

13 March 2021

To the Organisers of Reclaim These Streets,

We have been asked to set out in very brief terms the implications of the *ex tempore* Judgment handed down yesterday by Mr Justice Holgate.

The application for judicial review and the Judgment

1. The Tier 4 regulations that are currently in effect across England, prohibit outdoor gatherings of more than two people subject to certain exceptions. The right to protest is not identified as a specific exception (although picketing is). It is however not an offence to participate in a gathering where a person has a “reasonable excuse”. Regulations applicable at other times have identified protest as an express exception.
2. The position of the Metropolitan Police earlier this week was understood to be that in the absence of any express exception in the Tier 4 rules for protesting, outdoor gatherings for that purpose are currently prohibited. This was understood to be the reason why the police refused to support the Vigil on Clapham Common. This appears to reflect the Metropolitan Police’s policy towards protests generally under Tier 4 rules as well as being the apparent position of other police forces.
3. At the application issued on Friday 12 March 2021, it was argued on behalf of Reclaim These Streets that this position is erroneous in law. It was argued that Tier 4 regulations do not prohibit protest where persons are legitimately exercising their rights under Articles 10 and 11 of the European Convention on Human Rights, which rights are protected by the Human Rights Act 1998.
4. The Judge confirmed that Reclaim These Streets’ assessment of the law is correct: not all protest is, or can be treated as, illegal under the Tier 4 rules. The court agreed that,
 - (i) The law set out by the Court of Appeal in *Dolan v Secretary for State for Health*:

<https://www.bailii.org/ew/cases/EWCA/Civ/2020/1605.html>

in the context of the first lockdown regulations that were applicable from 26 March 2020 is equally applicable to the Tier 4 regulations currently in effect insofar as the judgment relates to the exercise of Articles 10 and 11 rights.

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- (ii) This means that the Tier 4 regulations must be read consistently with rights protected by Article 10 and 11.
 - (iii) Therefore, unless it is necessary and proportionate to prevent persons gathering to exercise their right to freedom of expression and assembly, having regard to the individual facts and circumstances of the protest in question, such a protest is not prohibited by the Tier 4 regulations.
 - (iv) A person participating in a protest in these circumstances would have a “reasonable excuse” to be participating in a gathering.
5. The Judge also indicated in the course of argument that the application of a “blanket ban” on protests by the police would not be lawful.
6. After the application had been filed, the Metropolitan Police stated in correspondence that they did not have a policy that all protests were unlawful. In the course of the hearing, the police also accepted that the Tier 4 regulations did not allow them to prevent people from exercising their rights under Article 10 and 11 unless it was necessary and proportionate for them to do so.
7. The Judge stated during the hearing that:

“If [the police] are not careful it seemed to be coming across that [their position was that] because it appears in the Tier 3 Restrictions doesn’t appear in Tier 4 Restrictions, protest is not exempted. That would be a mistake. It fails to take on board the Dolan Point....

I think the problem from the Claimant’s perspective is that it may well be that the need to take into account Arts 10 and 11 which the Defendant does acknowledge, has become lost in discussions and has been misunderstood as the Defendant applying a blanket policy that protest is immediately limited”
8. In his ruling his Lordship stated

“[The Police] rightly accepted that if a police force has a policy which imposes a blanket prohibition on protest irrespective of the specific circumstances and irrespective of articles 10 and 11, that would be unlawful.”
9. The Judge was not asked (and did not decide) whether or not the Reclaim These Streets Vigil was or was not a proportionate exercise of Article 10/11 rights. He could not have made that assessment within the confines of the emergency hearing yesterday. He was asked to clarify the law in light of the fact the Metropolitan Police appeared to be treating gatherings for protest as automatically banned and had not refuted solicitors’ correspondence and had referred to a policy that did not take into account the need to allow protests where this was necessary to comply with Article 10 or 11. He made clear that the police must assess the particular circumstances of the event proposed with Article 10 and 11 in their minds and applying the proportionality assessment they require.
10. The Judge’s ruling also stated:

“[The Claimants] correctly accepted leaving aside the facts of the case, these regulations are capable of being applied to protests and demonstrations in general. It is possible when article 10 and 11 are being applied, that the outcome of applying the relevant test is that a particular protest or demonstration should not go ahead [but] that is a matter to be considered in the circumstances of each case” (Emphasis added).

