



CAJ and Amnesty International UK Joint Briefing Note

The Health Protection (Coronavirus, Restrictions) (Amendment No. 4) & (Amendment No. 5) Regulations (Northern Ireland) 2020 and application to the Black Lives Matter anti-racism protests on Saturday 6 June 2020 (S494)

This briefing is produced in advance of an anticipated Assembly debate on the above amendment regulations, and is produced jointly by the Committee on the Administration of Justice (CAJ) and Amnesty International UK.

As human rights organisations, we recognise the need for extraordinary measures to limit contagion and save lives during the current pandemic. Fundamental rights, including rights to protest can be limited in a public health emergency, pursuant to such a legitimate aim. In order to be lawful, such limitations must meet requirements of being necessary in a democratic society, meeting the tests of proportionality and 'legal certainty' (i.e. the rules are clear to enable citizens and law enforcement officers alike to regulate their conduct and actions). Regulations also must not be enforced in an arbitrary or discriminatory manner.

In this context, we have a number of concerns that relate to the application of the regulations to the Black Lives Matter protests that took place in Belfast and Derry-Londonderry on Saturday 6 June.

Pursuant to Regulation 6A (which limited 'outdoor gatherings' to a maximum of six persons not from the same household) there was significant PSNI intervention in the protests. This included intervention that reportedly prevented organisers facilitating social distancing and the exercise of enforcement powers for offences under the regulations with reportedly 60-70 fines and other alternative sanctions being levied. The intervention was different to the manner in which other 'gatherings' before and after these protests have been managed.

There are concerns as regards the proportionality of the PSNI response in general to the anti-racism protests, as well as concerns derived from testimony from directly affected persons that action against individuals may have been undertaken in an arbitrary or discriminatory manner, including on the basis of racial profiling.

This briefing deals with a number of procedural and legal certainty issues in relation to the amendment regulations, which, along with executive action by the PSNI engages issues of ECHR compatibility. In particular, the above amendment regulations extended broad and vaguely drafted enforcement powers to outdoor gatherings under Regulation 6A.

1. Was the right regulation-making procedure used by the Department of Health to extend enforcement powers to outdoor gatherings under Regulation 6A?

The regulation power relied upon by the Department of Health is provided for in a temporary new part of the Public Health Act (Northern Ireland) 1967.ⁱ The procedure for the regulations is provided for in section 25P (assembly control). This requires a draft of amendment regulations to be first laid and approved by the Assembly before the regulations are made and subject to negative resolution. There is however an 'emergency

procedure' under section 25Q whereby "by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved" (emphasis added).

The Department can therefore bypass prior Assembly scrutiny to make amendment regulations, but only when this is necessary "by reason of urgency" to do so. Both amendment regulations No. 4 and No. 5 relied on this urgent emergency procedure under section 25Q.

The principal Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, when originally made on the 28 March, under Regulation 6 restricted gatherings in a public place to two persons (with some limited exemptions). Regulation 6 was subject to enforcement powers under Regulation 7, and breaches of Regulation 6 constituted an offence under Regulation 8 (subject to a 'reasonable excuse' defence).

Regulation 6A was then inserted into the Regulations on the 19 May 2020, by Amendment Regulation No. 3.ⁱⁱ Regulation 6A permitted participation in an 'outdoor gatherings' of up to six persons who are not members of the same household, or any number of persons who are members of the same household. Consequential amendments were also made to Regulation 5 (the stay at home regulations) which added 'outdoor activities' and 'outdoor gatherings' in accordance with Regulation 6A to the list of explicit 'reasonable excuses' for permitting persons to leave their homes.

However, no amendment was made to Regulations 7 or 8 which would have made breaches of Regulation 6A on outdoor gatherings an offence or subject to enforcement powers.

The Department of Health did not consider necessary by reason of urgency to amend the regulations and make Regulation 6A enforceable at the time Amendment No. 4 Regulation was made on the 21 May. No such provision is included in Amendment No. 4 Regulation.

