



Protest, Pandemic and Proportionality

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GARDEN COURT CHAMBERS



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Part 1: Liberties in Lockdown

Tom Wainwright, Garden Court Chambers

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Coronavirus Regulations

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
[last amended 13th June 2020].



Restrictions on gatherings

7(1) During the emergency period, unless paragraph (2) applies, no person may participate in a gathering which takes place in a public or private place—

- (a) outdoors, and consists of more than six persons, or
- (b) indoors, and consists of two or more persons.

7(3) For the purposes of this regulation—

- (a) there is a gathering when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other;



Exceptions

Paragraph 2 exceptions include:

- Same household
- Funeral / Hospital
- Elite athlete
- Legal obligation
- Education



Exceptions

Paragraph 2 exceptions include:

- Reasonably necessary:
 - For work purposes;
 - To facilitate a house move;
 - Emergency assistance.



Enforcement

8(9) Where a relevant person considers that a number of people are gathered together in contravention of regulation 7, the relevant person may—

- (a) direct the gathering to disperse;
- (b) direct any person in the gathering to return to the place where they are living;
- (c) remove any person in a gathering in a public place to the place where they are living.

8(10C) A relevant person may only exercise the power in paragraph (9)... if the relevant person considers that it is a necessary and proportionate means of ensuring compliance with the restriction in regulation 7



Enforcement

8(10) A relevant person exercising the power in paragraph (9)(c) to remove a person in a gathering in a public place to a place where they are living may use reasonable force, if necessary, in exercise of the power.



Offences

9(1) A person who... without reasonable excuse contravenes a requirement in regulation... 7 or 8... commits an offence.

(2) A person who obstructs, without reasonable excuse, any person carrying out a function under these Regulations... commits an offence.

(3) A person who, without reasonable excuse, contravenes a direction given under regulation 8... commits an offence.



Offences

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Defences

1. Secondary legislation – public law / human rights grounds;
2. Particular direction – public law / human rights grounds;
3. Reasonable excuse.



Consideration of A10 and A11 rights in a criminal trial

James v DPP [2016] 1 W.L.R. 2118

- Specifically dealing with s.14 of Public Order Act 1986.
- What is the interaction between the offence alleged and the rights of the accused under articles 10 and 11 of the Convention?
- How do those rights become part of the consideration at trial?



Consideration of A10 and A11 rights in a criminal trial

James v DPP [2016] 1 W.L.R. 2118 (para 34)

‘For some POA 1986 offences... these rights and the qualifications to them, and thus the proportionality of the prohibitions or restraints on expression and assembly, form part of the statutory defence that the accused's conduct was reasonable.’



Consideration of A10 and A11 rights in a criminal trial

James v DPP [2016] 1 W.L.R. 2118 (para 36)

‘The relationship between the offence of obstruction of the highway... and common law rights to freedom of speech and assembly is dealt with by interpreting the words “without lawful authority or excuse in any way wilfully obstructs ... free passage” as not prohibiting those acts which involved wilful obstruction of the highway but which were not otherwise of themselves unlawful and which might or might not be reasonable in the circumstances.’



Consideration of A10 and A11 rights in a criminal trial

James v DPP [2016] 1 W.L.R. 2118 (para 35)

‘There are other Criminal Justice and Public Order Act 1994 offences... where... once the specific ingredients of the offence have been proved, the conduct of the accused has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights.’



Article 10(1)

‘(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...



Article 10(2)

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



Article 10 caselaw

Where rights under Article 10 are engaged, restrictions on that right must be 'narrowly construed' and the justification for any criminal sanction must be 'convincingly established'.

Sunday Times v UK (No 2) 14 EHRR 229

Where the expression in question 'relates to "a debate on a matter of general concern and constitutes political... expression... a high level of protection of the right to freedom of expression is required under Article 10'

Lindon and others v France (2008) 46 EHRR 35



Article 10 caselaw

In *Tabernacle v Secretary of State for the Defence* [2009] EWCA Civ 23, a byelaw prohibiting camping near a nuclear weapons site was held to unjustly interfere with the Article 10 and 11 rights being exercised at a longstanding 'peace camp', despite the fact that there were other ways of carrying out the protest.



Article 10 caselaw

At what point are criminal sanctions proportionate?

- *Alekhina v Russia* (2019) 68 E.H.R.R. 14
- *PWR v DPP* [2020] EWHC 798 (Admin)



Reasonable excuse

- Other exceptions to prohibition against gatherings:
 - Reasonably necessary for work purposes;
 - Elite athletes.
- Dominic Cummings



Factors to take into account

- Duration of protest
- Location
- Degree of risk
 - Social distancing;
 - Facemasks.
- Penalty



Subject matter of the protest?

