iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

UK HUMAN RIGHTS CHALLENGES IN THE TIME OF COVID-19

Jamie Grace[1]

INDEX

1. INTRODUCTION TO THE UK CONTEXT
2. THE SIGNIFICANT JUDGMENT OF THE COURT OF APPEAL IN *DOLAN*
3. DISCRETION AFFORDED TO POLICYMAKERS DURING A PANDEMIC
4. HUMAN RIGHTS AND STANDARDS OF 'REASONABLENESS'
5. A CONCLUDING THOUGHT ON COVID-19 AND THE RULE OF LAW

1. INTRODUCTION TO THE UK CONTEXT

This piece explores the way that administrative law and judicial review cases, including claims for violations of the European Convention on Human Rights (1950) ('the ECHR'), whether resolved before a hearing or otherwise, have shaped the way that the UK government has been held to account during the coronavirus pandemic. As Tom Hickman QC has explained, the UK government, unlike some other European executives and administrations, did not seek to derogate from the any fundamental rights under the ECHR using Article 15 ECHR procedures, even if, as the European Court of Human Rights has held in *Lawless v Ireland (No.3) (1961)*, that derogation is possible in a situation comprising a "crisis or emergency which affects the whole population and constitutes a

[1] Sheffield Hallam University

Copyleft – Ius Publicum

threat to the organised life of the community"[2]. There is a vocal lobby in opposition to the 'lockdown' measures deployed by the UK government that, despite 126, 000 coronavirus deaths at the time of writing, argues that the true 'threat to the organised life of the community' is in fact the deployment of 'lockdown' laws themselves. This is not to say that there have not been serious concerns about the human rights impacts of a very wide range of coronavirus restrictions (some of which are discussed below), and considerable constitutional impropriety from the UK government at times. In Lord Sumption's words, the "sheer scale on which the government has sought to govern by decree, creating new criminal offences, sometimes several times a week on the mere say-so of ministers, is in constitutional terms truly breathtaking"[3].

Judicial review claims in the UK throughout the 2020-21 pandemic phase have highlighted both the social justice and the civil liberties issues with the government response to the impact and seriousness of COVID-19[4]. These legal claims have been based around Human Rights Act grounds, and sometimes on wider international human rights law instruments, and also on traditional common law grounds of review; such as irrationality, failure to consult, and other types of illegality ground. The COVID-19 pandemic has shown us the multitude of ways in which drastic public health policy can undermine human rights even as it brings legislative measures that are taken to protect us from a virulent disease, given the all-too-often fatal consequences for those who are infected. As shown in the important Court of Appeal judgment in the 'lockdown' case of *Dolan*, discussed below,

[2] See Tom Hickman QC, 'The coronavirus pandemic and derogation from the European Convention on Human Rights', E.H.R.L.R. 2020, 6, 593-609; quoting the judgment of the Strasbourg Court in *Lawless v Ireland (No.3)* (1961) 1 E.H.R.R. 15 at 28.

[3] Jonathan Sumption, *Law in a Time of Crisis*, Profile Books, 2021, 228.

[4] On procedural impacts of the pandemic, see Joe Tomlinson, Jo Hynes, Emma Marshall, and Jack Maxwell, 'Judicial review during the COVID-19 pandemic', P.L. 2021, Jan, 9-19.

Copyleft – Ius Publicum

rights under the European Convention on Human Rights (1950), and taking effect in the UK through the Human Rights Act 1998, work on the basis of a variety of structures and degrees of importance and protection, depending on the rights concerned. The range of ECHR rights interfered with, through the coronavirus pandemic, has been very great indeed. And yet there have been constitutionally drastic inroads into the rule of law in the UK in the last 12 months, too. As a result, this piece concludes with a short discussion of the importance of the values and operation of the rule of law during a time of crisis such as in the current pandemic.

I was motivated to write a first draft of this piece on the 8th December 2020, as hopeful news broke of the first person in the UK, Margaret Keenan, being vaccinated against COVID-19 outside of a trial programme, and using a vaccine developed by Pfizer/BioNTech. Very sadly, many more deaths related to the coronavirus pandemic lie ahead, globally and in the UK itself. The emergence of more transmissible strains of COVID-19 saw rates of deaths and hospitalisations both increase in the winter of 2020-21 in the UK, necessitating a third, lengthy 'lockdown' by way, once more, of ministerial health protection regulations - approved by the UK Parliament on the 6th January 2021.