The section 25Q emergency procedure was however used again for Amendment No. 5 Regulation which was made at 3pm on Friday 5 June, laid before the Assembly at 5pm on the same Friday. Whilst all other changes brought in by Amendment No. 5 did not come into force until 11pm on Sunday 7 June, uniquely the amendments relevant to Regulation 6A came into force at 11pm on Friday 5 June itself, the eve of the anti-racism protests.ⁱⁱⁱ

There would appear to be two possible explanations for this, both of which are troubling.

First, the Department intentionally fast tracked the making and commencement of provisions to enforce Regulation 6A specifically for the Black Lives Matter protests. This would raise questions as regards discriminatory treatment. Consequently there would be an onus on the Department to explain whether their decision was grounded on reasonable and objective criteria that distinguished the anti-racism protests from the numerous large gatherings that had taken place from the commencement of Regulation 6A on 19 May. In relation to such gatherings, the Department did not consider such powers to be necessary or urgently required.

The second explanation was that the timing of both the making and commencement of the regulations was entirely coincidental: the Department was simply using the opportunity of the amendment regulations to make a routine technical correction to previous mistaken drafting. In such circumstances however, it would follow that the Department could not have made this change lawfully using the 'emergency procedure' under section 25Q as the provisions were not necessary "by reason of urgency."

MLAs could seek clarity from the Department of Health in relation to the above questions.

2. Legal certainty: how clear were the rules?

Concerns regarding the ambiguity over the rules are not limited to the enforcement powers only having been made the night before the protests. Until 5 June itself, long after the principal Coronavirus Regulations commenced on 28 March, there was no official guidance available to interpret the scope of the rules that had been amended several times.

A Department of Health website, with some short delays, has largely been the first place PDF copies of the Regulations and each amendment regulation were published.^{iv} Whilst it is welcome that this gap has been addressed through the publication of official consolidated guidance on this website it would not have been available in the run up to the protests on 6 June. At the time also no information on the scope of relevant provisions of the regulations was available on the PSNI, NI Direct or Public Health Agency websites.

Even for the minority of persons who can read secondary legislation, a consolidated version of the amended regulations is not provided on the Department of Health hub website. This means readers would have to piece all amendment regulations together themselves with the principle regulation. Whilst a consolidated version of the NI Regulations is available on the UK Statute Law Data base (www.legislation.gov.uk), it had not been updated to include Amendment No. 5 at the time of the protests.

Participants in the anti-racism protests on 6 June are also far more likely to have heard the pronouncements of senior Ministers in the UK Government in relation to Black Lives Matter protests than have found any of the above information. Even in the aftermath of protests the UK Prime Minister Boris Johnson tweeted the Government line that “People have a right to protest peacefully and while observing social distancing.”^v

3. Legal certainty: what is an outdoor ‘gathering’?

A further issue relates to how outdoor ‘gathering’ is interpreted under Regulation 6A.

The NI regulations do not define ‘gathering’. The equivalent provision in regulations in England defines gathering (from 1 June) as *“when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other”*^{vi}

There are therefore questions regarding the differential treatment for the anti-racism protests in relation to other large outdoor social gatherings that occurred before or after them. Comparisons have even be made to hundreds of people gathering outside IKEA in Belfast, with social distancing in place, several days before the protests (June 1).^{vii} Whilst the IKEA queue would not constitute a gathering under the definition in English regulations this is less clear in the NI regulations due to the lack of definition.

A related question concerns whether the anti-racism protests of the 6 June should have been treated as one ‘gathering’ or as numerous separate ‘gatherings’ due to the express efforts of organisers to ensure the protests were socially distanced.

Several days after the protests (June 9) reportedly around 100 people lined the streets of Ballymena to pay respects at a funeral, but did so with social distancing in place.^{viii} Insofar as we are aware there was, rightly, no similar police intervention on this occasion, presumably as each group of mourners was treated as a separate gathering.

