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Case No: CO/4032/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2019

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE CHAMBERLAIN

- -

Between :

The Queen
on the application of

(1) BARONESS JENNY JONES
(2) DAVID DREW MP
(3) ELEANOR CHOWNS MP
(4) ADAM ALNUTT
(5) CAROLINE LUCAS MP
(6) CLIVE LEWIS MP
(7) GEORGE MONBIOT

Claimants

- and -

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

Phillippa Kaufmann QC and Jude Bunting (instructed by **Bindmans LLP**) for the **Claimants**
Ian Skelt and Aaron Rathmell (instructed by **Directorate of Legal Services, Metropolitan Police Service**) for the **Defendant**

Hearing date 24 October 2019

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Approved Judgment

Lord Justice Dingemans and Mr Justice Chamberlain:

Introduction

1 This is the judgment of the Court to which we have both contributed. This case raises a point about the proper interpretation of the words "public assembly" in section 14(1) of the Public Order Act 1986 ("the 1986 Act").

2 This is an expedited, rolled-up hearing, pursuant to an order dated Thursday 17 October 2019, of an application for permission to apply for judicial review and, if permission is granted, a claim for judicial review of the decision of Superintendent Duncan McMillan to impose a condition on the "Extinction Rebellion Autumn Uprising" ("XRAU") on Monday 14 October 2019.

3 The XRAU was intended to run between Monday 7 and Saturday 19 October 2019. There were intended to be multiple sites at which protests would take place. It was intended that the protests would cause inconvenience to the general public so that politicians would take notice of and engage with the aims of Extinction Rebellion ("XR"). At 1900 hours on 14 October 2019, Superintendent McMillan, who had been designated by the Commissioner of Police of the Metropolis ("the Commissioner") as Bronze Commander for Contingencies, recorded the view that XRAU was "an assembly" that "may result in serious disruption to the life of the community". He purported to exercise the power conferred on "the senior police officer" by section 14(1) of the 1986 Act and imposed the following condition:

> 'Any assembly linked to the Extinction Rebellion "Autumn Uprising" (publicised as being from 7th October to 19th October at 1800 hours) must now cease their protest(s) within London (MPS & City of London Police Areas) by 2100 hours 14th October 2019.'

4 Following a review carried out at 1730 hours on Friday 18th October 2019 by Chief Superintendent Karen Findlay who was Silver Commander, the condition was removed.

The parties and the procedural history

5 XR is an environmental pressure movement that aims to bring about governmental action on climate breakdown, biodiversity loss and the risk of social and ecological collapse. It co-ordinated the XRAU between 7 and 19 October 2019. This consisted of many individual gatherings (using a neutral word) of protestors, in distinct locations within the Metropolitan and City of London police areas. The Claimants are politicians, and activists who support XR. Two of them, the Third Claimant Ms Chowns and the Seventh Claimant Mr Monbiot, were arrested for breach of the condition (though in Mr Monbiot's case obstruction of a highway was given as a further ground for arrest).

6 On 16 October the Claimants issued a claim for judicial review challenging the decision of 14 October to impose the condition on XRAU and seeking urgent consideration and an expedited hearing before 19 October. On 17 October 2019 there was a hearing of an oral application for the hearing to take place on Friday 18 October 2019. The application was refused because it would not have been possible for the hearing to take place on a basis that was fair to both parties in such a short time scale, and because it would have

been very difficult for the court to produce any judgment before the conclusion of the XRAU on Saturday 19 October 2019. It was ordered that there should be an expedited, rolled-up hearing. That took place on Thursday 24 October 2019.

7 The Commissioner is responsible for policing in the Metropolitan police area. At events like XRAU, which have public order implications, the Metropolitan Police has a three-tier command structure. The officers in charge are referred to as 'Gold', 'Silver' and 'Bronze'. Gold was Commander Jane Connors. Silver was Chief Superintendent Karen Findlay. Superintendent McMillan was Bronze Commander for Contingencies.

The evidence

8 We have set out below a short summary of relevant evidence from the Claimants and the Commissioner. There was no real dispute about matters of fact between the parties, because the dispute related to the legal consequences of the facts.

9 The First Claimant, Baroness Jenny Jones, is a life peer and a campaigner on environmental and civil liberties issues. She spoke at an XR-linked gathering on 7 October 2019.

10 The Second Claimant, David Drew, is the Labour MP for Stroud. He has repeatedly spoken in support of XR.

11 The Third Claimant, Eleanor Chowns, is a member of the Green Party and since June 2019 has been Member of European Parliament for the West Midlands. Ms Chowns was arrested at Trafalgar Square for breach of the condition challenged in this claim.

12 The Fourth Claimant, Adam Alnutt, is an active supporter of XR, including as an organiser for Tower Hamlets XR. He is a member of XR's 'political circle'. After the condition was imposed he went to the Trafalgar Square site and was involved in relocating "lost and found items" from those involved in the XRAU. He attempted to agree a movement of the lost and found items to a location in Vauxhall but was required, because of the condition, to move the items outside the M25.

