

**Oral Submission
to
Perth & Kinross Council
ref District L.O.L No.65 Procession in Dunkeld Sunday 22nd August 2021**

Freedom of Assembly

The right of freedom of peaceful public assembly is included as a fundamental right within all the major international human rights instruments, including the European Convention on Human Rights [ECHR] which was ratified by the UK government in 1951 and entered into force in September 1953. Freedom of assembly includes the right to parade, process, march demonstrate, rally, picket, protest and to participate in other forms of gathering in public space to voice opinions and express views collectively. The right to assemble is particularly important for minority and marginalised groups whose voices may otherwise not be heard or expressed in the mass media, nor reflected in the views in the mainstream political parties. Exercising the right to assemble and protest will often lead to unpopular, controversial and outrageous views being expressed, and people may be offended and challenged, but this is just one part of the wider process of debate and discussion that drives social change.

Public assemblies will almost inevitably lead to some level of disruption to the lives of others. Sometimes disruption may be the direct aim, if for example protesters attempt to confront opponents or to challenge assumptions, but often it is an indirect consequence of assembling people in a public space that is otherwise used for more mundane activities, such as shopping or traffic. But rather than seeing a protest as an exception or an inconvenience, they should be considered as a vital part of the democratic process and with as much claim on public space as pedestrians, car drivers and the business community. If demonstrations are so constrained that they do not, or are not allowed to, impinge on, or be heard by others, then they are unlikely to have any impact, they become neutered, and the exercising of a fundamental human right will be undermined.

The right to assembly is a key civil and political right, and as such the state has a positive obligation to protect and facilitate the exercise of the right. However, the right to assemble is not an unlimited right. Rather it is a right that can be legitimately constrained by the state in certain circumstances. All international human rights instruments confirm that the right only extends to peaceful protest, there is no right to use physical violence as part of an assembly, and thus those who use physical force are not considered to be exercising a protected right. Article 11.2 of the ECHR sets out a number of other grounds in which the right to assemble may be limited:

“No restrictions shall be placed on the exercise of these rights other than such 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 and morals or for the protection of the rights and freedoms of others”.

Furthermore, while the ECHR affirms that the right to assemble applies to all without discrimination (Article 14), it also states that exercising a human right must be done in a way that respects the rights of others, and one cannot invoke a right to do something that is deliberately designed to restrict other people's rights (Article 17). Thus, what begins by being expressed as a broad principle, 'my right to assemble and protest' for example, is not quite so simple in practice. As always there is a challenge to interpret when and in what context it is legitimate to impose restrictions and when it is the responsibility of the state to protect the right to assemble. The ECHR outlines rights as broad principles but cannot provide unequivocal direction for all cases; rather the principles always have to be interpreted and reinterpreted according to the particular local context.

The need to protect the right to assemble, while balancing the rights and interests of others and the desire to maintain public order, remains a constant challenge for the state. Furthermore, a state's willingness to protect and facilitate the right to assemble, remains a key indicator of its general respect of human rights due to the way that the right to assemble is played out in the public sphere.

I would refer Perth & Kinross Council to the terms of Lord Clyde's speech in *DPP v Jones* (1999) 2 AC 240. "It seems clear that there is a public right to pass along the public road but of course, subject to certain limitations and restrictions open to a local authority under section 62 of the 1982 Act. This permits the local authority to propose conditions or prohibition but requires them to base any decision on correct facts, exercise their discretion in a reasonable manner and act within their powers". They also require to give reasons if they have exercised their discretion.

What objectors are proposing is a restriction on the organisers Right to Process along the route of their choosing in other words a prohibition.

However, it is submitted that "No restrictions may be placed on a march unless the Council can demonstrate that it is 'necessary' for one of the reasons in Article 11.2. The Convention case law makes it clear that 'necessary' does not mean 'useful' or 'desirable', but it implies a 'pressing social need', thus making it a strong word. This has been accepted in the Scottish Courts where a Sheriff has said, in a challenge to a ban on a march that "it is for the public authority to show that it is necessary to curtail the basic right before any such restriction will be upheld" – *Aberdeen Bon Accord Loyal Orange Lodge 701 v Aberdeen City Council* 2002 SLT (Sh Ct) 52.

In *Novartis Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty* [2010] HRLR 8, the English court said:

“As the wider authorities make clear, any restrictions on the rights of freedom of expression, and/or of freedom of assembly and association, must be: (i) convincingly established; (ii) justified by compelling reasons; (iii) subject to careful scrutiny; (iv) proportionate and no more than necessary.”

It should be noted that “No restrictions shall be placed” of the right to process, unless they are “necessary” for one of the reasons in Article 11.2. The lodge contends, therefore, that if any conditions are to be imposed on any procession that it is only lawful to impose such conditions if the council can show that the conditions are necessary for one of the purposes in Article 11.2; that the need has been convincingly established and is justified by compelling reasons. If that cannot be demonstrated, then such conditions would be a breach of the direction that “No restrictions shall be placed on the exercise of those rights”.

