

LIBERTY

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FAO Rt Hon Priti Patel MP
Secretary of State for the Home Department

and

FAO Rt Hon Matt Hancock MP
Secretary of State for the Department of Health and Social Care

16 November 2020

URGENT

Dear Madam and Sir,

PROTEST RIGHTS UNDER CURRENT CORONAVIRUS REGULATIONS

We write in respect of the *Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020* (hereafter ‘the Regulations’), which have been in force since 5 November 2020, and the effect they are having on the fundamental right to protest.

We are extremely concerned that the Regulations appear to give effect to a blanket ban on protest, under the threat of criminal sanction. If this is the case, we believe it would be an unlawful interference of fundamental rights.

We seek urgent clarification as to whether this is the intended effect of the Regulations, and ask that they are amended without delay to make specific provision for protests to take place, in the same way that previous incarnations of the Regulations did.¹

¹ *The Health Protection (Coronavirus, Restrictions) (England) (No.2) Regulations 2020; the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020; the Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020; and the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020.*

LIBERTY'S BACKGROUND

The National Council for Civil Liberties (now known as Liberty) was founded in 1934 as a response to brutal police attempts to stop peaceful protest. Liberty is now a membership and campaigning organisation that promotes the values of individual human dignity, equal treatment and fairness as the foundations of a democratic society throughout the United Kingdom. Liberty campaigns to protect basic rights and freedoms through the courts, in

Parliament and in the wider community. It does this through a combination of public campaigning, test case litigation, parliamentary work, policy analysis and the provision of free legal advice and information.

Since its foundation, Liberty has taken a particular interest in protecting peaceful protest. It led a public campaign against the heavy sentencing of the leaders of the miners' strike at Harworth Colliery in 1937; investigated police behaviour at demonstrations organised by the Campaign for Nuclear Disarmament and the Committee of 100 in 1960; and upheld the right to strike and to campaign by miners in 1985. More recently, it has intervened in a successful appeal against sentence brought by a number of anti-fracking campaigners;² it has provided detailed briefings to Parliamentarians in respect of the impact on protest rights of recent legislation³ and played an active role in public consultations about public protest.⁴

THE RIGHT TO PROTEST

The right to protest has a long history in the common law.

- In 1819 Magistrates sought to stop a demonstration in support of universal suffrage in St Peter's Fields, Manchester. At least 12 were killed and hundreds injured. In response to this, the Court of Common Council of London affirmed "*the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.*"
- In 1976, in the case of *Hubbard v Pitt* (1976) QB 14, Lord Denning MR relied on that *dicta* to support his assertion that, "*the right to demonstrate and the right to protest on matters of public concern ... are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done.*"⁵
- In *DPP v Jones (Margaret)* [1999] 2 AC 240, Lord Irvine recognised a "*public right of peaceful assembly on the highway*"; Lord Slynn held that, "*The right of assembly, of demonstration, is of great importance but in English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored*"; and Lord Hutton agreed: "*the common law recognises the right of public assembly*".

² *R v Roberts (Richard)* [2019] 1 WLR 2577.

³ Including in respect of the passage through Parliament of the Serious Organised Crime and Police Act 2005, the Constitutional Reform and Governance Act 2010, the Crime and Security Act 2010, the Police Reform and Social Responsibility Act 2011, and the Counter-Terrorism and Border Security Bill 2018.

⁴ Including the Home Office consultation on "*Managing Protest Around Parliament*" (January 2008), the Joint Committee on Human Rights inquiry into policing protest (in June 2009), the Home Office consultation on "*Police Powers to Promote and Maintain Public Order*" (2012), the Greater London Authority public engagement on the police use of a water cannon (2014), and the Home Office consultation on buffer zones for abortion clinics (2018).

⁵ Approved in *Kent v Commissioner of Police for the Metropolis*, *Times* May 15, 1981, per Lord Denning MR, and in *Hirst and Agu v Chief Constable of West Yorkshire* (1987) 85 Cr App R 143, per Otton J, at 151-2.