Joshua Rozenberg has explained that following the landmark judgment in *Miller No. 2* on the (non-)prorogation of Parliament in late 2019[5], an advocate in the case made the point to him that "the thing about great cases is that what once seemed impossible now seems inevitable"[6]. It would seem that the thing about pandemics is that what once seemed impossible now seems inevitable. Across the UK, secondary legislation has been used to impact on the freedoms, liberties, health, education and labour of tens of millions of people, largely without Parliamentary scrutiny at the time of restrictions coming into force; albeit

[5] *R (Miller and others) v Prime Minister* [2019] UKSC 41

[6] Anonymous, in Joshua Rozenberg, *Enemies of the People? How judges shape society*, Bristol University Press 2019, 189.

Copyleft – Ius Publicum

with the overarching goal of preserving the function and integrity of the National Health Service (NHS), and with it, preserving life and meeting substantive Article 2 ECHR obligations on a mass scale. But as a result, many different ECHR rights have been affected on a similarly mass scale and in novel, unexpected ways, due to the impact of COVID-19 and the measures taken to suppress it in the UK.

The coronavirus pandemic of 2020-201 has arguably 'engaged' the absolute right to freedom from inhuman or degrading treatment under Article 3 ECHR, for example, when families have been prevented from visiting vulnerable loved ones in residential care, thanks to a lack of 'personal protective equipment' (PPE), or the lack of accurate, accessible and prompt testing of possible cases, or both. At the same time, and in particular in the spring of 2020, twenty thousand estimated coronavirus deaths in adult residential case homes occurred in the 'first wave' of the pandemic in the UK, leading to claims of a violation of the 'operational' duty on the state to preserve life under Article 2 ECHR[7]. At the time of writing, as of 26th March 2021, at least 126, 000 people, most with underlying health conditions, had succumbed to coronavirus-related deaths in the UK alone. Alongside this stark reading of the pandemic in the UK, the argument has been made that the fall in access to and provision of NHS services concerning, amongst other things, cancer care and treatment have raised other Article 2 ECHR issues due to a fall in screening and diagnosis during the earlier waves of the pandemic[8].

As phases of the pandemic have progressed, a number of judicial review cases have received national media coverage in the UK, as the pandemic has continued into a 'second wave' in the UK, from September 2020 onwards. For example, the Doctors'

---

[7] See https://www.clydeco.com/en/insights/2020/11/permission-granted-for-judicial-review-of-covid-19 (accessed 08.12.2020).

[8] See for example, in Miroslav Baros (2020), 'The UK Government's Covid-19 Response and Article 2 of the ECHR *Laws* 2020, *9*(3), 19; https://doi.org/10.3390/laws9030019

Copyleft – Ius Publicum

Association UK began a JR claim over the shortage of NHS PPE, focusing on the need for a public inquiry, raised by allegedly insufficient protection from viral infections[9]. In terms of human rights grounds and freedom of religion, Catholic worshipper Lauren Monks challenged the 'lockdown' Regulations in their different iterations, and at a point before their restrictions began to be eased, resulting in some consideration that restrictions on religious worship in larger gatherings may have been unlawful[10]. And perhaps most prominently amongst those claims to be granted a full hearing to date in the High Court in England and Wales, microbiologist Dr Cathy Gardner has sought JR of alleged decisions, and a policy failing, to discharge untested and possibly-COVID-19-infected patients from hospitals into adult residential care homes; the site of arguably the most horrible and preventable loss of life in the pandemic within the UK[11].

In terms of broader international human rights standards, there have been challenges to policy arising from the impact of the pandemic in situations where instruments like the United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCRPD) or the UN Convention on the Rights of the Child 1989 (UNCRC) apply. This might be only in an interpretive sense, given the dualist UK constitution, since these instruments are non-incorporated international instruments, meaning that findings of violations of rights in the context of claims involving ECHR rights can be so 'fortified'[12]; or

[9] See https://www.theguardian.com/society/2020/jun/08/uk-ministers-face-legal-challenge-for-refusal-to-order-ppe-inquiry (accessed 08.12.2020)

[10] See https://catholicherald.co.uk/high-court-judge-rules-that-public-mass-ban-may-have-been-illegal/ (accessed 08.12.2020)

[11] See https://www.theguardian.com/world/2020/jun/12/matt-hancock-faces-legal-action-from-daughter-of-covid-19-care-home-victim (accessed 08.12.2020)

[12] *Per* Mostyn J, in *R (RF) v SSWP* [2017] EWHC 3375 (Admin) at 60. Mostyn J was explaining how submissions on the application of Article 19 UNCRPD helped him reach

Copyleft – Ius Publicum

that these instruments might be more broadly justiciable in the sense of accountability over breaches of an aligned UK statute, such as with the Care Act 2014 with regard to the UNCRPD, for example.

