Neutral Citation Number: [2023] EWHC 3229 (Admin)

Case Nos: CO/04383/2022 and CO/152/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2023

Before :

LORD JUSTICE WARBY
and
MRS JUSTICE THORNTON

- -

Between :

(1) LIVIA TOSSICI-BOLT **(2) THE KING (on the application of CHRISTIAN CONCERN)**	**Claimants**
- and -	
BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL	**Defendant**

- -
- -

Bruno Quintavalle (instructed by **Andrew Storch Solicitors**) for the **Claimants**
Kuljit Bhogal KC and Tara O'Leary (instructed by **BCP Council Legal Services**) for the **Defendant**

Hearing date: 17 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE WARBY and MRS JUSTICE THORNTON:

Introduction

1. In these two cases the claimants challenge the validity of a Public Space Protection Order ("PSPO") made by the defendant ("the Council") in October 2022 ("the Order"). The Council was prompted to make the Order by activities in the vicinity of a clinic in Ophir Road, Bournemouth which provides abortion services ("the Clinic"). The Order designates an area around the Clinic as a "safe zone" within which it is prohibited to engage in protest related to abortion services and other specified activities.

2. The main issues are whether the Order is unlawful because it goes beyond the scope of the Council's statutory powers to make PSPOs or because it involves unjustified interference with individual rights and freedoms, including the freedoms of conscience and religion, expression and assembly guaranteed by Articles 9, 10 and 11 of the European Convention on Human Rights ("the Convention") and is hence a breach of the Council's duties under s 6 of the Human Rights Act 1998 ("HRA").

The legal context

3. The purpose of a PSPO is to prevent anti-social behaviour in public places. This is achieved by imposing legally enforceable controls on the behaviour of individuals. Power to make a PSPO is conferred on local authorities by s 59 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). A PSPO can last for up to three years, and there is power to extend during that period (ss 60 – 61 of the 2014 Act). A person who fails without reasonable excuse to comply with a PSPO is liable on summary conviction to a fine of up to £1,000 (s 67).

4. Section 59(1) provides that a local authority may make a PSPO if two threshold conditions are met. The first of these is specified by s 59(2): "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." The second threshold condition is specified by s 59(3). It 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."

5. Section 59(4) defines a PSPO as "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." Section 59(5) limits the prohibitions or requirements that may be imposed to "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. Section 72(1) provides that in deciding whether to make a PSPO the 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. Section 72(3) requires the authority to carry out "the necessary consultation" before making a PSPO. This means consulting

with "the chief officer of police, and the local policing body, for the police area that includes the restricted area" and with appropriate community representatives and those who own or occupy land within the restricted area: s 72(4). Section 73 allows the Secretary of State to issue guidance to local authorities about the exercise of their functions under Chapter 2. The guidance current at the relevant times identified the purpose of a PSPO as "to stop individuals or groups committing anti-social behaviour in a public place".

7. Section 66 sets out a procedure by which the validity of a PSPO may be challenged. A challenge may be brought by "an interested person", defined to mean "an individual who lives in the restricted area or who regularly works in or visits that area". The challenge is to be made by an application to the High Court which must be brought within six weeks of the order being made. The only grounds that may be relied on are (so far as relevant here) that "(a) the local authority did not have power to make the order … or to include particular prohibitions or requirements imposed by the order ….; (b) that a requirement under this Chapter was not complied with in relation to the Order …". If satisfied that these conditions are met or that the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement of the relevant Chapter the court may quash the order or any of its prohibitions or requirements.

8. Applications under s 66 have been considered in two cases cited to us. In *Summers v Richmond upon Thames London Borough Council* [2018] EWHC 782 (Admin), [2018] 1 WLR 4729 the challenge was to a PSPO that set limits on the number of dogs a person could take into a restricted area without a licence from the local authority, a reasonable excuse or the permission of the landowner ("the Richmond PSPO"). May J concluded that there was no proper basis for two of the prohibitions but the PSPO was otherwise upheld. In *Dulgheriu v Ealing London Borough Council* the PSPO followed activities by "pro-life" and "pro-choice" campaigners in the vicinity of a medical centre which provided abortion services. The order ("the Ealing PSPO") established a "safe zone" in which protest or campaign activities were prohibited except in a "designated area" about 100 metres from the entrance to the centre. The Ealing PSPO was upheld by Turner J in the High Court [2018] EWHC 1667 (Admin), [2019] PTSR 706 and by the Court of Appeal [2019] EWCA Civ 1490, [2020] 1 WLR 609 ("*Dulgheriu* (CA)").

9. From these decisions we draw the following propositions of relevance to the present case:

   (1) The term "in the locality" in s 59(2)(a) of the 2014 Act is capable in law of embracing not only local residents but also those who regularly visit or work in the locality and occasional visitors such as women attending a clinic and their family members and supporters; a local authority has a wide discretion to decide who falls within that term on the facts of the case: *Summers* [24], *Dulgheriu* (CA) [47], [49] affirming Turner J on the point.

   (2) A local authority also has a wide discretion to determine what activities are troublesome and are having or likely to have a "detrimental effect" on the "quality of life" of those whom it considers to be "within the locality": *Summers* [25], *Dulgheriu* (CA) [47].

   (3) Whether prohibitions or requirements are "reasonable" to deal with the detrimental effect of the relevant activities is a matter of judgment for the local authority, taking

into account the particular needs of and circumstances pertaining to the local area: *Summers* [23]-[28].

(4) In a challenge under s 66 the court exercises a supervisory jurisdiction in accordance with ordinary judicial review principles: *Summers* [33], [35], [39].

(5) But where the case requires consideration of fundamental human rights the court has to identify the rights at stake and form its own judgment on the extent of any interference with those rights and whether such interference is justified rather than merely considering whether the local authority reached its decision by a proper process: *Dulgheriu* (CA) [64].

10. It is inherently likely that some PSPOs will interfere with the exercise of the rights guaranteed by Articles 10 and 11 of the Convention. It is therefore understandable that s 72(1) of the 2014 Act highlights and requires a local authority to have "particular regard" to the rights guaranteed by those Articles. The statutory language is similar to that of s 12(4) of the HRA which requires a court to have "particular regard" to the importance of the right protected by Article 10 when it is considering whether to grant any relief that may affect the exercise of that right. There are four uncontroversial points to be made:

(1) First, it is not every PSPO that will affect the freedoms of expression or assembly. Nobody suggested that either was affected by the Richmond PSPO. Other typical examples of PSPOs mentioned in the Guidance include the control of alcohol consumption in public parks and prohibitions on spitting.

(2) Secondly, the rights guaranteed by Articles 10 and 11 are both qualified rights; measures that interfere with freedom of expression or assembly can be justified where that is necessary in a democratic society in pursuit of one of the legitimate aims specified in the Article, and proportionate to that aim.

(3) Thirdly, a requirement to have "particular regard" to a specified Convention right is not a duty to have regard "only" to those rights. It does not relieve a public authority of the duty imposed by s 6 of the HRA to avoid acting incompatibly with other human rights that are relevant in the circumstances of the case.

(4) Finally, a requirement to have "particular regard" to a qualified Convention right does not give it any presumptive priority over another qualified right; such rights as such are of equal value; any conflict between them falls to be resolved by focusing intensely on the comparative importance of the specific rights in play and the necessity and proportionality of any interference with them: see *Dughleriu* (CA) [91]. This was all well-established long before the enactment of the 2014 Act: see for instance *Douglas v Hello! Ltd* [2001] QB 967 [133] (Sedley LJ) and *In re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [17] (Lord Steyn).