13 The Fifth Claimant, Caroline Lucas, has been the Green Party MP for Brighton Pavilion since 2010 and has supported XR since its inception. She spoke at XR gatherings on 7 October.

14 The Sixth Claimant, Clive Lewis, has been the Labour MP for Norwich south since 2015. He is an active supporter of the XR movement and spoke at a gathering organised by a group called "XR East England and West Midlands" on Horse Guards Parade on 9 October.

15 The Seventh Claimant, George Monbiot, is a journalist who writes for *The Guardian* and who has campaigned with XR since it was formed. He spoke at the XR gathering at Lambeth Bridge on 7 October and was arrested at Trafalgar Square on 14 October for breach of the challenged condition and for obstructing the highway.

16 In a document headed "October Rebellion Action Design Version 1 25th September 2019", it was stated: "In October, thousands of rebels from across the UK are coming to

London. We will build pressure on the state to the point where their only option is to respond to our demands for change…". Three tactical elements were identified: "blocks" around Government departments in Westminster; "mass actions" said to be a co-ordinated calendar of pressure building mass participation actions away from the blocks; and "AGs", being a decentralised network of smaller satellite actions which will contribute to stretching the state's resources. Under the heading "Third logic for Rebellion" it was stated: "it is vital that we continue to take disruptive actions outside of the large scale national actions that will necessitate a police response to further stretch police capacity. When taking these actions, groups should remember that we are not going to London to do bad things to bad people. We are following a clear strategy of taking police resources to a breaking point, so the only mechanism the state has to remove us is by engaging with us directly".

17 On 4 October 2019, a document appeared on XR's website produced 'by Ronan'. It was headed "Everybody Now: London's Rebellion on track to be FIVE times bigger than April". There was a map showing 12 locations in the centre of London with one or more groups listed by each location. There was to be an opening ceremony at 5pm at Marble Arch. The document noted that "Rebellion will consist of three tactical elements: site 'blocks', mass participation actions, and decentralised affinity (member) group actions". It was noted that protests would take place in 60 cities around the world. The mass participation actions scheduled included "Westminster Site Blocks" on Monday 7 October and action to "occupy/block" all Government departments around Westminster on Tuesday 8 October. The author added for clarity that "we will not be preventing civil servants from going about their work". Other events were scheduled for the remainder of the week. In the second week, there was to be a "hunger strike", which was to be part of an international movement taking place in cities all round the world.

18 For Monday 14 October, the following appeared:

> "START TIME 7am
>
> WHERE TO SWARM: Festival Gardens (near St Paul's)
> Montague Close (behind Southwark Cathedral)
> Exchange Square, Broadgate (behind Liverpool Street Station)
>
> START TIME: 9am
>
> MEETING PLACE: Bank tube station, Threadneedle Street, EC3V 3LA
>
> ACTION
> Affinity groups will come together to hold mass actions across the City of London, disrupting roads, public transport, and financial institutions. This includes the Bank of England…"

19 Superintendent McMillan explained that, among his duties was to 'work within Gold's legal framework and be available to Silver as a tactical option to deploy, assess, develop and impose… conditions'. Superintendent McMillan noted that it had been decided that, if he were to impose conditions under section 14 of the 1986 Act, he would "own" the review process, ensuring the conditions remained necessary, proportionate and legally accountable.

20 Superintendent McMillan was appointed Bronze Commander for Contingencies in part because of his experience in dealing with XR protests in April 2019. He explained that there are:

> "numerous groups that affiliate to XR, but are not under its direct control. However, for the large scale events in London, there is no doubt that XR both coordinated and publicised actions by XR related groups, in order to maximise the direct impact of events and publicity generated."

He noted that XR listed affinity groups across the country and by theme or vocation, for example "XR Doctors" and "XR Elders", "XR Youth" and "XR Farmers". He considered, on the basis of the open source intelligence about what was planned, "that there would in effect be a continuous XR protest taking place in central London throughout the two weeks". The overall policing plan included deploying resources on and around the event footprint to prevent those wishing to commit public nuisance or obstruct the highway from doing so.

21 Intelligence updates were provided to Superintendent McMillan throughout the period, which became important in his decision-making. He noted that "it was clear that one of the main goals of the XRAU was to cause maximum disruption in London". XR had stated that protestors should be prepared to break the law and that it had 5,000 supporters who were willing to be arrested. In April 2019 there had been mass sit downs, 'glue-ons' and building of structures with "lock-ons" to delay safe removal. There had also been protests on the Docklands Light Railway.

22 Superintendent McMillan assessed that XR would "maximise the effectiveness of their numbers by careful selection of where activity occurs and they will move their resources between linked sites". He continued:

> 'I knew that, if left unpoliced, XR would cause maximum disruption. Indeed that is their stated aim. While I accept that XR is a peaceful movement, the impact on the lives of the those living in, working in or visiting London as a result of XR's protest activity is dramatic.'