In one recent action, disabled man Luke Runswick-Cole successfully threatened Derbyshire Council with a judicial review claim over their proposed reductions in Care Act-related provision in the pandemic, on the basis of a lack of necessity of those plans[13]. This successful pre-action example, in the context of the standards under the UNCPRD, was followed by a successful claim in a different case, in the end, for the charity Article 39. The charity had started a judicial review claim relating to pandemic-prompted regulations which allowed for a reduction in safeguards around the rights of young people, like inspections of children's homes, and were granted permission for a hearing[14]. After an initial defeat for the charity in the High Court stage of the case, in a reversal of that decision, the Court of Appeal held in *R (Article 39) v SSfE* [2020] EWCA Civ 1577 that the creation of changes to inspections of children's care accommodation was unlawful, since it did not take place with sufficient consultation either with the Children's Commissioner or with other key interested bodies, and that there had been a duty to consult that still applied during the pandemic. In an even more high-profile case, food charity Sustain sent a pre-action protocol letter over a lack of free school meals over the 2020 summer period for

---

conclusions as to the unlawfulness of an interference with Article 8 and Article 14 ECHR rights in that case.

[13] See https://rookirwinsweeney.co.uk/challenging-derbyshires-care-act-easements/ (accessed 08.12.2020)

[14] See https://www.independent.co.uk/news/uk/politics/children-care-coronavirus-sexual-abuse-anne-longfield-a9551596.html and https://article39.org.uk/2020/06/26/removal-of-safeguards-for-children-in-care-judicial-review-given-go-ahead/ (both accessed 08.12.2020)

Copyleft – Ius Publicum

poorer children[15] - and eventually a government U-turn followed after a famous, and very effective, intervention from campaigner and footballer Marcus Rashford[16].

2. THE SIGNIFICANT JUDGMENT OF THE COURT OF APPEAL IN *DOLAN*

The first UK lockdown regulations (the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350)) were tough in their effects, and restricted the enjoyment of many ECHR rights on the part of tens of millions of people in England; while other parts of the UK faced similar restrictions, in turn, in the spring of 2020. There have been a number of permutations of 'lockdown' regulations in England alone[17], and even more variation when we look across the UK as a whole, but while the combined effect of these restrictions by way of secondary legislation may have been lawful, in the sense of not being *ultra vires* their statutory underpinnings (the *Public Health (Control of Disease) Act 1984)*, they have certainly been the most significant shift in living conditions, as a matter of law, in any peacetime period of government in the UK in modern times. This section of this paper highlights the way in which the Court of Appeal addresses these sorts of wider, more universal impacts on human rights in the UK, as stemming from coronavirus-related restrictions, in *R (Dolan and others) v SSHSC* [2020] EWCA Civ 1605.

[15] See https://www.bbc.co.uk/news/education-52931665 (accessed 08.12.2020)

[16] See https://www.bbc.co.uk/news/uk-england-53079784 (accessed 08.12.2020)

[17] Barrister Adam Wagner had tracked 64 sets of changes to English lockdown rules by the 12th January 2021, for example. See: https://www.theguardian.com/world/2021/jan/12/england-covid-lockdown-rules-have-changed-64-times-says-barrister (accessed 27.01.2021)

Copyleft – Ius Publicum

Simon Dolan, a successful businessman, was affected as so many others were, in suffering significant interferences with their ECHR rights thanks to the strictures of 'full lockdown'[18], when, in essence, leaving one's residence could only be done lawfully with 'reasonable excuse' and gatherings with others from outside of one's household were criminalised. The Court of Appeal, however, dismissed all of Dolan's Human Rights Act-based grounds. Presented here are snippets of the reasoning that the judgment provided in *Dolan* for rejecting this claim, Article by Article, in ECHR terms:

