Neutral Citation Number: [2019] EWCA Civ 1490

Case No: C1/2018/1699

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Turner J
[2018] EWHC 1667 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2019

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE KING
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Florica Alina DULGHERIU (1) **Andrea ORTHOVA (2)**	**Claimants/ Appellants**
- and -	
THE LONDON BOROUGH OF EALING	**Defendant/ Respondent**
-and-	
THE NATIONAL COUNCIL FOR CIVIL LIBERTIES (t/a LIBERTY)	**Intervener**

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- -

Philip Havers QC, **Alasdair Henderson** and **Ben Fullbrook** (instructed by **Tuckers Solicitors**) for the **Appellants**
Ranjit Bhose QC, **Kuljit Bhogal** and **Tara O'Leary** (instructed by **the London Borough of Ealing**) for the **Defendant**
Victoria Wakefield QC and **Malcolm Birdling** (instructed by **Liberty**) made written submissions for the **Intervener**

Hearing dates: 16 & 17 July 2019

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Approved Judgment

Sir Terence Etherton MR, Lady Justice King and Lady Justice Nicola Davies:

Introduction

1. This is an appeal against the order dated 2 July 2018 of Mr Justice Turner, by which he dismissed the appellants' challenge to the validity of the Public Spaces Protection Order made by the London Borough of Ealing ("Ealing") on 10 April 2018 ("the PSPO") prohibiting anti-abortion protests in the immediate vicinity of Marie Stopes UK West London Centre ("the Centre"). The Centre provides family planning services, including abortion services.

2. Two issues lie at the heart of this appeal: (1) whether a local authority has power to make a PSPO where the activity to be regulated impacts only or primarily on the quality of life of occasional visitors to the locality rather than on those who reside or work in the locality or visit it regularly; and (2) whether the restrictions imposed by the PSPO were compatible with articles 9, 10 and 11 of the European Convention on Human Rights ("ECHR").

Legal framework

Anti-Social Behaviour, Crime and Policing Act 2014

3. Chapter 2 of the Anti-Social Behaviour, Crime and Policing Act ("the 2014 Act") empowers local authorities to make PSPOs if the conditions in section 59 are met. That section provides as follows:

> "**59 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."

Orders may last for up to three years, and may be renewed or varied by the local authority (sections 60-61).

4. Section 67 makes it an offence for an individual to fail, without reasonable excuse, to comply with the requirements of a PSPO or to violate any prohibition contained in the order. A person who commits the offence created by section 67 is liable on summary conviction to a fine not exceeding £1000 (level 3 on the standard scale). The

individual may discharge his or her liability by paying a fixed penalty of up to £100 (section 68).

5. Section 72 imposes various duties on the local authority in deciding whether to make, extend, vary or discharge a PSPO. The local authority must have "particular regard" to the rights of freedom of assembly and expression (articles 10 and 11 ECHR respectively). It must also consult with the chief officer of police local to the restricted area, any appropriate community representatives, and the owner or occupier of the land in the restricted area. Section 72(4) imposes further duties (not relevant in this case) to publicise the order and to notify other local authorities of the order before making the order.

6. Section 66 sets out the exclusive procedure by which the validity of PSPOs may be challenged. In summary, PSPOs may only be challenged (1) within 6 weeks of the order being made, (2) by an individual who lives in or regularly works in or visits the restricted area, (3) on the grounds that the local authority did not have the power to make the order (or some part of it), or for lack of compliance with a requirement set out in Chapter 2 of the 2014 Act (ss.66(1)-(3)). The High Court may quash the order or any of its particular prohibitions if satisfied that the local authority did not have the power to make the order, or if the applicant's interests have been substantially prejudiced by a failure to comply with the requirements of Chapter 2 (s. 66(4)-(5)).

European Convention on Human Rights

7. Articles 8, 9, 10 and 11 are set out in Annex A to this judgment.

Factual background

8. The appellants are affiliated to a Christian group called the Good Counsel Network ("GCN"). Prior to the PSPO members of GCN, and other pro-life campaigners, have for a number of years congregated immediately outside the Centre in an effort to dissuade users of the Centre from having abortions. Members of GCN were there every week and usually on a daily basis. Their activities included attempts to engage in dialogue with users entering the Centre in an attempt to dissuade them from having an abortion, handing out leaflets and displaying posters depicting foetuses at various stages of gestation. They have also held group vigils and entered into either vocal or silent prayer.

9. In 2015 pro-choice activists, affiliated to a group called Sister Supporter, began more frequently to protest against the aims and methods of the anti-abortion protestors outside the Centre. This generated an atmosphere of tension.

10. In 2017 Sister Supporter organised a petition calling on Ealing to ban protestors from the vicinity of the Centre. Ealing encouraged the opposing groups to reach a compromise, but those efforts failed. Ealing then considered whether to make a PSPO. It prepared a draft PSPO and undertook the statutory consultation on its terms. The draft PSPO in effect contained a prohibition on all abortion related protest within a substantial safe zone surrounding the Centre ("the Safe Zone") save as to limited protest within a designated area 100 metres away from the entrance to the Centre ("the Designated Area"). The terms of the restrictions were materially identical to the PSPO eventually made by Ealing, which we summarise below.

11. The consultation attracted 2,181 online responses in addition to a number of written representations. As summarised in the consultation report, 83.2% of all respondents to the consultation agreed overall with the scope of the Safe Zone, with 67.3% agreeing strongly. 85.4% agreed with the restrictions in the Safe Zone. 60.2% agreed with the scope of the proposed Designated Area. 75.1% agreed with the restrictions in the Designated Area.

12. On 3 April 2018 a 40 page report based on the consultation was presented to Ealing's cabinet recommending that a PSPO be made ("the Murphy report"). It was accompanied by a series of exhibits, running to thousands of pages, including an equalities analysis assessment. The report set out over 19 sections the issues before members.

13. Section 4 was entitled 'Evidence Base', and summarised the protestors' activities and their impact, at Section 4, paragraphs 4.1 - 4.5.3

14. Turner J summarised the evidence before Ealing in the following terms:

> "*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."

15. Ealing resolved to make the PSPO, which is dated 10 April 2018 and came into effect on 23 April 2018. It prohibited 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."

16. Subject to certain restrictions on the number of participants (no more than four); size of placards (no larger than A3) and activity (no shouting or amplified sound or music), protests continued to be allowed in the Designated Area inside the Safe Zone. The PSPO has no effect outside of the Safe Zone.

The proceedings

17. The appellants commenced these proceedings under section 66 of the 2014 Act by issuing a CPR Part 8 claim form in the Queen's Bench Division of the High Court on 27 April 2018, claiming an order that the PSPO be quashed on the grounds that:

    1) there was insufficient evidence for Ealing to be reasonably satisfied that the activities in the vicinity of the Centre had a detrimental impact on those in the locality;

    2) the terms of the PSPO were far more extensive than was reasonable to impose to prevent the detriment alleged; and

    3) the prohibitions in the PSPO constituted an unjustified interference with Articles 9, 10, 11 and 14 ECHR.