23 Decision logs detailing Superintendent McMillan's decisions were made by him personally "to ensure so far as reasonably practical that my thoughts, decisions and rationale were recorded… contemporaneously". By the early morning of 8 October, the logs showed that there was 'an assembly' spread across the various sites noted on the map published on XR's website (apart from Lambeth and Westminster Bridges, which had been cleared). There had been mass disruption across the Westminster event footprint and further afield. Roads had been blocked to vehicle traffic and in some places even pedal cycles. Over 51 bus routes had been diverted. Superintendent McMillan knew from his experience of TfL's assessment of the impact of the April demonstrations that disruption of this kind would be likely to cause delay or inconvenience to around 500,000 passengers. There was no vehicular access to the Palace of Westminster. Preparations for the State Opening of Parliament were being threatened. Businesses across the footprint of the protests were unable to receive deliveries and footfall was reduced in shops and restaurants. There were glue-ons and lock-ons. Protestors were beginning to establish

cooking facilities and infrastructure indicative of plans to remain for the long term. The effect was to seal off the whole of the centre of Westminster for normal business.

24 In those circumstances, at 0550 on 8 October, Superintendent McMillan imposed a condition under section 14(1) of the 1986 Act in the following terms:

> "Any assembly linked to Extinction Rebellion 'Autumn Uprising' and those linked to it who wish to continue with their assembly MUST go to Trafalgar Square the location of Burning Earth."

25 This condition was publicised by a notice, which contained a warning that the condition had been imposed by the "Senior Police Officer present" and that "[s]hould you fail to comply with the conditions you run a risk of being arrested and prosecuted". The legality of this condition was not in issue before us.

26 The condition of 8 October 2019 did not achieve its aim of preventing any further gatherings associated with XRAU because the evidence shows that XRAU continued to use tactics of evasion by moving between locations and then carrying out actions to cause further disruption. Their way of working was to "leave one part of the protest and rejoin another, reconstituting themselves and regrouping at locations on and off the footprint". Officers policing the protests reported that "a network of addresses and institutions supported them".

27 On 14 October 2019 Superintendent McMillan attended Bank junction in the morning and had seen a tailback of buses and spoken to passengers who explained the effect the disruption was having on them. When he returned to his base at Lambeth Police Station on the afternoon of 14 October, he reviewed reports about the current situation and intelligence reports of what was planned. He noted that Bank junction had been closed all day, causing serious disruption to the bus network and to traffic generally, and XR were by this time stating that they intended to carry out action against the London Underground network. (In April the protestors had considered pulling the emergency cords in crowded trains when they were in tunnels. In previous situations when tubes had stalled 6,000 people had to be evacuated through tunnels and 70 of them were taken to hospital.) Superintendent McMillan was concerned that the planned protest method would not only be "hugely disruptive to London and by association the nation… but it will also pose a severe threat to the safety of customers and staff". Finally, Superintendent McMillan considered a new piece of information, which he thought significant. It was an online communication posted by XR London at about 1800 on 14 October, advising protestors to adopt certain tactics. It said:

> "Be water, crowds split up into fast moving groups and pairs, that network via phones. You gather at particular spots in large numbers, until the police response building then you move to a new disruptive site."

28 In the light of all the information before him, Superintendent McMillan formed the judgment that it was necessary to impose a further condition under section 14 of the 1986 Act. He did so at 1900 on 14 October, in these terms:

> "Any assembly linked to the Extinction Rebellion "Autumn Uprising" (publicised as being from 7th October to 19th October at 1800 hours) must

> now cease their protest(s) within London (MPS & City of London Police Areas) by 2100 hours 14th October 2019."

29 The condition was publicised in a tweet from the Metropolitan Police Service ("MPS") Twitter account at 2152 on the same evening, together with a warning that "conditions have been imposed by the senior police officer present in order to prevent serious disruption to the life of the community" and that "[s]hould you fail to comply with the conditions you run the risk of being arrested and prosecuted".

30 In his witness statement, Superintendent McMillan described the intended effect of the condition in these terms:

> "…over the days 15th to 19th October, the XRAU could not continue, and… people seeking to take part in it would be in breach of the section 14(1) condition that I had imposed."

31 Superintendent McMillan's evidence is that, after the condition was imposed, the scale and impact of the XRAU lessened considerably. By 1800 on 18 October he had formed the view that the condition was no longer required and it was revoked.

32 Although the protests appear to have reduced after 14 October, they did not completely stop. Ms Chowns was arrested, on her evidence for breach of the condition alone. On the same day (14 October) a group of about 30 people gathered outside the Royal Courts of Justice. On 15 October, a group gathered at Millbank Tower before marching to Victoria and then on to Whitehall. Another group that had been at Vauxhall Pleasure Gardens for some days remained until 16 October, when it was cleared by police. On the same day, there was a meeting at Trafalgar Square at which Mr Monbiot spoke. He announced his intention to defy the condition, then sat down in the road and was arrested for breaching the condition and for obstructing the highway.

