Neutral Citation Number: [2018] EWHC 782 (Admin)

Case No: CO/5479/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2018

Before:

MRS JUSTICE MAY DBE

- -

Between:

Summers	**Applicant**
- and -	
London Borough of Richmond Upon Thames	**Respondent**

- -
- -

Martin Porter QC and Jessica van der Meer (instructed by **Kingsley Napley**) for the **Applicant**
Kelvin Rutledge QC and Kuljit Bhogal (instructed by **South London Legal Partnership**) for the **Respondent**

Hearing dates: 27 – 28 February 2018

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Approved Judgment

Mrs Justice May:

1. This is an application for statutory review of a Public Spaces Protection Order made by the Respondent ("Richmond") pursuant to its powers under the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). The application is brought under section 66 of the 2014 Act; it does not require permission from the court, unlike a claim for judicial review brought under Part 54 of the CPR.

2. The order under challenge in this case ("the PSPO") was issued by Richmond on 16 October 2017. It relates to dog control within the borough's open spaces and highways, setting out in numbered articles various prohibitions and requirements designed to regulate the behaviour of dog-walkers in Richmond: picking up dog faeces, keeping dogs on leads in certain areas, exclusions from play areas and the like.

3. No objection is taken to most of the PSPO, however the Applicant ("Ms Summers") seeks an order quashing Article 5 (relating to the maximum number of dogs permitted to be walked by one person) and certain parts of Article 6 (elaborating on what is meant by keeping a dog under "proper control"). Ms Summers contends that these provisions within the PSPO are unlawful and ultra vires as the statutory requirements under section 59 of the 2014 Act for the making of an order were not met in each case.

4. Further, although not disabled herself, nor the owner of an assistance dog, Ms Summers also seeks to challenge certain parts of the wording of exemptions set out in the PSPO relating to assistance dogs, as being unfairly discriminatory.

The wording of the PSPO

5. The relevant parts of the PSPO provide as follows:

> *"This Order comes into force on 16 October 2017 and lasts for a period of 3 years from this date, unless extended pursuant to section 60 of the [2014 Act]*
>
> *In this Order the following definitions apply:*
>
> *...*
>
> *"Restricted area" means the land described and/or shown in the maps in the Schedule to this Order*
>
> *…*
>
> *"Prescribed charity" means –*
>
> *(i) Dogs for the Disabled (registered charity number 700454);*
>
> *(ii) Support Dogs Ltd (registered charity number 1088281);*

(iii) Canine Partners for Independence (registered charity number 803680)

The Offences

Article 1 Dog Fouling

…

Article 2 – Dog Exclusion from Barn Elms (playing fields) and Petersham Meadows

…

Article 3 – Dog Exclusion from play or sports areas

…

Article 4 – Dogs on leads

(1) A person in charge of a dog shall be guilty of an offence if, at any time, his dog is not on a lead in the restricted area unless –

a. he has a reasonable excuse for failing to do so; or

b. the owner, occupier or other person or authority having control of the restricted area has consented (generally or specifically) to his failing to do so.

Article 5 – Multiple Dog Walking

(1) A person in charge of a dog shall be guilty of an offence if, at any time, and at the same time, he takes on to the restricted area more than four dogs unless-

a. he has a licence issued by the Council permitting more than four dogs; or

b. he has a reasonable excuse for doing so; or

c. the owner, occupier or other person or authority having control of the restricted area has consented (generally or specifically).

Article 6 – Dogs to be kept under proper control

(1) A person in charge of a dog in the restricted area shall be guilty of an offence if –

(a) his dog is not kept under proper control; or

(b) his dog causes an annoyance to any other person or animal; or

(c) his dog causes damage to any Council structure, equipment, tree, plant, turf or other Council property.

In this Article "proper control" means a dog being on a lead or muzzled if the dog requires it, or otherwise being at heel/close enough to the person in charge that it can be restrained if necessary or responding immediately to voice commands.

Exemptions

(2) Nothing in Articles 1, 2 and 3 of this Order applies to –

a. a person who is registered as a blind person in a register compiled under Section 29 of the National Assistance Act 1948; or

b. a person who is deaf, in respect of a dog trained by Hearing Dogs for Deaf People (registered charity number 293358) and upon which that person relies for assistance (dogs must be clearly marked as assistants); or

c. a person who has a disability which affects that person's mobility, manual dexterity, physical co-ordination or ability to lift, carry or otherwise move everyday objects, in respect of a dog trained by a prescribed charity and upon which that person relies for assistance (dogs must be clearly marked as assistants); or

d. a person who is training an assistance dog in an official capacity; or a dog used by the police or other agencies permitted by the Council for official purposes.

Penalty

It is an offence under section 67 of the Act for a person without reasonable excuse –

(a) to do anything they are prohibited from doing by a public spaces protection order, or,

(b) to fail to comply with a requirement which they are subject to under a public spaces protection order.

A person guilty of an offence under section 67 is liable on summary conviction to a fine not exceeding level 3 on the standard scale."

6. A schedule to the PSPO includes two maps of the borough. Articles 5 and 6 apply to "*all parks and open spaces, including commons, grounds and wooded areas, managed by the London Borough of Richmond upon Thames*". Article 5 also applies to "*highways – all roads, footpaths, pavements, alleyways, towpaths and grass verges maintained at public expense*".

7. At the time of passing the resolution approving the PSPO, Richmond decided to permit up to 18 licences to be issued to professional dog walkers living in the borough, permitting them to walk up to 6 dogs in specified areas at any one time. This explains the reference to "licence" in Article 5(1)a.

8. By agreement between the parties, Articles 5 and 6 are not being enforced pending the determination of this statutory review.

