Neutral Citation Number: [2018] EWHC 1667 (Admin)

Case No: CO/1695/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2018

Before :

MR JUSTICE TURNER

- -

Between :

FLORICA ALINA DULGHERIU	**Claimant**
- and –	
ANDREA ORTHOVA	**Second Claimant**
-and-	
THE LONDON BOROUGH OF EALING	**Defendant**

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Alasdair Henderson and **Benjamin Fullbrook** (instructed by **Tuckers Solicitors**) for the **Claimants**
Kuljit Bhogal and **Tara O'Leary** (instructed by **London Borough of Ealing Legal Services**) for the **Defendant**

Hearing dates: 7th June 2018

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Approved Judgment

Mr Justice Turner :

INTRODUCTION

1. The debate over whether, and in what (if any) circumstances, it is right for a woman to choose deliberately to terminate her pregnancy is one which has polarised opinion for centuries. Inevitably, clinics providing abortion services, in this country and abroad, have tended to attract the attention of both pro-life and pro-choice activists. Feelings run high. Those who work at and who use the facilities of such clinics are liable to become the focus of the scrutiny of individuals who have strong feelings on the issue. One such clinic is the Marie Stopes UK West London Centre ("the Centre") which operates from premises on Mattock Lane in Ealing.

2. For many years, pro-life supporters have congregated immediately outside the Centre to advance their cause. They have attempted, in different ways, to engage with users and, in particular, pregnant women who come to the Centre to have abortions. Latterly, they have been joined by pro-choice activists advancing a radically different agenda.

3. This situation changed completely when, on 10 April 2018, the defendant made a Public Spaces Protection Order ("PSPO") which, in broad terms, provided for a "safe zone" around the Centre within which the opposing sides were henceforth precluded from communicating their respective views on issues relating to the provision of abortion services. The activists have, subject to certain additional constraints, been permitted to continue to operate but only within a defined "designated area" which is some distance from the entrance to the Centre. If they were to return to continue their activities at their former pitch then, so long as the PSPO remains in force, they would be guilty of a criminal offence. This decision has, predictably, given rise to considerable controversy. The claimants, who are both strong proponents of the pro-life stance, now apply to this court to quash the order of the defendant so as to permit the protesters to return to the immediate vicinity of the Centre to continue their activities as before.

4. Very many contentions and counter contentions have been raised by the parties to this litigation and I pay tribute to their industry. It would, however, involve a disproportionate exercise for this Court to attempt to address and resolve each and every point relied upon. The parties can rest assured that I have considered all of the issues they have raised and that where I have not adjudicated upon any given area of dispute it is because whatever finding I may have made thereon would not have affected the outcome of this challenge.

THE BACKGROUND

5. The presence of pro-life activists outside the Centre dates back to 1995. The individuals involved over the years have been affiliated to various Christian groups one of which is an organisation called the Good Counsel Network ("GCN") of which the claimants are members. One of their primary objects was, and is, to try to dissuade users of the Centre from going through with their abortions. A variety of strategies have been deployed to this end. Leaflets have been handed out at the entrance to the Centre and posters illustrating what foetuses look like at various stages of gestation have been on display. Attempts have been made to engage the users in dialogue in the

hope that they might change their minds. Offers have been made to provide practical support to those who may have been motivated, at least in part, to seek an abortion because of domestic and financial pressures.

6. In 2015, pro-choice activists began to arrive on the scene with greater frequency and stood close by their pro-life counterparts. They were members of, or affiliated to, a group called Sister Supporter who flagged up their allegiance by sporting high visibility pink tabards. They would generally turn up on Fridays and Saturdays and protest against the aims and methods of the pro-life supporters. Inevitably, the simultaneous attendance of the two rival factions generated an atmosphere of tension outside the Centre. I have seen photographs illustrating the sort of scene which might be expected to present itself on the approach of any visitor to the Centre on days upon which both groups were active.

7. In October 2017, Sister Supporter organised an e-petition with the object of encouraging the defendant to take steps to bring an end to the presence and activities of the pro-life supporters outside the Centre. The defendant attempted to encourage the opposing groups to reach a mutual accommodation. In this it failed. So it went on to consider other options. One of these was the making of a PSPO under the provisions of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). In the consideration of this potential response, the defendant launched an online public consultation which ended on 26 March 2018. Soon after, on 3 April 2018, Paul Murphy, an operations manager with responsibility for community safety and services, presented a report ("the Murphy report") to cabinet on the issue. This was a detailed document which referred to a very considerable number of appendices which included evidence and information from a broad range of sources together with written representations both in support of and in opposition to the proposed PSPO. In addition, representatives of the defendant took statements from users and staff at the Centre.

8. The pro-life supporters' stance was identified in the body of the Murphy report. In particular, it was recorded that they denied that they had caused any intimidation, harassment, abuse, alarm or distress to service users or staff. They also pointed out that there had been little or no police action or intervention as a result of their activities over the years. In addition, GCN had prepared and presented a briefing pack to the defendant pointing out that all members had been required to sign a "Statement of Peace" before attending outside the clinic disavowing any intention to threaten, physically contact or verbally abuse users and members of staff. The pack included brief testimony from mothers who had decided, after all, to keep their babies and had expressed gratitude to GCN for its support.

9. There were also contributions from Sister Supporter, the British Pregnancy Advisory Service ("BPAS") and the Centre, all of which were in support of the imposition of a PSPO. The BPAS documentation included a number of reports of relevant incidents which had been made by users, staff and local residents. Complaints included allegations that pro-life supporters had, on occasion, grabbed the arms of clinic users and shouted at them and their partners. Some had found the images of foetuses which were on display to be disturbing and particularly inappropriate for a public street along which children often walked.

10. The Murphy report revealed that the statutory consultation had generated over 2,000 responses about 80% of which were to the effect that the activities outside the Centre were having a detrimental effect in the locality.

11. In the event, the Murphy report recommended the implementation of a PSPO. The defendant voted to accept this recommendation and a PSPO came into force on 23 April 2018.

12. The terms of the PSPO were such as to prohibit the following activities within the "safe zone":

> "(i) Protesting, namely engaging in any act of approval/disapproval or attempted act of approval/disapproval, with respect to issues related to abortion services, by any means. This includes but is not limited to graphic, verbal or written means, prayer or counselling,
>
> (ii) Interfering, or attempting to interfere, whether verbally or physically, with a service user or member of staff,
>
> (iii) Intimidating or harassing, or attempting to intimidate or harass, a service user or member of staff,
>
> (iv) Recording or photographing a service user or member of staff of the Clinic whilst they are in the Safe Zone,
>
> (v) Displaying any text or images relating directly or indirectly to the termination of pregnancy, or
>
> (vi) Playing or using amplified music, voice or audio recordings."

13. Protests were, however, permitted to continue within a "designated area" comprising a well-defined grassy space about 100 metres or so from the entrance to the Centre. Such protests were subject to some restrictions as to the numbers of participants, the size of placards on display and the like.

14. The claimant now seeks to challenge the making of the PSPO under the procedure provided for in the relevant statutory framework which I will now proceed to outline.

