

E. CONCLUSION

It is, of course, too early to say whether the petitioner will be successful in obtaining an order for rectification. Even if the case does proceed to a proof before answer – and the court rolls suggest a reclaiming motion will take place before that²⁸ – the petitioner may not be home and dry. It is one thing to use wording which has been deliberately (though incorrectly) chosen to achieve a specific legal result, as was the case in *Bank of Ireland*. It is another thing altogether for the petitioner to use wording which no reasonable person could imagine would have the legal effect which the petitioner now claims it intended to achieve when granting the deed of conditions (i.e. excluding the Arcade spaces from the servitude rights granted to the apartment owners and excluding the car park wall from common ownership).²⁹ On this point, the petitioner will have been encouraged by Lord Tyre’s remarks on the evidential value of its averred third and fourth intentions. In turn, the respondent will no doubt seize upon Lord Tyre’s further comment that any carelessness on the part of the petitioner could be relevant when exercising the court’s discretion under section 8(1)(b).³⁰ In any event, regardless of how the later stages of this case proceed, Lord Tyre’s decision will provide useful guidance to any grantor seeking rectification of a deed already registered in the Land Register and to any grantee who may be looking to resist this.

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Scottish Public Protest at a Time of Covid-19

“This attack on our free press, society and democracy is completely unacceptable”¹ was the response of the UK Home Secretary on an early September Saturday afternoon to a coordinated protest by the environmental activist group Extinction Rebellion. Their members had managed to blockade several distribution centres for Rupert Murdoch’s News International Group. Their belief was that Murdoch’s press was not reporting climate change and was “polluting national debate”.² In doing so, they managed to delay the distribution of newspapers across the country.

28 The court rolls for Tuesday 13 October 2020 show that a procedural hearing for P897/19 (Reclaiming motion of Lord Tyre) was to take place before an Extra Division of the Inner House.

29 A point anticipated in Reid & Gretton, *Conveyancing 2000* (n 22) 119.

30 *PHG* para 39.

1 Tweet by Priti Patel MP, UK Home Secretary, 5 September 2020, available at <https://twitter.com/pritipatel/status/1302149080869679104>.

2 Tweet by Extinction Rebellion UK, 4 September 2020, available at <https://twitter.com/XRebellionUK/status/1301992744047521793>.

This protest had also spread to Scotland where the Eurocentral press in Lanarkshire was targeted.³ Two elements of this event seemed to typify the themes around public order law in Scotland in this strange time. First, Police Scotland announced that the Motherwell event was “peaceful” and had passed without major incident⁴ in contrast to London where more than 600 arrests were made.⁵ Further, the organisers of the Scottish protest were keen to stress that protesters had worn face masks and had maintained social distancing of two metres. These were only two in a number of examples of UK public protests at the time of Covid-19. However, they also took place at a time when there had been heightened legal discourse around the very question of public protests in Scotland and across the UK.

A. EARLY LOCKDOWN MEETS BLACK LIVES MATTER

It is not an overstatement to say that the extraordinary measures introduced on public gatherings in the first months of lockdown faced their first major challenge over the heated question of public protests.⁶ At the start of lockdown, Regulation 6 stated that no person “may participate in a gathering in a public place of more than two people”.⁷ Although a number of exceptions were listed, there was no mention of gatherings to express a political view.⁸ As delegated legislation made by the Scottish Government, such rules must comply with the European Convention on Human Rights (“ECHR”).⁹ Article 11 of the ECHR protects freedom of assembly, albeit that right is qualified where any restriction is made for the “protection of health or for morals or the protection of the rights and freedoms of others”.¹⁰ This became more than an abstract question of law two months into the lockdown with the killing of

3 J McKenzie, “Newspapers delayed as Extinction Rebellion activists block printing press in North Lanarkshire” (5 September 2020) *The Scotsman*, available at <https://www.scotsman.com/news/people/newspapers-delayed-extinction-rebellion-activists-block-printing-press-north-lanarkshire-2962507>.

4 *Ibid*.

5 “More than 600 arrests made at Extinction Rebellion protests in London” (5 September 2020) *The Guardian*, available at <https://www.theguardian.com/environment/2020/sep/05/over-600-arrests-made-at-extinction-rebellion-protests-in-london>.

6 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103 (passed 26 March 2020).

7 *Ibid* reg 6.

