



IN THE EAST LONDON MAGISTRATES' COURT

Before District Judge (Magistrates' Courts) Jonathan Radway

In the matter of: Anti-Social Behaviour, Crime and Policing Act 2014

Hearing date: 26th and 27th February 2020 at Stratford Magistrates' Court

Judgment date: 6th May 2020 at Thames Magistrates' Court

BETWEEN:

Christian Hacking

Appellant

v

London Borough of Waltham Forest

Respondent

JUDGMENT (corrected¹)

**Mr Michael Phillips for the Appellant
Ms Kuljit Bhogal for the Respondent**

APPLICATION

1. This is an appeal made by Christian Hacking (the Appellant) against a Community Protection Notice (CPN) issued to him on 03.10.2019 by the Respondent London Borough of Waltham Forest.
2. The Respondent opposes the appeal.
3. The grounds of appeal are
 - a. the Respondent's actions violated the Appellant's rights under Articles 9 and 10 of the European Convention on Human Rights (the Convention) and the Human Rights Act 1998 (the HRA), and

¹ In 2 paragraphs of the judgment the year was wrongly stated as 2020: it should have been 2019

- b. the Appellant's actions were neither of detrimental effect nor of a persistent or continuing nature, nor did they have an adverse effect on the quality of life of those in the locality nor was the conduct unreasonable.

BACKGROUND

4. The appellant works for CBR² UK, an organisation dedicated to challenging public opinion on abortion in the UK. It seeks to educate the general public about abortion through campaigns, talks, media appearances and public street displays. Images of both live and dead fetuses are displayed because they say there is a no more powerful tool to speak about the reality of abortion than these images. CBR UK were invited to Walthamstow by one of its residents. The purpose was to inform local people there of the reality of abortion, and highlight what they say was the local MP's support to liberalise it. They say the MP had whipped up opposition to their presence. Their Walthamstow campaign ran for three weeks from Saturday 28th September until Saturday 19th October 2019 with 7 events being held, one of which was on Thursday 3rd October 2019 next to a well-known high street bank in the town centre; this area has a high volume of footfall, being adjacent to the street market. The Appellant was in charge of this event. CBR UK say the council were trying to shut them down.
5. At the start I must make very clear this case is not about the rights and wrongs of abortion. The issues are complex and there is a wide spectrum of different opinions held about them. The merits of the respective arguments in the longstanding and continuing public debate about abortion are not the concern of this court. The case is about what restrictions can properly be placed on people wanting to express views with which others disagree. The sole issue for the court is whether or not the CPN issued by the Respondent is lawful.

THE NOTICE

6. The CPN appealed in this case was issued to the Appellant by Philip Connor, an officer of the Respondent local authority, at midday on 3rd October 2019 pursuant to its powers under section 43 of the Anti-Social Behaviour, Crime and Policing Act 2014 (the Act). The conduct complained of as having a detrimental effect on the quality of life of those in the locality, being persistent and continuing in nature and

² Centre for Bio-Ethical Reform UK

unreasonable, is “*Displaying large images of unborn fetuses and/or aborted fetuses which have caused or are likely to cause distress and/or alarm to members of the public.*” A warning notice in similar terms had been issued to the Appellant 15 minutes earlier by Brian Nish, another officer employed by the Respondent.

7. The CPN required as follows:

“You are required to remove from public view the images of large unborn fetuses and/or aborted fetuses on display.

You are not permitted to return to the area shown on the attached map³ in possession of large images of unborn fetuses and/or aborted fetuses on display.”

8. The campaign’s display this day was large, and witnesses estimated it to be 3m² in size⁴. It had 2 parts: to the left a large photograph of the MP above which were the words ‘Your MP is working hard.....’; and to the right a large, bloody and graphic image of an aborted 24 week foetus above which were the words ‘...to make this a human right’. The display would have been visible and obvious to anyone present in the town square. 2 or 3 members of the public tried to prevent it being put up. After the Appellant failed to comply with the CPN, officers of the Respondent removed both these photographs which, they accept with hindsight, they had no power to do.

STATUTORY PROVISIONS

9. The power to issue a community protection notice is to be found in section 43 of the Act:

43 Power to issue notices

(1) An authorised person may issue a community protection notice to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that-

³ The map showed the whole borough.

⁴ Looking at the video and still photographs in which police officers can be seen standing directly in front of the display, I consider its size to be greater than this estimate because the top of it is significantly higher than the tallest officer; I take account of what I saw rather than actual dimensions estimated by witnesses.

- a) The conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and
- b) The conduct is unreasonable.

10. The right to appeal against a CPN is to be found in section 46 of the Act. I do not need to recite the appeal provisions here in full. By section 46(4) this court must

- a. Quash the notice,
- b. Modify the notice (for example by extending a period specified in it), or
- c. Dismiss the appeal.