THE STATUTORY FRAMEWORK

15. The defendant made the PSPO which is the subject of the present challenge pursuant to section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014 which provides:

> "**Power to make orders**
>
> (1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.
>
> (2) The first condition is that—

(a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or

(b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.

(3) The second condition is that the effect, or likely effect, of the activities—

(a) is, or is likely to be, of a persistent or continuing nature,

(b) is, or is likely to be, such as to make the activities unreasonable, and

(c) justifies the restrictions imposed by the notice.

(4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ("the restricted area") and—

(a) prohibits specified things being done in the restricted area,

(b) requires specified things to be done by persons carrying on specified activities in that area, or

(c) does both of those things.

(5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order—

(a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or

(b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.

(6) A prohibition or requirement may be framed—

(a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories;

(b) so as to apply at all times, or only at specified times, or at all times except those specified;

(c) so as to apply in all circumstances, or only in specified circumstances, or in all circumstances except those specified.

(7) A public spaces protection order must—

(a) identify the activities referred to in subsection (2);

> (b) explain the effect of section 63 (where it applies) and section 67;
>
> (c) specify the period for which the order has effect.
>
> (8) A public spaces protection order must be published in accordance with regulations made by the Secretary of State."

16. The Explanatory Notes to the Act provide:

> "161. The public spaces protection order … is intended to deal with a particular nuisance or problem in a particular area that is detrimental to the local community's quality of life, by imposing conditions on the use of that area. The order could also be used to deal with likely future problems. It will replace designated public place orders, gating orders and dog control orders. Examples of where a new order could be used include prohibiting the consumption of alcohol in public parks or ensuring dogs are kept on a leash in children's play areas. It could also prohibit spitting in certain areas (if the problem were persistent and unreasonable). This is currently covered in local byelaws…
>
> 172. The public spaces protection order will be different from the powers it will replace in the following ways:
>
> a. It can prohibit a wider range of behaviour, which makes the new order more like the 'good rule and government byelaws' made under the Local Government Act 1972, but with a fixed penalty notice available on breach (although some current byelaws do allow for fixed penalty notices to be issued). This is following feedback in the consultation from local authorities that current byelaws are hard to enforce as the only option available to local agencies is to take an individual to court if they fail to comply, which can be costly and time-consuming;
>
> b. There is intended to be less central government oversight than with byelaws, and no central government reporting requirements as with designated public place orders. This would reduce bureaucracy; and
>
> c. There will be lighter touch consultation requirements to save costs (for example, there is no duty to advertise in local newspapers). This is following feedback in the consultation from local authorities that the current processes for consultation outlined in secondary legislation are costly and time-consuming."

17. In addition, there is Statutory Guidance to the 2014 Act for "frontline professionals" which has been issued by the Home Office in accordance with section 73 of the Act and which was last updated in December 2017.

18. Only a local authority can issue a PSPO and, before doing so, they must, pursuant to section 72 of the 2014 Act, consult with the chief officer of police, the local policing body for the police area that includes the restricted area and any representatives of the local community they consider appropriate.

19. By the operation of section 60 of the 2014 Act, PSPOs may last for up to three years before requiring a review. However there is no limit on the number of times an order can be reviewed and extended. There is a requirement to inform the chief of police and any other community representatives on review and renewal (as with the original order). Under section 61 of the 2014 Act, a PSPO can be varied or discharged at any time by the local authority.

20. Breach of the terms of a PSPO, without reasonable excuse, is, pursuant to sections 67 and 68 of the 2014 Act, a criminal offence the sanctions in respect of which comprise either a fixed penalty notice of up to £100 or prosecution. On summary conviction, an individual is liable to be sentenced to pay a fine not exceeding £1,000.

21. A PSPO may be challenged under the provisions of section 66 of the 2014 Act:

> "**Challenging the validity of orders**
>
> (1) An interested person may apply to the High Court to question the validity of—
>
> (a) a public spaces protection order, or
>
> (b) a variation of a public spaces protection order.
>
> "Interested person" means an individual who lives in the restricted area or who regularly works in or visits that area.
>
> (2) The grounds on which an application under this section may be made are—
>
> (a) that the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied);
>
> (b) that a requirement under this Chapter was not complied with in relation to the order or variation.
>
> (3) An application under this section must be made within the period of 6 weeks beginning with the date on which the order or variation is made.
>
> (4) On an application under this section the High Court may by order suspend the operation of the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied), until the final determination of the proceedings.

> (5) If on an application under this section the High Court is satisfied that—
>
> (a) the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied), or
>
> (b) the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement under this Chapter,
>
> the Court may quash the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied).
>
> (6) A public spaces protection order, or any of the prohibitions or requirements imposed by the order (or by the order as varied), may be suspended under subsection (4) or quashed under subsection (5)—
>
> (a) generally, or
>
> (b) so far as necessary for the protection of the interests of the applicant.
>
> (7) An interested person may not challenge the validity of a public spaces protection order, or of a variation of a public spaces protection order, in any legal proceedings (either before or after it is made) except—
>
> (a) under this section, or
>
> (b) under subsection (3) of section 67 (where the interested person is charged with an offence under that section)."

22. A challenge brought under section 66 of the 2014 Act is assigned to the Administrative Court by virtue of PD8A. The jurisdiction is akin to judicial review. For example, it is exercisable by a single judge of the Queen's Bench Division and evidence at the hearing is by witness statement. There are differences. There is no permission stage and the only remedies available are a suspension or a quashing order. Notwithstanding these distinctions, there is no dispute that the level of scrutiny to be applied by the court should reflect that which would be appropriate to judicial review proceedings.

THE INTENSITY OF REVIEW

23. The parties agree that the implementation of the PSPO in this case has led to the engagement of rights enshrined in a number of the Articles of the European Convention on Human Rights ("the Convention"). Under section 6 of the Human Rights Act 1998, it is unlawful for the defendant, as a public authority, to act in a way which is incompatible with a Convention right. Furthermore, under section 72 of the 2014 Act, a local authority must have particular regard to the rights of freedom of

expression and freedom of assembly set out in Articles 10 and 11 of the Convention when, for example, deciding whether to make a PSPO and, if so, what it should include. Finally, under section 3(1) of the 1998 Act, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

24. Over recent years, the courts have moved away from the "one size fits all" approach to the level of intensity of the judicial review process as it may apply to the infinitely wide variety of circumstances in which such challenges arise. Indeed, the law is still is state of flux as is evident from the judgment of Lord Carnwath in R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] A.C. 1454 who observed:

> "55 In R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2016] AC 1355 (decided since the hearing in this appeal) this court had occasion to consider arguments, in the light of Kennedy and Pham, that this court should authorise a general move from the traditional judicial review tests to one of proportionality. Lord Neuberger of Abbotsbury PSC (with the agreement of Lord Hughes JSC) thought that the implications could be wide ranging and "profound in constitutional terms", and for that reason would require consideration by an enlarged court: para 132. There was no dissent from that view in the other judgments. This is a subject which continues to attract intense academic debate: see, for example, the illuminating collection of essays in The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow, (2015), eds Wilberg and Elliott. It is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as "anxious scrutiny" and "sliding scales".
>
> 56 Even in advance of such a comprehensive review of the tests to be applied to administrative decisions generally, there is a measure of support for the use of proportionality as a test in relation to interference with "fundamental" rights: the Keyu case, at paras 280–282, per Lord Kerr of Tonaghmore JSC, and at para 304, per Baroness Hale of Richmond DPSC. Lord Kerr JSC referred to the judgment of Lord Reed JSC in Pham v Secretary of State for the Home Department [2015] 1 WLR 1591, paras 113, 118–119, where he found support in the authorities for the proposition that:
>
> > "where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the

> legitimate aim of the interference: in substance, a requirement of proportionality": para 119.
>
> See also my own judgment in the same case, at para 60, and those of Lord Mance JSC, at paras 95–98 and Lord Sumption JSC, at paras 105–109, discussing the merits of a more flexible approach in judging executive interference with important individual rights, in that case the right to British citizenship."

