

CAMPAIGNING LEGAL GUIDE: RIGHT TO PROTEST

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We do this work because we've found that today it's far too hard for ordinary people, especially those in marginalised communities, to challenge those in power. Because of this, injustices persist and millions of people do not live happy, safe and fulfilled lives.

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**CAMPAIGN
BOOTCAMP**



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FOREWORD

Many of the organisations TrustLaw supports engage in campaigning activities, community engagement and advocacy, with the aim of highlighting and solving social problems and encouraging systemic change.

The closing space for civil society means that campaigners are under increasing pressure to run campaigns for social change that are not only politically effective but are also run in compliance with the law. Campaigners do not always have the time or expertise to analyse and understand a complex and evolving legal landscape and, as a result, may unwittingly break the law, restrict their activities unnecessarily through defensive decision making, or be discouraged from engaging at all.

In collaboration with Bates Wells and Campaign Bootcamp, TrustLaw's goal is to support the development of a resilient and informed campaigning community by publishing this series of legal guides for campaigning and advocacy organisations in the United Kingdom.

The guides offer campaigners advice and tips on how to comply with the laws that apply to their day-to-day activities. These guides aim to arm campaigners with the legal information needed to navigate issues including: political activities, election and lobbying laws; defamation and campaigns that target companies; hacktivism and shareholder activism; the right to protest and laws relating to marches, assemblies and police powers; using social media and online campaigns; data protection and direct marketing.

We hope that these guides will ultimately empower campaigners to act with confidence and achieve the positive outcomes they seek.

Glen Tarman
Director of TrustLaw
Thomson Reuters Foundation

RIGHT TO PROTEST





RIGHT TO PROTEST

Is it legal to protest?

Every person has the right to peacefully protest. This applies to all forms of non-violent protest including sit-ins, marches, demonstrations, picketing etc. The most obvious and clear source for this right can be found in Articles 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the European Convention on Human Rights ("the ECHR") as incorporated into domestic law by the Human Rights Act 1998 ("the HRA"). Article 10 provides as follows:

"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. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

"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 11 provides as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. 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."

Any attempt to prevent a protest happening, for example by refusing permission to demonstrate at a particular time or location will constitute an interference with Articles 10 and 11. The same would be true if police arrested individuals during a protest or prevented them from attending in the first place. Whether such interferences are lawful will depend on the particular facts. This is explained in further detail below.

However, the state cannot interfere with the right to peaceful assembly simply because there is disagreement with the views of the protesters or because it is likely to be inconvenient, or there

might be tension or disagreement – even where that disagreement may become heated - between opposing groups.

There is moreover a positive obligation on the State to take reasonable steps to facilitate the right to freedom of assembly, and to protect participants in peaceful demonstrations from disruption by others. For example, if an anti-Nazi demonstration is organised at the same time and in the same location as a pro-Nazi rally, the state must do all that is reasonable to protect both groups from interference by the other. Only in extreme circumstances should that mean cancelling either protest.

What are the limits on freedom of expression and freedom of thought and assembly?

It is clear from the terms of Articles 10 and 11 themselves that the rights they guarantee are not “absolute”. A balance must always be struck between the rights of individuals to exercise their fundamental democratic right to protest peacefully and the rights of the wider community. There is no right to organise or participate in intentionally violent protests. This means that as well as the protestors themselves being subject to certain duties and responsibilities, the state also has the right to enact laws which limit – subject to the requirements of necessity and proportionality – the rights of individuals seeking to protest. This may mean anything from limits on the size and location of a demonstration to criminal penalties for protestors under public order or even terrorism legislation.

These restrictions constitute interferences with Articles 10 and 11. To determine whether such interferences are capable of justification by the state, the following criteria must be met:

1. Is the interference “in accordance with the law” (i.e. did the state have a legal power to do what it did?);
2. Was the interference necessary and proportionate; and
3. Is the interference in pursuit of a legitimate aim, namely:
 - a. National security or public safety
 - b. Prevention of disorder or crime;
 - c. Protection of public morals; or
 - d. The protection of the rights or freedoms of others.