THE HEARING

11. At the first hearing court allocated 2 days of court time for the full appeal at the parties' request. This was always going to be tight, bearing in mind there were 12 live witnesses required. I declined an application (made a couple of weeks before the hearing) to re-fix it because of the delay which would be caused. At the commencement, I advised the parties to focus on the events of 3rd October 2019 and the material covered by the notice. Both parties adduced video evidence to help the court. I declined to view some 'vox pop' street interviews the Appellant wanted to show the court because they were not all immediately connected to the events and notice under scrutiny, and did little more than show some members of the public were informed by the CBR UK campaign and supported his cause. I watched other video he relied on and did give some latitude, viewing clips from other dates which shed some light on how other campaign appearances had been set up and public engagement with them. Following oral submissions, day 2 concluded a little after 6 p.m. and I reserved judgment until 2nd April 2020, by which time the courts were closed for all but the most urgent of business because of the coronavirus. Judgment was postponed and handed down on 6th May 2020 in open court but with the parties' attendance excused.

12. In this judgment I concentrate on what I consider to be central to the notice issued on 3rd October 2019, and avoid peripheral issues which were aired at some length before me, such as prior notifications, allegations of harassment, or where warning notices were placed (if at all).

THE EVIDENCE

13. All witnesses had provided written statements in the bundle, which they adopted and I had read before they entered the witness box for examination. As referred to above, I viewed video evidence introduced by both parties. As far as the witnesses are concerned, I think everyone came to court to tell the truth as they saw it: nobody lied to the court about what they saw or what they did, their motives or their history.
14. **The appellant** was open and frank about the origins of the Walthamstow campaign and his role in it. Although the witness template stated it was in dispute whether he was the person in control on 3rd October 2019, he readily accepted he was in charge that day. I thought him to be sincere, genuine, wholly committed to the CBR UK cause, to be upset by the images which were on display and firmly of the belief displaying them was necessary to bring home to the public the reality of abortion. He was clear⁵ in his statement and under cross-examination they did not deliberately seek to offend people; he maintained “*however we cannot be responsible for someone’s emotions just because they have had a traumatic experience*”⁶. He told the court if he didn’t display images because a few people didn’t like it, it would prevent society at large engaging with an uncomfortable truth, and gave good examples of images which had turned public opinion in the past. He accepted the images of aborted fetuses were shocking and disgusting, but explained they were beneficial in changing people’s minds. While some people might be affected negatively, that was not necessarily a reason to ban them. Their upset was outweighed in his opinion by the benefit of informing and educating the public. While some people were angry, the majority of the population did not react that way. The appellant conceded some people may have been affected by abortion or miscarriage themselves, or might be veterans who’d be upset encountering the images, so there was benefit in having warning notices put up nearby. He could only speculate about whether warnings were up when the council visited because he had not erected any himself. He accepted they could get their message over without the image which triggered the CPN but their ability to reach the public would be reduced; and it would allow the public to dictate how they put their message across. Social reform was all about objecting to process and the image could change hearts and minds. On 3rd

⁵ Paragraph 27 of his statement

⁶ In my judgment this is an abrogation of any responsibility for the effect on others of images he displayed.

October 2019 people in the square were agitated but there was no counter-protest that day.

15. **Ruth Rawlins** is the head of communications for CBR UK. She gave an honest account of how she saw things. She explained why she considered the MP had whipped up opposition to them, and why she thought two of the Respondent's witnesses had links to the MP. She told the court the images they displayed were upsetting, and asserted one they had used on an advertising bill board had been approved by the ASA⁷, though the one used on 3rd October 2019 in the town square had not. She knew of the Respondent's letter dated 18th October 2019 referencing complaints made to them. Warning notices were used in case the images they displayed might trigger a negative impact on some people who saw them: someone might have had an abortion and not want to see the display, but that wasn't a reason not to display the image. Using an analogy she said a person may have had a close relative die of cancer, but images of cancerous organs or tissue were still displayed in public. Asked how a person in the town square could avoid the image on display, she said they could walk on by without stopping.

16. **Andrew Stephenson** came across as a genuine witness, who could not conceive of anything more important than the method he chose to campaign. He described how different, smaller images had been prosecuted in Brighton magistrates' court but the case was dismissed. He made the point the pictures were factual images and a reasonable response to counter other information in the public domain about abortion. There was no legal requirement to display a warning but they did, as a courtesy, to give people the opportunity to walk away if they wanted. The issues surrounding abortion had 2 strongly opposed sides and the use of the CPN was to give the disagreeing hecklers a veto over the CBR UK campaign; the Respondent had tried to shut down their message with people of an opposite ideology driving it down. He told the court they had started wearing body worn video because of their concerns people might be violent towards them. He had feared for his own safety 2 or 3 times. They'd received the Respondent's letter of 18th October 2019 but not replied to it. He did not believe the Respondent should determine what they displayed because their freedom of speech did not depend on the opinion of councillors.

