LEVIATHAN CHALLENGED – IS THE LOCKDOWN ECHR COMPLIANT?

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Introduction

1. The inevitable has finally happened - a letter before action[1] has been sent to the Health Secretary challenging the legality of the various restrictions that cumulatively underpin the current Covid-19 lockdown within the UK through the mechanism of the Health Protection (Coronavirus) (England) Regulations 2020 (as amended) '**the Regulations**.'

2. The letter before action builds on the opinions previously outlined by Francis Hoar both on the UK Human Rights Blog[2] and in a previous paper[3] concerning the compatibility of the 'lockdown' with the ECHR.

3. The letter before actions also draws on the arguments made that the relevant regulations are themselves ultra vires and therefore unlawful. That view has been expressed by a number of other commentators - in particular by Robert Craig[4], Tom Hickman QC, Emma Dixon and Rachel Jones[5], and Lord Sandhurst QC and Benet Brandreth QC.[6]

4. The claim is therefore made that the decisions to impose and thereafter continue the restrictions on 'personal and private life' throughout England imposed were unlawful through the Regulations being both;

    4.1. Ultra vires the relevant authorising power under s.45C of the Public Health (Control of Diseases) Act 1984; and

    4.2. Also disproportionate relative to the harmful effects of those restrictions (contrary to the requirement under s.45D of the Public Health Ac 1984 for the minister to consider

[1] https://wedlakebell.com/content/uploads/Letter-to-The-Rt-Hon-Matt-Hancock-MP-Secretary-of-State-for-Health-and-Social-Care-30-April-2020.pdf (accessed 3 May 2020)
[2] https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/ (accessed 3 May 2020)
[3] https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf (accessed 3 May 2020)
[4] https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/ (accessed 3 May 2020)
[5] https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4 (accessed 3 May 2020)
[6] https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf (accessed 3 May 2020)

"*that the restriction or requirement is proportionate to what is sought to be achieved by imposing it*."

5. The assertion is made that

> "*The gravity of the effects and consequences of restrictions made under the Regulations are extreme and affect every area of national life. In such circumstances, they could only be proportionate if the positive effect of their imposition on the coronavirus (if any) relative to less restrictive measures was not outweighed by the harms they might cause*."

6. The common law claim is consequently encapsulated in the statement that the claimant does not accept that:

> "*…restrictions requiring the population to remain at home and that restrict (directly or indirectly) the trading of the majority of businesses in England are the least restrictive means of obtaining that legitimate objective* [of slowing the spread of coronavirus] *and thus proportionate and lawful*."

7. Further, that the continuation of the restrictions, in particular by the reference to the '5 tests' announced on 16 April 2020 that had to be satisfied prior to their easing, was an unreasonable fetter on the Health Secretary's discretion. In particular, because the five tests did not consider the question of proportionality or whether there were less restrictive means of containing Covid-19.

8. The claim is therefore made that through the imposition and continuation of the restrictions, the Government thereby:

> "*failed to consider the following relevant considerations before deciding whether to impose the Regulations:*
>
> > *(a) the uncertainty of scientific evidence about the effectiveness of the restrictions;*
> > *(b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence;*
> > *(c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread;*
> > *(d) the medium and long-term consequences of the measures; and*
> > *(e) whether, in the light of those considerations, less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms";*

9. As an aside, it is interesting that are other potential common law challenges to the restrictions that could have been raised, but which were not: for example, whether the policy and practice surrounding the prohibition under Regulation 6 of the amended Regulations of leaving or being outside the home without reasonable excuse is sufficiently clear to prevent the population being subjected to unlawful detention.

10. The final limb of the challenge to legality of the restrictions, and the one that is the focus of the remainder of this paper, is that:

> "*save (for a limited period and subject to regular review) restrictions that would prevent gatherings of more than 100 people (provided schools can reopen), are a disproportionate breach of fundamental rights and freedoms protected by Articles 5, 8, 9, 11 and 14 and by Articles 1 and 2 of Protocol 1 of the European Convention on Human Rights*."

11. This paper does not seek to address the issue as to whether or not the Regulations are themselves unlawful through being ultra vires. There have been cogent arguments made that the breadth of the restrictions imposed an entire population does make them outwith both the spirit and letter of the enabling power granted by Public Health Act 1984, particularly when given the presumptions in favour of liberty requiring clear and explicit legal authority for such drastic measures as have been enacted.

12. However, the author agrees with the opinions expressed (notably by Benet Brandreth QC and Lord Sandhurst QC) that any such unlawfulness could be relatively easily cured through enacting equivalent measures through either primary legislation or potentially though using the Civil Contingencies Act 2004. The secondary common law argument that the proportionality test imposed under s.45D of the Public Health Act has not been satisfied, could similarly equally be easily answered if alternative statutory routes did not include such a threshold test.

13. Ultimately, any potential illegality by way of being ultra vires is potentially more of a political than a legal difficulty for the Government in continuing the lockdown.

14. However, if in themselves the degree and nature of the restrictions that have been deemed necessary by the Government to address the problem of Covid-19 are in breach of any or all of the ECHR provisions referred to in the current claim, then there is a more

fundamental political and legal problem for the Government. There is also a significant challenge for any judge faced by an extremely contentious judicial review of the decisions to impose and maintain the Regulations, and/or of the compatibility of the Regulations with the ECHR.

15. This paper seeks to build upon Leo Davidson's analysis[7] of the arguments previously made by Francis Hoar as to the ECHR compatibility of the Regulations and subsequent restrictions on daily life, and to make the argument **that there has not been a breach of all or any of the relevant ECHR rights.**

16. Lastly, it should be noted that in contrast to the assertions previously made in Francis Hoar's paper the letter before action does not seek to argue either that:

    16.1. The fact that the Government chose to pass the Regulations under the 1984 Act rather than under the Civil Contingencies Act 2004 and the consequent lack of parliamentary scrutiny and time limitations on the restrictions "*strengthens the argument that they are disproportionate*"; or

    16.2. The fact that the Government has not to date sought to derogate from the ECHR under Article 15 might indicate that the Government does not consider that the high threshold of a public emergency threatening the life of the nation has been reached, and indeed that in light of the mortality rate of Covid-19 it is "*questionable*" whether the threshold is in fact satisfied.

Engagement of ECHR Rights

17. The first issue is of course whether the Regulations do in fact engage the ECHR rights claimed at all.

[7] https://ukhumanrightsblog.com/2020/04/30/the-coronavirus-lockdown-does-not-breach-human-rights-part-one-leo-davidson/ (accessed 3 May 2020)

18. While there has been some debate as to whether the Regulations do in fact engage specific ECHR articles (particularly with regards to Article 5[8]), the author agrees with Francis Hoar that Articles 8, 9, 11, 14 and Articles 1 and 2 of Protocol 1 are potentially engaged.

19. However, with respect to Article 5, there is very much a live issue as to whether Article 5 is in fact engaged.

The test for deprivation of liberty under Article 5

20. The key principles from the ECtHR jurisprudence are that:

20.1. Article 5 contemplates the physical liberty of the person. Accordingly,

> "*it is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance*."[9]

20.2. An assessment of the nature of the preventive measures must consider them "cumulatively and in combination": *De Tommaso* at [81].

20.3. The requirement to take account of the "type" and "manner of implementation" of the measure in question requires having:

> "*…regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good*."[10]

20.4. Further, "*it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation*": *Creanga v Romania* [2013] 56 EHRR 11 at

[8] See for example – Darragh Coffey https://ukhumanrightsblog.com/2020/04/10/the-coronavirus-act-2020-when-legislation-goes-viral-part-two/ (accessed 5 May 2020), Niall Coghlan https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-coghlan/ (accessed 5 May 2020), and Merris Amos https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576496 (accessed 5 May 2020)
[9] *De Tommaso v Italy* [2017] 65 EHRR 19 at [80]
[10] *De Tommaso* at [81], *Nada v Switzerland* [2012] (Application 10593/08) at [226]

[91]. This is particularly as "*the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today…. the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions*": *Austin v United Kingdom* [2012] 55 EHRR 14 at [53-4].

20.5. Relevant factors taken into consideration outside of 'classic detention' in prison or equivalent facilities include:

20.5.1. Whether the individual in question is able to make social contacts and maintain relations with the outside world: *De Tommaso* at [85,88], *Guzzardi v Italy* [1981] 3 EHRR 333 at [95], *HM v Switzerland* [2002] (Application 39187/98) at [45].

