

Press summary

A. The issue

1. The case concerns a challenge brought by the National Council of Civil Liberties ("*Liberty*") to the legality of Regulations adopted by the Secretary of State which have the effect of lowering the threshold for police intervention in processions and assemblies by persons wishing to protest.
2. It is very important to emphasise from the outset that although the subject matter of this case is one of broad public interest, the legal issues arising are narrow and technical.

B. The facts

3. The Public Order Act 1986 ("*POA 1986*") permits the police to intervene in a public procession or assembly in order to prevent "*serious disruption to the life of the community*". The legislation does not define what is meant by "*serious disruption*".
4. In response to concerns expressed by the police that this expression was unclear, a power was introduced in the Police, Crime, Sentencing and Courts Act 2022 ("*PCSCA 2022*") allowing the Secretary of State to amend the definition of "*serious disruption*" by secondary legislation. The power to amend an Act of Parliament by a statutory instrument is colloquially termed a "*Henry VIII power*".
5. In a statement to Parliament on 8 June 2021 the Minister had explained that the power would be used to provide clarification to the police as to what was meant, in a practical sense, by the expression "*serious disruption to the life of the community*". It would not be used to alter the threshold for police intervention in processions or assemblies.
6. That same year, in order to address new forms of protest being undertaken by certain action groups which the Government considered to be extreme, the Government introduced into the House of Commons a Public Order Bill creating two new offences of "*locking on*" and "*tunnelling*" where they gave rise to "*serious disruption*". In relation to those new offences the term "*serious disruption*" was then broadly defined in the Act by reference to a threshold of "*more than minor*".

7. The Government did not seek to amend the seriousness threshold for intervention by the police in relation to other public processions or assemblies.
8. In 2023, this time specifically in relation to public processions and assemblies, the Government introduced two amendments to a new Public Order Bill which would have defined the phrase “*serious disruption*” in the POA 1986 to include any disruption that was “*more than minor*”. These amendments were however rejected by the House of Lords and the Government did not seek to re-introduce them into primary legislation.
9. Instead, the Government exercised the newly conferred Henry VIII power to amend the POA 1986 by secondary measures. It laid draft regulations before Parliament which sought to define “*serious*” as anything that was “*more than minor*” ie introduce the same changes which had failed to get through Parliament as primary legislation. It is a feature of secondary legislation that it is subject to less scrutiny than Parliamentary Bills and cannot be amended by either House of Parliament. In formulating their proposals the Government engaged with police enforcement agencies but did not consult with the public or groups representing civil liberties.
10. In March/April 2023 the Home Office prepared an Economic Note seeking to assess the impact of the draft regulations. This estimated that if adopted they would increase the number of occasions when the police intervened in processions and assemblies by up to 50% and that prosecutions would also rise substantially.
11. The draft regulations came before the House of Lords Secondary Legislation Scrutiny Committee which published a report in May 2023. This concluded that the Regulations would lower the threshold for police intervention in public processions and assemblies, that the new definition was legally uncertain, and that the Government consultation on the proposal was “*inadequate*”. The Committee observed that it was unprecedented for the Executive to bring back as secondary legislation a matter which had been rejected by the House of Lords in Parliament as primary legislation. They considered that this raised constitutional issues and they invited the House of Lords to reject the draft regulations.
12. Notwithstanding these concerns, the Regulations were approved by both chambers of Parliament and they came into force on 14 June 2023. Days

later Liberty commenced proceedings for judicial review. The Public Law Project (“PLP”) intervened in the proceedings to support Liberty.

C. The challenge

13. The challenge brought by Liberty can be summarised as follows:

Ground I - In conferring power upon the Minister to amend legislation, the legislature did not intend that power to be used to alter the standard for police intervention in processions and assemblies. By defining “*serious*” in the Regulations to mean “*anything more than minor*” the Secretary of State did lower the threshold and therefore acted outside of the power conferred by Parliament.

Ground II – The Regulations were unlawful because they subverted Parliamentary sovereignty in seeking to achieve by secondary legislation that which Parliament had rejected as primary legislation.

Ground III: The Regulations were unlawful because they frustrated and circumvented the will of Parliament and lacked objective justification.

Ground IV: The Regulations were unlawful because they were the result of an unfair consultation process.

D. The judgment of the Court

14. The High Court has upheld Grounds I and IV of the challenge. It has dismissed Grounds II and III.

15. Under Ground I the issue is a technical question concerning the scope of the power conferred by Parliament upon the Secretary of State to amend the law. Was the power limited to clarification of the expression “*serious disruption*” or, alternatively, did it extend also to changing the meaning of that expression and thereby the threshold for police intervention in processions and assemblies? In short, did the expression “*serious*” when properly interpreted, cover anything that was “*more than minor*”? Ground IV concerns the fairness of the procedure adopted by the Government in relation to the consultation exercise which preceded the Regulations.

16. The Court held in relation to Ground I that properly interpreted the enabling power was limited to using regulations to *clarify* the word “*serious*”. It did not extend to altering the threshold for police intervention in processions and assemblies. By defining “*serious*” to mean anything that

was “*more than minor*” the Regulations lowered the threshold for police intervention in a manner not contemplated by Parliament when it conferred the power. The Regulations were therefore unlawful.

17. In relation to consultation (Ground IV) the Court held that the Government embarked upon a voluntary consultation process but by consulting only law enforcement agencies the procedure was not fair, as it was required to be by law. For the procedure to be fair and balanced Government needed at least to obtain the views of those who might be adversely affected by the proposed measures.
18. On Grounds II and III the Court found in favour of the Secretary of State. The Court held that there was no overarching principle of constitutional law preventing Parliament adopting by secondary legislation measures which at an earlier point had been rejected by Parliament as primary legislation.
19. Recognising the public importance of the issue the High Court has granted the Secretary of State permission to appeal and has indicated that the appeal should be expedited. Pending the appeal the Court has also suspended its order that the Regulations be quashed.

Royal Court of Justice
Tuesday 21st May 2024