Human Rights Law and the Covid-19 Pandemic in the United Kingdom

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1. Introduction

The purpose of this note is to provide some further detail to the human rights issues raised by the Covid-19 pandemic in the United Kingdom building on important work already done.[1] This is a rapidly moving situation and new human rights issues and challenges arise every day. In discussing these it is important that the national rules on human rights protection through law are as clear as possible. The focus here is on setting out the applicable relevant rules and, where possible, suggesting how these might apply to current issues. However, the human rights issues arising are multiple and often it is a situation of the human rights of one person finely balanced against those of another. Furthermore, unless a particular measure is a gross violation of rights for a large group, it usually not possible to draw blanket conclusions such as 'the current lockdown is proportionate' or 'disproportionate'. Such measures have different impacts for different groups and individuals, and much will depend on the circumstances.

In these unprecedented times, human rights questions are arising which a few months ago were unimaginable in the UK. It is important to remember that there is a human rights framework for protection contained in the Human Rights Act 1998 (HRA) which gives further effect to the European Convention on Human Rights (ECHR) and Protocol No.1 to that Convention.[2] This is accompanied by almost 20 years of national jurisprudence although it is beyond doubt that the jurisprudence of the European Court of Human Rights (ECtHR) also remains influential and important and is almost always followed by UK courts.[3] The guarantees of the HRA apply across the board to all public authorities and private bodies exercising public functions. Crucially section 3 of the HRA ensures that key legislation[4] is interpreted compatibly with human rights, so far as it is possible to do so. Finally, any human rights claims must start in a UK court and it is here that the most effective remedies are available.

The note proceeds as thematically as possible although there are two overarching issues examined at the outset: the possibility of changing the protection of the HRA through a derogation from the ECHR; and the impact of the many facets of the protection contained in Article 2 ECHR, the right to life.

2. Reducing human rights protection for a limited period through derogation from the ECHR

Under the HRA it is possible to change the meaning of Convention rights through 'derogation' from the ECHR in international law. On this issue the HRA is clear. Section 1(2) provides that the Convention rights given further effect in the HRA are subject to any 'designated derogation'. Section 14 states the definition of a 'designated derogation' and section 16 provides that in order to approve a designated derogation the affirmative procedure for secondary legislation must be followed. In

[1] This note was originally published in two parts. Part 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576496 and Part 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577779. Both parts are consolidated in this version.
[2] See further M. Amos *Human Rights Law Second Edition* (Oxford: Hart, 2014). The *Third Edition* will be published in 2021.
[3] Interim measures are available from the ECtHR but should a crisis arise, it is much faster and more effective to obtain a remedy from a UK court.
[4] Including the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

short, there must be approval within 40 days by a resolution of the House of Commons and the House of Lords therefore Parliament must be sitting.[5]

Article 15 of the ECHR sets out what elements must be satisfied in order for there to be a valid derogation.[6] Article 15 is not one of the Convention rights given further effect by the HRA although it was accepted by the House of Lords in its judgment in *A v SSHD*[7] that it is the test that must be applied to determine the lawfulness of any derogation instrument. To date, under the HRA the UK has not had a happy experience with derogation. The only derogation that has been entered whilst the HRA was in force was struck down by the House of Lords and much later by the ECtHR[8] for not meeting the Article 15 test. The measures, indefinite detention without trial of suspected foreign national terrorists, were held to be not 'strictly required' by the exigencies of the post 9/11 situation in the UK.[9]

A derogation from the HRA and the ECHR is possible but given the exceptions contained in the Convention itself to deal with this type of crisis, and also the HRA, it is not necessary. At the time of writing derogations have been notified by Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova and Romania.[10] Given the measures taken, derogations should have been notified by a number of other states, including Hungary. No derogation had been notified by Italy, Spain, or France.

Some have argued that the UK should have already derogated to facilitate the Coronavirus Act 2020 and accompanying secondary legislation.[11] This is predicated on the assumption that the Act constitutes a restriction on liberty, engaging Article 5, and interferes disproportionately with a number of other rights including Articles 8-14. Whether or not the current measures breach or have the potential to breach these guarantees is discussed in more detail in the following paragraphs and in Part 2 of this note.

