

# A DISPROPORTIONATE INTERFERENCE WITH RIGHT AND FREEDOMS

## THE CORONAVIRUS REGULATIONS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*In the course of history, men come to see that iron necessity is neither iron nor necessary.*

Friedrich Nietzsche

### Introduction and summary

- 1 The ‘lockdown’ imposed by the government to contain the spread of the coronavirus<sup>1</sup> has been enforced mainly through the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (‘the Regulations’). These regulations were imposed under powers delegated by the Public Health (Control of Disease) Act 1984 (‘the 1984 Act’). The Coronavirus Act 2020 (‘the 2020 Act’) is largely concerned with other measures intended to deal with the virus or to ameliorate its effects, including loosening regulations to enable more medical practitioners to practise, delaying regular elections to 2021 and enabling live links in criminal proceedings. The Act does, however, include powers to close educational establishments, which will be considered in this article.<sup>2</sup>
- 2 In recent articles Lord Anderson QC,<sup>3</sup> Robert Craig,<sup>4</sup> Tom Hickman QC, Emma Dixon and Rachel Jones<sup>5</sup> and Lord Sandhurst QC and Benet Brandreth QC<sup>6</sup> have argued that the Regulations were or may have been *ultra vires* as secondary legislation that went beyond the delegated powers under Pt 2A of the 1984 Act. In turn, Prof Jeff King has argued that the delegated powers were exercised lawfully.<sup>7</sup> It is the view of the author that the arguments against the *vires* of the legislation on that ground are more convincing. The powers to make secondary legislation delegated by the 1984 Act do not envisage restricting the whole population to their houses; and Hickman *et al* argue that the Regulations purport to authorise the tort of false imprisonment, powers the 1984 Act cannot have delegated in the absence of clear words.<sup>8</sup>

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<sup>1</sup> In the 2020 Act “coronavirus” is defined as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2); and “coronavirus disease” as ‘COVID-19’, the disease which can be caused by coronavirus: s 1(1).

<sup>2</sup> This article considers only the provisions in the Act and the Regulations applying to England and, where applicable, England and Wales; and concerns only the law of England and, where appropriate, England and Wales. My thanks and apologies to Daniel Hannan for alerting me to the opening quote.

<sup>3</sup> ‘Can we be forced to stay at home?’ (<https://www.dagc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/>) 26.3.2020.

<sup>4</sup> ‘Lockdown: a response to Professor King’ (<https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/>), 6.4.2020.

<sup>5</sup> ‘Coronavirus and Civil Liberties in the UK’ ([https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#\\_edn4](https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4)), 6.4.2020.

<sup>6</sup> ‘Pardonable in the Heat of a Crisis – Building a Solid Foundation for Action’ ([https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359\\_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf](https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf)), 16.4.2020 (Lord Sandhurst practised at the Bar as Guy Mansfield QC).

<sup>7</sup> ‘The lockdown is lawful and proportionate’ (<https://ukconstitutionalaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>), 1.4.2020.

<sup>8</sup> At para 35, citing *R (Jalloh) v Home Secretary* [2020] UKSC 4.

- 3 This article does not address that question. Rather, it considers whether the Regulations and the executive act authorising school closures under the 2020 Act: (a) engage any of the rights protected by the European Convention on Human Rights ('the Convention'); and (b) if so are nevertheless lawful as a proportionate means of dealing with a public health crisis. If incompatible with the Convention, the Regulations and executive orders must be disapplied if necessary to avoid a breach of s 6 of the Human Rights Act 1998 ('the HRA').<sup>9</sup> This was a question considered by King in a second article,<sup>10</sup> to which this article is in part a response.<sup>11</sup>
- 4 It is the conclusion of the author that the restrictions undoubtedly engage a number of Convention rights, at least to family and private life (Article 8), religious practice (Article 9), association and assembly (Article 11), property (Article 1 of Protocol 1) and education (Article 2 of Protocol 1) and probably to liberty (Article 5); that they represent an unprecedented intrusion into the freedoms and livelihood of the public at large; that they are a disproportionate response to the public health crisis; that the government has unreasonably fettered its discretion in discharging its duty to disapply the restrictions where proportionate through the adoption of over-rigid and unreasonable tests;<sup>12</sup> and that the restrictions will become more disproportionate the longer they continue in force, escalating the harms they cause. In implementing and not terminating the restrictions, the government appears to have failed to consider (adequately or at all) whether they are, as the law requires, the least regressive acceptable in a democratic society, given their object.
- 5 The measures are, as Hickman *et al* remark, the most extreme restriction on liberty that have been imposed on the public in modern times. They have been forecast to cause GDP to decline further than at any time since the Great Depression,<sup>13</sup> thereby causing great harm to the livelihoods and health of millions. And they are causing ever more damage to the education and prospects of a generation of schoolchildren and students. While proportionality must be considered in the light of evidence of the positive effect of the restrictions measured against the harms (including the expert evidence of scientists modelling the effect of the restrictions on the spread of the virus), that evidence is far from unanimous and is much more uncertain and equivocal than is generally recognised. Restrictions of this magnitude and duration, that received no Parliamentary scrutiny,<sup>14</sup> are not a proportionate and lawful response even

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<sup>9</sup> Human Rights Act 1998 ('HRA'), ss 2, 3 and 6.

<sup>10</sup> The lockdown is lawful and proportionate, Part II' (<https://ukconstitutionalaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/>) 2.4.2020.

<sup>11</sup> The Regulations will not be set out in detail here and the reader is referred to the above articles, in which they are well summarised.

<sup>12</sup> Announced by the First Secretary of State on 16.4.2020, see paras 66-72, below.

<sup>13</sup> By the Office for Budget Responsibility: <https://www.theguardian.com/business/2020/apr/14/uk-economy-could-shrink-by-35-with-2m-job-losses-warns-obr>.

<sup>14</sup> The Regulations were passed under powers delegate by s 45R of the 1984 Act. While this requires that any such regulations cease to have effect after 28 days in the absence of a positive resolutions in both Houses, s 45R(6)(a) provides that that 28 day period does not include any period within which Parliament is prorogued, dissolved or not sitting for more than four days. Those resolutions have yet to be passed; and, given that Parliament has not yet sat since the Regulations have passed, the period will only include days in which it sits and periods of less than four days between each sitting. In contrast, periods provided for under the Civil

to a public health crisis of this seriousness.

### **The failure to use delegated powers under the Civil Contingencies Act**

- 6 Before considering whether the Regulations and educational closures engage Convention rights and are proportionate, two important matters appear relevant. The first is that, while the government chose to exercise delegated legislative powers under the 1984 Act, the Regulations could more naturally have been justified as regulations made under the Civil Contingencies Act 2004 ('the CCA'). These powers may be exercised in an 'emergency', which includes 'an event or situation threatening serious damage to human welfare in a place in the United Kingdom' (s 1(1)(a)). While there is a divergence of view about the gravity of the threat of the coronavirus and the proportionality of measures intended to reduce its spread, it would appear to satisfy this criterion throughout the United Kingdom.<sup>15</sup>
- 7 The CCA empowers emergency regulations, which may be exercised only where each of three conditions apply, namely that: (a) an 'emergency' (as above defined) has occurred, is occurring or is about to occur; (b) it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency; and (c) the need for the provision is urgent (s 21(2)-(4)). The scope of the regulations is extremely broad and includes (*inter alia*) provisions which a Minister is satisfied are appropriate for protecting human life, health or safety, treating human illness or injury and protecting the provision of services relating to health (s 22(2)(a),(b) and (g)) and may make provision of any kind that could be made by primary legislation or through the Royal Prerogative, including by creating offences of failing to comply with the regulations (s 22(3)(i) and 23).
- 8 There are two limitations to regulations imposed under the CCA. First, they may last no more than 30 days (s 26); and, secondly, they lapse in the absence of positive resolutions by each House within seven days of being laid before Parliament (s 27), including in circumstances in which Parliament has been prorogued (s 28). Thus, while new regulations in the same form may be laid after the first regulations have lapsed, they would still require such a positive resolution.<sup>16</sup>
- 9 In contrast, the (Health Protection, etc) Regulations were passed without a positive resolution of each House, purportedly under powers under s 45R of the 1984 Act permitting the negative procedure by which they remain in force in the absence of a negative resolution of each House; and, while subject to review by the Secretary of State every 21 days (reg. 3), they expire only after six months without any requirement for Parliamentary scrutiny, let alone veto, within that period (reg. 12).