It is the latter question that is often the most difficult to answer and will be fact-sensitive. It will also be seen from the restrictions outlined later on in this section that the police have an incredibly wide range of powers at their disposal when it comes to protests and protestors.

In practice this means that protestors are subject to a multitude of different laws and regulations governing their right to protest. These laws vary depending on the type of activity in question. For example, the restrictions on static demonstration or assembly differ from those applicable to marches or processions. It is not possible to list every provision that may apply to the various forms of protest in this Guide. What this section seeks to do is provide an overview of the most common restrictions and offer some guidance for campaigners on how to protest within the limits of the law and what rights they have in the event that they are subject to detention or arrest by the police.

An overview of the main restrictions that may be imposed on peaceful protests

Demonstrations, gatherings, protests (static assembly)

Unlike “moving protests” i.e. marches and processions, there is generally no duty on the organisers of so-called “static assemblies” (demonstrations, gatherings etc.) to give the police prior notice nor can the police generally impose a blanket ban on a public assembly. However, conditions can be imposed on public assemblies. The most frequently relied upon restrictions are found in the Public Order Act 1986 (“POA”). Section 14(1)(5) of POA provides:

“Imposing conditions on public assemblies

“(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that— (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do, he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.” “(5) A person who takes part in a public assembly and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.”

The POA therefore empowers the police to impose certain conditions on a public assembly – for example the number of people allowed to attend, the time and location of the assembly, the duration of the protest - if the senior officer present reasonably believes such conditions to be necessary in order to:

- a. prevent serious public disorder;
- b. prevent serious damage to property;
- c. prevent serious disruption to the life of the community; or
- d. prevent the organisers from intimidating others.

There must be a clear link between the conditions imposed and the aim pursued – the wider ranging or more restrictive the conditions, the less likely it will be that they are lawful. Campaigners should bear in mind that a group of just two people may be classed as a “public assembly” and so subject to the POA restrictions.

Can protests be held on private land?

Section 14A of the POA creates a power to prohibit “trespassory assemblies”, i.e. any protest on land where the public has no right of access or only a limited right of access **and**:

- a. is likely** to be held without the permission of the occupier of the land or to conduct itself in such a way as to exceed the limits of any permission of his or the limits of the public’s right of access, and
- b. may** result—
 - i. in serious disruption to the life of the community, or

- ii. where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument, he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified. (Emphasis added)

As with restrictions imposed under s.14, the test is one of reasonable belief.

Other powers to prevent or impose restrictions on protests

The police may apply for interim injunctions to prevent, restrict, or otherwise impose conditions on assemblies, marches, demonstrations or other protests under s. 1 of the [Anti-Social Behaviour, Crime and Policing Act 2014](#) ("the 2014 Act"). For example, in *Chief Constable of Bedfordshire Police v Golding* [2015] EWHC 1875 (QB), Bedfordshire police sought and obtained interim injunctions against the Leader and Deputy Leader of "Britain First", a political party known for its anti-Muslim views. Although the injunctions were granted for up to a year, the immediate reason for the application was that Britain First was planning a march in Luton during the month of Ramadan. It was also the day scheduled for a community celebration known as "Luton in Harmony". Amongst the injunctions granted was one preventing Britain First entering any Mosque or Islamic Cultural Centre or its private grounds within England and Wales without prior written invitation. However, the Chief Constable's application for an injunction banning Britain First from entering Luton altogether was refused.

The 2014 Act permits the court to grant an injunction only where two conditions are met. The first is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour. The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour. Section 21(7) permits the Court, when deciding whether to grant an injunction under section 1, to take account of conduct occurring up to the 6 months before the commencement date of the 2014 Act. "Anti-social behaviour" is defined in section 2 of the 2014 Act as including conduct that has caused, or is likely to cause, harassment, alarm or distress to any person, and conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises.

In addition to the power to grant an injunction, restricting or prohibiting a protest in its entirety, section 4 of the 2014 Act permits the court to attach a power of arrest of any individual breaching the terms of the injunction where:

- (a) the anti-social behaviour in which the respondent has engaged or threatens to engage consists of or includes the use or threatened use of violence against other persons, or
- (b) there is a significant risk of harm to other persons from the respondent.