20.5.2. Whether they are required to live in a restricted area: *De Tommaso* at [85].

20.5.3. Whether there has been any coercion: *Foka v Turkey* [2009] (Application 28940/95) at [78], and at *Shimovolos v Russia* [2011] (Application 30194/09) at [50].

20.5.4. Whether they are able to work: *Trijonis v Lithuania* (Application No 2333/02) where the Court distinguished the 'home arrest' from *Guzzardi,* noting in particular that while the individual in question was required to be at his home overnight and all day at weekends he was able to go to his usual workplace.

20.6. 'House arrest' has been found to be a deprivation of liberty such that Article 5 is engaged. Nevertheless, 'house arrest' is generally treated as an autonomous and self-explanatory concept, despite the exact meaning of house arrest differing from country to country, and case to case. However, there are cases where the national measure in question has been described and then equated to a deprivation of liberty. For example, where someone was prohibited from leaving their home without permission;[11] where someone was permanently confined to the interior of their flat, placed under surveillance and prohibited from going outside;[12] where there were

[11] *Nikolva v Bulgaria (No 2)* [2004] (Application 40896/98) at [53]
[12] *Lavents v Latvia* [2003] (Application 58442/00) at [63]

prohibitions such as leaving the house, or using the telephone, mail or other means of communication, or a ban on communicating with certain persons or receiving visits from them;[13]

20.7. In *Engel v Netherlands* [1979-80] 1 EHRR 647 at [19, 62] no deprivation of liberty was found for soldiers placed under 'aggravated arrest' who continued to perform their military duties, but the rest of the time had to remain, in the company of other servicemen undergoing a similar punishment, in a specially designated but unlocked place. The offender might receive visits if he had the company commander's written permission. They could not move freely about the barracks so as to visit the cinema, canteen or recreation facilities. As far as possible, ordinary servicemen had to be separated from their fellows during the night.

20.8. In *Austin* at [59] the ECtHR held that freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match (see paragraphs 35 and 37 above). The Court does not consider that such commonly occurring restrictions on movement (such as travel by public transport or attendance at a football match) were deprivations of liberty "*so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose*."

21. From the domestic caselaw concerning Article 5 it is relevant that:

21.1. Deprivation of liberty under Article 5 is not to be equated to common law unlawful detention: *R(Jollah) v SSHD* [2020] 2 WLR 418 at [33], referring to the "*very different and much more nuanced concept of deprivation of liberty under the ECHR*."

21.2. In *Surrey County Council v P (Cheshire West)* [2014] AC 896, Baroness Hale at [40-41] referred to the question of whether someone was 'confined' involving consideration of "*whether the complainant was under the complete supervision and control*

[13] *Buzadji v Moldova* 42 B.H.R.C. 398 at [43]

of the staff and not free to leave." At [48-9] that was held to be the acid test. [14]Baroness Hale noted at [49] that:

> "*I would not go so far as Mr Gordon, who argues that the supervision and control is relevant only in so far as it demonstrates that the person is not free to leave. A person might be under constant supervision and control but still be free to leave should he express the desire so to do.* ***Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty***." [Emphasis added]

21.3. She went on to hold at [46] that:

> "*…the right to physical liberty, which is guaranteed by article 5 of the European Convention…is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities.* ***If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person****. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage*." [Emphasis added]

21.4. In *SSHD v AP* [2011] 2 AC 1, the Supreme Court cited at [1] with approval Lord Bingham of Cornhill in *SSHD v E* [2008] AC 499 to the effect that

> "*…what principally must be focused on is the extent to which the suspect is "actually confined": "other restrictions (important as they may be in some cases) are ancillary" and "[can] not of themselves effect a deprivation of liberty if the core element of confinement … is insufficiently stringent*"."

21.5. Lastly, in *SSHD v JJ* [2008] 1 AC 385, Lord Bingham in holding that control orders were a deprivation of liberty noted at [24] that:

> "*The effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled* ***persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time****. The area open to them during their six non-curfew hours was unobjectionable in size,*

[14] In *Birmingham City Council v D* [2019] 1 WLR 5403, Baroness Hale held at [33] that the 'acid test' for deprivation of liberty following Cheshire West was "*that a person is under continuous supervision and control and not free to leave*."

> *much larger than that open to Mr Guzzardi. But they were (save for GG) located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason. The requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoners would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy*." [Emphasis added]

21.6. Similarly, Lord Hoffmann at [37] referred to the 'paradigm case' of deprivation of liberty:

> "*The prisoner has no freedom of choice about anything. He cannot leave the place to which he has been assigned. He may eat only when and what his gaoler permits. The only human beings he may see or speak to are his gaolers and those whom they allow to visit. He is entirely subject to the will of others*."

Article 5 is not engaged

22. The author suggests that the current restrictions do not amount to deprivation of liberty so as to engage Article 5 at all: -

23. The current Covid-19 pandemic is a unique situation, unparalleled in history of the ECHR the potential numbers of infections due to the apparent ease and invisibility of transmission (particularly by the asymptomatic), the very high mortality rates for some in highly vulnerable categories, the lack of any vaccine, and the limited evidence for the utility of medication in reducing mortality in those requiring hospitalisation. This must be a paradigmatic situation "where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good," such that Article 5 is not in fact engaged. The requirements of Article 5 have to be interpreted in light of the unique situation (and the threat to life inherent within it), as well as the current conditions and near universal imposition of 'lockdowns' across the ECHR signatory states.

24. Further, when considering the "type, duration, effects and manner of implementation of the measure in question" the critical factors concerning the current restrictions are that is fundamentally different from 'detention' or 'house arrest' or even 'close supervision and control amounting to a deprivation of liberty':

24.1. People are not prevented from work, only encouraged to work from home if at all possible. Leaving the home to work is a specified 'reasonable excuse' under Regulation 6(2)(f)– "to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living."

24.2. People are not prevented from having social contact by all means: there is no restriction on the use of telephone, email, video, or letter.

24.3. There is no restriction on someone changing their home – i.e. the 'place where there are living', providing moving is 'reasonably necessary' – Regulation 6(2)(l).

24.4. No advance permission is required to leave the home, provided that there is a reasonable excuse for doing so.

24.5. There is no supervision or monitoring within the home. [15]

The relevance of Article 2

25. When considering the proportionality of any restriction on the ECHR rights in question, the second issue is to the extent to which such an assessment should take into account any obligations imposed on the Government by Article 2 ECHR – the right to life.

26. Interestingly (though perhaps unsurprisingly) the letter before claim does not repeat the argument made in Francis Hoar's earlier paper that there is no positive obligation to impose the Regulations arising out of any Article 2 duties incumbent on the Government arising out of the threat to life posed by Covid-19. He argued that there is no authority to support the argument that there is no relevant (systemic)[16] duty beyond the duty to have an effective criminal law and operational machinery by which it is enforced. Further, that there could not be any (operational) duty to take specific preventative measures where "*some scientific evidence suggests heavy restrictions on the movement and association of the whole*

[15] See also http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html (accessed 6 May 2020)
[16] The distinction between systemic and operational duties arising under Article 2 is not referred to in the paper.

population is necessary to contain its spread." Lastly, the relevance of Article 2 if anything weighed against the Regulations overall being proportionate:

> "*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, neglect through isolation and the cancellation of operations and other medical treatment for those with serious and terminal health conditions. 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*."

27. In Leo Davidson's response to Francis Hoar's original paper, he makes the powerful arguments in relation to Article 2 that:

27.1. Protecting the right to life is, self-evidently, one of the most basic values of a democratic society in particular because (i) life is a prerequisite for enjoyment of every other right; and (ii) death is permanent.

27.2. Article 2 imposes requirements on the state to take reasonable positive measures to prevent lives being lost and critically from avoidably being put at risk, and this obligation extends to the public health arena.

27.3. A pandemic spread by human-to-human contact is not strictly analogous to a natural disaster, inasmuch as the spread is a function of human activity. The state is able to exert control over human activity by making and enforcing law. The state is therefore able to affect the impact of the pandemic and as a result has a positive obligation under Article 2 to do so.

27.4. In the alternative, even if not obliged to take any specific step (let alone impose a lockdown), nevertheless, the Government is clearly entitled to have regard to the objective of safeguarding life enshrined in Article, including when considering the proportionality of any resulting interference with other ECHR rights.

27.5. The uninhibited spread of the virus would also have a discriminatory impact on the enjoyment of the right to life and the protection of health and permitting this would be contrary to Art 14 ECHR. This is particularly relevant given the evidence of

differential impact of Covid-19 on the elderly and those with underlying health conditions, as well as the differential risk on those whose occupation requires them to work outside the home and also those in institutional settings.