33 On 17 October, the London Underground network was disrupted at a number of stations and there were glue-ons and lock-ons which provoked a public response. There were various events including a meditation organised by XR Buddhists at Trafalgar Square and a "critical mass" cycle ride starting at the Serpentine and ending at Trafalgar Square. On 18 October, there was a protest at Oxford Circus and a man scaled Big Ben and remained there for over an hour. There were static protests outside Downing Street, on Horse Guards Road and at Finsbury Square and a procession along Whitehall.

34 It was common ground that, on the basis of all the information before him on 14 October 2019, Superintendent McMillan could reasonably conclude that XRAU "may result in serious disruption to the life of the community" for the purposes of section 14 of the 1986 Act. It was also common ground that the evidence before us showed that XRAU co-ordinated separate gatherings or events at different times and places around the Metropolitan and City of London police areas and would continue to do so from 14 to 19 October 2019. This, of course, does not answer the question whether the "gatherings or events" were one public assembly or separate public assemblies.

Issues

35 We are very grateful to Ms Kaufmann QC and Mr Skelt, and their respective legal teams, for their succinct and helpful written and oral submissions. It was apparent by the conclusion of the hearing on 24 October 2019 that the following matters were in issue: (1) whether the First, Second, Fifth and Sixth Claimants had standing to bring this claim (it being common ground that the Third, Fourth and Seventh Claimants had standing); (2) whether permission to apply for judicial review should be granted to those Claimants who had standing; (3) whether there was power to impose the condition on 14 October 2019 on the basis that XRAU was one public assembly for the purposes of section 14(1) of the 1986 Act; (4) if so, whether the condition was so uncertain in its effect that it was unlawful; and (5) what relief, if any, ought to be granted.

36 We should make it clear that we are not concerned in this case with the lawfulness of the arrests of any individuals or the merits of the prosecution or proposed prosecutions of any individuals.

Relevant materials and principles relating to standing

37 Section 31(3) of the Senior Courts Act 1981 provides:

> 'No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

38 Paragraph 5.3 of the Administrative Court Judicial Review Guide 2019 provides that "the sufficient interest is case specific and there is no general definition." In Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure* (OUP, 2013) it was noted that:

> "The courts have adopted an increasingly liberal attitude to both individuals and groups bringing judicial review claims in the public interest. If an individual or group seeking to represent the public interest demonstrates that they have a real and genuine interests in the decision under challenge, they are likely to have standing to bring a claim, although other factors to consider in this context will include the merits of the claim, the existence of better placed challengers, and the nature and reputation of the individual or organisation in question."

The common law right to protest

39 The importance of the common law right to protest was underlined recently in *R v Roberts (Richard)* [2019] 1 WLR 2577 (Lord Burnett CJ, Phillips and Cutts JJ), at [37]:

> "The long-established recognition in the United Kingdom of the value of peaceful protest, echoed in Lord Hoffmann's remarks [in *R v Jones (Margaret)* [2007] 1 AC 136], is a manifestation of the importance attached by the common law to both the right to protest and free speech: see,

> eg, *Hubbard v Pitt* [1976] QB 142 , 174D and 178, per Lord Denning MR; *Bonnard v Perryman* [1891] 2 Ch 269 , 284, per Lord Coleridge CJ (with whom Lord Esher MR, Lindley, Bowen and Lopes LJJ agreed); *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 , 297, per Lord Steyn; *R v Shayler* [2003] 1 AC 247 , para 21, per Lord Bingham; *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 , para 20, per Sedley LJ. In a free society all must be able to hold and articulate views, especially views with which many disagree. Free speech is a hollow concept if one is only able to express "approved" or majoritarian views. It is the intolerant, the instinctively authoritarian, who shout down or worse suppress views with which they disagree."

40 Before the enactment of the Public Order Act 1936 ("the 1936 Act"), the powers of the police to deal with assemblies were limited. There was a power to arrest if there was an actual or reasonably apprehended breach of the peace. Separately, there was a crime of unlawfully assembling in such a manner as to disturb the public peace: see *Kamara v Director of Public Prosecutions* [1974] AC 104.

Statutory control of assemblies and processions

41 The demonstrations organised by Sir Oswald Moseley in the 1930s led to the 1936 Act. Section 3(1) of the 1936 Act conferred on the chief officer of police a power to give directions to persons organising or taking part in "any public procession", imposing on them such conditions as appeared to him necessary for the preservation of public order. These could include conditions prescribing the route and conditions prohibiting the procession from entering any specified public place. If this power would not be sufficient to enable him to prevent serious public disorder, section 3(2) & (3) conferred an additional power to make an order prohibiting the holding of "all public processions or of any class of public procession" in a particular area for a period not exceeding 3 months. In London, this power was vested in the Commissioner of Police of the Metropolis and the Commissioner of the City of London Police and its exercise required the consent of the Secretary of State. Breach of conditions imposed under section 3(1), or an order made under section 3(2) or (3), was an offence. "Public procession" was defined in section 9(1) as "a procession in a public place". "Public place" was "any highway, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise".