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Contingencies Act 2004 expressly include any period within which Parliament is prorogued, dissolved or not sitting (there is no provision disallowing any natural days in s 27 and s 28 provides that regulations under the CCA lapse even if the date by which approval is required falls when Parliament is prorogued).

<sup>15</sup> The test is considerably less stringent than that that must be met before a derogation from the Convention can be entertained under Article 15, requiring a threat to the 'life of the nation'.

<sup>16</sup> It might be suggested that new regulations could be laid every seven days to evade this scrutiny but such an approach would be vulnerable to challenge as an abuse of power.

- 10 The failure to exercise delegated powers under the CCA is relevant for two reasons. First, the exceptionally wide powers provided for under that Act are subject to strict limitations of time and rigorous Parliamentary scrutiny. It is at least arguable that Parliament, in passing the additional s 45G in the 1984 Act (by s 129 of the Health and Social Care Act 2008) may be imputed to have had in mind that any delegation of the power to make secondary legislation through the 1984 Act would supplement the delegated powers of the CCA (of 2004); and that powers that had the breadth of those delegated under the latter should only be used under that Act, especially given that Parliament made them subject to strict limitations of time and rigorous Parliamentary scrutiny. While in reference to strictly delegated powers in the same Act, this is supported by authority that a general delegated power cannot be used in a way that would undermine the limitations imposed in relation to delegated powers elsewhere in that Act.<sup>17</sup> This argument supports the analysis of Anderson, Craig, Hickman *et al* and Sandhurst and Brandreth, challenging the *vires* of the use of the delegated powers under the 1984 Act (as amended).
- 11 Secondly, Parliament's delegation of particularly wide powers of secondary legislation in the CCA only where subject to limitations and scrutiny contradicts the argument that the powers imposed by the Regulations are proportionate restrictions of Convention rights. A key element of the proportionality test (considered further below) concerns the extent to which restrictions are time limited and subject to democratic scrutiny.<sup>18</sup> Here, secondary legislation imposes wide restrictions in circumstances that would amount to an 'emergency' under the CCA but fit only tenuously to the Act from which those powers are purportedly derived. The absence of the limitations and scrutiny of the CCA strengthens the argument that they are disproportionate.

### **The failure to derogate from the Convention**

- 12 Before implementing the Regulations, the government could have, but did not, attempt to exercise a derogation from the Convention under Article 15. Under s 14 of the HRA, derogations are subject to review by the domestic courts and by the European Court of Human Rights ('the Strasbourg Court')<sup>19</sup>. If restrictions reliant on a derogation of which the Strasbourg Court is notified are imposed other than in primary legislation, they may be voided by the domestic courts if they could not otherwise be justified under exceptions to the rights engaged. The test to be applied is whether there is '*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of*

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<sup>17</sup> *Bennion on Statutory Interpretation*, s 3.7, citing *R (JM (Zimbabwe)) v Secretary of State for the Home Department* [2017] EWCA Civ 1669 *per* Flaux LJ at [74], [76].

<sup>18</sup> See paras 52 and 83-88, below.

<sup>19</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56

which the State is composed<sup>20</sup>. The Council of Europe recently published a ‘toolkit’ for member states considering exercising their qualified right to derogate<sup>21</sup>

- 13 Derogations may remove the enforceability of any Convention rights save the right to life (other than in respect of deaths resulting from lawful acts of war), the prohibition of torture and inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, freedom from the application of retrospective criminal laws and the right not to be subject to the death penalty (added by Articles 2 and 3 of Protocol 6).<sup>22</sup> A derogation may only be exercised in a time of war or ‘a public emergency threatening the life of the nation’; and may only be exercised lawfully to the extent strictly required by the exigencies of the situation,<sup>23</sup> provided that such measures are not inconsistent with its other obligations under international law<sup>24</sup>.
- 14 There have been at least ten derogations registered as a result of the coronavirus epidemic, albeit they tend to be in relation to specific measures and are not concerned with the lockdown provisions in general.<sup>25</sup> The failure of the United Kingdom to register any derogation (or even France, Italy and Spain, despite more stringent ‘lockdowns’) *might* indicate none consider this high threshold has been reached. It must be questionable whether a virus which, while undoubtedly dangerous and life threatening, appears to have a mortality rate of between 0.12<sup>26</sup> and 1%, could be considered to threaten the life of the nation.<sup>27 28</sup>

### **The Convention rights engaged.**

- 15 Each of the Articles considered below are to some extent qualified by case law that includes (in many cases) express qualifications to the exercise of rights and freedoms in view of considerations including that of public health. Restrictions may be lawful

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<sup>20</sup> *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.

<sup>21</sup> Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis (<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>), 7.4.2020.

<sup>22</sup> A state may not derogate from the prohibition on double jeopardy in Article 3 of Protocol 6, but the UK has not implemented that Protocol and has permitted the re-conviction of acquitted defendants in limited circumstances.

<sup>23</sup> Article 15.1 of the Convention.

<sup>24</sup> *A*, *ibid*, para 68, *per* Lord Bingham.

<sup>25</sup> Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>26</sup> ‘Antibody study suggests coronavirus is far more widespread than previously thought’ (<https://www.theguardian.com/world/2020/apr/17/antibody-study-suggests-coronavirus-is-far-more-widespread-than-previously-thought>), 18.4.2020.

<sup>27</sup> It is of note that Hayden J has opined, *obiter*, that these circumstances do constitute a public emergency threatening the life of the nation, although he so remarked on hearing an emergency application and apparently without hearing extensive argument on the issue (which could not have had any bearing on his decision in the absence of derogation): *BP v Surrey CC* [2020] EWCOP 17. The author is grateful to Dominic Ruck Keene for drawing his attention to this judgment in ‘Leviathan unshackled’ (<https://ukhumanrightsblog.com/2020/04/10/leviathan-unshackled/>), 10.4.2020.

<sup>28</sup> For further reading, see Holcroft–Emmess, Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification (<https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/>), EJIL 10.4.2020.

if they are a proportionate interference with those rights in the light of those qualifications and the exercise of other rights and public duties. This section, however, concerns only the extent of the interference before proportionality is considered below.

### Liberty: Article 5

- 16 Whether the restrictions on movement and confinement to the home can constitute deprivations of liberty engaging Article 5 of the Convention was addressed in relation to the Regulations by Hickman *et al* and the author agrees with and adopts their analysis to the effect that the degree of confinement, even though not continuous or subject to supervision, is a form of deprivation of liberty sufficient to engage Article 5.<sup>29</sup> Those authors point to the case law on ‘control orders’, in which it was found that home curfews of 18 hours engaged Article 5 and that “social isolation is a significant factor”.<sup>30</sup>
- 17 Before considering Article 5, Hickman *et al* also observed the relevance of the finding of the Supreme Court in *R (Jalloh) v Home Secretary*<sup>31</sup>, that a restriction confining a person to his house was a tort of false imprisonment. This finding supports their later analysis that Article 5 is engaged by the Regulations.
- 18 In his second article, King considers the related question of whether the Regulations amount to ‘quarantine’ in its technical sense. It is necessary for the *vires* of the Regulations that they do not, as the 1984 Act from which the delegated power is derived does not permit regulations imposing quarantine on groups of individuals (s 45D(3)(d)). King concludes they do not, relying on the fact there are no enforceable restrictions to houses, there are identifiable rights to leave and that the measures are enforced only by measuring whether those rights have been breached.<sup>32</sup> This analysis rests uneasily with case law which considers confinement for most of the day does engage Article 5 and the judgment in *Jalloh*, albeit that that case did not concern restrictions alleged to amount to quarantine.
- 19 The courts need only consider Article 5 if they conclude the Regulations do not constitute quarantine, as they would otherwise be required to find them *ultra vires* in view of s 45D of the 1984 Act. Assuming the current circumstances do not fit the definition under that section, it would be difficult to argue they do not amount at least to a *quasi*-national quarantine in view of their expressed intention to confine people to their houses wherever possible; and this should accordingly inform the Court’s consideration of the proportionality of the measures.<sup>33</sup>

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<sup>29</sup> ‘Coronavirus and Civil Liberties’ *ibid*, at paras 47-63.