28. With regards to the obligations imposed by Article 2, the author agrees with the points made by Leo Davidson and would further highlight that: -

28.1. The ECtHR has emphasised that its interpretation of Article 2 "*must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective*" – *McCann v UK* [1996] 21 EHRR 97 at [146].

28.2. Article 2 has been interpreted by the ECtHR as imposing on the State both a negative obligation to refrain from the intentional and unlawful taking of life and, albeit in more limited circumstances, positive obligations to take appropriate steps to safeguard the lives of those within their jurisdiction.

28.3. The positive obligation can apply in the context of any activity, whether public or not, in which the right to life may be at stake: *Brincat and others v Malta* [2014] ECHR 836 at [79-80]. That includes where the right to life is threatened by a natural disaster, such as an earthquake: *Budayeva v Russia* [2014] 59 EHRR 2 at [128-130]. It also includes situations where even though an individual survived, there had been a clear risk to their life: *Kolyadenko v Russia* [2013] 56 EHRR 2 at [151] (in the context of a flood from a reservoir). The positive obligation also applies a fortiori in the case of industrial activities which by their very nature are dangerous: *Brincat* at [80] – in a case concerning exposure to asbestos.

28.4. It is relevant that the United Nations Human Rights Committee similarly underlined that States' duty to protect life requires them to adopt 'appropriate measures to address the general conditions in society that may give rise to direct threats to life', including life-threatening diseases (General Comment n° 36, § 26; see

also General Comment n° 6, §5, explicitly referring to the taking of all possible measures to 'eliminate' epidemics).[17]

28.5. Further, the ECtHR has considered that cases of serious illness (or 'real risk to health') are within the ambit of Article 2 when the circumstances potentially engaged the responsibility of the State: *LCB v UK* [1999] 27 EHRR 212 at [36-41]. In addition, the ECtHR has held that "*it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article* 2": *Trepalko v Poland* [2011] (Application 25124/09) at [23].

28.6. States are required to "*make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives*": *Cavelli v Italy* [2002] (Application 32967/96) at [49] – including preventing dysfunction in hospital services that could endanger the life of more than one patient: *Aydogdu v Turkey* [2016] ECHR 719 at [53-56], and *Lopes de Sousa Fernandes v Portugal* [2018] 66 EHRR 28 at [181-184].

28.7. The ECtHR case law distinguishes between two categories of potential implied positive obligations under article 2: on the one hand, a "legal framework" (or "systems") obligation; and an "operational" obligation.

28.7.1. The ECtHR has emphasised that States must put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life: see e.g. *Osman v UK* [2000] 29 EHRR 245 at [115]. This has been called a "systems duty" to have in place appropriate procedural and legal systems. It includes, for example, appropriate mechanisms for maintenance of standards, and discipline for those who fall short of those standards. In *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 Lord Bingham described, at §2, this aspect of the article 2 obligation as being "… *to establish a framework of laws, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.*"

[17] https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/ (accessed 4 May 2020)

28.7.2. The ECtHR has also held that article 2 may in appropriate circumstances give rise to an implied "operational" obligation on the State to take reasonable preventative operational measures to protect the life of a particular individual where the State knew or ought to have known of a real and immediate risk to their life: see *Osman* at [115] and *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at [12]. The operational duty applies exceptionally to certain categories of individual, typically those who are vulnerable and over whom the State has assumed responsibility and control for example, prisoners who are suicide risks: see e.g. *Savage v South Essex Partnership NHS Trust* [2009] 1 AC 681 at [27-32].

29. The author agrees with Leo Davidson and others[18] that the weight placed by the ECtHR on the preservation of life in a broad range of circumstances where 'the state' has some degree of responsibility and/or ability to influence the outcome suggests that that it is impossible to separate any consideration of what degree of interference with non Article 2 rights is necessary and proportionate from an assessment of the degree to which the Government could be held to be required under Article 2 to impose measures for the protection of life from risks to life resulting from of Covid-19, even if those measures extended to the whole population.

30. There is support for this argument in the approach taken by the ECtHR, for example in *Austin* at [55, 58] where the Article 2 operational duty was specifically referred to in the context of considering whether Article 5 was engaged, and the court referred to the underlying public interest motivating any deprivation of liberty as being potentially relevant to considering whether there had been a breach of Article 5.

31. Similarly in *R(Hicks) v Commissioner of Police of the Metropolis* [2017] AC 256, the Supreme Court referred at [29] to the need not to interpret Article 5 in such a way as to prevent the police from performing the duty to maintain public order and protect the lives of others, and cited at [30] with approval Lord Hope in *Austin:*

[18] In particular Jeremy McBride http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?m=1), (accessed 4 May 2020)

> "*34. I would hold … that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances. No reference is made in article 5 to the interests of public safety or the protection of public order as one of the cases in which a person may be deprived of his liberty … But the importance that must be attached in the context of article 5 to measures taken in the interests of public safety is indicated by article 2 of the Convention, as the lives of persons affected by mob violence may be at risk if measures of crowd control cannot be adopted by the police. This is a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with each other. The ambit that is given to article 5 as to measures of crowd control must, of course, take account of the rights of the individual as well as the interests of the community. So, any steps that are taken must be resorted to in good faith and must be proportionate to the situation which has made the measures necessary*."

32. In respect of the degree to which Article 2 places any positive obligations on the Government to act, there is not a precise analogy between a natural disaster such as an earthquake or flood (even a flood from an artificial reservoir as in *Kolyadenko*) and a pandemic such as Covid-19. However, it is at least arguable that there are some crucial similarities – Covid-19 is a 'natural' disease; its spread is not intentional (albeit spread by human choices to interact with each other); coronaviruses do appear to re-appear regularly and were already a 'known hazard'; and arguably in a globalised and interconnected world a major country such as United Kingdom could not prevent the population becoming infected to at least some degree. The relevant caselaw concerning the specific requirements of Article 2 in the context of natural disasters would suggest that these would be the most naturally analogous situation. For example, the ECtHR in <u>*Ozel v Turkey*</u> [2016] (Application 14350/05) held:

> "*170. The Court reiterates that Article 2 of the Convention requires the State not only to refrain from intentionally causing deaths but also to take appropriate steps to safeguard the lives of those within their jurisdiction. That obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, but it also applies where the right to life is threatened by a natural disaster (see Budayeva and Others, cited above, §§ 128-130).*
>
> *171.* ***In that respect, the Court pointed out, in connection with natural hazards, that the scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation, and clearly affirmed that those obligations applied in so far as the circumstances of a particular case pointed to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use*** *(ibid., § 137). Therefore, the applicability of Article 2 of the Convention and the State's responsibility have been recognised in cases of*

natural disasters causing major loss of life. In the instant case, the applicants' complaints must be assessed under the substantive and procedural heads of Article 2 of the Convention….

173. The Court observes that earthquakes are events over which States have no control, ***the prevention of which can only involve adopting measures geared to reducing their effects in order to keep their catastrophic impact to a minimum. In that respect, therefore, the prevention obligation comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of such natural phenomena as earthquakes.***" [Emphasis added]

33. In a situation where the disaster in question is an evolving process, rather than a one-off event, it is logical for the state's 'prevention' obligation to mitigate the (future) risk from Covid-19 to life to be continuous even though the risk to life has already begun to be operative.

The competing scientific evidence

34. A further preliminary issue is that the letter before claim repeats the arguments previously made by Francis Hoar that there is scientific material, and also evidence of the relative merits of alternative measures taken in other countries, 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….*

…and establish substantial doubt about the scientific and statistical basis for the modelling that has been the basis on which the Government has imposed the Regulations. In weighing the supposed benefits of the restrictions against the harms they unquestionably cause, this undermines the weight that that evidence should be given and any attempt to assert that the restrictions are proportionate."

35. In the letter before action, the argument is further made that a 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*" citing *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, at [90-94].

36. Various scientific papers and media articles are referred to, in essence casting doubt on:

36.1. The assumed mortality and infection rates.

36.2. The reliability of the epidemiological modelling used to predict the spread of Covid-19.

36.3. The efficacy of the measures adopted in the UK relative to those adopted elsewhere, in particular in Sweden.

36.4. The utility of ventilators as treatment for Covid-19 patients requiring intensive care.

36.5. The effectiveness of closing schools.

37. The author agrees with Leo Davidson that:

37.1. It is true that there are many unknowns on a number of different areas. In particular: the Covid-19 infection and mortality rates (and its variations across different groups); the transmission methods and associated risk mitigation offered by physical social distancing; and the degree of immunity conferred by infection by Covid-19. While more and better information is being gathered daily, many questions remain as to the actual state of play and estimates of crucial metrics vary considerably. Meanwhile, projections and predictions are only as good as the data used to produce them.