11. In the present case, as we shall explain, the aims of the Order were to protect the rights of women who are on their way to or from the clinic as well as their family and supporters and staff at the Clinic; and some of the restrictions and requirements of the Order are expressly aimed at forms of expression with religious connotations. *Dulgheriu* shows that in such a case the local authority and the court may have to consider not only the rights under Articles 10 and 11 to which particular attention is

drawn in s 72(1) but also the right to respect for private and family life guaranteed by Article 8 of the Convention and the right to freedom of thought, conscience and religion guaranteed by Article 9.

12. The text of all four Articles is not only familiar it is also set out in full in Annex A to *Dulgheriu* (CA). It is unnecessary to set it out here. What is worth pointing out is that these are all qualified rights. In each case an interference with the right can be justified as "necessary in a democratic society … for the protection of the rights … of others." So when, as here, a PSPO interferes with the Convention rights of the protestors (Articles 9, 10 and 11) it is necessary to consider whether that test is satisfied. The test can in principle be satisfied by a need to protect the Article 8 private and family life rights of Clinic visitors and staff.

13. *Dulgheriu* illustrates the point. It was common ground that the Ealing PSPO involved an interference with rights under Articles 9, 10 and 11. There was a dispute as to whether the activities that were the target of the PSPO "engaged" Article 8 rights. Turner J held that they did, as they interfered with the reasonable expectations of women using the centre that being pregnant, seeking, having, or having had an abortion would be private and not the focus of public attention. On appeal it was argued that this was wrong: visitors to the centre could have no more than a limited expectation of privacy and no reasonable expectation of being free from any engagement with protestors in a public place. The Court of Appeal dismissed that ground of appeal with "no hesitation".

14. Citing *A v Ireland* (2010) 53 EHRR 13, *In re Human Rights Commission for Judicial Review (Northern Ireland: Abortion)* [2019] 1 ALL ER 173 and *P v Poland* (2012) 129 BMLR 120 the court reasoned (at [53]-[57]) that the decision of a woman whether or not to have an abortion is an intensely personal and sensitive matter and there is "no doubt" that it falls within the notion of private life within the meaning of Article 8; 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 a lawful abortion and relevant information; and that:

> 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.

We interpose at this point to mention that the UK Supreme Court has since affirmed that where a right to abortion exists the state has an obligation to facilitate its exercise and this includes prohibiting harm or hindrance outside abortion clinics: *In re Abortion Services (Safe Access Zones) (NI) Bill* [2022] UKSC 32, [2023] AC 505 [115].

15. Returning to *Dulgheriu*, the court went on to apply the principles we have cited to the facts of the case before it, concluding that the activities under consideration clearly "engaged the article 8 rights of those visiting the centre" in two respects: (1) "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 (2) "from the legitimate 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." The court held that the question for the judge was whether the Ealing PSPO "was both a necessary and proportionate restriction of the [protestors'] article 9, 10 and 11 rights in order to accommodate the article 8 rights of women visiting the Centre". The court concluded that Turner J had addressed and answered that question correctly.

16. As Mr Quintavalle has stressed on behalf of the claimants, however, the focus must always be on the facts of the individual case. Counsel drew our attention to what Turner J said at the end of his judgment in *Dulgheriu*, where he observed (at [99]) that his conclusions in that 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 much be decided on its own facts."

The facts of this case

17. The Clinic is operated by the British Pregnancy Advisory Service ("BPAS") and funded by the NHS. It provides a number of sexual health services including medical and surgical abortions to its clients ("service users"). The Clinic is located on a *cul de sac* in a residential area adjacent to the A338. Opposite the clinic is a grassed area of public open space. Before the PSPO was made a number of groups and individuals would visit the site from time to time to express views about abortion. These included groups from or associated with local churches, members of organisations called "40 days for Life" (a "pro-life" organisation) and "Sister Supporters" (a "pro-choice" group), and some unaffiliated individuals. These people would generally congregate on the grassed area.

18. From about 2017 onwards the Clinic and clients of the Clinic reported to the Council (and its predecessor Bournemouth Borough Council, "BBC") that the presence and activities of protesters in the immediate vicinity of the clinic were having a detrimental impact on staff, clients and visitors, causing alarm and distress. In February 2019 BBC took external legal advice to determine whether the evidence received since 2017 met the threshold for making a PSPO. The conclusion was that the evidence was insufficient at that time. Some 300 further reports were received after that. We shall come later to the substance of the evidence these contained. As for the process, Council officers established a reporting procedure with the Clinic, visited the site, engaged in multi-agency meetings with BPAS and Dorset Police, and carried out engagement activities with local residents and pro-life bodies and individuals. In April 2022 the Council took further legal advice. Counsel's view was that the evidence received since February 2019 would support action including but not limited to a PSPO. Efforts were made to arrive at a negotiated solution with pro-life groups and individuals, without success.

19. The Council considered various other possible courses of action including Community Protection Notices and civil injunctions against individuals. On 11 July 2022 it decided to consult on four options. The first three were alternative forms of PSPO involving (1) the exclusion of all protest within a defined geographical area around the Clinic referred to as a safe zone; or (2) the exclusion of all protest within the safe zone except for one designated area in which there would be no restrictions on the activities undertaken; or (3) the exclusion of all protest within the safe zone but with two designated areas.

Option (4) was no PSPO. The decision-maker was the Portfolio Holder for Community Safety and Regulation, Councillor Dove.

20. The Council carried out online consultation of members of the public (shared with those who had previously contacted the Council and via the Council's social media platforms and libraries), leafleting of all owners and occupiers of land within the proposed safe zone, putting up posters within that zone, and consultation with Dorset Police and the Police and Crime Commissioner. A total of 2,241 responses was received. An independent provider called Darmax Research was commissioned to analyse these and in September 2022 it submitted a report running to 217 pages ("The Darmax Report"). This found that 75% of respondents favoured some form of PSPO around the Clinic with 24% against. The option most favoured by respondents was option (1), supported by 66% of respondents. Second most popular was option (4), supported by 22%. Eight per cent of respondents favoured option (3). Option (2) was the least favoured, attracting support from 4% of respondents. The Council's post-consultation options analysis recommended option (1).

21. In late September and early October 2022 Cllr Dove considered the results of the consultation, the post-consultation options analysis, and an Equality Impact Assessment ("EIA"), and discussed these with officers. On 11 October 2022 Cllr Dove made a decision ("the Decision") to implement a PSPO in the form of option (1) with effect from 13 October 2022. A Decision Record of that date set out in some detail the background to the Decision and the reasons behind it. The reasons for the Decision were summarised in this way:

> The evidence, external legal advice and outcome of the public consultation in regard to this matter has been tested against the relevant legislation including case law precedent. All enforcement options have been assessed and proportionality has been carefully considered in determining the recommended option.
>
> The legislative test for the implementation of a PSPO has been met. Public consultation has now been concluded, which supports the implementation of a PSPO, and of the option being pursued. The restrictions within the PSPO are proportionate to the evidence and provide for effective enforcement, protection of clinic staff and service users and maintains a balance of access to the open space by the public.
>
> A full equality impact assessment which considered human rights and the right to peaceful protest has been undertaken.