25. In A v The Chief Constable of Kent Constabulary [2013] EWCA Civ 1706, Beatson LJ held:

> "36 It was common ground between the parties that, where the question before a court concerns whether a decision interferes with a right under the ECHR and, if so, whether it is proportionate and therefore justified, it is necessary for the court to conduct a high-intensity review of the decision. The court must make its own assessment of the factors considered by the decision-maker. The need to do this involves considering the appropriate weight to give them and thus the relative weight accorded to the interests and considerations by the decision-maker. The scope of review thus goes further than the traditional grounds of judicial review: see e.g. R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 at [27].
>
> 37 There are also clear statements that it is the function of the court to determine whether or not a decision of a public authority is incompatible with ECHR rights. In R (SB) v Governors of Denbigh High School [2006] UKHL 15 at [30], Lord Bingham stated that "proportionality must be judged objectively by the court". See also Lord Hoffmann at [68], Lord Neuberger MR in L's case [2009] UKSC 3 at [74], and Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19. In the last of these decisions Baroness Hale stated (at [31]) that it is the court which must decide whether ECHR rights have been infringed. In Huang v Secretary of State for the Home Department [2007] UKHL 11 Lord Bingham also stated that the court must "make a value judgment, an evaluation". But he made it quite clear (at [13]) that, despite the fact that cases involving rights under the ECHR involve "a more exacting standard of review", "there is no shift to a merits review" and it remains the case that the judge is not the primary decision-maker. In Axa General Insurance Ltd v HM Advocate [2011] UKSC 46, Lord Reed (at [131]) stated that, "although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion".

26. The structured proportionality test as applied in English law was summarised in De Smith's Judicial Review, 8th Edition at paragraph 11 - 081 thus:

> "It requires the court to seek first whether the action pursues a legitimate aim (i.e. one of the designated reasons to depart from a Convention right, such as national security). It then asks whether the measure employed is capable of achieving that aim, namely, whether there is a "rational connection" between the measures and the aim. Thirdly it asks whether a less restrictive alternative could have been employed. Even if these three hurdles are achieved, however…there is a fourth step which the decision-maker has to climb, namely, to demonstrate that the measure must be "necessary" which requires the courts to insist that the measure genuinely addresses a "pressing social need", and is not just desirable or reasonable, by the standards of a democratic society."

27. I am satisfied that such an approach is consistent with the decisions of the most recent authorities on the point although I note, in passing, that there remains some debate over the role and scope of any "minimum impairment" test (i.e. that a less restrictive alternative could be pursued)[1]. However, on the facts of this challenge, I will accept the claimants' invitation to consider alternative ways by which it is alleged that the defendant could and should have secured its objectives short of imposing a PSPO in the terms identified.

28. Having thus identified the level of review upon which this Court proposes to embark, I will proceed to deal with the grounds upon which the claimants seek to challenge the making of the PSPO.

DETRIMENTAL EFFECT

29. The first ground of challenge is that the necessary ingredients of section 59 of the 2014 Act have not been established and, in particular, that of "detrimental effect" has not been made out.

30. The term "detrimental effect" is not defined in the Act but was considered by May J in Summers v Richmond Upon Thames [2018] EWHC 782 (Admin) who observed:

> "25 The Act therefore envisages use of PSPOs to curb activities which it is possible that not everyone would view as detrimentally affecting their quality of life. Taken together with the absence of any further definition of the key terms *"activities"* or *"detrimental"* this strongly points to local authorities being given a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. This requires local knowledge, taking into account conditions on the ground, exercising judgment (i) about what activities need to be covered by a PSPO and (ii)

[1] See, for example, the comments of Lord Sumption in Bank Mellat v Her Majesty's Treasury (No.2) [2014] A.C. 700 at paragraph 20.

> what prohibitions or restrictions are appropriate for inclusion in the order. There may be strong feelings locally about whether any particular activity does or does not have a detrimental effect, in such cases a local authority will need to weigh up competing interests. Deciding whether, and if so what, controls on certain behaviours or activities may be necessary within the area covered by a local authority is thus the very essence of local politics.
>
> 26 It is important to bear in mind, however, as Mr Porter emphasised, that the behaviours which PSPOs are intended to target are those which are seriously anti-social, not ones that are simply annoying. He referred me in this respect to the following passage in the Home Office guidance from 2017:
>
> > "Our aim in reforming the anti-social behaviour powers is to give the police, councils and others more effective means of protecting victims, not to penalise particular behaviours. Frontline professionals must use the powers in [the 2014 Act] responsibly and proportionately, and only where necessary to protect the public."

31. I gratefully adopt the approach of May J in Summers and would further observe that the fact that Parliament did not choose to define what may amount to "detrimental effect" should not, of course, be treated by the courts as an invitation to fill the vacuum a definition of their own. The circumstances in which PSPOs may be considered are many and various and attempts to lay down any general threshold level of conduct having detrimental effect by deploying various permutations of the concepts of "intimidation", "harassment", "alarm", "distress" and suchlike would almost certainly prove to be unhelpful and inappropriate.

32. The claimants, however, argue that the defendant, when considering the need for a detrimental effect to have been established, applied the wrong tests under section 59 in a number of respects which fatally contaminate its decision to make a PSPO. I propose to deal with each in turn.

Objective detriment

33. In their skeleton argument, the claimants contend that:

> "…any effect identified must be objectively detrimental – i.e. such that it would be detrimental to the quality of life of a reasonable person. Otherwise it would not be possible to comply with s59(3)(b) which stipulates that the effect of the activities must be (or be likely to be) "*such as to make the activities unreasonable*". Thus, any reliance on residents saying that they are "upset", "offended", "angry" "annoyed" or similar is insufficient, certainly in the context of a PSPO which interferes with fundamental rights."