⁷ No evidence was called to corroborate this assertion

17. **Olawale Akinrogunde** is Pastor of a local church in Walthamstow, the oldest Baptist church in London. He had, not surprisingly, much local knowledge of the people and the area around the town centre. He was thoughtful and insightful about the issues, and an honest witness. He had offered the use of his church to CBR UK and described how this organisation had come to his attention. He'd attended the campaign on 28th September and 3rd October 2019. The mood of the square on 28th was very different from the 3rd as there had been no violence or disruption. On 3rd October there were only 3 people objecting to the display until they whipped up the crowd. 2 ladies had been distressed and upset by the display which had not been up long before they came out of nowhere, in his opinion to cause trouble. With raised voices, people gathered. He thought the image on 3rd October was the same one as displayed on 28th September and the ladies might have seen it then. He described how he had been concerned for his own safety because of the anger around on 3rd October and thought if the police had not been there they'd have been beaten up. The police had separated them from the crowd. He described people in the crowd as being upset rather than distressed. Put to him it all started with the image on display he agreed, adding because it was attacking the MP. He was of the view people had come on 3rd October because of the MP, with whom he had formerly had a good relationship but the abortion issue had changed things.

18. **David Beach** was the first of the Respondent's professional witnesses, being Director of Regulatory Services. His evidence was frank: he told the truth even when it went against him. He told the court in 2019 the Respondent had issued 252 CP warnings and 13 CPNs. The Respondent had not had any information from the local Labour Party about CBR UK, neither had there been any instructions from the MP, who had no influence on actions the Respondent's officers took. CBR had been sent a second letter, on 25th October 2019, which contained 10 complaints made to the respondent. He disagreed there had been no anti-social behaviour reported from the 28th September: complaints had been made though he didn't have details of them to give the court today. People on 3rd October had been agitated and upset, and he feared a breach of the peace. While it was the job of the police officers to make arrests, it was the Respondent's officers' job to de-escalate the situation. He expressed regret they had acted beyond their powers in seizing the display; it had been done with the best intentions. On 1st October he had taken legal advice about the application of the HRA. Freedom of expression was engaged, a qualified right, and the local authority had to consider issues of public order and prevention of harm. Freedom of speech permitted the shocking, the provocative and the offensive. His

officers had acted as was needed to prevent distress and alarm to individuals affected by the displayed image. Tensions had been running high. Public order and health issues were in play, individuals' stress and public safety. The Respondent had balanced the rights of the campaigners and the people in the square fronting them. Consideration had been given to the detriment caused by the image and its persistence. Their action had been reasonable because the Respondent had kept the requirements in the CPN to a very narrow focus, i.e. particular images. He had considered the human rights implications of the action taken and thought the display was not necessary as part of the campaign.

19. **Irem Boran** gave a sincere account of her involvement on 3rd October. She told the court she happened to be passing; she had not been prompted by anyone or anything to be there, her reason for being in town was to have lunch with a friend. She had seen the image of the 24 week terminated baby and had found it disturbing. It was not what she wanted her young child to see. She had given birth herself recently on 8th September 2019 and described how the image made her feel ill and emotionally affected: sick, disturbed and angry. She thought she had probably used bad language towards the campaigners. She had held the banner at one point to try and stop it going up.

20. **Mandy Baker** was not present on 3rd October 2019 so her evidence was of limited value, but she also gave a sincere account of her experience of the campaign. She had seen different images on 5th October, but they had made her feel physically sick and anxious. She did not want her 10 year old daughter to see them, but had had to have a conversation with the child she wasn't ready for. For her the issue was the graphic nature of the images she'd seen, which would stop her from visiting the town square.

21. I found **Lesley Finlayson** to be a genuine, honest, compelling and sincere witness. On 3rd October 2019 she thought the police were ineffective. She described being present for 10 to 20 minutes during which time the crowd became very angry, the anger being directed at the images. She had found the terminated baby frightening to look at. Asked about her personal background she told the court she was a member of the Labour Party and had campaigned for it and for Unite in the past. She described the MP as representing Walthamstow but not her. She felt CBR UK were trying to harm the MP with their campaign, using a little 24 week foetus to weaponise and upset people. Despite this she actually agreed with the CBR UK campaign, explaining why she supported their cause but not the use of that image. She gave the

court a difficult, personal, honest and revealing account, never before mentioned even to her husband, of how her own mother had once had an abortion for reasons she found completely unacceptable, the details of which it is unnecessary to repeat here. The witness readily accepted if the pictures were lawful there was a right to display them, however she had felt truly sick in her stomach on seeing this image. It had opened old wounds about a baby she had lost in an ectopic pregnancy more than 20 years ago. It was that particular image, over the top but used to attract attention, which she said was absolutely horrific. She had now been left feeling anxious and nervous when approaching the location in town and described now she suffered from 'flashbacks'.