18. The hearing of the action took place before Turner J on 7 June 2018.

Turner J's judgment

19. The Judge first considered whether the section 59 requirement of detriment to those in the locality was met. He then considered whether the unreasonableness of the activities justified the terms of the PSPO, which turned on the question of whether the PSPO constituted a disproportionate interference with the protestors' ECHR rights.

20. As to the meaning of "those in the locality", it was argued before the Judge that that phrase was limited to those who reside or work in or regularly visit the locality, and could therefore not include occasional visitors to the Centre. The Judge rejected this argument (at [38]-[43]). He said that the literal meaning of "those in the locality" was not confined to regular visitors; such an approach would deprive Ealing of the power to impose PSPOs in relation to detriments suffered by a mainly transient population (e.g., tourist attractions); and there was no reason to construe "those in the locality" as narrowly as the "interested person" in section 66, which restricts standing to challenge a PSPO to those who live in or regularly work in or visit the restricted area: the use of different terms in each sections militated in favour of those phrases meaning different things.

21. Turner J then reviewed (at [44]-[55]) the evidential basis for Ealing's view that those in the locality were suffering a detriment to their quality of life as a result of the protestors' activities, and concluded that Ealing had reasonable grounds to be satisfied that the conditions in section 59(2) were satisfied.

22. On the question of whether the restriction on the activities was justified by their unreasonableness, the Judge held (at ([56]-[63]) that the answer to that question was inextricably linked with the question of whether there was a disproportionate interference with the protestors' ECHR rights. He held that the article 8 rights of users of the Centre were engaged on the basis that both being pregnant and seeking or

having an abortion are aspects of life that the users of the Centre would reasonably wish to keep private. Users of the Centre of reproductive age were very likely to be seeking or to have had an abortion. To be the focus of public attention at that time was an invasion of privacy even if it occurred in a public place. He also held that the rights of the staff or other visitors of the Centre were not engaged on the facts.

23. The Judge held (at [65]-[76]) that the restrictions on the protesters' rights under articles 9 (freedom of thought and religion), 10 (freedom of expression), 11 (freedom of assembly) and 14 (non-discrimination in the protection of the ECHR rights) were prescribed by law, namely by section 59; that the protection of the service users' privacy was a legitimate aim; and that there was a rational connection between the PSPO and that aim. He also rejected a number of less restrictive alternatives to the making of a PSPO.

24. As to whether the interference with the protestors' rights was necessary in a democratic society, the Judge held (at [90]-[97]) that it was, given the significance of the interference with the article 8 rights of the service users visiting the Centre.

25. For those reasons, the Judge concluded that the activities were unreasonable and the PSPO was justified for the purposes of section 59(3)(b) and (c).

Grounds of appeal

26. The appellants' Grounds of Appeal are as follows:

1) the Judge erred in holding that the phrase "those in the locality" in s.59(2)(a) of the 2014 Act applies to occasional visitors such as women who visit an abortion clinic for abortion procedures;

2) the Judge erred in failing to adopt a merits-based approach to the justification for the PSPO;

3) the Judge erred in holding that the article 8 ECHR rights of those using the Centre were engaged;

4) the Judge erred in giving too little weight to the appellants' article 9 ECHR rights;

5) the Judge failed to give any or any sufficient consideration to whether the terms of the PSPO could have been formulated in a less restrictive way;

6) when considering whether the PSPO constituted an interference that was necessary in a democratic society, the Judge gave insufficient weight to the appellants' article 10 and 11 ECHR rights.

Respondent's Notice

27. Ealing has issued a respondent's notice seeking to uphold the Judge's order on three additional bases:

1) even if the Judge did err in failing to adopt a merits-based approach to reviewing the justification for PSPOs, on the evidence he would have reached the same conclusion;

2) even if the article 8 rights of the service users were not engaged, he would still have held that the interference with the appellants' ECHR rights was justified by virtue of the objectives set out in articles 9(2), 10(2) and 11(2);

3) the Judge was wrong to hold that the article 8 rights of the staff and persons accompanying service users were not engaged.

The Intervener

28. By order dated 23 May 2019 Liberty was given permission to intervene in the appeal by way of written submissions only. It subsequently filed and served written submissions.

Discussion

Ground 1 – meaning of "those in the locality"

29. The appellants' submission is that visitors to the Centre do not fall within the words "those in the locality" in section 59(2)(a) because those words do not encompass occasional visitors. The appellants' case is that the words extend only to members of the local community and that the purpose of the statutory power for a local authority to make a PSPO is to protect the community from anti-social behaviour of a continuing and persistent nature.

30. Mr Philip Havers QC, for the appellants, advanced several arguments in support of those submissions. He pointed out that the White Paper "Putting Victims First - More Effective Responses to Anti-Social Behaviour" published in May 2012, which anticipated the 2014 Act, said (at Annex C para 44) that "The Community Protection Order (public spaces) is intended to deal with a particular nuisance or problem in a particular area that is detrimental to the local community's way of life" by imposing conditions on the use of that area which apply to everyone, and (at Annex C para 46) that the test for issuing the order would be that "the local authority reasonably believes that the behaviour is detrimental to the local community's quality of life, and that the impact merits restrictions being put in place in a particular area".

31. Mr Havers also referred to the Explanatory Notes to the 2014 Act, which used similar language to the White Paper in describing PSPOs, stating (at [173]) that "The public spaces protection order (referred to as the community protection order (public places) in the White Paper) 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."

32. The Explanatory Notes gave as examples prohibiting the consumption of alcohol in public parks, ensuring dogs are kept on a leash in children's play areas and prohibiting spitting in certain areas. The Explanatory Notes stated (at para. 177) that the two-part test for issuing the order would be that the authority is satisfied on reasonable grounds that activities carried on, or likely to be carried on, in a public

place are detrimental to the local community's quality of life, and that the impact justifies restrictions being put in place in a particular area. It stated that the behaviour must also be ongoing and unreasonable.

33. Mr Havers pointed out that Chapter 2 of the 2014 Act, which deals with PSPOs, is in Part 4 of the 2014 Act, which has the title "Community Protection".

34. Mr Havers observed that both section 43(1)(a) of the 2014 Act, which addresses the power to issue a community protection notice, and section 59(2)(a), which addresses the power of the local authority to make a PSPO, describe the relevant conduct as having a detrimental effect on "quality of life", which was the same expression used in the White Paper and the Explanatory Notes, as mentioned above. He submitted that indicated a continuing intention that the legislation was intended to protect those with a settled life in the community. He linked that submission to the condition in section 53(3)(a) that the effect, or likely effect, of the activities "is, or is likely to be, of a persistent or continuing nature". He said that such a condition would not practically apply to those who visit the locality only once or twice.