- In *Dolan*, with regard **Article 5 ECHR**, the Court of Appeal found that there had been no unlawful interference with the right to liberty in the original coronavirus 'lockdown' beginning in March 2020, explaining at [93] that: "…it is a mischaracterisation to refer to what happened under the regulations as amounting in effect to house arrest or even a curfew."[19]

- With regard to the effect of the original 'lockdown' on family life, and in terms of impacts on **Article 8 ECHR** rights through an inability to meet loved ones, the

[18] A successful claim for a violation of ECHR rights starts with the courts establishing a 'victim' of interferences with the right or rights concerned. In relation to an application lodged with the European Court of Human Rights in April 2020, *Le Mailloux v. France* (application no. 18108/20), the claimant could not show that had been personally affected in their healthcare by French measures to deal with coronavirus, so they did not meet the requirements or Article 34 ECHR.

[19] In *R (Francis) v SSHSC* [2020] EWHC 3287 (Admin), the regulations requiring self-isolation following a positive test for SARS-COV-2 were challenged as to their lawfulness. But the High Court found that the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020 No 1045) were lawfully made.

Copyleft – Ius Publicum

Court of Appeal found in *Dolan* [at 96] that: "There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate."

- On **Article 9 ECHR**, and impacts of restrictions on the right to manifest religious beliefs through communal worship indoors, the Court of Appeal in *Dolan* reserved judgement, since the Court was aware of a substantive hearing pending (at the time of handing down judgment in *Dolan* on 1st December 2020) in relation to *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin).[20]

- On **Article 11 ECHR**, the Court of Appeal found in *Dolan* [at 103] that: "…the regulations cannot be regarded as incompatible with article 11 given the express

[20] However, in *Hussain*, the High Court found that the lockdown restrictions on communal worship in mosques and other communal faith meetings were lawful, and proportionate. Swift J considered [at 21-22] that: "What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess… In the circumstances of the present case, the issue is not whether it is more important, for example, to go to a garden centre than to go to communal prayer; the issue is not whether activities that are now permitted and those that are prohibited are moral equivalents. Rather, the question is as to the activities that can be permitted consistent with effective measures to reduce the spread and transmission of the Covid-19 virus; that so far as they interfere with Convention rights, strike a fair balance between that inference and the general interest. That will be a delicate assessment. There will be no single right answer. The Secretary of State is entitled, in my view, to adopt a precautionary stance."

Copyleft – Ius Publicum

possibility of an exception where there was a reasonable excuse [to avoid a fine, when meeting others]. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March [2020]."

- On **Article 1 of the First Protocol** to the ECHR, the Court of Appeal found in *Dolan* [at 110] on the impact on businesses that: "…it is impossible to conceive that there was a disproportionate interference with the right in A1P1. The margin of judgement to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case. Furthermore, the balance to be struck under this A1P1 [sic] would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic."

- On **Article 2 of the First Protocol**, and given that schools and typically remained open to the children of key workers during the pandemic in the UK in 2020, and as some teaching continued online and remotely, the Court of Appeal found in *Dolan* [at 113-114] that: "…article 2 of the First Protocol, reflecting a theme which runs throughout the Convention, envisages a fair balance having to be struck between the rights of the individual and the general interests of the community. In the exceptional circumstances of the pandemic, there is no arguable ground on which a court could interfere with the actions of the Government in this respect."

3. DISCRETION AFFORDED TO POLICYMAKERS DURING A PANDEMIC

The decision of the Court of Appeal in *Dolan* recognises that 2020 saw wide-scale human rights impacts, and interferences with a number of ECHR, but not unlawful interferences, to date, given the justification available to the courts on the basis of an important public health rationale. So far, UK government responses to unprecedented challenges caused by a respiratory virus pandemic, that is far more fatal to the elderly and