Restrictions on and police powers to ban marches and processions

As with public assemblies, POA allows the police to impose such conditions or restrictions on a procession as the senior officer present reasonably believes to be "necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions." (POA, s.12(1)). Two conditions must be satisfied, namely that the senior police officer:

“having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that:

- a. it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
- b. the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do” (emphasis added)

The threshold is not a particularly high one and the powers available to the police in relation to the conditions or restrictions they might impose are broad. Failure to comply with such orders will constitute an offence punishable by a fine not exceeding £1,000.

Unlike public assemblies – which under POA there is no general power to prevent - police may ban a procession altogether if “at any time, the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.”

Marches and processions: the duty to notify

Section 11 of POA requires advance (6 days) written notice of any march or procession where the protest is:

- a. to demonstrate support for or opposition to the views or actions of any person or body of persons,
- b. to publicise a cause or campaign, or
- c. to mark or commemorate an event,

The duty to give notice does not apply where it is not “reasonably practicable” to give any advance notice of the procession. In practice, only the most exceptional circumstances would be considered to render notice not reasonably practicable.

The notice must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or of one of the persons) proposing to organise it. “Proposed route” does not have to mean a specifically planned route, but could cover one which was spontaneously chosen by the participants from time to time: *Powlesland v DPP* [2013] EWHC 3846 (Admin).

Failure to comply with the terms of s.11 POA is a criminal offence. An offence will also be committed if, having given notice, the protest then takes place on a different date, different route, or different start time. It is a defence to show the accused did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements or (as the case may be) the difference of date, time or route. So, for example, if the police change the route, no offence is committed by any campaigner following that route. This offence is a ‘summary’ offence punishable by a fine not exceeding £1,000.

What additional powers do the police have in relation to individual protestors?

Some of the main powers available to the police in relation to the restrictions and conditions they can impose on protests and the requirements for individual campaigners to comply are set out above. However, there are a number of other powers available to police which may infringe upon the liberty of individual protestors.

Police powers of stop and search

Police officers have a wide range of legal powers to “stop and search” individuals, including section 1 of the Police and Criminal Evidence Act 1984 (PACE), section 23 of the Misuse of Drugs Act 1971 (MDA), sections 43 and 47A of the Terrorism Act 2000 (TA 2000) and section 60 of the Criminal Justice and Public Order Act 1994 (CJPOA).¹ The important distinction between the powers accorded by section 1 PACE, section 23 MDA and section 43 TA 2000, on the one hand, and those provided by section 47A TA 2000 and section 60 CJPOA, on the other, relates to the requirement of reasonable suspicion. Whereas a police officer may not exercise powers under section 1 PACE unless he or she reasonably believes that the person to be stopped (and searched) is in possession of stolen goods or prohibited articles² (under section 23 MDA without reasonable belief that the person is in possession of a controlled drug or, in the case of s43 TA 2000, that the person is a terrorist), an officer may stop and search under the other provisions, when they are applicable, irrespective of actual (much less reasonable) suspicion that the person stopped and searched is guilty of any wrongdoing. These powers are frequently used – and misused – by police during protests.

PACE Code of Practice A

General provisions

Whatever the basis upon which stop and search powers are exercised in respect of protestors, the police must comply with PACE and its Code of Practice A. These impose significant constraints on police powers to stop and search. Importantly, Code A of PACE applies to stops and searches carried out under powers requiring reasonable suspicion (with the exception of section 43 TA, which is covered by another Code of Practice³). It also applies to stops and searches carried out under section 60 POCJA.

PACE Code A sets out the “fundamental principles” governing the use of stop and search as follows (§§1.1-1.5):

- Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination... [and with] regard to the need to safeguard and promote the welfare of all persons under the age of 18.
- The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a search must take place at or near the location of the stop.
- The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest.
- An officer must not search a person, even with his or her consent, where no power to search is applicable, except in cases of searches of persons entering sports grounds or other premises carried out where their consent has been given as a condition of entry.

¹ There are powers of stop and search under many other statutory provisions including the Firearms Act 1968.

² See further ** below

³ Issued under s47AA TA 2000 and available at <https://www.gov.uk/government/publications/code-of-practice-for-the-exercise-of-stop-and-search-powers>.