The Applicant

9. Ms Summers is a resident of Richmond and the owner of a dog which she walks in the borough on evenings and at weekends. During the working week, she employs the services of a professional dog-walker. In her witness statement filed in support of this application Ms Summers sets out the history of orders made by the Council relating to the maximum number of dogs permitted to be walked in the borough, and of her attempts to challenge the necessity or proportionality of such a restriction. During the consultation period prior to the making of the PSPO under challenge in this case there was input from the Kennel Club and the Dogs Trust. Ms Summers spoke at council meetings opposing the proposed terms of the PSPO. She also collected over 2000 signatures on a petition which she submitted to Richmond, objecting to the proposals which were later to become Articles 5 and 6 of the PSPO.

Dog control in Richmond prior to the making of the PSPO

10. The witness statement of Mr Allister, employed by Richmond as its Head of Culture, sets out the history of dog control measures within the borough, and the steps taken leading to approval of the PSPO in Full Council in September 2017.

11. Prior to the enactment of the Clean Neighbourhoods and Environment Act 2005 ("CNEA 2005") councils could only require persons to exercise control over their dogs in public areas by means of a byelaw. Richmond had passed a byelaw in 1986 making it an offence for any person to "*cause or suffer any dog belonging to him or in his charge to remain in the* [excluded area], *unless such dog be and continue to be under proper control…*" (Byelaw Relating to Pleasure Grounds and Open Spaces in the Borough, no. 11).

12. The Dogs (Fouling of Land) Act 1996, section 6, created an offence of dog fouling committed by the person "in charge of the dog" at the material time. That offence was repealed by the CNEA 2005, Chapter 1, part 6 of which empowered councils to pass Dog Control Orders ("DCOs"), creating offences under section 55(3) relating to: *"(a) fouling of land by dogs and the removal of dog faeces; (b) the keeping of dogs on leads; (c) the exclusion of dogs from land; (d) the number of dogs which a person may take on to any land*". Regulations made under the CNEA 2005 stipulated the terms for any DCO relating to multiple dog walking, under which local authorities could fix the maximum number of dogs for their area.

13. In 2007, following consultation, Richmond made five Dog Control Orders covering exclusion of dogs from fenced playgrounds and specified playing fields and cemeteries; dog fouling, and dogs to be kept on leads. A restriction upon the number of dogs to be walked by one person was discussed but not introduced at that time.

14. In early 2012 Richmond revisited the question of multiple dog walking, concerns having been raised by residents and others. Following consultation, a DCO relating to multiple dog walking was introduced on 13 June 2012 limiting the maximum number to six.

Introduction of the PSPO

15. Concerns about multiple dog walking remained and grew, particularly following the introduction of restrictions in surrounding boroughs and the Royal Parks limiting the maximum to four. Following the coming into force of the 2014 Act, Richmond decided to launch a formal statutory consultation on PSPO conditions for dog control, amongst other behaviours and activities being considered for control at that time. The consultation ran from 17 March to 12 April 2017. There were 1124 responses to the proposal to limit the maximum number of dogs being walked by one person to four, of which 36% were in favour and 59% against. Richmond believed that there was a late swing attributable to lobbying on behalf of professional dog walkers.

16. An Equality Act impact assessment was carried out on 12 June 2017 and on 11 July the proposals were considered by the Regulatory Committee ("RegCom"). The pack of materials before the RegCom included submissions against the proposals as well as those in favour, also a report showing the increase in numbers of professional dog walkers visiting Richmond's public spaces since the introduction of a four-dog limit in surrounding areas. There were representations from Ms Summers and an officer of the Kennel Club, amongst others, against the proposals, as well as contributions from those in favour. The RegCom voted to approve the PSPO subject to certain amendments including a requirement that up to 15 licences to walk a maximum of six dogs should be issued to professional dog walkers living in the borough.

17. The resolution of the RegCom was debated in Full Council at a meeting on 12 September 2017. Under the terms of Richmond's constitution Ms Summers' petition of over 1000 signatures had triggered an open debate on the proposals. Questions from Ms Summers and others were submitted in advance. Several councillors had by then received representations from residents supporting the proposals, which they reported to the meeting. The minutes record a very full discussion over more than two hours, with contributions from Ms Summers and others. At the end of the debate the Council resolved to approve the PSPO but to increase the number of licences from 15 to 18 and also to review the operation of the PSPO over the following twelve months.

18. Richmond made the PSPO on 16 October 2017 and on 24 November 2017 Ms Summers issued this application. As indicated above, Articles 5 and 6 have been suspended by agreement pending the outcome of this statutory review.

Making and challenging a PSPO under the 2014 Act

19. On 20 October 2014 Part 4, chapter 2 of the 2014 Act dealing with PSPOs came into force. Relevant provisions of the CNEA 2005 were at the same time repealed, subject to various saving and transitional provisions set out in section 75. The effect of these transitional arrangements was that a DCO would, unless revoked, remain in force for a period of 3 years after which it would be treated as a PSPO. Since the 2014 Act provides for PSPOs to be in force for a period of 3 years it follows that a DCO would, unless replaced by a PSPO in the meantime, remain in force until its expiry at the end of 3 years on 19 October 2020.

20. Statutory Guidance issued by the Home Office in July 2014 (*Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers: Statutory guidance for frontline professionals)* recommended that local authorities review their need for orders ahead of the transition in order to *"simplify the enforcement landscape"*. The guidance expressly refers to using the new powers under section 59 of the 2014 Act to *"restrict the number of dogs that can be walked by one person at any one time; and put in place other restrictions or requirements to tackle or prevent any other activity"*.

