JUDICIAL REVIEW DURING THE COVID-19 PANDEMIC

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A. INTRODUCTION

The COVID-19 pandemic presents a unique opportunity to examine how judicial review responds to situations of crisis and emergency. It provided a stress test of the system. There has been nothing comparable other than the two world wars, when nationwide restrictions on individual freedoms were imposed by government and resulted in courts adopting highly deferential and permissive interpretations of the law (albeit not without powerful dissenting voices).[1] But that was well before the outlines of judicial review in its modern form were drawn out by judges in the 1960s and 1970s, which outlines have been extensively coloured-in by the courts and Parliament over succeeding decades. The COVID-19 pandemic represents the first opportunity to assess how the developed system of judicial review responds to a major and prolonged national crisis. It also presents a unique opportunity for analysis because of the obvious scope for comparison with other jurisdictions, comparisons that are facilitated by the fact that every country in the world was presented with an identical public health crisis and addressed it through substantively similar laws and decrees which were often subject to the

[1] *R v. Halliday* [1917] A.C. 260 (Lord Shaw dissenting); *Liversidge v Anderson* [1942] AC 206 (Lord Atkin dissenting).

same human rights norms derived from international law. Our focus is on the operation of judicial review procedure in England and Wales and in Scotland, two of the three legal systems of the United Kingdom, although we mention the wider comparative context.

The curtailment of individual freedoms during the COVID-19 pandemic was unparalleled. Everyone in society was compelled under threat of criminal penalties to remain in their homes for weeks on end and, at other times, prevented or restricted from meeting with people outside their household, including close family, friends and non-co-habiting partners. Schools and workplaces were closed for long periods. In the early and most panicked months, playgrounds were closed, park benches taped-up, picnics outdoors prohibited, for fear of transmission of the virus. There were long periods when children could not play with any friends. Large sections of society were put out of work and the UK governments established massive programmes of financial support, effectively paying the wages of millions of people. International travel was, at different times, either prohibited or highly constrained. When vaccines became available, vaccination became a condition of work for many and of overseas travel for all. This extraordinary world quickly became normality. An entirely new lexicon developed: hitherto unknown words such as "furlough", "self-isolation", and "lockdown" assumed new meanings and entered everyday language. Given the degree to which the restrictions became the norm and given the absence of any identifiable end point, the period was not truly one of emergency, at least as typically defined. The initial emergency in early 2020 abated as society attuned and the period became one of sustained crisis that lasted for about two years.

The COVID-19 pandemic exposed the system of judicial review to competing pressures and policy imperatives. The emergency that enveloped the country in Spring 2020 and the extended crisis that followed imposed pressures on courts to recognise broad executive powers, which would enable rules to be formulated and changed at speed and in a wide variety of contexts. Connectedly, there was pressure to avoid the need for further primary legislation from the UK Parliament, the Senedd or Scottish Parliament, as the legislative bodies were initially suspended and then semi-functioning as they struggled to accommodate social distancing with the demands of deliberative activities.[2] Less obviously, but within the same category, there was

[2] See P Evans, C Salmon Percival, P Silk, and H White (eds) *Parliaments and the Pandemic* (Study of Parliament Group 2021); House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (HL 2021-22, 106).

pressure on courts to ensure that the time of officials, including senior public health officials, and Ministers was not diverted to addressing legal challenges and preparing evidence. Understandably, it became a standard refrain of the UK Government in resisting expedited hearings that the time of Ministers and officials was occupied on confronting the unfolding emergency and that dealing with judicial review proceedings was a much lesser priority. In these ways, the system of judicial review was placed under pressure to be accommodating to governments both substantively and procedurally, for judicial review to be minimised and restricted to the most serious cases, and for powers to be broadly and generously construed.

However, a second form of pressure or policy imperative operated in precisely the opposite direction. The fact that the rules imposed had such substantial impact on individuals made judicial vigilance against *ultra vires*, unreasonable or disproportionate consequences particularly important. Moreover, rules were produced with great haste and without the careful consideration and consultation that ought to accompany measures with serious impacts on lives and livelihoods. The rapidly changing nature of the pandemic, as infection rates fluctuated and strains mutated, meant that the rules were being written and re-written at a dizzying pace. The UK Government laid 582 COVID-related statutory instruments before the UK Parliament between the start of 2022 and 3 March 2023.[3] It was understandable that many of the rules and sub-rules contained in these instruments would be ill-considered and their full implications unforeseen. And the political checks on such rulemaking were patchy and unreliable. The UK and Scottish Parliaments were unable to scrutinise COVID regulations in a timely or effective way,[4] and they had little oversight or control over the sprawling guidance documents issued by Governments and other official agencies. Whilst political pressure did operate to curb Government plans from time to time, it was haphazard and did not always lead to rational or justifiable positions being taken. One striking example is the exemption made for hunting with

[3] Meg Russell, Ruth Fox, Roman Cormacain, and Joe Tomlinson, 'The marginalisation of the House of Commons under Covid has been shocking; a year on, parliament's role must urgently be restored' (*UCL Constitution Unit Blog*, April 21 2021) <https://constitution-unit.com/2021/04/21/covid-and-parliament-one-year-on/> accessed 30 April 2023 (citing Hansard Society data). For discussion of the position as regards the Scottish Parliament, see Delegated Powers and Law Reform Committee, *Inquiry into the use of the made affirmative procedure during the coronavirus pandemic* (SP 2022, 110).

[4] Ibid. See also T R Hickman. 'Abracadabra law-making and Accountability to Parliament for the Coronavirus Regulations' in P Evans, C Salmon Percival, P Silk, and H White (eds) *Parliaments and the Pandemic* (Study of Parliament Group 2021); F de Londras, 'Rights Parliamentary oversight in the pandemic: Reflections from the Scottish Parliament' [2022] PL 582; P G Hidalgo, F de Londras, and D Lock, 'Parliament, the Pandemic, and Constitutional Principle in the United Kingdom: A study of the Coronavirus Act 2020' [2022] MLR 1463.

guns from the "rule of six" restrictions on outdoor associations, which followed private lobbying from grouse shooting enthusiasts, an exemption that advisers feared was irrational at the time.[5]

There were, therefore, a number of reasons for courts to operate with heightened vigilance over government rules and decisions during the pandemic and it presented an opportunity for the courts to provide a more detailed scrutiny of measures and their effects that was lacking prior to their introduction or subsequently in parliaments. Judicial review procedure is said to be different from ordinary forms of litigation and to represent one of "partnership" between Government and the courts, "based on a common aim, namely maintenance of the highest standards of public administration".[6] This conceptualisation of judicial review as a "common enterprise"[7] with governments and public bodies provided a juridical basis for the courts to step into the vacuum caused by a lack of opportunity for *ex ante* scrutiny of proposed rules and the limited nature of on-going political checks, and to provide a way of allowing affected persons and groups to test the legality, rationality and proportionately of the measures in a meaningful way. There was, in other words, an opportunity for the courts and government to approach judicial review as contributing to the broader system of good governance by ensuring that COVID rules were properly tailored to the circumstances.

We consider in this article how the system of judicial review responded to these conflicting pressures.[8] In doing so, we begin by examining the decided cases. We then widen

[5] Paul Waugh, 'Grouse shooting and hunting exempt from Johnson's "rule of six" Covid curbs' (*Huffington Post*, 14 September 2020) <https://www.huffingtonpost.co.uk/entry/boris-johnson-rule-of-six-hunting-shooting-exemption_uk_5f5f4ad0c5b6b4850803110f> accessed 30 April 2023. A. Wagner, *Emergency State: How We Lost Our Freedoms in the Pandemic and Why it Matters* (Penguin Random House 2022) 103-104, refers to fears within government that the exemption was *Wednesbury* unreasonable. For more justified examples, such as the extension of the furlough period and the scrapping of A-level exam results in 2020 following public pressure, see Kevin Rawlinson, 'Boris Johnson's year of U-turns: from Covid tests to free school meals' (*The Guardian*, 10 December 2020) <https://www.theguardian.com/uk-news/2020/dec/10/boris-johnson-year-of-u-turns> accessed 30 April 2023.

[6] *R v Lancaster County Council, ex p Hiddleston* [1986] 2 All ER 941, 045c (Sir John Donadlson MR).