8 The exceptions covered house moves, care and assistance for the vulnerable, funerals, essential work, emergency assistance or legal proceedings.

9 Scotland Act 1998 s 57(2).

10 Article 11(2) provides:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

George Floyd in Minneapolis by a police officer.¹¹ This action sparked a worldwide movement of protests under the banner “Black Lives Matter”¹² (“BLM”) that soon reached Scotland.

The Scottish Government, via the First Minister and the Justice Minister, publicly stated their support for the campaign but urged protestors to stay at home to “prevent the risk of spreading Covid-19” rather than join in demonstrations planned for 8 June 2020.¹³ Perhaps unsurprisingly, given their political support, neither the First Minister nor the Justice Secretary chose to emphasise that any such gathering would have been illegal under the relevant legislation passed to deal with Covid-19. This approach – downplaying the question of the protest’s (il)legality – was echoed by the Chief Constable of Police Scotland who said that he was “aware of several planned protests” but urged people to follow “government guidance”.¹⁴

This low-key approach – attempting to persuade people not to take part in mass gatherings rather than stressing the possibility of legal sanction – was reflected in the policing of the Glasgow event which attracted thousands of people with only two arrests made. Assistant Chief Constable Kenny MacDonald, in charge of policing the event, said only that the police “were disappointed that large numbers of people chose to ignore advice and attend protests across Scotland”.¹⁵

B. SANCTIONING ILLEGAL GATHERINGS?

In the aftermath of the June event more BLM protests were organised, with a spill-over into other campaigns such as those in support of refugees in Scotland.¹⁶ In turn, this provoked counter events, nominally to “protect statues”¹⁷ from those protests that had been targeted at the defiling or removal of monuments which honoured individuals with links to the slave trade.¹⁸ This led to confrontations between the two groups in Glasgow on 17 June 2020 when several arrests were made relating to general public order issues. Strikingly, however, there was no recourse made to the relevant legislation passed to deal with Covid-19, which was still in force at that time.

It seems then that Police Scotland had made a conscious decision to put the relevant legislation passed to deal with Covid-19 to one side in favour of facilitating

11 N Bogel-Burroughs, “8 Minutes, 46 Seconds Became a Symbol in George Floyd’s Death: The Exact Time is Less Clear” (18 June 2020) *New York Times*, available at <https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html>.

12 See e.g. an online world map, showing the extent of the protests, available at <https://www.creosotemaps.com/blm2020/>. The figure on 28 September 2020 was 4,443.

13 Tweet by Nicola Sturgeon MSP, First Minister of Scotland, available at <https://twitter.com/NicolaSturgeon/status/1269541705142996993>.

14 See Iain Livingstone, Chief Constable of Police Scotland, at Scottish Government press conference, 2 June 2020 and quoted by BBC News, available at <https://www.bbc.co.uk/news/uk-scotland-52897532>.

15 Quoted in *The Times*, 8 June 2020, available at <https://www.thetimes.co.uk/article/black-lives-matter-scotland-its-about-having-to-justify-why-youre-here-pvzlxg3xl>.

16 The No Evictions campaign in Glasgow organised an event on 17 June 2020 over the treatment of asylum seekers in temporary accommodation during lockdown.

17 Organised by a group identified as the Loyalist Defence League.

18 Most notably in Bristol where the statue of the slave owner Edward Colston was torn down by protestors on 7 June 2020.

(mostly) peaceful public protests over political issues. However, this approach was met with a strong response from the Chairman of the Scottish Police Federation, David Hamilton, representing rank and file officers, who issued an official statement arguing that the failure of politicians “to condemn the actions of those who defy the law” made police enforcement “increasingly difficult”. In his view this had created a situation where “hundreds (and thousands) are able to gather with impunity and without criticism, simply by carrying a banner or a placard”¹⁹ despite this being in direct breach of the law. This critique ignored that the approach of senior police officers generally had followed the lead of politicians in not emphasising punitive action.

C. PROCESSIONS VERSUS “STATIC” EVENTS

The central contradiction here – the legal ban on gatherings versus the facilitation of political protest via assemblies – reflects a problem that has long bedevilled the law on public order in Scotland. That is, how does one regulate a static gathering or rally in a public place?