21. Section 59 of the 2014 Act is entitled "Power to make orders" and provides as follows:

> *"(1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.*
>
> *(2) The first condition is that—*
>
> *(a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or*
>
> *(b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.*
>
> *(3) The second condition is that the effect, or likely effect, of the activities—*
>
> *(a) is, or is likely to be, of a persistent or continuing nature,*
>
> *(b) is, or is likely to be, such as to make the activities unreasonable, and*
>
> *(c) justifies the restrictions imposed by the notice.*
>
> *(4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ("the restricted area") and—*

> *(a) prohibits specified things being done in the restricted area,*
>
> *(b) requires specified things to be done by persons carrying on specified activities in that area, or*
>
> *(c) does both of those things.*
>
> *(5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order—*
>
> *(a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or*
>
> *(b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.*
>
> *…"*

22. Under section 75(1) "*local authority*" includes a London Borough Council and "*public place*" is defined as "*any place to which the public or a section of the public has access*".

23. Section 59 requires two conditions to be satisfied before an order may be made. The first is that "*activities*" carried on, or likely to be carried on, in a public place have had or would have a "*detrimental effect*" on the quality of life of "*those in the locality*". Neither "*activities*" nor "*detrimental effect*" is defined in the 2014 Act.

24. Mr Rutledge QC, for Richmond, submitted, and I did not understand Mr Porter QC, for Ms Summers, to dissent from the proposition, that "*those in the locality*" must refer to some, but not necessarily all, of those within the locality. In my view the term must be read to include those who regularly visit or work in the locality, in addition to residents. This construction is supported by the definition of those persons who may apply under section 66 (set out below) to challenge an order.

25. The Act therefore envisages use of PSPOs to curb activities which it is possible that not everyone would view as detrimentally affecting their quality of life. Taken together with the absence of any further definition of the key terms "*activities*" or "*detrimental*" this strongly points to local authorities being given a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. This requires local knowledge, taking into account conditions on the ground, exercising judgment (i) about what activities need to be covered by a PSPO and (ii) what prohibitions or restrictions are appropriate for inclusion in the order. There may be strong feelings locally about whether any particular activity does or does not have a detrimental effect, in such cases a local authority will need to weigh up competing interests. Deciding whether, and if so what, controls on certain behaviours or activities may be necessary within the area covered by a local authority is thus the very essence of local politics.

26. It is important to bear in mind, however, as Mr Porter emphasised, that the behaviours which PSPOs are intended to target are those which are seriously anti-social, not ones that are simply annoying. He referred me in this respect to the following passage in the Home Office guidance from 2017:

> *"Our aim in reforming the anti-social behaviour powers is to give the police, councils and others more effective means of protecting victims, not to penalise particular behaviours. Frontline professionals must use the powers in [the 2014 Act] responsibly and proportionately, and only where necessary to protect the public."*

27. The second requirement, under section 59(3)(a)-(c) of the 2014 Act, is that the effect, or likely effect, of the activities is, or is likely to be, of a "*persistent or continuing nature*", such as to make them unreasonable and so as to justify the restrictions imposed by the order. The wording plainly excludes one-off activities, or those which might occur more than once, but rarely. In an analogous statutory context – gating orders to close footpaths so as to prevent "persistent commission" of anti-social behaviour, under Part 8A of the Highways Act 1985 – Supperstone J held that the word "persistent" was an ordinary English word "commonly understood to mean 'continuing or recurring, prolonged'": *Ramblers' Association v. Coventry City Council* [2008] EWHC 796, at [21].

28. Although the word "*effect*" is used on its own in sub-section 59(3) it is plainly intended to refer back to the "*detrimental effect*" required to be established for the purposes of the condition in sub-section 59(2). As Mr Rutledge rightly pointed out, there is a degree of overlap between sub-section 59(2) and the requirements of sub-section 59(3)(a) and (b). Sub-section 59(3)(c) imposes a proportionality check, requiring a balance to be struck between the extent of detrimental effect of the activities and the measures taken to prevent or restrict it. This proportionality cross-check is picked up in, and underlined by, the requirement of reasonableness for any prohibitions or requirements found in sub-section 59(5).

29. Sub-section 59(4) describes the shape and content of a PSPO: an order must first identify the public place which is to be protected – the "*restricted area*"; it must then set out prohibitions or requirements (or both) which apply to activities in that area.

30. Those prohibitions/requirements are subject to provisions as to reasonableness specified in sub-section (5), assessed by reference to the "detrimental effect" of the activities in question. Any evaluation of the reasonableness of specific prohibitions or requirements taken to deal with the "*detrimental effect*" of activities within a particular area must be a matter of judgment for the local authority, taking into account the particular needs of, and circumstances pertaining to, the local area.

Penalties for breach of a PSPO

31. Section 67 of the 2014 Act provides that breach of a PSPO will be an offence carrying, on summary conviction, a fine not exceeding level 3 (max £1000). Section 68 of the 2014 Act institutes a fixed penalty regime, under which fixed penalty

notices may be issued to anyone believed to have committed an offence under section 67. These provisions taken together thus afford a local authority a flexible regime for dealing with breaches of a PSPO, ranging from low-level fixed penalties at one end to prosecution and conviction in the magistrates' court, incurring a fine of up to £1000, at the other.

Challenges under section 66 of the 2014 Act

32. Challenges to the validity of any PSPOs may be made in accordance with the provisions of section 66 of the 2014 Act as follows:

> *"66 Challenging the validity of orders*
>
> *(1) An interested person may apply to the High Court to question the validity of—*
>
> *(a) a public spaces protection order, or*
>
> *(b) a variation of a public spaces protection order.*
>
> *"Interested person" means an individual who lives in the restricted area or who regularly works in or visits that area.*
>
> *(2) The grounds on which an application under this section may be made are—*
>
> *(a) that the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied);*
>
> *(b) that a requirement under this Chapter was not complied with in relation to the order or variation.*
>
> *(3) An application under this section must be made within the period of 6 weeks beginning with the date on which the order or variation is made.*
>
> *(4) On an application under this section the High Court may by order suspend the operation of the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied), until the final determination of the proceedings.*
>
> *(5) If on an application under this section the High Court is satisfied that—*
>
> *(a) the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied), or*

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

33. Both sides agreed that the scope of any review under section 66 is supervisory only, akin to the jurisdiction exercised on a judicial review, as distinct from any merits-based assessment. Counsel were also agreed, adopting Lord Diplock’s classification in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, that section 66(2)(a) is apt to embrace challenges to the legality or rationality of a PSPO, whilst allegations of procedural impropriety would fall within section 66(2)(b).

