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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **29/03/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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DIVISIONAL COURT

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IN THE MATTER OF APPLICATIONS BY KLARA KOZUBIKOVA, MICHELE ANNE HUGHES, SUZANNE FITZGERALD AND OTHERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Ronan Lavery QC with Mr Seamus McIlroy (instructed by Brentnall Legal Ltd) for the applicant Kozubikova
Mr Michael Forde (instructed by Toal Heron Donnelly Solicitors) for the applicant Hughes
Mr Michael Potter (instructed by Norman Shannon & Co Solicitors) for the applicants Fitzgerald and Others
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the proposed respondent in all three applications

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Before: Colton J and Humphreys J

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COLTON J

Introduction

[1] These applications all involve challenges to decisions by the PSNI to issue the applicants with a Fixed Penalty Notice ("FPN") pursuant to the Health Protection (Coronavirus Restrictions) (No.2) Regulations 2020 as amended ("the Regulations"). In the cases of Kozubikova and Hughes the court delivered judgment on 19 May 2021 in which it determined that the proceedings in those cases related to a criminal cause or matter. Therefore, the court convened as a Divisional Court to determine

the substantive leave applications. It was agreed that the applications in Fitzgerald and others would also be heard by the same court as they raised similar issues.

Statutory Background

[2] Before considering the individual applications it is useful to set out the statutory background to these applications.

[3] The Health Protection (Coronavirus Restrictions) (No.2) Regulations (Northern Ireland) 2020 (as amended) were made by the Department of Health in exercise of the powers conferred by sections 25C(1), (3)(c), (4)(d) and 25F(2) of the Public Health Act (Northern Ireland) 1967 [see Coronavirus Act 2020 (chapter 7) Schedule 18].

[4] Regulations 4-6 and Schedule 2 impose restrictions and requirements on members of the public. In particular, Schedule 2 imposes restrictions on persons staying overnight at any place other than the place where they are living or where their linked household is living and provides at para 3(a) that:

> "No person may participate in a gathering indoors in a private dwelling which consists of persons from more than one household."

The Regulations also provide for restrictions on outdoor gatherings.

[5] The Regulations create offences and penalties arising from contraventions of the requirements. In particular, Regulation 8(1) provides as follows:

> "8.-(1) A person who, without reasonable excuse, contravenes a requirement in regulation 4 to 6, or Schedule 2 commits an offence."

Regulation 9 provides for fixed penalty notices. In particular, Regulation 9(1) provides:

> "9.-(1) An authorised person may issue a fixed penalty notice to anyone that the authorised person reasonably believes:
>
> (a) has committed an offence under these Regulations;
> …
>
> (2) A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by

payment of a fixed penalty to the authority specified in the notice.

…

(4) Where a person is issued with a notice under this regulation in respect of an offence:

(a) no proceedings may be taken for the offence before the end of the period of 28 days following the date of the notice;

(b) the person may not be convicted of the offence if the person pays the fixed penalty before the end of that period.

(5) A fixed penalty notice must:

(a) give reasonably detailed particulars of the circumstances alleged to constitute the offence;

(b) state the period during which (because of para (4)(a)) proceedings will not be taken for the offence;

(c) specify the amount of the fixed penalty;

…

(f) inform the person to whom it is given of the right to ask to be tried for the offence."

[6] In relation to enforcement of requirements under the Regulations, Regulation 7 provides:

> "7.—(1) A relevant person may take such action as is necessary to enforce any requirement imposed by regulation 4 to 6, or Schedule 2."

[7] The interpretation section of the Regulations at Regulation 1 provides that:

> "Relevant person means:
>
> (a) a constable..."

Klara Kozubikova

Factual Background

[8] The background to the issue of the FPN in dispute in this application is set out in the supporting affidavit of the applicant.

[9] For the purposes of this ruling it is sufficient to note that when Covid-19 restrictions were put in place the applicant decided to move in with her step-mother and some of her family in their home at 4 Downshire Park Central, Belfast. On 28 December 2020 she was present in those premises when two PSNI officers entered the house. It is her case that they did so without anyone's consent and were uninvited. She avers that a number of other persons were in the house, including her stepmother, two of her sons, three other persons and two other children.