<sup>30</sup> At para 52, citing *SSHD v AP* at [2-4] and *SSHD v GG* [2016] EWHC 1193 (Admin) at [36].

<sup>31</sup> [2020] UKSC 4.

<sup>32</sup> In Part II, *ibid*.

<sup>33</sup> This article considers, below, the Siracusa Principles, which provides for a test by which may be judged the proportionality of measures imposing quarantining or severe restrictions in order to protect public health.

- 20 Prof King describes the Regulations as ‘a profound intrusion into our freedom of movement’ but they are much more than that. Aside from the serious question of liberty and Article 5, they engage many more Convention rights, that are considered in turn below.

### Private and family life: Article 8

- 21 The right to private life includes the establishment and development of relationships with other human beings and the outside world,<sup>34</sup> including through activities of a professional or business nature.<sup>35</sup> It includes not only an 'inner circle' in which a person may live his own life and exclude the outside world,<sup>36</sup> but also a person's ability to function socially.<sup>37</sup>
- 22 Family life includes relationships outside the nuclear family including between siblings,<sup>38</sup> grandparents and grandchildren,<sup>39</sup> and between children and parents following the separation of the parents.<sup>40</sup>
- 23 The Regulations impose profound and far-reaching restrictions on the private and family lives of all citizens, more than at any time in the modern era. They prevent any meetings with any persons outside a person's household, save perhaps by chance where a person leaves with a ‘reasonable excuse’ (albeit leaving one's house for an arranged meeting does not constitute one of the named reasonable excuses). This will be a particularly onerous intrusion into the personal and family lives of those with terminally ill relatives, who will thus be denied the opportunity to visit them at home in their last weeks or months; those who are mentally ill; and for those living alone, where they will be denied the possibility of human company through visiting or meeting any of their family or friends. But they affect everyone.
- 24 The ability of individuals to continue their direct personal relationships with family members or friends online is no answer to the impact of Regulations affecting the entire population, including the proportion that don't have access to the internet; and does not mean that Article 8 is not engaged, even if its impact might be mitigated, in some cases, by online contact.

### Assembly and association (Article 11)

- 25 The right to freedom of assembly and association largely engages meetings and assemblies of a political, not social, nature.<sup>41</sup> No restrictions may be placed on an

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<sup>34</sup> *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [47].

<sup>35</sup> *Niemietz v Germany* (1992) 16 EHRR 97.

<sup>36</sup> *Niemietz, ibid.*

<sup>37</sup> *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [9].

<sup>38</sup> *Moustaquim v Belgium* (1991) 13 EHRR 802, ECtHR.

<sup>39</sup> *Marckx v Belgium* (1979) 2 EHRR 330, ECtHR; *Re J (leave to issue an application for a residence order)* [2002] EWCA Civ 1346.

<sup>40</sup> *Berrehab v Netherlands* [1988] ECHR 10730/84.

<sup>41</sup> Although Article 11 has been found to apply to assemblies of an essentially social character, see *Emin Huseynov v Azerbaijan* §91, concerning police intervention in a gathering at a private café

assembly or association other than are prescribed by law and are necessary in a democratic society in the interests (*inter alia*) of public safety and the protection of health. The Strasbourg Court has described the freedom of assembly as a ‘foundational feature of a democratic society, allowing people to visibly participate in the political process and communicate ideas that challenge the existing order’;<sup>42</sup> and the Strasbourg Court found the way in which states enshrine and protect the freedom to associate is indicative of the state of democracy in the country concerned.<sup>43</sup> Both rights are part of a nexus of rights which include the right to freedom of expression.<sup>44</sup> The Court has held that:

‘Freedom of assembly and the right to express one’s views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.’<sup>45</sup>

And the Strasbourg Court has also observed the right to freedom of association was of ‘special importance’.<sup>46</sup>

- 26 The Convention right is reflected in the developing common law recognition of the right of assembly and association, as described by Lord Denning:

‘...freedom of assembly is another of our precious freedoms. Everyone is entitled to meet with his fellows to discuss their affairs and to promote their views; so long as it is not done to propagate violence or do anything unlawful.’<sup>47</sup>

And by Lord Bingham:

‘it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that

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([https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-154161%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-154161%22]})), as well as cultural gatherings (The *Gypsy Council v UK* (<http://hudoc.echr.coe.int/eng?i=001-22414>) and religious and spiritual meetings *Barankevich v Russia* (2007) Application no. 10519/03 (albeit also protected by Article 9).

<sup>42</sup> *Plattform 'Ärzte für das Leben' v Austria* (1988) 13 EHRR 204.

<sup>43</sup> *Tebieti Muhafize Cemiyeti v Azerbaijan* [2009] ECHR 37083/03 at [52].

<sup>44</sup> *Steel v UK* (1998) 5 BHRC 339 at 358.

<sup>45</sup> *Stankov v Bulgaria*, Applications 29221/95, 29225/95.

<sup>46</sup> *Ezelin v France* (1991) 14 EHRR 362 at [53], ECtHR.

<sup>47</sup> *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at 217.



it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it.’<sup>48</sup>

- 27 The right to peaceful protest protects demonstrations that are contentious, heretical and eccentric,<sup>49</sup> including those that may annoy or give offence to persons opposed to the ideas and claims that are being promoted.<sup>50</sup>
- 28 The restriction on gatherings of more than two people<sup>51</sup> will prevent any sort of meetings and demonstrations, including for political purposes. They are so far reaching that they prevent the mere possibility of a political meeting (association) or a public demonstration (assembly).
- 29 Perhaps the (arguably concerning) extent to which opposition to lockdown measures has been muted has limited discussion about the extreme nature of the prohibition on *any* political gathering or mass demonstration. Again, the ability to organise and meet online can only mitigate the great damage to these freedoms caused by the Regulations. Political movements rely on the ability to mobilise protest through gatherings; and the past four years have seen a resurgence of mass demonstrations involving, in some instances, many hundreds of thousands of people.
- 30 A disturbing example of the way in which similar restrictions (at least as far as gatherings are concerned) have been used recently is the example of a German lawyer who was not only arrested for calling for a public demonstration against the lockdown measures but was later committed to a psychiatric ward, apparently on the grounds that she had called for such a demonstration.<sup>52</sup> While one must be wary of commenting further where facts are inevitably not known in full, this is a worrying example of the effect such restrictions are already having on the ability to mobilise political opposition to highly restrictive measures.<sup>53</sup>
- 31 It is of note that the German Constitutional Court has found that ‘lockdown’ restrictions that prevented any political protest were unconstitutional.<sup>54</sup>

#### Freedom of Conscience, Thought and Religion (Article 9)

- 32 This freedom includes the right to worship in community with others in public and to manifest religion or belief, in worship, teaching, practice and observance.<sup>55</sup>

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<sup>48</sup> *R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12 at 1.

<sup>49</sup> *Redmond Bate v DPP* (1999) 7 BHRC 375 at [20].

<sup>50</sup> *Plattform 'Ärzte für das Leben'*, *ibid.*

<sup>51</sup> Reg 7 of the Regulations.

<sup>52</sup> <https://www.ukcolumn.org/article/coronavirus-lockdown-german-lawyer-detained-opposition>, 14.4.2020

<sup>53</sup> Readers will not need to be reminded of the use of psychiatric institutions to imprison dissidents behind the Iron Curtain.

<sup>54</sup> Top German court: Coronavirus restrictions not grounds to ban all protests (<https://www.dw.com/en/top-german-court-coronavirus-restrictions-not-grounds-to-ban-all-protests/a-53153858>), 16.4.2020. The author thanks Prof Colm O’Cinneide for drawing his attention to this judgment.