34. There is no merit in this argument. The statutory language is clear and the introduction of the concept of "objectivity" takes the claimant's case no further. Some individuals are more robust than others. The defendant was entitled to assess the impact of the activities of the protestors on all those whose quality of life it was the object of the Act 2014 to protect: the vulnerable and resilient alike. Indeed, cases may well arise in which the activities under scrutiny are performed in a locality particularly frequented by susceptible individuals whether arising from physical vulnerabilities, mental health issues or otherwise. The suggestion that the interests of such people should be relegated because they do not measure up to the standards of robustness of the man (or woman) on the Clapham Omnibus has only to be stated to be rejected. In many cases, the fact that the activites under consideration would not detrimentally effect people of reasonable resilience will be a factor to be taken into account when, for example, deciding whether the requisite overall detrimental effect has been made out and whether the effect of the activities are such as to make them unreasonable but it does not present a free standing additional hurdle for a local authority to surmount. I do not overlook the fact that expectations of privacy under Article 8 of the Convention are to be analysed objectively but that is a matter to be considered when addressing the competing Convention rights and not when interpreting the statute.[2]

35. Furthermore, the argument lapses into a non sequitur. Feelings of upset, offence, anger and annoyance are perfectly capable of having a detrimental effect on the quality of life of any given individual, even on one of average or greater resilience, a fact to which many commuters by rail or car or, indeed, omnibus could doubtless attest. Such feelings are not simply to be disregarded as in some way not being "objective". The argument here appears to have shifted from the resilience of any given individual to meld into a consideration of the threshold level of upset which even those of normal robustness should be expected to tolerate without local authority intervention under the 2014 Act.

36. Ultimately, the task of the defendant was to exercise its judgment on the application of the words of the statute. The superimposition of a free-standing test of "objectivity", however it may be defined, would serve not merely to confuse but to impede this process. Of course, a local authority will take into account the possibility that those whose quality of life is said to have been adversely affected are being oversensitive when deciding whether a detrimental effect has been made out and in whether the activities have been rendered unreasonable. Moreover, such assessments, as I have observed, are bound also to feed into the need to act in accordance with the Convention. In this case, however, there is no compelling evidence to suggest that the defendant wrongly took into account information which it ought either to have disregarded or to have significantly relegated in importance when applying the statutory tests.

37. I would add that, in any event, even if the defendant were in error in failing to deploy a free-standing test of "objectivity" it would not have affected by overall view of the validity of the claimants' challenge. In particular, even an objective test, when applied to users of the clinic, would have to take into account that many of them would be

[2] See, for example, Wood v Commissioner of Police of the Metropolis [2009] EWCA Civ 414 at para 24.

pregnant, exposed to public view and facing the imminent prospect of termination. These are no subjective factors.

Meaning of "those in the locality"

38. The claimants contend that the reference in section 59(2)(a) to the "quality of life of those in the locality" must refer only to those who reside or work in the relevant place or its immediate vicinity or who visit regularly.

39. This argument, if successful, would exclude from consideration the vast majority of those women, together with their family and supporters, who visit the clinic for abortion procedures.

40. The short answer to this point is that if Parliament had thus intended to limit the scope of the section it could easily have done so. The concept of a person in a given locality is not necessarily, as a matter of common English usage, limited to residents of or frequent visitors to such a locality. The Oxford English Dictionary gives the example of "A blind man…feeling all around him with his cane, so as to find out his locality."

41. A narrow approach would also have the potential to tie the local authority's hand when attempting to prohibit detrimental activities in public areas mainly populated by visitors (for example, in the vicinity of tourist attractions) on the ground that persons in the locality have to be "locals" for the purposes of the application of the 2014 regime.

42. Undaunted, the claimants pray in aid the wording of section 66(1) of the 2014 Act which provides that only an interested person can challenge a PSPO. "Interested person" means an individual who lives in the restricted area or who regularly works in or visits that area. In my view, the terms of this section operate against rather than in favour of the construction advocated by the claimants. It would have been very straightforward for the draughtsperson to have use the term "interested persons" or some similarly narrowly defined group rather than "those in the locality" in section 59. The fact that different terms were deployed in the different sections of the Act strongly points to the conclusion that different interpretations were also intended. One can easily see the policy considerations behind imposing tighter controls upon the requisite standing of those who would seek to challenge a PSPO than upon the wider class of those whose quality of life can be taken into account by the local authority when making one. The wording of the statute provides protection for the rare migrant visitor without issuing to him or her an itinerant busybody licence.

43. Of course, the more infrequent the visitor to the locality, the less likely it will be that the activities under consideration will adversely impact upon his or her quality of life but this factor, in itself, does not mandate the imposition of a further interpretive limitation on the words of section 59. It is also the case that the use of the term "quality of life" carries with it the implication that the impact on those affected is more than merely transient but, as the evidence in this case revealed, there were users of the Centre who described a long term impact on their mental well-being.

Evidence of detrimental effect

44. The evidence and information available to the defendant included the following:

(i) Outcomes of a "resident engagement exercise" from 2017;

(ii) Evidence collected in the course of an investigation by officers comprising: thirteen formal witness statements; photographs of the activists outside the Centre and excerpts from the Centre's log of incidents;

(iii) Evidence packs from GCN;

(iv) Evidence packs and submissions from Marie Stopes, BPAS and Sister Supporter;

(v) Minutes of officers' meetings with pro-life and pro-choice supporters;

(vi) A consultation report and the full text of all consultation responses;

(vii) An equalities analysis assessment.

45. The defendant carried out a consultation in accordance with its duty under section 72 of the 2014 Act. The police were neutral. The NHS and BPAS were strongly supportive of the imposition of a PSPO. Members of the represented groups made submissions in accordance with their respective allegiances.

46. The results of the consultation are set out in detail in the Murphy report. Direct representations were received in the form of emails and letters. Of the 78 letters, 65 were supportive of the PSPO and 13 were against. Of the 46 emails, 12 supported the PSPO and 34 objected. In addition, a further 1,430 responses were received through the pro-life campaign group "Be Here for Me". Caution must, however, be exercised with respect to this and, indeed, other aspects of the consultation to varying degrees. Inevitably, the views expressed in many cases were likely to have been determined entirely, or almost entirely, with reference to the moral position of those responding on the issue of abortion rather than the broader aspects of the impact of the activities of the protestors. By way of example only, the "Be Here for Me" responses were drawn from all corners of England, Scotland and Wales some of which were hundreds of miles from the Centre.

47. There was an online survey which generated 2,181 responses. Nearly two thirds of these came from people who identified themselves to be users of services, shops or facilities in the proposed safe zone. 16.4% lived in the vicinity and 7.4% were users of the services of the Centre.

48. The vast majority of those who responded confirmed that they had seen activists outside the Centre displaying material relating to abortion and approaching people using the clinic. Of course, none of this is surprising because the claimants have never sought to deny that this is what they were doing. However, 470 respondents gave narrative examples of what they had witnessed. These included:

(i) The display of lifelike foetus dolls;

(ii) Threats that users of the Centre would go to Hell;

(iii) Referring to users of the Centre as "Mum".

(iv) The handing out of rosary beads to users and passers-by;

(v) Pursuing users of the Centre with leaflets;

(vi) Not leaving users with enough room to pass into the Centre;

(vii) The playing of loud music and chanting from pro-choice activists;

(viii) The taking of photographs of persons using the clinic;

(ix) Young children passing by exposed to images of foetuses.

49. On the issue of the detrimental impact on their quality of life, the results of the online survey were striking. Between 85% and 90% of respondents supported the imposition of the proposed prohibitions in the safe zone. A clear majority said that their quality of life had been detrimentally affected either "extremely" or "very much".