[7] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHV 1509 (Admin) [20] (Singh LJ)

[8] A third form of pressure on the system of judicial review during the COVID-19 pandemic was the challenge posed to the ability of the litigation process to function effectively given the need for social distancing. The legal system was forced to operate in way that sought to eliminate transmission of the virus. This meant not only that hearings could not be held in court, given that would involve exposing Counsel, solicitors, clients, court staff and Judges to the virus, but the very operation of the court administration and of the working practices of lawyers and their engagement with clients had to be re-configured. A rapid-response empirical study found that the shift to

the scope of our inquiry to consider examples of cases that did not make it to court. The data on which we draw is necessarily imperfect and incomplete; our sources are reported cases and those unreported cases and records we have been able to identify in public sources, including newspaper reports and press-releases about settled cases. With such an evidence base even approximate quantitative conclusions are plainly impossible, but studying public domain sources allows illuminating conclusions to be drawn about the use and value of judicial review during the pandemic nonetheless. Our first conclusion—that decided cases had negligible impact on the COVID-19 laws—will come as no surprise to informed court observers, but other conclusions are not so surface-apparent. In particular, judicial review viewed in wider compass did have a significant impact through its deterrent effect, the evidence for which we find in examples of the threat of judicial review causing public bodies to revise or reverse rules or decisions. Thus, whilst the law reports reveal no instances of material changes to COVID-19 rules being required by courts, changes did occur pursuant to the second-look function, as we call it, of judicial review at the behest of litigants. The prevalence of such instances is not possible to measure, although we give sufficient examples to demonstrate it was more important than judicial rulings. Therefore, whilst there were no signs of judicial review operating as form of "partnership" with government, the institution of judicial review viewed in broader perspective did have an effect in subjecting COVID rules to norms of legality, rationality and proportionality.

These conclusions are not limited in their relevance to the specific context of the pandemic or even to judicial review in times of crisis. As we have suggested, the COVID-19 pandemic represents an opportunity to assess the judicial review system under stress, but the conclusions shed light on features of the system of judicial review that are always present, albeit potentially less evident or more difficult to assess within a specific factual or thematic context. The second look function is a key feature of judicial review in normal as well as abnormal times. If it is any less apparent, it is only because it is normally eclipsed by the examples of cases pursued to a successful conclusion where judicial authority is ultimately brought to bear. The COVID-19 pandemic nonetheless provides both an important case study of the second look feature of the judicial review system and reveals how it can be effective

remote proceedings in the Administrative Court had been relatively smooth: J Tomlinson, J Hynes, E Marshall, and J Maxwell, 'Judicial Review during the COVID-19 Pandemic' [2020] P.L. 9 (though this was not necessarily the case in respect of other parts of the civil justice system).

even in the most challenging of litigation environments, where successes were few and far between in those claims pursued to final judgment.

B. COMPARATIVE COUNTERPOINT

Whilst this is not a work of comparative analysis, it is revealing to situate our inquiry within a comparative frame, if only because it suggests that there was nothing self-evident or inevitable about the limited impact of court decisions or judicial procedures on public health laws during the pandemic. Indeed, one study that examined cases across the international spectrum, concluded that the role of courts was significant during the pandemic and that courts stepped-up to scrutinise COVID rules, particularly against constitutional and human rights principles, weakening the theory that courts are ill-equipped to manage emergencies or contribute to crisis management.[9]

The French Conseil d'État provides a striking illustration. Over the first twelve months of the pandemic, it heard 647 cases filed by private individuals, associations, and organisations. It ordered a suspension or change to government measures in 51 cases and in over 200 cases the process resulted in concrete solutions and pre-decision modifications to COVID measures.[10] The judicial orders were not of minor significance and included ordering places of worship to be re-opened[11] and the right to protest restored[12] during the first lockdown, limiting

[9] F Cafaggi and P Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives' (2012) 12(4) *European Journal of Risk Regulation* 792.

[10] Conseil d'État, 'A look in figures at the activity of France's Conseil d'État, the court responsible for urgent measures and freedoms' (Conseil d'État, 21 April 2021) <https://www.conseil-etat.fr/en/news/one-year-of-legal-proceedings-linked-to-covid-19> accessed 23 April 2023.

[11] No. 440366 of 18 May 2020. See 'Gatherings in places of worship: the Council of State orders the Prime Minister to take less restrictive measures' (Conseil d'État, May 18 2020) <https://www.conseil-etat.fr/actualites/rassemblements-dans-les-lieux-de-culte-le-conseil-d-etat-ordonne-au-premier-ministre-de-prendre-des-mesures-moins-contraignantes> accessed 23 April 2023;.

[12] Nos. 440846, 440846, 441015 of 13 June 2020. See 'The judge in chambers of the Council of State suspends the obligation to obtain authorization before organizing a demonstration' (Conseil d'État, 6 July 2020) <https://www.conseil-etat.fr/actualites/le-juge-des-referes-du-conseil-d-etat-suspend-l-obligation-d-obtenir-une-autorisation-avant-d-organiser-une-manifestation> accessed 23 April 2023

mask wearing mandates,[13] and lifting restrictions on French nationals returning to France on the basis that they were disproportionate to the risk to health they sought to address.[14] Thus, the court's ordinance on 13 June 2020 restoring the right to protest, which followed anti-racism marches, recalled that protest was a fundamental right and that "the ban on protests if not justified by the health risks—except where social distancing measures cannot be respected, or the event is likely to bring together more than 5,000 people."[15] Bénédicte Fauvarque-Cosson, a judge on the court, has written that the administrative judge "became key actor during the crisis."[16] The status of Conseil d'État as part of the French administration, as well as features of its procedure, in particular the urgent applications judge procedure ("procedure de référé"), facilitated its role during the pandemic. Nonetheless, such comparative analogies indicate that judges and judicial procedures were not incapable of providing scrutiny of the actions of governments during the pandemic, and it is not inevitable that judges must or will adopt a super-light touch approach.

C. DECIDED CASES

Reported cases are where most public law analysis begins and ends, and it is where we shall begin. However, it is important to be aware that the law reports, including electronic databases, do not provide a comprehensive set of decided cases either in relation to final judgments in judicial review proceedings. Final judgments following a substantive hearing may not be reported in smaller matters and permission determinations are rarely reported, even if there has been an oral permission hearing. The published reports do, however, provide some guide to the volume of cases that attracted a reasoned judgment after the grant of permission, as well as representing the authorities that later cases will rely upon by way of precedent. In this section, we will first provide an overview of the judgments that are available, grouping them by key

[13] No. 460002 of 11 January 2022. See 'Mask-wearing can only be imposed outdoors under certain conditions' < https://www.conseil-etat.fr/en/news/mask-wearing-can-only-be-imposed-outdoors-under-certain-conditions> accessed 23 April 2023.

[14] Nos. 449743-449830 and no.449908. See Conseil d'État, 'Urgent reasons for travel' (*Conseil d'État*, 12 March 2021) <https://www.conseil-etat.fr/en/news/urgent-reasons-for-travel-the-conseil-d-etat-suspends-this-requirement-for-french-citizens-returning-from-abroad-but-maintains-it-for-travel-to> accessed 23 April 2023.

[15] Nos 440846, 440856, 441015, 13 June 2020; B Fauvarque-Cosson, 'How Did French Administrative Judges Handle COVID-19?' in E Hondius, M Santos Silva, A Nicolussi, P Salvador Coderch, C Wendehorst, and F. Zoll (eds) *Coronavirus and the Law in Europe* (Instersentia, 2021), 89.

[16] Ibid 82.

thematic areas. The reports show that there appear to have been surprisingly few cases concerning rules or decisions specifically concerned with the COVID-19 pandemic that were pursued to a final determination, and these were rarely successful. There was only one successful challenge to a COVID-19 regulation restricting individual rights and freedoms, and the ruling had no concrete implications.

Lockdown and restriction regulations

The numerous forms of "restriction regulations" made by the governments in the UK from March 2020 might have been thought to have generated a large number of judicial review determinations. After all, the coverage and impact of the regulations were enormous. For long periods, they applied to everyone in the United Kingdom, and at other times to whole cities or areas. Moreover, almost without exception, they were produced hurriedly, without consultation and without meaningful parliamentary scrutiny. While there was a broad public health imperative, the particulars of measures often embodied bizarre rules or arbitrary distinctions or impacted particular persons or families far more severely than others. The "rule of six", for example, at certain times prevented a family of five from meeting with two grandparents together, whereas a family of less than five could do so, despite there being no greater public health risk in the former situation. At another time, six people from six different households could meet together, but not two households if it meant more than six people being together, although the risk of spreading the virus was far lower in the latter situation. There were periods where parts of towns were subject to severe lockdown rules but neighbouring areas were free of them. Arbitrary distinctions are inherent in any system of rules, but it nonetheless might be thought that some of these rules and distinctions might have attracted reasoned judgments. Indeed, it might have been predicted that there would be many cases finding, upon a more focused and considered analysis than had been available to officials and Ministers when measures were hurriedly drawn-up, that certain rules were irrational, unnecessary, or disproportionate.

The initial English lockdown regulations were subject to a root-and-branch challenge in the case of *Dolan*.[17] Three broad grounds were relied upon. The first claimed that the government had no authority under the Public Health (Control of Disease) Act 1984 to make

[17] R (*Dolan & Ors) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

the regulations.[18] The second ground was that the regulations and the conditions imposed for lifting them were unlawful under common law principles, such as failing to take account of relevant considerations, fettering of discretion and irrationality. The third ground was that the regulations violated a number of the Convention rights protected by the Human Rights Act 1998, in particular Article 5 (personal liberty), Article 8 (private and family life) and Article 11 (freedom of association).