34. There was unanimity between counsel that ordinary Wednesbury principles would apply to a legality challenge to a PSPO under section 66(2)(a), however counsel both addressed me as to what level of scrutiny would be appropriate. I was referred in this regard to *Kennedy v. Charity Commission* [2015] AC 455, where at p.507 Lord Mance discussed a flexible approach to the Wednesbury jurisdiction, approving a passage from *De Smith’s Judicial Review* (currently in the 7th Edn., at para 11-086). The passage includes a table giving a spectrum from “light touch” at one end to “anxious scrutiny” at the other.

35. Mr Porter argued that the highest level of anxious scrutiny should be applied to decisions concerning the making of a PSPO, given the possibility of a criminal conviction for breach. Mr Rutledge QC submitted that the highest level of scrutiny should be reserved for cases where convention rights are in play and that whilst some PSPOs might very well impact upon convention rights, these are dealt with specifically by the provisions of section 72 of the 2014 Act. He argued that the terms of a PSPO dealing with dog control do not engage convention rights and accordingly

do not require anything beyond the standard level of Wednesbury review. Mr Rutledge characterised the PSPO in this case as a "modern-day byelaw" requiring the same level of scrutiny as that discussed by Lord Lowrie in *R v Home Secretary ex p. Brind* [1991] 1 AC 696 where at 765H he summarises the question to be asked as: "Could a decision maker acting reasonably have reached this decision?".

36. At one point Mr Rutledge suggested that the appropriate level might be at the lowest end of the scale, on the basis that a decision about dog control was essentially one resting on policy considerations and political judgment on the part of the authority, but I understood his final position to be that I should apply the standard level, albeit through the question of Lord Lowry referred to above.

37. Mr Rutledge relied in this context on the restrictions and requirements included in the 2014 Act for a challenge to a PSPO: section 66(2) which limits to two the possible grounds of challenge (irrationality and procedural impropriety); section 66(3) which sets a very short time limit for challenge, being 6 weeks with no provision for any extension, and section 66(7) which is an ouster clause preventing challenge by any other means than under section 66 of the 2014 Act. He contended that the existence of these restrictions further supported the view that considerable deference needed to be paid to the local authority's own judgment.

38. Although in the course of argument Mr Porter appeared to me to draw back from a test at the highest end of the Wednesbury scale, he nevertheless maintained that the correct test was higher than standard and certainly no lower than that enunciated by Lord Denning in *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320, at 1326:

> "The court can only interfere on the ground that the minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretations to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law"

39. At the conclusion of counsels' submissions there did not appear to me to be to be much between them on the proper level of scrutiny to be applied to a review of the PSPO in this case, namely a standard level of scrutiny. As I see it, the question enunciated by Lord Lowry in *Brind* is likely, in any given case, to engage any or all of the several considerations identified by Lord Denning in *Ashbridge*.

The arguments on Articles 5 and 6

Article 5

40. Grounds 1 to 4 of Ms Summers' grounds for review concern Article 5. She contends that, in making the order under Article 5, Richmond:

    (1) Failed to identify the detrimental or likely detrimental effect of walking five or six dogs in a public space;

    (2) Failed to identify the persistent or continuing nature of the detrimental effect of walking five or six dogs in a public space;

    (3) Failed to identify that the detrimental effect of walking five or six dogs in a public space is such as to make that activity unreasonable; and

    (4) Failed to identify that the effect of walking five or six dogs justified the restrictions imposed by the PSPO.

41. In developing these grounds, Mr Porter emphasised that the touchstone of any PSPO is the detrimental effect on quality of life of persons living in the locality, which needs to be of a persistent or continuing nature before any order could be made. He submitted that there was no evidence before Richmond that walking six dogs, as opposed to four, had had such a detrimental effect. There had been no more than six individual complaints about people having five or six dogs; even if this was sufficient evidence of detriment itself, Mr Porter argued, there was nothing to suggest that it was persistent or continuing.

42. Mr Porter maintained that it was for the Council to demonstrate that there were persistent and continuing problems which would not arise if persons were walking four dogs, rather than six. Evidence of incursion into Richmond by dog-walkers from adjoining boroughs whose rules only permitted four dogs, was irrelevant to the question of detriment, he suggested. Article 5 was penalising all those walkers of six dogs who had for 5 years created no issue for anyone in the locality; moreover if walking six dogs was causing a detrimental effect then Richmond's decision to issue licences permitting certain professional walkers to take out six dogs was illogical: if behaviour is so bad as to be criminal, Mr Porter asked rhetorically, why permit it at all?

43. Mr Rutledge responded that Mr Porter was identifying "*activities in a public place*" wrongly, and too narrowly, for the purposes of assessing whether the conditions for the making of a PSPO were met. The activities which Richmond was seeking to regulate and control by means of the PSPO was dog-walking in general. Mr Rutledge contended that by taking no issue with Articles 1-4 of the PSPO, Ms Summers must be taken to have accepted the validity of the PSPO as covering dog control in public spaces. The activities which had or were likely to cause a detrimental effect for the purposes of section 59 of the 2014 Act were those associated with dog walking generally, not multiple dog-walking specifically. Multiple dog-walking was but one aspect of the wider activity at which the PSPO was directed. Accordingly, Mr Rutledge argued, Articles 5 and 6 did not fall to be considered by reference to the

conditions set out in section 59(2) and (3), but as restrictions and prohibitions on the activity of dog-walking in general, covered by section 59(5).