The terms of the Order

22. The Order made pursuant to the Decision is headed as follows:

> **ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014, SECTION 59 PUBLIC SPACES PROTECTION ORDER**

It then sets out that the order is made by the Council and that it shall be known as the Public Spaces Protection Order (OPHIR ROAD AND SURROUNDING AREA) 2022.

23. The first three numbered paragraphs of the Order contain the following recitals under the heading "Preliminary":

> 1. The Council, in making this Order is satisfied on reasonable grounds that: The activities identified below have been carried out in public places within the Council's area and have had a detrimental effect on the quality of life of those in the locality, and that: the effect, or likely effect, of the activities: is, or is likely to be, of a persistent or continuing nature, is, or is likely to be, such as to make the activities unreasonable, and justifies the restrictions imposed by the notice.
>
> 2. The Council is satisfied that the prohibitions imposed by this Order are reasonable to impose in order to prevent the detrimental effect of these activities from continuing, occurring or recurring, or to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.
>
> 3. The Council has had regard to the rights and freedoms set out in the European Convention on Human Rights. The Council has had particular regard to the rights and freedoms set out in Article 10 (right of freedom of expression) and Article 11 (right of freedom of assembly) of the European Convention on Human Rights and has concluded that the restrictions on such rights and freedoms imposed by this Order are lawful, necessary and proportionate.

24. Paragraph 4 contains a list of Activities prohibited by the Order. There are seven of them, as follows:-

> 4a Protesting, namely engaging in an 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.
>
> 4b Interfering, or attempting to interfere, whether verbally or physically, with a service user or member of staff of the BPAS clinic.
>
> 4c Intimidating or harassing, or attempting to intimidate or harass, a service user or a member of staff, of the BPAS clinic.
>
> 4d Recording or photographing a service user or member of staff of the BPAS Clinic.

> 4e Displaying text or images relating directly or indirectly to the termination of pregnancy and or playing or using amplified music, voice or audio recordings.
>
> 4f Holding vigils' where members audibly pray, recite scripture, genuflect, sprinkle holy water on the ground or cross themselves if they perceive a service-users is passing by.
>
> 4g Remaining in the Safe zone, when asked to leave by a Police Officer or police community support officer or any other person designated by BCP Council or returning to the Safe zone before 7pm on the day you have been asked to leave.

25. The prohibition is contained in paragraph 5:

> A person shall not engage in any of the Activities anywhere within the Safe zone as highlighted in red on the attached map labelled 'The Safe zone' between the hours of 7am and 7pm Monday to Fridays.

26. The Safe zone is defined in paragraph 6:

> 'Safe zone' means the area outlined in a red boundary on the attached map and marked 'Safe zone' for the PSPO (OPHIR ROAD AND SURROUNDING AREA) 2022

A copy of the map is annexed to this judgment. In the order, it has this text at its head:

> Roads/Street covered:
>
> Methuen Road, Methuen Close, Beechey Road, Ophir Road, Ophir Gardens, Porchester Road, Porchester Place, Ascham Road, Wessex Way, Holdenhurst Road.

27. Paragraph 8 of the Order provides that:

> A person who is believed to have engaged in a breach of this order within the safe zone, is required to leave the area if asked to do so by a police officer, police community support officer or other person designated by [the Council]."

The claims

28. The first claimant, Livia Tossici-Bolt, leads the Bournemouth branch of "40 days for Life" which describes itself as a Christian organisation which for many years has arranged for volunteers to pray for, and offer help to, women outside the Clinic. The organisation conducts biannual campaigns each lasting for 40 consecutive days in which volunteers gather in groups of two to four, praying and providing those entering the Clinic with leaflets offering help.

29. On 23 November 2022 the first claimant brought a timely claim for statutory review of the Order pursuant to s 66 of the 2014 Act, contending that the Order was unlawful on

five grounds. These, as elaborated in the Statement of Facts and Grounds can be summarised as follows:

(1) The order seeks to prohibit peaceful and lawful behaviour which falls short of meeting the threshold test for a PSPO in s 59(2) of the 2014 Act; alternatively the Council had no proper evidential basis for concluding that the first claimant's behaviour or that of the volunteers fell within s 59 and gave no adequate reasons.

(2) Alternatively, the prohibitions are unreasonably extensive, including many that cannot be considered relevant to the allegedly detrimental activities the Order is designed to prevent. One of the first claimant's contentions under this ground is that the safe zone extends to private land and thereby exceeds what the statute permits.

(3) The restrictions interfere with the rights of the first claimant under Articles 9, 10 and 11 of the Convention to an extent that is neither necessary nor proportionate in pursuit of any legitimate aim and in a way that discriminates on religious grounds contrary to Article 14.

(4) The restrictions similarly interfere unjustifiably with the rights of persons unknown under Articles 8, 9, 10 and 11 read by themselves and with Article 14.

(5) The 2014 Act does not permit the Council to confer the free-standing powers of dispersal contained in paragraph 4(g) of the Order.

30. The second claimant, Christian Concern, describes itself as an incorporated organisation which campaigns at a national level for the rights of Christians, including their rights to pray in public and witness to their faith. It has been extensively involved in supporting pro-life litigation and upholding the Article 9, 10 and 11 rights of Christians in that and other contexts. The second claimant is not an "interested person" within the meaning of the 2014 Act, thought it says it has subscribers and supporters who are. The second claimant brings a claim for judicial review of the Decision. This was filed on 11 January 2023, precisely three months after the Decision. Three grounds of review were identified, namely that the Order is non-compliant with the 2014 Act in that (1) it purports to restrict otherwise lawful activities conducted on private land; (2) the power of dispersal at paragraph 4(g) is unauthorised by the 2014 Act and unlawful; and (3) there was a failure to consult the Chief Constable in accordance with s 72 of the 2014 Act. It will be immediately apparent that grounds (1) and (2) overlap with grounds (2) and (5) of the first claimant's claim for statutory review.

31. The Council takes issue with each of the claims on their merits. By its acknowledgment of service in the judicial review claim the Council also raised formal objections on jurisdictional and procedural grounds. It maintained that permission should be refused on the grounds that judicial review is excluded by necessary implication under s 66 of the 2014 Act, and that in any event the claim was not brought within three months after the act complained of or promptly, the claimant lacks any sufficient interest and the claim is academic. Swift J gave directions for the application for permission to be listed for hearing together with the first claimant's claim, with the substantive hearing to follow if permission is granted. The time estimate was one day. Deadlines were set for the filing and service of skeleton arguments. The claimants' skeleton arguments were due 10 days before the hearing.

Procedural issues

32. At the start of the hearing we heard argument on some procedural points. The Council sought a ruling on its formal objections to the grant of permission for judicial review. The second claimant applied for permission to amend the judicial review claim form to add a further ground of review, namely that Cllr Dove lacked authority to make the Decision. The Council opposed the application to amend and also objected to some of the content of a "revised" skeleton argument filed and served on behalf of the first claimant on Friday 13 October 2023, one clear day before the hearing, and ten days after the deadline which Swift J had imposed for the filing and service of skeleton arguments for trial.

33. At the end of the argument we announced that the amendment application was refused for reasons to be given later. Those reasons are set out in a separate judgment of today's date ("the Amendment Judgment"). We decided to leave over the determination of the issues raised by the Council's formal objections and to consider *de bene esse* the material in the revised skeleton argument to which the Council had objected. We have now concluded that it was illegitimate for the first claimant to advance, in her revised skeleton argument, contentions that Cllr Dove lacked authority to make the Order. Our reasons for that conclusion are also explained in the Amendment Judgment. The remaining procedural points will be dealt with in the present judgment.