Legally, the danger of a derogation in this context is that it would remove the protection of the HRA from those suffering from the disproportionate negative impact of the measures taken. Whilst the pandemic has an impact on all of us, it is not an equal impact and it is so important for the vulnerable to have access to human rights law to challenge the most devastating effects. Whilst it is not possible to derogate from Articles 2 and 3, it is possible to derogate from Article 8 (private life and family life), Article 10 (freedom of expression), and, most worryingly, Article 14 which protects vulnerable groups from discrimination. Whilst the present law, regulations, and guidance appear flexible enough to cater for the most disadvantaged groups, the HRA provides an important safety net. Furthermore, the government has stated its commitment to abiding by HRA guarantees throughout the crisis. During the passage of the Coronavirus Bill through Parliament, in the House of Lords Lord Bethell[12] stated as follows:

> The Government are 100% committed to protecting and respecting human rights. We have a long-standing tradition of ensuring that rights and liberties are protected domestically and of

[5] At the time of writing, it is due to resume as a 'hybrid virtual' Parliament on 21 April 2020.
[6] These are discussed in detail by Alan Greene https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/
[7] [2004] UKHL 56.
[8] *A v United Kingdom*, Application No. 3455/05, 19 February 2009.
[9] *A v Secretary of State for the Home Department* [2004] UKHL 56
[10] https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354
[11] See Alan Greene, above. Contrast Kanstantsin Dzehtsiarou https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/
[12] Parliamentary Under-Secretary of State, Department of Health and Social Care.

> fulfilling our human rights commitments. That will not change. We have strong human rights protections, with a comprehensive and well-established constitutional and legal system. The Human Rights Act 1998 gives further effect in UK law to the rights and freedoms contained in the European Convention on Human Rights. Nothing in this Bill contradicts that.
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> I reassure a number of speakers . . that there is nothing in this Act that allows the Government to breach or disapply the Human Rights Act or the Equality Act. The Bill itself is fully compliant with the Human Rights Act and the Government have certified this on the face of the Bill – in fact I signed it myself in accordance with section 19. Pursuant to Section 6 of the Human Rights Act, every exercise of power by a public authority under this Bill is already required to be compliant with the Human Rights Act. I further reassure the House that, at all times, this Government will act proportionately.[13]

Politically and strategically there are numerous other problems with a derogation. First is the messaging. For the people of the UK to be told that their human rights are to be suspended, even if this is only a limited suspension, will escalate the current panic even further. For the UK to derogate, when France, Italy or Spain have not, also sends the wrong message to less liberal states. This is also a rapidly changing situation with no clear end in sight. A new derogation may have to be made and approved by Parliament every month or couple of weeks. Once the immediate and overwhelming threat to life is over, it is likely that serious interferences with private life, such as surveillance and access to medical records, will be necessary to enable some sort of normal life to resume. Whilst many may welcome a derogation in the present circumstances, to suspend the right to private life indefinitely to facilitate this carries numerous risks.

3. The Right to Life – Article 2

My intention in this note is to explore the issues presented by the Covid-19 pandemic as thematically as possible but at the outset it is important to consider one human right which is overarching - the right to life as protected by Article 2 ECHR.

UK courts and the ECtHR have interpreted Article 2 to include a duty not to take life (the negative duty), in some circumstances a duty to take steps to prevent life being taken (the positive duty) and as part of that, a duty to investigate the circumstances surrounding a death (the investigatory duty). Everyone's right to life is protected. The right to life is inherent in the human condition which we all share[14] and it is not lawful under Article 2 to balance the worth of one life against the worth of another.[15]

3.1 Positive duty to protect

The two duties duty most important to the Covid-19 pandemic are the positive duty to protect and the duty to investigate. The origins of the positive duty can be found in the judgment of the ECtHR in *Osman*[16], adopted by the House of Lords in its judgment in *Officer L*[17]. It must be established that the public authority knew or ought to have known of the existence of a real and immediate risk to life and failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk[18]. Here the risk to life is obvious. On 16 March 2020 in a report from

[13] HL Deb 25 March 2020, Vol 802, Col 1778.
[14] *R v Director of Public Prosecutions, ex p Pretty* [2001] UKKHL 61 per Lord Hope at [87].
[15] *Re A (Children) (Conjoined Twins)* [2001] Fam 147.
[16] *Osman v UK* (1997) 29 EHRR 245.
[17] [2007] UKHL 36.
[18] See further Natasa Mavronicola https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/

Imperial College, it was concluded that if a strategy of mitigation rather than suppression of the virus was pursued, this would possibly result in 250,000 deaths in Great Britain[19]. The lockdown was announced by the UK government on 23 March 2020 and came into force on 26 March 2020.