In a ruling reflecting the deferential imperatives outlined at the outset of this article, the claim was refused permission to proceed by Lewis J, who reasoned that questions of proportionality and necessity were "ultimately, for the minister", it was unarguable that the regulations were unlawful and that in any event there was no good reason for courts to get involved in issues that had become "historic" as the regulations were no longer in force.[19] By contrast, the opposing pressures for heightened vigilance were at the fore in the reasoning of Lord Justice Hickinbottom granting permission to appeal from Lewis J's decision. He ordered a "rolled up" up hearing noting that the regulations "impose possibly the most restrictive regime on the public life of persons and businesses…outside times of war".[20] Nonetheless, in a judgment delivered on 1 December 2020, the pendulum had swung back in favour of deference and latitude to the government. The Court of Appeal rejected the claim in a brief judgment.

The Court of Appeal held that the claim was "clearly academic" as the regulations under challenge had been repealed and it upheld the refusal of permission on this ground in relation to all the arguments except the issue of *vires*. The court was critical of lack of promptness in bringing the claim. The court stated that the case had called for very quick action indeed given the fast-moving situation and the *vires* issue at least could have been addressed "very quickly".[21] Instead, the claim had not been issued until almost two months after the lockdown had been imposed. The court also depreciated the length and complexity of the written pleading and the attempt at "rolling judicial review" by which subsequent

[18] The relevant power was in the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008.

[19] *R (Dolan & Ors) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin).

[20] Order dated 4 August 2020.

[21] *Dolan* (n 16) [35].

developments or amendments to regulations were sought to be introduced into the claim.[22] Such comments served to highlight the challenges posed to claimants and their legal representatives in seeking to utilise the judicial review procedure to contest Covid-19 measures.

The human rights arguments were dismissed perfunctorily, the court noting the "wide margin of judgment must be afforded to the Government and to Parliament" on grounds of democratic accountability and institutional competence.[23] In the circumstances, the Court did not apply any real scrutiny to the question of proportionality despite the massive impact on private and family life that the regulations had. The right to liberty protected by Article 5 was found not to be applicable, despite the fact that the lockdown regulations, and their limited exceptions, were not dissimilar to civil obligations imposed in the terrorism context where Article 5 had been found to be engaged.[24] The court also held that the restrictions on associations did not breach Article 11 because if protected associations were permitted by that article, they would fall within the "reasonable excuse" exception to the prohibition. Similarly, the common law arguments were given short-shrift on the basis that decisions were "quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suitable for determination by the courts".[25]

The *vires* argument was recognised as the strongest, but the court's reasoning on the issue is cursory. Given its centrality, it is a point on which it is worth dwelling briefly. The initial lockdown regulations, along with all the restriction regulations thereafter, were made under section 45C(1) of the Public Health (Control of Disease) Act 1984 (as well as an identical provision applicable in Scotland), which states that the Minister may, by regulations, "make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales". Section 45C goes on to refer to specific matters that can be included in such regulations, such

[22] Ibid [118]. On the wider context of this remark, see: L Marsons, 'Crossing the t's and dotting the i's: the turn to procedural rigour in judicial review' [2023] P.L. 29.

[23] Ibid [97]. It was held that the lockdown did not constitute a deprivation of liberty for the purposes of Article 5, the right to education (A2P1) was not interfered with as Schools were not closed compulsorily, and Article 9 was left-over given the case of *Hussain* had been granted permission.

[24] *Secretary of State for the Home Department v JJ and Ors* [2007] UKHL 45; *R (AP) v Secretary of State for the Home Department* [2010] UKSC 24.

[25] *Dolan* (n 16) [90]

as requirements on handling and disposal of dead bodies and imposing "restrictions or requirements or in relation to persons, things or premises". In turn, such restrictions can include prohibiting or restricting an event of gathering, or a "special restriction or requirement". Special restrictions and requirements are more intrusive restrictions that ordinarily only magistrates can impose, on persons who are or may be infected with infectious disease. They include requiring the person to undertake a medical examination or be removed to hospital. It is a general principle of statutory interpretation that broad powers are not to be taken to authorise what would otherwise be tortious conduct or an interfere with fundamental rights unless it is clear from the words that this must have been contemplated by Parliament, *i.e.* that such conduct is authorised expressly or by necessary implication.[26] But there is nothing in section 45C that expressly or necessarily implies that regulations can be made confining the whole population, the vast majority of whom will not be infected with disease, to their homes subject to criminal sanctions if they leave and permitting physical return of people found outside. One would have expected such extraordinary powers to have been specifically identified had Parliament contemplated such restrictions, particularly as other intrusive measures were expressly identified. In other contexts, such as terrorism control orders and immigration curfews, the courts have held that equally broad and general powers cannot be read as authorising conduct such as personal searches or confinement to a specific residence absent clear words of authority.[27] In contrasting reasoning, the Court of Appeal in *Dolan* held that the words of s.45C(1) are "not to be cut down" and "could not be broader".[28] Finding the regulations to have been *ultra vires* would have been highly problematic, as numerous regulations throughout the UK had been imposed under this provision and its Scottish equivalent. To have found such measures to have been *ultra vires* would thus have given rise to claims in damages and no doubt would have required retrospective legislation to sort out. That justified the court emphasing that any such claim should have been brought exceptionally quickly, but having decided to resolve the issue the Court adopted an approach to statutory

[26] *GG v Secretary of State for the Home Department* [2010] QB 585. See also: *R (Gedi) v Secretary of State for the Home Department* [2016] 4 WLR 93; *Morris v Beardmore* (HL) [1981] AC 446, 463 (Lord Scarman).

[27] *GG* (n 26); *Gedi* (n 26).

[28] *Dolan* (n 16) [62] (however, the *vires* argument does not appear to have been advanced by the claimant in the same way that it is set out here). See also R *(Francis) v Secretary of State for Social Care* [2020] EWHC 3287 (Admin).

construction that differed from that adopted in ordinary times and which conferred enormous, open-ended, power on the Secretary of State.[29]

*Dola*n was applied in the Scottish case of (*First) KLR & RCR International Ltd v The Scottish Ministers*, in which the Outer House dismissed a challenge to the continuation of "Level 3 restrictions" imposed on the Edinburgh area, and specifically the prohibition on the petitioners—who operated cafes, restaurants and hotels—selling alcohol between 6:00am and 6:00pm.[30] The Court held that the decision to maintain Level 3 restrictions was based on relevant considerations, such as low transmission levels but risks of an increase over Christmas. The Court reasoned that the decision to maintain the level was not "an individual decision on the details of the restrictions" such as restrictions on the sale of alcohol but, instead, that was a prior decision made when the levels were set. Analysing the matter this way, the individual obligations were effectively immune from challenge by reference to the specific level of risk at any one time; they could only be challenged in the abstract, at the time the regulations were first devised, which would mean that they would have to be tested against a hypothetical risk level taken at its highest.[31] One leading Scottish law firm that specialises in public law litigation wrote after the case that, it would now "be very difficult for any further challenges to restrictions to succeed, whether they are local or national in scope".[32]

Despite this, the only challenge to restriction regulations that did succeed was a subsequent Scottish claim. It was pursued by the Reverend Dr Willian Philip and other leaders of Christian Churches in Scotland. Lord Braid in the Outer House held that regulations which, amongst many other things, closed places of worship—thus criminalising collective or private worship in church—represented a disproportionate interference with freedom to practice religion contrary to Article 9 of the ECHR. Lord Braid pointed to the fact that many places where people would congregate remained open, ranging from bicycle shops to jury centres. In a judgment delivered on 24 March 2021, Lord Braid held that the respondents had not

[29] See the similar approach to statutory construction adopted in *Halliday* (n 1) and *Liversidge* (n 1).

[30] [2020] CSOH 98.

[31] Ibid [45].

[32] Charles Livingstone, Brodies, 'Judicial Review Challenges to Government Coronavirus Restrictions"' (Brodies LLP, 21 December 2020) <https://brodies.com/insights/public-law-and-regulation/judicial-review-challenges-to-government-coronavirus-restrictions/> accessed 23 April 2023.

demonstrated that there were no "less intrusive" ways to achieve the objective, including by issuing guidance to those responsible for places of worship on mitigation measures. He also held that the justification for the ban on individual private prayer in places of worship–that it would discriminate against faiths that did not practice private prayer—was "insufficient to withstand even the lowest degree of scrutiny".[33] Nonetheless, the conclusion had no practical impact because the restriction was, in any event, removed a few days after judgment was delivered and before any relief was granted—although it is possible that the litigation contributed to the decision to lift the restriction.