These “fundamental principles” apply to all searches covered by the Code which goes on to point out, however, that its provisions do not “affect the ability of an officer to speak to or question a person in the ordinary course of the officer’s duties without detaining the person or exercising any element of compulsion.”

Whatever the statutory basis for the stop and search, it (§§3.1-3.3) “must be carried out with courtesy, consideration and respect for the person concerned”; the “co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search”, detention for the purposes of stop and search must be “reasonable and kept to a minimum” with “the thoroughness and extent of a search” depending, in a case where reasonable suspicion is required, “on what is suspected of being carried, and by whom”, though where searches do not require reasonable grounds for suspicion, “officers may make any reasonable search to look for items for which they are empowered to search”.

Para 3.5 provides that, except where the power to require the removal of a disguise is in force:

“[t]here is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves” and “[a] search in public of a person’s clothing which has not been removed must be restricted to superficial examination of outer garments” though this “does not ... prevent an officer from placing his or her hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search. For the same reasons, subject to the restrictions on the removal of headgear, a person’s hair may also be searched in public”.

Para 3.6 then provides that any more extensive search “must be done out of public view” and, where it involves “the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it”. The Notes of guidance appended to PACE Code A warn (§4) that:

“Many people customarily cover their heads or faces for religious reasons - for example, Muslim women, Sikh men, Sikh or Hindu women, or Rastafarian men or women. A police officer cannot order the removal of a head or face covering except where there is reason to believe that the item is being worn by the individual wholly or mainly for the purpose of disguising identity, not simply because it disguises identity...”

No search should be carried out by an officer under any power unless and until the officer has (if not in uniform⁴):

1. shown his or her warrant card,
2. informed the person to be searched, inter alia:
 - a. that he or she is being detained for the purposes of a search;
 - b. of the officer’s name (except in the case of enquiries linked to the investigation of terrorism, or otherwise where the officer reasonably believes that giving their name might put them in danger, in which case a warrant or other identification number shall be given)
 - c. of the name of the police station to which the officer is attached;

⁴ Only uniformed officers may carry out searches under s60.

- d. of the legal search power which is being exercised,
- e. of the object of the search in terms of the article or articles for which there is a power to search;
- f. in the case of a s60 search, of the nature of the 60 power, the authorisation and the fact that it has been given, or
- g. in the case of a search for which reasonable suspicion is required, of the grounds for that suspicion.

PACE Code A imposes recording requirements in respect of stops and searches. Detailed discussion of these requirements are beyond the scope of this chapter but it should be noted that anyone subject to stop and search is entitled to be provided with a copy of that record immediately on request, alternatively to a receipt which explains how they can obtain a copy of the full record or access to an electronic copy of the record. A request for a copy of the record may, if not made immediately, be made within three months of the stop and search.

A record must be made in any case where the stop and search does not result in arrest unless there are exceptional circumstances which make this wholly impracticable. The record must include:

- (1) A note of the self defined ethnicity, and if different, the ethnicity as perceived by the officer making the search, of the person searched;
- (2) the date, time and place the person was searched;
- (3)(a) the object of the search in terms of the article or articles for which there is a power to search or
- (3)(b) where the search is carried out under section 60 CJPOA, the nature of the power, the authorisation and the fact that it has been given;
- (4) in the case of a stop and search for which reasonable suspicion is required, the grounds for that suspicion; and
- (5) except in the case of enquiries linked to the investigation of terrorism, or otherwise where the officer reasonably believes that giving their name might put them in danger (in which case a warrant or other identification number shall be given) the name of the officer.

Additional requirements where the stop and search requires reasonable suspicion

In addition to the generally applicable provisions, PACE Code A provides, where stop and search is subject to a requirement for reasonable suspicion, (§2.2) that:

1. *Firstly*, the officer must have formed a *genuine* suspicion in their own mind that they will find the object for which the search power being exercised allows them to search ... and
2. *Secondly*, the suspicion that the object will be found must be reasonable. This means that there must be an *objective* basis for that suspicion based on facts, information and/or intelligence which are relevant to the likelihood that the object in question will be found, so that a reasonable person would be entitled to reach the same conclusion based on the same facts and information and/or intelligence.