Knowledge is also clear so the key duty on the state is to take reasonable measures to avoid the risk. It is now becoming very clear that there was unnecessary delay including an initial strategy of herd immunity and shielding the vulnerable. But lockdown came into force on 26 March following the trajectory of Italy, Spain and France. The lockdown is not as strict as in other states so questions could still be raised over whether it is a reasonable response to the threat to life and whether it should be stricter. At the time of writing there has been no change since it was introduced. Further details are considered in section focussing on the lockdown.

3.2 Duty to investigate

Under Article 2 there is a duty to investigate where there is an arguable breach of Article 2.[20] The form of the investigation required will vary depending on the circumstances but the more serious the events, the more intensive must be the process of public scrutiny.[21]

It is beyond doubt that a large-scale public inquiry into the Covid-19 pandemic and the response to it must take place in the long term and the government should set this up without being ordered to as the result of an HRA claim. All of the issues arising are tragic but some are more suited to such an inquiry than separate claims about breach of the duty to protect life.[22] These include: the lack of preparation for a pandemic[23]; the delayed response despite warnings from China and Italy; the initial 'herd immunity' and 'shielding' strategies; the slowness to test NHS staff, allowing them to get back to work; and the slowness in testing the wider population.[24]

Other Article 2 issues, including immediate investigatory failures, are more urgent and require more rapid resolution, possibly in the courts. These are discussed in the following paragraphs.

4. Medical treatment for Covid-19 patients

4.1 Lack of personal protective equipment (PPE)

NHS staff, care home staff and other such as pharmacists and transport workers have consistently complained that they do not have adequate and effective personal protective equipment (PPE) which would allow them to do their jobs without risk of catching the virus[25]. At the time of writing there are numerous reports of doctors, nurses, bus drivers and others tragically losing their lives as a result of catching Covid-19 in the course of their work.

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[19] Imperial College COVID-19 Response Team, 16 March 2020 https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf

[20] *R. (Gentle) v The Prime Minister* [2008] UKHL 20.

[21] *R. (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.

[22] Class actions are not possible under the HRA and the section 7 victim test requires victims to be directly affected.

[23] The NHS failed a 'major cross-government test of its ability to handle a severe pandemic' carried out in October 2016, B. Gardner and P. Nuki, *The Telegraph*, 28 March 2020.

[24] Although at the time of writing, there are doubts about the accuracy of the tests available and this is of course a reason for delay.

[25] D. Campbell, 'Lack of surgical gowns for medics 'a disaster in wating' The Guardian, 9 April 2020; L. May, 'Doctors lacking protective equipment are being bullied and shamed into treating coronavirus patients' The Daily Mail, 7 April 2020.

Article 2 imposes a positive duty on the state to provide this equipment and in its judgment in *Smith and Ellis*[26] the Supreme Court considered a comparable argument. Here the application was to strike out a claim that the Ministry of Defence was in breach of its duty to take appropriate steps to protect life by providing suitable armoured equipment for use by its soldiers on active service in Iraq. The majority confirmed that failures of this kind were not immune from scrutiny under Article 2, but that context was important. It held that servicemen and women should be given the same protection against the risk of death and injury by the provision of appropriate training and equipment as members of the police, fire and other emergency services. However, it was different when the serviceman or woman moved from recruitment and training to operations on active service. Here it was noted that a wider measure of appreciation for those 'on the ground' was required.

The majority concluded that positive obligations in this context must be avoided if unrealistic or disproportionate. 'But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article.' The majority concluded that the claims under Article 2 should not be struck out but should proceed to trial with the notice that the trial judge should allow a 'very wide measure of discretion' to those responsible on issues of procurement.

With respect to PPE in the Covid-19 pandemic, it may be that the worldwide shortage means that supplies are simply not available despite all efforts being made. The situation is also complicated by the presence of another Article 2 positive duty – that of the NHS to treat a patient where treatment is in the patient's best interests. Here there are conflicting positive duties resting on the NHS. First, the duty to take reasonable measures within the scope of its powers to avoid the risk to life involved in requiring its staff to treat Covid-19 patients without protective equipment. Second, the duty to take reasonable measures within the scope of its powers to treat a patient where life is at risk (assuming treatment remains in the patient's best interests). Where the balance falls will depend very much on the facts of each individual case. It could be argued that it is not reasonable, or within the scope of NHS powers to compel an NHS employee who is not suffering from Covid-19 to treat Covid-19 patients without appropriate protection. But could it be reasonable to compel those who have recovered, and are immune, even though this is a small group given the problems there have been with testing NHS staff?