50. Some examples of reports collected by the Centre were appended to its submissions, a flavour of which may be gained from the following:

(i) **Local resident** – It is extremely stressful living opposite these protests. It is a regular occurrence seeing protestors standing in the way of clinic users grabbing their arms and shouting at them… Do I comfort the crying women on the street, or do they prefer privacy? Local residents should be able to live a peaceful life and should not have the weight of such things on their shoulders on a daily basis.

(ii) **Clinic/Unit Staff** – Client very distressed because of protestors. Protestor holding pretend baby and trying to give client leaflets.

(iii) **Passer-by** - The pictures displayed by those opposing abortion are truly awful. I walk past my local clinic with my children and they have images of dead foetuses on show. They create an awful environment for local residents.

51. The claimants accurately point out that only a minority of local residents (as opposed to others in the locality) reported that they had problems with the protests. They also complain that most of the evidence from other sources is "second hand" or anecdotal and that the activities complained of are, with one or two exceptions, entirely innocuous.

52. Care must be taken not to equiparate the process of consultation with that of conducting judicial proceedings. The categories and quality of the information which is gathered in the former exercise is, inevitably, not subject to rules of evidence and the rigid application of burdens and standards of proof. As the explanatory notes record, the process is intended to involve a "lighter touch" than was required in respect to the procedures it was enacted to supplement or replace. Furthermore, the level of scrutiny and analysis which this Court must deploy is not such as to transform its jurisdiction from a "reviewing" to a "merits based" approach. Stepping back from the many individual criticisms which the claimants make of the process adopted, I remain satisfied that the defendant's decision was untainted by the undue promotion of one category of information over another or any other public law irregularity.

53. As May J held in Summers: "There may be strong feelings locally about whether any particular activity does or does not have a detrimental effect, in such cases a local authority will need to weigh up competing interests. Deciding whether, and if so what, controls on certain behaviours or activities may be necessary within the area covered by a local authority is thus the very essence of local politics."

54. The claimants' suggestion that, with few exceptions, the activities of those outside the Centre were "innocuous" is likely to distract from the issues which the defendant was called upon to consider. Activities may fall within the provisions of the PSPO regime without having been proven, particularly when considered in isolation, to be nocuous. In any event, there was a considerable tranche of evidence and information before the defendant of activities which many would reasonably consider to be fully capable of a having a detrimental effect on the quality of life who were exposed to them whatever the choice of adjective used to describe them.

55. Taking the evidence as a whole, I find that the defendant had reasonable grounds to be satisfied that the conditions in sub-section 59(2) and 59(3) (a) of the 2014 Act were met. I am satisfied that my findings in respect of the proper interpretation of these subsections are compatible with Convention rights the consideration of which I will embark upon later in this judgment. The decision of the defendant was, in this sense, thus properly prescribed by law. The issues as to whether the effect of the activities was likely to be such as to make them unreasonable and thus justify the restrictions imposed by the notice are inextricably bound up with the application of conflicting Convention rights to which I will now turn.

INTERFERENCE WITH CONVENTION RIGHTS

Article 8

56. One issue to be resolved is whether or not the provisions of Article 8 of the Convention (right to respect for private and family life) are engaged on the facts of this case. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

57. As the Council of Europe Guide ("the Guide") to Article 8 provides:

> "The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence. This obligation is of the classic negative kind, described by the Court as the essential object of Article 8 (Kroon and Others v. the Netherlands, § 31). However, member

> States also have positive obligations to ensure that Article 8 rights are respected even as between private parties. In particular, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

58. In Peck v United Kingdom (2003) no. 44647/98, the EHCR observed:

> "57. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see P.G. and J.H. v. the United Kingdom, no. 44787/98, § 56, ECHR 2001-IX, with further references).
>
> 58. In P.G. and J.H. (§ 57) the Court further noted as follows:
>
> "There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain.""

59. In Couderc and Hachette Filipacchi Associes v. France (2015) no. 40454/07 the EHCR observed at paragraph 83:

> "The Court reiterates that the notion of private life is a broad concept, not susceptible to exhaustive definition. It extends to

> aspects relating to personal identity, such as a person's name, photograph, or physical and moral integrity. This concept also includes the right to live privately, away from unwanted attention (see Smirnova v. Russia, nos. 46133/99 and 48183/99, § 95, ECHR 2003-IX (extracts)). The guarantee afforded by Article 8 of the Convention in this regard is primarily intended to ensure the development, without outside interference, of the personality of each individual in his or her relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life."

60. As Sir Anthony Clarke MR observed in Murray v Express Newspapers [2009] Ch 481:

> "36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

61. This defendant in this case had information to the effect that photographs of those using the Centre were being taken on occasion. GCN consistently denied doing this but the defendant was entitled to take into account the activities of all of those who were on watch outside the Centre when considering the issue of the privacy of users. However, even setting aside the taking of photographs of those entering or leaving the Centre, I am satisfied that their rights to a private life were engaged. Their position is very different to the person who walks down a public street knowing that they will inevitably be casually observed by others. In particular, women of reproductive age who are entering the Centre are quite likely to be going there in order to have an abortion. Those leaving may well have undergone an abortion. They thereby become objects of attention not as ordinary members of the public but as women in the early stages of pregnancy who are considering the prospect of an abortion or who have just had an abortion. The fact of being pregnant is often, in itself, one that a mother reasonably wishes to be kept private, to a greater or lesser extent, in the early stages. The fact that one is considering, or has undergone, an abortion is, if anything, likely to be an even more intensely private affair for many women and their partners. To be the focus of open public attention, often at the very moment when sensitivities are at their highest, is an invasion of privacy even when it occurs in a public place. Furthermore, the activities of the participating groups, however well-intentioned, would inevitably serve to attract the gaze of local residents and passers-by to the users of the Centre to a greater extent than would be the case if no such interaction were to take place. Of course, there will be users who are either oblivious to or positively welcome the opportunity to engage with the activists. That is why it was important for the defendant to gather the information and evidence it did concerning the preponderant impact of the activities of the protesters upon those in the locality and, particularly,

users. And this it did. The feelings of intrusion felt by many users are evidenced in the statements and reports made by users of the Centre and considered in the Murphy report.

62. Accordingly, I am satisfied that the Article 8 rights of such users of the Centre were engaged on the facts of this case.

63. I am not, however, satisfied by the application of the authorities referred to that the activities of the protestors, in the particular circumstances of this case, engaged the Article 8 rights of other visitors, local residents, and staff working at the Centre.