Officers must therefore be able to explain the basis for their suspicion by reference to intelligence or information about, or some specific behaviour by, the person concerned.

Further (§2.2B) “Personal factors [such as ethnicity, religion, gender etc] can never support reasonable grounds for suspicion” though the police may use such information when it is part of a description of a particular suspect”.

Kettling

In addition to the general power to alter a particular protest route or location, the police may also be able to contain or corral protestors into designated areas during a protest. This clearly involves a use of force by the police and as such must be reasonable, necessary and proportionate. This practice found a degree of infamy in a series of high profile cases, for example during the G20 demonstrations in 2001 and the student protests of 2015. This generally involves placing protestors into a cordoned area for a specified period of time – in some cases several hours. In *Armstrong v United Kingdom* [2012] 55 EHRR 14, the European Court of Human Rights found that the practice of kettling did not constitute a breach of the Article 5(1) rights of those contained, provided that it had been rendered unavoidable by circumstances beyond the control of the authorities and was necessary in order to avert a real risk of serious injury or damage.

Powers of arrest

In order to lawfully arrest a protestor (assuming it is without an arrest warrant, otherwise known as the “summary power of arrest”) a police officer must have reasonable grounds to suspect that the individual in question was guilty of an offence (s. 24(2) PACE). This is a low standard and will be judged objectively.

Following the Serious Organised Crime and Police Act 2005 (**SOCPA**), the Police and Criminal Evidence Act (**PACE**) was amended to include an additional requirement that the police officer has “reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is **necessary** to arrest the person in question.” (PACE, s. 24(4)).⁵ Subsection 5 sets out an exhaustive list of reasons for which it may be judged necessary to arrest the suspect, namely:

- a. “to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person’s name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
- b. correspondingly as regards the person’s address;
- c. to prevent the person in question –
 - i. causing physical injury to himself or any other person;
 - ii. suffering physical injury;
 - iii. causing loss of or damage to property;
 - iv. committing an offence against public decency (subject to subsection (6)); or
 - v. causing an unlawful obstruction of the highway;
- d. to protect a child or other vulnerable person from the person in question;

⁵ Emphasis added.

- e. to allow the prompt and effective investigation of the offence or of the conduct of the person in question;
- f. to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.”

What amounts to reasonable belief of necessity was considered by the Court of Appeal in *Hayes v Chief Constable of Mersyside Police* [2011] EWCA Civ 911. Here, the Claimant had argued that in order to satisfy s. 24(4) of PACE a police officer must pass through a three-stage thought process, namely that:

- He must understand that he must believe arrest to be necessary for one of the specified reasons and he must in fact believe this; and
- He must actively consider all possible courses of action alternative to arrest; he must have taken into account all relevant considerations and have excluded all irrelevant ones; and
- He must make a decision which a constable acting reasonably could have reached. [§18]

The Court of Appeal rejected this test. It held that while an officer *should* apply his mind to alternatives short of arrest, consistently with PACE Code G 1.3 and that if he does not do so, he is open to challenge, it would not be one akin to a “public-law reasons challenge” as to do so would place an unreasonable burden upon the police. [§39]

The relevant test according to the Court of Appeal in *Hayes* is:

- That the constable actually believed that arrest was necessary, and for a subsection (5) reason; and
- That judged objectively that belief was reasonable.[§42]

There will therefore need to be some evidence to demonstrate that the officer did in fact apply her mind to the necessity test at the time she took the decision in order to satisfy the first limb of the test. That aspect of the test is likely to be more easily satisfied than the second limb. Only those facts known to the officer at the time the decision was taken to arrest will be relevant to both limbs of the test: *Harringford v Chief Constable of Essex Police* [2013] EWHC 243 (QB).

Consideration of alternatives to arrest

The relevant PACE Code in force at the time in this case provides in relation to voluntary interviews, at Note 2F. that:

“An officer who believes that it is necessary to interview the person suspected of committing the offence **must** then consider whether their arrest is necessary in order to carry out the interview. The officer is not required to interrogate the suspect to determine whether they will attend a police station voluntarily to be interviewed but **they must consider whether the suspect’s voluntary attendance is a practicable alternative for carrying out the interview**. If it is, then arrest would not be necessary. Conversely, an officer who considers this option but is not satisfied that it is a practicable alternative, may have reasonable grounds for deciding that the arrest is necessary at the outset ‘on the street’. Without such considerations, the officer would not be able to establish that arrest was necessary in order to interview.”⁶

⁶ Emphasis added.