44. Mr Rutledge argued that the court could and should start with the proposition that the first and second conditions in section 59(2) and (3) were met, that dog-walking in general in public spaces had had, or was likely to have, a detrimental effect on the quality of life of residents in the borough and that the effect was, or was likely to be, of a persistent or continuing nature such that it was reasonable to seek to control it. He relied on the fact that the Home Office guidance specifically indicated that PSPOs might cover dog control and numbers of dogs to be walked (see the extract referred to at para 20 above), and on the fact that the 2014 Act had explicitly repealed provisions for DCOs contained in the CNEA 2007, intending DCOs to be replaced by PSPOs .

45. Mr Rutledge submitted that the question for this court was accordingly whether the prohibition on walking more than four dogs at a time in Article 5 and the requirements as to keeping dogs under proper control in Article 6, were reasonable ones for Richmond to have included in the PSPO, by reference to the considerations set out in section 59(5). When considering the reasonableness of restrictions/prohibitions designed to deal with a detrimental effect it was necessary to do so by reference to the detrimental effect of dog-walking in general, not to take one aspect of dog-walking in isolation, in this case walking five or six dogs.

46. Mr Rutledge contended that there was more than sufficient evidence before Richmond to justify setting a limit of four on the maximum number of dogs permitted to be walked by one person. In setting that limit but allowing for licences and permits to derogate from it, Richmond had struck a balance between competing interests, taking a proportionate approach to reducing the potential detriment arising from dog-walking in general.

47. In response Mr Porter drew my attention to the phrasing of the consultation document, arguing that in consulting about the proposed PSPO Richmond itself appeared to have viewed it as a collection of orders tackling particular detriments, rather than as a fresh approach to the issue of dog control generally.

Article 6

48. Ms Summers' Grounds of challenge to Article 6 were as follows:

(1) A failure to identify any detrimental or likely detrimental effect of dogs causing annoyance in public spaces.

(2) A failure to identify any persistent or continuing detrimental effect of dogs causing an annoyance in public spaces.

(3) A failure to identify that the detrimental effect of dogs causing an annoyance in public spaces is such as to make unrestricted dog walking unreasonable.

(4) A failure to identify that the effect of dogs causing annoyance justifies the restrictions imposed by the PSPO.

(5) Failure to satisfy itself on reasonable grounds that the two conditions set out in section 59 were met.

(6) A failure to consider the requirements of section 59(5).

(7) A failure to comply with the obligations of section 61(2) of the 2014 Act in that the provisions of Article 6 impose wider restrictions than in any previous orders.

49. In submissions Mr Porter confirmed that the Applicant took no issue with the title to Article 6 or para 1(a) thereof. The complaint was as to the terms of 1(b) and (c), and to the definition set out in Article 6 of what constitutes "proper control". Mr Porter contended that seeking to criminalise (by para 1(b)) those owners whose dogs were "annoying" was illiberal and contrary to the purpose of the 2014 Act, which was to curb seriously anti-social behaviour, not to ban an activity that was simply annoying. The same point applied, Mr Porter said, to "damage" under (1)(c), where it could be argued that a dog will "damage" a patch of turf or a tree every time it urinates on it.

50. Mr Porter argued further that the definition of "proper control" was unreasonably narrow; a dog running off the lead after a squirrel or pigeon, momentarily distracted, could not be described as a detriment. Such behaviour should not render its owner liable for a criminal offence, he submitted.

51. Mr Rutledge repeated that we were here concerned with evaluating Article 6 by reference to the provisions of section 59(5) and not as an independent "activity" under section 59(2) and (3). He argued that the definition of "proper control" was supported by evidence and was in itself eminently reasonable. He referred me to evidence of complaints made by members of the public to councillors about uncontrolled dogs in Richmond's open spaces, being off the lead and unresponsive to commands from owners. Article 6 was to be read with Article 4, Mr Rutledge pointed out: Article 4 requires dogs to be kept on the lead in certain parts of Richmond's green spaces, but this is balanced by dogs being permitted to be off the lead in other parts, provided that they are under control by being muzzled (if required) and/or on the lead or near at hand and/or trained to respond to their owner's commands. He drew attention to the ability of the flexible penalty regime to respond according to the nature and seriousness of any breach, permitting "light-touch" enforcement of minor infractions. With that in mind it was reasonable for the Council to have sought to define what was expected of the requirement that a dog be under proper control, that requirement itself being one to which the Applicant could not and did not object.

52. In relation to Article 6(1)(b), Mr Rutledge relied on the fact that "causing annoyance" was the term used in a previous byelaw. He argued that it was sensible to use the same wording in the PSPO. He emphasised that the restriction had to be viewed in the context of a need to control dog walking generally, where Richmond was satisfied that that was an activity properly falling within section 59(2) and (3). The requirement that a dog should not cause annoyance was a way of addressing that detriment. There was evidence, again in the form of complaints addressed to councillors from residents, that uncontrolled dogs had behaved in ways which could properly be described as "annoying".

53. Likewise as regards para (1)(c) there was evidence of complaints about damage caused by increased footfall, dog faeces, worming tablet chemicals and urine,

justifying the wording used. The Council would not enforce, Mr Rutledge suggested, in respect of a dog behaving in an ordinary way, urinating against a tree for instance.

Conclusions on Articles 5 and 6

54. In my view Mr Rutledge is correct in his wider definition of *"activities"* as dog walking in general for the purposes of the first and second conditions in section 59(2) and (3). One of the aims of the PSPO regime was to simplify the previous regulatory "landscape" with its mixture of byelaws and DCOs. Controls had been imposed over dog-walking for many years prior to the introduction of PSPOs, on the obvious principle that dog-walking in public spaces, if uncontrolled, may have an adverse impact on the life of the community in a variety of ways.