42 Processions move but there was no equivalent power to regulate static assemblies, although sections 4 and 5 of the 1936 Act did make it an offence to have an offensive weapon or to use threatening, abusive or insulting words or behaviour (with the specified intent) 'at any public meeting'. 'Public meeting', by section 9(1), included 'any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise'.

The 1985 White Paper

43 On 16 May 1985, the Home Office and the Scottish Office published a White Paper: *Review of Public Order Law* (Cmnd 9510). It recognised at §1.7 that the "rights of

peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one" and announced the Government's concern to "regulate these freedoms to the minimum extent necessary to preserve order and protect the rights of others". Chapter 5 of the White Paper was concerned with static demonstrations and meetings. It explained that the powers in the 1936 Act "did not apply to static demonstrations, assemblies, or meetings, whether public or private", even though "three-quarters of the demonstrations in London which come to the attention of the police come into the category of static demonstrations". The examples given were "meetings, counter-demonstrations outside meetings, demonstrations outside embassies, lobbies of Parliament, pickets and demonstrations in support of pickets". The White Paper stated that "[s]ince 1980 some of the most serious public order problems have been associated with static demonstrations" (§5.1).

44 The Government considered that "it is no longer acceptable that [static demonstrations] should be completely exempt from the Public Order Act framework of controls" (§5.2). Nevertheless, the Government was concerned "not to extend statutory controls over static demonstrations any further than is strictly necessary". There was to be no "new power to ban static demonstrations" (§5.3). Instead, there would be a power to impose conditions on "static demonstrations in the open air, but not those in closed premises" (§5.5). The White Paper continued, at §5.6:

> "In order to prevent the imposition of conditions whose effect would be tantamount to a ban, the conditions which the police will be able to impose will be limited to the location, numbers and duration of a static demonstration. The police will not be able to prevent a demonstration from going ahead on the date and at the time planned by the organisers, but they will be able to impose conditions about its size, location and duration if they reasonably apprehend circumstances defined…"

The 1986 Act

45 Part II of the 1986 Act is entitled "Processions and Assemblies". Section 12 is headed "Imposing conditions on public processions", and provides:

> "12.—(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—
>
> (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
>
> (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,
>
> he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the

route of the procession or prohibiting it from entering any public place specified in the directions.

(2) In subsection (1) 'the senior police officer' means —

(a) in relation to a procession being held, or to a procession intended to be held in a case where persons are assembling with a view to taking part in it, the most senior in rank of the police officers present at the scene, and

(b) in relation to a procession intended to be held in a case where paragraph (a) does not apply, the chief officer of police.

(3) A direction given by a chief officer of police by virtue of subsection (2)(b) shall be given in writing."

46 A person who organises or takes part in a public procession, and knowingly fails to comply with a condition imposed under section 12, commits an offence, though it is a defence for him to prove that the failure arose from circumstances beyond his control: section 12(4) & (5). It is also an offence to incite another to take part in an assembly knowingly in breach of a condition: section 12(6).

47 Section 13(4) confers powers, in cases where the section 12 powers are insufficient, to make an order prohibiting '*all* public processions (or of any class of public procession so specified) in the area or part concerned' (emphasis added).

48 Section 14 headed "Imposing powers on public assemblies", conferred powers, for the first time, to regulate static assemblies. It provides as follows:

"14.—(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that—

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.

(2) In subsection (1) "the senior police officer" means —

(a) in relation to an assembly being held, the most senior in rank of the police officers present at the scene, and

> (b) in relation to an assembly intended to be held, the chief officer of police.
>
> (3) A direction given by a chief officer of police by virtue of subsection (2)(b) shall be given in writing."

49 A person who organises or takes part in an assembly, and knowingly fails to comply with a condition imposed under section 14, commits an offence, though it is a defence for him to prove that the failure arose from circumstances beyond his control, see section 14(4) & (5). It is also an offence to incite another to take part in an assembly knowingly in breach of a condition, see section 14(6).

50 Section 15 enables the chief officer of police to delegate any of his or her functions under sections 12-14A but only (as respects London) to an assistant commissioner of police.

51 When the 1986 Act was enacted, 'public assembly' was defined in section 16 as 'an assembly of 20 or more persons in a public place which is wholly or partly open to the air'. '2' was substituted for '20' by the Anti-social Behaviour Act 2003 so that the definition now reads "an assembly of 2 or more persons *in a public place* which is wholly or partly open to the air" (emphasis added). It is therefore necessary to consider what is a "public place". That is defined as "any highway… and… any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission".

52 The Criminal Justice and Public Order Act 1994 added a new section 14A to the 1986 Act, headed "Prohibiting trespassory assemblies". Insofar as relevant to London, that now provides:

> "14A.—(4) If at any time the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis reasonably believes that an assembly is intended to be held at a place on land to which the public has no right of access or only a limited right of access in his police area and that the assembly—
>
> (a) is likely to be held without the permission of the occupier of the land or to conduct itself in such a way as to exceed the limits of any permission of his or the limits of the public's right of access, and
>
> (b) may result—
>
> (i) in serious disruption to the life of the community, or
>
> (ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument,
>
> he may with the consent of the Secretary of State make an order prohibiting for a specified period the holding of all trespassory assemblies in the area or a part of it, as specified.