The Court of Appeal in *Hayes* considered the decision in *Richardson v Chief Constable of West Midlands Police* [2011] EWHC 773 (QB), decided a few months earlier. Here, the claimant was a teacher who was accused of hitting a pupil. He denied the charges but indicated that he was willing to come into the police station and attend a voluntary interview. He was arrested upon his arrival at the police station. There were clearly reasonable grounds to suspect commission of an offence and the statutory reason for the arrest was recorded as being for the “prompt and effective investigation of the offence or of the person in question”. However, there was “no evidence as to whether and if so why” the arresting officer thought it necessary to arrest Mr Richardson in order to achieve this. [§53]

The Court of Appeal in *Hayes* found that the approach of the Divisional Court in *Richardson* was consistent with the objective test it was formulating, namely whether objectively judged, there were reasonable grounds for the decision to arrest. [§35]. However, it went on to suggest that even where a suspect would attend an interview voluntarily, there may be circumstances in which it would still be reasonably necessary for a police officer to arrest him where, for example, a voluntary interview would not be as effective as one conducted under caution. [§42] Whether voluntary attendance would provide a suitable alternative means to arrest – thus rendering the arrest objectively unnecessary – is fact sensitive: *R(On the Application of TL) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin) [§47]. However, the court in TL also held that “necessity [...] cannot be envisaged as a synonym for ‘desirable’ or ‘convenient’”. [§40]

Breach of the peace

In reality, the most likely offences which are likely to be alleged to have been committed by protestors are under so-called “breaches of the peace”. Breach of the peace is an offence at common law which carries a power of arrest without warrant. Such an arrest may be effected when a breach of the peace is committed or where a police officer (or other individual) reasonably believes that such a breach is imminent, in order to prevent it. This is an extremely wide-ranging power of arrest. A protestor who argues with a police officer about a stop and search could in principle be subject to arrest. The powers of the police were somewhat restricted by the Court of Appeal in *Bibby v Chief Constable of Essex Police*. There are now the following requirements:

1. there must be a real and present threat to the peace justifying depriving a citizen, not acting unlawfully at the time, of his liberty,
2. the threat must come from the person arrested,
3. the conduct must clearly interfere with the rights of others and its natural consequence must be not wholly unreasonable violence from a third party, and
4. the conduct of the person arrested must be unreasonable.⁷

Sections 4, 4A and 5 POA prohibit the use of threatening, abusive or insulting words or behavior:

- (section 4) causing, fear of or provoking violence;
- (section 4A) intending to and causing harassment, alarm or distress (this offence may also be committed by disorderly behavior);

⁷ 2000 The Times 24 April.

- (section 5) likely to cause harassment, alarm or distress (this offence may also be committed by disorderly behavior).

The first two of these offences carry possible sentences of imprisonment of up to six months, the latter a fine only.

Arrests to prevent breaches of the peace

In addition to the incredibly broad powers of arrest outlined above, it may even be lawful for the police, in certain circumstances, to pre-emptively arrest those who it believes may breach the peace by attending a protest. The power to do so was recently upheld by the Supreme Court in *Hicks v Commissioner of Police for the Metropolis* [2017] UKSC 9. This case involved the arrest of a number of individuals on 29 Apr 2011, which was the day of the royal wedding. They were taken into police custody and released without charge once the pageant was over. The justification was that the arrests were said to be necessary to prevent an imminent breach of the peace – the violent disruption of the wedding. None of the individuals was ever charged or brought before a court.

The Claimants alleged that their arrests had been unlawful and a breach of Article 5(1) (c) ECHR. Article 5 provides, in relevant part:

1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

...