37.2. This uncertainty does not per se undermine the lawfulness of the lockdown.

37.3. The Government can only, and must, act having regard to the scientific advice available to it. No court should criticise the Government for relying on reasonable expert advice and acting accordingly. Still less should a court substitute its own amateur assessment of conflicting scientific evidence without a clear case of manifest error or irrationality.

37.4. It is also entirely proper for a decision-maker, faced with uncertain or conflicting scientific evidence concerning a pandemic that has already been

responsible for 10,000s of deaths across the United Kingdom, to adopt a precautionary approach based on a worse case scenario.

38. In this context, the judgment of the Court of Appeal in R(Mott) v Environmental Agency [2016] EWCA Civ 564, as referred to by Leo Davidson, is worth considering in some detail. The Claimant alleged the decision to impose limits on salmon fishing was both Wednesbury irrational and a breach of his Article 1 Protocol 1 rights. Beatson LJ held at [67]:

> "….*it is perhaps understandable that the judge sought to make an educated guess on a number of matters. I have, however, concluded that in doing so he fell into error and strayed beyond what is proper for a reviewing judge dealing with complex scientific material…*
>
> *68 My starting point in considering the contention (put at times in very strong terms) that the judge in this case had not accorded sufficient weight to the nature of the exercise or the expertise of the Agency* ***is the approach a judicial review court should take when considering a challenge to the decision of the designated statutory regulator that is the result of an evaluation of assessments made using scientific material as to what might happen in the future, and is in that sense predictive****. Neither party drew the attention of this court to any guidance in the authorities as to how to approach such a question. There is also none in the skeleton arguments for the hearing before the judge.*
>
> *69. After the hearing, the court invited the parties to make submissions on this and drew their attention to three decisions, R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department [2008] EWCA Civ 417, (2008) 105(18) LSG 24, Secretary of State for Environment, Food and Rural Affairs v Downs [2009] EWCA Civ 664, [2009] Eu LR 799, and R v Director General of Telecommunications, ex p. Cellcom [1999] ECC 314.* ***The very helpful submissions from both parties showed that it was common ground that in principle the court should afford a decision-maker an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments****…*
>
> *70.* ***The judge correctly recognised (at [52]) that it was not the function of the court to form its own view as between the views of different experts in a technical area, and that he was concerned with the rationality of the decisions. He was also clearly aware (see, for example, [59]) that he was dealing with a technical area in which the professionals would have more expertise. He did not, however, address the particular issues that arise when dealing with a decision based in part on scientific assessments which involve a predictive element.***
>
> *71. R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department [2008] EWCA Civ 417, (2008) 105(18) LSG 24 and Secretary of State for Environment, Food and Rural Affairs v Downs [2009] EWCA Civ 664, [2009] Eu LR 799 are decisions of this court in which the challenges had succeeded at first instance but appeals by the defendants were successful in broad terms because* ***this court considered that the judge had***

substituted his own inexpert view of the science for the view of the decision-maker which was based on a tenable expert opinion.

72. The Abolition of Vivisection case concerned a challenge to a decision of the Chief Inspector of Animals that the adverse effects experienced by marmosets as a result of tests forming part of a university's research into the functioning of the human brain were "moderate" and not, as the claimant maintained, "substantial". The judgment was given by May LJ, with whom Dyson and Moses LJJ agreed. May LJ stated ***at [1] that a challenge to "a composite scientific judgment based upon an expert analysis of scientific material" is a type of decision that is intrinsically less amenable to a successful judicial review application than others and at [54], in the context of perversity arguments, that "an analysis of apparently competent expert scientific opinion [is] not …. a proper subject of judicial review proceedings".***

*73. In Downs' case, Ms Downs, an experienced campaigner with expertise and knowledge of pesticides, challenged the United Kingdom's regulatory regime for pesticides on the ground that it did not comply with the provisions of Directive 91/414 EEC because it did not properly protect residents in rural areas who were exposed to the effects of crop-spraying. The evidence included criticism by the Royal Commission on Environment Pollution in its 2005 report of a model used by the Advisory Committee on Pesticides on which the Secretary of State had relied. The judgment was given by Sullivan LJ, with whom Keene and Arden LJJ agreed. Sullivan LJ stated at [76] that "****whilst the [Secretary of State's] decisions in this respect are not immune from judicial review, the hurdle of "manifest error" in such a highly technical field is a formidable one …. [Ms Downs] is not able to surmount that hurdle".***

74. I have also been assisted by two other cases…. The second case is R (Levy) v Environment Agency [2002] EWHC 1663 (Admin), which Mr Lewis relied on in his further submission. It was a challenge to a decision permitting the use of scrap tyres as a substitute fuel in kilns at a cement works. Silber J stated at [75] – [76] ***that he accorded an enhanced margin of appreciation to the Environment Agency, an environmental regulator making a specialist judgment, applying very sophisticated specialised scientific and environmental knowledge and expertise.***

*75. The contexts of these cases and the evidence before the bodies whose decisions were challenged are different from the position in the present case. In Downs' case, there were differences between different experts, and in the Animal Experiments case, the view of the decision-maker was supported by other experts****. As well as those factors, the scope of judicial review is acutely sensitive to the regulatory context and, in particular, decisions involving what Professor Lon Fuller called "polycentric" questions pose particular challenges to a judicial review court****. Notwithstanding the differences and recognising the importance of sensitivity to context and flexibility, I consider that these cases provide general assistance in considering the approach to the decisions of the Agency…*

77. More broadly, in the Abolition of Vivisection case [2008] EWCA Civ 417 May LJ stated at [1] that scientific analysis "is not immune from lawyer's' analysis" ***but a reviewing court must be "careful not to substitute its own inexpert view of the science for a tenable expert opinion****". A reviewing court should be very slow to conclude that the expert and experienced decision-maker assigned the task by statute has reached a perverse scientific conclusion …"*

39. While not explicit, it appears that the claim as currently pleaded is in part on the basis that the Regulations are insufficiently based on scientific evidence, in particular, due to the lack of any, or any sufficient, comparative exercise considering the effectiveness of alternative less restrictive measures. The assertion is made that there is no evidence that the Government has evaluated alternative means of containing the virus as adopted in other countries.

40. With regards to the specific question of the degree to which the Government is entitled to rely on the scientific evidence that it is being given, it is of course highly likely that there is a variation in what the Government is being told about the relevant 'science'. This is not least because seeking to analyse the requirement for, and the impact of, the various restrictions imposed by the Regulations (or any alternative measures seeking to mitigate the impact of Covid-19) crosses so many scientific disciplines – epidemiology, clinical respiratory, psychology, geriatric and paediatric medicine, demography, behavioural science, let alone economics. This appears to be pre-eminently an area where judicial review is deeply inappropriate as a means of judging alternative epidemiological models or the efficacy of alternative restrictions at mitigating the impact of Covid-19.

41. The example of Sweden suffices to demonstrate the near impossible task set for a court seeking to assess the degree to which the Regulations are scientifically 'justified', in particular, by looking at alternative measures adopted in other countries and extrapolating from them judgments as to the efficacy, necessity and proportionality of the restrictions imposed in the United Kingdom.

    41.1. The letter before action asserts that:

> "*…evidence of the impact of alternative measures in different jurisdictions, while difficult to evaluate, is a relevant consideration, 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. Its chief health adviser has stated that reduced infection rates in Stockholm suggests that the archipelago will achieve 'herd immunity' within weeks. Only yesterday (29 April 2020) the World Health Organisation praised the measures Sweden has put in place to contain the virus*."

41.2. The clear implication is that a court should look at the measures enacted in Sweden and ask whether similar measures (or at least elements thereof) should have been enacted in the United Kingdom, and that if Sweden has not been copied then the measures must therefore be disproportionate.

