

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

*Sent by email only to
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FAO Rt Hon Matt Hancock MP
Secretary of State for the Department of Health
& Social Care



19 March 2021

URGENT

CC: Secretary of State for the Department of Health and Social Care

Dear Home Secretary,

Protest rights under Coronavirus legislation

We write in respect of the impact Coronavirus legislation is having on protest rights across the country. These long and well-established rights are a fundamental cornerstone of any democratic society and have been severely curtailed for the best part of a year.

We call on you to expressly exempt protests from restrictions on gatherings in **all** Tier areas under the *Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020* ('the Regulations'), immediately.

Coronavirus Regulations

The Regulations set out, amongst other things, the current restrictions on indoor and outdoor gatherings in England.

Paragraph 1, Schedule 3A of the Regulations prohibit a person from leaving or being outside their home in a Tier 4 area "without reasonable excuse". A 'reasonable excuse' includes, but is not limited to, the exceptions listed at paragraph 2 of the Regulations.

The Court of Appeal in *R (Dolan and others) v Secretary of State for the Health Department and the Secretary of State for Education* [2020] EWCA Civ 1605 found that the Regulations in force at the time (which are substantially the same as those in force now) must be read in such a way as to give effect to Articles 10 and 11 of the European Convention on Human Rights ('ECHR').¹

¹ The rights to freedom of expression and freedom of assembly, respectively.

Indeed, the Court found that the ‘without reasonable excuse’ provision was the means by which Articles 10 and 11 ECHR were given effect; in other words, exercising one’s Article 10 and 11 ECHR rights may constitute a reasonable excuse for the purposes of the Regulations.

Protests are specifically excluded from the general restrictions on gatherings in Tier 1, 2 and 3 if:

- a) They have been organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body;
- b) the organiser has carried out a risk assessment that would satisfy the requirements of the *Management of Health and Safety at Work Regulations 1999*; and
- c) the organiser has taken all reasonable measures to limit the risk of transmission of Coronavirus, taking into account the risk assessment and any government guidance which is relevant to such a gathering.

However, in Tier 4 areas, protests are not expressly excluded from the restrictions on gatherings.

The Right to Protest

The right to protest has a long history which is enshrined at common law, and under statute and international conventions, including Articles 10 and 11 of the European Convention on Human Rights (ECHR) which protect the positive rights to freedom of expression and freedom of assembly, and are given effect in domestic law by the Human Rights Act 1998.

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,² and it should not be interpreted restrictively.³

The European Court has repeatedly stated that peaceful demonstrations should not, in principle, be rendered subject to the threat of criminal sanction,⁴ and that contracting states must not apply unreasonable restrictions on the right to assemble peacefully.⁵

Clapham Common, 13 March 2021

On 12 March 2021 the High Court heard a challenge against the Metropolitan Police Service (MPS) decision to ban a vigil organised by Reclaim These Streets which was due to take place on 13 March 2021 at Clapham Common.⁶ The vigil was intended to be in memory of Sarah Everard, a 33-year-old local woman who was tragically killed as she walked home (Wayne Couzens, a serving MPS officer, has been charged with her kidnap and murder), and a way of standing up to male-perpetrated violence against women. The MPS’s position was that the vigil would breach the Tier 4 restrictions on gatherings under the Regulations and that the organisers and attendees would be at risk of fines, arrests and criminal prosecution if it went ahead.

You were represented as an Interested Party at the hearing, so will be aware of the rationale behind the Court’s decision. In summary, it transpired during the hearing that the MPS accepted that the Regulations must be read in such a way as to give effect to the rights

² See, amongst other examples, *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at §49.

³ *Djavit An*, § 56; *Barraco v France* (App. no. 31684/05), §41.

⁴ See, amongst many other authorities, *Kudrevičius*, §146.

⁵ *Kudrevičius*, §158; *Chernega v Ukraine* (2020) 70 EHRR 9, §222.

⁶ *Leigh, Birley, Shah and Klingler v The Commissioner of the Police of the Metropolis* (CO/9191/2021)

protected by Articles 10 and 11 ECHR and that they do not impose a blanket ban on protest.⁷ A blanket ban would of course be unlawful.