3. Everyone arrested and detained in accordance with the provision of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The Court of Appeal rejected their appeal, holding that the arrest of a person for a breach of the peace could be lawful under art 5(1)(c), provided that at the time of the arrest there was an intention to take the arrested person before the courts. If the person could be released before it was practicable to give effect to the intention then this did not undermine the lawfulness of the arrest. The Supreme Court upheld this. It found that the fundamental principle underlying art 5 was to protect the individual from arbitrary detention. Article 5 was not to be interpreted in such a way as would make it impractical for the police to perform their duty to maintain public order and protect the lives and property of others. Thus, where there is a reasonably held belief that breach of the peace is imminent, the police may lawfully exercise their power of arrest to prevent the offence occurring.

This is a troubling decision. However, this does not give officers free reign to arrest people it considers to be potential troublemakers. The requirements for lawful arrest set out above must be met. Detention must not be for an unduly long period of time: in *Hicks* the brevity of the detention was an important factor in the Court's decision that it would not have been practicable to bring the individuals in question before a court in the time they were detained.

Other potential criminal offences

In addition to general public order/breach of the peace offences, protestors must be careful not to deface public or private property – this could include placing posters or stickers on shop windows or private homes, breaking or otherwise damaging property, for example by graffiti. The nature of the penalty will depend to a large extent on the amount of damage caused, including the monetary value. In cases where the damage is extensive, a custodial sentence may be imposed.

As noted above, the police may ban protests planned to take place on private property whether in whole or in part. Section 14B POA makes it an offence to knowingly take part in an assembly that breaches an order made prohibiting a trespassory assembly under s.14A. There are different offences depending on whether the individual organises or merely takes part in such a protest. Anybody who incites another person to commit an offence under this section will also be guilty of an offence. An organiser faces a maximum of 3 months imprisonment and a fine not exceeding £2,500. The punishment is the same for somebody who incites an offence under this section. Somebody who merely participates faces a fine of up to £1,000.

What to do if you are arrested and/or believe your arrest is unfair or unlawful

If you are arrested you have a number of rights. These should be communicated to you by the police – usually the custody officer at the police station. In practice, however, the police often fail to do this. Every person who is arrested in England and Wales has the following rights:

- get free legal advice
- tell someone where you are
- have medical help
- see the rules the police must follow ('Codes of Practice')
- see a written notice telling you about your rights, eg regular breaks for food and to use the toilet

If you believe your arrest is unlawful it is important to seek legal advice as soon as possible. As set out above, there is a right to free legal advice while you are in custody but it may be important to seek specialist advice as you may be entitled to bring a civil claim against the police if the arrest was unlawful.

CASE STUDIES





CASE STUDIES

An unincorporated campaigning group believes that the government has created a policy that adversely affects women. They have spent the last year documenting the negative impact of the policy and now want to raise public awareness about the issue by challenging the government on its position. They're not sure how to do this and want to know whether they should challenge the government in court, or hold a protest.

What are the key considerations for this group of campaigners?

You may wish to consider:

- (a) whether the protest would be an assembly or a march?
 - (b) If it is a march, consider the obligation to notify the police in writing 6 days in advance and the route that would be taken. It may be more straightforward to organise an assembly that doesn't move anywhere and can be self contained.
 - (c) How many people are likely to attend? Is there a chance that some of those attending may be violent or cause disruption?
 - (d) Where will the protest take place? Remember the restrictions on assemblies on private property although it may be possible to obtain the permission of the landowner.
 - (e) Legal challenges can be effective but more limited. Seek legal advice before pursuing this option – there is nothing to prevent legal action and protests in tandem.
 - (f) Consider the broad powers of arrest available to the police, especially in relation to public order offences - if it is a peaceful protest, the risk of arrest is reduced but it is easy to get caught up if there are only one or two troublemakers. Good communication with the police before the event can ease tensions and reduce the risk of things going wrong.
 - (g) Remember that the police can impose conditions and restrictions prior to the protest. If it is a march this might include things like a change of route. The police may limit the number of protestors allowed to attend, the location or the duration of the march. The police can only do this in accordance with the powers under the POA or may apply for an injunction under the 2014 Act. If the police choose to seek an injunction, they must put you on notice of that application so you have the opportunity to respond.
 - (h) You may also want to remember the wide stop and search powers addressed above and the chances that these will be applied during the protest.
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