The exceptional nature of the judgment in *Philip*, is reinforced by the fact that an English court had reached a contrary opinion on English regulations closing places of worship for prayer and collective worship.[34] The Executive Committee of Barkerend Road Mosque in Bradford challenge the relevant regulations, emphasising, in particular, the serious impact of preventing Friday prayers during Ramadan. The claim was issued urgently on 19 May 2020, three days before the final Friday prayers in Ramadan, seeking interim relief prohibiting enforcement of the regulations. The application was refused. The court emphasised the limited duration of the restrictions and the fact that places of worship could open for funerals, broadcast worship and certain support services. Such reasoning is hardly persuasive, the limited duration of the restrictions does not speak to the justification for the restriction on collective prayers during Ramadan (even accepting that the claim was not solely limited to that period), nor do the limited other circumstances for which mosques could be open have much relevance as they did not allow collective worship to any degree. The nub of the decision was the fact that the steps to be taken to restrict the spread of COVID-19 were taken based on scientific advice, and considerations of social policy, which "a court should not lightly second-guess". The Secretary of State was entitled to take a "precautionary stance". Taking a notably different approach to the Scottish Court, Swift J was unimpressed with comparisons with places that remained open, such as shops and garden centres.[35]

[33] *Reverend Dr William J U Philip* [2021] CSOH 32 [115].

[34] *R (Hussain) v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin).

[35] Ibid [21]-[23].

The case is of interest not only for the contrast with Scotland but also with Germany. The Court was referred to the ruling of the Bundesverfassungsgerict in *F* (1BBQ 44/20), in which it granted relief to allow Friday prayers to take place.[36] Swift J essentially reasoned that given the "margin of appreciation", different courts could reach different conclusions. The case also has an intriguing and unusual dénouement. Despite robustly refusing interim relief on the basis that it was very unlikely the Article 9 argument would succeed at trial, Swift J nonetheless granted the claim permission to proceed. The restrictions were, however, lifted a few weeks later in July 2021, and in January 2022 Fordham J struck the claim out on summary basis as it had become academic, relying on the reasoning in *Dolan*.[37]

Before turning to our next thematic category, it is necessary to record another twist in the tale of the *Dolan* litigation. The Court's finding in relation to Article 11 proved to be critical in a later case, *R (Leigh & Ors) v Commissioner for the Metropolitan Police*, which challenged the refusal of the Metropolitan Police to allow a vigil on Clapham Common for a woman murdered by a police officer. Like the first lockdown regulations, the regulations then in force did not make provision for peaceful protest or assembly, but this right was—relying on *Dolan*—held to be implicit in the reasonable excuse exception. The police, in failing to understand this, and failing to consider whether preventing the vigil represented a disproportionate interference with Article 11 rights were found to have acted unlawfully.[38] The case served a purpose in vindicating the claimants' rights under Article 11, but its determination was far too late to allow the vigil to go ahead.[39]

Lockdown regulations were, whether fully justified or not, an extreme interference with individual freedoms, private and family life, and they raised real and difficult issues of legality, rationality and proportionality. For the most part, the Courts avoided much more than surface-level engagement with these questions, and in cases where they did find that governments or

[36] See the similar ruling of the Conseil d'État on 18 may 2020, no. 440366.

[37] *R. (on the application of Hussain) v Secretary of State for Health and Social Care* [2022] EWHC 82 (Admin).

[38] *R (Leigh and others) v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin).

[39] The court heard an urgent application for interim relief the day prior to the scheduled vigil but did not grant relief that would have enabled the vigil to go ahead: *Leigh v Commissioner of Police of the Metropolis* [2021] EWHC 661 (Admin).

public bodies had gone too far, in *Philip* and in *Leigh*, the vindication of legal rights took too long to have concrete implications.

Children's rights

Another area of legal controversy during the pandemic was the rights of children. In *R (Article 39) v Secretary of State for Education*, a charitable organisation for the protection of children living in institutional settings challenged regulations that removed and relaxed obligations on local authorities and their partners to take care of vulnerable children.[40] The changes included relaxing the requirement for social workers to visit children in care and for them to review care plans in accordance with strict timetables, allowing persons to act as temporary foster carers and removing the requirement for independent panel approval of foster placements and adoption. The regulations came into force on 24 April 2020 the day after they were laid before Parliament.[41] The following week, the Children's Commissioner, published a statement expressing concern about the changes, highlighting that it affected some of the most vulnerable children, who were most impacted by the pandemic and school closures, that it had not complied with the 21 day rule for laying before Parliament, and consultation had been "minimal"—a very short consultation of local authorities and adoption and fostering agencies.[42]

The claim was heard over two days in July 2020 and judgment delivered by the High Court on 7 August 2020. The claim had raised three grounds. First that there had been a failure to consult organisations that defended the rights of children; second, that the regulations were contrary to the policy the primary legislation to safeguard the welfare of children; and third, they were made without regard to the welfare of children as required by section 7 of the Children and Young Persons Act 2008. In comments that reflect the two competing forms of pressure or policy imperative that we set out at the outset of this paper, Lieven J reasoned that

[40] [2020] EWHC 2184 (Admin).

[41] The Adoption and Children (Coronavirus) (Amendment) Regulations 2020, SI 2020/445.

[42] Children's Commissioner, 'Statement on changes to regulations affecting children's social care' (30th April 2020) <https://www.childrenscommissioner.gov.uk/2020/04/30/statement-on-changes-to-regulations-affecting-childrens-social-care/> accessed 10th March 2023; Department for Education, *Children's Social Care* (Government Consultation Response, August 2020).

there were two "overarching points in this case".[43] The first was the "unprecedented crisis" and advice that the Government was receiving that up to 41% of social workers would be off work and that the country was facing potentially 828,000 excess deaths. On the other hand, the Judge pointed to the fact that the measures were "fundamental" to protecting vulnerable children in a context in which failings could be "catastrophic". The court's reasoning nonetheless reflected the first of these general imperatives, holding that it was reasonable for the defendant not to have consulted widely and that the defendant was acting to promote the welfare of vulnerable children, even though he was taking measures that would reduce the protections for them.

The matter moved very speedily to the Court of Appeal during the long court vacation and was heard on 4 September 2020. Only the consultation ground was pursued before the Court of Appeal, which heard argument on 4 September 2020.[44] The Court upheld the appeal. Baker LJ, with whom Henderson and Underhill LJJ agreed, held that the "urgency was not so great as to preclude at least a short informal consultation" but the consultation had been "entirely one-sided" in failing to consult the Children's Commissioner and other groups representing the rights of children.[45] The court declared the consultation had been unlawful. Again, however, by the time this result had been reached—judgment was delivered on 24 November 2020—matters had moved on a considerable way. On 1 July 2020, the Parliamentary Under Secretary for Children and Families announced that most of the measures would not be renewed after 25 September 2020, and the Government held an open consultation process on a more limited number of amendments. New regulations were introduced on 25 September 2020 with much more limited scope. The claim had become "academic". Whilst it can be argued that the declaration had importance in identifying a breach of the rights of organisations to be consulted and the importance of due process even during the pandemic, had the Court of Appeal's judgment in *Dolan* pre-dated this case, the Court of Appeal may well have refused to determine the appeal altogether.[46]

[43] *Article 39* (n 40) [74]-[76].

[44] *Dolan* (n 16) [77], [83].

[45] Ibid.

[46] Despite the limited success, the litigation might have exerted beneficial pressure on the government to make changes to the regime and to consult fully on the further changes.

In the same field, the Administrative Court in *Shaw* considered a challenge to regulations relaxing the time limits for completion of SEND assessments and notices issued under the Coronavirus Act 2020, which replaced a statutory duty to prepare educational, health and care plans with a duty to use reasonable endeavours to do so.[47] The Claimant attacked the decisions on five grounds: breach of duty to consult; failing to comply with the *Tameside* duty of enquiry; irrationally only laying the regulations before parliament the day before they came into force contrary to the conventional 21 day notice rule; irrationally not adopting a less intrusive measures; and not having in mind the aim of promoting the well-being of children. The court rejected the claim in strident terms. The court found that it was "obvious that performance of the full" statutory duty to prepare care plans "was unachievable during lockdown conditions".[48] The exceptional situation justified not holding a formal consultation and the claimants' objections to the replacement of the statutory duty were merely disagreements with the merits which did not come near the threshold of irrationality.[49] The failure to observe the 21-day rule was non-justiciable but, in any event, the court noted that if the convention had been observed, regulations would have come in late, placing local authorities in breach of unperformable duties.[50]

In this area of litigation, we see similar themes emerging in the adjudication of claims to those identified in the previous section. The courts were deferential both in terms of the substance of decisions and the processes adopted in reaching them, challenges to the decisions taken by government were unable to make inroads given the flexibility of principles of fairness and irrationality, which were applied with further restraint given the crisis situation faced by government.