[10] She avers that the PSNI took the details of all those present and issued a FPN to all the adults in the property.

[11] The FPN challenged in this application is set out in a pro-forma document. In one column it sets out the details of the applicant, her name, date of birth and her address. Under the section **Offence Details** a box adjacent to the following statement is ticked:

> "You were in contravention of a requirement without a reasonable excuse – Regulation 8(1)."

[12] The document goes on to set out the date of the offence, the location of the offence and the issuing officer. It also records that the relevant penalty is £200. The FPN form is signed by the applicant. The pro-forma also informs the recipient in a section headed **Part A** how to pay the fixed penalty of £200.

[13] The document further provides in Part B that:

> "If you choose to request a court hearing you must do so either by returning Part B of the fixed penalty notice or by writing within 28 days to the address shown giving your details and an address at which a summons may be served on you."

Part B includes the following declaration:

> "I wish to be dealt with by a court for the alleged offence described within the Recipient Copy of this notice."

[14] Finally, the FPN contains information for the attention of the person in receipt of the notice. The information includes the following paras:

> "Within 28 days of the date of issue you must either pay the penalty by completing **PART A** or request the matter to be heard by a court by completing **PART B**. You may not do both.
>
> If you do not either pay or request a court hearing within the permitted 28 day period (known as the suspended enforcement period) the sum payable will be automatically increased by 50% and registered against you in your local court for enforcement as a court fine, which if it remains unpaid may result in the issue of a court warrant.
>
> You can seek legal advice on these matters if you wish but you must still either make full payment or request a court hearing within the permitted 28 day period.
>
> A penalty notice does not result in a criminal conviction or form part of a criminal record. However, a record will be kept on police computer systems that will show you as being responsible for committing this offence and may be used for other policing purposes. If you go on to commit another offence this record will be reviewed to help decide how to deal with the matter.
>
> It may also be disclosed if deemed relevant as part of an enhanced Criminal Record check or shared for other purposes where deemed relevant and appropriate. …"

[15] The applicant has completed a **Part B** Notice which was signed by her on 30 December 2020. Subsequent to completing this Notice the applicant has been summoned to appear at Belfast Magistrates Court. The summons was issued on 27 June 2021 and includes statements from police officers setting out their account of the circumstances in which the FPN was issued. It is clear from the contents of the statements that there is a conflict between the applicant and the police officers about the precise circumstances in which the FPN was issued.

The applicant's case

[16] Whilst the applicant challenges the actual decision to issue an FPN, for the purposes of judicial review proceedings, the challenge is essentially twofold.

[17] Firstly, the applicant says that the FPN is invalid by reason of a failure to give reasonably detailed particulars of the circumstances alleged to constitute an offence

as required by Regulation 9(5)(a) of the Regulations. Secondly, she says that the PSNI did not have the power to enter her home prior to issuing the FPN.

[18] In relation to the first point, the proposed respondent realistically concedes that it has not complied with the requirements of the Regulations. The court has been informed that it has now reissued instructions to officers regarding the need to record reasonably detailed particulars of the circumstances alleged to constitute the offence on FPNs.

[19] It is important to note that the prosecution of the applicant is not dependent on a valid FPN. When a recipient chooses to request a court hearing the FPN slip is sent to PSNI Penalty Notice Processing Office, who then inform Court Service of the request. The Court Service then confirms back to PSNI that they have authorised the withdrawal of the COV4 FPN from their system and that a report should issue to the PPS.

[20] The PPS must then consider whether to prosecute. Proceedings do not issue automatically when the Notice is served requesting a court hearing. It then becomes a matter for the PPS to exercise a prosecutorial judgment, as would have been the position had the matter simply been referred to the PPS in the first instance without a FPN issuing.

[21] Thus even if an FPN were quashed in any given instance the relevant applicant would still face potential proceedings as the issuing of a FPN is not a pre-requisite for the commencement of proceedings. This of course is subject to the obligation on the PPS to ensure that a summons is issued within 6 months of the date of the alleged offence (see discussion in the Hughes case below).