DPP v Ziegler [2019] 1 Cr. App. R. 32 (para 55)

‘...the courts - which are strictly neutral arbiters of people’s rights - cannot adjudicate upon the validity or legitimacy of particular points of view... what the courts cannot do is to engage in discrimination as between different *viewpoints*. It is not the function of the court to express a view about the acceptability of a political opinion, still less to express approval or disapproval of those opinions.’



Subject matter of the protest?

Article 2:

1. Everyone's right to life shall be protected by law.

Article 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.



Subject matter of the protest?

Article 17

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

Norwood v UK (2005) 40 E.H.R.R. SE11



Police seek protests ban after 23 officers injured in London rallies

“I urge the home secretary to be unequivocal in her terms that whilst we are under the threat of this virus, any large gathering or protest must be banned.”



Banning protests

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

r.7(1) During the emergency period, unless paragraph (2) applies, no person may participate in a gathering which takes place in a public or private place—

- (a) outdoors, and consists of more than six persons, or
- (b) indoors, and consists of two or more persons.



Banning protests

Public Order Act 1986

S.12 – Imposing conditions on processions

S.13 – Prohibiting processions. (*Only on grounds of serious public disorder*)

S.14 – Imposing conditions on assemblies

(Cannot be used to impose conditions which effectively amount to a ban

– Austin & Saxby v CPM [2005] HRLR 20)

S.14A - Prohibiting *trespassory* assemblies



Facemasks

Criminal Justice and Public Order Act 1994, section 60AA

[When a s.60 order is in force]

(2) This subsection confers power on any constable in uniform:

- (a) to require any person to remove any item which the constable reasonably believes that person is wearing wholly or mainly for the purpose of concealing his identity;
- (b) to seize any item which the constable reasonably believes any person intends to wear wholly or mainly for that purpose.



Facemasks

Criminal Justice and Public Order Act 1994, section 60AA

(7) A person who fails to remove an item worn by him when required to do so by a constable in the exercise of his power under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale or both.

R (Roberts) v CPM [2012] EWHC 1977 (Admin)



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Part 2: ECHR Cases Update

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Legal Boundaries of the Right to Protest: Direct Action

- ***R v Roberts and others*** [2019] 1 WLR 2577
- Is the imposition of immediate custodial sentence for a non violent crime committed as part of a peaceful protest in breach Art 10 ECHR?



Direct Action Protests - Art 10 and 11

- There is no doubt that direct action protests fall within the scope of articles 10 and 11.



Strasbourg approach:

- ECHR considered the question of the proportionality of a sentence imposed for crime committed in the course of peaceful protest.



Taranenko v Russia (2014) 37 BHRC 285

- It's clear from the cases that the contracting states' discretion in punishing illegal conduct is intertwined with expression or association, although wide, is not unlimited.
- It goes hand in hand with European supervision by the court, whose task it is to give a final ruling on whether the penalty was compatible with article 10 or 11 . The court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.



There are no bright lines... cautious approach needed

- The Strasbourg court has accepted as proportionate both immediate sentences of imprisonment and suspended sentences in cases where the conduct in question caused less harm and was less culpable.
- The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences.



Boycott cases – *Baldassi v France*

- Cases concerned the criminal conviction of Palestinian activists for inciting economic discrimination on the basis of Article 24, paragraph 8 of the Press Freedom Act of 29 July 1881, for their participation in actions calling for a boycott of products imported from Israel.
- Court found violation of Art 10.



Boycotting does not necessarily amount to incitement to discriminate

- Boycotting is primarily a means of expressing protest opinions and therefore in principle protected by Art 10.

Tensions between :

- the exercise of freedom of expression and protest through calls for a boycott (on the one hand), and
- the call for discrimination (which is a call for intolerance which together with a call for violence and hatred must be limited in the exercise of freedom of expression).



Was the interference necessary in a democratic society?

- The Court noted that the domestic Court did not consider whether the boycott was necessary in a democratic society to achieve the legitimate purpose pursued, namely the protection of others within the meaning of Art 10 (2).
- 10 (2) leaves little room for restrictions of freedom of expression on matters of political discourse or matters of general importance.



Was the interference necessary in a democratic society?

- Political discourse is inherently controversial and is often virulent. Nevertheless, it remains in the public interest, unless it degenerates into a call for violence, hatred or intolerance. There is the limit not to exceed.