41.3. This analysis potentially ignores fundamental structural differences between Sweden and the United Kingdom which would affect the effectiveness of measures to mitigate the risk to health from Covid-19, for example:

41.3.1. significantly lower overall population density in Sweden;[19]

41.3.2. the size of Stockholm (just under 1m)[20] compared to London (nearly 9m)[21];

41.3.3. the much higher number of single person households within Sweden (over 50%) compared to the United Kingdom (just over 30%);[22] and

41.3.4. the higher incidence in the United Kingdom in Covid-19 vulnerability related health conditions such as obesity (26.0% male obesity in the United Kingdom vs 19.9% in Sweden).[23]

41.4. It also glosses over the degree to which the Swedish approach has itself been challenged: Sweden's mortality rate, even if lower than the United Kingdom, appears to be significantly higher than its neighbours Denmark, Finland and Norway.[24]

[19] https://data.worldbank.org/indicator/EN.POP.DNST (accessed 6 May 2020)
[20] https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/rank-lists-municipalities/swedens-50-largest-municipalities-2019/, (accessed 6 May 2020)
[21] https://airdrive-secure.s3-eu-west-1.amazonaws.com/london/dataset/housing-led-population-projections/2020-03-03T09%3A33%3A06/2018-based-housing-led-results.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAJJDIMAIVZJDICKHA%2F20200506%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-Date=20200506T083959Z&X-Amz-Expires=300&X-Amz-Signature=1c2f8a07cfa80980c4a4be9abae4cec51becc6d61c862403dd7e290d8bfd8571&X-Amz-SignedHeaders=host (accessed 6 May 2020)
[22] https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170905-1?inheritRedirect=true (accessed 6 May 2020)
[23] http://www.euro.who.int/__data/assets/pdf_file/0003/243327/Sweden-WHO-Country-Profile.pdf , http://www.euro.who.int/__data/assets/pdf_file/0020/243335/United-Kingdom-WHO-Country-Profile.pdf?ua=1 (accessed 6 May 2020)
[24] https://www.itv.com/news/2020-04-29/is-sweden-s-lack-of-coronavirus-lockdown-a-fatal-mistake/ (accessed 6 May 2020)

42. Alternatively, if there is to be any assessment of the strength of the Government's scientific evidence, as is the clear implication of the letter before action, then the Government's scientific advice should be measured against an appropriate yardstick.

43. As those of us who work in clinical negligence are constantly reminded, two 'leading experts' can often come to diametrically opposite (yet seemingly equally convincingly argued) conclusions as to what has happened or will happen in complex medical scenarios. The uncertainties involving in medical negligence are reflected in the specific test for breach of duty – the Bolam/Bolitho test, or whether a clinician has acted in accordance with a responsible body of medical opinion, with the sole rider that the body of opinion in question has have to a logical basis. The author would suggest that when assessing whether or not the Government's underlying scientific assumptions or advisors are 'wrong' a similar test of being in accordance with a reasonable and logical body of scientific opinion should be adopted that reflects the sheer impossibility of reaching scientific consensus on the 'lockdown'.

The Test for Proportionality

The irrelevance of the Siracusa principles

44. The fourth issue is what is the correct test for considering the proportionality of any restrictions on the ECHR rights engaged, and the framework through which a court should take into consideration the various factors identified above.

45. The letter before action initially considers the question of proportionality in the context of the s.45D of the Public Health Act test, and repeats the assertion previously made by Francis Hoar that the:

> "*A determination of the proportionality of the Regulations, imposing a code affecting a number of different freedoms for public health reasons, should be judged through applying the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights adopted for that purpose by the UN Economic and Social Council in 1984, and the UN Human Rights Committee. 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 (Demir v Turkey [2015] ECHR 316 at [85]– [86], ECtHR). They are principles of international law*

developed and adopted for that purpose during public health crises, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms. They incorporate well established proportionality principles and must be considered alongside the proportionality of restrictions of individual rights, all of which will also be relevant to the determination of the challenge.

The Siracusa Principles require that restrictions should, at a minimum, be:

- *carried out in accordance with the law;*
- *directed towards a legitimate objective;*
- *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*."

46. The claim is then made that "*as with the statutory test of proportionality in s 45D of the 1984 Act, proportionality is best judged through the application of the Siracusa Principles*" as well as through caselaw addressing 'proportionality.' This is expanded in Francis Hoar's previous paper:

"*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."

47. No authority is cited in support of the proposition that the Siracusa Principles should be adopted as the relevant test of proportionality other than *Demir v Turkey* [2008] (Application 34503/97), in which the ECtHR held:

"*76. The Court recently confirmed, in its Saadi judgment (cited above, § 63), that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it.* ***Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty****…*

85. ***The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.*** *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."

48. There is no evidence or authority cited as to why the Siracusa principles should be given such weight. It is noteworthy that the only instance where the Siracusa principles have been cited before the ECtHR was in *A v UK* [2009] 49 EHRR 29 in the context of defining a public emergency for the purposes of Article 15 derogation – similarly the only consideration of the principles in the domestic courts was in the House of Lords in the preceding case of *A v SSHD* [2005] 2 AC 68.

49. Indeed that is not surprising, as the entire purpose of the Siracusa principles was to address the problem of the circumstances in which derogations from rights guaranteed by the International Covenant on Civil and Political Rights could be permitted on the grounds of a public emergency.

50. It is true that paragraph 25 of the Sircacusa principles (as one of the 'general interpretative principles' states:

"*25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.*"

51. However, the 6 part test cited by Francis Hoar does not appear within the Siracusa principles. They solely state:

"*5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.*

6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.

7. No limitation shall be applied in an arbitrary manner.

8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.

10. Whenever a limitation [on a right recognised by the Covenant] is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

(b) responds to a pressing public or social need,
(c) pursues a legitimate aim, and
(d) is proportionate to that aim.
Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation."

52. When considering in detail what constitutes measures in a derogation situation that are strictly required by the exigencies of the situation, the principles state:

"*51. The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.*

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation."

53. It is accordingly seriously stretching the Siracusa principles to assume that they are "*principles of international law developed and adopted for that purpose during public health crises*."

54. There is simply therefore no basis for the detailed test proposed as being allegedly found or even grounded in the Siracusa principles. In particular, there is no reference to any requirement for scientific evidence, or for periodic review, or that the measures should be of limited duration: all factors stated to weigh against the Regulations being proportionate and lawful.

55. More fundamentally, the principles themselves are irrelevant to a situation where the United Kingdom has deliberately chosen not to exercise its right to derogate under Article 15. Furthermore, their actual content adds nothing to how proportionality should be assessed – whether under ECtHR jurisprudence or under domestic law. There is simply no requirement to look to the Siracusa principles to add any gloss onto the well understood tests for proportionality.

Bank Mellat

56. Aside from the requirement allegedly found in the Siracusa principles for any measures to be "*the least intrusive and restrictive available to reach the objective*," in the letter before claim, the Supreme Court's judgment in R (on the application of Lumsdon and others) v Legal Services Board [2015] UKSC 41 at [66] is cited as authority for the proposition that "*a restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been attained equally well by measures that were less restrictive of a fundamental freedom*."

57. The ECtHR's judgment in Mellacher v Austria [1989] 12 EHRR 391 is no longer cited (as it was in Francis Hoar's earlier paper) – unsurprisingly as it in fact confirms (in the context of an alleged breach of Article 1 Protocol 1) at [53] that:

> "*The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way*."

58. When considering the correct test for proportionality, it should be noted that *Lumsdon* concerned a question of proportionality in EU law, and Lords Reed and Toulson emphasised at [26] that:

> "*the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground,* ***the four-stage analysis of proportionality which was explained in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39; [2014] AC 700, paras 20 and 72-76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights****, is not applicable to proportionality in EU law*."

59. Lastly, the House of Lords judgment in R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15 is cited in the letter before claim. It is worth referring to the detail of what was said by the House of Lords in *Begum* at [30]:

> "*the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in Smith and Grady v United Kingdom (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532, paras 25-28, in terms*

which have never to my knowledge been questioned. ***There is no shift to a merits review, but the intensity of review is greater than was previously appropriate****, and greater even than the heightened scrutiny test adopted by the Court of Appeal in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554.* ***The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time*** *(Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2004] 1 AC 816, paras 62-67).*[25] ***Proportionality must be judged objectively, by the court*** *(Williamson, above, para 51)"* [Emphasis added]

60. The reference to *Daly* in *Begum* was to the judgment of Lord Steyn:

> "*28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way.* ***This does not mean that there has been a shift to merits review****. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct.* ***And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything****."* [Emphasis added]

61. The conclusion advanced in the letter before action as to the appropriate test that should be adopted by a court is it should:

> "*…(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 interferences are the least restrictive means of obtaining the objective of containing the virus while not causing disproportionate harms,*** *and thus a proportionate response, based on a rational factual appreciation of the facts at the date of the review.*

62. Further*:*

> *"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*."