11. In effect, this means that Articles 10 and 11 require police to facilitate and uphold the right to protest and that they only prevent it where, following a proper assessment, this is necessary and proportionate in the particular circumstances of the protest in question. In our view this requires that police meaningfully engage with organisers, identify risks so that solutions can be proposed and found, and in general seek to facilitate a protest taking place in a way which is proportionate to any risk.

Implications

12. It follows from the Judge’s clarification of the law that some version of the Vigil could be lawful (and the same is true of other similar vigils that had been planned for today). Whether or not it an event is proportionate is a matter that the police must consider carefully and anxiously. It is not a matter of discretion. Ultimately, it is a legal question which is subject to correction by the Courts if the police get it wrong and disproportionately restrict the right to protest.
13. The circumstances which, in our view, must be considered when assessing the proportionality of a proposed protest in the context of the current pandemic would likely include:
 - a. The importance of the right being exercised (certain forms of freedom of expression attract special protection);
 - b. Whether a risk assessment has been conducted;
 - c. Whether social distancing will be maintained and other mitigations, such as wearing of face coverings, will be adhered to;
 - d. The overall risk to public health, having regard to the location of the event, compliance with public health guidance, and other safety measures in place (e.g. marshalling); and
 - e. The consequences of not permitting the event, including the possibility that people might still attend in significant numbers without coordinated and organised safety measures being in place.
14. The Judge did not grant the declarations that were sought on behalf of Reclaim These Streets principally because the combined effect of the concessions made by the Metropolitan Police and reasoning of the Judge meant that it was unnecessary to make such declarations. In respect of the blanket policy of the police, he could not be satisfied on the basis of the evidence before him as to precisely what the police’s policy was.

Attendance at commemorative event in groups of 6 or as a bereavement support group

15. Having a ‘reasonable excuse’ is also not the only basis on which a vigil might be held.
16. We would refer people to the following provisions within the Regulations which allow for attendance at commemorative event in groups of 6 or as a bereavement support group of no more than 15 (including any number of children under 5).

17. Schedule 3A deals with the restrictions in Tier 4. Paragraphs 6(7) and 6(11) of Schedule 3A provide exceptions to the prohibition on gatherings of more than 30 people in a public outdoor place as follows:

Exception 6: support groups

(7) Exception 6 is that—

(a) the gathering—

(i) is of a support group,

(ii) consists of no more than 15 persons, and

(iii) takes place at premises other than a private dwelling, and

(b) it is reasonably necessary for members of the group to be physically present at the gathering.

(8) In determining whether the limit in sub-paragraph (7)(a)(ii) is complied with, no account is to be taken of any child who is below the age of five.

Under s2: “support group” means a group or one to one support which is organised by a business, a charitable, benevolent or philanthropic institution or a public body to provide mutual aid, therapy or any other form of support to its members or those who attend its meetings, including those providing support—

(g) to those who have suffered bereavement;

Exception 11: commemorative event following a person's death

(16) Exception 11 is that—

(a) the gathering is for the purposes of a commemorative event to celebrate the life of a person who has died (for example, a wake or stone setting ceremony),

(b) the gathering consists of no more than 6 persons,

(c) the gathering takes place at premises other than a private dwelling, and

(d) the gathering organiser or manager takes the required precautions in relation to the gathering.

18. The legislation can be found here:

<https://www.legislation.gov.uk/ukxi/2020/1374/schedule/3A/paragraph/6>

19. The Metropolitan Police are aware of these provisions. In written submissions made to the Court immediately before the hearing, they said:

“It may be that the event planned might also be regarded as potentially falling within exception 11, as it may be a “gathering is for the purposes of a commemorative event to celebrate the life of a person who has died”. However, such a gathering is limited to no more than six persons.”

20. It is our intention to provide a fully reasoned advice addressing these issues early next week.

Yours sincerely,

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