> (5) An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—
>
> (a) is held on land to which the public has no right of access or only a limited right of access, and
>
> (b) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access.
>
> (6) No order under this section shall prohibit the holding of assemblies for a period exceeding 4 days or in an area exceeding an area represented by a circle with a radius of 5 miles from a specified centre."

Relevant authorities on the 1936 and 1986 Acts

53 In *Kent v Commissioner of Police of the Metropolis* The Times, May 15, 1981, the Court of Appeal dismissed a challenge brought by Bruce Kent on behalf of the Campaign for Nuclear Disarmament to a condition imposed under section 3(3) of the 1936 Act prohibiting all processions in the Metropolitan Police District. It might be noted that the power exercised in that case was in the 1936 Act and related to processions.

54 In *Director of Public Prosecutions v Jones* [2002] EWHC 110 (Admin), the Divisional Court upheld a condition imposed under section 14 of the 1986 Act which prescribed permitted entrance and exit points for an assembly. That shows that an assembly may have an entrance and exit point but does not assist in determining the meaning of the words "public assembly".

55 In *Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480, [2005] HRLR 20 (the case was unsuccessfully appealed on other grounds, see [2009] UKHL 5; [2009] 1 AC 564), Tugendhat J held at [91] that the section 12 power to impose conditions on a public procession can be used to bring that procession to an end. It was not suggested that there was any reason why a different approach should apply to a condition imposed on a public assembly under section 14 and in *R (Moos) v Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin), [2011] HRLR 24, at [63], a condition imposed under section 14 of the 1986 Act was upheld that had the effect of bringing to an end an assembly that was blocking the highway. These cases show that, where the section 14 power is used in respect of a public assembly that is currently being held, the power to impose conditions as to "maximum duration" can be used to bring the assembly to an end. However, as the White Paper made clear, the purpose of the 1986 Act was not to confer a power to prohibit a public assembly that had not yet begun.

56 It should be noted that in section 14 there is an express power to impose conditions on intended public assemblies, but this is a power which, in London, may be exercised only by the Commissioner or, if delegated under section 15, the Assistant Commissioner, so it is not relevant to this case. It might be noted that there is a power to set a condition as to the "maximum duration" of the public assembly, but it was common ground that the maximum duration could not be zero.

57 *R (Jukes) v Director of Public Prosecutions* [2013] EWHC 195 (Admin) was an appeal by case stated from a conviction by a district judge at Westminster Magistrates' Court for breach of a condition imposed under section 12 of the 1986 Act in respect of a procession organised by the Occupy Movement. The Divisional Court considered what was a public procession and in particular focussed on the statutory language in section 12, some of which might have relevance to section 14. The Divisional Court said at [16]:

> "It is important to note that the conditions imposed pursuant to the power confirmed under section 12(1) are conditions which relate, as the section indicates, to a particular public procession. 'Public procession' is defined in section 16 of the Act to mean a procession in a public place. That it relates to a particular public procession is made clear by the identification within section 12(1) of the grounds upon which conditions may be imposed. The circumstances and the route on the basis of which a police officer's belief of risk must reasonably be founded route relate to a particular public procession."

58 At [17], it was noted that section 12(2)(a) was a "reference to a particular scene", which made it clear that "it is to a particular procession that the conditions must relate."

59 In *R (Brehony) v Chief Constable of Greater Manchester* [2005] EWHC 640 (Admin), the claimant challenged a condition imposed by the chief officer of police under section 14(2)(b) prohibiting his group from holding an assembly at a particular location. One of the grounds of challenge was a failure to give adequate reasons. In the course of considering that ground, Bean J said at [17]:

> "It seems to me that a distinction is to be drawn – and Mr Hossein-Bor accepted this – between a direction given under section 14(2((a) and a direction given under section 14(2)(b). A direction under section 14(2)(a) is given on the spot in relation to an assembly "being held" by the most senior in rank of the police officers present at the scene. Mr Hossein-Bor accepted that in those circumstances the duty to give reasons does not arise. If the officer says, "Stand on the other side of the footpath", and the demonstrators ask why, the answer may be, quite lawfully, "Because I say so". But the position is different, in my judgment, under section 14(2)(b). Parliament has drawn a distinction between an on-the-spot decision and a decision 'in relation to an assembly intended to be held'. In the latter case the direction must be given personally by the chief officer of police and must be given in writing."

Standing (issue 1)

60 It is common ground that the Third, Fourth and Seventh Claimants have standing to bring this claim. This is because the Third and Seventh Claimants were arrested in part for breach of the condition imposed on 14 October, and because the Fourth Claimant was the organiser for Tower Hamlets XR and was involved in moving from Trafalgar Square the "lost and found items" belonging to those who had taken part in the XRAU following the imposition of the condition.