Accordingly, the Civic Government (Scotland) Act 1982 as amended by the Police, Public Order & Criminal Justice (Scotland) Act 2006 must be read and understood against that background.

The Lodge has a right of freedom of peaceful assembly, which includes a right to assemble, and that right may be exercised in any manner the Lodge wishes and this includes the selection of places to assemble. The council’s duty is to take reasonable and appropriate measures to enable lawful assemblies to proceed peacefully.

In the case of Provincial Grand Black Chapter of Scotland -v- West Dunbartonshire Council (August 2009), the Sheriff stated that “it is for [the local authority] to establish that there is a necessity for intervention and that any intervention will be proportionate to meet that need. Necessary implies the existence of a pressing social need and proportionality has to be assessed by the standards of a democratic society characterised by pluralism, tolerance and broadmindedness.”

A Council and its councillors have a duty, not only to their constituents, but also a duty not to act in any way which contravenes the European Convention on Human Rights & Fundamental Freedoms.

We submit that the Loyal Orange Institution is a religious organisation within the meaning of the Human Rights (Scotland) Act 1998, Section 13 (1) which provides that “if a Court’s determination of any question arising under this Act might as affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, IT MUST HAVE PARTICULAR REGARD TO THE IMPORTANCE OF THAT RIGHT”. We submit further that Perth & Kinross Council is a court within the meaning of the same statute.

Freedom of peaceful assembly is a fundamental human right which can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. It has been recognised as one of the foundations of a functioning democracy. Facilitating participation in peaceful assemblies helps ensure that all people in a society have the opportunity to express opinions which they hold in common with others. As such, freedom of peaceful assembly facilitates dialogue within civil society, and between civil society, political leaders and government.

Freedom of peaceful assembly can serve many purposes including (but not limited to) the expression of views and the defence of common interests, celebration. Commemoration, picketing and protest. The exercise of the freedom can have both symbolic and instrumental significance; and can be an important strand in the maintenance and development of culture, and in the preservation of minority identities. Article 11(1) is a right with profound content.

Participants in public assemblies have as much a claim to use such sites for a reasonable period as everyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as an equally legitimate use of public space as the more routine purposes for which public space is used (such as commercial activity or pedestrian and vehicular traffic). This principle has been clearly stated by the European Court of Human Rights in *Balcik v. Turkey* (2007) at paragraph 52, and *Ashughyan v. Armenia* (2008) at paragraph 90:

“Any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic, and where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 ECHR is not to be deprived of all substance”.

The Lodge’s position is that this is not an application that Perth & Kinross Council has before it but a notification. We do not seek a licence to hold a procession because one is not required.

The Lodge has particular problems with the Document attached to the papers entitled “Report by Head of Legal Services as inter alia it fails to point out the Council’s unequivocal duty in terms of the European Convention on Human Rights AND the Human Rights (Scotland) Act 1998 to positively promote the fundamental right of freedom of Peaceful Public Assembly. Your Director of Legal Services states that: -

The committee has three possible courses of action open to it in determining the notification in terms of the Civic Government (Scotland) Act 1982, Section 63.

OPTION 1 - Accept the Notification as received

OPTION 2 – Accept the notification and make an Order imposing Conditions such as those set out in attachment 10 to this report and any other conditions that the Committee considers appropriate. The conditions include provision for timing, route, compliance with Police instructions, litter disposal, marshalling and stewarding arrangements. A Code of Conduct (see attachment 8) detailing what is expected of organisers and participants can also be issued although this does not form part of the conditions of the Order. 9) Obtaining a TTRO for the event.

OPTION 3 - Reject the Notification and make an Order prohibiting the holding of the procession.

The Lodge would contend that this is not an accurate summary of the legal position, apart from OPTION 1.

In OPTION 2 - the final bullet point is ambiguous as, it, at the very least, implies that the Council could impose, as a condition under Section 63 of the 1982 Act, a requirement that the Organiser obtain a Temporary Traffic Regulation Order for the event.

The Lodge submits that primary responsibility for roads rest with the relevant road's authority (Local Authorities and Scottish Government with regards to trunk roads) and as such it will be for the roads authority to make a judgement as to whether this pre-planned event requires road(s) to be closed or other restrictions imposed on the flow of traffic to allow it to proceed safely. The Road Traffic Regulation Act 1984 (section 14 and 16A) gives powers to the relevant traffic authority to grant a TTRO and it is this order that permits road closures and other traffic management measures to be implemented. As it is the primary duty of the road's authority, any police officers in the vicinity of the event will invoke their common law powers if the roads authority fails to discharge its duty and fails to implement the necessary TTRO's and appropriate traffic management plans, supposing these to be necessary.