Support, social security, and funding

Several cases were brought challenging limits placed on government grants, loans, and social security payments. One such challenge, *CC*, was brought to a decision not to increase financial

[47] *R (Shaw) v Secretary of State for Education* [2020] EWHC 2216 (Admin). The statutory duty was imposed under s.42 of the Children and Families Act 2014. The claim was heard as a rolled-up hearing and permission was refused on several of the grounds.

[48] Ibid [124].

[49] Ibid [172]

[50] Ibid [154].

support for recipients of carers allowance who had not been moved onto Universal Credit, in circumstances where persons in receipt of such allowance who had been moved on to universal credit received an additional £20 per week as part of the financial support during the pandemic.[51] Swift J held that the claim was unarguable as it required the Social Security Contributions and Benefits Act 1992, which set out the conditions payment of carers allowance, to be read as preserving a common law power on the part of the Secretary of State to make such payments in exceptional circumstances. Swift J held that this involved a special rule of statutory construction in times of crisis that had no basis in authority and would be "entirely unruly".[52] There was no other basis for such payments to be made, including under the Coronavirus Act 2020.[53] The court also dismissed an argument based on discrimination, holding that the Government had to prioritise resources and was entitled to prioritise other categories of person.[54]

Another claim challenging the absence of financial support for persons of "intermediate status", between self-employment and employment, was also dismissed.[55] An Uber driver was left unable to work after the introduction of lockdown measures and was thus unable to renew his private hire vehicle licence. The claimant did not qualify for support under the Statutory Sick Pay scheme or the Coronavirus Job Retention Scheme, as he was not paid by PAYE. A claim was brought on grounds that, in excluding such workers from the Coronavirus Job Retention Scheme or Statutory Sick Pay, the government violated Article 14 and Article 1 of the First Protocol, and because the decision indirectly discriminated against the disproportionate number of women and BAME workers. The court accepted that the regime placed women and BAME persons at a particular disadvantage but found it was a proportionate means of achieving a legitimate aim. The court reasoned that the circumstances gave rise to "the widest margin of discretion available to Government".[56] The Government had to act at speed and balance a very wide range of economic and political considerations. "Standing back"

[51] *R (CC) v HM Treasury* [2020] EWHC 2817 (Admin).

[52] Ibid [12]

[53] Ibid [14]. See also, Coronavirus Act 2020, s 76.

[54] Ibid [22].

[55] *R (Adiatu & Independent Workers Union of Great Britain) v HM Treasury* [2020] EWHC 1554 (Admin).

[56] Ibid [178].

the court held, there was an almost infinite variety of measures the Government could have adopted, the aims were rational, and the means adopted were appropriate to those aims.[57]

In Scotland, a challenge was brought to the limitation on grant support for businesses. Support was available in full only in respect of the first of the claimants' six coffee shops.[58] This differed from the approach announced by the UK Government and that applied in England, and the Scottish Government had also stated would apply also in Scotland.[59] The Claimant submitted that this created a legitimate expectation for the 100% grant, which it was unfair to change.[60] It was held that the Scottish Government was not administering a UK scheme and was not required to justify or give reasons for adopting a different policy to that adopted in England. There had been no sufficiently clear or unequivocal statement that the schemes would be the same to generate an enforceable legitimate expectation. Even if there had been, the circumstances fell with the "macro-political field" where a change of policy would not readily be seen as an abuse of power.[61]

Decisions about the distribution of finite resources are inherently difficult to challenge by way of judicial review, and the cases in this category therefore may not have suffered from the deferential approach adopted by courts. Indeed, the reasoning in *CC* expressly relied upon the need for a consistent approach to legal reasoning in normal and exceptional times. Nonetheless, these inherent difficulties were compounded by the need to afford governments a very broad margin of discretion in allocating resources during the pandemic.

Individuals in accommodation or detention

An important group of cases during the pandemic concerned people that were being housed in various forms of public accommodation or who were subject to detention. The *Detention Action* case was an ambitious application for interim relief that sought to require all persons in

[57] Ibid [178], [193]

[58] *Sharp v The Scottish Ministers* [2020] CSOH 74.

[59] Ibid [3].

[60] Ibid [26].

[61] Ibid [23], [29].

immigration to be released unless detention remained necessary for public protection. The application was refused on the basis that there was not even an arguable case that the system gave rise to a real risk of death of serious harm.[62] The court was critical of the claim and dismissed suggestions that it had provoked needed changes to guidance, which it stated had not been reactive to the claim.[63]

More narrowly framed challenges found some success. AQS was a destitute asylum-seeker entitled to accommodation but who was unable to gain access to accommodation when he developed symptoms of coronavirus. Just hours after proceedings were commenced, the Administrative Court granted an interim order requiring him to be housed, which he was the following day.[64] The evidence revealed confusion as to whether the Home Secretary had a policy not to house asylum-seekers with symptoms of COVID-19. Robin Knowles J directed that the policy be set out in the Acknowledgment of Service. This revealed a developing picture but one acknowledging the need for such persons to be suitably accommodated. In a short judgment, Robin Knowles J made interesting observations on how he viewed the proceedings. He recognised the interim order had "served its purpose" and made clear that, as long as the claimant continued to be housed, the claim should not be pursued as a vehicle for obtaining further details of the Secretary of State's policy, or as damages claim. He noted "the pressures on the Secretary of State and the officials working in her department".[65]

In another case brought in April 2020, Mr Bello, a Nigerian national with serious mental and physical health difficulties brought an urgent claim alleging that his continued detention was unsafe.[66] One of the grounds was that the inability to provide effective shielding breached the positive obligation under Articles 2 and 3 and that the Home Secretary's own policy was that people requiring shielding should not be detained. In a claim for interim relief, Chamberlain J recognised that there was "plainly a serious issue to be tried" but decided that

[62] *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) (Swift J).

[63] Ibid [29], [35].

[64] *R (AQS) v Secretary of State for the Home Department* [2020] EWHC 843 (Admin).

[65] Ibid [34]-[35]. This can be contrasted with *R (Escott) v Chichester District Council* [2020] EWHC 1687 (Admin).

[66] *R (Bello) v Secretary of State for the Home Department* [2020] EWHC 950.

the balance of convenience did not require release as the case would be heard within a few weeks.[67] At the full hearing, Johnson J ordered Mr Bello's release. The Secretary of State's operational instruction categorised Mr Bello as the highest risk level (a fact Chamberlain J had not been informed of by the Secretary of State), which clearly indicated he should not be detained.[68]

A broader challenge was also successful in the *Napier Barracks case*, in which the Court found that the decision taken by the Home Secretary in summer 2020 to house male asylum-seekers in a disused army barracks, which did not allow for social distancing or "cohorting" if individuals contracted COVID-19, was unlawful.[69] The accommodation was not suitable accommodation as required under sections 95 and 96 of the Immigration and Asylum Act 1999. Notably, the case was seeking to uphold guidance rather than challenge it, and the case did not require the court to engage in a difficult balancing of public health risks, as the evidence clearly showed that Public Health England had advised against using the barracks and the mitigation measures they proposed had not been adopted.

Judicial review applications also produced judgments relating to elderly and mentally incapacitated care home residents. In one, a care home resident, BP, had been admitted with Alzheimer's in 2019.[70] A decision was taken by his care home to suspend all visits from family members to BP or others in the home.[71] The court dismissed the challenge to the total prohibition on visits and an alternative request that, if the ban was upheld, BP should be allowed to return home with a package of care. Reflecting the "invidious" and heart wrenching circumstances of the time, the court placed reliance on the fact that the family could wave at elderly resident through a window.[72] In a contrasting case, an elderly patient with a terminal illness was allowed home so that they would not pass away isolated from her daughter.[73]

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[67] Ibid [31]-[36].

[68] [2020] EWHC 3014 (Admin) (unreported).

[69] *R (NB) v Secretary of State for the Home Department* [2021] 4 WLR 92.

[70] *BP v Surrey CC* [2020] EWCOP 17 and [2020] EWCOP 22.

[71] Ibid [2].

[72] Ibid [7].

[73] *VE v AO (by her litigation friend the official solicitor) and the Royal Borough of Greenwich* [2020] EWCOP 23 [35].