<sup>55</sup> Article 9.1 of the Convention.

- 33 The Regulations prevent or severely restrict religious practice, including attending or gathering in places of worship and for services. The very limited exceptions to the restriction on gatherings (under reg. 7) include only weddings and funerals and prevent the gathering of people together in a religious service; places of worship may only be attended for services in the case of funerals;<sup>56</sup> and the list of reasonable excuses for leaving a residence includes ‘in the case of a minister of religion or worship leader, to go to their place of worship’<sup>57</sup> which, read together with regs 4 and 8, suggests that it would not be a reasonable excuse for any other person to leave their house to gather in church, which would in any event amount to an unlawful gathering.
- 34 The effect of these restrictions is to prevent communal worship and, for Christians, the reception of most of the sacraments. Indeed, the wholesale closure of churches over Holy Week and Easter were the first such closures since the end of the Interdict of Pope Innocent III in 1213; and churches remained open even during the ravages of the Black Death.

#### The prohibition of discrimination (Article 14)

- 35 Although discrimination on the grounds of disability is not expressly recognised in Article 14, it has been found to be a protected ground derived from a person’s personal characteristics.<sup>58</sup> Those subject to a disability include individuals suffering from long-term and terminal illness as well as those with long-term mental health conditions. Discrimination on the grounds of sex is expressly prohibited.
- 36 Discrimination can be imposed indirectly, that is by imposing a law or policy that has a greater detrimental effect on individuals with a protected characteristic than those without; and can be proven without recourse to statistics.<sup>59</sup> It is self-evident that some of those suffering from mental health issues will be more gravely affected by isolation than those who do not. This is evidenced by the spike in mental health crises since the ‘lockdown’ was imposed.<sup>60</sup> Similarly, women are statistically much more likely to be victims of domestic violence and there is evidence that its incidence has more than doubled since mid-March 2020.<sup>61</sup>

#### The right to the peaceful enjoyment of property (Article 1, Protocol 2 to the Convention)

- 37 The Protocol prohibits the ‘deprivation’ of property, which includes the ‘serious interference’ with the enjoyment of property. This has been found to include un-

<sup>56</sup> Reg. 5(6), although they may also be used to house the homeless or broadcast online services.

<sup>57</sup> Reg. 6(2)(k).

<sup>58</sup> *R (on the application of RJM) v Secretary of State for Work and Pensions* [2009] 2 All ER 556.

<sup>59</sup> *DH v Czech Republic* (2007) 47 EHRR 59.

<sup>60</sup> ‘Domestic violence and anxiety spiked after lockdown announcement’

(<https://www.sheffield.ac.uk/news/nr/depression-anxiety-spiked-after-lockdown-announcement-coronavirus-mental-health-psychology-study-1.885549>), 31.3.2020.

<sup>61</sup> <https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown>.

enacted or proposed legislation that nonetheless caused serious harm to businesses, measured by a decline in its goodwill due to its inability or reduced ability to trade.<sup>62</sup>

- 38 The Protocol is undoubtedly engaged by the closure of business premises under the Regulations.<sup>63</sup> The inability to trade for an indefinite period will have had a considerable effect on goodwill value. Many businesses will fail, notwithstanding government measures to mitigate the situation.

#### Education (Article 2, Protocol 1 to the Convention)

- 39 The right is a negative right not to be denied an education. Significantly, while the courts might take into account the circumstances of any potential breach of the Protocol, it is not expressed as a right qualified by the right of the state to restrict it for a legitimate aim or for reasons of public health, in the way that positive rights (in particular to family life or to religious practice) are restricted. The qualification recognised in the Protocol is the right of parents to educate their children in conformity with their religious convictions.
- 40 While the power to close educational premises is derived from primary legislation,<sup>64</sup> it must be exercised through a declaration by the Secretary of State. That decision is thus challengeable by judicial review, including on the grounds that it is a disproportionate interference with the right to education under the Protocol. Further, the Regulations themselves prevent the opening of educational establishments: Reg. 6 does not include attending educational premises as a named example of a ‘reasonable excuse’ and, while the list in Reg. 6(2) is not comprehensive, attending a school or university does not fall within the exceptions to the prohibitions on gatherings under Reg. 8 and so would arguably be unlawful.
- 41 In *Ali v Head Teacher and Governors of Lord Grey School*, the House of Lords found that

‘The test, as always under the convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?’<sup>65</sup>

And that:

‘...art 2 of the First Protocol is concerned only with results: was the applicant denied the basic minimum of education available under the domestic system?... For this purpose it is necessary to look at the domestic system as a whole.... [A breach of A 2 of the First Protocol] would have required a

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<sup>62</sup> *Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408.

<sup>63</sup> Under regs 4 and 5.

<sup>64</sup> Sch 16 to the 2020 Act (Part 1 applying to England and Wales).

<sup>65</sup> [2006] UKHL 14, para 24, *per* Lord Bingham.

systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education.’<sup>66</sup>

- 42 During the closures, the provision of a comprehensive – or even perhaps a reduced – education through online resources *may* be sufficient to avoid a finding that closure decisions did not breach the Protocol. There is, however, evidence that some schools are providing minimal, if any, education and that wholly online provision will put poorer children of less well-educated parents and children with disabilities at an acute disadvantage.<sup>67</sup>

#### The right to free and fair elections (Article 3, Protocol 1 to the Convention)

- 43 Local elections were delayed for one year by the 2020 Act.<sup>68</sup> As an unambiguous provision of primary legislation, this legislation is not subject to judicial oversight save through a declaration of incompatibility. It is *possible* that it might be found to engage the Protocol<sup>69</sup> but, given the inability of the Courts to overturn it, this right is not considered further.

#### **The relevance of Article 2 of the Convention**

- 44 In a detailed and carefully researched article about the impact of lockdown provisions on Convention rights across member states of the Council of Europe, Jeremy McBride suggests there are ‘positive obligations for member states with respect to the right to life and to respect for private life under Article 8’.<sup>70</sup> He argues that ‘there is scope to argue that insufficient steps to inform the public as to risks posed by succumbing to Covid-19 and to advise particular preventive steps could, as in other circumstances considered by the Court, result in a breach of the positive obligation to take the measures necessary to protect life’. Whether that is correct has no bearing on a state’s suggested obligation (argued by King) to impose restrictions on the public. McBride goes much further when he argues that:

‘...once the nature of measures required to tackle a threat [have] become clear and are within the capacity of the State to take – notably through restricting the activities that can be undertaken by inhabitants – then the failure to adopt them could well be viewed as violating the obligations owed under Articles 2 and 8 (as in *Finogenov and Others v. Russia*, no. 18299/03, 20 December 2011)...’

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<sup>66</sup> At paras 57 and 61, *per* Lord Hoffman.

<sup>67</sup> ‘Coronavirus will deepen the class divide’ (<https://www.thearticle.com/coronavirus-will-deepen-the-class-divide-in-next-years-gcse-results>), 15.4.2020. This might also be a basis on which the measures could be found indirectly discriminatory, particularly in relation to its potentially differential impact on children with disabilities.

<sup>68</sup> By s 60. Further provisions about England are made by ss 59-63.

<sup>69</sup> Although it may be found to be proportionate even if it engaged the right protected by the Protocol.

<sup>70</sup> An analysis of Covid-19 Responses and ECHR Requirements’ by Jeremy McBride ([echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?m=1](http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?m=1)), 27.3.2020, pp 2/3.