35. Mr Havers also relied on the various references to "the community" in the latest statutory guidance on PSPOs issued by the Home Office (updated in December 2017). The guidance says, for example, that PSPOs are intended to deal with a particular nuisance or problem in a specific area "that is detrimental to the local community's way of life"; it advises that discussing potential restrictions and requirements prior to issuing a PSPO with those living or working nearby may help to ensure that the final Order "better meets the needs of the local community"; it says, in relation to homeless people and rough sleepers, that PSPOs "should only be used to address any specific behaviour that is causing a detrimental effect on the community's way of life" and should define precisely the specific activity or behaviour "that is having the detrimental impact on the community"; it says that Parish and Town Councils wishing to deal with dog control issues should discuss with their principal authority whether a PSPO would provide the means "to address the issues being experienced by the local community", and that a PSPO should target specifically the problem behaviour that is having "a detrimental effect on the community's way of life" rather than everyday sociability, such as standing in groups.

36. Section 67 of the 2014 Act provides that it is an offence for a person, without reasonable excuse, to break the terms of a PSPO. Mr Havers submitted that, in accordance with the usual rules of statutory interpretation where a criminal offence is created, the provisions of section 59 should be interpreted restrictively rather than expansively.

37. He submitted that another reason for a restrictive interpretation of section 59 is the requirement in section 72(1) that any local authority, when deciding whether to make a PSPO and, if so, what it should include or whether to make the other decisions in relation to a PSPO mentioned in section 72(1), must have particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 ECHR.

38. Mr Havers said that the appellants accept and endorse the view of May J in *Summers v London Borough of Richmond Upon Thames* [2018] EWHC 782 (Admin), [2018] 1 WLR 4729, at [24], that the expression "those in the locality" in section 59 of the

2014 Act "must be read to include those who regularly visit or work in the locality, in addition to residents".

39. All those arguments were skilfully and elegantly put by Mr Havers but we nevertheless reject this Ground of Appeal.

40. Mr Havers devoted considerable time to the references to "the community" in the White Paper, the Explanatory Notes and the Statutory Guidance but none of those are a substitute for the words of statute themselves. There is no mention of "the community" in section 59. The White Paper was, at the end of the day, no more than a statement of future intent, affected by all that followed between the publication of the White Paper and the final enactment of the 2014 Act. The 2014 Act even changed the name from "Community Protection Order (Public Spaces)" to "Public Spaces Protection Order". The Explanatory Notes state, at their very beginning, that they have been prepared by the Home Office and do not form part of the 2014 Act and have not been endorsed by Parliament. They state that they are not, and are not meant to be, a comprehensive description of the 2014 Act.

41. It is clear from the terms of the 2014 Act itself that Parliament deliberately decided not to limit, by way of a statutory definition or statutory guidance, the expression "those in the locality". The looseness of that expression is to be contrasted with the express limitation of an "interested person" who may apply under section 66 of the 2014 Act to the High Court to challenge the validity of PSPO or its variation. "Interested person" is defined in section 66(1) as "an individual who lives in the restricted area or who regularly works in or visits that area". Similarly, the obligation on a local authority under section 72 of the 2014 Act to consult before making, extending the duration of, varying or discharging a PSPO, is limited to certain persons representing the police and the community and (under section 72(4)(c)) to "the owner or occupier of land within the restricted area". Parliament plainly decided not to limit section 59(2)(a) in either of those ways.

42. Accordingly, while we agree with May J in *Summers* that the expression "those in the locality" in section 59 includes those who regularly visit or work in the locality, in addition to residents, it will depend on the precise local circumstances whether or not it extends to others.

43. We do not consider that the Home Office's statutory guidance throws doubt on that conclusion. While it is true that there are several references to "the community" in the guidance, read as a whole the guidance is compatible with Ealing's case that it was entitled to regard visitors to the clinic as falling within the expression "those in the locality" in section 59(2)(a) even though such visitors would only visit once or twice. The "Introduction" to the guidance states that the first part of the guidance focuses specifically on putting victims at the heart of the response to anti-social behaviour. The guidance describes the purpose of a PSPO as being "to stop individuals or groups committing anti-social behaviour in a public place". It correctly summarises the statutory test for behaviour which can be restricted by a PSPO as behaviour which has, or is likely to have, a detrimental effect on the quality of life of those in the locality, is persistent or continuing in nature, and is unreasonable. It states that a local authority can make a PSPO in any public space within its own area, and that the definition of public space is wide and includes any place to which the public or any section of the public has access, on paying or otherwise, as of right or by virtue of

express or implied permission, for example a shopping centre. The guidance envisages, therefore, that visitors to a shopping centre might fall within the expression "those in the locality" in section 59(2)(a). Mr Havers agreed that such visitors might fall within the expression but he limited them to regular visitors. Such a rigid and hard edged limitation, which the appellants would also apparently apply to patients in hospitals and hospices and medical services generally and those visiting such patients, would not only be unworkable in practice in distinguishing regular from irregular visitors but would potentially produce considerable uncertainty as to the legality of a PSPO and is highly unlikely to have been the intention of Parliament.

44. The reference to the protection of victims or potential victims in the statutory guidance is a convenient reference point for the submissions on behalf of both the appellants and Ealing in the present case that, although distinct, the requirement in section 59(2)(a) that the activities must have had a "detrimental effect on the quality of life" of those in the locality and the requirement in section 59(3)(a) that the effect, or the likely effect of the activities "is, or is likely to be, of a persistent or continuing nature", may throw light on whether on the facts any particular group or categories of people fall within the expression "those in the locality". The appellants' argument is that it is very unlikely that the effect of an activity on a person who visits only once or twice will have a persistent or continuing detrimental effect on their quality of life. The evidence in the present case, however, is that it is both possible and has indeed been the case, as the Judge observed at [43], that some of those who have visited the Centre have been left with significant emotional and psychological damage lasting substantial periods of time by the conduct of GCN and others protesting outside the Centre immediately before and immediately after the visit to the Centre. There is also evidence that those activities have led some women to cancel their appointment at the Centre, delaying advice and treatment, with consequential potential physical harm to them.

45. We have set out above the Judge's summary of the evidence before Ealing. He subsequently said as follows:

> "54. … 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 [of those] 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. …"

46. It is clear from the judgment as a whole that the Judge was there referring particularly to the women, their family and supporters, who visit the Centre for abortion procedures, to whom he referred at [39] of his judgment at the beginning of the section addressing the meaning of "those in the locality". He was satisfied, therefore, that it was reasonable for Ealing to conclude on the evidence that the activities of GCN and other protest groups outside the Centre had a detrimental effect on the quality of life of those visiting the Centre which was, or was likely to be, of a persistent or continuing nature. There is no appeal against that finding.

47. We agree with May J in *Summers* at [25] that the 2014 Act gives local authorities a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. Equally, in deciding who is "in the locality" for the purpose of protection from such activities by way of a PSPO a local authority will (applying the words of May J to that issue) use its local knowledge, taking into account local conditions on the ground.