Of more general significance, the Divisional Court in *Gardner* entertained a retrospective challenge to the controversial policies and decisions that resulted in the transfer of patients from hospitals to care homes in the early stages of the pandemic. The claim was brought by relatives of two residents who had died, and since it was brought under Article 2, as well as the common law, it was found not to be academic. Whilst the Article 2 claim failed, the court did find that it had been irrational for government policy not to require isolation of persons moved from hospitals without a negative test given known risks of asymptomatic transmission.[74]

The cases concerning individuals in accommodation or detention present something of a more mixed picture of the role of the courts. Reflecting the fact that such people are in a particularly vulnerable position, and the fact that cases were more focused on individual circumstances, the judgements are more characteristic of a heightened vigilance approach than in other contexts. Even so, cases such as *Bello* and *BP* demonstrate that real difficulties existed in persuading courts to second-guess decision-makers during the pandemic in this context. This is also context in which one would have expected to see many more reported judgments, their absence in this context is a reflection, at least in large part, of the fact that many cases were settled before they reached a hearing.[75]

Administration of justice

A number of cases related to the operation of the justice system. In November 2011, the Court of Appeal ruled on a challenge to a practice direction that stayed possession proceedings for 90 days.[76] The case was not brought by judicial review procedure but was in substance a public law challenge. It was argued, amongst other things, that the automatic stay rendered nugatory provisions in the Coronavirus Act 2020 which gave rights to landlords to give three months' notice to tenants and other similar provisions. The court held that the provisions, whilst overlapping, were not inconsistent—reasoning that is not entirely convincing but which was

[74] *R (Gardner) v Secretary of State for Health and Social Care [*2014] EWHC 967 (Admin), [2022] PTSR 1338.

[75] Counsel in the *Bello* case, Tim Buley KC, informed us that he conducted lots of similar cases at the time but they almost all settled pre- or post-permission when individuals were released.

[76] *Arkin (as fixed charge receiver of Lord Farm) v Marshall* [2020] EWCA Civ 620.

convenient and avoided the need to amend the Act. On the wider question of whether there was an unlawful restriction on access to justice, the court held that "the short delay in possession litigation …is amply justified by the exceptional circumstances of the coronavirus pandemic".[77]

Litigation also arose from the difficulty in holding jury trials and the extension of custody time limits pending trial. In one case, a Judge refused to extend a custody time limit because of the suspension of jury trials on the basis that the pandemic was not a good and sufficient reason for doing so.[78] Other countries, he held, had found ways for hearings to continue and the root cause was lack of funding. The Divisional Court, presided over by the Lord Chief Justice, Lord Burnett, found without difficulty that suspension of jury trials was necessary to protect public health and it was not a matter of financial constraints preventing hearings going ahead.[79] The courts also upheld extended periods of detention arising from delays to extradition processes during the pandemic.[80]

In *JCWI v President of the Upper Tribunal*, the claimants challenged the Immigration Chamber's Covid-19 guidance issued on 23 March 2020 which had allowed appeals to be decided without hearings on the papers.[81] It argued that this guidance conflicted with the overriding objective of the Upper Tribunal to deal with cases "fairly and justly" and basic procedural fairness.[82] Fordham J held in November 2020 that the guidance was unlawful and he accepted an undertaking from the Secretary of State to use reasonable endeavours to bring the ruling to the attention of persons who had had substantive appeals determined against them on the papers since 23 March 2020.[83]

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[77] Ibid [33].

[78] Prosecution of Offences Act 1985, s 23.

[79] *R (DPP) v Crown Court at Woolwich, R (Lucima) v Central Criminal Court* [2020] EWHC 3243 (Admin). A similar case was determined by the Divisional Court in *R (McKenzie) v Crown Court at Leeds* [2020] 4 WLR 106.

[80] *Cosar v Governor of HMP Wandsworth and Westminster Magistrates' Court* [2020] EWHC 1142 (Admin); *Verde v Governor of HMP Wandsworth and Westminster Magistrates' Court* [2020] EWHC 1219 (Admin).

[81] *R (on the application of the Joint Council for the Welfare of Immigrants) v President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin).

[82] Ibid [2.6].

[83] Ibid.

Travel restrictions

In *R (Manchester Airports Holdings Ltd) v Transport Secretary,* the Divisional Court allowed a relatively small part of a claim challenging regulations setting out a "traffic light system" for international travel in 2021 but dismissed the remainder of the claim.[84] The Court accepted the claimant's arguments that the requirement to review the regulations included a requirement to consider whether to move countries to different "colours". However, the court refused to require the Secretary of State to provide information about the basis on which countries were assessed to be green, amber, or red, despite the Secretary of State having previously indicated such information would be provided to the travel industry. The ruling relieved the government of an administrative burden but was also a blow to transparency of the international travel traffic light system.

A subsequent challenge to the managed hotel quarantine scheme that required people travelling from red countries to quarantine was refused permission.[85] If such quarantine fell within Article 5, it was permitted by the exception in 5(1)(e), which was not limited to the quarantine of infectious persons. The scheme met the requirement of proportionality because individuals had an element of choice whether to travel to and from red-list countries, against Government advice; in addition, the quarantine period was relatively short, and there were limited exceptions. The Court reasoned that it would not be in a position to second-guess the government's decision that hotel quarantine was necessary, which involved difficult questions as to the choice between alternative designs and modes of implementation. Fordham J explained, "there is, … no realistic prospect that this court would conclude that an alternative scheme of allowing British citizen returnees from Red List countries to go to their homes to self-isolate there was a "less intrusive measure".[86]

Procurement

[84] [2021] 1 WLR 6190.

[85] *R (Hotta) v Secretary of State for Health and Social Care* [2021] EWHC 3359 (Admin).

[86] Ibid [26].

The pandemic required the government to contract rapidly with a range of private companies. This, of course, is a significant feature of modern government generally, but the initial crisis phase of the pandemic saw government seek to procure a range of products and services at exceptional speed, including vital Personal Protective Equipment for frontline workers exposed to the virus.[87] As would be expected, demand was high—with many countries seeking the same products and services—and supply chains were squeezed. How the government approached procuring goods and services became one of the most vexed areas of judicial review activity during the pandemic, with multiple high-profile cases being brought by a pressure group, the Good Law Project.[88]

In one case brought against the Secretary of State for Health and Social Care,[89] the Good Law Project challenged the Department's decisions, taken at the height of the pandemic, to enter into three contracts with a company, Abingdon Health, for COVID-19 antibody testing. It was October 2022 by the time the High Court handed down its judgment, and it was clear the Court was nervous about interrogating government conduct during the crisis with the benefit of hindsight. For instance, Waksman J pointed to how examining the record of decision-making had the "one particular benefit" that "it reveals on a real-time basis how highly-skilled and motivated (but often changing) teams of civil servants and medical professionals were all attempting, at great speed, to understand the pandemic enveloping the country and create methods of combating it that would all need to be established immediately".[90] The Court also stressed that it is "worth remembering that this claim is not a public inquiry into the adequacy or efficiency of the measures taken".[91]

In another case, the High Court initially found, in June 2021, there to be apparent bias where a Minister had awarded a contract to Public First for the provision of focus group and

[87] National Audit Office, *The supply of personal protective equipment (PPE) during the COVID-19 pandemic (2019-2022, HC-961).*

[88] An account of this litigation is provided by the Good Law Project's Director in J. Maugham KC, *Bringing Down Goliath* (WH Allen 2022), Ch. 9.

[89] *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC).

[90] Ibid [54].

[91] Ibid [55].

communications support services without public notice of competition to the interested party.[92] Both the Minister and the Prime Minister's senior advisor, Dominic Cummings, had previously worked with Public First's directors and the contract was to provide research to support the Government's communications strategy during the pandemic. Mrs Justice O'Farrell, after dismissing the claimant's challenge under procurement regulations, held that the decision to award the contract to Public First gave rise to apparent bias, due to a combination of the relationship between Dominic Cummings and Public First's directors and the failure to consider other options. This finding of bias was, however, subsequently overturned by the Court of Appeal in January 2022.[93] The Court observed that this was not a typical competitive procurement process and there was not an adjudicative function being exercised, so it was arguable the principles of bias did not apply—but the court was prepared to assume that they were engaged.[94] In conducting the analysis of the decision against the principles of bias, the Court concluded that a "fair-minded observer" would not have thought there was a risk of bias, drawing attention to "the working conditions and pressures arising out of the pandemic crisis"[95] and how the "central context for an assessment of the fair minded and informed observer's belief is the emergency conditions arising out of the pandemic".[96]

Such cases, much like other areas examined in this paper, show how cautious the courts were to judge, with the benefit of hindsight, the decisions made by the government at the early stage of the pandemic—and the time it took cases to be heard meant this was the position from which they were judging them. Even when arguments were successful, the success was often vindicatory but did not directly impact upon the approach of government to procurement during the pandemic. The larger effect of these cases is better understood when seeing them as an example of judicial review having the effect that Harlow and Rawlings call the "tin-opener": the litigation process brought to light some practices and decisions within government that were undeniably problematic in both substance and law.[97] The political ramifications of this

[92] *R (The Good Law Project) v Minister for the Cabinet Office* [2021] EWHC 1569.

[93] *R (on the application of The Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21.

[94] Ibid [69]-[71].

[95] Ibid [21].

[96] Ibid [72].

[97] C. Harlow and R. Rawlings, *Law and Administration* (CUP 2022), p.___.

part of these cases continue to play out, long after the pandemic faded from being the focal point of public life.