55. I agree with Mr Porter that section 59 of the 2014 Act stands alone and that previous regulations cannot assist with the question of whether or not Richmond correctly observed the requirements of that section in issuing the PSPO. I part company with Mr Porter, however, in my approach to a consideration of how Articles 5 and 6 of the PSPO are to be evaluated under section 59: in my view provisions in the PSPO dealing with the numbers of dogs permitted to be walked by one person at any one time and with the necessity for dogs to be under proper control are properly to be viewed as two aspects amongst many others (such as picking up faeces, exclusions from certain play areas, keeping dogs on a lead) of an overarching concern with dog control in public spaces generally. As such, Article 5 is a prohibition and Article 6 contains requirements both of which fall to be considered under section 59(5).

56. So far as Article 5 is concerned, I am satisfied that in setting a four-dog limit, subject to a system of licences to be reviewed in a year's time, Richmond acted reasonably in deciding that this was a prohibition which it was reasonable to impose in accordance with the provisions section 59(5) of the 2014 Act. Richmond had before it the following evidence when making that decision:

    a) A table showing the increase in numbers of commercial dog walkers using Ham Lands for 1-4 walks per day between 2012 and March 2016, from 6 per day in 2012, to 31 per day in March 16. Many people who responded to the council's statutory consultation expressed concern over the displacement of walkers from surrounding areas where there was a four-dog limit.

    b) Emails from borough residents and professional dog trainers asking for a cap of four on the number of dogs to be walked by one person, expressing the view that numbers above this could not properly be controlled.

    c) The results of a survey by South West London Environment network (SWLEN) in which 67% of respondents had said that walking more than four dogs was an issue with 94% supporting Richmond's proposal to introduce a limit on the number of dogs.

    d) A letter from the Chief Executive of the National Association of Pet Sitters and Dog Walkers stating "We are in agreement that the maximum four dog rule should be introduced for commercial dog

walkers, in line with our terms and conditions and code of practice, which have been written in consultation with the RSPCA. This is something that is being introduced across many boroughs in the UK at the moment..".

e) An email from the MP for Richmond Park and N Kingston, Zac Goldsmith including the following: "As MP… I have received correspondence from local people regarding the number of dogs being walked together in large packs (which can be frightening for children and older residents).."

57. The minutes of the RegCom meeting on 11 July 2017 show that the Committee heard representations both for and against the proposals, including from the Applicant and from a representative of the Kennel Club. It considered the advantages and disadvantages of what was being proposed. The Committee reminded itself that it had to look at each proposal under the PSPO and not focus on just the matters raised in writing and at the meeting. It called for clarification of the legal process from the Legal Advisor and was reminded of the specific requirements of section 59 of the Act; the relevant provisions were set out in the minutes. Having received this legal advice, the Chairman read out each proposal one by one after which the members of the Committee made some amendments before voting on the amended proposals.

58. Mr Porter rightly took no point before me on the result of the statutory consultation regarding maximum numbers of dogs being walked. 59% of respondents to that consultation disagreed with the proposal to reduce numbers from six to four; as he fairly acknowledged, however, this was just one part of the information and evidence taken into account by the RegCom.

59. The recommendation of the RegCom came to Full Council on 12 September 2017. 54 councillors were there, with the Mayor in the Chair. The minutes of the meeting record the Applicant spoke at length. Her questions were addressed by Cllr Fleming, after which Cllrs Frost, Tippett and Churchill also spoke. I was referred to the collection of email representations received by Cllrs Fleming and Nicholson on the subject of dog-walking in advance of the Full Council meeting. There were a number of public questions asked and answered. The Chair allowed an extended time for debate. An amendment was made to increase the number of licences from 15 to 18 and to require a review of the PSPO after 12 months (it would otherwise be in operation for 3 years). The full Council then voted, deciding to accept the recommendation of the RegCom, with the further amendments.

60. Mr Porter made the point that the problem of professional dog walkers walking together might be more directly addressed by targeting irresponsible professional dog-walkers, and that setting a four-dog limit would not prevent three walkers, each with four dogs, walking together and having thereby a pack of twelve dogs, in just the same way as two walkers with six dogs each would do.

61. However my task on this review is not to decide whether Richmond has tackled the problems posed by dog-walking in the best or most logical way but only whether it acted reasonably, on the evidence, in tackling it in the way it has. Starting from the position that dog-walking generally is properly to be viewed as the "*activities in public spaces"* sought to be controlled, and even applying a careful level of scrutiny

to Richmond's decision-making, I have reached the firm conclusion that the decision to impose a four-dog limit (with conditions as to licences, and review after a year) was reasonable.

62. Moving to Article 6: I have concluded that Richmond's decision to include a definition of proper control as part of the requirement under Article 6 was reasonable and in accordance with the provisions of section 59(5). Ms Summers takes no issue with the requirement itself only with the disposition. A penalty could only arise if a dog is "not kept" under proper control, which would allow for momentary distractions or lapses. Against the context of a flexible penalty regime and taking into account the scrutiny given to the wording of each Article of the PSPO in RegCom and in Full Council, I have concluded that Richmond acted reasonably in seeking to define what is meant by the use of the term "proper control" in Article 6.

63. In my view, however, paras (b) and (c) of Article 6 are objectionable. The instances cited by Mr Rutledge as supporting evidence for the inclusion of a restriction against "causing an annoyance", when read carefully, are no more than complaints of dogs being out of control. To that extent para (b) adds nothing to the requirement to keep dogs under proper control in para (a), as that term is defined in Article 6. Insofar as (b) addresses behaviours not covered by (a) then in my view there was no evidence that could reasonably have justified that further requirement under section 59(5).