The statutory challenge

34. We deal first with the issues raised by this challenge, before turning to the judicial review claim.

The threshold (Ground 1)

35. The first claimant's pleaded grounds, mirrored in the initial skeleton argument, raised two main points on the application of the threshold test. First, it was argued that the Council exceeded its statutory powers by prohibiting behaviour by the first claimant and the volunteers – in the form of silent prayer and the distribution of leaflets containing useful information – that was peaceful, reasonable and lawful. Secondly, it was argued that the Council had no proper evidential basis for concluding that the behaviour of the "protestors" was "detrimental" to the quality of life of those in the locality within the meaning of s 59. In support of the second point it was submitted that the Council's consultation was flawed and tendentious; and that it failed in any event to conduct any proper analysis of the evidence. That evidence fell far short of showing seriously anti-social conduct such as to justify a PSPO. The first claimant sought to compare and contrast the facts of the present case with those in *Dulgheriu.* She relied, in addition, on an observation of May J in *Summers* that "the behaviours which PSPOs are intended to target are those which are seriously anti-social not ones that are simply annoying" and a passage in the statutory guidance emphasising the need to use the statutory powers "responsibly and proportionately, and only where necessary to protect the public."

36. The revised skeleton argument dealt with these points in four short paragraphs whilst developing some new and distinct lines of argument. Over 12 paragraphs, under the heading "breach of principle of legality", it was argued that in the light of this principle the 2014 Act could not be construed as conferring on local authorities, in the guise of

restricting anti-social behaviour, "a power … to restrict common law/Convention rights on the free exercise of religion nor on the exercise of rights of free speech or assembly". Mr Quintavalle further submitted that the authorities relied on in *Dulgheriu (CA)* are distinguishable because English law – unlike that of Northern Ireland - confers no right to abortion, which is prohibited save in the circumstances defined by statute; nor is there any general right of privacy in English law; there is only the limited cause of action for misuse of private information identified in *Campbell v MGN Ltd* [2004] UKHL, [2004] 2 AC 457; that right is not engaged here and clinic users accordingly enjoy no Article 8 right which could give them any free-standing protection enforceable at law.

37. We see no merit in the pleaded grounds. First, it is clear that Parliament's intention went beyond establishing a mechanism for the control of behaviour that was in any event a breach of the peace or otherwise unlawful. The intention was to allow local authorities to use PSPOs to restrain or restrict behaviour that is anti-social even if not contrary to the criminal law or unlawful in some other way. The contention that activity must be criminal or at least tortious before it justifies the making of a PSPO was dismissed as unarguable by Cavanagh J in *R (Hacking) v Stratford Magistrates Court* [2022] EWHC 2733 (Admin) [44]. We agree. Secondly, the first statutory condition is that the behaviour under consideration has had or is likely to have a "detrimental effect on … quality of life". Mr Quintavalle's contention that this connotes something that, if not illegal, is bordering on violence is untenable. We would accept that the term "detrimental" should not be read down so as to encompass *de minimis* conduct or trivial annoyances. But otherwise, the matters mentioned by May J in *Summers* and in the statutory guidance come in at a later stage when the authority is considering the second statutory condition (reasonableness) and the necessity and proportionality of any restrictions.

38. Thirdly, it could not be enough – assuming if were so - for the first claimant to say, or to show, that her own activities or those of the volunteers were not such as to justify a PSPO, or one cast in the terms of the Order made in this case. The first claimant and the volunteers were not the only people who had engaged in acts of "protest" in that area nor was the Order targeted exclusively at them. It is clear from the terms of the Order and from the evidence before us that the objective pursued by the Council in this case was to impose on any individual within that zone certain restrictions and some positive obligations. The question has to be whether these constraints were lawful in the light of the totality of the evidence before the Council which included tens if not hundreds of complaints which had no evident connection with this claimant or her associates. Many of those carrying out the activities to which objection was taken were not identifiable. Fourthly, we would not accept that it can be said in the abstract that conduct such as silent prayer and the handing out of leaflets is unobjectionable and incapable of being deemed "detrimental" or of having effects that make them "unreasonable". It cannot realistically be said that *Dulgheriu* (which we agree was in many ways a more extreme case than the present) sets some minimum standard for that purpose. All depends on detail, context and judgment. As we have explained, the primary decision-maker in this context is the Council and the role of the court is a supervisory one.

39. When it comes to the sufficiency of the evidence, we are wholly unpersuaded that the Council's consultation exercise was flawed in the ways alleged, nor do we consider it arguable that the Council's evidence base was inadequate for that or any other reason.

It is fair to bear in mind, as Turner J did in *Dulgheriu* [46], that rates of response can be misleading and that their content is apt to be driven by the respondents' moral positions on abortion. Decisions on whether the threshold conditions are satisfied ought not to be driven by expressions of opinion, however vehemently expressed. The key issues at that stage are the behaviour, its actual impact on the quality of life of those in the locality, and the extent to which this makes it reasonable to impose restrictions. We see no evidence that the Council overlooked these points in this case. We are satisfied that the decision-making was based upon an assessment of the evidence of what was happening and how it was affecting people working at, using or visiting the Clinic, coupled with an evaluative assessment of what was needed to avoid unreasonable conduct. That is the process described in the introductory paragraphs of the Order, and we accept that it is what happened in fact.

40. The Darmax Report may not be the equivalent of the "Murphy Report" which featured prominently in *Dulgheriu* (see *Dulgheriu (CA)* at [12], [14]). There is no contemporary document that draws together and analyses the evidence obtained by the Council in quite the same detailed fashion as that report appears to have done. But the question is one of substance not form. During the hearing we were provided with a helpful "defendant's table of evidence" which sets out to identify, non-exhaustively, evidence in the papers before us that relates to each specific element of the list of prohibited activities. This shows that there was ample evidence before the Council that protestors had engaged persistently in each of the listed activities in the public spaces outside the Clinic.

41. Turning to the question of detrimental impact the Darmax Report does contain some significant pieces of evidence going directly to that issue. It reports, for example, that 107 respondents supported the proposed restrictions "because local residents are adversely affected" by protestors and groups gathering in the area close to the clinic. These respondents reported confrontations leading to them being "unable to enjoy their local area" and witnessing conduct they considered to amount to harassment. More significantly, the statement of Julia Howlett on behalf of the Council exhibits a table prepared by the Clinic setting out in an orderly and detailed manner over 32 pages the information provided to it by service users, staff and visitors (JH3). This identifies what happened when and the impact it had on the individual(s) concerned, using their own words. The table is replete with records of reactions such as "intimidated", "anxious", "worried", "very uncomfortable", "particularly distressed", and "uneasy". All these examples are taken from reports that post-date February 2019. Ms Howlett also exhibits individual report forms completed by clinic staff setting out "the detrimental impact they experience" (JH4). These lend support to the picture portrayed by the Clinic's table.

42. The evidence includes instances of individuals feeling agitated, harassed and intimidated by the handing out of leaflets, or being stared at. Some clients reported that protestors "singing" and "praying" caused them to feel "anxious", "nervous", "uncomfortable", "angry". Others felt "intimidated and nervous" as a result of protestors "standing outside". The context here is obviously critical. The protest activities described in the evidence, including silent prayer and the handing out of leaflets, were not taking place in a shopping centre or park or in a church but outside a clinic to which women were resorting at particularly sensitive and difficult moments in their lives. The important common feature of those activities is that they were, quite

reasonably, interpreted as an expression of opposition or disapproval. It is, in our judgment, naïve and simplistic to suggest that activities of this kind in this context cannot be considered "detrimental" to a person's quality of life and "unreasonable" just because they are silent, or the literature distributed is informative rather than shocking and confrontational.