An urgent HRA claim arguing breach of the substantive duty to protect life due to the lack of PPE is unlikely to produce the necessary PPE if it is not possible to source. What would be more useful at this point would be a claim triggering an emergency inquiry so the government's efforts are exposed to scrutiny.

4.2 Allocation of treatment

The British Medical Association has issued a guidance note on the ethical issues raised by Covid-19.[27] It is stated as follows:

> Although doctors would likely find these decisions difficult, if there is radically reduced capacity to meet all serious health needs, it is both lawful and ethical for a doctor, following appropriate

[26] *Smith and Ellis v Ministry of Defence* [2013] UKSC 41.
[27] https://www.bma.org.uk/media/2226/bma-covid-19-ethics-guidance.pdf

> prioritisation policies, to refuse someone potentially life-saving treatment where someone else has a higher priority for the available treatment. [28]

It has been revealed as the pandemic has developed that the demand for resources and staff may outstrip supply[29] and that individual hospital ethics committees are already deciding on who will have priority treatment.[30] On 12 April the *Financial Times* reported that the NHS had adopted a scoring system to decide which patients would receive critical care, but this was disowned and does not appear to be in use.[31] Furthermore, at the time of writing the system is not yet at capacity and rationing of critical care has not occurred although it has also been widely reported that many care home residents suffering from Covid-19 are not being taken to hospital and are dying in the care home. There are also numerous deaths of the elderly in the community. These deaths are not being counted in official reports.

Determining what Article 2 requires here is difficult, both morally and legally and the situation is unprecedented. In previous HRA judgments, withholding or discontinuing treatment of the seriously disabled or those in a permanent vegetative state has been characterised as an omission rather than an intentional deprivation of life. There is only a duty to treat a patient who does not have the capacity to accept or refuse treatment when treatment is in the patient's best interests.[32] However, if treatment is in a patient's best interests, any failure to treat will be in violation of Article 2:

> Article 2 therefore imposes a positive obligation to give life-sustaining treatment in circumstances where, according to responsible medical opinion, such treatment is in the best interests of the patient but does not impose an absolute obligation to treat if such treatment would be futile.[33]

Another relevant judgment is *D*[34] where Cazalet J concluded that treatment of I which would include non-resuscitation in the event of a respiratory and/or cardiac failure and/or arrest with palliative care to ease his suffering and to permit his life to end peacefully with dignity was in I's best interests:

> Having regard to the minimal quality of life that I has in the short life span left to him through his irreversible and worsening lung condition, I weigh, from I's assumed standpoint, any possible very limited short-term extension to this that mechanical ventilation might give him against the increasing pain and suffering caused by the further mechanical ventilation. … I consider that the thorough and careful analysis of the way ahead through full palliative treatment as advocated by the paediatricians in the declaration as sought is in the best interests of I.

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[28] Much more detail is provided by G. Thomas, K. Gollop and S. Roper, 'Covid -19: Allocation and withdrawal of ventilation – the urgent need for a national policy' http://ukmedicaldecisionlawblog.co.uk/rss-feed/119-covid-19-allocation-and-withdrawal-of-ventilation-the-urgent-need-for-a-national-policy

[29] R. Davies and J. Rankin, 'NHS faces shortfall of ventilators as manufacturers struggle', The Guardian, 3 April 2020.

[30] J. Chisholm, 'Doctors will have to choose who gets life saving treatment', The Guardian 1 April 2020.

[31] https://www.ft.com/content/d738b2c6-000a-421b-9dbd-f85e6b333684?sharetype=blocked

[32] *NHS Trust A v Mrs M* [2001] 2 WLR 942, [37]. See also the pre-HRA case in which the same conclusion was reached: *Airedale NHS Trust v Bland* [1993] AC 789, per Lord Goff at 867 and Lord Brown Wilkinson at 884–85 and the post-HRA judgment *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

[33] *NHS Trust A v Mrs M* ibid, [37]. See also *W v M* [2011] EWHC 2443 (Fam) which concerned a proposal to withdraw artificial nutrition and hydration to a patient in a minimally conscious state. See also *An NHS Trust v DJ* [2012] EWHC 3524 (COP).