- 45 This is a bold claim but one, it is respectfully submitted, unsupported by *Finegenov* or other authority and contrary to the development of the case law developed in relation to Article 2. *Finegenov* concerned the actions of the Russian state to intervene to safeguard hostages held in a Moscow theatre by Chechen terrorists in 2002, when they used gas intended to put terrorists and hostages alike to sleep in order to effect a rescue. The complaint to the Strasbourg Court was that the state had put the lives of the hostages at risk through its intervention (para 164). The claim was defended, in part, on the grounds that the state was obliged to use all appropriate measures to secure the release of hostages, under Article 3 of the International Convention against the Taking of Hostages.<sup>71</sup> The Court also judged the case in relation to the exception in Article 2 permitting the use of proportionate force by law enforcement officers to protect life.<sup>72</sup>
- 46 The Strasbourg Court found that '*[a] duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and if the authorities retained a certain degree of control over the situation*'.<sup>73</sup> This is very different to the circumstances of a pandemic in which some scientific evidence suggests heavy restrictions on the movement and association of the whole population is necessary to contain its spread. Moreover, that passage is in relation to the *justification* of potentially lethal force in order to safeguard life, not 'measures' applying to the population at large (or even specific sections of the population).
- 47 Although considered in relation to property rather than Article 2 rights, the Strasbourg Court has found that '*natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature*'.<sup>74</sup> While a pandemic is not entirely analogous to (for example) a hurricane or mud-slide and there is some evidence about what can be done to reduce their spread, it is nonetheless a natural disaster in origin.
- 48 Article 2 does impose positive obligations on the state to safeguard life through a legislative and administrative framework designed to provide effective deterrence against threats to the right to life,<sup>75</sup> but there is no authority to suggest this goes beyond the duty to have an effective criminal law and operational machinery by which it is enforced.<sup>76</sup>
- 49 Thus, while scientific evidence supporting restrictions on movement and association will be relevant considerations in determining the proportionality of the Regulations,

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<sup>71</sup> See para 186.

<sup>72</sup> Citing *Hilda Hafsteinsdóttir v Iceland* [2004] ECHR 40905/98; *Ergi v Turkey* [1998] ECHR 23818/94, *McCann v UK* [1995] ECHR 18984/91 and *Andronicou v Cyprus* [1997] ECHR 25052/94.

<sup>73</sup> Para 209, citing *Osman v United Kingdom* (1998) 29 EHRR 245, at para 116.

<sup>74</sup> *Budayeva and others v Russia* [2008] ECHR 15339/02, para 174.

<sup>75</sup> *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10.

<sup>76</sup> *Osman (ibid)* at para 115.

it is difficult to derive from the Strasbourg case law a *positive* obligation on the state to impose them.

- 50 It might be observed, however, that were Article 2 to impose a positive obligation to safeguard life that went further than the above limited duty, the courts would be obliged (in reviewing the Regulations) to consider the threat to life which those self-same safeguards will cause. These can be divided into two: (i) the loss of life that might be attributed directly to the ‘lockdown’ restrictions; and (ii) the impact of the restrictions on health, wellbeing and (ultimately) life-expectancy in the long-term.
- 51 The second (long-term) effects are contentious, rest upon assumptions about the impact of poverty (caused by the economic depression likely to be caused by the restrictions) on health and are a matter of high government policy also impacted by government decisions across a range of areas. While it is submitted that this impact might have a bearing on decisions about the proportionality of the Regulations,<sup>77</sup> there is no sound arguable basis they could lead to Article 2 rights being engaged.
- 52 The immediate effects of the restrictions on life are, however, no different from the positive duty imputed by King and McBride. They include (but are probably not limited to) the increase in deaths caused by suicide due to isolation, domestic violence,<sup>78</sup> neglect through isolation<sup>79</sup> and the cancellation of operations and other medical treatment for those with serious and terminal health conditions.<sup>80</sup> Each of these categories are apparent direct consequences of the positive action of the state, as opposed to its inaction in the face of a natural disaster; and a more conventional application of Article 2 jurisprudence suggests they are more naturally relevant considerations in a review of the proportionality of the restrictions.

## **The Convention rights, scientific and comparative evidence and proportionality**

### Proportionality in general and the Siracusa Principles

- 53 The exceptions and qualifications to the above rights are each expressed somewhat differently and have developed their own case law. However, the Regulations restricting movement and gatherings are a code that limit the exercise of all the above rights; and the Court could not determine their proportionality without considering their impact on each of the rights engaged. For example, by restricting individuals to their residences their liberty is impacted; they are unable to associate personally or to assemble, to attend religious services or educational establishments or to visit their

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<sup>77</sup> Particularly in the light of the increased willingness of the courts to intervene in matters of high policy, for example in *R (Miller) v Prime Minister* [2019] UKSC 41.

<sup>78</sup> ‘Domestic violence and anxiety spiked after lockdown announcement’ (<https://www.sheffield.ac.uk/news/nr/depression-anxiety-spiked-after-lockdown-announcement-coronavirus-mental-health-psychology-study-1.885549>), 31.3.2020 (*ibid*).

<sup>79</sup> For example, the deaths of abandoned residents of a care home in Spain imputed to its lockdown policy: <https://www.bbc.co.uk/news/world-europe-52014023>.

<sup>80</sup> <https://www.itv.com/news/2020-03-26/coronavirus-outbreak-cancer-treatment-surgery-cut-back-surge-in-covid-19-patients/>.

close relations; and these (and more specific) restrictions affect the profitability, goodwill and survival of numerous businesses.

54 Whether or not the Regulations constitute a quarantine as defined under the 1984 Act, they are restrictive measures imposed to protect public health; and they have a ‘global’ impact on rights and freedoms. It is submitted that their proportionality may be judged through applying the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by the UN Economic and Social Council in 1984, and the UN Human Rights Committee.<sup>81</sup> The Siracusa Principles require that restrictions should, at a minimum, be:

- provided for and carried out in accordance with the law;
- directed toward a legitimate objective of general interest;
- strictly necessary in a democratic society to achieve the objective;
- the least intrusive and restrictive available to reach the objective;
- based on scientific evidence and neither arbitrary nor discriminatory in application; and
- of limited duration, respectful of human dignity, and subject to review.

55 A reasonable reading of the requirement for the ‘least intrusive and restrictive’ restrictions is to impute a duty to weigh the advantage any individual measures has against not only the impact of other means (in this case) of containing viral spread but also of the impact they have on protected rights and freedoms.

56 The courts are bound to have close regard to principles accepted by international bodies, particularly given their close adherence to overarching principles of proportionality developed by the Strasbourg Court and the domestic courts. With respect to their relevance, the former has found that:

‘The consensus emerging from specialised international instruments and from the practice of contracting states may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases... it will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member states of the Council of Europe and show, in a precise area, that there is common ground in modern societies.’<sup>82</sup>

#### Determining what is the least restrictive means of obtaining a legitimate aim

57 This question is a feature of the caselaw concerning proportionality developed by the Strasbourg Court.<sup>83</sup> A restriction impacting upon fundamental freedoms is unlikely to

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<sup>81</sup> <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

<sup>82</sup> *Demir v Turkey* (2008) 48 EHRR 1272 at [85]–[86], ECtHR.

<sup>83</sup> See, for example, *Campbell v United Kingdom* (1992) 15 EHRR 137, ECtHR.

be proportionate if a less restrictive method could have been used to achieve the legitimate aim, although a challenge will not succeed merely by establishing that alternative methods *could* have been used to achieve the aim.<sup>84</sup>

58 The Court of Justice of the European Union ('the CJEU') has also addressed this issue in relation to public health measures, holding that:

'...national rules or practices likely to have a restrictive effect, or having such an effect, on imports are compatible with the Treaty only to the extent to which they are necessary for the effective protection of health and life of humans. A national rule or practice cannot benefit from the derogation provided for in art 30 EC if the health and life of humans may be protected just as effectively by measures which are less restrictive of intra-Community trade (see, to that effect, the *Deutscher Apothekerverband* case<sup>85</sup> (para 104)).'<sup>86</sup>

It can be observed that, while the United Kingdom has not registered a derogation from the Convention (which might have some relationship with other forms of derogation), its decision to impose the Regulations has been expressly due to a public health emergency.

59 Considering and applying the above principle, the Supreme Court has formulated the means by which the 'least restrictive' test should be applied (again, in relation to EU law):

'This margin of appreciation applies to the member state's decision as to the level of protection of the public interest in question which it considers appropriate, and to its selection of an appropriate means by which that protection can be provided. Having exercised its discretion, however, the member state must act proportionately within the confines of its choice. A national measure will not, therefore, be proportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive of a fundamental freedom: see, for example, *Rosengren v Riksaklagaren*... (para 43).'<sup>87</sup>

60 It is right to say that the Strasbourg Court has found that:

'A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally

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<sup>84</sup> *Mellacher v Austria* (1989) 12 EHRR 391; *Sejdic v Bosnia and Herzegovina* (2009) 28 BHRC 201, ECtHR

<sup>85</sup> (2003) 81 BMLR 33.