48. We do not consider there is any scope for narrowing the proper interpretation of the expression "those in the locality" in section 59(2)(a) on the ground that it is a criminal offence to breach a PSPO or because section 72(1) requires a local authority, in deciding whether to make, extend or vary a PSPO, to have particular regard to rights of freedom of expression and freedom of assembly in articles 10 and 11 ECHR. Any general presumption in relation to statutory provisions which criminalise conduct or activity (which was not explored in any detail before us) must be subject to the particular statutory provisions and framework in question. As regards section 72(1), its provisions are neutral on the issue of the proper interpretation of section 59(2)(a) as they pre-suppose that it is indeed lawful, where the statutory conditions for a PSPO are satisfied, for the PSPO to interfere with rights under articles 10 and 11 ECHR.

49. We conclude that Ealing was correct to interpret the expression "those in the locality" in section 52(2)(a) as capable of embracing occasional visitors, and were entitled to decide on the facts that the women, their family members and supporters visiting the Centre, in addition to staff and local residents, fell within that section.

Ground 3 – engagement of article 8

50. It is convenient to consider next the issue whether the Judge was correct to conclude (in [63]) that the article 8 ECHR rights of those using the Centre were engaged.

51. Mr Havers submitted that none of the three cases cited by the Judge in this part of his judgment - *Peck v United Kingdom* (2003) no. 44647/98, *Couderc v France* [2016] EMLR 19 and *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481 - are factually comparable to the present case or supports the Judge's conclusion on the engagement of article 8. In brief, Mr Havers said that, in contrast to the situation in *Peck*, which concerned the disclosure to the media of closed circuit television footage, including images of the applicant attempting to commit suicide, the Judge made no finding in the present case of any photographs being taken of any service user, and there was certainly no evidence that photographic images have been recorded or published or that there was any attempt to identify anyone in them. The issue in *Couderc* was whether a magazine had infringed the article 8 rights of Prince Albert II of Monaco in publishing an article about whether Prince Albert was the father of a child, with an accompanying photograph showing Prince Albert, the child and the child's mother, and whether the decisions of the French courts circumscribing that publication was a breach of the publisher's article 10 rights. Mr Havers submitted that the case had no relevance as it was accepted before the European Court of Human Rights ("ECrtHR") that article 8 was engaged; the case concerned the publication to a worldwide audience, and, moreover, the Grand Chamber emphasised the importance of the right to freedom of expression under article 10 and held there had been a violation of article 10. Mr Havers emphasised that, unlike the present case, *Murray* was also a case about whether an unauthorised photograph and its publication in a

national newspaper infringed the article 8 rights of the claimant, in that case the infant child of a famous author.

52. Mr Havers advanced the following reasons as to why the article 8 rights of the visitors to the Centre were not engaged. First, the activities which are the subject of the PSPO were in a public place, taking advantage of a public highway. Secondly, no record was made or kept by the protesters of what the service users were doing. Thirdly there was no publication of what the service users were doing. Fourthly, the cases relied upon by the Judge all concerned publication of what the claimant was doing. Fifthly, the visitors to the Centre could not have more than a limited expectation of privacy as they were visiting the Centre in a public place and by means of a public highway. Sixthly, there could be no expectation on the part of the service users that no one would seek to engage with those who entered the Centre as abortion is a controversial topic of general public importance. On the contrary, the expectation was that there would be some engagement by protesters with those seeking to use the services of the Centre. Had the users of the Centre wished to avoid such engagement, they could have gone to another clinic or hospital which was less publicly exposed.

53. We have no hesitation in rejecting Ground 3 of the appeal. The decision of a woman whether or not to have an abortion is an intensely personal and sensitive matter. There is no doubt that it falls within the notion of private life within the meaning of article 8. As the ECrtHR said in *A v Ireland* [2011] (2011) 53 EHRR 13:

> "212. The Court notes that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to personal autonomy and personal development (see Pretty, cited above, § 61). It concerns subjects such as gender identification, sexual orientation and sexual life (see, for example, Dudgeon v. the United Kingdom, 22 October 1981, § 41, Series A no. 45, and Laskey, Jaggard and Brown v. the United Kingdom, 19 February 1997, § 36, Reports 1997-I), a person's physical and psychological integrity (see the judgment in Tysiąc, cited above, § 107) as well as decisions both to have and not to have a child or to become genetic parents (see Evans, cited above, § 71)."
>
> …
>
> "214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her eligibility for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8."

54. As Lady Hale said in *Re Northern Ireland's Human Rights Commission's application for judicial review* [2018] UKSC 27, [2019] 1 All ER 173 at [6]:

> "For many women, becoming pregnant is an expression of their autonomy, the fulfilment of a deep-felt desire. But for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity."

55. In *P v Poland* [2012] ECHR 1853, which concerned difficulties the applicants had encountered in trying to obtain authorisation for an abortion under the laws permitting an abortion in Poland, the ECrtHR said (at paragraph 99) that the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion. The court concluded that the authorities had failed to comply with their positive obligation to secure to the applicants effective respect for their private life and so there had been a breach of article 8 ECHR. The court said the following:

> "111. The Court is of the view that effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent (Evans v. the United Kingdom [GC], no. 6339/05, § 71, ECHR 2007 I; R.R. v. Poland, cited above, § 180). The nature of the issues involved in a woman's decision to terminate a pregnancy or not is such that the time factor is of critical importance."

56. In a subsequent passage (at paragraph 128) the Court said, in relation to the need for protection of medical data in order to maintain, in addition to a patient's privacy, the person's confidence in the medical profession and in the health service in general, that without such protection those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health.

57. The present case, therefore, must be seen in the context of the exercise by those visiting the Centre of their right under article 8 to access advice on abortion and medical procedures for abortion available under the laws of this country. That is a reflection of the centrality under article 8 of the protection of every individual's right to personal autonomy. There is no right to protection, however, unless there is a reasonable expectation of privacy or, which the authorities treat as synonymous, a legitimate expectation of protection: see, for example, *Re JR38* [2015] UKSC 42, [2016] AC 1131, at [84]-[88].

58. In assessing whether article 8 is engaged by the activities of protesters outside the Centre, it is necessary to bear in mind, as Mr Ranjit Bhose QC, for Ealing, pointed out, that service users visiting the Centre are women in the early stages of pregnancy. Some are children. Some are victims of rape. Some are carrying foetuses with abnormalities, even fatal abnormalities. Some may not have told friends or family. Their very attendance at the Centre is a statement about highly personal and intimate matters. They may be in physical pain and suffering acute psychological and emotional issues both when attending and leaving the Centre. There is no alternative way of arriving at and leaving the Centre except across a public space, which they would naturally wish to cross as inconspicuously as possible.