64. As to para. (c) of Article 6, none of the evidence to which my attention was drawn by Mr Rutledge in the schedule attached to his submissions deals with specific damage done by any individual dog to a "*Council structure, tree plant turf or other Council property*". Damage to paths or ecology resulting from the presence of an increased numbers of dogs is a separate matter from wilful damage caused by any individual dog. I have seen no evidence to suggest that that was a problem requiring a requirement specifically to address it, over and above the requirement that a dog be kept under proper control (as defined).

Exemptions to the PSPO

65. Turning lastly to the exemptions to the PSPO ("the Exemptions") Mr Porter submitted that these were objectionable in two ways, first because the definition of *"prescribed charities"* listing three named charities was simply a cut-and-paste from the wording of an out-of-date byelaw. He pointed out that one of these charities no longer exists by the name given and suggested that Richmond could not have taken account of the letter from the Kennel Club submitted to it naming eight charities registered as training assistance dogs. The inequality and unfairness was accepted, Mr Porter pointed out, by Mr Allister in his witness statement prepared for the hearing (at para 75) stating as follows:

> *"I accept that the PSPO/DC includes an out-dated name and charity number for Dogs for Good. However this would not be an impediment to exempting assistance dogs from the re-branded charity. This will be updated in the PSPO at the first opportunity, probably on the one-year review. In the meantime our enforcement officers will be instructed to ensure dogs trained buy the relevant charity are also exempted"*

66. Mr Porter's second objection was to the words in parentheses in the Exemptions, requiring assistance dogs to be identified as such when out in public.

67. The Grounds of Review, whilst asserting that these matters were discriminatory, made no reference to any provisions of the Equality Act 2010. I found the assertion that certain parts of the Exemptions were "discriminatory" of little assistance in identifying whether there had been an actionable breach of the Equality Act 2010, or what remedy might be available in the context of a statutory review under section 66 of the 2014 Act. As will be seen, when these questions were addressed by counsel, an interesting jurisdictional clash appeared.

The Applicant's standing

68. Mr Rutledge's original response was limited to taking issue with Ms Summers' standing: since she did not herself have a disability, nor an assistance dog, he argued, she had no standing to take any point arising under on discrimination.

69. I have set out section 66(1) and (2) of the 2014 Act above. Under that section any *"interested person"* may apply to question the validity of a PSPO on one or both of two grounds: (i) that the authority acted outside its power in making the order or including any prohibitions or requirements and/or (ii) that the authority did not adopt the correct procedure before making the order.

70. There is no question that Ms Summers fits the definition of an *"interested person"* as she lives in Richmond and owns a dog which she regularly walks in the public spaces. As such, she is entitled to question the validity of the PSPO on any ground properly falling within section 66 of the 2014 Act. Whilst the statutory provision for a challenge under section 66 shares many features with judicial review, standing is not approached in the same way; the right of a person to challenge a PSPO is exclusively determined by the provisions of section 66(1). Although section 66(6) includes reference to quashing an order, or any prohibition or requirement imposed by the order *"so far as necessary for the protection of the interests of the applicant"*, I do not think that these words can be read as restricting the standing of an applicant to bring a challenge, if they are otherwise an "interested person".

The Equality Act 2010

71. As I have pointed out above, there was no reference to the EA 2010 in the Grounds of Review. The only provision of the Equality Act 2010 cited or relied upon by Mr Porter in his opening submissions on this application was section 15, which provides as follows

> *"(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

72. Mr Porter's case was that, by omitting certain charities from the definition of "prescribed charities", and by requiring assistance dogs to be marked out as such, persons with disabilities were being discriminated against within the meaning of the term as defined by section 15. Mr Porter asserted that provisions of the PSPO which were discriminatory must be ultra vires. However I wanted to know how Ms Summers put her case for a breach of the EA 2010 and specifically which provisions were being relied on for that case.

73. In response, Mr Rutledge sought to assist (although, as he pointed out, it was not his case to make). He drew my attention to Part 3 of the EA 2010 which deals with discrimination in the context of services and public functions. Section 29(6) in Part 3 provides that:

> *" a person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."*

74. Enforcement of section 29 is dealt with in Part 9 of the EA 2010. Section 113 provides that proceedings relating to a contravention of the EA 2010 must be brought in accordance with that Part: see section 113(1). Exceptions to this requirement are set out in sub-section (3) and include a *"claim for judicial review"*, but following the decision of the Court of Appeal in the case of *Hamnett v. Essex County Council* [2017] 1 WLR 1155, it is clear that this description is not apt to cover a statutory review such as that provided for by section 66 of the 2014 Act (see [15] and [24(iv)] of the decision in *Hamnett*, where Gross LJ approved the decision of Singh J at first instance).

75. Section 114 of the EA 2010 (headed "Jurisdiction") provides that a county court has jurisdiction to determine a claim relating to *"(a) a contravention of Part 3 (services and public functions)"*: see section 114(1).

76. The effect of sections 113 and 114 of the EA 2010 is to confer exclusive jurisdiction on the county court to hear and determine any claim for breach of section 29 EA 2010. To my mind, the requirement for a discrimination claim to be brought in the county court, with assessors assisting the judge who hears the claim (see section 114(7)) makes obvious sense, given the context-sensitive nature of an enquiry as to whether or not there has been discrimination.

77. There is, however, an apparent clash between the above provisions as to jurisdiction contained in sub-sections 113 and 114 of the EA 2010 and the ouster clause at section 66(7) of the 2014 Act. Under section 66(7) only the High Court may hear and determine a challenge to a PSPO; under sub-sections 113 and 114 of the EA 2010 only the county court may hear and determine a claim for breach of section 29 EA 2010.

