

THE USE OF POLICE TACTICS TO DISPERSE PROTESTS AND THE FINE LINE BETWEEN LEGITIMATE PROTESTING AND ANTI-SOCIAL BEHAVIOUR

By [Mariya Peykova](#)

3PB Barristers

A number of protests were held across the country and the world in response to the brutal killing of George Floyd in the United States. Although the protests were largely peaceful, there was some tension between the police and protesters over the weekend. This unfortunately resulted in some protesters and Legal Observers being kettled by the police. This note will provide a brief overview of the law surrounding the various tactics used by the police to disperse protests and maintain the peace. Some of the most commonly used tactics include kettling (otherwise known as containment) and the use of dispersal orders under s.35 of the Anti-social Behaviour, Crime and Policing Act 2014. The note will also focus on what constitutes ‘anti-social behaviour’ in the context of protests.

What is ‘kettling’?

During a protest the police has the power to ‘kettle’ or contain groups of protesters to keep them in a particular place. Containment or kettling is only lawful to prevent an imminent breach of the peace in circumstances where there are no other means by which that imminent breach can be obviated.¹ The police must review and assess the grounds of containment and bring it to an end once an imminent breach of the peace is no longer anticipated.² This means that the process of kettling should only be used as a last resort; given the implications for article 5 ECHR, the act must be necessary and proportionate.

¹ See Moses LJ in *Mengesha v Commissioner of Police of the Metropolis* [2013] EWHC 1695 (Admin); *Austin and Anor v Commissioner of Police of the Metropolis* [2009] UKHL 5.

² *Ibid*

When does kettling become unlawful?

Kettling can become unlawful if the police contain a group of people for longer than it is necessary to prevent the imminent breach of the peace. It is not unlawful to kettle a group of people who are not directly involved in violence or a breach of the peace, if the police take the view that it is necessary to kettle such individuals to prevent disorder or a breach of the peace by others.³ Kettling could also be unlawful where the police are using it as a tactic to deter demonstrations, whether this is done directly or indirectly.⁴ If you find yourself in a kettle for longer than it appears to be necessary, seek legal advice as soon as possible, as the police may have acted unlawfully. Furthermore, where the tactic appears to have been used simply to deter or break up a protest, it is more likely than not that it will be found to be unlawful. Kettling is a highly controversial tactic, as it involves the police containing people for long periods of time, often in conditions which could be dangerous. If you are vulnerable, or you were kettled in dangerous conditions, such as being left in the cold for a prolonged period of time, or where you were deprived of water and food, you may be able to challenge the police on the ground that the act of containment in the particular circumstances constitutes a breach of article 3 ECHR, which prohibits torture and other inhuman or degrading treatment. Bear in mind that challenges under article 3 ECHR need to meet a high threshold, thus an affected individual needs to demonstrate more than simple inconvenience or discomfort; such challenges are less likely to succeed due to the very high threshold. Most challenges against kettling tactics are brought on the ground of article 5 ECHR, which prohibits unreasonable and excessive deprivations of liberty. This does not mean that other human rights cannot come into play when kettling tactics are used by the police, such as the right to freedom of expression (article 10 ECHR) and the freedom of assembly (article 11 ECHR).

The powers of the police to gather information

The use of kettling to gather information, such as collecting the names and addresses of those involved, as well as taking photos of individuals inside the kettle, is unlawful.⁵ There are specific statutory powers conferred by s.50 of the Police Reform Act 2002, which enables a constable in uniform to ask an individual to provide their name and/or address, where the constable reasonably believes that the individual has been or is acting in an anti-

³ *R (on the application of Hannah McClure and Joshua Moos) v The Commissioner of Police of the Metropolis* [2012] EWCA Civ 12

⁴ *Austin and Others v United Kingdom*, Applications nos. 39692/09, 40713/09 and 41008/09, Grand Chamber, 15th March 2012.

⁵ See *Mengesha* at [11] – [12]; *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55 at [52] – [53].

social manner. Section 64A of the Police and Criminal Evidence Act 1984 confers the power to take photographs where a person is in a public place but where he or she is under arrest for the purpose of investigating a crime, or where a direction is given under s.35 of the Anti-social Behaviour, Crime and Policing Act 2014 (see more on s.35 below). Moses LJ observed in *Mengesha* that ‘it is unacceptable that a civilian photographer on instruction from the police should be entitled to obtain photographs for investigation and crime investigation purposes under the power conferred by s.64A of the 1984 Act as the price for leaving a kettle deployed by the police’.⁶

Is the act of protesting anti-social behaviour?

This is a tricky question; the line between legitimate protesting and anti-social behaviour can be a fine one in certain circumstances. Section 2 (1) of the Anti-social Behaviour, Crime, and Policing Act 2014 defines anti-social behaviour as (i) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person, (ii) conduct capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises, or (iii) conduct capable of causing housing-related nuisance or annoyance to any person. Although the definition appears to be relatively wide, the position is that peaceful protesting does not amount to anti-social behaviour and it does not justify the use of powers such as the power under s.50 of the Police Reform Act 2002 to ask a protestor for their name and address.