[22] The applicant has undoubtedly established an arguable case that the FPN issued to her was unlawful and in breach of the Regulations. The issue for the court is whether it should grant leave to permit the applicant to seek the remedy sought in the Order 53 Statement, namely an Order of Certiorari to quash the issuing of the notice. The court accepts that the public law issue identified is clear and does not require further consideration by the court. However, the court accepts the applicant's submission that these are the only proceedings whereby the Notice itself can be challenged. Even though the Notice does not result in any criminal conviction a record is kept on the police computer systems and it may be used for other policing purposes. It may also be disclosed, if deemed relevant, as part of an enhanced criminal record check or shared for other purposes where "deemed relevant and appropriate." Even if the applicant is acquitted by the District Judge the notice remains on the system, or at least that is the understanding of the court at the leave stage. In those circumstances it seems to the court that there is some utility in the court reviewing this issue.

[23] **For these reasons the court grants leave to the applicant to challenge the fixed penalty notice on the grounds of breach of statutory duty and legality.**

[24] In relation to the second issue, Mr Lavery submits that there is considerable public confusion and debate regarding the powers of the PSNI to enter premises under the Regulations. The PSNI relies upon Regulation 7(1) as the power which permits officers to enter premises outwith any other statutory or common law power. As set out above it provides:

> "7.—(1) A relevant person may take such action as is necessary to enforce any requirement imposed by regulation 4 to 6, or Schedule 2."

[25] It is the applicant's case that the intrusive power to enter a citizen's premises should not be permitted absent an express provision by the legislator.

[26] Mr Lavery points out that this provision is a vague, sweeping and arbitrary provision which lacks the quality of law necessary to justify interference of citizens' rights under Article 8 ECHR.

[27] It is the applicant's case that the PSNI officers entered the premises without a warrant. Although disputed, it is asserted that they were not invited into the premises by any residents or visitors in the premises. The PSNI officers could not rely on the provisions of Part II of the Police and Criminal Evidence (Northern Ireland) Order 1989 nor any common law power to justify entering the premises without the consent of the residents.

[28] The applicant points out that the Regulations do provide specific powers to police officers to direct a gathering to disperse, direct any person in a gathering to return to the place where they are living or remove any person from a gathering – Regulation 7(3). Further, Regulation 7(4) provides the power to a relevant person exercising the power in sub-paragraph (3) to remove a person from a gathering to use reasonable force, if necessary, in the exercise of the power. In short, it is argued that if Regulation 7(1) has the all-encompassing nature argued for by the proposed respondent these provisions would be rendered otiose.

[29] The applicant points to the fact that Regulation 8(5) to the Regulations provides:

> "(5) Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 applies in relation to an offence under this Regulation as if the reason in paragraph (5) of that Article included:
>
> (a) to maintain public health;
> (b) to maintain public order."

In this way it was recognised that it was necessary to provide legislative provision for powers of arrest in relation to the Regulations.

[30] The applicant points to further provisions arising from restrictions relating to the Coronavirus which demonstrate the need for express provision when providing powers to relevant persons such as police officers.

[31] In similar vein the amendments to the Public Health (Northern Ireland) Act 1967 ("the 1967 Act") made by the Coronavirus Act 2020 granted specific powers to enter premises in limited circumstances - see section 25R which allowed for entry by authorised officers under bespoke circumstances in relation to "Part 1A Orders" under sections 25G, 25H and 25I (*i.e.* measures which can be taken on foot of an order by a magistrate) and specific powers under section 25R/S.

[32] These submissions find some support in the fact that in other jurisdictions express provision has been made for similar powers. In England and Wales, notwithstanding the existence of a similar provision to Regulation 7(1) the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.7) Regulations 2021 provided an express power of entry to constables to search for a person who is suspected of committing an offence of contravening requirements to self-isolate.