78. A very similar jurisdictional clash was considered by the Court of Appeal in *Hamnett. Hamnett* concerned experimental traffic orders ("ETROs") made by the local highway authority under the Road Traffic Regulation Act 1984 ("RTRA 1984"). The ETROs operated to close certain roads to private cars, thereby removing parking spaces on those streets that had previously existed for cars driven by persons with disabilities.

The claimant in *Hamnett* sought a statutory review of the ETROs under para.35 of Schedule 9 to the RTRA 1984 on the grounds that the local authority had, inter alia, breached its duty not to discriminate in the exercise of its public functions under section 29 of the EA 2010.

79. *Hamnett* has close parallels with the instant case as the wording of paras 35-37 of Schedule 9 of the RTRA 1984 dealing with the scope of the statutory review in that case share many of the same features as section 66 of the 2014 Act, viz: challenges to be brought in the High Court (para.35 of Schedule 9, cf section 66(1) of the 2014 Act), "powers" and "procedure" grounds of challenge (para 35(a) and (b) of Schedule 9, cf section 66(2(a) and (b) of the 2014 Act), power to suspend until final determination (para 36(1)(a) of Schedule 9, cf s.66(4) of the 2014 Act), power to quash (para 36(1)(b) of Schedule 9, cf s.66(5) of the 2014 Act) and an ouster clause (para 37 of Schedule 9, cf s.66(7) of the 2014 Act).

80. In *Hamnett,* Singh J (as he then was) decided that as a complaint of discrimination under section 29 EA 2010 could only be brought in the county court, the High Court hearing a claim for statutory review under para 35 of Schedule 9 of the RTRA 1984 did not have jurisdiction to hear it. The claimant appealed that part of his decision.

81. By the time the appeal was heard, the ETROs had long-since expired, so that the appeal was academic. This was the primary ground upon which the Court of Appeal dismissed the appeal. However the court heard the jurisdiction argument *de bene esse* and went on to discuss the issue in its judgment, albeit (as Gross LJ noted at [35]) with rather less argument on the point than they might otherwise have sought.

82. The solution to the jurisdiction "conundrum" adopted by the Court of Appeal in *Hamnett* was the seldom-used principle of implied repeal: see [24-28] of the judgment of Gross LJ. As the EA 2010 was enacted after the RTRA 1984 the provisions of sub-sections 113-114 of the later Act were taken to have impliedly repealed the provisions of the ouster clause in Schedule 9 of the RTRA 1984 in relation to a claim under section 29 of the EA 2010.

83. In the present case the 2014 Act post-dates the EA 2010, accordingly the doctrine of implied repeal cannot apply to the ouster clause at section 66(7) of the 2014 Act.

84. I am not prepared to find that doctrine of implied repeal operates in reverse here, namely that by the inclusion of an ouster clause at section 66(7) of the 2014 Act, Parliament must be taken to have intended to repeal the jurisdiction provisions in sub-sections 113 and 114 of the EA 2010 as applied to PSPOs. The fact that the provisions of the EA 2010 are specific to discrimination claims would militate against the operation of the doctrine here. Moreoever I share the view of Singh J and the Court of Appeal in *Hamnett* that a part 8 procedure in the High Court, with evidence on witness statements only (and with no assessors to assist) is an inappropriate venue to investigate whether or not a local authority has acted in breach of section 29 EA 2010. As Mr Rutledge pointed out, context is everything in determining whether a public authority has treated a person with a disability unfavourably and if so whether its actions were nevertheless *"a proportionate means of achieving a legitimate aim"* under section 15(2) of the EA 2010.

85. The claimant in *Hamnett* had also relied on section 149 of the EA 2010, alleging breach of the public sector equality duty. Section 149 provides that a public authority must in the exercise of its functions:

> *"..have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

In *Hamnett* there was no dispute that the High Court had jurisdiction to hear any complaint based on section 149. Singh J heard and dismissed the claim based on section 149 and there was no appeal against that part of his decision.

86. At one point Mr Porter indicated that he would seek to rely on a breach of the section 149 public sector equality duty, but as Mr Rutledge pointed out, section 149 was not referred to in the Applicant's Grounds nor in Mr Porter's skeleton for the hearing. Although, at para. 22 of the Grounds and at para. 41 of Mr Porter's skeleton, there was brief reference to alleged inadequacies in Richmond's Equality Impact and Needs Assessment the legality of that assessment was not in terms challenged. I agree with Mr Rutledge that if the Applicant had been seeking to challenge the discharge of Richmond's public sector equality duty under section 149 EA 2010 then quite different evidence would have been required.

87. I am satisfied that I do not have jurisdiction to investigate a claim for breach of section 29 of the EA 2010. Whilst the Applicant has standing, in principle, to seek statutory review in the High Court of a PSPO on whatever grounds may fall within section 66(2), this court does not have jurisdiction to investigate a breach of section 29. No proper case has been made for any breach of the section 149 public sector equality duty.

88. I am aware that, applying the logic of Gross LJ in the *Hamnett* case, but without recourse here to the doctrine of implied repeal, my decision that I lack jurisdiction to entertain a section 29 investigation on this statutory review could be said to leave a statutory lacuna. Neither Mr Porter nor Mr Rutledge addressed me in any detail on the point. The answer may be that the public sector equality duty in section 149 represents sufficient protection for persons with protected characteristics who might be impacted by any terms of a PSPO, however a final determination on this point will have to await another case where the point is more fully addressed.

89. The Applicant's complaints of "discriminatory" provisions in the Exemptions to the PSPO cannot, therefore, provide her with any ground for review under section 66.

Conclusion

90. For the reasons given above I shall order that paras 1(b) and (c) of Article 6 be quashed. The remainder of this application for statutory review will be dismissed.