Articles 9, 10, 11 and 14

64. The Murphy report provided advice to the defendant on the engagement of these Articles in the following terms:

> ""**Article 9: Right to Freedom of Thought, Conscience and Religion**
>
> 2.2.8 Article 9 of the ECHR protects a person's right to hold both religious and non-religious beliefs and protects a person's right to choose or change their religion or beliefs. The PSPO is not seeking to interfere with this right and it does not seek to prohibit any activities that affect a person's right to hold religious or non-religious views.
>
> 2.2.9 Article 9 additionally protects a person's right to manifest their beliefs in worship, teaching, practice or observance. For example the right to talk and preach about their religion or beliefs and to take part in practices associated with those beliefs. The right to manifest one's religion or beliefs is a qualified right, which means it can be interfered with in certain situations, for example, to protect the rights of others.
>
> 2.2.10 The Council is aware that some of the represented groups believe that their activities are part of their right to manifest their religion or beliefs. The Council should be advised that these are important rights and that it should be reluctant to interfere with those rights. Where the Council does interfere it must ensure that any interference is in accordance with the law (this is addressed later in this report), and is necessary (also addressed more fully later in this report) to ensure the protection of the rights of others. The proposed PSPO would interfere with these Article 9 rights. This is a delicate balancing exercise in which any interference with the right must be in accordance with the law and necessary to protect the rights of others. Both of these considerations are addressed more fully later in this section.
>
> **Article 10 Right to Freedom of Expression**

2.2.11 Article 10 of the ECHR protects the right of everyone to freedom of expression. This includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Article 10 is a qualified right, which means it can be interfered with in certain situations, for example, to protect the rights of others.

2.2.12 Again, this is an important fundamental right in any democracy. It includes the entitlement to express views that others might disagree with, find distasteful or even abhorrent. Article 10 provides a protection to express those views and is an important part of a free and democratic society.

2.2.13 It is important to consider that individuals from Pro-Life represented groups have stated they attend the Clinic to impart information to women accessing services and that the proposed PSPO will interfere with their Article 10 rights. It should also be noted that the PSPO will interfere with the Article 10 rights of Pro-Choice represented groups. In deciding whether to implement a PSPO, therefore, the Council will have to balance the rights of pregnant women to access health services free from fear of intimidation, harassment or distress and with an appropriate level of dignity and privacy against the Article 10 rights of Pro-Life and Pro-Choice represented groups to impart information and ideas relating to the termination of pregnancy. This is a delicate exercise in which any interference with the right must be in accordance with the law and necessary to protect the rights of others. Both of these considerations are addressed more fully later in this section.

Article 11 Right to Freedom of Assembly and Association

2.2.14 Article 11 of the ECHR protects everyone's right to freedom of peaceful assembly and to freedom of association with others. Article 11 is again a qualified right, meaning it can be interfered with in certain situations, for example, to protect the rights of others.

2.2.15 The right to freedom of assembly includes peaceful protests and demonstrations of the kind seen outside the Clinic. The PSPO will interfere with the Article 11 rights of both Pro-Life and Pro-Choice represented groups in the locality of the Clinic. The Council therefore needs to balance the rights of pregnant women to access health services free from fear of intimidation, harassment or distress against the Article 11 rights of Pro-Life and Pro-Choice groups. This is a delicate balancing exercise in which any interference with the right must be in accordance with the law and necessary to protect the rights of others. Both of these considerations are addressed more fully later in this section.

> **Article 14 Right to Freedom from Discrimination**
>
> 2.2.16 Article 14 of the ECHR provides 'The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' It is therefore not a free-standing Article but rather one which relates to the engagement of other Articles, and to discriminate in the manner in which people are entitled to enjoy those rights.
>
> 2.2.17 Article 14 needs to be considered by the Council, given the proposed PSPO targets the activities of groups which identify with a specific religion and belief (namely Christianity)."

THE ROLE OF RELIGION

65. In van den Dungen v The Netherlands (1995) no 22838/93, in an admissibility ruling, the European Commission of Human Rights considered a case in which the applicant had regularly attended outside an abortion clinic handing out leaflets and displaying enlarged photographs of foetal remains together with images of Christ. He maintained that he had the right to hand out leaflets and that he would leave people alone if they did not accept them. The domestic court granted an injunction prohibiting him from coming within 250 metres of the clinic for a period of six months on the ground that the users would be in a very vulnerable state of mind and that the Clinic had shown that, in consequence, it had had to offer extra assistance to patients.

66. The applicant complained that his rights under Articles 9 and 10 had been infringed. The Commission found that the applicant's activities were primarily aimed at persuading women not to have an abortion and did not constitute the expression of a belief within the meaning of Article 9.

67. Accordingly, the advice given to the defendant on Article 9 was arguably generous to the stance taken by the claimants in this case. Furthermore, I am not persuaded that the application of Article 14 is of salient significance. The PSPO applies to those of all faiths and none and the reference to prayer is no more than an example of the sort of generically overt behaviour which the order seeks to prohibit rather than a free standing discriminatory provision.

68. I will, however, assume, for the sake of argument, that the advice given in the report in so far as it related to the Christian beliefs of some of the activists was accurate. It does not, however, follow that the resolution of these issues either way would have led me to a different conclusion on the central issues of the case. It would not.

LEGITIMATE AIMS AND COMPETING RIGHTS

69. The rights under Articles 8, 9, 10 and 11 which are engaged in this case are qualified rights which may be subject to restrictions for legitimate aims.

70. In the case of Article 8, 9 and 11, one such legitimate aim is "for the protection of the rights and freedoms of others."

71. In the case of Article 10, the similarly worded legitimate aim is "the protection of the reputation or rights of others".

72. With respect to the relationship between competing rights, the position is set out in the Guide as follows:

> "32. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect (Couderc and Hachette Filipacchi Associés v. France [GC], § 91)."

73. In van den Dungen the Commission found that the injunction amounted to an interference with the Article 10 rights of the protester but that it had the legitimate aim of protecting the rights of others, namely, the visitors and employees of the Clinic.

74. In this case, I am satisfied that the protection of the rights to privacy of the users of the Centre was a legitimate aim.

RATIONAL CONNECTION

75. The next stage of a structured review requires the court to consider whether the measure employed (i.e. the PSPO) is capable of achieving the legitimate aim which interferes with the rights under Articles 9, 10 and 11, namely, whether there is a "rational connection" between the measures and the aim.

76. The creation of the safe zone meant, as was intended, that users of the Centre would be able to make their entrances and exits without inevitably being exposed to the close scrutiny of those whose interests lie in supporting or opposing their decisions to terminate their pregnancies. There is, therefore, a rational connection between the measure employed and the legitimate aim of protecting the Article 8 rights of users of the Centre.

SECTION 59(5) AND LESS RESTRICTIVE ALTERNATIVES

77. Section 59(5) provides that the only prohibitions or requirements that may be imposed under a PSPO are ones that are reasonable to impose in order either to prevent the detrimental effect from continuing, occurring or recurring, or to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence. Further, the related question arises as to what the minimum interference necessary to the claimants' rights would be under a proportionality review.

78. The claimants contend that better, or at least, no worse results could have been achieved by other means. Each of the alternatives relied upon by the claimants were presented for consideration in the Murphy report. The report dealt with the options in the following extract:

> "2.2.26 Members are also asked to note the Options Assessment, which formed part of the report to Cabinet and which is reproduced at Appendix 6 for ease. Officers have had regard to a broad range of powers to deal with the activities that are having a detrimental effect on the quality of life of those in the locality. Careful consideration has been given to whether there are alternative means of achieving a reduction or elimination of the detrimental effect on the quality of life of those in the locality. Each option has its own advantages and disadvantages, which will not be repeated here.
>
> 2.2.27 The proposed PSPO includes the provision of a designated area for use by the represented groups, which is intended to protect and facilitate the rights of those groups. The creation of the area is addressed more fully in Section 5.
>
> 2.2.28 The main issue for the Council is whether the making of the proposed order is a proportionate means of achieving a reduction/elimination of the detrimental effect on the quality of life of those in the locality. Enforcement options which attach to an individual are not thought to be appropriate here as the people present outside the Clinic differ from day to day. The best fit is thought to be a solution which attaches to the space as opposed to an individual. If Members are of the view that other measures are more suited, or ought to be tried first, they should not approve the making of the proposed order. However, Officer advice to Members is that the interference with ECHR rights is in accordance with the law and necessary to protect the rights and freedoms of others."

