

Legal update

Public processions – commonly or customarily held – section 11 Public Order Act 1986

Kay v. Metropolitan Police

House of Lords, November 2008

Background

In April 1994 a regularly monthly cycle ride started in London under the banner “Critical Mass cycle ride” (CMCR). CMCR starts at the same time and in the same place in London on the last Friday of every month, following a spontaneous and unpredictable route. Although the motives of some participants in London might be questionable, the majority take place to promote cycling and share a common experience.

In 2005, the Metropolitan Police issued a circular letter to CMCR participants stating that “Organisers of public processions are required by law to notify police at least six days before the event occurs of the date, time, proposed route and name and address of an organiser. Failure to do so makes the event unlawful.... These cycle process are not lawful because no organiser has provided police with the necessary notification. Your participation in this event could render you liable to prosecution. Police policy in facilitating these events is currently under review”.

The claimant commenced judicial review proceedings challenging that stance. In the administrative court, Lord Justice Sedley, giving the judgment of the court, rejected the argument that the wording of Section 11 of the Public Order Act 1986 could not apply to CMCR because it had neither an organiser nor a proposed route capable of notification under the provisions of Section 11(3). The claimant succeeded on the basis of the exemption under Section 11(2) to the extent that “the procession [was] one commonly or customarily held in the police area.....”

The Commissioner appealed on that narrow issue – is CMCR a “procession [which is] commonly or customarily held”? The finding that section 11 of the 1986 could apply to CMCR was not challenged, and the appeal proceeded on the basis that CMCR was indeed a procession caught by section 11.

In the Court of Appeal, in answer to the narrow question, the Commissioner succeeded. The court held that no procession could fall into the common or customary exemption “if no route or end point is ever the same” – see Lord Justice Leveson. Although Lord Justice Wall dissented, Sir Mark Potter, the President, held that the first part of section 11 (2) concluded that the monthly CMCRs could not be

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described as processions “of sufficient consistency and longstanding” to qualify for the exemption.

The claimant appealed to the House of Lords, again on the narrow issue only.

House of Lords

The House of Lords unanimously allowed the appeal, although different Law Lords applied different reasoning.

Having noted that the evidence in the case showed that the police “are usually able to police [CMCR] without difficulty” because the starting point date and time do not change, Lord Phillips allowed the appeal, reasoning that “the fact that, on their natural meaning, the words of Section 11(2) are wide enough to exclude some processions in respect of which the police do not have all the information they would wish is no reason to give those words an unnatural meaning. They should be given their natural meaning so as to apply to [CMCR] as a procession that is commonly or customarily held”.

Lord Rodger noted the Commissioner’s acceptance that “speaking generally, there is nothing incongruous about the idea of a procession of cyclists being common or customary, even though one of its essential characteristics is that the procession follows no predetermined route and the actual route varies from month to month”. But in seeking “to explain why the correct answer to the general enquiry becomes the wrong answer for the sub-section (2)” the Commission’s case did not meet with approval – “... if Parliament had actually intended to use the Public Order Act 1986 to outlaw processions of that kind without a predetermined route, then it would not have done so by a side wind in a section creating a system of notification; it would have done so specifically”. The narrow issue was determined in the claimant’s favour.

In reaching the same conclusion, Baroness Hale noted that “the inevitable consequence of this stance [namely the argument that the lack of a predetermined route prevented the procession being commonly or customarily held] is that the CMCR cannot continue in its present form in the places where it is already established and cannot establish itself anywhere new”. That consequence was against the Commissioner’s arguments. Lords Carswell and Brown agreed with the result on the narrow issue.

Comment

The opinions handed down in the House of Lords conveyed their Lordships’ frustration that only the narrow issue was fully argued for consideration. That was effectively because of the absence of subsequent challenge to the administrative court’s finding that there was no reason why section 11 should not apply to CMCR. Although expressing their views with greater or lesser degrees of force in the absence of proper argument, whether or not the administrative court’s original view was correct is highly questionable. Lord Phillips went as far as to say that the administrative court had been wrong to hold that section 11 applied to CMCR.

Finally, in an amusing analogy, Baroness Hale noted that “it is not only cycle rides that can take a somewhat random route, ending up in a place which was not determined at the start. Legal proceedings may do so too”.

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