[25] *Wilson* at [62] makes it clear that the 'relevant time' is the time when a court considers the issue, not the position when the legislation came into force or was enacted.

63. The author agrees with Leo Davidson as to the starting point for considering proportionality in respect of any interference with Articles 5, 8, 9, and 11 is the test contained in Bank Mellat v HMT (No 2) [2013] UKSC 39. As noted above, the Supreme Court in *Lumsdon* confirmed that *Bank Mellat* is the general test for proportionality in the context of the ECHR.

64. The appropriate test for any interference with Articles 14, and also Articles 1 and 2 of Protocol 1 is explored further below.

65. Accordingly, the test as set out in *Bank Mellat* at [20] is:

> "*The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap…**the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.** These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile **in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective**. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.*"[26]

> "*… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, **(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter**. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. **I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step***

[26] Per Lord Sumption for the majority

four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure… [27][Emphasis added]

66. A crucial difference between the third limb of the (correct) test as set out by Lords Sumption and Reed in *Bank Mellat*, and that proposed by Francis Hoar, is that under the *Bank Mellat* test the availability of less intrusive measures (assuming that they are as effective) is not determinative of the final question as to whether the measures in fact adopted are disproportionate. In a case such as the Covid-19 restrictions, their effectiveness is likely to be directly related to the resulting degree of interference with fundamental rights. There is arguably a subtle but meaningful distinction between the question posed in *Bank Mellat* as to whether "*a less intrusive measure could have been used without unacceptably compromising the objective*" as opposed to that posed by Francis Hoar which looks at whether the "*interferences are the least restrictive means of obtaining the objective of containing the virus while not causing disproportionate harms*."

67. The former correctly focuses on considering the extent to which measures with a different impact on rights achieve the desired objective, the latter conflates the third and fourth limbs of the *Bank Mellat* test and starts with a focus on the harm caused. See for example, *R(Ngole] v the University of Sheffield* [2019] EWCA Civ 1127, where the Court of Appeal held at [107] "*The real questions are the degree of intrusion into the Article 10 right, and whether a less intrusive alternative to removal from the course and a bar from professional life would have sufficed*."

Manifestly without reasonable foundation

68. One issue that is not considered at all by Francis Hoar is whether the same proportionality test should apply to all the allegedly infringed ECHR rights.

69. The author considers that given the sheer breath of the restrictions, and the scale of their impact on social and economic life, that the courts are likely to have regard to the 'manifestly without reasonable foundation' principle when considering the final limb of

[27] Per Lord Reed's dissenting judgment

the *Bank Mellat* test in respect to any interference with Article 14 and Article 1 Protocol 1 rights.

70. In Stec v United Kingdom [2006] 43 EHRR 47 after referring to the concept of the "margin of appreciation" which is afforded to Contracting States in the application of the Convention, the Court said at [52]:

> "*The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, 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 respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'*"

71. The Court of Appeal in R(Drexler) v Leicestershire CC [2020] EWCA Civ 502 recently confirmed that the 'manifestly without foundation' principle is not confined solely to cases concerning discrimination in the context of welfare benefits. The Court of Appeal noted at [63-4] that the origin of the test in *Stec* was itself about interference with Article 1 Protocol 1.

72. The same conclusion was reached in the April 2020 judgment of the Court of Appeal in *R(Joint Council for the Welfare of Immigrants) v SSHD* [2020] EWCA Civ 542 at [134]. The Court of Appeal in *Joint Council* further cited at [138] Blečić v Croatia [2005] 41 EHRR 13 to the effect that the ECtHR would "*accept the judgment of the domestic authorities in socio-economic matters 'unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued.*" At [140] Hickinbottom LJ held:

> "*In my view, the criterion simply recognises that, where there is a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically-elected or -accountable body that enacts the measure must be accorded great weight because of the wide margin of judgment they have in such matters. The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded. That is, for obvious reasons, particularly so when that body is Parliament.*"

Deference to the Government

73. In respect more generally of the degree of deference that should be accorded to the Government over the choices it has made in respect of the Regulations and any resulting interference with any of the ECHR rights cited, Lord Sumption in *Bank Mellat* held at [21] in respect of the role of the courts:

> "***None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one.*** *As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Human Rights Convention. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition,* ***the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive****. For my part,* ***I wholly endorse the view of Lord Reed that "the making of government and legislative policy cannot be turned into a judicial process***." [Emphasis added]

74. Further, as noted by Lord Kerr in <u>*R (Steinfeld) v Secretary of State for Education*</u> [2018] 3 WLR 415 at [29]

> "*It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the Government or Parliament, (at least not in the sense that the expression has been used by ECtHR). The court may, of course, decide that a measure of latitude should be permitted in appropriate cases. Before Andrews J the respondent had relied on the well-known statement of Lord Hope of Craighead in R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 381A–B, where he said:*
>
> > "difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

75. Similarly, the majority of the Supreme Court held in <u>*Coventry v Lawrence*</u> [2015] 1 WLR 3845 held at [58] that:

> *"...even in a field such as access to justice and legal costs, the court, while being vigilant to protect fundamental rights, must give considerable weight to informed legislative choices, at least where state authorities are seeking to reconcile the competing interests of different groups of society. In such cases, they are bound to have to draw a line somewhere in order to mark where a particular interest prevails and another one yields. Making a reasonable assessment of where to draw the line, especially if that assessment involves balancing conflicting interests falls within the state's wide discretionary area of judgment. As Lord Bingham said in Brown v Stott [2003] 1 AC 681, 703:*
>
> > "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies …"

76. Finally, as noted by Leo Davidson, the Court of Appeal in <u>*R(Sinclair Collis) v Health Secretary*</u> [2011] EWCA Civ 437, in a case involving Article 1 Protocol 1 as well as EU law, held at [23] that the margin of appreciation will be broader where it the interference with a right involves the "*promotion of a benefit of great general importance such as public health*."

Conclusion as to the appropriate test

77. The 'Siracusa test' proposed by Francis Hoar is neither found in the Siracusa principles themselves, nor relevant to the question as to whether there has been any disproportionate interference with any ECHR articles, particularly in circumstances where the United Kingdom has opted not to derogate under Article 15 from the ECHR.

    77.1. 'Proportionality' is to be judged objectively and with an intensity appropriate to the degree of interference with fundamental rights. However, there is still no 'merits review' and 'context is everything') when assessing what degree of intensity is appropriate: (<u>*R (Daly) v Secretary of State for the Home Department*</u> [2001] UKHL 26.

    77.2. A court should give significant weight to informed legislative choices, in particular where state authorities are seeking to reconcile the competing interests of different groups of society, and/or make wide ranging social and economic decisions, and/or making critical public health related decisions.

77.3. A court should tread very carefully in any area where there are multiple competing scientific models and analysis of restrictions and their efficacy even within the United Kingdom, let alone when considering any alternative measures adopted in other countries. This challenge clearly raises polycentric issues, involving consideration of highly complex scientific and expert opinion. A low threshold test should be adopted when considering the scientific basis for the Regulations of 'being in accordance with a reasonable and logical body of scientific opinion' as this reflects the sheer impossibility of reaching scientific consensus on the 'lockdown'.

77.4. A court should give significant weight to the Article 2 obligation on the state to continue to adopt reasonable and appropriate preventative measures in light of the clear risk to life posed by Covid-19.

77.5. The question of proportionality is an objective test, assessed by the court on the evidence before it as at the time of challenge. A failure on the part of a decision maker to consider either sufficiently or even at all whether there are any alternative less restrictive measures does not necessarily in itself make a measure impacting on fundamental rights disproportionate – that potentially conflates a public law challenge to how the decision was reached with a challenge as to the ECHR compatibility of the decision that is reached. As Baroness Hale said in *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19 at [31]:

> "*The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account*."

77.6. With specific regards to Articles 5, 8, 9, 11, and Article 2 of Protocol 1 the appropriate test for proportionality is that set out in *Bank Mellat*, namely: (1) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (2) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. However, the court should tread very

carefully when reaching its own assessment as to the effectiveness of any less intrusive measure that has not been put in place in the specific United Kingdom context, the efficacy of which would therefore be a matter of conjecture.

77.7. With specific regards to Articles 14, and Article 1 of Protocol 1, an additional threshold consideration when considering the overall proportionality under the *Bank Mellat* test is that set out in *Stec v United Kingdom* [2006] 43 EHRR 47, namely whether the social or economic measure employed is manifestly disproportionate to the legitimate aim pursued.

Are the Regulations proportionate?