59. Mr Bhose put forward the following 12 respects in which the activities of protesters, including but not limited to GCN, intruded on service users visiting the Centre: (1) seeking out and identifying women of reproductive age approaching the Centre, identifying them as pregnant women attending an abortion clinic; (2) standing directly outside the entrance to the Centre so that service users had no alternative to engaging with them, there being no alternative means of access or exit; (3) engaging with the service uses directly by word or conduct, whether or not the service users wanted any engagement; (4) engaging with service users about the choice they had made and seeking to persuade them to change their ways, including in some cases telling the service users that what they were doing was morally wrong; (5) giving service users literature, coloured pink or blue, which advised that it was not too late to save the life of the baby and describing possible physical and psychological complications, and also handing out pink and blue rosary beads; (6) displaying photographs on the ground of foetuses at different periods of gestation; (7) praying, both audibly and not, for the souls of foetuses in the Centre, intending to provoke, and provoking, feelings of guilt on the part of service users; (8) conducting group vigils, drawing attention to service users when coming and going; (9) speaking to service users when leaving the Centre; (10) handing leaflets to women leaving the centre; (11) taking or pretending to take photographs of service users; (12) further drawing attention to women attending the Centre when there were counter protesters.

60. There is evidence to support all of those activities on the part of pro-life protesters. There is some repetition and overlap in the activities mentioned in Mr Bhose's list. We consider it is clear, nevertheless, that they engaged the article 8 rights of those visiting the Centre both from the perspective of the right to autonomy on the part of service users in wishing to carry through their decision to have an abortion and from the reasonable desire and legitimate expectation that their visits to the Centre would not receive any more publicity than was inevitably involved in accessing and leaving the Centre across a public space and highway.

61. That conclusion is further reinforced by the evidence that some of those who have visited the Centre have been left with significant emotional and psychological damage by the conduct of GCN and others protesting outside the Centre immediately before and immediately after visiting the Centre, and evidence that those activities have led some women to cancel their appointment at the clinic, delaying advice and treatment, with consequential potential physical harm to themselves. All of that is borne out by the Judge's unappealed findings of fact (at [54] and [55]), set out above, that the activities of GCN and other protest groups outside the Centre have had a detrimental effect on the quality of life of those visiting the Centre which was, or was likely to be, of a persistent or continuing nature.

62. In the circumstances, it is not necessary for us to address the claim in Ealing's respondent's notice that the Judge was wrong to hold that the article 8 rights of non-service using visitors to the Centre and/or staff and/or local residents were not engaged. Mr Bhose did not develop that claim as he accepted that, in all the circumstances, the article 8 rights of those other persons does not add materially to Ealing's case.

Ground 2 – failure to carry out a "merits-based" approach

63. Having found that the article 8 rights of women visiting the Centre were engaged, the Judge had to balance, on the one hand, those rights and, on the other hand, the rights of protesters, including the appellants and other members of GCN, to exercise their rights to manifest their religion under article 9 and their rights to freedom of expression and freedom of assembly under articles 10 and 11 ECHR respectively. The Judge had to consider whether the PSPO made by Ealing was both a necessary and proportionate restriction of the appellants' article 9, 10 and 11 rights in order to accommodate the article 8 rights of women visiting the Centre.

64. It is common ground that the correct approach of the court, when considering the justification of any limitation or interference under articles 9(2), 10(2) and 11(2), is not to determine whether the decision maker has followed a defective decision-making process but rather the court must form its own view as to whether the applicant's ECHR rights have been infringed: *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [29]; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, at [31], [37].

65. The appellants contend that the Judge failed to form his own view of whether the PSPO was a justified restriction or limitation of the appellants' articles 9, 10 and 11 rights. They say that he wrongly relied upon what he regarded as the propriety of Ealing's own assessment of that issue. They rely on [96] of the Judge's judgment, in which he said that "[t]he 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" and set out the relevant paragraphs of the Murphy report addressing that issue, and [97] of the judgment, which was as follows:

> "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."

66. Mr Havers submitted that the Judge there expressed himself in the traditional way for a public law challenge on the standard *Wednesbury* approach.

67. In addition to the language used in that paragraph of the judgment, Mr Havers submitted that it is clear that the Judge approached the matter of justification incorrectly because, while the judge referred at [64] and [96] to the way in which articles 9, 10 and 11 and justification had been addressed in the Murphy report, there is nowhere to be found in the judgment any balancing exercise by the Judge himself. He did not examine the content and significance of the appellants' and other protesters' article 9, 10 and 11 rights and state why, in the light of the evidence, he concluded that the interference with those rights by the PSPO was justified.

68. The language of the Judge at [97] was not well chosen but, reading the judgment as a whole, we are satisfied that he did not fall into the error of failing to form his own judgment on justification as opposed to merely considering whether Ealing had reached its decision on the PSPO by a proper process.

69. The Judge was perfectly aware of the correct approach because he quoted at [25] the judgment of Beatson LJ in *R (A) v The Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706 at [36] and [37]. In those paragraphs Beatson LJ stated that the court had to make its own assessment of the factors considered by the decision-maker, and he cited the *Denbigh High School* case, quoting the statement of Lord Bingham in that case at [30] that proportionality must be judged objectively by the court, and the *Miss Behavin'* case, quoting the statement of Baroness Hale at [31] that it is the court which must decide whether ECHR rights have been infringed.

70. Further, at [26] the Judge quoted the following description of the structured proportionality test as applied in English law in *De Smith's Judicial Review*, 8th edition at paragraph 11-081:

> "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."

71. The Judge then said (at [27]) that he was satisfied that such an approach was consistent with the decisions of the most recent authorities on the point.

72. As mentioned above, the Judge reviewed the evidence and information available at [44]-[56], stating at [54] that "there was a considerable tranche of evidence and information before the defendant of activities which many would reasonably consider to be fully capable of having a detrimental effect on the quality of life [of those] who were exposed to them whatever the choice of adjective used to describe them". He then addressed at [56]-[63] the issue of engagement of the article 8 rights of visitors to the Centre, concluding (at [62] and [63]) that the article 8 rights of service users of the

Centre were engaged on the facts of this case but the article 8 rights of other visitors, local residents and staff working at the Centre were not. It is clear from [68] and [69] that he formed the view that rights under articles 9, 10 and 11 were also engaged. It is clear from [72], where he quoted a passage from the Guide of the Council of Europe to article 8, that he was conducting the review on the footing that rights under article 8 and rights under article 10 in principle deserve equal respect. At [74] he said that he was satisfied that the protection of the rights to privacy of the users of the Centre was a legitimate aim. At [75] he said that the next stage of the structured review required the court to consider whether the PSPO was capable of achieving the legitimate aim which interfered with the rights under articles 9, 10 and 11, namely whether there was a rational connection between the measures in the PSPO and the aim. He found at [76] that there was a rational connection between the PSPO and the legitimate aim of protecting the article 8 rights of users of the Centre because the creation of the Safe Zone meant that service users of the Centre would be able to make their entrances and exits without inevitably being exposed to the closer scrutiny of those whose interests lay in supporting or opposing the users' decisions to terminate their pregnancies. There can, therefore, be no doubt that up to this point in his analysis the Judge was approaching the review on the entirely correct basis of deciding matters for himself and not simply relying on the Murphy report.