Copyleft – Ius Publicum

the chronically unwell, have received benevolent treatment from the judiciary in England and Wales. In terms of wider avenues of accountability, it remains to be seen what the outcomes of a future public inquiry report might be, of course[21]. However, the issue remains that government ministers have been able to defend themselves against a range of judicial review claims based on human rights grounds, essentially by drawing on i) the flexibility of a precautionary approach to proportionality in the pursuit of health protection, ii) the principle in administrative law of executive discretion, and iii) the 'margin of appreciation' doctrine in relation to the ECHR, and as seen from the perspective of the European Court of Human Rights. In recognising these factors, and when scrutinising government health protection policy in the pandemic from a human rights perspective, the UK courts have already begun to accept arguments about COVID-19 impacts based on recognition of policymaker discretion. For example, in *Dolan* the Court of Appeal highlighted [at 97] that:

> "In this context [of impacts on qualified ECHR rights in a pandemic] we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither

[21] On 17th March 2021, a group of families bereaved as a result of COVID-19 issued a pre-action protocol letter to the UK government, demanding a decision is made to announce a public inquiry into pandemic preparedness, the issue of border control and travel restrictions (or the lack of them with regard to the ports and airports of the UK), and the timing of lockdowns. See https://www.theguardian.com/world/2021/mar/17/bereaved-families-issue-legal-ultimatum-to-boris-johnson-over-covid-inquiry (accessed 25.03.2021)

Copyleft – Ius Publicum

> here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."

Furthermore, as a sort of interpretative fix, or a safeguard in the event of future lockdown restrictions which are not judged to be so proportionate at some given point, the Court of Appeal in *Dolan* also took pains to highlight the strength of the human rights law framework in the UK. This of course includes an obligation on the courts to 'read into' legislation a degree of relevant protection for ECHR rights, even when applying primary legislation like an Act of Parliament, and certainly when applying and interpreting a statutory instrument like the 2020 'lockdown' Regulations. On this requirement of section 3 of the Human Rights Act 1998 (the HRA) and the lockdown Regulations, the Court of Appeal in *Dolan* noted [at 106] that:

> "…the HRA is primary legislation, whereas the regulations are subordinate legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right…"

So while the observance of a doctrine of recognising policymaker discretion presumably has its limits for the UK judiciary, so long as lockdown restrictions continue to be made under secondary legislation and in a way that aspires or purports to be proportionate, and is reviewed by Parliament on a proper basis, the UK courts will reassure themselves that COVID-related restrictions can be 'read down' if necessary to ensure ECHR compliance. However, this does not alleviate the everyday experience for tens of millions of people in relation to the restrictions involved in the pandemic response, or its enforcement. And in relation to the 2020-21 pandemic, the UK government will not be able to easily brush off claims that there have been violations of the right to life, and in particular the positive obligation to preserve life under Article 2 ECHR; or to protect the right to respect for private and family life under Article 8 ECHR. More evidence about the human rights impacts of the pandemic is coming to light, in this regard. For example, there has been a shocking report by the Care Quality Commission (CQC) which found that

Copyleft – Ius Publicum

decision-making by clinicians was at times poor with regard to 'do not attempt cardio-pulmonary resuscitation' (DNACPR) notices being placed on patients records. This report found that "increased pressure on staff time and resource due to the pandemic meant that conversations about people's care [and DNACPR notices] were often taking place at a much faster pace in busier settings", while the CQC also "heard evidence from people, their families and carers that there had been 'blanket' DNACPR decisions in place"[22]. This creates a severe risk of violations of the ECHR rights of dying patients and their families, as the CQC has explained:

> "Though clinicians can make DNACPR decisions, if these decisions are made in ways that do not protect people's rights to life, it is possible that this may be a breach of Article 2. This may happen, for example, by putting a DNACPR decision in place without the knowledge of the person and/or those close to them and then failing to provide CPR should the person's heart stop beating. Not consulting with the person or their representatives when making a DNACPR decision also risks breaching Article 8 of the of the European Convention on Human Rights, which protects their right to respect for their private and family life."[23].

4. HUMAN RIGHTS AND STANDARDS OF 'REASONABLENESS'

Article 2 ECHR case law concerning positive obligations to take steps to preserve life can turn on what is *reasonable*, as highlighted below, and what is reasonable can be

[22] Care Quality Commission, *Protest, respect, connect - decisions about living and dying well during COVID-19: Final report*, March 2021, 11.

[23] Care Quality Commission, *Protest, respect, connect - decisions about living and dying well during COVID-19: Final report*, March 2021, 15.