Necessary in a democratic Society Art 10 (2)

- The Court recounted its own jurisprudence on the application of “necessary in a democratic society” in within the meaning of 10 (2)
- Noting the case of *Perinçek* and the following principles:
- Freedom of expression applies equally to favoured ideas and information as well as those intended to shock, worry and offend. Exceptions must be restrictively interpreted and the need to restrict must be convincingly established.
- *Necessary* implies a compelling social need.
- Whether the interference is proportionate to the legitimate purpose.



Alekhina v Russia (2019) 68 E.H.R.R. 14

- The applicants complained that the institution of criminal proceedings against them, entailing their detention and conviction, for the performance of 21 February 2012 had amounted to a gross, unjustifiable and disproportionate interference with their freedom of expression, in breach of art.10 of the Convention.



Political Expression covered by Art 10

Existence of Expression

- The performance of their song from the Cathedral as a response to the ongoing political process in Russia amounted to artistic and political expression covered by Art 10.

Interference

- The imposing of criminal sanctions amounted to an interference with Art 10 right.



Art 10 – restriction

There is no Freedom of Forum

- There is no requirement for the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries.
- Holding an artistic performance or giving a political speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct.



Imposition of criminal sanctions

- Possible violation of accepted rules of conduct in a religious place of worship (Moscow's Christ the Saviour Cathedral) which may in principle justify the imposition of certain criminal sanctions - the demands of protecting the rights of others.
- The restriction of freedom of expression by imposing criminal sanctions was only acceptable in cases of incitement to hatred.



The interference was not just and necessary in a democratic society

- The applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers.
- In principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence.
- Interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question.



Art 10 – banning of videos

- The video material on the internet was declared extremist and banned.
- The banning of the video recordings amounted to an interference of freedom of expression (art 10).
- The issue was the proportionality of the interference and whether it was prescribed by law.



The interference was not necessary in a democratic society

- The domestic court failed to provide sufficient reason for the interference.
- The applicants were prevented from participating in the proceedings (domestic law doesn't allow concerned parties to participate in proceedings under the Suppression of Extremism Act).
- Concluded that declaring the applicants' video material on the internet extremist and placing a ban on them did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked.



Proportionality of the interference

- There is little scope under art.10(2) for restrictions on political speech or debate on questions of public interest.
- Where the views expressed do not comprise incitements to violence, the state must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in art.10(2).



PWR v DPP [2020] EWHC 798

- The 3 appellants were each convicted of an offence contrary to section 13(1) of the Terrorism Act 2000 , for taking part in a demonstration in which they carried the PKK flag. They argued that:
- Section 13(1) of the 2000 Act does not create an offence of strict liability, and the appellants therefore could not be convicted without proof of mens rea;
- Or alternatively, if the section does create an offence of strict liability, it is incompatible with article 10 of the European Convention on Human Rights.



Art 10

- The CA accepted that Art 10 was engaged because s.13 restricted the freedom of persons to express their opinions.
- Was the restriction justified Art 10 (2)?



Proportionality

- The appellants argued (in line with ECHR jurisprudence) that s. 13 disproportionately interferes with the exercise of freedom of expression because it is not limited to circumstances in which the expression incites violence.
- CA did not consider s.13 offence a disproportionate interference with art 10 rights.
- S.13 strikes a fair balance between freedom of expression and need to protect the society against terrorism.



Overlap between Art 10 and Art 11

- There is significant overlap between Art 10 (freedom of expression and Art 11 (freedom of assembly) in the context of demonstrations – much of what is said in relation to Article 10 applies to Art 11.



Kasparov v Russia [2018] 66 ECHR 20

- The applicants complained that their arrests following a demonstration and conviction for administrative charges violated their right to freedom of expression and freedom of peaceful assembly.
- Court found a violation of Art 11 (interpreted in light of art 10).



Peaceful Assembly

- The Court considered that the dispersal and arrest of the applicants constituted an interference with their right of peaceful assembly, as did the ensuing administrative charges brought against them.



Was the interference justified?

- The Court reiterated that an unlawful situation, such as the staging of a demonstration without prior authorisation, does not necessarily justify State interference with a person's right to freedom of assembly.
- In particular, where demonstrators do not engage in acts of violence the public authorities must show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art.11 of the Convention is not to be deprived of all substance.



Whether the interference was justified

- The state is required to show a measure of tolerance and the questions of whether a demonstration is objectionable and what action, if any, should be taken by the police should depend primarily on the nuisance being caused.



Thank you

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