61 In circumstances where it is apparent that there are Claimants with standing to bring this claim and address the relevant issues the Court will examine more critically the claims of the other Claimants to have standing. Mr Skelt submitted that there was no evidence that any of them were planning to protest after 14 October or were deterred from doing so or otherwise affected by the condition, but Ms Kaufmann submitted that there was no requirement to adduce evidence of that. Mr Skelt accepted (rightly in our view) that if there had been evidence showing that any of the First, Second, Fifth or Sixth Claimants had been deterred from protesting, that would have been enough to confer standing on them, but there was no such evidence. Furthermore, although the evidence shows that the First, Second, Fifth and Sixth Claimants are interested in and supporters of XR, there are other Claimants, being the Third, Fourth and Seventh Claimants, who are better placed to bring the claim. We therefore find that the First, Second, Fifth and Sixth Claimants do not have a sufficient interest to bring this claim.

62 It might be noted that this does not make any practical difference to the outcome or relief that the Court will grant in this case. However it is important to remind parties of the need to ensure that those who bring claims for judicial review are limited to those best placed to bring the claim. This is because adding unnecessary Claimants is likely to increase the costs of the litigation, if only by requiring solicitors to send out extra reports on the litigation. It is also because parties to an action are in a distinct position, for example by receiving a confidential draft of the judgment at a time when it is circulated to the parties for typographical and other corrections before it is handed down in Court.

Grant of permission to apply for judicial review (issue 2)

63 It is right to note that the condition imposed on 14 October 2019 was removed on 18 October 2019 and was due to expire in any event on 19 October 2019. However both parties accepted that the claim raised a relevant issue of statutory interpretation and submitted that the Court should determine this issue of statutory interpretation. We agree that it is necessary for the parties to know what is the proper interpretation of section 14(1) of the 1986 Act.

64 We grant permission to apply to those Claimants who have standing to bring this claim (being the Third, Fourth and Seventh Claimants). This is because, for the detailed reasons set out below, the claims are arguable. We refuse permission to apply to the First, Second, Fifth and Sixth Claimants because of our findings on standing.

The XRAU was not a public assembly in the presence of Superintendent McMillan on 14 October 2019 so that there was no power to impose a condition under the 1986 Act (issue 3)

65 It is common ground that the condition imposed by Superintendent McMillan on 14 October 2019 treated XRAU as one "public assembly". Ms Kaufmann on behalf of the Claimants submits that it is plain from the factual materials set out above that there were planned from 14 to 19 October 2019 many more public assemblies, at various distinct locations, all over the Metropolitan and City of London police areas. Mr Skelt on behalf of the Commissioner submits that the XRAU was in fact one public assembly, taking place in different locations over the whole of the Metropolitan and City of London police areas, and all planned and co-ordinated by XR. Both Ms Kaufmann and Mr Skelt relied on the natural interpretation of section 14 of the 1986 Act to support their respective and

opposing constructions of the word "public assembly". It is obvious that these rival interpretations of section 14 of the 1986 Act cannot both be right.

66 In our judgment, it is important to note the following words in section 14 and in the definitions in section 16. First the introductory words of section 14 refer to "the senior police officer". This is defined in relation to a public assembly being held (as opposed to a future intended public assembly) as "the most senior in rank of the police officers present *at the scene*" (emphasis added). This shows that there must be a "scene", and not a series of different scenes across the Metropolitan and City of London police areas. Secondly, "public assembly" is defined in section 16 to mean "an assembly of 2 or more persons *in a public place which is wholly or partly open to the air"* (emphasis added). This implies a location of which it is coherent to pose the question whether it is wholly or partly open to the air, and not a series of separate locations across the Metropolitan and City of London police areas. Thirdly "a public place" is defined as a place "to which *the public or any section of the public has access*" (emphasis added), which 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.

67 These words and phrases in sections 14 and 16 strongly support the interpretation that "a public assembly" must be in a particular location to which the public or any section of the public has access, which is wholly or partly open to the air, and which location can be fairly described as a "scene".

68 We consider that this interpretation is part supported by the approach taken in *R (Jukes) v Director of Public Prosecutions* at [17] to the word "scene" when used in section 12 of the 1986 Act (which, as we have indicated, is not materially different from section 14). The language of the power in section 14(1) to impose conditions on "any public assembly" mirrors that of the power in section 12(1) (itself based on section 3(1) of the 1936 Act) to impose conditions on "any public procession". The phrase "the most senior in rank of the police officers present at the scene" as used in section 12(2)(a) was said in [17] of *Jukes* to refer to a particular scene with the result that the procession referred to in section 12 must be a particular procession. By parity of reasoning, the "assembly" referred to in section 14 must, in our judgment, be a particular assembly.