22. **Nial Finlayson** came across as genuine and sincere, giving his honest opinion to the court based on his experience. He said he was not a member of the Labour Party or a Socialist Worker. On 3 occasions he had protested against CBR UK of his own accord, not as part of any group. He had sympathy for anyone who saw the image displayed on 3rd October 2019. He also objected to the different images displayed on 5th October 2019. He found all of them deeply upsetting and thought they should be banned. When he saw the image on 3rd October 2019 his stomach had churned and he had felt sick. Afterwards he had cried with his wife about their loss 20 years before. He also had 'flashbacks', and a wound had been reopened.

23. **James King** was the second of the Respondent's professional witnesses. He struggled to answer several questions put to him and said he had not made contemporaneous notes of what he saw and did on the 3rd October 2019. It was surprising to me he was deployed to evaluate and, if necessary, help respond to events in the town square without being fully conversant with the Convention rights in play that day. I thought he had a very simplistic understanding of the issues in the case. He told the court he had been given intelligence that CBR UK were going to be in the town square that day to campaign. His role that day was really to observe. He said the display had been taken down because it was causing harassment, alarm and distress to onlookers. His statement⁸ describes how people there were upset and he was satisfied the image was causing a detrimental effect of a persistent or continuing nature on the quality of life of those in the locality and was unreasonable. The difficulty I had with his evidence about this was the absence of any real reasoning to support why he was so satisfied, other than upset was caused to others.

⁸ Paragraph 7 of his statement refers

24. **Brian Nish** was the third professional witness for the Respondent. He is one of their anti-social behaviour officers and it was he who served the warning notice on the Appellant. Like James King, his assessment⁹ of a detrimental effect of a persistent or continuing nature on the quality of life of those in the locality and why it was unreasonable lacked any real reasoning, until the very end of his testimony when I asked him about it. To begin with, he told the court how people were distressed and asking him could he take the display down. Reactions amongst the onlookers included upset, unhappiness and distress because the image was so graphic. Asked about his training, he replied he had received HRA training but not on freedom of speech, he had never been trained on that. However, he had been briefed by Philip Connor, though that did not touch on freedom of speech. He felt the warning he had given was lawful because of the distress being caused by the image: it was a combination of the distress, the image and the tone of the crowd which had gathered. The police were there to keep the peace but there were no arrests made or instructions given to take the banner down. Police did not seem to have an issue with CBR UK. Put to him that distress did not make things unlawful, for example distress caused by eviction, he said he had wanted to defuse the situation. He had looked in the Appellant's folder and seen documents on freedom of speech and court judgments. He had not given them further consideration in the period between issuing his warning and the full CPN. He said he had told the crowd that CBR UK had a right to campaign, but telling the crowd to calm down would have inflamed the situation because they wanted the image taken down due to its size and explicit nature. When I asked him to explain the detriment, he said it was disturbing to children, it was the degree of explicitness and some people were angry about the juxtaposition of the foetus image with a photo of the MP. It was persistent and continuing because the behaviour continued after a warning had been given. He hadn't inquired how long the appellant intended the display to remain there that day. It was unreasonable because of the size, explicit nature, it was unavoidable for passers-by.

25. The final professional witness was the Respondent's Anti-Social Behaviour Service Delivery Manager, **Philip Connor**. He was a sound witness, well informed about the issues (on which he had taken legal advice), and realistic. He willingly accepted errors which had been made. I considered him well-experienced, having worked in the anti-social behaviour 'industry' (as he put it) for 14 years. I found his assessment

