Cambridge Law Journal, **79(1)**, March 2020, pp. 1–37

THE
CAMBRIDGE LAW JOURNAL

VOLUME 79, PART 1 MARCH 2020

CASE AND COMMENT

THE MEANING OF "PUBLIC ASSEMBLY": POLICING PROTEST IN THE TWENTY-FIRST CENTURY

THE judgment of the Divisional High Court in *R. (Jones) v Metropolitan Police Commissioner* [2019] EWHC 2957 (Admin) turned on the meaning of "public assembly" in section 14 of the Public Order Act 1986 (the Act). Section 14 confers limited powers on the most senior police officer present at an assembly to impose conditions on its location, duration and number of participants. Only the chief officer of police has the power under section 14 to impose conditions on a future assembly. While the decision in *Jones* involved a straightforward exercise in statutory interpretation, the definition of "assembly" elaborated by the court is likely to have considerable practical implications for the future regulation of public assemblies under the Act.

The claimants challenged the lawfulness of a condition imposed pursuant to section 14 by a superintendent in the Metropolitan Police on the "Extinction Rebellion Autumn Uprising" (Autumn Uprising). The Autumn Uprising commenced in central London on 7 October 2019 and had been scheduled to end on 19 October 2019. Between 7 and 13 October, the Autumn Uprising conducted mass sit-ins, which blocked roads and impeded access to business, and glue-ons and lock-ons – which entailed protestors affixing themselves to public transport – thereby causing significant disruption. A condition imposed under section 14 on 8 October – which was not the subject of challenge – sought to restrict all assemblies associated with the Autumn Uprising to Trafalgar Square, but this failed to prevent further gatherings outside of the delimited area. The challenged condition required that all assemblies associated with the Autumn Uprising cease by 9pm on 14 October 2019, with the consequence that all protests associated with the Autumn Uprising in central London were banned from 9pm on 14 October to 6pm on 19 October 2019.

The central issue before the court was whether the separate gatherings and events coordinated by the Autumn Uprising that were then taking place in different locations and at different times across the whole of metropolitan London, as well as planned future assemblies, constituted a single public assembly. In rejecting that contention, the court adopted a combined textual and purposive approach to the interpretation of the Act. The Act empowers the most senior police officer "present at the scene" to impose a condition on an assembly that is already occurring (section 14(2)(a)). As the court observed, this "shows that there must be a 'scene', and not a series of different scenes" (at [66]). In addition, the Act defines a "public assembly" in section 16 as an assembly of two or more people "in a public place which is wholly or partly open to the air". This implies a single location in respect of which "it is coherent to pose the question whether it is wholly or partly open to the air" (at [66]). Finally, "public place" is defined as a place to which the public (or a section of it) has access and this "plainly cannot include the whole of the Metropolitan and City of London police areas, because that would include many private houses to which the public do not have access" (at [66]). These observations, made by the court in respect of section 14, were bolstered by the wording of section 14A, which pertains to "trespassory assemblies". Section 14A confers power on the chief officer of police to make an order prohibiting all trespassory assemblies within a specified area or part of it. As the court noted, "the difference between the singular [in section 14] and the plural [in section 14A] does not seem to be accidental". Where Parliament intends to confer power to impose conditions on multiple assemblies, including prohibiting them, it says so expressly (at [71]).

Drawing these observations together, the court defined "public assembly" for the purposes of section 14 as being in a "location to which the public or any section of the public has access, which is wholly or partly open to the air, and which can be fairly described as a scene" (at [72]). Significantly, gatherings that are separated in time and by "many miles" are not a single public assembly even if they are coordinated by the same body (at [72]).

The Commissioner of Police for the Metropolis had argued that the Act should be interpreted such that all assemblies taking place in London relating to the Autumn Uprising, including planned future assemblies, were a single assembly. This interpretation would have had the consequence that section 14(1) could be relied upon to impose an area-wide ban on all public gatherings affiliated with a single unifying cause even if these public gatherings were separated in time and place. Such an interpretation was directly at odds with the wording of section 14, particularly when read with section 14A. Section 14A enables the placing of conditions on multiple trespassory assemblies, but only when those conditions are imposed by the chief officer of police with the consent of the Secretary of State. When considered in its

statutory context, it is apparent that beyond the chief officer of police, section 14 is limited to empowering the most senior police officer present at an assembly to respond to developments at the scene by imposing conditions on the location, duration and size of the assembly.