73. We consider that it is wholly unrealistic to think that the Judge simply forgot the correct approach to justification at the very end of his judgment in [97] when expressing his conclusions on necessity. Indeed, [97] begins with the Judge expressing his own view that, in the circumstances of the case, the PSPO was a significant interference with the rights of activists under articles 9, 10 and 11. We consider that it is more realistic to read the Judge's language later in [97] as a legitimate acknowledgment that his own view that the PSPO was a justified interference with the appellant's and other protesters' article 9, 10 and 11 rights was supported by the views of Ealing, which had been reached after a full, careful and comprehensive consideration of the issues following extensive consultation.

74. We therefore reject the submission that the Judge failed to determine for himself whether the appellants' ECHR rights had been breached.

Ground 4 - the appellants' article 9 rights

75. The criticism of the appellants in this Ground of Appeal is that the Judge underplayed the significance of the article 9 rights of the appellants and other pro-life protesters to manifest their religion and religious beliefs by seeking to persuade women visiting the Centre not to have an abortion. The members of GCN are motivated by their Christian faith and belief in the rights of unborn children. It is not in dispute that they and other protesters have prayed both silently and vocally outside the Centre and kept vigils for religious reasons.

76. Mr Havers submitted that the case law cited by the Judge in this context, *Van Den Dungen v The Netherlands* [1995] ECHR 59, in which the European Commission on Human Rights held that the applicant's activities aimed at persuading women not to have an abortion did not constitute the expression of a belief within the meaning of article 9(1), was confined to its particular facts and had been, in any event, superseded by more recent authority. Mr Havers cited, in that context, *Eweida v United Kingdom* (2013) 57 EHRR 8 and *Barankevich v Russia* (2008) 47 EHRR 8.

77. The ECrtHR held in *Eweida*, that the applicant's insistence on wearing a cross visibly at work, motivated by her desire to bear witness to her Christian faith, was a manifestation of her religious belief and attracted the protection of article 9. It held (at paragraph 82) that it is sufficient that the act in question is intimately linked to the religion or belief, and there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question. In *Barankevich* the ECrtHR said (at paragraph 43) that, under article 9, "freedom to manifest one's religion includes the right to try to convince one's neighbour".

78. It is a well established principle of the jurisprudence of the ECrtHR that, as enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of the meaning of a "democratic society", within the meaning of the ECHR, and, as regards religion, is one of the most vital elements that go to make up the identity of believers and their conception of life: *Eweida* at paragraph 79.

79. For its part, Ealing relies on the *Van Den Dungen* case and on the decision of the European Commission on Human Rights in *Van Schijndel v The Netherlands* (1997) no. 30936/36. *Van Schijndel* rejected as manifestly ill founded the applicants' complaint that their conviction for breach of the peace for praying in the corridor of an abortion clinic was contrary to their article 9 rights. The Commission, with reference to the *Van Den Dungen* case, said that article 9 does not always guarantee the right to behave in the public sphere in a way which is dictated by a belief.

80. Ealing accepts that the vigils and other acts of prayer of protesters outside the Centre fall within article 9 but contends that the other activities of the appellants and other members of GCN do not have a sufficient nexus with religious belief to fall within article 9.

81. We do not need to resolve that question in order to reach the conclusion, which we do, that Ground 4 of the appeal fails. The Judge plainly accepted, for the purposes of his justification review, that article 9 rights were engaged: see [68], [69], [70], [75]. He quoted in [64] paragraph 2.2.10 of the Murphy report, which stated that Ealing was aware some of the represented groups believed their activities were part of their right to manifest their religion or beliefs, that those were important rights and that Ealing should be reluctant to interfere with them, and that the proposed PSPO would interfere with them. The Judge stated in [97] that he did not doubt that there had been "significant interference with the rights of activists" under article 9. There is simply no indication that he underplayed the significance of those rights. It is plain, moreover, that the article 9 rights in play could not have carried more weight, in the balancing exercise, than the rights of protesters under articles 10 and 11, to which Ealing was required by section 72 of the 2014 Act to have particular regard when deciding whether to make the PSPO. Engagement of the article 9 rights of protesters could not have tipped the balance against the making of the PSPO if Ealing was otherwise justified in making it. We address below the specific issue of the prohibition of prayer by the PSPO.

Ground 5 - a PSPO with less restrictive terms – and

Ground 6 – relative importance of the appellants' article 10 and 11 rights

82. Justification under article 10(2) and article 11(2) requires, as part of the structured proportionality review, that the limitation of the ECHR rights must be the least restrictive possible. There is an overlapping question of whether the measure is necessary in a democratic society, which is essentially a question of whether a fair balance has been struck between the competing rights and interests: *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700, at [20]. That latter question arises in a particularly acute form in a case, such as the present, where there is a tension between different ECHR rights.

83. Provided that the Judge carried out correctly the proportionality and balancing exercise, the Court cannot interfere with his conclusion on those matters as his conclusion will not have been "wrong" within the meaning of CPR 52.21(3): *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] WLR 4079.

84. Mr Havers submitted that, in relative terms, the significance of the appellants' article 10 and 11 rights was so great and the nature of the activities of the pro-life protesters so unintrusive that the Judge should have concluded that the PSPO should not have been made at all. This is an attack on the making of the order as such, whatever its particular terms. It therefore amounts to the claim that making the PSPO as such was a disproportionate interference with articles 10 and 11 or, even if not disproportionate, was not necessary in a democratic society.

85. In *Annen v Germany* [2015] ECHR 1043 the ECrtHR emphasised the importance of article 10 in ECHR cases where the relevant conduct contributes to a highly controversial debate of public interest. In that case the court held that an injunction against the applicant prohibiting him from (1) disseminating in the immediate vicinity of a clinic leaflets containing the names of two medical practitioners operating there, and asserting that unlawful abortions were performed in the clinic, and (2) mentioning the doctors' names and address in the list of "abortion doctors" on a specified website, was a breach of article 10 even though the doctors' article 8 rights were engaged by reason of their right to the protection of their reputation, which was part of the right to respect for private life. Even in the Opinion of the two dissenting judges it was acknowledged that participation in a debate involving moral and ethical issues normally calls for a high degree of protection in terms of free-speech requirements. The majority judgment (at paragraph 62) said :

> "… 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."

86. In *Couderc* the ECrtHR said the following about the right of freedom of expression in article 10:

> "88. 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 enshrined in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly …."

87. As regards article 11 ECHR, Mr Havers referred to *Lashmankin v Russia* (2019) 68 EHRR 1, in which the ECrtHR said (at paragraph 405) that the right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in article 11(2). Having reiterated (at paragraph 412) the general principle that the right to freedom of assembly is one of the foundations of a democratic society, the ECrtHR went on to say (at paragraph 145):

> "Freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote … Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities - do a disservice to democracy and often even in danger it …".

88. Mr Havers submitted that, in the light of those statements of principle, there could be no reasonable justification for prohibiting the activities of pro-life protesters identified in the Murphy report, which comprised no more than offering leaflets, offering to engage in conversations, and holding placards.