The argument made against the Regulations

78. The letter before action does not seek to argue that the objective of the Regulations is not sufficiently important, or that the measures are not rationally connected to the objective.

79. The focus is solely on proportionality, although neither the letter before action nor Francis Hoar's previous paper considers at all when applying the test of proportionality the individual Articles alleged to have been interfered with, and whether the restrictions on those fundamental rights is proportionate when considering the specific context and content of each Article.

80. Save indirectly by referring to Sweden, neither the letter before action nor the previous paper also sets out any less intrusive and restrictive measures that would not have unacceptably compromised the aim of mitigating the risk to life posed by Covid-19 focuses on the interference with fundamental rights allegedly caused by the Regulations, it is simply asserted that:

> "*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.*"

81. The letter before action then extrapolates that the restrictions are disproportionate and repeats the conclusion previously advanced by Francis Hoar that the Regulations are not a proportionate response to the Covid-19 public health crisis when applying the Siracusa Test:

> *"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….*
> *While the scientific and comparative evidence 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*."

82. As noted above the (incorrect) approach adopted in the letter before action is to focus on the harm caused by the Regulations, rather the relative efficacy of any less intrusive measures.

83. That harm is stated to be exceptional, and to include in particular:

83.1. The short-term impact on health, including the risk of thousands more deaths from cancer and heart conditions that are undiscovered (through people being unable or unwilling to seek medical advice, for example, with lumps or other symptoms) and untreated, including from "*the fear caused by the Government's messaging policy that has the effect of deterring those at risk from seeking treatment*."

83.2. The short-term impact on mental health and domestic violence caused directly by the lockdown, particularly on poor and vulnerable families effectively locked in small flats with no outside space and limited opportunities to leave and exercise;

83.3. The damage to the education and lifetime opportunities of a generation of children and young people;

83.4. The catastrophic economic damage from reducing the demand for goods and services and the impact on the ability of businesses to supply those goods and services.

83.5. The consequence of that damage on individuals, families, communities and societies as a whole – "*A primary consideration is the damage to health and wellbeing from poverty and unemployment but the closure of numerous small businesses – particularly but not exclusively restaurants, cafes and pubs, will have a devastating effect on towns and cities in particular.*"

84. In his earlier paper, Francis Hoar concluded that:

> "*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 the responsibility to weigh these competing harms is the cardinal duty of any political leader.*
>
> *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…*"

85. The claim as currently pleaded is in part on the basis that the Regulations are insufficiently based on scientific evidence, in particular, due to the lack of any or any sufficient comparative exercise considering the effectiveness of alternative less restrictive measures. The assertion is made that there is no evidence that the Government has evaluated alternative means of containing the virus as adopted in other countries:

> "*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….*
>
> *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.*"

86. Lastly, again, while not explicit, the letter before action appears to assert that the magnitude of the restrictions imposed by Regulations is not justifiable on the basis that there is insufficient review of the Regulations, in part because of the restriction imposed by the Regulations themselves on political gatherings and public demonstrations.

87. With regards to the five tests and the ongoing proportionality of the Regulations, the claim is made that there is no consideration required, or even allowable, under the five tests as to whether different or less restrictive means could be achieve the same object of reducing the spread of Covid-19. Accordingly, the tests (unlawfully) fail to ask whether interference with fundamental rights is and will be proportionate.

Sufficient consideration of alternative measures

88. A core argument made by Francis Hoar is that the Regulations in essence must be disproportionate because Government has given insufficient or even no consideration to alternative and less restrictive measures.

89. However, the author would argue that even on the basis of the limited information that has been made public, that there is evidence of such consideration having been given to the extent possible and continuing to be given. For example,

89.1. The SAGE paper 'SPI-M-O working group on scenario planning: Consensus view on Covid-19' dated 25 March 2020[28] stated:

> *Comparison to other countries*
> *14. It is very difficult to directly compare modelling results to what has been seen in other countries. It was agreed that control measures put in place in some other countries, possibly including Italy, have reduced the reproduction number to below 1, and that it was reasonable to assume that stringent measures with high compliance rates in the UK, as modelled here in the optimistic scenarios, would have a similar effect.*
> *15. A modelling group with access to data from Italy believe that the results here are broadly in line with what was been occurred there*."

[28] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882723/26-spi-m-o-working-group-scenario-planning-consensus-view-25032020.pdf (accessed 6 May 2020)

89.2. The SAGE paper 'Options for increasing adherence to social distancing measures' dated 22 March 2020[29] stated:

Coercion
7. Compulsion: Experience with UK enforcement legislation such as compulsory seat belt use suggests that, with adequate preparation, rapid change can be achieved. Some other countries have introduced mandatory self-isolation on a wide scale without evidence of major public unrest and a large majority of the UK's population appear to be supportive of more coercive measures. For example, 64% adults in Great Britain said they would support putting London under a 'lock down'. However, data from Italy and South Korea suggest that for aggressive protective measures to be effective, special attention should be devoted to those population groups that are more at risk…

Appendix A: Methodology
Options were canvassed considering what other countries have done, analysis of the problems encountered in the UK and suggestions for mitigation. These were evaluated using a set of criteria specifically developed to evaluate behaviour change interventions."

89.3. The SAGE paper 'School closures' dated 17 March 2020[30] stated "*Members of SPI-B have not found a robust academic evidence base relating to the acceptability or social impact of dismissal vs closure… Though for a useful discussion of various issues and solutions, see: https://en.unesco.org/themes/educationemergencies/coronavirus-school-closures*"

89.4. The critical SAGE paper 'Potential impact of behavioural and social interventions on an epidemic of Covid-19 in the UK' dated 9 March 2020[31] stated:

"*3. In the event of a severe epidemic, the NHS will be unable to meet all demands placed on it. In the reasonable worst-case scenario, demand on beds is likely to overtake supply well before the peak is reached.*

4. There are a range of behavioural and social interventions which are evidenced as having been effective in responding to historic epidemics. These interventions are well understood by the public and have been enacted in other countries. Modelling suggests as compliance drops so does impact, but there is no major inflexion point at which a drop in compliance leads to a disproportionate drop in effect.

[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882722/25-options-for-increasing-adherence-to-social-distancing-measures-22032020.pdf (accessed 6 May 2020)
[30] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882719/22-school-closures-spi-b-17032020.pdf (accessed 6 May 2020)
[31] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874290/05-potential-impact-of-behavioural-social-interventions-on-an-epidemic-of-covid-19-in-uk-1.pdf (accessed 6 May 2020)

5. Applying these interventions could be helpful in containing an epidemic to some degree or changing the shape of the epidemiological curve, see figure 1, potentially making the response of the NHS and other sectors more sustainable. The objectives of these interventions could be to:

1. Contain the outbreak so that it does not become an epidemic;
2. Delaying the peak so it occurs when the NHS is out of Winter pressures;
3. Reducing the size of and/or extending the peak so that the response by the NHS and other sectors can be maintained more sustainably; and
4. Reducing the total number of deaths by limiting the number of cases in vulnerable groups….

9. Modelling suggests that the stringent interventions introduced in Wuhan from 23 January (quarantine and movement restrictions) may have reduced the reproduction number to below one. However, there are differing views across the scientific community about whether other factors were involved in this. There is also speculation that the approach taken in Wuhan, to apply stringent regulations which have been rapidly lifted, may result in a subsequent second larger peak.

10.Hong Kong and Singapore are undertaking extensive contact tracing as well as a raft of social distancing measures such as school closures and self-isolation, but not to the same level of stringency as seen in Wuhan. There is also anecdotal evidence of extensive self-isolation by the general population. The roughly linear increase in the number of cases in Hong Kong and Singapore suggest that this approach has held the reproduction number around 1.

90. The 9 March 2020 paper went on to consider the effectiveness of using all or any of the interventions analysed, namely Stopping large scale events, Closure of schools, Home isolation of symptomatic cases, Whole household isolation, Social distancing, Social distancing solely for the elderly. The author would argue this is exactly the kind of comparative exercise that is alleged not to have been conducted adequately.

91. Further, the Government has, throughout its management of the crisis, moved through the phases, namely containment, delay, research and mitigate. These phases contained their own measures and when the Government announced that there was movement from one phase to another it was supported by clinical and scientific evidence and advice.[32] The timetable and actions of Government show a definite process that examined a variety of less intrusive measures.