[33] In Wales the local assembly inserted a specific provision to deal with this issue under Regulation 27 of the Health Protection (Coronavirus, Restrictions) (No.3) Wales Regulations 2020 which state:

> "**Power of entry**
>
> 27.-(1) An enforcement officer may enter premises, if the officer -
>
> (a) has reasonable grounds for suspecting that a requirement imposed by these Regulations is being, has been or is about to be contravened on the premises, and
>
> (b) considers it necessary to enter the premises for the purpose of ascertaining whether the requirement is being, has been or is about to be contravened."

[34] These are of course not determinative of the issue but do demonstrate a recognition by those legislators that express powers were appropriate in certain circumstances.

[35] On the substance of the matter the proposed respondent says that Regulation 7 does provide the requisite power and relies on guidance issued by the Department

of Health on the exercise of police powers under Regulation 7(1) of the 2020 Regulations. It should be noted that this guidance was issued on 29 January 2021, some 5 weeks after the incident involving the applicant and 10 months since the first Covid Regulations were introduced in Northern Ireland. The guidance provides:

> "5. In exercising any power under Regulation 7(1) the relevant person should be particularly cognisant of the following:
>
> (a) the rights to respect for private and family life and the home under Article 8 ECHR;
>
> (b) the rights to freedom of peaceful assembly and freedom of association with others under Article 11 ECHR;
>
> (c) the prohibition on discrimination under Article 14 ECHR;
>
> (d) the right to peaceful enjoyment of possessions under Article 1 Protocol 1 ECHR;
>
> (e) the best interests of a child as a primary consideration under Article 3 UNCRC."

[36] For the purposes of this hearing the court is persuaded that it is at least arguable that the Regulations are insufficient to provide the power of entry argued for by the proposed respondent, are not compliant with the Human Rights Act 1998 and lack the necessary quality of law.

[37] However, the main issue raised in these leave proceedings by the proposed respondent is that this is a matter which can and should be dealt with in the ongoing criminal proceedings.

[38] It is pointed out that it is clear from the papers that there is a factual dispute about whether the constables exercised their power of entry or were invited into the premises. Such a factual dispute cannot be resolved by this court.

[39] It is submitted that the point which the applicant raises can be addressed fully in the course of the criminal trial.

[40] The intervention by the Divisional Court in criminal matters is an exceptional course. The proposed respondent characterises this application as the type of impermissible satellite litigation repeatedly deprecated by the Divisional Court.

[41] The District Judge hearing this case can make a determination on the factual issues. If necessary he or she can further make a determination on whether or not Regulation 7 provides powers to the PSNI to enter premises in the circumstances of this case. That can include a determination on the Convention compliance arguments if it is necessary to do so.

[42] If a substantial legal issue arises in the context of the trial the "case stated" procedure provides the appropriate mechanism for resolution of questions of law against a fixed factual framework.

[43] The respondent therefore says this matter should be litigated in the correct forum of the Magistrates' Court.

[44] The leading authority is *R v DPP, ex p Kebeline* [2000] 2 AC, where a challenge to the DPP decision to prosecute had been made by way of judicial review, Lord Steyn stated:

> "Where the passing of the Human Rights Act 1998 marked a great advance for the criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system."

[45] This principle was applied in this jurisdiction in cases such as *R v O'Neill* [2005] NIJB where Weatherup J held that any issue of fairness in particular proceedings concerning disclosure arrangements should not be dealt with by judicial review as such applications amounted to impermissible satellite litigation. He was satisfied that the criminal proceedings were capable of producing a trial that satisfied the requirements of Article 6 ECHR. In the case of *Marshall Taggart* [2003] NIQB 2 Kerr J considered a challenge to a senior investigating officer of the Office of the Police Ombudsman for Northern Ireland requiring the applicant to attend for interview at a police station. He held that it was not open to the applicant to do so as this represented impermissible satellite litigation.