Reflections on the decided cases

A number of conclusions can be drawn from this survey of decided cases. Most obvious is the fact that there were only two successful challenges to COVID regulations, despite the proliferation, intrusiveness, and lack of external scrutiny of such regulations. These were *Philip* and *Article 39*, with the latter case successful on a relatively narrow procedural ground. The Rev. Philip case was the only case in which a rule in a restriction regulation was found disproportionate or insufficiently justified. In addition, *Leigh* represented a successful challenge to the application of restrictions regulations by the police. The other claims that succeeded can largely be characterised—with a degree of simplification—as claims seeking to enforce COVID rules or guidance and protect individuals from public health risk. Overall, the measures introduced by the Government to address the pandemic, including measures that interfered significantly with individual rights, not only in terms of restriction of movement but contexts such as the protection of vulnerable children and adults, were upheld.

The speed at which events moved and laws were changed contributed to neutering of the court's role in improving or curbing overly intrusive regulations. It normally takes many months for a case to reach a final hearing in judicial review proceedings. The data from recent years in England and Wales shows that a claimant can expect to wait somewhere between 200 to 400 days, from the point the claim is issued to a determination after a full hearing.[98] There was, of course, the possibility of applying for a case to be expedited. Judicial review procedure is capable of producing a result very quickly, withing weeks or, exceptionally, days. However, the crisis circumstances made such applications difficult, and the examples of reported judgments in this context relate to cases where interim relief was sought rather than where the claims were expedited to be determined exceptionally quickly. The Government resisted calls for expedited hearings on the basis that public officials, including senior public health officials, would be diverted from urgent tasks to provide witness statements and instructions.

[98] For a recent summary of the position, see L Graham, L Marsons, M Sunkin, and J Tomlinson, *A Guide to Reading the Official Statistics on Judicial Review in the Administrative Court* (UK Administrative Justice Institute 2022) 11.

A dominant theme of our survey is that the wheels of justice generally turned too slowly relative to the pace of events. A good example of this is *Dolan*.[99] By the time that the Court of Appeal issued its judgment in the case, it was held that the claim had, in substantial part, become academic as the regulations in question had been repealed. Although the Court criticised the claimant for not bringing the claim quickly enough, it is hard to think that it would have been decided before the initial lockdown rules had substantially changed.[100] In both the successful challenges to regulations—*Philip* and *Article 39*—the pace of events rendered those victories largely symbolic. Whilst the *Leigh* and *Gardner* case represented important vindications of ECHR rights, the rulings came too late to have practical consequences. On the other hand, even substantial cases could sometimes move at pace in the right circumstances, as a challenge brought by three airlines to the first international travel restrictions shows. The regulations were published on 3 June 2020 and applied from 8 June 2020. A pre-action letter was sent on 5 June 2020 and the claim proceeded to a full "rolled-up" hearing before a Divisional Court on 3 July 2020 with statements filed by senior figures, including Professor Chris Whitty, Chief Medical Officer for England, and Professor John Aston, Home Office Chief Scientific Adviser.[101] The claim settled part-way through the hearing.

It is also striking how few cases there were overall that reached trial or even that resulted in a published reasoned judgment.[102] Even accepting that databases are not comprehensive, there are unlikely to have been many more challenges to COVID rules that were determined by the courts at substantive hearing than those we have discussed. There are a number of possible reasons for this. One is the permission hurdle. In ordinary times, permission is granted in slightly *c.*20% of cases, a percentage which might have been lower given the courts were very conscious of the burden placed on government when defending judicial reviews during the pandemic. The reported permission judgments, such as that in *Dolan*, indicate that the

[99] *Dolan* (n 16) .

[100] Ibid [36]-[42].

[101] *R (British Airways, Easyjet and Ryanair) v Secretary of State for Transport*. The fact that lockdown restrictions were in place during the intervening period limited the impact of the measures over that period, although the restricted business travel and also deterred people booking holiday flights in July and August.

[102] We make this observation from a purely domestic perspective, but it is notable that some jurisdictions have generated vastly more Covid-19 related judgments. In Germany, for example, there were around 1,000 published decisions by administrative courts, see A Kaiser and R Hensel, 'Federal Republic of Germany: Legal Response to Covid-19' in J King and O L M Ferraz et al (eds*), The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021) [46].

courts were taking a tough stance on the merits and on whether claims were academic. This accords with other evidence, such as that a challenge to the decision to delay reopening of hospitality venues until 17 May 2021 was refused permission by Knowles J on the twin bases that the Government was entitled to take a precautionary approach and that any claim would be academic by the time it was determined.[103]

Another explanation might be the cost of judicial review proceedings. By contrast with applications to the Conseil d'État, which is generally cost-free, claimants in judicial review claims must pay their own legal costs and those of the defendant if the case is lost, which are not prescribed or capped.[104] Unless individuals qualify for legal aid, the costs and cost-risk of bringing proceedings will usually be prohibitive or a major disincentive. Another possible explanation is that many cases might have successfully generated compromise, an issue addressed in the next section. It does nonetheless seem surprising that there is not a greater number of judicial rulings concerning COVID -19 rules or related decisions.

In drawing these threads together, it is worth returning to an observation we made at the outset. The circumstances of the COVID-19 pandemic, given the need for rushed rule-making, the degree of intrusion into individual rights, and the absence of other effective forms of scrutiny and oversight, provided a fertile opportunity for judicial review procedure to be used to contribute constructively to the management of the pandemic as a mechanism for testing and improving COVID-rules and decisions—building on the established idea that the jurisdiction represents a "partnership" and "joint enterprise" between government and the courts in upholding the rule of law. As we have noted, the judicial review jurisdiction might have been used and developed to provide a more regular, more timely, and more focused scrutiny on specific rules or provisions that was otherwise lacking, something like the role that the Conseil d'État performed in France. But the courts did not fulfil this role. Governments and public bodies did not invite or welcome judicial scrutiny, and litigation that proceeded to a judicial ruling largely followed an adversarial paradigm.

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[103] Katherine Price, 'High Court judge rules against Lord and Osmond's case to reopen indoor hospitality' (*The Caterer,* 3 May 2021) <https://www.thecaterer.com/news/high-court-judge-rules-against-sacha-lord-hugh-osmond-reopen-indoor-hospitality> accessed 30 April 2023.

[104] For wider discussion on this access to justice problem in judicial review, see: J Tomlinson, Beyond the end of ouster clause history?' in L Stirton, T T Arvind, R Kirkham, and D Mac Síthigh (eds), *Executive Decision-making and the Courts* (Hart Bloomsbury 2021); J Tomlinson and A Pickup, 'Reforming Judicial Review Costs Rules in an Age of Austerity' in. A Higgins (ed.), *The Civil Procedure Rules Twenty Years On* (OUP 2020).

D. THE SECOND LOOK FUNCTION

It is tempting to look at judicial review exclusively through the lens of judgments delivered by the courts, but that is only a fraction of the overall picture. The courts are, in many ways, peripheral to the bulk of the activity that goes on between claimants and government bodies in respect of judicial review claims.

In England and Wales, since immigration cases were transferred to the Upper Tribunal, around 3,000 to 4,000 judicial review cases have been issued each year in the Administrative Court.[105] Many more disputes settle or are never taken forward at the pre-action stage following formal pre-action correspondence. Many more are settled before the permission stage. In 2019, for example, 3,384 applications were lodged, but only 2,487 cases reached the permission stage.[106] Typically, around 20% of cases where permission is determined by the Court are determined in favour of the claimant,[107] but the grant of permission is usually a trigger for further attempts to reach a negotiated outcome on the claim. As a result, each year we end up with only a few hundred Administrative Court judgments in England and Wales. Only around 55% are available on public databases, with the rest behind paywalls.[108] Although it is difficult to get clear evidence on settlements of judicial review, it has been suggested may cases that are settled are due to defendants agreeing to reconsider a decision or there is some change that substantively benefits the claimant.[109]

When viewed from this perspective, it becomes clear that a vital part of the contemporary judicial review system is how it prompts government bodies to take, what we might call, a "second look" at its decision-making. This is a specific aspect of the deterrent function of judicial review proceedings—the role of judicial review in prompting public

[105] Graham *et al* (n 102) 2-3.

[106] Ibid 4.

[107] Ibid 4.

[108] D Hoadley, J Tomlinson, E Nemsic, and C Somers-Joce, 'How Public is Public Law?' [2022] J.R. 95.

[109] M Sunkin and V Bondy, 'Settlement in Judicial Review proceedings' [2009] P.L. 237.

officials to take sound and lawful decisions without compulsion of a judicial order.[110] The "second look" function of judicial review is thus a key feature of the modern system generally, but it is understudied and rarely discussed in the literature. The litigation generated by the COVID-19 pandemic allows the operation of this feature of judicial review to be observed within a thematic setting and reveals it operating effectively in an exceptionally challenging litigation environment. Its importance is underscored by the contrast with claims pursued through to final judgments, which, as we have seen, were strikingly unsuccessful.