Copyleft – Ius Publicum

hard to determine when there are few comparators. As Oswald and Grace have recently explained in a short comment article for the UK journal *Public Law*, on the human rights obligation to create a functioning COVID-19 tracing app, and contact tracing systems more generally, "[t]here is doubt, however, as to whether art.2 obliges *particular* measures to be taken to prevent infection."[24] For example, needle sterilisation tablets provided in UK prisons were not an unlawful alternative to needle exchange programmes, as determined in the European Court of Human Rights case of *Shelley v United Kingdom (2008) 46 E.H.R.R. SE16*. Under Article 2 ECHR, the positive obligation on the state to take preventive steps, where a real and immediate risk to life exists, is not without practicable limit, and is to be measured by the administrative law concept of *reasonableness*. As Dyson LJ explained in *R. (on the application of Rabone) v Pennine Care NHS Foundation Trust [2012] UKSC 2; [2012] 2 A.C. 72* at [43], the "standard demanded for the performance of the operational duty is one of reasonableness". What is *unreasonable* will be highly contextual: and in the case of SARS-COV-2, the full context will often mean taking into account the age of those infected, and who might be far more likely to die, based on 'co-morbidities' such as excess weight, diabetes, pre-existing lung/respiratory and heart/vascular diseases, and so forth.

So the protection of the most vulnerable in the case of COVID-19 infection is, from a perspective of Article 2 ECHR positive obligations, about the reasonableness, or unreasonableness, of measures, or inactions, in *protecting those most at risk*, based on what authorities knew or ought to have known, as at particular points in time, and even between different phases of the pandemic. It is for these reasons that the most controversial judicial review started in 2020 is likely to be a case now set to be heard in the spring of 2021, whatever the extent of the UK 'second wave' of COVID-19. This is the application for judicial review made by Dr. Cathy Gardner in relation to arguable Article 2 ECHR failings in advance of the peak of the 'first wave' of the pandemic as it occurred in the UK,

[24] Marion Oswald and Jamie Grace, 'The COVID-19 contact tracing app in England and "experimental proportionality"', P.L. 2021, Jan, 27-37, 31.

Copyleft – Ius Publicum

concerning the discharge of (untested) possibly-COVID-19-infected patients from hospitals into care homes, thought to have led to so many untimely and early deaths of older people.

5. A CONCLUDING THOUGHT ON COVID-19 AND THE RULE OF LAW

Most of the restrictions on the full exercise of qualified ECHR rights during the UK coronavirus pandemic have been less-than-ideally scrutinised by Parliament and the courts. The defence that HM Government will use if further challenged on this, that the use of secondary legislation allows for quicker lawmaking when a rapid response of variation of the applicable rules is needed to preserve more lives, will seem weak, given the repeated delays by government in deciding to act to restore lockdown in the crucial days of late December 2020, and the first few days of January 2021. However, it must be said that there is a crucial and material difference between the effect on the rights of individuals in England and Wales, say, brought about by this use of secondary legislation to create COVID-related restrictions for so many people; versus the kind of denial of access to justice, and breach of the rule of law, represented by the use of secondary legislation that was used to increase employment tribunal fees, and which were quashed in *R (UNISON) v Lord Chancellor* [2017] UKSC 51. The UK constitution preserves the supremacy of the rule of law in a Parliamentary democracy, as a kind of meta-principle which is seen in application through the facilitation of access to justice in the outcome in *UNISON*. The most fundamental extension of the meta-principle of the rule of law is the way that the courts are empowered to ensure the democratic functioning of the Parliamentary system (witness the unanimous stance of the 11-member panel of the Supreme Court in *Miller No.2* determining in late 2019 that Parliament not been prorogued lawfully or otherwise). In *UNISON* [at 68] the Supreme Court explained that:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the

> Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them."

In *Dolan*, by way of contrast, qualified ECHR rights are applied in a way that tests the proportionality of coronavirus-related restrictions; and through the judicial review of these restrictions, despite the rejection of claims those restrictions are disproportionate, we can see strong jurisprudential evidence that the rule of law is at least intact, even if confidence in HM Government is shaken. It remains to be seen what further reputational damage the Johnson government can withstand through the period of the pandemic, and how that might transfer to its electoral fate. The eventual outcome of the Article 2 ECHR claim for judicial review made by Dr. Cathy Gardner in relation to coronavirus deaths in care homes in 2020 may be highly influential in this regard.

Copyleft – Ius Publicum