[46] Whilst the court bears this important principle in mind, it considers that leave should be granted on this point. The powers of the police in relation to the enforcement of these emergency Regulations is a matter of public importance and debate. This issue is likely to have arisen in other cases. A District Judge hearing the prosecution in this case may not provide a definitive ruling on the issue. For example, it may be decided that in fact the powers under Regulation 7 were not

exercised. A District Judge could decide that the powers of entry were exercised, were unlawful, but nonetheless admit the evidence giving rise to the prosecution. Different District Judges may come to different conclusions when faced with an argument on this point. Overall, the court considers that there would be utility in considering this issue and providing legal guidance on whether, in fact, Regulation 7(1) provides a lawful basis for police officers entering private premises.

[47] **For this reason leave is granted in respect of the applicant's challenge to Regulation 7(1) and whether it gives a "relevant person" the right to enter any premises.**

Michelle Anne Hughes

Factual Background

[48] On 3 January 2021, police were called to 3 Killowen Drive, Magherafelt by the applicant who reported that a Mr Woods was refusing to leave her property.

[49] On attendance at the property two males were located along with the applicant. All three that were present were intoxicated. FPNs were served on all three.

[50] The FPN served on the applicant did not provide any details of the offence. Under the heading "**OFFENCE DETAILS (only select one offence per recipient per incident)"** none of the three options in the pro forma Notice were ticked.

Events subsequent to the issuing of the fixed penalty notice

[51] The applicant did not pay the £200 fixed penalty. Neither did she make a request to be tried, which she is entitled to do by completing Part B of the FPN within 28 days of its issue.

[52] As a consequence the Chief Constable of the PSNI issued a registration certificate under section 66(3) of the Justice (Northern Ireland) Act 2011 requiring a sum equal to the fixed penalty plus one half of the penalty (£300) to be registered under section 67 of the Act for enforcement as a fine. A Collection Order was made by a District Judge without a hearing on 4 February 2021 requiring payment of the £300 to be made before 4 March 2021. Her failure to pay the £300 will make the applicant liable for further enforcement action which could include deducting money from her benefits or wages; freezing her bank accounts to the value of the outstanding amount; vehicle seizure and ultimately selling her vehicle to cover the outstanding amount; a warrant of distress; a Supervised Activity Order or a warrant committing her to prison.

The applicant's case

[53] By these proceedings the applicant seeks the following:

> "(i) An order of certiorari quashing the decision to issue a fixed penalty notice.
>
> (ii) A declaration that the impugned decision was unlawful, ultra vires and of no force or effect."

[54] By way of interim relief she seeks an injunction halting any action being taken pursuant to the Registration Certificate issued by the PSNI and the Collection Order issued by Magherafelt court office on 4 February 2021.

Consideration

[55] There can be no doubt that the fixed penalty notice does not comply with the provisions of Regulation 9(4)(a) of the Regulations which state:

> "A fixed penalty notice must—
>
> (a) give reasonably detailed particulars of the circumstances alleged to constitute the offence."

[56] In the applicant's case the Notice failed to tick any of the three boxes under the hearing "Offence Details." Even if one of the boxes had been ticked it is the court's view that this would still be insufficient to comply with the mandatory requirements of the Regulations. To say that a person had been in contravention of a requirement without a reasonable excuse – Regulation 8(1), does not constitute "reasonably detailed particulars of the circumstances alleged to constitute the offence."

[57] As in the case of Kozubikova the proposed respondent has not sought to argue otherwise. It has indicated to the court that it has now reissued instructions to officers regarding the need to record reasonable detailed particulars of the circumstance alleged to constitute the offence on fixed penalty notices. In the particular circumstances of this applicant the proposed respondent points out that she was also served with a Prohibition Notice under Regulation 7(2) of the Regulations which did include particulars of the offence alleged. However, this does not, in our view, remedy the failure of the proposed respondent in respect of the mandatory requirements concerning the FPN.

[58] The proposed respondent argues that given the concession that has been made it is not necessary for the court to make any order in relation to the FPN or to consider the matter further. The real issue that arises in this application is the effect of the deficiencies in the FPN, in circumstances where the recipient has not asked to

be tried for the offence. This is a discrete issue which does not arise in the other applications.