79. One option open to the defendant would have been to have done nothing. A risk of taking this course was identified to be that of a successful challenge by way of judicial review. In so far as this reflected a genuine concern that a failure to act would be difficult to sustain in the face of the materials upon which the defendant was required to make its decision then the ground was an appropriate one. There is also a reference to the reputational damage which it was feared would be inflicted on the defendant should it fail to act. I share the doubts expressed by the claimants as to the relevance of this latter factor. However, the obvious disadvantage of doing nothing is that the situation giving rise to the conclusion that the quality of life of those in the locality was being detrimentally affected would remain unremedied.

80. Further complaint is made that the defendant could have deployed its powers under section 222(1) of the Local Government Act 1972 which provides that "where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area they may prosecute or defend or appear in any legal

proceedings and, in the case of civil proceedings, may institute them in their own name."

81. This course, however, carries with it the substantial disadvantage that any such proceedings would have to be based upon the commission of specific and substantive legal wrongs and would have to be directed against named individuals or legal entities. The fact that the activities to which the PSPO is directed do not, of themselves, necessarily amount to unlawful conduct is part of the attraction of the PSPO option which, so long as it deployed in full compliance with the statutory criteria and with all requisite restraint, provides a flexible tool with which to enhance the quality of life of those in any locality within the jurisdiction of any given local authority.

82. Similar observations apply to the option of obtaining ad hoc injunctions under the Protection from Harassment Act 1997. Of particular relevance is the risk identified in the Murphy report that the "evidence may not meet the harassment threshold as defined in the Act." Actually, harassment, as such, is not defined in the Act but the case law establishes a relatively high threshold and one which would be particularly difficult to surmount where potential victims are visiting the Centre infrequently and against whom a course of conduct would be difficult to prove. Again, proceedings would have to be directed against named individuals or legal entities.

83. Another option for the defendant identified in the Murphy report, and relied upon by the claimants, would have been that of working with the police. Yet again, however, the effectiveness of such a course would be dependent upon the protesters acting in such a way as to justify police intervention. Of course, the police could intervene in the event of the commission of criminal offences or in response to an actual or threatened breach of the peace. However, in this context, they are singularly ill-equipped to take into account the long term quality of life of those in the locality.

84. Finally, the complainant suggests that the deployment of Community Protection Notices under section 43 of the 2014 Act would have been a preferable option to a PSPO. I disagree. Such an order must be made against an "individual or body" and suffers from the disadvantage that a separate order would have to be sought every time a new participant turned up outside the Centre to engage in the detrimental activities thereby giving rise to the risk of the wholly disproportionate expenditure of time and money.

THE TERMS OF THE PSPO

85. The claimants criticise the breadth of the PSPO. In particular, it is said that the PSPO does not distinguish between groups and that the GCN should be allowed to continue to congregate outside the Centre even if other groups such as Sister Supporter should be excluded. The complaint is made that it is the members of Sister Support who are the cause of the problem and GCN should not suffer as a result.

86. However, the reality is that such a solution wold be completely unworkable. It would be impossible to identify with adequate precision which persons belonged to one group or another or who were acting on their own initiative. Even less attractive would be the notion that only those on one side of the debate should be permitted to ventilate their views outside the Centre. Such a course would represent the very

antithesis of democracy. In any event, a very significant proportion of the conduct found by the defendant to have given rise to a detrimental effect was attributable to the conduct of the pro-life groups and was not limited to the pro-choice lobby. The reality is that there would have arisen overwhelmingly powerful objections to any attempt to allow some but not others to continue their activities immediately outside the Centre.

87. A number of objections are taken by the claimants to the actual wording of the terms of the PSPO. These include, but are not limited to, the risks that: someone standing silently outside the Centre might be subject to criminal penalty; someone who inadvertently takes a photograph in the vicinity of the Centre which includes a Centre user or member of staff could be committing a criminal offence; someone could be committing an offence by listening to a voicemail message on their mobile phone's loudspeaker within the safe zone.

88. I regret to say that I find these, and all other such objections, to be unattractively contrived. In any event, an act in breach of a PSPO, is by the operation of section 67 of the 2014 Act, a crime only when carried out without reasonable excuse. I struggle to believe that any of the unfortunate individuals in the imaginative scenarios conjured up by the claimants would not, in the unlikely event of being prosecuted, be able to raise and sustain the defence of reasonable excuse.

89. In van den Dungen the Commission noted that the injunction against the pro-life protestor was, as was the PSPO in this case, granted for a limited duration and in respect of a defined limited area. The injunction was not aimed at depriving the applicant of his rights under Article 10 but merely at restricting them in order to protect the rights of others. Similar considerations apply here. The PSPO is of limited duration and must be reviewed after three years by the operation of section 60 of the 2014 Act. Furthermore, the creation of the "designated area" further mitigates the impact of the PSPO on the Convention rights of the activists to assemble and express their views.

NECESSARY IN A DEMOCRATIC SOCIETY

90. In the case of Annen v Germany (2015) no. 3690/10 the pro-life applicant was in the habit of distributing leaflets outside the practice of two doctors who ran a day clinic providing abortion services. The leaflets condemned the activities of the two doctors in the strongest possible terms comparing lawful abortion to the atrocities of the holocaust. They also referred to a website where the two doctors were further identified in the same context.

91. The named doctors successfully applied for an injunction against the applicant to prohibit his activities complaining that the leaflets gave the false impression that they were performing illegal abortions.

92. There was no dispute that the injunction: amounted to an interference with the applicant's Article 10 rights, was prescribed by domestic law and was in pursuit of a legitimate aim, namely, the reputation and personality rights of the doctors. The central issue was, therefore, whether the interference was necessary in a democratic society. The relevant principles were helpfully summarised thus:

"52. The fundamental principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have recently been summarised as follows (see Delfi AS v. Estonia [GC], no. 64569/09, § 131, 16 June 2015 with further references):

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...

53. Another principle that has consistently emphasised in the Court's case-law is that there is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest (see, among other authorities, Wingrove v. the United Kingdom, 25 November

1996, § 58, Reports of Judgments and Decisions 1996-V; Ceylan v. Turkey [GC], no. 23556/94, § 34, ECHR 1999-IV; and Animal Defenders International v. the United Kingdom [GC], no. 48876/08, § 102, ECHR 2013 (extracts)).