89. We reject that submission because this was not simply a case of a protest causing irritation, annoyance, offence, shock or disturbance, which can still fall within the protection of articles 10 and 11: *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204 at [32], *Sánchez v Spain* (2012) 54 EHRR 24 at [53], *Animal Defenders v United Kingdom* (2013) 57 EHRR 21 at [100]. As we have said, the Judge's finding of fact was that Ealing was reasonably entitled to conclude that the activities of GCN and the other protest groups outside the Centre had a detrimental effect on the quality of life of those visiting the Centre which was, or was likely to be, of a persistent or continuing nature. There is evidence of lasting psychological and emotional harm of service users, mentioned in [43] of the Judge's judgment, and of those who wished to use the services of the Centre cancelling appointment, with potential adverse consequences to their health. The service users were entitled to protection in respect of those matters. A PSPO was necessary to strike a fair balance between, on the one hand, protecting those important interests of the service users and, on the other hand, the rights of the protestors. For Ealing to have made no order would not have struck a fair balance between those competing interests. For the same reasons, we reject the

suggestion that any PSPO, whatever its terms, would have been a disproportionate interference with the protestors' rights.

90. The effect of the PSPO is to prohibit in the Safe Zone all of the activities which the appellants and other protestors have carried on outside the Centre and, subject to some restrictions, to confine them to the Designated Area, some 100 metres away. The next questions, therefore, are whether the Judge was entitled to conclude that the restriction of the appellants' article 10 and article 11 rights by the PSPO, in effect imposing a blanket ban in the Safe Zone other than in the Designated Area, was proportionate to the aim of protecting the appellants' article 8 rights, and whether its terms, individually and taken together, strike a fair balance between the competing rights.

91. It is common ground that the rights under articles 8, 9, 10 and 11 are all of equal importance in the sense that none has precedence over the other and, where there is a tension between their values, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case: *Annen* at paragraph 56, *Murray* at [24], *PJS* at [20]. We do not consider that, in a context such as this, the requirement in section 72(1) of the 2014 Act for a local authority to have particular regard to the rights under articles 10 and 11 adds anything of substance to the analysis.

92. Mr Bhose submitted that the activities of the protesters did not contribute to a public debate. We reject that submission. The protestors' expressions of opinion in public, on a topic of public interest, was a contribution to public debate within the scope of article 10, notwithstanding the fact that individual service users of the Centre were the immediate target of those expressions of opinion.

93. The Judge reached his conclusion (at [97]) that the restriction on the appellants' rights under articles 9, 10 and 11 by the PSPO was necessary and proportionate on the basis of the entirety of the evidence and information available, including the substantial evidence that a very considerable number of service users of the Centre 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, namely just before and just after they had undergone a highly personal medical procedure. It is plain that the Judge was there taking into account the evidence as to the long-term impact on the mental well-being of some service users and that a reasonable conclusion from the evidence was that the activities of GCN and other protest groups outside the Centre had a detrimental effect on the quality of life of service users visiting the Centre which was, and was likely to be, of a persistent or continuing nature. It is clear also that the Judge took into account, as he was entitled to do, the wide statutory consultation on the proposed PSPO conducted by Ealing before making the PSPO, the recognition in the comprehensive Murphy report and in the Equality Impact Assessment of the competing rights, including ECHR rights, and interests of the protesters and the service users, and its assessment of the weight of those rights and interests on the evidence available, including evidence of Marie Stopes UK of internally reported incidents relating to the Centre.

94. As Ms Kuljit Bhogal, junior counsel for Ealing, emphasised, the Murphy report stated (at 2.4.4) that the proposed PSPO had been carefully drafted to address the specific activities which were said to be having a detrimental effect on the quality of life of those in the locality. Specific consideration was given (at 5.1.1-5.1.3) to the issue of

prayer in the Safe Zone. Careful consideration was also given to the scope of the Safe Zone (at 5.2.5), and whether it could be made smaller but still achieve protection for the persons affected by the protesters' activities, and (at 5.3.4) as to the location of the Designated Area. Some relevant extracts from the Murphy report are set out in Annex B to this judgment. In the circumstances, the Judge was entitled to give due weight to the conclusion of Ealing: *Miss Behavin'* at [26], [37]. [47], [91].

95. In our view, the Judge was entitled to come to the conclusion that, on the particular facts of the present case, the article 8 rights of the service users visiting the Centre outweighed the rights of the appellants and other pro-life protesters under articles 9, 10 and 11, and the terms of the PSPO were proportionate.

96. That is not, however, the end of the matter because, as part of their attack on the way the Judge carried out the proportionality and balancing exercise, the appellants contend that the Judge failed entirely to address their argument that the terms of the individual provisions of the PSPO are too vague and uncertain in many respects and are too extensive in that they prohibit perfectly innocuous conduct which has nothing to do with activities offensive to those visiting the Centre. Mr Havers adopted the detailed written submissions of Liberty, the Intervener, on this aspect.

97. In short order, the complaints about the individual provisions of the PSPO are as follows:

1) Paragraph 4(i) covers the full range of opinionated activity, including the most unobtrusive, factual and mild-mannered expression of a viewpoint, and is so broad that it loses any rational connection with the aim of protecting the rights to privacy of the service users of the Centre, is not confined to less intrusive measures available and does not strike a fair balance between the competing rights;

2) Paragraph 4(ii) is too vague and would potentially encompass a very broad scope of conduct, including an act of silently offering a staff member a leaflet in a manner which did not obstruct or intimidate them, is not confined to less intrusive measures and fails properly to strike the right balance between the competing rights of those affected;

3) Paragraph 4(iii) is insufficiently precise, and does not make clear, as it could have done, what amounts to intimidation or harassment or attempted intimidation or harassment;

4) Paragraph 4(v) is overbroad, and should have been tailored to text or images which are likely to cause a certain level of distress to service users, or which are abusive, insulting or threatening in nature;

5) Paragraph 4(vi) is overly broad, lacks a rational connection to the aim of protecting the article 8 interests of service users and fails to achieve a correct balance between the competing rights.

98. Liberty also criticises the location of the Designated Area as being an infringement of the rights of the appellants and others under article 11 as it removes the right of protestors to choose the time, place and manner of the assembly and to ensure that it

is, in the wording of *Lashmankin v Russia* (2019) 68 EHRR 1 (at paragraph 405), "within sight and sound of its target object and at a time when the message may have the strongest impact".

99. We consider those objections to the individual terms of the PSPO to be overstated. The Judge described those that were made before him (at [88]) as contrived. The starting point on this part of the appellants' case is that, as we have found, the Judge was entitled to find, having carried out the structured proportionality exercise, that the PSPO was a justified restriction on all those activities formerly carried out by the appellants and other protesters outside the Centre that would otherwise fall within the protection of articles 9, 10 and 11. That included prayer, whether silent or not. Those are the activities prohibited generally under paragraph 4(i) of the PSPO.