[34] *A National Health Service Trust v D* [2000] 2 FLR 677.

There is also no duty to treat where to do so would expose the patient to inhuman or degrading treatment breaching Article 3 ECHR.[35]

'Futility' of treatment is essentially the stance adopted by the BMA although it is expressed as 'capacity to benefit quickly'. In the present circumstances, treatment which would not previously have been considered futile may suddenly become so should the resources to treat everyone run out. However, a successful claim that an NHS Trust is in breach of the Article 2 positive duty to protect life will depend very much on the circumstances of the case. In the short term what would be far more likely to succeed is an Article 2 investigatory duty claim forcing disclosure of the measures used by different Trusts to determine treatment. In the long term, there must be an Article 2 compliant inquiry focussing on how this situation has arisen in the sixth largest economy in the world.

Any prioritisation of Covid-19 patients to determine access to critical care also has the potential to discriminate against certain groups. This is also recognised by the BMA in its guidance where it is stated that during the peak of the pandemic, doctors are likely to be 'required to asses a person's eligibility for treatment based on a capacity to benefit quickly analysis.' Here Article 14 of the ECHR is key. This provides that Convention rights must be secured without discrimination on any ground. Applying Article 14 to a factual situation is complex and I will only summarise the most relevant parts. Here the facts fall within the ambit of Article 2, and there is both direct discrimination (possibly against care home residents) and indirect discrimination (which will result from any 'scoring' system or other means to prioritise care). As recognised by the BMA, the groups disadvantaged potentially include the elderly, and those suffering from long term health conditions. Under Article 14 these are prohibited grounds of discrimination.

The decision would therefore have to be justified as Article 14 is not an absolute right. In its judgment in *Steinfeld*[36] the Supreme Court held that the test of justification in relation qualified Convention rights such as Article 14 was that summarised in *Quila*:

> (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?[37]

The legitimate aim identified here would likely be preservation of resources in order to treat those with a greater life expectancy and those for whom treatment was not 'futile'. In its guidance where the BMA refers only to the Equality Act 2010, it states that the justification would be 'fulfilling the requirement to use limited NHS resources to their best effect.' It is also important to note that a court may find such a claim not justiciable and even if it were to proceed, where economic factors are raised as a justification, courts are much more likely to defer to the judgment of the primary decision maker.[38]

[35] *R. (Burke) v General Medical Council* [2005] EWCA Civ 1003 at [39]
[36] *R. (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32.
[37] [41] *Steinfeld*, quoting from *R. (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] AC 621 at [45].
[38] *Brewster v Northern Ireland Local Government Officer's Superannuation Committee* [2017] UKSC 8

5. Lockdown

The Health Protection (Coronavirus) Restrictions (England) Regulations 2020 imposing 'lockdown' came into force on 26 March 2020[39] although the lockdown had already been announced on 23 March 2020. A number of restrictions are imposed including the closing of certain premises[40], restrictions on gatherings[41]and restrictions on movement.[42] No person may leave the place where they are living without 'reasonable excuse'. A number of 'reasonable excuses' are listed but the list is non exhaustive. There is also further explanation in government guidance.[43] It is this particular regulation, Regulation 6, which has prompted the most comment, particularly where there has been overzealous and, in some instances, unlawful policing in its enforcement.[44]

A number of human rights issues arise as a result of the lockdown and it is important to identify these as the laws regulating lockdown, including the meaning of 'reasonable excuse' must be interpreted consistently with human rights so far as it is possible to do so.[45]

5.1 Lockdown and deprivation of liberty

Article 5 ECHR regulates deprivations of liberty and it is a limited rather than absolute or qualified human right. In order for Article 5 to apply, it must first be established that there is a deprivation of liberty which has an autonomous meaning. Relying on ECtHR authority, in *Cheshire West*[46] a majority of the Supreme Court held that there were three elements to a deprivation of liberty: (a) the objective element of a person's confinement to a certain limited place for a not negligible length of time; (b) the additional subjective element that they have not validly consented to the confinement in question; and (c) the confinement is imputable to the state.[47] Lady Hale noted that the 'acid test' for an objective deprivation of liberty was that the individual was subject to constant supervision and control and was not free to leave.[48]

In its judgment in *Austin*[49] the House of Lords held that it was also important to take into account the purpose of the measure in question. 'If purpose is relevant, it must be to enable a balance to be struck between what the restriction seeks to achieve and the interests of the individual.'[50] However, this was expressly disapproved of by the ECtHR in its judgment in *Austin v UK* and rejected by the majority of the Supreme Court in its judgment in *Cheshire West* although context remains

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[39] The same measures were made in relation to Wales, Scotland and Northern Ireland. For further detail, see Joint Committee on Human Rights, *Chair's Briefing Paper*, 8 April 2020 https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf

[40] Regulation 4.