<sup>86</sup> *Rosengren and others v Riksåklagaren* [2009] All ER (EC) 455, para 43.

<sup>87</sup> *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, para 66.



respect the legislature's policy choice unless it is "manifestly without reasonable foundation."<sup>88</sup>

61 However, it can be observed that the reference is to social and economic *policy*. While the claim concerned legislation and related to alleged discrimination due to different pension ages for men and women, the Court concluded the policy was not unlawful due to its purpose of redressing the unfairness to which women had been subjected in the workplace. It addressed a particular harm in respect of which the state must have a wide margin of appreciation. While the Regulations were introduced for a particular purpose – and one aimed at protecting the public as a whole – they are different in definition, scale and effect from the above and similar limited policies.

62 It is submitted that the above cases should be treated with some caution. They each apply (as most challenges do) to specific and limited measures, not to sweeping restrictions on the very operation of national life, imposing the most fundamental restriction on the private and family lives and rights of political association and assembly of all citizens. While a wide margin of appreciation (and limited consideration of alternative, less restrictive, policies) is appropriate in reviewing restrictions of that category, it is less so where the restrictions and their consequences are of such breadth and gravity. And, to the extent that the exercise of the power of delegated legislation might be treated similarly to any other public law decision, the test to be applied by the court is not to determine whether the decision maker failed adequately to take potential restrictions of Convention rights into account, but whether an objective consideration leads to the conclusion that such restrictions are disproportionate.<sup>89</sup>

63 Moreover, the Supreme Court recently held that:

‘...although the courts cannot decide political questions, the fact that a legal dispute... arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it... almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries...

‘...the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts...’<sup>90</sup>

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<sup>88</sup> *Stec and Others v. UK* [2006] ECHR 65731/01, § 52.

<sup>89</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, para 68, *per* Lord Hoffman. It should be noted, however, that this was in reference to potential breaches of Article 9 in particular, it being concerned with ‘substance, not procedure’.

<sup>90</sup> *R (Miller) v Prime Minister*, *ibid*, paras 31 and 33.

64 That (controversial) judgment related to the exercise of the Royal Prerogative over matters of ‘high policy’ in circumstances traditionally understood to have been non-justiciable and which did not engage Convention (or any individual) rights. A statute making sweeping encroachments on the rights and freedoms of individuals in many and various domains falls easily and necessarily within the ambit of the Court to review and, if necessary, quash.

65 Where the court is asked to determine the lawfulness of a statutory code of such wide ranging impact on the whole of society and that restricts so gravely the rights and freedoms of individuals, it would be inadequate to consider the proportionality of each measure in isolation. Each measure impacts across a range of rights, as we have seen. Thus, the proportionality of the Regulations must be considered ‘globally’; and it is suggested that the Siracusa Principles, with reference to the gravity of the Regulations’ impact on rights and freedoms generally, are the best means by which to judge their proportionality.

#### The statutory and stated basis for the Regulations and their continuation

66 The Secretary of State has a statutory duty not to terminate the Regulations until he decides they are no longer necessary ‘to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus’<sup>91</sup>. It can reasonably be imputed that the Government’s decision to impose the Regulations was also made on that basis.

67 Of pertinence to the lawfulness of the continuation of the Regulations after 16.3.2020<sup>92</sup> was the statement of the First Secretary, made when announcing the decision not to end their application on that date, that the government would continue to extend the Regulations until each of the following five conditions were met:

- making sure the NHS could cope;
- a "sustained and consistent" fall in the daily death rate;
- reliable data showing the rate of infection was decreasing to ‘manageable levels’;
- ensuring the supply of tests and Personal Protective Equipment (PPE) could meet future demand; and
- being confident any adjustments would not risk a second peak.<sup>93</sup>

68 It has also been a notable feature of the policy making of the UK government and of others across the world to have expressly ‘followed the science’. The Prime Minister and (more recently) First Secretary of State and Chancellor of the Exchequer are routinely flanked by the chief scientific officer, chief medical officer and others.

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<sup>91</sup> Reg 3(3).

<sup>92</sup> The Regulations were imposed for six months but the Secretary of State has a duty to review them every 21 days (reg. 3(2)) and must terminate them if he decides they are ‘no longer necessary’ for the reasons quoted in para 59, above (reg. 3(3)).

<sup>93</sup> ‘UK lockdown extended for ‘at least’ three weeks’ (<https://www.bbc.co.uk/news/uk-52313715>), 16.4.2020.

- 69 This article has outlined the many ways in which the Regulations<sup>94</sup> restrict rights and freedoms protected by the Convention; the requirement that any such impact must be proportionate; and the general tests of proportionality that must be met before they can be. Yet, if one is to take at face value the statutory test and the further five tests announced by the First Secretary, it would appear that no consideration has been given to any of these effects before imposing or deciding not to terminate the Regulations; and that he thereby fettered his discretion by adopting (at least in respect of the decision not to terminate the Regulations) an over-rigid policy.<sup>95</sup> It is reasonable to take the statutory test and the above ministerial statement at face value. Ministers can be taken to have acted for the reasons they express.
- 70 Nor are the above (statutory and/or stated) tests compatible with the Siracusa Principles. They fail to require ministers to consider whether the Regulations are, and continue to remain, the least restrictive means of obtaining the object of reduced viral spread. While it might be suggested that the test of whether any adjustments would ‘risk’ a second peak implies a similar test, others expressly do not. Under the First Secretary’s tests, restrictions would remain if there were insufficient tests or (given that each of the tests must be met) the rate of infection had not decreased. No consideration is required – or even may be taken – of whether different or less restrictive means could be attempted or are likely to succeed in reaching that object: the tests fail to ask whether the interference is now and will continue to be proportionate to this object.
- 71 While the scientific and comparative evidence<sup>96</sup> concerning the impact of the virus is of key importance, it is not and cannot be the only – or even the overriding – consideration in imposing restrictions of such magnitude and in limiting and removing fundamental human rights. By the signature of a ministerial pen – and in many cases for the first time in the modern era, if not ever<sup>97</sup> – children cannot visit their parents, *all* political demonstrations have been proscribed, worshippers may not attend churches, synagogues, mosques or temples, and children may not attend school. Through the impact of these measures on the economy thousands of businesses will fail, millions are likely to lose their jobs and millions more will be driven into poverty. And through the direct impact of the Regulations and the long-term effects of the poverty they will cause, many will die avoidable or early deaths. Such regulations can only lawfully be imposed after a detailed and careful evaluation of those effects against the scientific evidence of the gains they may cause. Almost every political decision with the object of mitigating harm will cause other harms; and

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<sup>94</sup> And school closures, which are independently required by the Regulations for reasons outlined above in relation to the application of Article 2 of Protocol 1 of the Convention, in addition to being derived from an order of the Secretary of State under the 2020 Act that is subject to judicial review.

<sup>95</sup> A ground for quashing a decision of a public body: *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

<sup>96</sup> Of alternative means of containing the virus adopted by other countries. There is no evidence that these have been evaluated by government; and Ministers’ express announcements suggest that they have not been.

<sup>97</sup> And it is of note that the coronavirus is likely to have a mortality rate around ten times lower than the ‘Spanish Flu’ of 1918/19, or perhaps even 100 times less deadly (‘Why a study showing that covid-19 is everywhere is good news’ (<https://www.economist.com/graphic-detail/2020/04/11/why-a-study-showing-that-covid-19-is-everywhere-is-good-news>), 11.4.2020).

the responsibility to weigh these competing harms is the cardinal duty of any political leader.