- More recently, in *R v Roberts (Richard)* [2019] 1 WLR 2577, the Lord Chief Justice held that, “*The long-established recognition in the United Kingdom of the value of peaceful protest ... is a manifestation of the importance attached by the common law to both the right to protest and free speech.*”
- The right to protest is a common law right. Freedom of expression has “*the status of a constitutional right with attendant high normative force*”. It is “*a fundamental right*” which “*has been recognised at common law for very many years*”.⁶

The positive rights to freedom of expression and freedom of assembly are enshrined respectively in Articles 10 and 11 of the European Convention on Human Rights (‘ECHR’), given effect in domestic law by the Human Rights Act 1998.⁷

The fundamental role of freedom of expression as “*one of the essential foundations*” of a democratic society has been repeatedly underscored by the European Court of Human Rights,⁸ and it should not be interpreted restrictively.⁹

Limitations on the rights protected by Articles 10(1) and 11(1) are only permitted in the limited circumstances contained in the text of Articles 10(2) and 11(2). Those provisions set out the *only* circumstances in which an interference with the rights to freedom of expression and association is permitted, and they must be “*narrowly interpreted*” and “*convincingly established*”.¹⁰

Additionally, the European Court has repeatedly stated that peaceful demonstrations should not, in principle, be rendered subject to the threat of criminal sanction,¹¹ and that contracting states must not apply unreasonable restrictions on the right to assemble peacefully.¹² This is simply common sense, as any measures to criminalise protest are likely to have a chilling effect on the exercise of the rights. In *Taranenko v Russia*¹³, the European Court stated that they, the Court, “*must exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the applicants and other persons from impacting information or ideas contesting the established order.*”

Similarly, the relevant principles of international human rights as regards the right to protest reflect the position at common law and under the ECHR. In particular:

- Article 19 of the International Covenant on Civil and Political Rights¹⁴ (“ICCPR”) protects freedom of expression. Article 21 protects the right of peaceful assembly. No restrictions may be placed on the exercise of

⁶ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Steyn, at 297; *R v Shayler* [2003] 1 AC 247, per Lord Bingham, at §21.

⁷ The Court has repeatedly noted that the issues of freedom of expression and freedom of peaceful assembly are closely linked. The protection of personal opinions, secured by article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in article 11 of the Convention (*Ezeliin v France* (1992) 14 EHRR 362, at §51, *Djavit An v Turkey* (2005) 40 EHRR 45, at §39)

⁸ See, amongst other examples, *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at §49.

⁹ *Djavit An*, § 56; *Barraco v France* (App. no. 31684/05), §41.

¹⁰ *Kudrevičius v Lithuania* (2016) 62 EHRR 34, §142.

¹¹ See, amongst many other authorities, *Kudrevičius*, §146.

¹² *Kudrevičius*, §158; *Chernega v Ukraine* (2020) 70 EHRR 9, §222.

¹³ (App. no. 19554/05)

¹⁴ The United Kingdom ratified the ICCPR in 1976.

the right to peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society. The right of peaceful assembly is set out in similar terms in other international and regional human rights instruments.¹⁵

- To meet the necessity requirement, any restriction imposed on these rights must be the least intrusive option capable of achieving the desired result, and it must be narrowly tailored to the specific aims and concerns of the authorities.¹⁶
- Assemblies can be instrumental in amplifying the voices of people who are marginalised or who present an alternative narrative to established political interests.¹⁷ Taken together with other related rights, the freedom of peaceful assembly forms part of the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism.¹⁸
- The law must be sufficiently clear so as to enable conformity, and any unclear legal provisions should be clarified. In the absence of clarity, such provisions should be interpreted in favour of those wishing to exercise their right to freedom of peaceful assembly.¹⁹

EFFECT OF THE REGULATIONS ON THE RIGHT TO PROTEST

Previous versions of the Coronavirus regulations²⁰ created a number of criminal offences and restricted gatherings to various sizes; however, they each specifically gave effect to the afore-mentioned fundamental rights by permitting gatherings for the purpose of protest providing that they:

- a. Were organised by a business, a public body, a political body, or a charitable, benevolent or philanthropic institution;
- b. a risk assessment which met the requirements of the Management of Health and Safety at Work Regulations 1999 had been carried out; and
- c. the organiser had taken all reasonable steps to limit the risk of transmission of the coronavirus in line with the risk assessment (and also, from 14 October 2020, in line with any relevant government guidance).

¹⁵ The Universal Declaration of Human Rights (article 20 (1)); the American Convention on Human Rights (article 15); the African Charter on Human and Peoples' Rights (article 11); the Arab Charter on Human Rights (article 24). Specific obligations relating to participation in peaceful assemblies can also be found in the Convention on the Rights of the Child (article 15); the International Convention on the Elimination of All Forms of Racial Discrimination (article 5(d)(ix)); and the African Charter on the Rights and Welfare of the Child (article 8).