[41] Regulation 7. See further David Mead, The human rights implications of the ban on gatherings in Regulation 7 https://protestmatters.wordpress.com/2020/04/10/the-governments-response-to-covid-19-the-human-rights-implications-of-the-ban-on-gatherings-in-regulation-7/

[42] Regulation 6.

[43] https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do

[44] See, for example, the quashing of a £660 fine where a woman was wrongly charged with an offence. L. Dearden, 'Coronavirus: Woman fined £660' *The Independent*, 3 April 2020.

[45] Section 3, HRA. Where problems arise, this is by far the quickest route to protection and does not require the intervention of Parliament.

[46] *Cheshire West & Chester Council v P* [2014] UKSC 19, [2014] AC 896; *P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2011] EWCA Civ 190, [2012] 2 WLR 1056.

[47] Per Lady Hale at [37] in reliance upon *Storck v Germany* (2005) 43 EHRR 96. See also *Re D (A Child)* [2019] UKSC 42, [2019] 1 WLR 5403 at [1] per Lady Hale.

[48] At [49].

[49] *Austin* v Commissioner of Police of the Metropolis [2009] UKHL 5.

[50] Ibid, per Lord Hope at [27].

important.[51] In its judgment in Austin v UK the ECtHR held that the purpose behind the measure in question was not relevant and had no bearing on the question whether that person had been deprived of his liberty 'although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified.'[52] Nevertheless, context remains important and the ECtHR also observed as follows:

> . . the requirement to take account of the "type" and "manner of implementation" of the measure in question . . enables it to have 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 action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good. . . In each case, Article 5(1) must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public, as they are required to do under both national and Convention law.[53]

The distinction is between deprivation of liberty and restriction on liberty of movement which falls within Article 2 of Protocol No 4 to the ECHR and does not engage Article 5.[54] The distinction is one of degree or intensity of restrictions, not of nature or substance. It is necessary to start with the concrete or actual situation of the individual concerned and take account of a range of criteria such as type, duration, effects and manner of implementation of the measure in question. Account must also be taken of the cumulative effect of the various restrictions.[55]

For the majority of people, the lockdown does not meet the deprivation of liberty threshold given the context and the absence of 'constant supervision and control'. It is this element which distinguishes the lockdown from the control order judgment *JJ.*[56] Here the controlees were required to remain within their residences at all times save for a period of six hours between 10am and 4pm. Visitors had to be authorised by the Home Office. During the six hours when they were permitted to leave, they were confined to restricted urban areas. They were prohibited from meeting anyone by pre-arrangement who had not been given Home Office clearance. A majority of the House of Lords concluded that the restrictions amounted to a deprivation of liberty. Lord Bingham observed as follows:

> 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. … The area open to them during their six non-curfew hours was unobjectionable in size. … But they were … located in an unfamiliar area where they had no family, friends or contacts. … Their lives were wholly regulated by the Home Office, as a prisoner's would be.[57]

The present lockdown is closer to the facts of control order judgment *E*[58] where the curfew was of 12 hours duration, from 7am until 7pm, and the residence was the controlee's own home in a part of London with which he was familiar, and he lived at home with his wife and family. There were no

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[51] [43] per Lady Hale, *Cheshire West*.
[52] [58], *Austin v UK*, Appl, 39692/09, 15 March 2012.
[53] [59]-[60].
[54] *Secretary of State for the Home Department v Mental Health Review Tribunal 'PH'* [2002] EWCA Civ 1868, [14].
[55] *PH*, ibid, [15].
[56] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
[57] Ibid, [24].
[58] *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

geographical restrictions during non-curfew hours and he was not prohibited from associating with named individuals. It was concluded that this did not amount to a deprivation of liberty within the meaning of Article 5.