43. We are satisfied that in relation to each activity in the list of prohibited activities there was not only evidence that it had taken place but also evidence of an impact which the Council could properly consider to be significantly "detrimental" within the statute. Subject always to the human rights arguments, which are raised and will be dealt with separately, the evidence as a whole afforded the Council reasonable grounds for reaching the conclusions set out in paragraphs 1 and 2 of the recitals to the Order (paragraph [23] above).

44. As for the new lines of argument contained in the belated revised skeleton argument, we were unimpressed by these at first blush. As observed in *Dulgheriu (CA)* at [48] the provisions of s 72 of the 2014 Act "presuppose 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 of the ECHR." Parliament surely must have held the same intention with regard to the common law analogues of those Convention rights. It seems hard to conclude from its silence on this specific point that Parliament did not intend to authorise interference with Article 9 or its common law analogue where that is necessary in a democratic society. As we have noted, the statutory obligation is to have "particular regard" to the specified Convention rights. Parliament did not say that those were the only rights to be considered. To exclude consideration of other Convention rights would be to derogate from the express obligation imposed by s 6 HRA, and it is surely impossible to read in such an intention.

45. Mr Quintavalle's arguments on Article 8 appear on the face of it to be inconsistent with the reasoning in *Dulgheriu (CA)* which we have outlined at [13]-[15] above, and with the Strasbourg authority cited in that case. We do not presently see that the private law analysis in *Campbell v MGN Ltd* assists in a case about the conduct of a public authority which is subject to the duty imposed by s 6 of the HRA, not to act (or to fail to act) in a way that is incompatible with any of the Convention rights. The contention that English law does not afford a right to abortion seems to us to involve distinctions that are altogether too sophisticated, and ultimately artificial. Our current view is that the law of England and Wales does afford such a right and also imposes on the state the corresponding obligation to which the Supreme Court referred in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* at [115]: to facilitate the exercise of the right and prohibit harm and hindrance outside abortion clinics.

46. We have concluded, however, that it would be inappropriate to proceed on the basis of these provisional views. These are points of substance that call for more detailed debate than was possible in the context of a highly compressed day's hearing. They were raised many months after the expiry of the statutory limitation period for challenges of this kind. They were also raised after the deadline imposed by the court for skeleton arguments and thus in breach of the court's directions. It may be that for this reason, as Ms Bhogal KC has submitted, the claimant requires relief from sanctions pursuant to CPR 3.9. There does seem to be an analogy with the position in respect of witness statements for trial. It is unnecessary to decide the point. We would rule these arguments out of consideration whatever the correct procedural analysis. The reason for the late

change of tack appears to have been a late change of Counsel, the reasons for which have not been explained. The effect was that – having regard to the proliferation of other issues and the limited time available – the Council had no proper opportunity to consider and address these additional points. Having now heard the whole of the argument we can see no satisfactory explanation for the lateness and we are persuaded that it caused real prejudice. In all the circumstances we do not consider it would be consistent with the overriding objective to permit reliance on these points. We uphold the Council's objection to these new lines of argument being raised in this case.

The prohibited activities (Ground 2)

47. The focus here is on the detail of the restrictions and the limits set by s 59(5). That subsection, it will be recalled, provides that a prohibition or requirement can only be imposed if it is reasonable in order to prevent the detrimental effect from continuing, occurring or recurring, or to reduce that effect, or to reduce the risk of its continuing, occurring or recurring. It is submitted that the terms of the Order fail these tests. Instead, they "criminalise" an extremely broad range of behaviours many of which cannot be said to be related to the behaviour which it was intended to prevent. Reliance is placed on passages in the statutory guidance which emphasise the need to focus on, target and define specific harmful behaviour. The first clamant also points to the absence of any complaints about the protestors from "the wider community". In the present context, too, she seeks to compare and contrast the conduct of the Council in this case with the "careful and wide-ranging analysis" conducted by Ealing before making the PSPO that was challenged in *Dulgheriu*,

48. We do not consider that this ground of challenge is arguable. As Ms Bhogal KC points out on behalf of the Council the argument is advanced in a broad-brush fashion without identifying any specific provision or aspect of the Order that is said to be irrelevant or unreasonable. Nor has any specific criticism been made of the detailed drafting. We are unable to see the force of the claimant's reliance on the statutory guidance. In our judgment the provisions of the Order sufficiently define, for legal and practical purposes, the prohibited behaviour. As we have said, it is all behaviour of which there was already evidence before the Order was made; and there was evidence that behaviour of each kind had caused more than minimal detriment. We accept the submission on behalf of the Council that the terms of the Order are tailored to correspond to the detriment shown in the past. It was reasonable to fear that in the absence of restrictions what had happened before would happen again, with similar effects. It was reasonable to conclude that an order in these terms would eliminate further harm or at least reduce it, or reduce the risk that it would recur.

The "safe zone" (Ground 2)

49. The first claimant's challenge to the geographical scope of the order is raised under Ground Two but is separate and distinct from the points with which we have just dealt. Here, the point is not so much that the restrictions go beyond what might be reasonable to avoid or reduce detriment. The crucial point of law, which we readily accept, is that the 2014 Act does not authorise the making of a PSPO in respect of any place that is not a "public place". The question raised is whether the Order in this case includes prohibitions or requirements in respect of behaviour in places that are not "public places". The first claimant argues that the restrictions in this Order operate "so as to

include all the surrounding houses" with the effect (among others) that "anyone wishing to pray in their house about abortion is so prohibited".

50. The argument has some superficial merit. The 'safe zone' is defined in paragraph 6 of the Order by reference to "the area outlined in a red boundary on the attached map". Paragraph 5 is in similar terms. There is no doubt that the area outlined in red on the map includes private land which clearly is not and could not be regarded as a "public space". In this respect the map stands in marked contrast to the one used in the *Dulgheriu* PSPO, which carefully delineated the roads and pavements or sidewalks. If the true effect of the Order was to prohibit any activity in any place that is not a "public space" it would to that extent be ultra vires and unlawful.

51. However, there are also several indications that the Order is not intended to prohibit or govern activities in any private places within the designated safe zone. First, there is the heading and introduction, both of which refer to "public spaces protection." Then there are the recitals in the Preliminary section ([23] above), and in particular recital 1. This identifies the starting point, that "the activities identified below have been carried out in public places". Finally, there is the text at the head of the map, identifying the "roads/streets covered". This would naturally be read as a reference to the public parts of those roads or streets and not the private homes or gardens that abut them. These features in combination represent strong indications that the order is aimed exclusively at behaviour in public places. Considering the Order as a whole, and without the need to resort to any extraneous materials, we consider it sufficiently clear that this was the intention. If there were doubt or ambiguity a court construing an order that imposes restrictions on individual freedom would lean towards a narrow interpretation. In all these circumstances we conclude that on its proper construction the Order in this case only prohibits activities in public places within the safe zone. It would have been better to spell this out. There should be no room for reasonable doubt about such a matter. But these are drafting imperfections rather than matters that could justify a quashing order pursuant to s 66 of the 2014 Act.