[59] Regulation 10 provides as follows:

> "**Effect of fixed penalty notice**
>
> 10.—(1) This regulation applies if a fixed penalty notice is given to any person under regulation 9.
>
> (2) If the person asks to be tried for the alleged offence, proceedings may be brought against the person.
>
> (3) If by the end of the period mentioned in regulation 9(4)(a)—
>
> (a) the penalty has not been paid, and
>
> (b) the person has not made a request to be tried,
>
> a sum equal to one and a half times the amount of the penalty ("the enhanced sum") may be registered under regulation 12 for enforcement against the person as a fine."

[60] The proposed respondent contends that it would be wrong to grant the applicant any relief in circumstances where she failed to exercise her right to challenge the FPN by requesting a court hearing. This aligns with the proposed respondent's argument that the general approach to these applications should be that the Magistrates' Court is the appropriate forum for determining the issues raised in these proceedings. The proposed respondent further submits that the applicant's failure to contest the matter via the criminal process means it would be an abuse of the court's process to permit her to seek a remedy by way of judicial review.

[61] This raises a particular issue in this application as it is no longer open for either the applicant or the PPS to bring the substance of the matter before a District Judge. If the recipient of a FPN fails to request a court hearing then the only way in which the matter could be brought before a Magistrates' Court is if the PPS were to issue a summons for breach of the Covid Regulations, something it would be entitled to do independently of any deficiency in the FPN.

[62] Since Covid Regulations breaches are "summary only offences" there is a six month time limit for laying a complaint with a lay magistrate before a summary only offence is time barred. Article 19(1)(a) of the Magistrates Court (Northern Ireland) Order 1981 states:

> "A magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable upon indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue."

[63] In any event, even had the matter been brought before a District Judge within six months of the commission of the offence the function of the District Judge would be to determine whether or not the offence against the applicant has been proved beyond a reasonable doubt, rather than the validity of the FPN.

[64] Clearly the architecture of the Regulations is such that it was anticipated that if a recipient fails to seek a court hearing Regulation 10 would come into play and it would not be necessary to issue a summons against the alleged offender.

[65] In circumstances where the FPN did not comply with the regulations then the proper course for the prosecuting authorities was to issue a summons rather than proceed on the basis of Regulation 10. Regulation 10 can only come into play in circumstances where a valid FPN has been issued.

[66] **In accordance with our decision in the Kozubikova case the court considers that the applicant should be granted leave to challenge the FPN in this case**. Perhaps the real issue in this application relates to the consequences of any quashing of the FPN. The court notes that the applicant has sought interim relief in respect of halting any action being taken pursuant to the registration certificate issued by reason of the applicant's failure to either pay the £200 fixed penalty or, in the alternative, to seek a trial. At the substantive hearing the court will hear submissions on what order, if any, is appropriate in this regard.

Susan Fitzgerald and Others

Factual Background

[67] The applicant, Susan Fitzgerald, and four other persons were involved in a protest organised by ROSA NI, which is described as a socialist feminist organisation which campaigns for the end of gender based violence, in the wake of the murder of Sarah Everard and the actions of some police officers at a vigil in Clapham Common, London, on Saturday 13 March 2021.

[68] The protest took the form of an outdoor "stand out" on 16 March 2021 in Writers' Square, Donegal Street, Belfast. The event was organised with a view to ensuring it complied with all the requirements of the Coronavirus Regulations and ensuring it took place in a safe, socially distanced and well managed way. In her supporting affidavit Ms Fitzgerald avers as follows:

"12. The 'stand out' started just before 6pm, there were two speakers, a minute's silence and a minute or two of chanting by participants. Ann Orr, one of the speakers, then thanked everyone for coming and asked everyone to leave, I believe she asked people at the back to leave first and so on. People obeyed this instruction and dispersed quickly as the event was over.

13. I had been standing up near the speakers when the speeches started. I then moved towards the back of the gallery to get a sense of the numbers, I estimate up to approximately 100 people were in attendance. As far as I was aware all of the participants adhered to social distancing and other Covid-19 safety measures, as may be seen from the photograph of the event exhibited and upon which I have marked my initials SF2 at the time of swearing hereof this document.