MLAs may wish to seek clarification on interpretation of ‘gathering’ in Regulations 6A and the circumstances in which socially distanced gatherings may be considered as one.

4. Legal certainty: is participating in protests a ‘reasonable excuse’ for leaving home?

In addition to Regulation 6A, the general issue of protests encompasses the scope of Regulation 5 – which provides that no persons should leave their home without reasonable excuse. Around a dozen ‘reasonable excuses’ are enumerated but the list is non-exhaustive. As alluded to above, Amendment No 3. added further ‘reasonable excuses’ including to take part in ‘outdoor activity’ and outdoor gatherings (in accordance with regulation 6A.)

As with ‘gathering’, there is no definition of what ‘outdoor activity’ encompasses. Whilst exercising rights to peaceful protests is not explicitly listed as a reason to leave your home, we would consider it disproportionate, given the engagement of fundamental rights under the European Convention on Human Rights (ECHR), if Regulation 5 was interpreted as not permitting a person to leave their home for *any* protest (which would include a one person protest). We are not aware of any such interpretation of Regulation 5, yet clarification from the Department would be welcome on this issue.

Notwithstanding the broader provisions on gatherings MLAs may wish to press the Department to ensure clarity that participation in protests will constitute a reasonable excuse under Regulation 5.

5. Legal certainty: the enforcement powers

The enforcement powers for Regulation 6 (and now 6A) are so vaguely and broadly drafted they are reminiscent of the Special Powers Acts. Regulation 7(1) provides that “a relevant person may take such action as is necessary to enforce any requirement” under these Regulations. The scope of powers this grants to the police is therefore unclear and not circumscribed in a manner which affords legal certainty.

The regulations have now been in place for several months and there has been time to examine and qualify the enforcement powers to what is necessary and proportionate.

6. The Policing response and ECHR rights

Whilst the policing response to the anti-racism protests will have been shaped by the regulations there are also questions as to operational decisions by the PSNI.

Under s32 of the Police NI Act 2000 and the common law, the PSNI have general duty to prevent the commissioning of offences, which would include breaches of Regulation 6A. However, as held by the UK Supreme Court^{ix}, this duty carries operational discretion on the PSNI -qualified by ECHR rights- regarding what action to take. In this instance, it is not clear if the PSNI took into account the issue of heightened protection for a protest where ECHR rights are engaged in a manner in which they are not for a social gathering.

CAJ & Amnesty International UK, June 2020

ⁱ Pt. 1A inserted (temp.) (25.3.2020) by virtue of Coronavirus Act 2020 (c. 7), s. 87(1), Sch. 18 (with ss. 89, 90)

ⁱⁱ Reg. 6A inserted (19.5.2020 at 11.00 p.m.) by The Health Protection (Coronavirus, Restrictions) (Amendment No. 3) Regulations (Northern Ireland) 2020 (S.R. 2020/84), regs. 1, 2(5) (with reg. 3)

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- iii The Health Protection (Coronavirus, Restrictions) (Amendment No. 5) Regulations (Northern Ireland) 2020, regulation 1(3).
- iv <https://www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-regulations-2020>
- v <https://twitter.com/BorisJohnson/status/1269724206440370178>
- vi Reg. 7 substituted (1.6.2020) by The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/558), regs. 1(2), 2(7) (with reg. 3(2))
<http://www.legislation.gov.uk/uksi/2020/350/regulation/7>
- vii Coronavirus: Long queues form as Ikea in Belfast reopens <https://www.bbc.co.uk/news/uk-northern-ireland-52875389>
- viii <https://www.belfasttelegraph.co.uk/entertainment/news/funeral-of-liam-neesons-mother-kitty-held-in-ballymena-39271444.html>
- ix DB (Appellant) v Chief Constable of Police Service of Northern Ireland (Respondent) (Northern Ireland) [2017] UKSC 7