- 72 The above might be considered political points; and to an extent they are. But, pursuant to the HRA the courts must (where asked) review the extent to which secondary legislation engages Convention rights; and are obliged to strike it down where its impositions on fundamental rights are disproportionate. As the courts have emphasised, the development of caselaw about the importance of fundamental freedom is no more than the development of the common law of England. These rights were not invented in the 1950s but are the culmination of the historical development of hard-fought freedoms, particularly of political freedoms.

### The relevance of the scientific and comparative evidence

- 73 Any court reviewing the proportionality (and thus lawfulness) of the Regulations would need to decide how to evaluate the factual basis for the government's decision to impose them. The factual basis for the decision is reviewable on *Wednesbury* grounds<sup>98</sup> and the proportionality of the decision based on that appreciation of the facts a matter for the court (applying the margin of appreciation). This is not an exercise uncommon to challenges to the proportionality of secondary legislation, on Convention grounds or otherwise.<sup>99</sup> It is reasonable to assume the underlying facts found by the Government to justify the restrictions are that: (i) the form of social distancing they enforce will reduce the spread of the virus; and (ii) it will, in turn, reduce the death rate to an extent that the NHS can cope with the increased demands.
- 74 How must the Court treat any underlying factual finding by the government or, indeed, evaluate scientific evidence? In *R (on the application of UNISON) v Lord Chancellor*, a case concerning the *vires* of secondary legislation introducing fees to the Employment Tribunal, the Supreme Court evaluated the factual evidence of the impact of the fees on access to justice and made its determination.<sup>100</sup> It is arguable that such a course should be followed in this case, given that the court is determining the proportionality of secondary legislation, rather than an individual decision by a public body. In the latter case, the exercise of statutory powers on the basis of a mistaken view of the relevant facts is *ultra vires* only where there was insufficient or no evidence available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view;<sup>101</sup> and such a decision must be based on evidence of some probative value.<sup>102</sup> Given the exceptional (and to a certain extent unprecedented) breadth of the impact of these Regulations, it is submitted that the Court should not hold back from at least determining whether the scientific evidence is of a sufficient strength to justify the magnitude of the restrictions imposed.

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<sup>98</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

<sup>99</sup> See, for example, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, particularly paras 38-49.

<sup>100</sup> *UNISON*, *ibid*, paras 90-94.

<sup>101</sup> *O'Reilly v Mackman* [1983] 2 AC 237 at 282.

<sup>102</sup> *Mahon v Air New Zealand* [1984] AC 808 at 820, [1984] 3 All ER 201 at 209-210, PC.

- 75 A further consideration in support of the approach in *UNISON* is that the Regulations and school closures are ongoing and that any judicial review must determine their effect on the day of the review: it is within the power of the Secretary of State to terminate them at any time and any failure to do so where the proportionality test (through, it is submitted, applying the Siracusa Principles) was not satisfied would render the restrictions (individually or as a whole) *ultra vires*.
- 76 It is suggested that the Court should evaluate the Regulations as follows: (i) determine the appreciation of the facts upon which the policy was based; (ii) consider whether that appreciation was rational and continues to be rational on the basis of all the evidence before the government and that they should reasonably take into account at the date of the review; and (iii) determine on the basis of that evidence whether the interference is a proportionate response based on a rational factual appreciation of the facts at the date of the review.
- 77 It is respectfully submitted the government may be in difficulty were they to argue that they have, *before deciding to impose the Regulations or allow them to continue*, evaluated the comparative evidence of the effectiveness and merits of other countries' measures to address the virus. The public statements made by ministers and advisors (communicating government policy) before or since the Regulations were imposed do not suggest such evaluations were conducted and the (arguably over-rigid and unduly fettered) tests announced by the First Secretary make no mention of either. If this is right, it undermines the government's case that the measures are proportionate or lawful with reference to regular principles of administrative law (including the failure to consider relevant factors before deciding to exercise delegated powers of secondary legislation, as in *UNISON*).
- 78 Evaluation of comparative evidence is critical to any decision that the restrictions are either the least intrusive and restrictive available to reach the objective of reducing viral spread or are strictly necessary in a democratic society to achieve that objective. It is impossible to make either decision without it; and the apparent failure of the government to do so before imposing the Regulations or failing to terminate them can only undermine the suggestion that they are both proportionate and necessary.

#### The scientific and comparative evidence

- 79 It is not the purpose of this article, and is outside the expertise of the author, to evaluate the complex scientific and statistical evidence about the spread and infection, hospitalisation and mortality rates of coronavirus or of the comparative evidence of the effectiveness of alternative means of addressing the spread of that virus. However, some consideration of that evidence is unavoidable. First, a court considering a challenge to the legislation would be obliged to evaluate such evidence. Secondly, the cogency of such evidence is a necessary and key consideration in any determination of whether the Regulations were and/or continue to be proportionate, the least restrictive means of obtaining the government's objective and necessary in a democratic society. For that reason, some references are set out below to scientific

material and evidence of the relative merits of alternative measures taken by other jurisdictions that at least demonstrate a real controversy amongst experts in the field about the efficacy and effectiveness of ‘lockdowns’ to reduce viral spread; and contradict the suggestion it is so much more effective than less regressive measures such as to justify the extreme impact it has on the rights and freedoms considered above.

- 80 The following are examples of evidence questioning that informing government policy. An analysis of the infection rate<sup>103</sup> by two Stanford professors of medicine suggests that the infection rate may be much higher, and the mortality rate much lower, than modelled, something supported by epidemiologist and statistician Prof John Ioannidis.<sup>104</sup> More recently, this evidence has been supported by evidence that the infection might be so large that the virus may only have mortality rate of up to 0.2%.<sup>105</sup> <sup>106</sup> Dr John Lee<sup>107</sup> and others have pointed out that deaths of those *with* C19 are not necessarily all *caused* by it; that respiratory deaths have been historically under-reported where underlying health conditions are cited as the cause of death; and that the collection of data in different countries may not be comparable.
- 81 The reliability of modelling the spread of a novel virus when so many critical factors are unknown is highly contentious.<sup>108</sup> It is of some relevance that evidence of modelling infection and mortality rates from new illnesses is notoriously uncertain; and that Prof Neil Ferguson, the epidemiologist whose paper was key to the government’s imposition of the Regulations, himself predicted up to 138,000 deaths from vCJD, a disease that has killed only around 150 people to date;<sup>109</sup> and who has also been criticised for his modelling of the foot and mouth crisis in 2001.<sup>110</sup> Moreover, Carl Heneghan, director of the centre for evidence-based medicine at

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<sup>103</sup> <https://www.wsj.com/articles/is-the-coronavirus-as-deadly-as-they-say-11585088464>.

<sup>104</sup> ‘A fiasco in the making... we are making decisions without reliable data’ (<https://www.statnews.com/2020/03/17/a-fiasco-in-the-making-as-the-coronavirus-pandemic-takes-hold-we-are-making-decisions-without-reliable-data/>), 17.3.2020; see also ‘Population-level COVID-19 mortality risk for non-elderly individuals overall and for non-elderly individuals without underlying diseases in pandemic epicenters’, by Prof Ioannidis (<https://www.medrxiv.org/content/10.1101/2020.04.05.20054361v1>), 8.4.2020.

<sup>105</sup> ‘Why a study showing that covid-19 is everywhere is good news’ (<https://www.economist.com/graphic-detail/2020/04/11/why-a-study-showing-that-covid-19-is-everywhere-is-good-news>), 11.4.2020, *ibid*.

<sup>106</sup> ‘Antibody study suggests coronavirus is far more widespread than previously thought’ (<https://www.theguardian.com/world/2020/apr/17/antibody-study-suggests-coronavirus-is-far-more-widespread-than-previously-thought>), 18.4.2020, *ibid*.

<sup>107</sup> <https://www.spectator.co.uk/article/The-evidence-on-Covid-19-is-not-as-clear-as-we-think>.

<sup>108</sup> ‘Predictive Mathematical Models of the COVID-19 Pandemic’, Nicholas P. Jewell, PhD and others (<https://jamanetwork.com/journals/jama/fullarticle/2764824>), 16.4.2020.