14. As the event was finishing up when someone told me that the police started to issue fines and to make sure anyone remaining dispersed quickly. As I was leaving, I spoke to a few people and everyone else was also leaving at this stage anyhow. I then walked over to my car where I was approached by another male police officer who proceeded to issue me with a fixed penalty notice. The time on my penalty notice was 6:25 pm ...

15. The police officer who issued the fixed penalty notice did not explain to me his grounds for issuing me with a fixed penalty notice or why he considered that it was necessary for him to do so. I do not believe or accept there were reasonable grounds for issuing the penalty notice. I believe I was acting responsibly and lawfully. The protest was a legitimate gathering and constituted a reasonable exercise to be in a public place undertaking the activity of protest. I was exercising my human rights proportionately with due regard to the pandemic and need to take precautions.

16. The fixed penalty notice required me to pay the sum of £200 within 28 days or face having to pay an increased penalty. The fixed penalty notice gave me the option to request a criminal trial in Magistrates Court and the options to do this on legal advice, without prejudice to my right to challenge the validity of the fixed penalty

> notice by judicial review. I believe that I was lawfully exercising my democratic right to peacefully protest and associate with others and express my views against gender violence."

[69] The other applicants namely, Kevin Henry, Lucy Marron, Ann-Katrin Orr and Lucy Simpson have also filed affidavits confirming they attended and participated in the protest, that they received FPNs and that they too sought a trial rather than pay the fixed penalty or face having to pay an increased penalty.

[70] As is the case with the related applications the court concludes that the FPNs in these cases were also invalid by reason of their failure to comply with the requirements of Regulation 9(5). As in the case of Kozubikova, the only details of the offence on the forms was a tick opposite "You were in contravention of a requirement without reasonable excuse – Regulation 8(1)."

[71] **In light of the court's reasoning in Kozubikova leave is granted to the applicants to challenge the issuing of the FPN on the grounds of a failure to comply with the requirements of Regulation 9(5). The court considers this is particularly relevant in these applications where it does not appear that any summons has been issued. In those circumstances these proceedings are the only vehicle whereby the FPN can be challenged. As set out in para [22] above the issuing of an FPN has consequences for a recipient.**

[72] In addition to relying on the invalidity of the FPN the applicants' grounds of challenge go further and say that the PSNI has erred in law in relation to its entire approach to the protest. In particular, the applicants say that the PSNI erred in law by informing the organisers/protestors at, or just prior to, the start of the protest that the "stand out" was unlawful and contrary to the Coronavirus Regulations. It is suggested that no authorised person could have formed a reasonable belief that an offence had been committed and issued the FPNs under these Regulations. It is further argued that pursuant to the 2020 Regulations the meaning of "reasonable excuse" in the context of a public gathering under Regulations 5A and 8, is so ambiguous, vague and uncertain that its meaning cannot be ascertained with reasonable clarity; and accordingly the regulations are too vague and uncertain in their meaning to constitute valid law and be enforceable.

[73] The applicants further argue that the proposed respondent breached the Human Rights Act 1998 and, in particular, Article 10 ECHR (Freedom of Expression) and Article 11 ECHR (Freedom of Assembly) by unreasonably, unnecessarily and disproportionately interfering with the applicants' freedom of expression and freedom of assembly by issuing the fixed penalty notices in question.

[74] It will be seen that the applicants in *Fitzgerald and Others* raise a separate point of challenge to the ones raised in the other applications. They challenge the validity of the Regulations themselves. They argue that the reference in Regulation 8(1) and

(2) (although the latter is not directly applicable to the applicants in this case) to "without reasonable excuse" read in conjunction with Regulations 4-6 and in particular, Regulation 5A which deals with gatherings is so vague and ambiguous that it should be declared unlawful.

[75] In the circumstances of this application the applicants have always made the case that their conduct in organising and participating in the protest was justifiable and constituted a reasonable excuse for the purposes of the Regulations.