69 A further difficulty with the Commissioner's interpretation of section 14(1) is that if, as was submitted, the public assembly included the whole of the Metropolitan and City of London police areas, it was plain that Superintendent McMillan, although a very senior officer, was not the most senior police officer present in the whole of the Metropolitan and City of London police areas. It was in our judgment impossible to suggest, as Mr Skelt did, that the "scene" should be Lambeth police station simply because that is where the response to XRAU was being co-ordinated by Superintendent McMillan. There was no "scene" there.

70 Another difficulty with the Commissioner's interpretation is that it would enable the police to prohibit intended future gatherings (provided only that they were sufficiently "linked to" gatherings currently being held to constitute part of the same "assembly"). Yet both the White Paper which preceded the 1986 Act and the language of section 14(1) itself make clear that there is no power to prohibit, rather than merely impose conditions upon, gatherings that have not yet begun.

71 A final difficulty with the Commissioner's proposed interpretation is that the 1986 Act as amended must now be read as a whole, including those provisions inserted after its enactment. There is a striking contrast in language between, on the one hand, sections 12(1) and 14(1) of the 1986 Act (which mirror section 3(1) of the 1936 Act and confer power to impose conditions in relation '*any* public assembly' and '*any* public procession') and, on the other, sections 13 and 14A of the 1986 Act (which mirror section 3(3) of the 1936 Act and confer power to make an order prohibiting the holding of '*all* trespassory assemblies' and '*all* public processions' within a specified area or part of it (emphasis added)). The difference between the singular and plural does not seem to be accidental. Where Parliament wished to confer power to impose conditions on *all* processions or *all* assemblies of a certain kind, it said so in terms. Further the power in section 14A of the 1986 Act, to impose a prospective area-wide ban on assemblies (plural) was confined to *trespassory* assemblies; there is no similar power in relation to *public* assemblies. Moreover, the section 14A power can be exercised only by the chief officer of police and then only with the consent of the Secretary of State; and it is subject to temporal and geographical limits. The interpretation contended for on behalf of the Commissioner would, if correct, permit section 14(1) to be used to impose a prospective area-wide ban on all public gatherings provided only they can be grouped under the umbrella of a single "assembly", and this power would be capable of being exercised by a police officer of any rank, provided only that he or she is the most senior of the officers present at "the scene", without the consent of the Secretary of State and without any temporal or geographical restrictions.

72 In our judgment a public assembly in section 14 must be 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. Separate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, are not one public assembly within the meaning of section 14(1) of the 1986 Act. This means that Superintendent McMillan purported to impose a condition not only on those public assemblies already in existence but also on intended future assemblies yet to be held. The XRAU intended to be held from 14 to 19 October 2019 was not a public assembly in the presence of Superintendent McMillan on 14 October 2019. Therefore the decision to impose the condition was unlawful because there was no power to impose it under section 14(1) of the 1986 Act. We will address the issue of relief to be granted under issue 5.

Not necessary to decide the certainty of the condition point (issue 4)

73 The Claimants criticise the condition imposed in this case as uncertain in two respects: first, the words '[a]ny assembly *linked to* [XRAU]' is too vague to enable anyone to know whether their planned demonstration will be caught; and secondly, the phrase 'must now cease their *protest*' makes it unclear what protestors have to do to avoid falling foul of the condition.

74 In the light of our conclusion on the first ground it is not necessary for us to determine this point, and we do not do so. This is because the condition was framed in the way it was because Superintendent McMillan wrongly believed that XRAU was "an assembly being held" on which he had power under section 14(1) to impose conditions. If he had correctly understood that a 'public assembly' referred to a single gathering of people in

a particular place, the condition would have been framed differently and there is no reason to suppose it would have included the elements criticised by the Claimants.

The relief to be granted (issue 5)

75 It is apparent that the condition imposed on 14 October 2019 was removed on 18 October 2019 and would, in any event, have expired under its own terms on 19 October 2019. What was challenged in this claim was, however, the decision to impose that condition. We have held that the decision to impose the condition was unlawful because Superintendent McMillan had no power to impose it under section 14(1) of the 1986 Act. The usual relief in such situations is a quashing order to quash the challenged decision to impose the condition, and we make such an order.

Other matters

76 It was common ground that there are powers contained in the 1986 Act which might be lawfully used to control future protests deliberately designed to "take police resources to breaking point", to use the words set out in the October Rebellion Action Design. However the extent and conditions for use of those powers are not issues before us in this claim and we say no more about them.

Conclusion

77 For the reasons set out above in our judgment: (1) the Third, Fourth and Seventh Claimants, but not the First, Second, Fifth and Sixth Claimants, have standing to bring this claim for judicial review; (2) the Third, Fourth and Seventh Claimants should be granted permission to apply for judicial review, but the First, Second, Fifth and Sixth Claimants should be refused such permission; (3) the XRAU was not a public assembly at the scene of which Superintendent McMillan was present on 14 October 2019, so that there was no power to impose a condition under section 14 of the 1986 Act; (4) it is not necessary to decide whether the condition was sufficiently certain as to be lawful; (5) Superintendent McMillan's decision to impose the condition on 14 October 2019 will be quashed.