100. So far as concerns paragraphs 4(ii)-4(vi) of the PSPO, some of the wording criticised by the appellants and Liberty is standard wording used in other contexts. For example, prohibitions on intimidation and harassment, without further elaboration, are to be found in the standard Family Court non-molestation order. Harassment, as a component of the expression "anti-social behaviour" (in section 2(1) of the 2014 Act), is not further defined in the 2014 Act. Moreover, the short answer to all the points made by the appellants and Liberty on the wording in paragraphs 4(ii) to (vi) of the PSPO is that those provisions are plainly to be read as sub-sets of, and examples of, the general prohibition of "protesting" in paragraph 4(i). Viewed in that way, they are not impermissibly vague or excessive.

101. There are two further points to be made on this aspect of the appeal. Firstly, it is not apparent that Liberty, in advancing its criticisms of the individual provisions of the PSPO, including the size of the Safe Zone and the location of the Designated Area, was aware of all the relevant evidence including, in particular, the detailed appraisal in the Murphy report. Secondly, there is no suggestion that the appellants are interested in the alleged vagueness or extensiveness of the terms of the PSPO because they are also residents or for some reason, other than protest, would want to be in the Safe Zone. They are regular visitors and so able to bring proceedings to challenge the PSPO pursuant to section 66 of the 2014 Act only because they wish to carry out the protest activities which the Judge held, and was entitled to hold, should not be carried out within with Safe Zone.

102. For those reasons we reject both Grounds 5 and 6 of the appeal.

Conclusion

103. For the reasons we have given we dismiss this appeal.

104. There is no need in the circumstances for us to address the issues in the respondent's notice.

ANNEX A

European Convention on Human Rights

ARTICLE 8

Right to respect for private and family life

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.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or

morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ANNEX B

Relevant extracts from the "Murphy report"

The ECHR

2.2.4 Council must take account of Articles 8, 9, 10, 11 and 14 of ECHR. …

Article 8: Right to Private and Family Life

…

2.2.7 The proposed PSPO does not interfere with any person's right to private and family life. However, it does seek to protect the private and family life of those persons accessing services at the Clinic. Service users and staff are entitled to a degree of privacy when seeking or providing medical treatment, and access to treatment without fear of or actual harassment or distress.

Article 9: Right to Freedom of Thought, Conscience and Religion

…

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

…

2.2.13 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 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 11: Right to Freedom of Assembly and Association

…

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.

…

The specific proposals

5.1.1 Paragraph 4 of the proposed order clearly sets out the activities which are having the detrimental effect of the quality of life of those in the locality. Each of these activities has been formulated by reference to the available evidence base. The existence of a detrimental effect is reinforced by the results of the online survey.

5.1.2 It is acknowledged that some may find the reference to 'prayer' in paragraph 4(i) surprising. It should be clear from the order that the only 'prayer' which is prohibited is that which amounts to an act of approval/disapproval of issues relation to abortion services, it is not a general ban on prayer and it applies only within the 'safe zone' defined by the order. As detailed further in Section 6 below, the Church of England parishes of St John's and St Mary's and the Ealing Trinity Circuit of the Methodist Church have all engaged with the consultation and are supportive of the proposed order.

5.1.3 Careful consideration has been given to whether this paragraph could be formulated differently, but it is felt that this

is the least restrictive measure which would address the activities identified as distressing to service users and detrimental to the quality of life of those affected by the activities.

5.1.4 The reference to 'interfering or attempting to interfere' in paragraph 4(ii) is intended to deal with members of the represented groups who approach and attempt to speak to service users whilst in the safe zone.

5.1.5 References to intimidation and harassment are intended to respond to evidence – particularly provided by Clinic staff members – that members of represented groups have attempted to engage with service users and visitors even after they have said 'no' or otherwise indicated that they do not wish to interact with them, and have at times physically impeded service users from entering or accessing the Clinic. The order therefore makes clear that, for the avoidance of doubt, this behaviour will not be tolerated within the safe zone.

5.1.6 As for the reference to recording, both the Pro-Life and Pro-Choice groups appear to accept that they use their phones to take photographs or videos. … The Council's concern is that a service user is not going to know why a person is recording/photographing or what is being captured or the purpose for which it will be used. For this reason it is thought reasonable and proportionate to seek to prohibit all recording and photography of a service user or member of Clinic staff in the safe zone.

…

5.1.9 Paragraphs 11 – 14 set out the proposed restrictions on protests and vigils within the Designated Area. …

5.1.10 The rationale of these restrictions is to ensure that the scale of activities continuing within the designated area is not such as would undermine or negate the impact of the PSPO within the rest of the 'safe zone'. In particular the restrictions are designed to ensure that any service users, staff and visitors who wish to avoid interaction with members of representative groups may do so if they choose. It has also been taken into account that all groups have already agreed that shouting words and messages was not acceptable, and that evidence suggests that Pro-Life groups have been using posters and placards of an A3 size in any event. Finally, it can be seen that the restrictions do not limit prayer of any kind, which will thus be permitted within this area.

…

5.2.4 Officers have spent a considerable amount of time and care in defining the scope of the 'safe zone' in which the prohibitions take effect. Careful thought has also been given to the size and scope of the designated area. Site visits have been undertaken of the area on numerous occasions and the area has been closely studied on maps.

5.2.5 The rationale for the scope of the safe zone has been the need to ensure safe access to the Clinic from the major routes of access, namely Ealing Broadway tube and train station and the main bus and pedestrian routes to the clinic from west and south Ealing. Officers have considered whether the scope of the area could be smaller but still achieve protection for the persons affected by the activities and have concluded that it could not. It is for this reason that officers conclude that the current proposed area – when considered in conjunction with the 'designated area' as discussed further below – strikes an appropriate balance between ensuing safe access for service users on the one hand versus enabling represented groups to continue their activities on the other. In doing so they have taken account of the consultation responses which specifically asked about the scope of the zone.

The scope of and restrictions within the designated area

5.3.1 Members should be aware that objections have been raised to both the scope and position of the designated area ...

5.3.3 Members are asked to note that 60.2% agreed overall with the scope [of] the designated area. A number of respondents disagreed with the provision of a designated area.

5.3.4 The designated area has been positioned within sight of those entering the clinic. This has been done deliberately so as to ensure that any service user who wishes to engage with the represented groups or the support they offer can do so if they choose. The position of the designated area would allow the groups to make their presence known, but in a way which reduces the impact of their activities of [sic] on those service users who do not wish to be approached by them or engage with them.

5.3.5 The restrictions which apply in the designated zone have been drafted so as to ensure that the interference with their rights is no more than is necessary. Of the survey respondents, 75.1% agreed with the proposed restrictions in the designated area.

5.3.6 It is considered necessary to have some form of restriction on those in the designated zone to control the numbers of people and the activities they engage in. In particular this is

relevant with regard to limiting any attempts there may be to attract the attention of service users through graphic images words or sound when service user may wish to avoid interacting with members of the represented groups.

5.3.7 On balance it is felt that the provision of the designated area with its restrictions allows both the Pro-Life and Pro-Choice groups to exercise their Article 9, 10 and 11 rights in a way which protects the rights of others in the locality, particularly the Article 8 rights of clinic service users.