The MPS further agreed that in each case, when contemplating restricting Article 10 and 11 ECHR rights, they must consider proportionality, in other words whether the aim is proportionate to the means used to reach that aim, which would presumably include taking into account any Covid safety measures implemented by the organisers.

It is therefore left to individual police forces to decide on a case by case basis, without any guidance or clear criteria from you, when and how a protest may take place. There is no legal certainty for the police as regards their duties and powers, and no legal certainty for protesters as regards their rights. This is not acceptable and is arguably not lawful.

On 13 March 2021, the MPS got this assessment very badly wrong, and did so despite extensive attempts by Reclaim These Streets to engage them in meaningful discussions on the safe facilitation of the vigil, and despite the proposed Covid safety measures.

Reclaim These Streets ultimately cancelled the vigil on threats by the MPS of fines, arrests and criminal prosecution; however, the strength of public feeling was such that many people still attended Clapham Common to pay their respects to Ms Everard and to take a stand against male-perpetrated violence against women.

What followed were truly shocking scenes of MPS officers using considerable force against attendees, primarily women, arresting them and issuing fines purportedly under the Regulations, causing widespread public outrage.

This was entirely avoidable. Safe, socially distanced protests are perfectly possible, and it is the duty of the police to facilitate them.

Lack of guidance and legal certainty

To the best of our knowledge, you have not issued any guidance to police forces on facilitating protests in Tier 4 areas under the Regulations, including factors to take into account when considering Articles 10 and 11 ECHR rights to determine whether a person has a 'reasonable excuse' to leave or be outside their place of residence, and whether they are entitled to gather with others in exercise those rights.

Similarly, as regards Tier 1, 2 and 3 areas, we understand that you have not provided any guidance on the 'required precautions' for protests, leaving it once again to organisers and the police to try to decipher precisely what is required.

The absence of clear guidance on these issues has created an entirely unsatisfactory situation, which has persisted to varying degrees for almost a year now, whereby the police have no legal certainty as to their duties and powers, protestors have no legal certainty as to their rights, and there is inconsistent application of the Regulations across the country. This cannot continue.

Given the importance of the rights at stake and the urgency, we ask that you respond substantively without delay.

⁷ Pursuant to *R (Dolan and others) v Secretary of State for the Health Department and the Secretary of State for Education* [2020] EWCA Civ 1605

Yours sincerely,

Gracie Bradley, Interim Director, Liberty
Silkie Carlo, Director, Big Brother Watch

Diane Abbott MP

Steve Baker MP

Paula Barker MP

Apsana Begum MP

Lord Beith

Baroness Natalie Bennett

Baroness Bonham-Carter of Yarnbury

Lord Bradshaw

Baroness Brinton

Richard Burgon MP

Dawn Butler MP

Dan Carden MP

Alistair Carmichael MP

Baroness Shami Chakrabarti

Sir Christopher Chope MP

Wendy Chamberlain MP

Daisy Cooper MP

Sir Edward Davey MP

Geraint Davies MP

Tim Farron MP

Baroness Featherstone

Richard Fuller MP

Lord Greaves

Chris Green MP

Baroness Hamwee

Baroness Harris of Richmond

Wera Hobhouse MP

Rachel Hopkins MP

Christine Jardine MP

Baroness Jenny Jones

Baroness Jolly

Mary Kelly Foy MP

Ian Lavery MP

Clive Lewis MP

Tony Lloyd MP

Caroline Lucas MP
Baroness Ludford
Lord McNally
Baroness Miller of Chilthorne Domer
Andrew Mitchell MP
Layla Moran MP
Lord Oates
Sarah Olney MP
Kate Osborne MP
Bell Ribeiro-Addy MP
Lloyd Russell-Moyle MP
Virendra Sharma MP
Baroness Sheehan
Jamie Stone MP
Lord Strasburger
Zarah Sultana MP
Sir Desmond Swayne
Lord Taylor of Goss Moor
Baroness Thornhill
Lord Tyler
Sir Charles Walker MP
Lord Wallace of Saltaire
Baroness Walmsley
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