⁹ Paragraph 7 of his statement refers

of the situation on 3rd October 2019 carried a good deal of weight not only because of his experience but also because he understood the Convention rights in play. He started by describing how he wanted to understand the legal framework and sought advice from the Respondent's Head of Legal Services. On arrival in the town square he spoke to the police who told him they had no intention of engaging either with CBR UK or the public. He described how there was a growing crowd of about 25 people and his service of the CPN¹⁰. His intention was to use the lightest touch to limit the negative consequences of the Appellant's conduct in displaying the image. When he arrived at 11:45 hours he saw people in evident distress. Children were present. Members of the public questioned what CBR UK were doing there. He found it an unpleasant environment to be in, "as feisty a place as I have ever been in in my professional career". The Respondent had a duty to protect people's health. Personally he commended the CBR UK campaign, speaking to the public and handing out leaflets. Nonetheless their behaviour that day was harming residents and it was the large, unavoidable image which caused the harm. The witness told the court about the training he had received on human rights with particular reference to Article 10 of the Convention. He said the threshold to justify an interference with political speech was a high one, and accepted some aspects of the CBR UK campaign were political speech. Removal of the banner was an infringement of the Appellant's Article 10 rights and proportionality lay at the heart of it. He had given this explicit consideration with the Respondent's legal team. The campaigners had rights and he had to work on the lightest touch if they were going to be infringed, which had led him to focus on the matter having the most import, which was the image. If people in the crowd were distressed, it was not his job to tell them not to be. While on one view hecklers in the crowd were a source of the problem, on the other hand people were coming across the image without warning. CBR UK had been elsewhere in the town with different images several times before and no action had been taken. He accepted the Respondent could not dictate how the campaign expressed itself, but it was part of his role to prevent harassment, alarm and distress. People could express themselves as they liked but there were potential consequences if they did, and such expression included the display of images. It didn't feel good to him his colleagues had broken the law in removing the display on his instructions but the situation had been rapidly escalating, he was surrounded by anger, and made the decision in the best interests of everyone there. Questioned about the Appellant's folder of legal documents, he said he had read and taken heed of it, but decided they

¹⁰ Paragraph 4 of his statement refers

were not relevant to his decision which was based on a combination of this particular image, distress caused by it and increasing disorder. Although there were no threats of violence, people were getting in each other's faces and both 'sides' were provoking the other. Each was at fault in his opinion. Describing the prohibitions in the notice, he said from a distance it was impossible to tell if a foetus displayed was born or unborn, so it was reasonable to ban both. He would disagree with any suggestion the peace was being kept: he had seen public disorder and riots flare up very quickly in the past and he had brought his experience to bear in assessing the situation on the ground that day.

FINDINGS

26. I make the following findings:

- a. The Appellant's banner with the image of the dead foetus displayed on 3rd October constituted political speech¹¹;
- b. It is common ground the Respondent is a public authority for the purposes of the Human Rights Act 1998; also that the Appellant's Convention rights were limited/interfered with by the actions of the Respondent issuing the CPN and I so find;
- c. The Appellant genuinely believes it is reasonable and necessary to display this image in support of the CBR UK cause;
- d. The Respondent's officers carried out their duties without influence from the MP; neither were they driven by political considerations of others; they were responding to complaints previously made to them by members of the public;
- e. There is insufficient evidence to support the Appellant's claim the Respondent's lay witnesses in this case were acting with encouragement from the MP (or anyone else) as organised opposition to protest against the CBR UK campaign on 3rd October 2019;

¹¹ Evidence of Philip Connor refers

- f. The MP condemned the CBR UK campaign in Walthamstow; she later asked people who supported her not to engage with the campaign but to report them as a form of harassment¹²;
- g. The lay witnesses present on 3rd October 2019 were acting of their own accord, not as part of an organised group. Their descriptions of how the image affected each of them personally were genuine and I find the impact they described to be true and not exaggerated;
- h. The image in question is intended to draw the public's attention by its size and content: a picture of a dead 24-week foetus is correctly described by the witnesses variously as graphic, upsetting, sickening, disturbing, anxiety-inducing, frightening and horrific to them;
- i. Sight of the image was unavoidable to anyone with normal vision¹³ entering the town square on 3rd October 2019;
- j. Notwithstanding the police presence there was a real likelihood of public disorder breaking out given the mood of the crowd. Pastor Akinrogunde genuinely feared for his safety. Philip Connor was right to anticipate it: there actually was some disorder when the banner was removed though no arrests were made;
- k. The Appellant was given a written warning by the Respondent in accordance with the requirements of section 43(5)(a) of the Act; and
- l. Philip Connor, the Respondent's officer, was rightly satisfied i) the appellant had had sufficient time to deal with the matter about which he was warned; ii) the appellant had not dealt with this matter; and iii) the appellant's conduct continued to have the perceived detrimental effect.

PARTIES' SUBMISSIONS

27. Mr Philips began with the proposition there was no detriment and the case should stop there. He submitted the Appellant's actions did not cause any detrimental effect

¹² Exhibit RR1

¹³ Corrected or otherwise

of a persistent or continuing nature on the quality of life of those in Walthamstow and his actions were reasonable for the following reasons: there were no threats or abusive behaviour or attacks on others; the images were subject to previous criminal litigation resulting in acquittal; in related civil proceedings an action against the Chief Constable of Sussex Police (for acting unlawfully against CBR UK's predecessor by interfering with the claimant's rights under Article 10 and 11 of the Convention) was compromised by consent¹⁴; and public offence or upset by the message *per se* is irrelevant and a potential breach of the peace arising from a 'heckler's veto'¹⁵ was not a relevant consideration. Further, the Appellant relied on authorities, particularly *Handyside v The United Kingdom* (1979-1980) 1 EHRR 737, to establish freedom of expression applies not only to information or ideas which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb.