The need for a "designated area"

52. Another new point raised in Mr Quintavalle's revised skeleton argument was that the Council acted in contravention of s 59(5) of the 2014 Act by failing to adopt Option 2 or Option 3. Such a proposal was advocated by one pro-choice group and supported by the Police Commissioner and the Dorset police. It was submitted that as the Council had earlier been prepared to adopt a solution on these lines as part of a negotiated settlement it must follow that it was acceptable and that the restrictions imposed went further than was necessary for any of the purposes specified in s 59(5). This was a modified version of an argument advanced in the Statement of Facts and Grounds in the form of a human rights challenge based on the principle of proportionality. By the time of the hearing that way of putting it had been abandoned.

53. This is a straightforward point which we consider lacks any merit. The test under s 59(5) is whether the prohibition or requirement is one that it is reasonable to impose for one of the specific purposes. The primary decision is for the Council. Its Decision Record of 11 October 2022 discloses a careful consideration of the merits of each option, taking account of the results of the public consultation and the pros and cons of each. The less intrusive options were considered and the record contains what appears to us to be a properly reasoned conclusion that the restrictions in Option 1 were necessary to give

effect to the rights of the service users, whereas each of Options 2 and 3 had considerable drawbacks. One key point here was and is that the green on which the protest activities had previously taken place is very close to the Clinic and is a natural route for visitors and staff to take when travelling to and from the Clinic.

The first claimant's Convention rights (Ground 3)

54. The primary case pleaded under Ground Three and set out in the original skeleton argument on behalf of the first claimant was that the restrictions imposed by the Order represented an interference with the first claimant's rights under Articles 9(1), 10(1) and 11(2) of the Convention which was not justified under Articles 9(2), 10(2) or 11(2) as it was not in accordance with the law and was in any event disproportionate. It is obvious and common ground that the Order interferes with the rights protected by Article 9, 10 and 11. We reject the contention that the interference is unjustified.

55. The argument that the restrictions were not in accordance with (or prescribed by) law was that they were not authorised by the 2014 Act for the reasons advanced under Ground One. That argument is no longer pursued. It would have failed for the reasons already given. The proportionality argument, as pleaded, was that the Council's justification for the Order rested critically on the Article 8 rights of service users but it was in no position to evaluate these as it had failed to gather sufficient or adequate information for that purpose. It was said that the Council in this case had failed to do as Ealing did in *Dughleriu* and gather detailed evidence of the impact on users. That part of the pleaded case has also been abandoned. We would have rejected it for the reasons we have given at [40]-[43] above.

56. Mr Quintavalle's revised skeleton argument took different proportionality points, targeting two specific aspects of the Order. The prohibition in paragraph 4a (engaging in "act of approval/disapproval" etc) was said to have, in practice, "a significant chilling effect" and to lack any justification as paragraphs 4b and 4c are sufficient to provide proportionate protection to Clinic staff and users. It was said that the practical effect of paragraph 4a is to prevent even silent prayer or the mere offer of help to pregnant women "even where no approval or disapproval of abortion is voiced." Paragraph 4e ("displaying text or images" etc) was criticised for "criminalising" the use of text and images in terms so vague that they fail to satisfy the foreseeability requirements of Article 10 and which are anyway overbroad as they include matters unrelated to the termination of pregnancy. This last point rested on a definition of the scope of "text or images" contained in paragraph 6 of the order. We reject these submissions.

57. Paragraphs 4a to 4e of the Order are copied from paragraphs (i) to (v) of the order in *Dulgheriu*, the terms of which are set out in the judgment of Turner J at [12]. That is understandable. The drafting of restrictions of this kind is plainly a difficult exercise. It is natural for someone preparing an order of this kind to look to precedents and to alight on one that has survived legal challenge. To some extent the points raised in the present case mirror criticisms considered and rejected by Turner J in *Dulgheriu* at [87]-[88]. Turner J was, for example, unimpressed by suggestions that the effect of the order in that case might be to subject someone standing silently outside the Centre to criminal penalty, and similar objections. He found such criticisms to be "unattractively contrived" and pointed out that in any event an act in breach of a PSPO is only a crime when carried out without reasonable excuse.

58. Although Mr Quintavalle's submissions are not identical to those raised in *Dulgheriu* they overlap and our response to them is substantially the same. His arguments appear to us to be abstract and theoretical rather than practical and realistic. The point is underlined by the fact that it took a year and a change of Counsel before these grounds of objection were identified in the present case. We regard these parts of the Order as distinctly different from paragraphs 4b and 4c, rationally connected to the objective, merited by the underlying evidence, and sufficiently clear to satisfy the Convention requirement of foreseeability. The Order in this case has an expanded definition of the prohibited categories of text and images which tends in our judgment to assist that process rather than hinder it. We cannot accept the submission that the prohibition on displaying "images of mothers and babies" is disproportionate because it is not "related directly or indirectly to the termination of pregnancy".

59. The first claimant originally pleaded, in addition, that the Order interferes with Articles 9, 10 and 11 read with Article 14 because, by expressly prohibiting prayer in the restricted area, it negatively targets those such as the first claimant who are motivated by religious faith as opposed to those without such faith and that the discriminatory impact has not been justified by the Council. The attack was, on the face of it, on the Order as a whole. The argument was that the Order was indirectly discriminatory. The claimant's case has since changed. The revised skeleton argument acknowledges that the Council conducted an Equality Impact Assessment which recognised that the Order might have an indirectly discriminatory effect but concluded that any such discrimination was justified by the need to balance the competing rights. It narrows the focus to paragraph 4f of the Order. And it changes the legal arguments in three respects. The case advanced now relies only on Article 9 read with Article 14. It is one of direct not indirect discrimination on the basis that paragraph 4f is "aimed squarely at proscribing … Christian practices" which are not practices which belong to other religions or beliefs. And Mr Quintavalle also prays in aid sections 13 and 29(3) of the Equality Act 2010.

60. What in substance has happened here is the complete abandonment of the pleaded case coupled with a belated attempt to substitute, without formal amendment, a different ground of claim which is loosely related but radically recast. By the time of the hearing before us the Council had not been able to prepare a full case in answer to the first claimant's new case on the Equality Act. Mr Quintavalle's response was that this line of argument added little to his case. Nonetheless, had we found this aspect of the new arguments presented any real difficulty we would have declined to consider it. As it is, we dismiss the claim of direct discrimination as unarguable, however it may be cast as a matter of law. It is impossible to conclude that the activities described in paragraph 4f of the Order were proscribed because they are characteristically Christian. It is plain that the reason for proscribing that conduct is that it is something that was happening. The Decision Record listed praying, singing, holding rosaries and sprinkling holy water as among the "most prevalent" behaviours reported by the Clinic since February 2019. This was conduct which, so the Council believed, had been engaged in within the safe zone and was likely to continue, and sufficiently detrimental to the quality of life of persons in the locality to make it necessary and proportionate to prohibit it within that zone. The Order targeted the behaviour not the individuals. There is no evidence, nor even any allegation, that the Council would not have acted in the same way if equivalent activities had been undertaken by people of other faiths or none.

The Convention rights of others (Ground 4)

61. The pleaded case is that the prohibitions in the order are contrary to s 6 of the HRA as they constitute unjustifiable interferences with the Convention rights of women unknown under Articles 8, 9, 10 and 11 both on their own and read with Article 14. The original written argument relied on the rights of women contemplating abortion to receive information about alternative options, which are guaranteed by Articles 8 and 10. The allegation was that the Council gave no weight to those rights. It was said to follow that there had been an unjustifiable infringement of the rights of the women concerned under Articles 8 to 11.