¹⁶ Joint report of the Special Rapporteurs, 4th February 2016, §32; General comment no.37, §37.

¹⁷ Joint report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4th February 2016 (A/HRC/31/66), §6.

¹⁸ United Nations Human Rights Committee, "*General comment No. 37 on the right of peaceful assembly*", 17th September 2020 (CCPR/C/GC/37), §1. A General Comment gives "*the most authoritative guidance now available on the effect*" of a right in international human rights law: *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, Lord Carnwath, §105; approved in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, Lord Wilson, §39 (by reference to General Comment no. 14 of the United Nations Committee on the Rights of the Child).

¹⁹ Report of the Special Rapporteur, 24th April 2013, §50.

²⁰ See footnote 1.

This exception from the general restrictions on gatherings has been omitted from the Regulations, which came into effect on 5 November 2020. The general rules about leaving one's home and gathering with other people under these Regulations are as follows:

RESTRICTIONS ON LEAVING HOME

5.—(1) No person may leave or be outside of the place where they are living *without reasonable excuse*.

(2) For the purposes of paragraph (1)—

(a) the circumstances in which a person has a reasonable excuse *include* where one of the exceptions set out in *regulation 6* applies;

PARTICIPATION IN OUTDOOR GATHERINGS

9.—(1) No person may participate in a gathering which—

(a) takes place in a public outdoor place and consists of more than two people, or

(b) takes place in any other outdoor place (including any outdoor part of a private dwelling) and consists of two or more people.

(3) Paragraph (1) does not apply if any of the *exceptions set out in regulation 11 apply*.

ORGANISATION OR FACILITATION OF GATHERINGS

10.—(1) No person may hold, or be involved in the holding of, a relevant gathering.

(2) For the purposes of paragraph (1) a person who only participates in a gathering by attending it is not to be taken as being involved in the holding of the gathering.

(3) A gathering is a “relevant gathering” for the purposes of this regulation if it falls within paragraph (4) or (5).

(4) A gathering falls within this paragraph if it—

(a) consists of more than 30 persons,

(b) takes place indoors, and

(c) would be a gathering of the kind mentioned in section 63(1) of the Criminal Justice and Public Order Act 1994 (powers to remove persons attending or preparing for a rave) if it took place in the open air.

(5) A gathering falls within this paragraph if (not falling within paragraph (4)) it—

(a) consists of more than 30 persons,

(b) takes place—

(i) in a private dwelling,

(ii) on a vessel (other than a government vessel, a vessel used for public transport or a houseboat), or

(iii) on land which satisfies the condition in paragraph (7),

(c) is not a gathering in relation to which any of the exceptions set out in regulation 11, so far as capable of applying to the gathering, *or the exception in paragraph (6), applies*.

(6) This paragraph applies if, in the case of a gathering described in paragraph (5)(b)(ii) or (iii), the person holding the gathering or, if they are not the person responsible for organising that gathering, the gathering organiser—

*(a) is a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and
(b) has taken the required precautions (see regulation 14).*

(7) Land satisfies the condition in this paragraph if it is a public outdoor place which is not—

- (a) operated by a business, a charitable, benevolent or philanthropic institution, or
- (b) part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution, or a public body

OFFENCES AND PENALTIES

20.—(1) A person commits an offence if, *without reasonable excuse*, the person—

- (a) contravenes a restriction or requirement imposed under regulation 5, 8, 9, 10, 15, 16 or 18,
- (b) contravenes a requirement imposed, or a direction given, under regulation 19,
- (c) fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 19, or
- (d) obstructs any person carrying out a function under these Regulations (including any person who is a relevant person for the purposes of regulation 19).

(2) An offence under this regulation is punishable on summary conviction by a fine.

...

(5) Section 24 of the Police and Criminal Evidence Act 1984 applies in relation to an offence under this regulation as if the reasons in subsection (5) of that section included—

- (a) to maintain public health;
- (b) to maintain public order.