The legal structure on gatherings in Scottish public spaces is still largely contained within the Civic Government (Scotland) Act 1982 (“the 1982 Act”). However, the procedure in place focuses on processions: a group of people moving from one place to another.²⁰ Local authorities regulate this after receiving proposals for processions,²¹ normally with twenty-eight days’ notice,²² and, following consultation with Police Scotland, decide whether to grant permission, impose conditions or prohibit any such event outright.²³ Where conditions are to be imposed or an application is to be refused, the 1982 Act sets out an exhaustive list of considerations: that there is a threat to public order or to public safety, a risk of damage to property or the prospect of disruption to the community.²⁴ The decision of the local authority can be appealed to the Sheriff Court.²⁵

A recent court action under this ground brought elements of the legislation under the microscope.²⁶ The Apprentice Boys (“AB”) organisation, based in the East End of Glasgow, applied for a procession to be held on 1 June 2019. Part of the proposed route would pass a Catholic church, St. Mary’s. In 2018, a similar procession had passed a neighbouring Catholic church, St Alphonsus, at which point the priest from the church was spat on and an individual subsequently convicted of assault.²⁷

19 Scottish Police Federation Media Release June 18 2020, quoted by BBC News, available at <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-53100299>.

20 The 1982 Act Part V.

21 *Ibid* s 62(1).

22 *Ibid* s 62(4).

23 *Ibid* s 63(1).

24 *Ibid* s 63(8).

25 *Ibid* s 64.

26 *Apprentice Boys of Derry, Bridgeton v Glasgow City Council* [2019] SC GLA 80, 2019 SLT (Sh Ct) 317.

27 “Man jailed for spitting on Catholic priest outside church” (27 February 2019) *BBC News*, available at <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-47387094>.

Moreover, in May 2019, a few weeks before AB's planned procession, there had been a similar event, again passing St Alphonsus, where there was a small counter-protest. Due to the combination of these two factors, the advice of the Chief Constable, followed by Glasgow City Council, was to re-route the procession to avoid the church. The AB appealed the decision on the grounds of Article 11 of the ECHR.

AB's appeal was unsuccessful. In his ruling, Sheriff Reid offered a useful overview of the law of public gatherings in Scotland in light of the protections contained within Article 11.²⁸ He stated that there is no "right" to march in Scotland.²⁹ Rather, there is a "qualified right of peaceful assembly (which can include a procession)".³⁰ In AB's case, Article 11 was held not to have been engaged as they had not established the purpose of their procession and thus whether it fell within the scope of the right.³¹ However, even if the right had been engaged the recent history and related incidents around the Catholic churches justified interference under Article 11(2).³² It was a proportionate use of the local authority's power to impose conditions on this procession. However, this discussion could only take place because what was being proposed by AB was a procession. The lacuna here covers those "peaceful assemblies" mentioned by Sheriff Reid which do not involve processions. There is no equivalent procedure for "static" events if they occur in public places.

In the context of the BLM protests taking place during strict lockdown this meant there was no forum prior to the event where the legality of the protests could be considered. All of the events were "rallies" and therefore no one had applied to the local authority for permission to hold a "procession". Had an equivalent process been in place there could have been interventions by Police Scotland on the basis of public safety and subsequent decisions could have been made either to prohibit, or to impose conditions on, them taking account of the protestors' rights under Article 11 of the ECHR.

D. LAW OF "PRIVATE" PUBLIC GATHERINGS

The legal regulation of static gatherings in Scotland seems to be easier where the event takes place on private properties. For example, the controversial Criminal Justice and Public Order Act 1994 gives the police power to prohibit trespassory assemblies.³³ And, in the specific instance of political protest the criminal charge of aggravated trespass³⁴ still exists for gatherings in private places.

The police also have the power to impose conditions on gatherings under the Public Order Act 1986 ("the 1986 Act") if they may result in "serious public disorder,

28 *Apprentice Boys of Derry, Bridgeton v Glasgow City Council* [2019] SC GLA 80, 2019 SLT (Sh Ct) 317 paras 29-45.

29 *Ibid* para 40.

30 *Ibid*.

31 *Ibid* para 57.

32 *Ibid* para 83.

33 Criminal Justice and Public Order Act 1994 s 70

34 *Ibid* s 68.

serious damage to property or serious disruption to the life of the community”.³⁵ This could apply to static protests but clearly relies on good intelligence from the police about the nature of any such gathering.