[32]See e.g. https://www.gov.uk/government/news/covid-19-government-announces-moving-out-of-contain-phase-and-into-delay (accessed 6 May 2020)

Individual Articles and proportionality

92. The substance of the letter before action, as with the original paper by Francis Hoar concerns the overall proportionality of the Regulations taken as a whole. There is very little assessment of the individual Articles. The author would in addition to the points already made concerning the Regulations as a whole, indicate a number of additional factors concerning individual Articles that go to reinforcing the argument that whether taken individually or as a whole the Regulations are compliant with the ECHR rights cited.

Article 5

93. If Article 5 is engaged, then it is a limited right and deprivation of liberty is possible under Article 5(1)(e) 'for the prevention of the spreading of infectious diseases. There is no relevant domestic caselaw, and limited consideration by the ECtHR. The only substantive judgment is *Enhorn v Sweden* [2005] (Application 562529/00).[33] A Swedish HIV positive man was placed in compulsory isolation having been deemed not to have complied with measures under the Swedish Infectious Diseases Act aimed at preventing him spreading HIV. The ECtHR held at [43]:

> "*…Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds.* ***It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention*** *(see Guzzardi v. Italy, judgment of 6 November 1980, Series A no. 39, pp. 36-37, § 98 in fine, and Witold Litwa, cited above, § 60,).*
>
> *44. Taking the above principles into account, the Court finds* ***that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease****, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist*."

[33] See e.g. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576496 (accessed 6 May 2020)

94. The author agrees with Tom Hickman et al[34] that the underlying rationale behind Article 5(1)(e) of allowing the effective mitigation of the risk posed by infectious diseases suggests it should not be limited to the detention of infectious persons, rather than potentially infectious:

94.1. Article 5.1(e) does not refer to persons spreading infectious diseases, but only refers to the need to detain persons for the purpose of preventing the spreading of infectious diseases. This distinction was not relevant in the *Enhorn* case because the applicant suffered from HIV. The Court in Enhorn did not consider the situation which now arises, where healthy people need to be shielded from infectious people in order to slow the spread of a virus. In English terms, the comments in Enhorn were obiter dicta.

94.2. It is often not possible to know whether a person is infected or not with Covid-19. Even if testing is feasible, it might not be available.

94.3. It is easy to envisage the necessity of isolating people simply because they have been in contact with an infected person or have been in a high risk environment or area. The present global pandemic illustrates that to combat the spread of an infectious disease, measures seeking only to isolate infected persons, or even persons suspected of being infected, will sometimes be insufficient.

95. The author would further argue that the measures adopted are proportionate, in particular when considering the potential impact of Covid-19 on mortality – both directly and indirectly through the NHS being unable to cope with non Covid-19 related illness in addition to Covid-19.

95.1. As noted above when considering whether Article 5 is engaged at all, the restrictions do not amount to a blanket ban on social contact or on work.

[34] https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn22 (accessed 6 May 2020)

95.2. The proportionality of requiring people to stay at home wherever possible and not to leave without reasonable excuse must be considered in the context of the Government's counter veiling Article 2 duties as it appears that this 'social distancing' is the single most effective measure at reducing the likely mortality rate.[35]

95.3. The exact mortality rate of Covid-19, and the accuracy of the assumptions used by the epidemiological models underpinning the Government's analysis of the need, and effectiveness of, the various restrictive measures imposed has been the subject of significant debate both in the media and the scientific community. It is not within the author's expertise to judge the rival assertions made, however, when applying the degree of discretion that must be accorded in such complex matters to the Government, there is clearly an insufficient basis for a court to conclude that any less restrictive measures would be not unacceptably compromise the objective of minimising the impact of Covid-19. The United Kingdom despite the lockdown imposed has one of the highest death rates in Europe.

Article 8

96. Any analysis of Article 8 will not in the author's view add materially to the considerations that would be relevant to the other Articles in question, in particular, the weight that should be given to the duties under Article 2 and the degree to which social contact is still possible, in particular through non-physical means. In this respect the reference in *Kuinov v Russia* [2009] (Application 32147/04 at [103] to communication with a child through a window as a factor towards there not being an interference with Article 8 during a quarantine period is of some relevance.[36]

97. The threshold for any remaining interference with Article 8 rights being lawful is clearly met as being both necessary to meet the pressing social need of protecting the health of infected and potentially infected people (the specified exemption from Article 8) and also proportionate for the same reasons as any interference with Article 5.

[35] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874290/05-potential-impact-of-behavioural-social-interventions-on-an-epidemic-of-covid-19-in-uk-1.pdf (accessed 6 May 2020)
[36] http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html (accessed 6 May 2020)

Article 9

98. The author accepts that Article 9 protects the right to public and communal worship where that is part of the belief held by an individual or group, and accordingly that Article 9 is engaged. Nevertheless, it is relevant that the Regulations do not in any way restrict the Article 9(1) right to hold a belief, or choices made regarding personal behaviour outside the context of places of worship. Further, the ECtHR held in *Pavlides v Turkey* [2013] (Application 9130/09) at [29] that "*Article 9, taken alone or in conjunction with Article 11, does not bestow a right at large for applicants to gather to manifest their religious beliefs wherever they wish.*"

99. However, again, there is likely to be limited additional consideration given to factors prompted by the requirements of Article 9 when considering the overall proportionality of the Regulations.

100. The threshold for any interference with Article 9 rights being lawful is clearly met as being both necessary to meet the pressing social need of protecting the health of infected and potentially infected people (the specified exemption from Article 9) and also proportionate for the same reasons as any interference with Article 5.

101. The author would note that specific consideration was given to the issue of religious services by SAGE in the context of preventing public gatherings and it was noted that "religious services with a high level of physical contact would be higher risk.[37]" Again, insufficient weight has been given to the degree to which worship can continue online.[38]

Article 2 Protocol 1

102. With regards to any interference with the right to education, the author would emphasise that:

[37] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873748/12-spi-m-o-consensus-view-on-public-gatherings.pdf (accessed 6 May 2020)
[38] https://eandt.theiet.org/content/articles/2020/03/church-of-england-attracts-five-million-worshippers-to-its-first-virtual-service/ , https://news.sky.com/story/coronavirus-big-audiences-for-online-church-services-amid-uk-lockdown-11971643 (accessed 6 May 2020)

102.1. As held by Lord Bingham in *R(Williamson) v Education Secretary* [2005] UKHL 15 at [51] "*The legislature is to be accorded a considerable degree of latitude in deciding which course should be selected as the best course in the interests of school children as a whole*"

102.2. Lord Bingham held in *Ali v Lord Grey School* [2006] UKHL 14, that what was key is that the essence of the right is protected and it is not deprived of effectiveness: at [12]. Further "t*here is no right to education of a particular kind or quality, other than that prevailing in the state… 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*": at [24]. Similarly, Lord Hoffmann at [56] held "*Everyone is no doubt entitled to be educated to a minimum standard… but the right under article 2 extends no further…*"

103. The author would argue that there is no conclusive evidence cited to demonstrate that any pupil has been prevented by the Regulations from accessing state educational facilities (in particular by way of remote access) to the extent that they can reasonably be provided within the context of the social distancing measures required by Covid-19.

The 5 Tests

104. As a reminder the 5 tests are essentially

104.1. Evidence that the NHS can cope across the UK;

104.2. A sustained and consistent fall in daily death rates;

104.3. Evidence that the rate of infection is decreasing to manageable levels;

104.4. Confidence that testing capacity and PPE supply were able to meet demand; and

104.5. No risk of a second peak that could overwhelm the NHS.[39]

[39] https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020 (accessed 3 May 2020)

105. With regards to the continuation of the restrictions by the reference being an unreasonable fetter on the Health Secretary's discretion. Even in the extended paper, it is not explained why the criteria are "over-rigid", as opposed to simply an indicative policy. It is entirely uncontroversial for the Government to set out how it understands and will apply a statutory duty. In any event, there is no evidence that ministers have failed or will fail to have an open mind.

106. The issue on whether less restrictive measures should be employed is considered at length above. The whole point of the criteria is to set a framework for when less restrictive measures can be introduced without compromising the objectives. The criteria do not impose a duty to consider alternative measures, since that is not their function. It does not follow that such a duty is not being complied within the application of the statutory test.

107. Lastly, it is the function of the five criteria to explicitly refer to the differential impact on fundamental rights and their proportionality. The requirement to consider such factors so is implicit in the decision to impose the lockdown in the first place along with the statutory requirement to remove any restriction which is no longer necessary. The criteria merely explain when the Government will consider the need for the lockdown to be reduced, such that the proportionality analysis no longer supports maintaining any given restriction.

This paper represents the views of the author alone and not those of 1 Crown Office Row Chambers.

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