(Emphasis added)

Regulation 6 provides a non-exhaustive list of ‘reasonable excuses’ for a person to leave or be outside of their home. Whilst it does not specifically include ‘for the purposes of attending a protest’, it is our view that the exercise of fundamental protest rights ought to constitute a reasonable excuse for the purposes of the Regulations. However, clarity is essential, particularly where fundamental rights are at stake, and where breach of the Regulations relating to leaving or being outside of one’s home could result in a fine and/or criminal sanction.

In terms of participating in gatherings, Regulation 11 does not include an exception for protests. This gives rise to a curious and unacceptably ambiguous situation whereby the Regulations would permit a political body to organise a gathering of more than 30 people (under regulation 10(6)), potentially permit a person to leave their home to attend the protest (under regulation 5), but would *not* permit more than two people to participate in it (under regulation 9), effectively creating a blanket ban on protests.

On 3 November 2020, The Times reported that:

“Protests involving more than two people will be prohibited during the lockdown, The Times understands.

Ministers are poised to remove any exemption for protesters and say the rules need to be clear and fair.

Priti Patel, the home secretary, briefed chief constables at the weekend and said that they would be expected to enforce the rules. However, some senior police officers are understood to be concerned that the move is too draconian for a liberal society.”²¹

This, coupled with the omission from the Regulations of the protest exception provided for in earlier versions, tends to indicate that a blanket ban on protest is precisely what was intended by the Regulations, albeit that the drafting makes this unclear. Indeed, numerous protestors have been fined and arrested in London,²² Manchester,²³ Bristol²⁴ and Liverpool²⁵ since the Regulations came into force.

This is of profoundly serious concern to Liberty. We are strongly of the view that the existing uncertainty in respect of the right to protest under the Regulations is legally unacceptable. Any effective blanket ban on protest would be a wholly disproportionate, unlawful interference with the fundamental protest rights protected by the common law, the ECHR and international human rights law.

The Regulations and political rhetoric, together with recent arrests of protestors, will have undoubtedly had a significant chilling effect on the right to protest, deterring people from exercising their fundamental rights and standing up for what they believe in, and likely impacting disproportionately on marginalised groups within society as we have seen with fines issued under earlier coronavirus regulations.²⁶

OUR REQUEST

Liberty has always supported proportionate measures to protect lives, but people must not be criminalised *en masse* for voicing opposition to Government action, even in the context of a pandemic, and particularly in circumstances where parliamentary scrutiny of coronavirus legislation, which has severely restricted civil liberties for everyone, has been denied for the best part of this year, making protest more important than ever to ensure everyone’s voices are heard.

In light of the above matters, and the state’s legal obligations to protect the right to protest, we respectfully ask for:

²¹ <https://www.thetimes.co.uk/article/coronavirus-lockdown-priti-patel-wants-police-to-stop-protests-of-more-than-two-zdpv3xczx> as at 13 November 2020

²² <https://www.bbc.co.uk/news/uk-england-london-54842605> as at 16 November 2020

²³ <https://www.bbc.co.uk/news/uk-england-manchester-54870378> as at 16 November 2020

²⁴ <https://www.theguardian.com/world/2020/nov/14/bristol-police-arrest-14-people-at-anti-lockdown-protest> as at 16 November 2020

²⁵ <https://www.bbc.co.uk/news/uk-england-merseyside-54950022> as at 16 November 2020

²⁶ <https://libertyinvestigates.org.uk/articles/bame-people-disproportionately-targeted-by-coronavirus-fines/> and <https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws> as at 16 November 2020

- a. Clarification as to the intended effect of the Regulations in respect of the right to protest, specifically whether or not an effective blanket ban was intended, and whether or not people participating in protests organised in accordance with Regulation 10(6) are at risk of being fined and criminalised;
- b. Clarification as to how the Regulations comply with common law, Articles 10 and 11 ECHR, and international human rights law;
- c. Clear guidance to be issued to the police making clear that any enforcement should be a last resort and must be compliant with common law, Articles 10 and 11 ECHR and international human rights law; and
- d. The Regulations to be amended without delay to make provision, in the same way as earlier versions did, to allow for protests to take place during the
- e. Coronavirus pandemic to give effect to the common law, Articles 10 and 11 ECHR and international human rights law.

Should you decline to clarify and/or amend the Regulations, please provide your full written reasons.

Giving the pressing nature of these issues, and the fact that the Regulations are due to expire on 3 December 2020, we ask that you respond by close of business on **Monday 23 November 2020**.

We will publish this letter on our website.

Yours faithfully



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