The case on behalf of the defendant also ran counter to the purpose of section 14, which was to introduce a means of regulating "static assemblies". Significantly, the White Paper, *Review of Public Order* (Cmnd 9510) (15 May 1985), that preceded the Public Order Act 1986 expressly rejected the possibility of a power to ban intended assemblies. As a result, section 14 cannot be relied upon by an officer other than the chief officer of police to impose conditions which have the effect of prohibiting a public assembly that is yet to begin, which is what the superintendent had attempted to do via the condition imposed on 14 October 2019 (at [55], [56], [71]).

There was no single public assembly at the time the superintendent imposed the condition on 14 October 2019 and the future assemblies intended to be held between 14 and 19 October 2019 were not a public assembly in the presence of the superintendent. Consequently, there was no power under section 14(1) to impose the condition which the superintendent had on 14 October 2019 (at [72]). The court declined to comment on the undoubtedly profound consequences of its finding on the lawfulness of the considerable number of arrests which had been made based on a breach of the condition.

The definition of "public assembly" distilled by the court, and the reasoning employed by it, are plainly correct. As the court itself observed, the common law has long recognised the right to peaceful protest and in a free society that values free speech, people must be afforded the opportunity to express their views, even if they do not accord with majoritarian opinions (at [39]). The interpretation sought by the defendant was not only at odds with the wording of section 14 but would have resulted in the recognition of a power that fundamentally undermines the right to peaceful protest. Nevertheless, the decision does have profound consequences for regulation by police of protests, particularly in light of the tactics of evasion employed during the Autumn Uprising.

What *Jones* demonstrates is that, for senior police officers, section 14 of the Act provides a means of regulating assemblies that are taking place *in their presence*. Section 14 does not, however, offer an effective means of regulating modern protest tactics, such as those employed during the Autumn Uprising during which participants were encouraged to "become water" and to disband and join other assemblies or to recongregate and form new ones in response to attempts at control by police. While the chief officer of police can impose conditions on intended assemblies subject to the requirements in section 14(2)(b), that power is still dependent on

there being a "public assembly" and is also subject to the limitation that it cannot be used to prohibit a public assembly that has not yet begun.

It is possible that the decision in *Jones* will lead to amendments to section 14 to mirror the language in section 14A which does expressly permit the prohibition of future, trespassory assemblies in a specific district or area. However, in the case of trespassory assemblies, the rights of property owners provide a counterweight to the rights to freedom of expression and assembly of protestors and there remains the possibility of assembling on public property. Amending section 14 to include the power to prohibit future assemblies in "public places" would run the risk of violating the rights to freedom of expression and assembly in Articles 10 and 11 of the European Convention on Human Rights. The European Court of Human Rights has repeatedly reaffirmed the "essential nature of the freedom of assembly and its close relationship with democracy" and the fundamental importance of free speech in a democratic society and it is unlikely that a prospective ban on all peaceful assemblies within an area the size (and significance) of central London would be "necessary in a democratic society" (*Helsinki Committee of Armenia v Armenia* (Application no. 59109/08), Judgment of 31 March 2015, not yet reported, at [45]–[47]).

Of course, the police have additional powers beyond those contained in the Act 1986 including, for instance, power to prevent a breach of the peace. But such powers, like section 14, are unlikely to provide a satisfactory solution to protests that are separated in time and space and which form, disaggregate and reform like starling murmurations.

Stevie Martin

Address for Correspondence: Fitzwilliam College, Cambridge, CB3 0DG, UK. Email: ssm41@cam.ac.uk

COMPENSATION FOR MISCARRIAGES OF JUSTICE: DEGREES OF INNOCENCE

WHILST the presumption of innocence may be the relatively uncontroversial golden thread that runs through English criminal law, it has provided a rich seam of case law in relation to compensation for wrongful convictions, most recently in the conjoined appeals of *R. (Hallam and Nealon) v Secretary of State for Justice* [2019] UKSC 2, [2019] 2 W.L.R. 440. It is generally accepted that compensation should be paid to the factually innocent whose convictions have been quashed. At issue is whether it should also be paid to those who did – or may have – committed a crime and have "got away with it", and whether such a refusal to pay compensation contravenes the presumption of innocence in Article 6(2) of the European Convention on Human Rights (ECHR).