28. In the alternative Mr Philips submitted that if the court finds there was a detrimental effect, the actions of the Appellant were reasonable in light of the jurisprudence on free speech. If you act lawfully it is not a natural consequence if others misbehave¹⁶. There is a right to try and convince your neighbour you are right¹⁷. Free speech requires the free exchange of ideas and permits criticism of other ideas and religions, any restriction by the state must be narrowly construed.

29. For the Respondent Ms Bhogal submitted for section 43 of the Act to be satisfied there is no minimum level of detrimental effect required; no minimum number of people who have to be affected; no given timeframe is prescribed; and there is no minimum number of incidents necessary to engage it. She drew analogies from the statutory guidance¹⁸ found on internal pages 38-46. In support of her argument she relied on *Summers v Richmond LBC* [2018] 1 WLR 4729 which concerned a Public Spaces Protection Order, the test for which in section 59 of the Act is similar (though not identical) to section 43: "*public authorities should have a wide discretion to decide what behaviours are troublesome and require addressing in their area*¹⁹." In

¹⁴ Order of Master Leslie in the High Court dated 11 January 2016

¹⁵ *Vajnai v Hungary* (Application 33629/06) 8 July 2008

¹⁶ *Redmond-Bate v DPP* 2000 HRLR 249

¹⁷ *Kokkinakis v Greece* (Application 14307/88) 25 May 1993

¹⁸ Statutory Guidance for Frontline Professionals (August 2019)

¹⁹ May J at paragraph 25

*Dulgheriu and another v Ealing LBC*²⁰ the Court of Appeal had endorsed the first instance judge's approach to detrimental effect, and Ms Bhogal relied on what he said at paragraph 31:

"...attempts to lay down any general threshold level of conduct having detrimental effect by deploying various permutations of the concepts of "intimidation", "harassment", "alarm", "distress" and suchlike would almost certainly prove to be unhelpful and inappropriate."

30. She submitted the existence of a detrimental effect should be judged objectively with reference to what people with ordinary sensibilities would find detrimental. As for persistent or continuing, these were ordinary English words "*commonly understood to mean 'continuing, recurring, prolonged*²¹" and a question of fact for the decision maker, subject to the court's oversight.

31. Lastly, Ms Bhogal submitted the Appellant's activities were clearly unreasonable, and the Respondent had a wide discretion to weigh up competing interests and exercise its judgment in determining them. The CPN was very limited in its terms and did not stop the other CBR campaign activities; it was carefully targeted and an entirely reasonable response to the circumstances.

DISCUSSION

32. Although there has been reference in the Appellant's statement to Article 9 of the Convention being infringed, it has been almost completely unreasoned in terms of freedom of thought, conscience or religious belief, with the thrust of both the Appellant's evidence and the written submissions from Mr Phillips relating to Article 10. The activities of the Appellant and CBR UK in LB Walthamstow were directed at informing the electorate there of the sitting MP's perceived support for relaxing the (then) legal restrictions on abortion within the UK. I do not consider the evidence demonstrates the Appellant's freedom to manifest his religion or beliefs has been limited by the Respondent in this case. If I am wrong, then the considerations I set

²⁰ [2018] EWHC 1667 (Admin) Turner J and [2019] EWCA Civ 1490 on appeal

²¹ May J in *Summers v Richmond* adopting *Ramblers Association v Coventry City Council* [2009] PTSR 715 at para 21

out below in relation to the restrictions placed on him in respect of his Article 10 rights, would also bear with equal effect on his rights under Article 9.

33. The structure I adopt for my analysis is this:

- a. Was the conduct of the Appellant having a detrimental effect on the quality of life of those in the locality?
- b. If so, was it of a persistent or continuing nature?
- c. If so, was it unreasonable?
- d. If it was unreasonable, was the issue of the CPN an interference with the Appellant's Article 10 Convention rights?
- e. If so, was the interference prescribed by law?
- f. If so, was the interference pursuant to a legitimate aim? and
- g. If so, is the interference necessary in a democratic society?

34. Obviously question c) and questions f) and g) are heavily intertwined. (There is no dispute on questions d) and e) – the parties are agreed the answer to each of these questions is in the affirmative.)

