §14, he found that it is “clear” that *“the same reasoning applies to Regulation 10(1) of the 2020 Regulations”*. This finding affected *“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) ... 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.”*

At §16, Holgate J sought to construe regulation 10(1) of the Regulations. He held, *“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 ...”*.

At §17, Holgate J held that it was “correct” 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.”* It was also “right” 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”* (§24).

On 17 March 2021, the Joint Committee on Human Rights published its report on *“The Government response to covid-19: freedom of assembly*

and the right to protest". The report stated, at §48, that *"going on a protest, if conducted in a manner that minimises the risk of spreading covid-19, could have been and could remain a lawful reason to leave the home during lockdown."* At §56, the Committee noted the following evidence from senior police officers:

"Significantly, the senior police officers who gave oral evidence to our Committee also appeared to agree that protest was not prohibited under lockdown. In answer to the question: "can we assume that your understanding of the law is that there is no absolute prohibition on the right to protest, and that it still exists, notwithstanding the terms the regulations made under the Public Health Act?", Chief Constable Harrington [Public Order & Public Safety lead at the National Police Chiefs Council] said: "Absolutely."

Grounds of challenge

The decisions under challenge were unlawful for the reasons set out below.

Greater Manchester Police's position in respect of the decision-making for preventing the protest was that all protest is criminal under the Regulations, regardless of whether or not there is any public health risk arising and regardless of the risk reduction measures in place. This policy was unlawful.

The operation of this unlawful policy was clear from the actions the officers took on the day (e.g. not accepting the offer to consider the Risk Assessment and opting to move immediately to enforcement of the Regulations). The approach is put beyond doubt by the email from the Assistant Chief Constable (please see above), which wrongly states:

- a) The legislation during both the recent lockdowns did not allow for protests to be exempt, effectively making protests of more than one person unlawful within the period of the lockdown;
- b) To organise or participate in a protest would therefore be unlawful;
- c) The intentions of those organising protests is unlawful regardless of any mitigating action put in place.

The decision-making by the Greater Manchester Police to not permit Ms Reissmann's protest, and to use criminal justice enforcement against her, was premised on the incorrect view that because there is no express exemption for protest in the Regulations, protests are therefore prohibited.

The Greater Manchester Police failed to interpret the Regulations consistently with Ms Reissmann's rights under articles 10 and 11 of the Convention. The Greater Manchester Police applied a blanket policy that all protest was unlawful under the Regulations.

This approach was wrong in law and contrary to authority (*Dolan and Leigh*).

As those authorities make clear, the police must consider the following when assessing the proportionality of preventing a protest:

1. The importance of the right being exercised.
2. The importance of the location of the protest.
3. Whether a risk assessment has been completed for the protest.
4. The adequacy of any such risk assessment.
5. Whether social distancing will be maintained.
6. Whether there are other mitigations, such as wearing a face mask.
7. The overall risk to public health (with consideration to the location of the event, compliance with public health guidance and other safety measures).
8. The consequences of not permitting the event.

The Greater Manchester Police did not consider any of the above in response to Ms Reissmann's protest. The decision to prevent Ms Reissmann from protesting was therefore unlawful, based on an unlawful policy, and inconsistent with s.6 Human Rights Act 1998.

For the same reasons, the decision to issue an FPN to Ms Reissmann was also unlawful.

The details of the action that the defendant is expected to take

The Chief Constable is respectfully invited to take the following steps:

1. Accept illegality.
2. Confirm that the unlawful policy (whereby all protest is banned under the Regulations) is no longer in force.
3. Withdraw the FPN administered to Ms Reissmann.
4. Provide his proposals for damages, to reflect the unlawful breach of articles 10 and 11 of the Convention, as set out above.

Should the Chief Constable fail to take these steps within 10 days, we put you on notice that Ms Reissmann will issue a claim for judicial review without further reference to you.

Disclosure

To assist us in properly advising our clients, please provide us with copies of all relevant documentation on which the decision was made. We request in particular (as requested in our letter dated 1 April 2021):

1. The Defendant's policy, or policies, on the policing of protests and other events involving the exercise of Article 10 and 11 rights as have applied from 6 January 2021 to date, including any revisions of those policies;
2. All documents considered by the officer, or officers, who made decisions relating to the Claimant's protest, including any PHE guidelines, any PHE advice provided (or other health advice sought or received);
3. Any risk assessment, or assessments, conducted on behalf of the Defendants in relation to the policing of the protest to inform the decisions referred to above or for any other purpose;
4. Any other document showing the proportionality assessment undertaken in respect of the protest as required by Article 10 and 11 and factors relevant to it being taken into account.

At the very least, this should include full reasons for the decision of 7th March 2021, together with any evidence upon which you rely to justify it. We remind you of your duty of candour in this regard.

Interested parties

We do not currently consider that any other third party is directly affected by this proposed claim. Should the Chief Constable disagree, he is respectfully invited to particularise any proposed interested parties and provide reasons as to why they have a direct interest in this proposed claim.

ADR proposals

Ms Reissmann is committed to resolving these issues without recourse to Court proceedings, if possible. She would welcome any proposals that the Chief Constable may have for resolving this claim by way of ADR.

Proposed reply date

We request that you provide a substantive response in writing by **4pm on 3 May 2021** failing which we reserve the right to commence judicial review proceedings without further notice.

Any queries in respect of this matter should be forward to Mr Jules Carey of our offices.

Yours faithfully

Bindmans LLP

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