Police Scotland have not requested that a TTRO is put in place.

It is quite wrong, therefore in our opinion for your Director of Legal Services to suggest that the organisers of this event might be required to obtain a TTRO.

It seems to us that there is *prima facie* a right for all persons to use a public road. A TTRO is an exceptional measure which can be used to limit the right of road users to use that road for the purpose of travel on it. *Prima facie* those who wish to walk down a road, for whatever purpose, are using it for the purposes for which the road is intended.

Your Roads Department in their memo, state simply “Insufficient time to promote a TTRO”, but if this is the case, then this is of no concern to the Organisers.

We would ask Perth and Kinross Council to consider the Venice Commission Guidelines on Freedom of Peaceful Assembly and Explanatory Notes which are based on International and regional treaties and states practices as derived from national court decisions (“VCG”)

As the VCG notes:

“69. “To require assembly organisers to pay such costs would create a significant deterrent for those wishing to enjoy their right to freedom of assembly and might actually be prohibitive for many organisers. As such, imposing onerous financial requirements on assembly organisers is likely to constitute a disproportionate prior restraint”.

The measures need to be within the law i.e., conditions prescribed by law, and they cannot be disproportionate. We submit that.

1. Nothing in the 1982 Act provision contemplates any conditions which require payment. “Reasonable conditions” has content. It cannot have unlimited scope. We see no basis for cost charging in the 19852 Act. Nor do we see it in the TTRO regime even of that regime had application; and
2. In general Article 11 terms, imposing significant costs or arguably any costs on an organiser are likely to be regarded as disproportionate: and
3. It is no answer as a matter of law to say that resources (Council or otherwise) are relevant. This is because states which contract with the ECHR are meant, as a matter of principle, to organise themselves in such a way as to ensure delivery of respect for ECHR rights. That assumes budgets are sufficient to meet these obligations that is why, per the guidance, resources are not a relevant consideration.

Our position in this regard is, that if Perth and Kinross Council has adopted a policy that compels a parade organiser to commission a TTRO for a public procession then it is acting *ultra vires* of its authority. So far as any requirement to meet the costs of a TTRO is concerned your Council is advised that the Lodge formally repudiates any liability to meet any such cost. After consulting our legal advisers and taking the advice of learned counsel, our view is that any suggestion that the organiser of a public procession is required to commission – or is otherwise responsible for meeting the cost of TTROs or Traffic Management Plans is a violation of the democratic right of freedom of peaceful public assembly.

We submit that if a TTRO is considered necessary before a procession can proceed, then the responsibility for securing one lies with the Council or Police Scotland and not with the event organiser.

I am bound to say. That I am surprised that your Director of Legal Services has raised the issue of TTROs at all because, the question of the provision of TTROs arose in Perth and Kinross in June 2015 when the local Orange Lodge raised an action against the Council which proceedings were settled in the Lodge's favour (see The Courier & Advertiser Saturday 06/06/2015).

CONCLUSION

What the Objectors are asking here, is that Perth and Kinross Council restrict the Human Rights of the Orange Order because of thematic objections to the message the objectors perceive, that the marchers wish to project. This, I, submit would be a discrimination and a violation of Article 1 of Protocol 12 and the Committee is obliged to reject it on that basis.

If the Licensing Committee was against me on this proposition, then I would further submit that:

The Police, Public Order and Criminal Justice (Scotland) Act 2006 states that there are four considerations which the Council must take into account when considering a notification received from a procession organiser and whether it is necessary to prohibit or impose conditions on a public procession. These four conditions are:

1. Public Safety
2. Public Order
3. Damage to property
4. Disruption to the life of the community

It is submitted that none of these four conditions is engaged by objections of the Complainers. What risk to public safety is there if L.O.L District No.65 traverses its chosen route? What risk to public order? Is it being seriously suggested that there is a probability of damage to property if the procession follows the organiser's chosen route? Perhaps the objectors will tell us how the procession is likely to disrupt the life of the community if it goes ahead as planned?

The procession has been conducted in Dunkeld for 14 years and I would put forward the proposition that if any of the four factors of risk to public safety, public order, damage to property and disruption to the life of the community had been encountered in the last 14 years then this would have come to the attention of the statutory authorities and Perth & Kinross Council long before now.

There is no such report from Police Scotland and the organiser is, therefore, entitled to conclude that, apart from the rather nebulous comments of the objectors, there are none.

We submit that our views are consistent with the European Court of Human Rights requirements that it is “the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully”.

I would ask the Licensing Committee to uphold the democratic right of freedom of peaceful public assembly, to approve the organiser’s procession at the time, date & routes duly submitted to the local authority, to repel the objections of the objectors and the suggestion that a TTRO should be obtained by this organisation.