35. I should highlight at this point the different test in these proceedings from that applicable in previous criminal proceedings (considering similar but not identical images²²) to which I have been referred. Not only is the standard of proof in these civil proceedings different²³, but the statutory language is very different. I respectfully agree with the observations in *Dulgheriu*: the concepts of "intimidation", "harassment", "alarm", "distress" and suchlike are unhelpful and inappropriate in determining the issues about detrimental effect in this case. While the facts of *Dulgheriu* are distinguishable, I agree with Ms Bhogal the principles to be drawn from that authority are of direct application here.

36. **Detrimental effect.** There is no doubt in my mind the conduct, by which I mean the display of the 24-week dead foetus, had a detrimental effect on the quality of life of some (though by no means all) of the people in the locality and I so find. In my

²² None was as old as 24 weeks, or as large as this display

²³ The balance of probability, not beyond reasonable doubt

findings above²⁴ I record this image is correctly described variously as graphic, upsetting, sickening, disturbing, anxiety-inducing, frightening and horrific. The Appellant's argument if something is lawful it cannot be detrimental is a non-sequitur; the simple example in the statutory guidance of a baby crying through the night exposes the flaw in the argument: it is not unlawful but could have a detrimental effect on the neighbours who are kept awake. The witnesses in this case, who described the image as I set out above, were affected in different ways as I have found. Ms Boran was "*emotionally effected*", "*sick*", "*disturbed*", "*angry*"; Ms Finlayson was "*frightened*", "*felt truly sick in her stomach*," old wounds were opened and she was left feeling anxious and nervous when approaching the location, she had flashbacks; Mr Finlayson's "*stomach churned*" and he "*felt sick*"; the image caused him to cry, he also had flashbacks. These are not hollow, empty descriptions given by over-sensitive people; they are the very real consequences for these local witnesses from what they saw on 3rd October 2019 in the town square. The evidence of Ms Baker, who on another day felt "*physically sick*", and "*anxious*" by what she saw, lends credence to the impact described by other witnesses present on 3rd October 2019. This leads me to the finding there was a detrimental effect on people in the locality. It cannot be characterised as *de minimis*.

37. **Persistent or continuing effect.** I note it is not the conduct which must be persistent or continuing for the purposes of section 43(1)(a), it is the detrimental effect. In this case there were members of the public who welcomed the CBR UK campaign and appear not to have suffered any detriment at all. At the other end of the spectrum there were continuing consequences, for at least 2 witnesses as I describe above, from the image they saw on 3rd October. I am satisfied it has been shown there was an effect of a continuing nature. I also observe for what it is worth (as it was a feature of the evidence), the campaign was spread over several different days, and the conduct itself was persistent and continuous by its very nature, continuing after a warning had been issued.

38. **Reasonable.** There are a number of factors in play, including the nature of the conduct, the period over which it took place or was planned, the consequences of it and the right to free speech which is in play. The nature of the conduct was intended to shock the public out of perceived complacency or apathy towards abortion. It was intended to challenge and provoke people in the centre of Walthamstow over a period of weeks to engage in the CBR UK campaign. I have found it to be political

²⁴ Paragraph 26 supra

speech, which has a high level of protection. It was welcomed by some and abhorred by others. In my opinion there was a high likelihood this image, or similar ones, would have been displayed on other occasions in the town centre over the remainder of the campaign by the Appellant. There is no doubt the display of this image raised the emotional temperature in the town square; it was “feisty”, Pastor Akinrode feared for his safety, disorder was likely to arise and eventually did. The sight of the image caused more than just distress to some observers: in simple terms it caused emotional harm to some of those who viewed it. Philip Connor’s assessment was right. It was unavoidable for anyone present in the town square without leaving this location. I consider it to have been the visual equivalent of shouting both loudly and directly into a person’s face, which would not be a reasonable way of imparting a message or trying to convince a stranger. Taking into account all these factors, the most important of which is causing harm to others, I am satisfied the display of this image on this occasion was unreasonable.

39. This leads on to the issue at the heart of these proceedings: the right to freedom of expression enshrined in Article 10 of the Convention. Article 10 states:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

40. **Interference with Article 10.** It is common ground the CPN interfered with the appellant’s Article 10 rights and I so find.

41. **Prescribed by law.** The issue of the CPN was in accordance with the provisions of the Act, applied correctly, so the interference was prescribed by law and I so find.