[76] The Court of Appeal in England and Wales has expressly considered a challenge to identical regulations in that jurisdiction in the case of *Dolan and others* [2020] EWCA Civ 1605. In that case the Court of Appeal rejected a series of challenges to the sweeping restrictions on civil liberties in England and Wales arising from regulations and restrictions similar to those under consideration in this application.

[77] In the judgment of the court Lord Burnett LCJ addressed the issue of the defence of "reasonable excuse" provided for in the equivalent regulations.

[78] The relevant portion of the judgment is as follows:

> "101. Article 11 guarantees the right to peaceful assembly and association. On the face of it, Regulation 7 as originally enacted in March 2020 might be thought to have taken away this right altogether. Nevertheless, it must always be recalled that Regulation 9(1)(a) provided a general defence of 'reasonable excuse.'
>
> 102. In *R(JGUI) v Secretary of State for the Home Department* [2020] EWCA Civ 5402; [2020] HLR 30, Hickinbottom LJ summarised the applicable principles. He noted that a distinction must be made between challenges under the HRA legislation and challenges to the application of that legislation to a particular case. At para 118 he said:
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> > 'legislation will not be unjustified (and, so, not unlawful) unless it is incapable of being operated in a proportionate way in all or nearly all cases.'
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> 103. The first difficulty with Mr Havers' submissions on Article 11 is that he submits that the regulations must necessarily be regarded as being incompatible with Article 11 in all, or nearly all circumstances. It is difficult to see how that can be so when the regulations

themselves include the inbuilt exception of 'reasonable excuse.' That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. In our view, the regulations cannot be regarded as incompatible with Article 11 given the express possibility of an exception when there was a reasonable excuse. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of Regulation 7 as originally enacted. There were powerful public interests laid behind the enactment of Regulation 7, given the gravity of the pandemic in late March.

104. Furthermore, as Sir James submits, the phrase "reasonable excuse" is not materially different from the phrase "lawful excuse" which is used in section 137 of the Highways Act 1980 and it was constructed by the Divisional Court in *DPP v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253 as being capable in principle of embracing the exercise of Convention rights, in particular, Article 11, depending on the particular facts; see paras 58-65 in the judgment of the court (Singh LJ and Farbey J). In particular, we would emphasise the way in which the Divisional Court concluded, at para 65, 'this is inherently a fact specific inquiry.'

105. There are also powerful arguments that the restrictions, time limited and subject to review, as they were, were in any event proportionate.

106. Finally, Sir James reminds us that the HRA is primary legislation, whereas the regulations support the legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA whether an incompatibility with a Convention right: **Popular Housing and Regeneration Community Association Ltd** [2001] EWCA Civ 595 at para 75, in particular, at sub-para (a) Lord Woolf CJ).

107. We therefore, conclude that the ground based on Article 11 is unarguable."

[79] We agree with the analysis of Lord Burnett for the reasons he sets out and conclude that the grounds of challenge to the lawfulness of the regulations based on Articles 10 and 11 of the ECHR and on the grounds of lack of clarity are unarguable.

[80] Whether or not the applicants can establish a "reasonable excuse" for any alleged breach of the regulations is inherently a fact specific inquiry. The PSNI officers who issued the FPNs came to the conclusion that there had been a breach. The applicants have exercised their right to have a court hearing on the matter. It remains to be seen whether in fact the PPS will issue a summons in respect of the alleged offences, although at the time of hearing no such summons had been issued. In the event that a summons is issued then the fact specific matters raised by the applicants are manifestly the type of issues appropriate to be dealt with in the Magistrates Court rather than by way of judicial review.

[81] Thus, the applicants various contentions, that they were acting lawfully, as to whether an offence was committed, the reasonableness of the issuing of the FPNs and the proportionality of the FPNs all raise matters of fact which can be determined in a Magistrates' Court should a summons be issued.

[82] **For these reasons leave is refused in respect of the challenge to the validity of the Regulations themselves, based on the argument that the defence of "without reasonable excuse" read in conjunction with Regulations 4-6 and, in particular, Regulation 5A, are so vague and ambiguous that the Regulations should be declared unlawful. The court concludes that this challenge is unarguable and has no reasonable prospect of success.**