<sup>109</sup> The spread of the prediction was of different orders of magnitude – from 150 to 158,000 – which itself reveals the uncertainty of any such modelling:

<https://www.telegraph.co.uk/news/uknews/1330370/Scientists-fear-second-wave-of-human-BSE.html>.

<sup>110</sup> Use and abuse of mathematical models: an illustration from the 2001 foot and mouth disease epidemic in the United Kingdom, University of Edinburgh. ([https://www.research.ed.ac.uk/portal/files/14288330/Use\\_and\\_abuse\\_of\\_mathematical\\_models\\_an\\_illustration\\_from\\_the\\_2001\\_foot\\_and\\_mouth\\_disease\\_epidemic\\_in\\_the\\_United\\_Kingdom.pdf](https://www.research.ed.ac.uk/portal/files/14288330/Use_and_abuse_of_mathematical_models_an_illustration_from_the_2001_foot_and_mouth_disease_epidemic_in_the_United_Kingdom.pdf)), 2006.

Oxford University, has suggested that the ‘peak’ of infections may have been as early as 18<sup>th</sup> March, days before the start of the ‘lockdown’.<sup>111</sup>

- 82 Comparative evidence of the impact of alternative measures in different jurisdictions is of course difficult to evaluate, given the different extent to which infections are introduced, population density and other factors. The European state whose policy has been most at odds with the rest of the continent has been Sweden, which has not introduced a ‘lockdown’, has kept primary schools open and has not closed shops, restaurants or even bars. Sweden’s policy is strongly endorsed by its chief medical advisors and, while its death rate increased faster than comparable Scandinavian countries at the beginning of the infection, those rates have plateaued in recent days.<sup>112 113</sup> Its chief health adviser has stated that reduced infection rates in Stockholm suggests that the archipelago will achieve ‘herd immunity’ within weeks.<sup>114</sup> Meanwhile, an Israeli study published days ago suggests that the measures that each countries have taken have had little impact on mortality rates.<sup>115</sup>
- 83 A key ground for the government’s imposition of these restrictions has been the need to reduce a ‘spike’ in hospital admissions in order to ensure that the NHS is able to treat those hospitalised with ventilators. Yet even their effectiveness in treating Covid-10 is disputed.<sup>116 117</sup>
- 84 In respect of the particular decision to close schools (one impossible to reverse without some restrictions within the Regulations being removed) a detailed assessment of evidence published by the *Lancet* on 6.4.2020 casts doubt on their need or effectiveness as a means of containing viral spread.<sup>118</sup>
- 85 The above are no more than examples of expert and comparative evidence, but they at least establish academic controversy and evidence challenging the need and proportionality of restrictions of such magnitude in containing viral spread.

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<sup>111</sup> ‘Coronavirus Peak is past and now lockdown worse than virus’ (<https://www.thetimes.co.uk/edition/news/coronavirus-peak-is-past-and-now-lockdown-worse-than-virus-expert-insists-sq6dd0jdx>), 21.4.2020.

<sup>112</sup> Sweden sees just 77 new deaths from coronavirus and number of new infections drops by a quarter to just 544 as nation continues to resist lockdown (<https://www.dailymail.co.uk/news/article-8208397/Sweden-sees-just-77-new-deaths-coronavirus.html>), 10.4.2020.

<sup>113</sup> Up to date statistics (in Swedish):

<https://experience.arcgis.com/experience/09f821667ce64bf7be6f9f87457ed9aa>.

<sup>114</sup> ‘Stockholm could have herd immunity by next month’

(<https://www.aol.co.uk/news/2020/04/19/coronavirus-stockholm-could-have-herd-immunity-by-next-month/?ncid=webmail&guccounter=1>), 19.4.2020.

<sup>115</sup> Israeli Study Suggests Lockdown Has No Effect On Coronavirus Timeline

(<https://www.dailywire.com/news/israeli-study-suggests-lockdown-has-no-effect-on-coronavirus-timeline-say-israeli-space-agency-chair>), 13.4.2020.

<sup>116</sup> ‘Clinical course and mortality risk of severe COVID-19’, Paul Weiss, David R Murdoch, *The Lancet*, ([https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30633-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30633-4/fulltext)) 17.3.2020.

<sup>117</sup> ‘Ventilators aren’t a panacea for a pandemic like coronavirus’ by Matt Strauss, *The Spectator*, 4.4.2020.

<sup>118</sup> School Closures and Management Practices by Prof Russell Viner and others, *The Lancet*

([https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(20\)30095-X/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30095-X/fulltext)), 6.4.2020.

## Application of the Siracusa Principles

86 It has been argued above that these Principles are a good means of evaluating the proportionality of the Regulations as a whole. They are principles of international law developed and adopted for that purpose during public health crisis, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms; and they incorporate well established proportionality principles. This is not to say that case law on the proportionality of restrictions of individual rights will not also be relevant to the determination of the challenge.<sup>119</sup>

87 Applying the Principles, the following considerations suggest that the Regulations, considered as a whole, are not a proportionate response to this public health crisis.

*Provided for and carried out in accordance with the law;*

88 The statutory basis of the Regulations is sufficient to meet this test.

*Directed toward a legitimate objective of general interest;*

89 The intention to reduce the spread of the coronavirus and its threat to human lives is of course a legitimate objective.

*Strictly necessary in a democratic society to achieve the objective;*

*The least intrusive and restrictive available to reach the objective;*

90 These are considered together as the question of whether the Regulations are the least intrusive and restrictive measure available is relevant to that of whether they are ‘strictly necessary’ in a democratic society. It is submitted that they are neither.

91 The Regulations were imposed as part of an express policy that not only fails to consider the potential effectiveness of less restrictive measures but which (through the First Secretary’s tests) expressly fails to balance the harms they may redress against the harms they cause. They impose unprecedented and exceptionally grave restrictions on every area of society and on almost all means of human interaction. And they are likely to devastate the livelihoods of millions and to cause great harm to individuals and to society.

*Based on scientific evidence and neither arbitrary nor discriminatory in application; and*

92 While the Regulations are based on scientific evidence, that evidence can only be measured insofar as it justifies the effectiveness of *these* restrictions measured against any that would be less regressive. There is no evidence that the government has considered such evidence adequately; and the First Secretary’s tests would appear to prevent the termination of any of the restrictions unless *each* of the conditions it set are met. These include a sustained reduction in infections and death rates that take no account of whether less regressive measures might achieve the same object. Thus, the

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<sup>119</sup> For reasons of space only, this case law is not considered here.



government's policy can be imputed to be that they will remain in such circumstances even in the face of evidence of that less restrictive measures would be just as effective.

- 93 The scientific evidence of the efficacy and effectiveness of the Regulations as a proportionate means of reducing the spread of the virus is uncertain. Before such evidence could establish that the Regulations are the 'least restrictive' means of addressing the objective, it would need to be compared to evidence of the effectiveness of less regressive measures; and there is positive evidence that no such evaluation has been conducted. Indeed, the speed with which the Prime Minister announced a change in policy on considering the evidence of just one scientific team, led by Prof Ferguson, strongly suggests that it was not.

*Of limited duration, respectful of human dignity, and subject to review.*

- 94 While the measures are subject to review every 21 days, the decision of the Secretary of State is absolute and subject only to judicial review. Unlike regulations passed under the Civil Contingencies Act, Parliament has no right to scrutinise the Regulations until they expire after six months.

- 95 Moreover, the Regulations themselves proscribe – for the first time in the history of this country – all political gatherings and public demonstrations without exception. Even if such an exceptional step was found (on other grounds) to be proportionate, the chilling effect it must have on the ability of opposition to the policy to be organised and mobilised and to demonstrate publicly weighs against a determination that restrictions of this magnitude, subject to no democratic scrutiny for up to six months<sup>120</sup>, are justifiable.

## **Francis Hoar**

21<sup>st</sup> April, 2020 (updated)

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*Any errors are, of course, the author's own.*

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<sup>120</sup> In view of the fact that the requirement for positive resolutions by both Houses of Parliament within 28 days is subject to the qualification that this period does not include periods where Parliament is prorogued, dissolved or not sitting for more than four days; see fn 14, above.