42. **Legitimate aim.** I am satisfied the CPN was issued by Philip Connor in pursuance of the legitimate aims he described: prevention of disorder and protection of the health of others effected negatively by the conduct. While the presence of the police weakened the need for the Respondent to act in respect of preventing disorder, neither party called a police witness to give their assessment of the situation. The video evidence showed a police officer saying they were there to prevent a breach of the peace and stop violence; and if there was violence they would make arrests. The operational deployment of police officers must have been based on a risk assessment which suggested the Queen's peace needed to be enforced that day in the town square if necessary, and disorder prevented. Keeping good order is not just the sole preserve of the police: there is considerable overlap of powers under the Act available to police and local authorities. Because the police did not see it as their role to intervene with the conduct, does not mean the Respondent was not right to make its own assessment of the situation as Mr Connor described. As far as protecting the health of others is concerned, Philip Connor also rightly identified harm being caused to some people in the crowd and he was correct to consider that a health issue. His action in issuing the CPN was aimed at two of the specified purposes in Article 10.
43. **Necessity and proportionality.** This aspect of the examination is fact-specific and requires close scrutiny. There is little room for restrictions on political speech or legitimate debate on matters of public interest²⁵. Strong justification is required to justify a restriction on such speech, a high threshold must be met. The question is whether the impact of the CPN is disproportionate to the likely benefit of the Appellant's conduct.
44. There are considerable parallels to be drawn between this case and the facts in *R (ProLife Alliance) v BBC* [2003] UKHL 23. ProLife Alliance's campaign followed their belief if people only knew what abortion actually involved and could see the reality themselves they would think again. The disturbing pictures they wanted to broadcast were a fundamental part of their message, as is the Appellant's image in this case. The sensitivity of the subject matter is the same, as touched on by Lord Hoffmann in his speech at paragraph 80 of the judgment: as he stated, abortion is often a traumatic emotional experience, which is also borne out by the evidence of witnesses in this case. Lord Nicholls in his speech touches on what can be expected by way of illustration of horrors and consequential limitations²⁶, though the issue concerned a

²⁵ *Vajnai* paragraph 47

²⁶ Paragraphs 12 – 13.

broadcasting standard relating to taste and decency. I keep Lord Nicholls' stringent analysis of boundaries on what can be expected in terms of free expression and the very high threshold in play firmly in mind.

45. With freedom of expression comes duties and responsibilities, as Article 10 specifically states. The Appellant did not know and had no way of knowing who would enter the town square and be negatively affected by the image he displayed that day. There is no evidence of a proper risk assessment having been undertaken by him and, other than warnings (notably only in English) not readily visible at the material time for reasons which have not been explained, the Appellant gave little consideration to any negative impact there might be on those who encountered the image, his view being blinkered by his belief "*we can't be responsible for someone's emotions....*". His mind was shut to his responsibilities which accompany expression, other than the warnings to which I have referred.

46. I take into account the importance of this image to the political campaign the appellant was leading that day. I also look very carefully at the actions of the Respondent because the officers responsible for the CPN overreached themselves in removing the display – so did they overreach themselves in issuing the notice itself? But, after anxious consideration, I find a prolonged static display, intended to last a couple of hours in the busy middle of the day, unavoidable to those entering the town square, of a deeply disturbing image which caused harm to some observers is beyond the margin of what freedom of expression requires, even for political speech. I reject the argument put forward by Andrew Stephenson that the Respondent tried to shut down the campaign by issuing the CPN: this is an exaggerated view when the actual restriction not to display a particular image is considered in context. It did not cause the campaign to end, at most it was blunted a little: the Appellant accepted in his evidence they could get their message over without the image, but without it their ability to reach the public was *reduced*. The evidence suggests to me the approach taken by CBR UK seems to have been to ignore any concerns expressed to them, rather than hear the concern and review what they were doing (whether or not that might lead to any change of approach). It is hard to understand why they later did not respond to the Respondent's correspondence, even if it was to reject expressed concerns. It has informed the assessment I have made about their general approach to their campaign and the activities on 3rd October 2019.

47. Was the CPN a proportionate response to the situation? After anxious consideration, I have concluded it was. There was no interference with any other of the campaign's

activities the Appellant was leading that day, such as presence in the town square, approaching members of the public, handing out leaflets, showing video images on portable devices or any other activity to garner support for their cause. Careful reading of the CPN confirms it was limited only to the images on display on 3rd October 2019.

CONCLUSION ON CONVENTION RIGHTS

48. The Appellant's Article 9 Convention rights were not interfered with.

49. The Appellant's Article 10 Convention rights were interfered with, the interference was prescribed by law, was pursuant to a legitimate aim, and was both necessary and proportionate. Not only was the Respondent's decision to issue a CPN in this case was not wrong, I go further and say this decision was right: after analysis the evidence demonstrates Philip Connor was justified in requiring the image to be removed, he had taken advice, he was aware of the Convention rights in play and applied them, he made a well-balanced decision, and the interference in the Appellant's expression of political speech was kept to the absolute minimum.

ORDER

50. I order the appeal be dismissed.

51. Any submissions from the parties about costs shall be made in writing, to reach me no later than 28 days from this decision being handed down.

District Judge (MC) Jonathan M Radway

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