The relationship between protesting and anti-social behaviour was considered by the High Court and Court of Appeal in two recent cases in the context of powers conferred on local authorities to limit or prevent protests, where the purpose of such limitations is to stop individuals or groups committing anti-social behaviour in public. In *Dulgerhiu v London Borough of Ealing* [2019] EWCA Civ 1490 the High Court considered whether the imposition of a Public Spaces Protection Order (‘PSPO’) by the London Borough of Ealing was legitimate. In *Dulghieru* demonstrators from pro-life and pro-choice groups gathered outside Marie Stopes UK West London Centre, which offered termination services. The High Court held that the article 8 rights of those visiting the centre were affected by the protests and that the imposition of a PSPO was proportionate; this was upheld by the Court of Appeal. Furthermore, the Court of Appeal in *Dulghieru* rejected the argument that the pro-life group’s actions were simply a protest causing irritation, annoyance, offence, shock or disturbance.⁷ The Court of Appeal held instead that their actions had a detrimental effect on the quality of life of those visiting the centre which was, or was likely to be, of a persistent or continuing

⁶ *Mengesha* at [12].

⁷ See *Dulghieru* at [89].

nature and further held that there was evidence of lasting psychological and emotional harm of service users.⁸

Birmingham City Council v Asfar [2019] EWHC 3217 (QB) concerned a dispute between a number of parents and Anderton Park Primary School in Birmingham relating to the school's curriculum and teaching of LGBT rights; this culminated in protests outside the school. Some parents objected on religious grounds to what was perceived as teaching which normalised LGBT relationships. Birmingham City Council applied for an injunction. When considering whether the protests amounted to anti-social behaviour, the Judge noted that sometimes anti-social behaviour might occur in otherwise legitimate protest.⁹ In particular, the Judge said the following:

“A great deal of anti-social behaviour (including several of the illustrative examples given in the Explanatory Notes) consists of spoken words and public assemblies; such conduct may well represent an unwarranted interference with the rights of others, in particular those under Article 8. The freedom to speak offensively, though important, is not an unqualified right. It is not feasible to read in any narrower limitation, to exclude “protest”. That is a protean term, with no fixed meaning, and protest is not in and of itself legitimate.”¹⁰

The Judge further noted that ‘some manifestations of the protests’ appeared to be ‘positively harmful to children whose parents or carers have allowed them to get involved’. The above authorities demonstrate that the act of otherwise legitimate protesting is not automatically exempt from the definition of anti-social behaviour.

Dispersal orders under s.35 of the Anti-social Behaviour, Crime and Policing Act 2014

The police have the power to disperse protests through the use of direction orders under s.35 of the Anti-social Behaviour, Crime and Policing Act 2014. To use the powers conferred by s.35, authorisation must be given by a police officer of at least the rank of inspector under s.34 of the Act. The relevant authority can extend over a ‘specified locality’ during a specified period of not more than 48 hours. The relevant officer may give such authorisation only if satisfied on reasonable grounds that the use of those powers in the

⁸ *Ibid*

⁹ *Asfar* at [31].

¹⁰ *Ibid*

locality during the relevant period may be necessary for the purpose of removing or reducing the likelihood of:

- Members of the public in the locality being harassed, alarmed or distressed, or
- The occurrence in the locality of crime or disorder.

In deciding whether to give authorisation, an officer must have particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 of the Convention. The decision of an officer to give authorisation can subsequently be challenged on human rights grounds. Legal Observers and those representing protesters in subsequent legal proceedings should be mindful of the balancing exercise that police officers are required to undertake before giving authorisation under s.34. Given the draconian powers conferred to the police under s.35, authorisation should not be given without proper consideration of the rights of all parties involved.

An authorisation under s.34 must be in writing, signed by the relevant officer, and it must specify the grounds on which it is given. When authorisation is in place, a constable in uniform may use the powers under s.35 if he or she is satisfied of the following conditions:

- (i) The constable has reasonable grounds to suspect that the behaviour of the person in the locality has contributed or is likely to contribute to members of the public in the locality being harassed, alarmed or distressed, or the occurrence in the locality of crime or disorder.
- (ii) The constable considers that giving a direction to the person is necessary for the purpose of removing or reducing the likelihood of the events mentioned above.

If the above conditions are met, the constable may direct a person who is in the specified locality to leave the locality or not return to it. The police officer giving the direction must inform the person that failure to comply without a reasonable excuse amounts to an offence, unless it is not reasonably practicable to do so at the time. Directions under s.35 cannot exclude an individual or individuals from a specified area for longer than 48 hours, and any subsequent variations to a direction cannot amount to an extension of the original 48-hour deadline. Finally, a direction under s.35 must:

- Be provided **writing**, unless it is not reasonably practicable to provide it in writing;
- **Specify the area** to which it relates.

The full text of ss.34 and 35 is accessible [here](#).

Some useful tips and recommendations if you are protesting during the pandemic

- Make sure you familiarise yourself with police powers to contain crowds of protesters (kettling) and recognise the signs of an impending kettle. Useful tips can be found on Netpol's website and its guide to kettles, accessible [here](#).
- If you see something that does not look right, find a Legal Observer and ask them to document it. You will be able to recognise them, as they usually wear high visibility vests with the title 'Legal Observer' on them. For more information on the role of Legal Observers, see [here](#).

As always, make sure you are safe and that you are protesting responsibly. Wear a mask and gloves, and try to comply with guidance on social distancing and the relevant Coronavirus regulations.

This document should not be used as a substitute for obtaining legal advice. To discuss this article further, or to instruct one of our barristers for advice on this or any other matter, please contact [Tom Cox](#) on tom.cox@3pb.co.uk.

18 June 2020



Mariya Peykova

Pupil barrister
3PB

0330 332 2633
mariya.peykova@3pb.co.uk
3pb.co.uk