62. In this context, reliance on Articles 9 and 11 appears to be misconceived. Mr Quintavalle's revised skeleton argument abandoned those aspects of the claim. Nor, in this context, did he advance any argument in support of any case of discrimination. His submissions focussed exclusively on Articles 8 and 10. He laid stress not only on the rights of pregnant women to receive information and support but also on the evidence adduced by the first claimant that "many women who have attended the Clinic have not proceeded with an abortion". He added that the consequence is that there are human lives that would not exist if help such as that offered by the first claimant outside the Clinic had not been available. It was argued that the Council had ignored these powerful considerations which plainly outweighed "the upset feelings of some clinic users".

63. We readily accept that Article 10(1) provides individuals with protection from state interference with their ability to receive information which they wish to acquire. In the present context, where the information under discussion relates to an issue so central to a woman's private and family life, the same is true of Article 8(1). The Order does represent an interference with these rights, but it is first necessary to assess the extent and significance of the interference involved. The question then is whether such interference is justified under Articles 8(2) and 10(2) by a need to protect the rights of others.

64. We are not persuaded that the Council ignored this aspect of the matter. The questions posed in the public consultation were open questions inviting information and opinions about the advantages and disadvantages of the various options. The EIA cited Article 10 in full, including its reference to the right to receive information. Ms Howlett's statement addresses the suggestion that 40 Days for Life and other pro-life groups were "providing support and/or counselling" which might help service users to decide whether to continue with their pregnancy. She clearly took account of this as a point in favour of the protestors. Her evidence is however that she understood when taking part in the decision-making process that none of the volunteers are trained medically or in counselling, whereas the Clinic's operations were highly regulated and imposed obligations to provide counselling by trained staff. We are nonetheless required to conduct an intensive review of our own.

65. The pleaded case is concerned with the information and privacy rights of women, not the rights of unborn children, which would raise a host of different legal issues. On the evidence, the interference complained of is limited. Much of the Order has nothing to do with the provision or acquisition of information about alternatives to abortion. That reflects the fact that few of the activities targeted by the Order were aimed at providing such information. To the extent that the Order does prevent women from receiving information it only has that effect when they are within the safe zone during the hours

of operation of the Order and someone, such as the first claimant, is seeking or offering to provide them with information. Even in that limited context the Order only affects women who want information. In our judgment there is scant evidence that this theoretical interference is in reality one of substance and significance.

66. We accept that not every woman who attends a facility such as the Clinic with a view to an abortion will already have a fixed, determined, and unalterable intention to go ahead with the procedure. In the nature of things some will be wavering over such a momentous decision. There is evidence that this was so in the case of some women who attended the Clinic in the years before the Order was made and interacted with the first claimant or volunteers from her organisation. But there is no evidence that this was for want of other means of access to information about alternatives. It appears clear to us that at all times any woman who wanted to obtain access to information about alternatives to abortion was able to do so before arriving in what became the safe zone and after leaving that zone and entering the Clinic itself. Information of that kind is readily available online. So far as the Clinic is concerned, as Ms Bhogal has emphasised, it had a legal duty to provide women with "impartial, accurate and evidence-based information which is delivered neutrally and non-directive and non-judgmental counselling": see the Procedures for the Approval of Independent Sector Places for Abortion paras 12 and 14.

67. Turning to the rights of others (namely women visiting the Clinic, those attending with them and Clinic staff) the balance appears to us to fall firmly in the opposite direction to the one contended for by Mr Quintavalle. The vast majority of visits to the Clinic were made by women who had no desire at that time to be provided with any information about alternatives to abortion unless it be by doctors and other specialist trained staff employed at the Clinic. To have unwanted information thrust upon one at such a time is a substantial intrusion into privacy. We adopt, with a minor adaptation, the Supreme Court's observation at [117] of *Re Abortion Services*:

> Enabling women to access premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity, without …. intrusions upon their privacy is of such obvious importance as to constitute a compelling justification for [state] intervention. The same can be said of the importance of enabling the staff of such facilities to access their place of work under acceptable conditions.

Counsel's argument plays down the effect of the evidence in this case, the overwhelming preponderance of which speaks to the substantial distress and anxiety that hundreds of women and family members and, to a lesser extent, Clinic staff had been caused over several years by the proscribed activities. We bear in mind that when dealing with this point we are addressing only the provision of information, but these observations have powerful resonance nonetheless.

The power of dispersal (Ground 5)

68. The first claimant's case remains as originally pleaded. The case is that paragraph 4g of the Order (prohibition on remaining in the safe zone when asked to leave etc) is unlawful for three reasons: because such a prohibition is too vague and imprecise, incompatible with the limited powers of dispersal conferred on the police by ss 34-37

of the 2014 Act, and in any event not "reasonable" for any of the purposes specified in s 59(5).

69. The key to this issue is to understand the relationship between paragraph 4g and paragraph 8 of the Order. By paragraph 8, which is not challenged, a person is required to leave the area if two conditions are satisfied: (a) they are "believed to have engaged in a breach of this order within the safe zone" and (b) they have been "asked to [leave]" by a police officer, PCSO or a person designated by the Council. Paragraph 4g prohibits such a person from staying in the safe zone or coming back to it until after 7pm the same day. It follows that the power of dispersal is not, as alleged, "free-standing". It can only be exercised where the person concerned is believed to have infringed the Order and then only by one of the designated categories of official.

70. Once this is understood, it disposes of the contention in the first claimant's statement of facts and grounds that paragraph 4g falls foul of the principle referred to in *DPP v Purdy* [2009] UKHL 45, and should be considered so imprecise that affected individuals could not understand its scope or regulate their conduct without breaking the law. Nor do we see any arguable incompatibility between this prohibition and the police powers referred to, which are conferred by a different Part of the 2014 Act. On the contrary. Sections 34-37 create a regime by which an officer of at least the rank of inspector can authorise constables, if certain conditions are met, to direct people to leave a locality and not to return. By s 39 of the Act a person who fails without reasonable excuse to comply with such a direction commits an offence punishable by up to 3 months imprisonment or a fine not exceeding level 4. The combined effect of paragraphs 4g and 8 of the Order is to confer powers of dispersal not only on the police but also on PCSOs and designated Council officials. But although failure to comply with a PSPO without reasonable excuse is also an offence (s 67) this is only punishable with a fine up to level 3 and s 68 provides that an authorised person can first issue a fixed penalty notice ("FPN"). The reality, as borne out by what has happened in fact, is that the first step will be the issue of an FPN, and legal proceedings will only follow in the event of non-payment. This aspect of the Order thus allows for a suitably calibrated response to conduct which is believed to be in breach of the Order. The police need not get involved. And the sledgehammer of prosecution for an offence contrary to s 39 need not be employed. There is nothing unreasonable about that.

The judicial review claim

71. For the reasons given in the Amendment Judgment we confine ourselves to the three grounds originally pleaded. We grant permission for judicial review on each of those grounds but dismiss the claim.

72. We do not consider the judicial review claim to be "academic". The mere fact that it overlaps with a statutory challenge that was already under way does not make it so. There is also one ground of judicial review that does not feature in the first claimant's challenge.