We begin our examples of the second look function in operation during the pandemic in the very early stages of the crisis. The initial lockdown rules allowed people to leave their homes for only limited reasons. This included an exception for "exercise" but not a general exception for health and well-being. This was challenged by parents of children with learning disabilities and autism, and it resulted in the Government changing the guidance on 8 April 2020 to state that any person with a specific health need, including a learning disability or autism, could properly be outside more than once a day, and travel beyond their local areas, and did not need to stay 2m apart from carers.[111] Another concern for parents of children with autism and mental health disabilities was also being pursued in separate proceedings at the same time. Parents of a young seriously autistic man who had been detained for two years under the Mental Health Act 1983 threatened a judicial review challenge to restrictions preventing them from visiting their son or facilitating online contact. In response to a pre-action protocol letter raising a breach of the Equality Act 2010 and the HRA 1998, on 8 April 2020, the Trust confirmed it would both provide the young man with a tablet and amend its policy on visitors to reflect its duty to facilitate the use of online communication between patients and their relatives.[112] This represented a partial but nonetheless significant success. Within less than

[110] L Platt, M Sunkin, and K Calvo, 'Judicial Review as an Incentive to Change in Local Authority Services in England and Wales' (2010) 20(2) *Journal of Public Administration Research and Theory* 243; M Sunkin and A Le Sueur, 'Can Government Control Judicial Review?' (1991) 44(1) *Current Legal Problems* 161.

[111] National Autistic Society, 'Government clarifies guidance on exercise' (National Autistic Society, 9 April 2020) <https://www.autism.org.uk/what-we-do/news/coronavirus-government-clarifies-guidance-on-exerc> accessed 30 April 2023; Bindmans, 'Government guidance changed to permit people with specific health needs to exercise outside more than once a day and to travel to do so where necessary' (*Bindmans*, 8 April 2020) <https://www.bindmans.com/knowledge-hub/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary/> accessed 30 April 2023. The use of guidance to make this change rather than altering the regulations is considered in T R Hickman, 'The use and misuse of guidance during the UK's coronavirus lockdown' (15 June 2020) 22-23.

[112] Doughty Street Chambers, 'NHS Trust changes its Coronavirus visits policy following legal challenge' (*Doughty Street Chambers,* 9 April 2020) <https://www.doughtystreet.co.uk/news/nhs-trust-changes-its-coronavirus-visits-policy-following-legal-challenge> accessed 30 April 2023.

a month, two judicial review claims that never formally entered the system contributed to public officials looking again at the effects of their rules and re-evaluating them under the HRA and the Equality Act 2020, resulting in meaningful changes for people with disabilities and their families, affecting change not only in individual cases but at the level of national policy.

An example of a crowdfunded case is provided by a claim brought by several individuals affected by the hotel quarantine regime, which was introduced later in the pandemic to control international travel from high-risk destinations.[113] Those subject to hotel quarantine had to pay a hefty fee which was said to be unlawful on several grounds. One ground, the absence of a waiver for impecuniosity, was conceded by the Government on 2 July 2021, when the government requested a stay for the proceedings so that they could introduce variations in the fixed fee for individual circumstances. On 25 September 2021, the government introduced their new scheme for waiving or reducing fees.

In June 2020 three of Europe's biggest airlines brought a judicial review challenging regulations that imposed a 14 day self-isolation requirement on any persons travelling into UK airport, irrespective of the country from which the person had travelled.[114] The claim was eventually compromised part-heard on the afternoon of 3 July 2020, after the Secretary of State for Transport produced and then published that day a list of countries and territories which the requirement to self-isolate would be lifted.[115]

Hotel quarantine also provides an example of a situation where many individual judicial reviews were threatened or brought, challenging the application to individual claimants, usually on grounds of health. One successful challenge, in May 2021, challenged the refusal of an exemption for a child with severe and complex needs. After an urgent application for permission for the child to return home, a High Court judge found there was a reasonable

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[113] Felipe Hotta, 'Join the Legal Challenge of the UK Government's Hotel Quarantine' (CrowdJustice, 24 June 2022) <https://www.crowdjustice.com/case/legal-challenge-to-the-hotel-quarantine-policy/> accessed 17th March 2023.

[114] BBC News, 'BA, Ryanair and EasyJet launch fight over 'devastating' quarantine plan' (*BBC News*, 12 June 2020) <https://www.bbc.co.uk/news/business-53020776> accessed 30 April 2023.

[115] Reuters, 'Airlines to drop UK quarantine legal challenge, lawyer tells court' (*Reuters*, 3 July 2020) < https://www.reuters.com/article/us-health-coronavirus-britain-quarantine-idUSKBN2441S5> accessed 30 April 2023.

prospect of success in showing the decision was unlawful. The Secretary of State conceded the case before the further hearing, permitting the claimant to complete self-isolation at home.[116] In another case, a Syrian journalist and refugee, Zaina Erhaim, had found the experience of hotel quarantine triggered her trauma from a past kidnapping by pro-Assad forces. An urgent application was granted by the Department of Health, allowing an exemption.[117]

It is often difficult to determine the extent to which changes in a defendant public body's position are attributable to judicial review proceedings, and it can often be a response to pressure of which threatened proceedings form only one part. Nonetheless, the examples show the importance of the "second look" function in judicial review during the pandemic and they suggest that its impacts were more significant thanat judicial orders. It led to decisions being revisited and government officials engaging constructively with claimants and their legal advisers to find solutions that would result in proceedings being unnecessary. Moreover, it often led to quick resolutions—and certainly quicker resolutions than a full judicial process could hope to achieve. Judicial review is supposed to provide a quick, effective, and relatively cheap form of litigation but the reality is often different. Yet, the ability of judicial review to be used as a means to obtain a speedy and effective resolution is apparent in its second look function, as demonstrated by these examples during the COVID-19 pandemic.

E. CONCLUSION

This article has explored the role that judicial review played during the COVID-19 pandemic. We have shown that judicial decisions had a negligible impact in restricting or curbing the impact on individuals of COVID-19 rules or restrictions and that courts did not contribute as a "partner" with the Government to ensure rules and decisions were rational, proportionate and

[116] Haroon Siddique 'Parents of disabled child win fight against UK hotel quarantine' (*The Guardian*, 5 May 2021) < https://www.theguardian.com/uk-news/2021/may/05/parents-of-disabled-child-win-fight-against-uk-hotel-quarantine#:~:text=A%20severely%20disabled%20child%20who,isolation%20after%20a%20legal%20challenge.> accessed 30 April 2023.

'Adam Wagner Successful in challenge to hotel quarantine of severely disabled child' (2021) available at <https://www.doughtystreet.co.uk/news/adam-wagner-successful-challenge-hotel-quarantine-severely-disabled-child> accessed 16th May 2023.

[117] Bindmans LLP, 'Award-winning journalist Zaina Erhaim exempted from hotel quarantine' (*Bindmans*, 10 September 2021) <https://www.bindmans.com/knowledge-hub/news/award-winning-journalist-zaina-erhaim-exempted-from-hotel-quarantine/> accessed 30 April 2023.

lawful. Judicial rulings proved most valuable in furthering adherence to public health rules, such as enhancing their application to asylum-seekers or in very narrowly-focused disputes relating to specific individual circumstances. The courts generally acted as a facilitator of the executive response to the pandemic, through deferential reasons and expansive interpretations of statutory powers. The system also facilitated vast freedom of government action because of the length of time required to decide cases, which resulted in many being academic or of no practical impact. This inability of the judicial review procedure to offer litigants a sufficiently speedy determination of their legal rights emerges as a key theme of our discussion of the cases. For those cases that proceeded to reasoned determination in reported cases, it was very often too late for the court to uphold individual rights or have a practical impact. The problem might appear intractable, although our glance at comparative analogues provides reasons to doubt that it is.

At the outset of this paper, we explained how the pandemic subjected the system of judicial review to two competing forms of pressure, on the one hand, there was pressure for special deference and, on the other, there was pressure for heightened vigilance. It was the former that is predominantly reflected in the case law. However, viewed in broader compass, a different, more nuanced conclusion can be drawn. The broader judicial review system was more impactful than the decided cases suggest and was often very effective as a remedy during the pandemic, insofar as it was a route to triggering a "second look" at decisions or rules by public servants. In this way, judicial review secured meaningful changes to decisions and policies relatively quickly that reflected a better balance of public health imperatives and individual freedoms and interests.

The province of judicial review is broader than the picture that emerges from reported decisions. The importance of this hidden dimension is vividly demonstrated by public law litigation during the pandemic, which reveals judicial review to have been considerably more useful and influential than the reported cases, taken by themselves, show.

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