A cautionary tale can be seen in another recent public order case from London, again involving Extinction Rebellion.³⁶ In this case, section 14 of the 1986 Act was invoked by the Metropolitan Police to place a ban on all “public assemblies” involving Extinction Rebellion for a set period of time (in response to the group’s so-called “Autumn Uprising” in 2019).³⁷ The time-limited ban was overturned following a judicial review—the events planned by Extinction Rebellion, the court said, could not be viewed as a “public assembly” as they were planned to take place across the city of London. As the court put it, “[s]eparate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, are not one public assembly within the meaning of section 14(1) of the 1986 Act”.³⁸

The high-risk strategy adopted prior to the case had been defended at the highest level of the police, with Deputy Commissioner Stephen House³⁹ stating to the Police and Crime Committee of the London Assembly that “enough is enough”—that action was needed and was “completely proportionate”.⁴⁰

This case shows how the action of police banning protests by specific groups under section 14 of the 1986 Act, in advance of their taking place, is fraught with difficulties. It is one that seemed not to have been considered by Police Scotland with the protests called during lockdown.

E. A SECOND WAVE OF PROTESTS?

As the BLM movement subsided and some lockdown restrictions were lifted, the conflict between the legal enforcement of any ban on public gatherings and political protests appeared to be less salient. However, there is a potential postscript with an increasing number of rallies against the lockdown itself or against specific impacts or public health measures, such as wearing masks.

On 6 September 2020 an anti-mask protest was held in Glasgow and then, four days later, a similar protest was held outside the Scottish Parliament. In both instances—and in contrast to the earlier (for example, BLM) protests—the organisers were arrested. Significantly, the Glasgow organiser was charged with organising an

³⁵ Public Order Act 1986 s 14.

³⁶ *R (on the application of Jones) v Commissioner of Police of the Metropolis* [2019] EWHC (Admin) 2957, [2020] 1 WLR 519—led by Green Party peer Jenny Jones.

³⁷ See discussion of case in S Martin “The meaning of “public assembly”: policing protest in the 21st century” (2020) 79(1) CLJ 1.

³⁸ *Jones* (n 36) para 72.

³⁹ One time Chief Constable of Police Scotland.

⁴⁰ Minutes of London Assembly Police and Crime Committee, 15 October 2019, available at <https://www.london.gov.uk/about-us/londonassembly/meetings/ieListDocuments.aspx?CID=240&MIID=6661>.

“unlawful parade”⁴¹ that fell outwith the provisions in the 1982 Act. The Edinburgh organiser was charged with “culpable and reckless conduct”,⁴² perhaps relating to the substantive message of the protest which could be seen as endangering public health.

F. CONCLUSION

For countless reasons, 2020 has been a year like no other. However, it would be a mistake to overlook the tensions we have seen between extensive police powers on public gatherings and the facilitation of political protest. These conflicts, built on deeper issues within public order law in Scotland, highlight the extensive regulation that exists for coordinating processions which contrasts with the relative gap that exists for static public events. Although the Scottish courts have recognised a “qualified right of public assembly”, how that is legally controlled is still unclear. As future restrictions under legislation passed to address the Covid-19 situation seem likely in the months and years ahead, it will be important to clarify and strengthen the structures of organised public protests within Scots Law.

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Free School Meals and Governmental Responsibility for Food Provision

Is food a public law issue? Who decides and how do we decide? In the absence of the right to food what levers can be pulled to ask the government to do more for food security in the UK? These questions around government responsibility for food systems, churning away during the Brexit debates, long ignored, sometimes derided, are meeting stark realities in the Covid-19 pandemic. This comment focuses on one of them: free school meals (“FSM”).

In the summer of 2020 when the UK government announced that it would be stopping the provision of FSM in England over the summer holidays, the announcement was met with public outcry. When the UK government then U-turned on that policy decision this outcome was attributed to a successful online campaign

41 T Fitzpatrick, “Man arrested and charged following ‘unlawful’ anti-lockdown protest in Glasgow” (6 September 2020) *Daily Record*, available at <https://www.dailyrecord.co.uk/news/scottish-news/man-arrested-charged-following-unlawful-22638606>.

42 C Hutchison, “Coronavirus Scotland: Man charged after mass anti-lockdown protests outside Scottish Parliament” (10 September 2020) *The Herald*, available at <https://www.heraldscotland.com/news/18712708.coronavirus-scotland-man-charged-edinburgh-mass-protests-coronavirus-restrictions-edinburgh/>.