73. Although we would take considerable persuasion that the effect of s 66 is to oust the remedy of judicial review altogether in this field we do see some force in the Council's contention that the 2014 Act impliedly excludes a judicial review claim of the kind that has been brought in this case. Section 66 sets limits on those who can challenge a PSPO, sets boundaries on the grounds that can be relied on, and lays down a short time limit

for bringing a challenge. The present claim relies on grounds that fall within the statutory scheme but it is brought by a corporate body not an "interested person" and was issued well outside the statutory limitation period However, the point is one of general importance to which the answer is not immediately plain and obvious and which it is not necessary for us to decide given our other conclusions about this claim.

74. Nor would we refuse permission on the grounds of delay or lack of standing. On the facts of this case both questions are closely allied with the question of whether and if so to what extent the statutory regime is exclusive. Both are moot if the Council's case on that point is correct. Again, there is no need to resolve them given our views on the merits.

75. For the most part, we have already set out and explained those views. Ground One (geographical extent) is arguable but ultimately fails because on its true construction the Order does not affect activities on private land: see [48]-[50] above. Ground Two (unauthorised power of dispersal) is also arguable but fails because it rests on a misunderstanding of the Order as a whole and viewed in context the powers are reasonable: see [67]-[70] above. We add that the contention advanced in the judicial review claim that paragraph 4g could result in a resident of one of the streets within the safe zone being barred from returning to his home before 7pm is ill-founded. Such a person could only be directed to leave if he or she was believed to have contravened the Order. They would have a reasonable excuse for travelling home through the safe zone and would no longer be in that zone once they got home. Ground Three (failure to consult) is also arguable but fails for the reasons that follow.

76. The second claimant's case is that the provision in s 72(4) of the 2014 Act whereby, before making a PSPO, a local authority must consult "with … the chief officer of police" is an essential formal requirement that can only be satisfied by substantive discussion with the office-holder personally. In fact, it is said, there was no such discussion. Instead, what happened was that on 8 August 2022 the Council sent an email to a police sergeant (Nicola Chalstrey) who was staff officer to the Assistant Chief Constable (Rachell Farrell) with a request that the email and consultation document be forwarded to the Chief Constable. Two chasing emails eventually prompted a short response dated 16 September 2022 from a Chief Inspector (Darren Harris) providing only a neighbourhood policing perspective. Not only was this after the close of the consultation period, there was never anything from the Chief Constable, nor any evidence that he or his Assistant Chief Constable personally considered the matter. The fact that the proposal was "to create new crimes by delegated authority" and the importance of the rights affected makes this an exception to "the Carltona doctrine": see *R v Adams* [2020] UKSC 19. The failure to consult with the Chief Constable, or his failure to discharge his statutory duty by engaging in consultation, makes the entire PSPO unlawful. In our judgment this ground fails on the law and on the facts.

77. The contention that the Chief Constable had a statutory duty to engage in consultation seems to us misplaced and in any event immaterial. The statutory duty to consult was cast firmly on the Council. The first question is what it had to do to comply with this duty. The statute identifies the consultee as the Chief Constable. We would accept that the duty cannot be discharged without communicating with the holder of that office. On one view it would be enough to satisfy the statutory obligation if the Council informed the Chief Constable of its proposals and asked him for a consultation response, allowing a sufficient period of time for that to be done. On a closer examination of the evidence

it appears to us that that is what actually happened here. The email of 8 August 2022 was sent for the attention of the Chief Constable. We have a witness statement from the Chief of Staff at the Office of Chief Constable of Dorset Police (Joseph Michael Pardey) which confirms that it was received at that office, as were the chasing emails. The email made clear that it was sent in discharge of the statutory consultation duty and contained a link to the consultation paper. There was ample time for the Chief Constable to respond.

78. Assuming that the duty of consultation required the Council to elicit a response, there plainly was one. The evidence makes plain that Chief Inspector Harris's email was the response of the police to the consultation request made to the Chief Constable on 8 August 2022 and it describes the response as "representative of the Chief Officer". The fact that the email came after the end of the formal consultation period is nothing to the point. It was plainly taken into account when making the Decision some three weeks later. So the question is whether that response fell short of the statutory requirement because it was not made personally by the Chief Constable. We do not believe so.

79. Reference has been made in argument to a number of authorities concerning the exercise of statutory powers conferred on the holder of a named office. We are not sure these are directly in point. They do show, however, that where a statute identifies something that has to be done by the holder of a named office it can be inferred that the act must be performed personally by that office-holder but that need not be so; context is important: see de Smith's Principles of Judicial Review 6th ed (2023) at para 5-144. *R v Adams* was concerned with the exercise of powers conferred on a minister; it shows that an aspect of the context that may point away from inferring a power to delegate is "the seriousness of the consequences": see [14] (Lord Kerr). On the other hand, there may be circumstances in which "the administrative convenience of allowing a deputy or other subordinate to act as an authorised agent very clearly outweighs the desirability of maintaining the principle that the officer designated by statute should act personally". The application of this principle is very familiar in the context of immigration and asylum decisions made by officials on behalf of the Home Secretary. Closer to the present case, this was the principle applied in *R (Lainton) v Chief Constable of Greater Manchester Police* [2000] 1 Pol LR 68 in holding that a power to extend the probationary period of a police constable, conferred by regulations on the Chief Constable, could validly be delegated to an Assistant Chief Constable (the passage cited is taken from the judgment of Laws LJ at pp71-2). An implied power to delegate can more readily be found where the function is assigned to officers such as Chief Constables who sit at the apex of a hierarchically structured organisation and are legally answerable for what is done by others under their command; and "one can readily infer that when Parliament confers functions on a chief officer of police, all but the most important are likely to be delegable": *R (Chief Constable of the West Midlands Police) v Birmingham Justices* [2002] EWHC 1087 (Admin) [14] (Sedley J).

80. In our view it can readily be concluded that Parliament did not, when enacting s 72(4)(a) of the 2014 Act, intend thereby to compel local authorities to secure a personal response from the Chief Constable as a precondition to making a valid PSPO. The Chief Constable was not the person charged with deciding whether to "create new crimes", if that is an appropriate description. That responsibility lay with the Council. The Chief Constable was no more than a consultee. The legislative aim of imposing this duty of consultation is tolerably clear: to enable the Council to factor into its decision-making

an expert professional policing assessment of the implications of the measures which it was proposing. As Parliament can be taken to know, a Chief Constable bears overall responsibility for the conduct of policing in his or her area but is most unlikely to possess the relevant local knowledge. Delegation to an appropriate person was, in our judgment, legally permissible. In this instance the chain of delegation is sufficiently clear from the evidence of Mr Pardey and the emails themselves. Mr Pardey states that the Council's emails were forwarded to the Superintendent (Heather Dixey) and Chief Inspector (Darren Harris) for their views "in order for the Office for Chief Constable to provide a response". This being essentially a matter of neighbourhood policing it was not improper for the response to come from the Chief Inspector in charge of that aspect of Dorset's policing function.

Conclusions

81. When making the Order the Council lawfully followed the democratic and consultative procedures prescribed by the 2014 Act. The decision-maker was entitled to conclude that the threshold conditions for making an order were satisfied. The detailed provisions of the Order are consistent with s 59(5) of the 2014 Act and with the Council's duty under s 6 of the HRA. To the extent that the Order interferes with the human rights of the first claimant and those of non-parties on which she has relied in support of her claim the interference is justified by the legitimate aim of protecting the rights of women attending the Clinic, their associates and the staff. Both claims are dismissed.

ANNEX: THE MAP