54. The Court further reiterates that the right to protection of reputation is protected by Article 8 of the Convention as part of the right to respect for private life (see Chauvy and Others v. France, no. 64915/01, § 70, ECHR 2004-VI; Pfeifer v. Austria, no. 12556/03, § 35, 15 November 2007; and Polanco Torres and Movilla Polanco v. Spain, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see A. v. Norway, no. 28070/06, § 64, 9 April 2009; Axel Springer AG v. Germany [GC], no. 39954/08, § 83, 7 February 2012 and Delfi AS, cited above, § 137).

55. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see Hachette Filipacchi Associés v. France, no. 71111/01, § 43, 14 June 2007; MGN Limited v. the United Kingdom, no. 39401/04, § 142, 18 January 2011; Axel Springer AG, cited above, § 84 and Delfi AS, cited above, § 138).

56. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the person who has made the statement in dispute or under Article 8 of the Convention by the person who was the subject of that statement. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in principle be the same in both cases (compare Axel Springer AG, cited above, § 88 with further references).

57. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see MGN Limited v. the United Kingdom, no. 39401/04, §§ 150 and 155, 18 January 2011; Axel Springer

> AG, cited above, § 88; Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, § 66, ECHR 2012 (extracts)).”

93. The Commission went on to consider the application of the test thus set out to the circumstances of the case before it and concluded that the order prohibiting the applicant from further disseminating leaflets in the vicinity of the clinic was in breach of Article 10:

> “62. While the Court furthermore accepts the domestic courts’ position, according to which the applicant’s campaign had been directly aimed at the two doctors, it also notes that the applicant’s choice of presenting his arguments in a personalised manner, by disseminating leaflets indicating the doctors’ names and professional address in the immediate vicinity of the day clinic, enhanced the effectiveness of his campaign. The Court also points out that the applicant’s campaign contributed to a highly controversial debate of public interest. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake (see A, B and C v. Ireland [GC], no. 25579/05, § 233, ECHR 2010)…
>
> 64. Having regard to the foregoing considerations and, in particular, the fact that the applicant’s statement, which was at least not in contradiction with the legal situation with regard to abortion in Germany, contributed to a highly controversial debate of public interest, the Court, in view of the special degree of protection afforded to expressions of opinion which were made in the course of a debate on matters of public interest (see Tierbefreier e.V. v. Germany, no. 45192/09, § 51, 16 January 2014 with further references) and despite the margin of appreciation enjoyed by the Contracting States, comes to the conclusion that the domestic courts failed to strike a fair balance between the applicant’s right to freedom of expression and the doctors’ personality rights.
>
> 65. There has therefore been a breach of Article 10 of the Convention in respect of the order to desist from further disseminating the leaflets.”

94. In contrast, the Commission in van den Dungen concluded on the facts of that case that the injunction against the pro-life protestor was necessary to satisfy a pressing social need and that, in the circumstances of the case as a whole, the interference was proportionate to the legitimate aims pursued.

95. A crucial distinction between van den Dungen and Annen lies in the nature of the rights under Article 8 which fell to be protected. Annen was concerned with the reputation of the two doctors who were being criticised in the applicant’s leaflets and online. In van den Dungen the rights which fell to be protected were primarily those of the users of the clinic. I would add, however, that the Murphy report correctly noted that the Article 10 rights include the freedom “to receive and impart

information" although it went on thereafter to focus solely on the rights of the pro-life and pro-choice activists to impart information rather than the rights of the users of the Centre to receive it. Nevertheless, I do not regard this to be a sufficiently serious omission as to have a bearing on the outcome of this challenge.

96. The Murphy report expressly dealt with the threshold requirement that a PSPO would have to be judged to be necessary in a democratic society before it could be made:

> "**'Is the interference 'necessary in a democratic society'?**
>
> 2.2.19 Members are invited to have regard to the content of the relevant rights as summarised above. They are reminded that all of the rights highlighted, but Articles 10 and 11 in particular, are important rights in a free and democratic society. This has been highlighted by a number of the responses to the consultation.
>
> 2.2.20 If the Council wishes to interfere with these rights the interference must be 'necessary' in order to achieve a stated aim, here the aim that the Council is seeking to achieve is the protection of the rights and freedoms of others. Those rights and freedoms include the freedom to access health care services without impediment. Members have to consider whether this objective is sufficiently important to justify limiting fundamental rights.
>
> 2.2.21 'Necessary' means that the interference must be connected to achieving the stated objective and must not interfere to any greater extent than is required in order to achieve it. In other words the PSPO must strike a fair balance between the competing rights of the represented groups and those affected by their activities.
>
> 2.2.22 The ECHR rights have been firmly in mind during the formulation of proposed order. In addition, these considerations have been kept under review throughout the process of consultation and drafting.
>
> 2.2.23 The principle issue identified by the evidence is the presence of the represented groups at the entry point to the Clinic and their desire to engage with the service users and staff. The evidence base suggests that the location of the groups, independently of what they do whilst they are there, is a problem in and of itself because the service users are sometimes impeded from entering the clinic, feel as though they are being watched or 'judged', are approached and spoken to about the procedure they are considering having or have already undergone, are given leaflets and 'boy' and 'girl' colour-coded rosary beads, are called 'Mum', partners, and relatives supporting service users are also approached and spoken to.

> 2.2.24 Members are reminded of the evidence base (summarised at Section 4 of this report and Appendix 3), which suggests that there is a detrimental effect on the quality of life of other persons who are living in or otherwise visiting the locality. Members are advised that the suggested prohibitions are directed at reducing the identified detrimental effect.
>
> 2.2.25 Balanced against this, Members should be aware that the represented groups say that their presence (of itself) should not be problematic, nor should the handing out of leaflets or attempting to speak to the service users/staff. They deny filming, shouting at or following Clinic service users or their partners, relatives and friends; they deny calling Clinic users 'murderers' or telling clinic users that they will be 'haunted'."

97. In the circumstances of this case, I do not doubt that there has been a significant interference with the rights of activists under Article 9, 10 and 11. I do not underestimate the seriousness of taking steps which are bound to conflict with that special degree of protection afforded to expressions of opinion which are made in the course of a debate on matters of public interest. Nevertheless I am satisfied that the defendant was entitled to conclude on the entirety of the evidence and information available to it that the making of this PSPO was a necessary step in a democratic society. There was substantial evidence that a very considerable number of users of the clinic reasonably felt that their privacy was being very seriously invaded at a time and place when they were most vulnerable and sensitive to uninvited attention. It also follows that, in this regard, I am also satisfied that the defendant was entitled to conclude that the effect of the activities of the protestors was likely to make such activities unreasonable and justified the restrictions imposed in satisfaction of the requirements of section 59(3) (b) and (c) of the 2014 Act.

CONCLUSION

98. Having, in the circumstances of this case, undertaken a structured proportionality review, I have concluded that the defendant's decision to make a PSPO ought not to be quashed in whole or in part on this challenge.

99. Finally, and at the risk of stating the obvious, I would make the following observations:

(i) This is not a case about the rights and wrongs of abortion;

(ii) The genuineness of the motives of the activists on both sides of the debate cannot be doubted;

(iii) My conclusions in this case do not give the green light to local authorities to impose PSPOs as a matter of course upon areas in the immediate vicinity of abortion clinics. Each case must be decided on its own facts.