5.2 Lockdown and Article 5(1)(e) – detention to prevent the spreading of infectious diseases

Whether or not lockdown per se amounts to a deprivation of liberty is a finally balanced question and for some, who may be under constant police surveillance, it is possible that the lockdown does amount to a deprivation of liberty. It is therefore important to consider what Article 5 requires. Article 5 is a limited right and deprivation of liberty is possible under Article 5(1)(e) 'for the prevention of the spreading of infectious diseases'. In addition to the meaning of these words, there are two overriding requirements. The first overriding requirement is that any deprivation of liberty must be in accordance with a procedure prescribed by law. The second requirement is that it must be lawful.[59] If these requirements are met, Article 5(1) does not limit the period for which a person can be detained.[60]

It is assumed that the deprivation of liberty here is in accordance with a procedure prescribed by law.[61] With respect to the second requirement, to be lawful, the deprivation of liberty must be lawful under domestic law and comply with the general requirements of the Convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by law. This principle includes the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction. Given the confusion surrounding what people can and can't do, and the significant 'inconsistencies in public communication' about the new regulations[62] the Convention requirement of lawfulness, closely linked to the rule of law, is not met.[63] As the Joint Committee recommends, it is important that this is rectified as soon as possible not only to comply with Article 5 but also Articles 8-10.

On the assumption that the confused messaging about the lockdown will be rectified, the next step is to consider the meaning of Article 5(1)(e). Given the lack of recent pandemics in the UK, this has not been the subject of litigation under the HRA and there is also limited ECtHR authority. In *Enhorn v Sweden*[64] the ECtHR held as follows:

> . . 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.[65]

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[59] *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19.
[60] *Flynn v HM Advocate* [2004] UKPC D1, [2004] HRLR 17.
[61] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (and equivalent measures in NI, Scotland, Wales).
[62] Joint Committee on Human Rights, op cit, para 19.
[63] See further T. Hickman, E. Dixon and R. Jones, Coronavirus and civil liberties in the UK https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/
[64] ECtHR, Application no. 56529/00, 25 January 2005
[65] [44]

Whilst at the time of writing lockdown of the majority of the population conforms to this test, with the passage of time, and as the number of those testing immune increases, whether or not lockdown still meets the test of 'last resort' will be open to question.[66]

6. Lockdown and other human rights

In addition to liberty, a number of other human rights issues arise as a result of the lockdown and it is important to identify these as the laws regulating lockdown, including the meaning of 'reasonable excuse' must be interpreted consistently with human rights so far as it is possible to do so.[67] The rights most at risk are the right to private life (Article 8), the right to family life (Article 8), freedom of religion (Article 9), freedom of expression (Article 10) and freedom of assembly (Article 11).

These are all qualified rights meaning that, apart from Article 14 where a slightly different test applies, each can be subject to lawful interference provided that the interference is 'prescribed by law' and necessary. As discussed in Part 1 of this note, whether or not the lockdown is 'prescribed by law' is open to doubt although the central message to stay at home is clear. In his judgment in *Gillan*, Lord Bingham explained the requirements of 'prescribed by law' as follows:

> The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred.[68]

Most who have looked carefully at the regulations and guidance agree that the messaging surrounding the lockdown has been very confused. Guidance conflicts with the regulations and the further guidance issued by various police forces and the College of Policing. Government ministers have also given inconsistent advice.[69] There is an urgent need for the guidance to be consolidated and a dedicated website set up allowing individuals to check what is and what is not permitted. However, it is important to also appreciate that it is quite difficult to determine in advance every instance where there is a 'reasonable excuse' to go out and it would be beyond the current capacity of police forces to set up dedicated inquiry lines. For the majority, the message to stay at home is clear. But there is a minority for whom the lockdown is extraordinarily difficult, and the guidance is unclear as to what they should do. Were a HRA claim to be brought under Article 8, it would succeed on this lawfulness ground alone.

Putting the 'prescribed by law' problem to one side, the next question when determining justification for an interference with qualified rights is whether the interference is necessary. Whilst it is difficult to generalise, for the majority of people, the interference with rights is necessary[70] for the protection of the rights of others. As explained in Part 1 of this note, the lockdown is a measure taken in order for the state to fulfil its Article 2 positive duty to protect life. However, for some, the lockdown is not proportionate to the objective pursued. It may also be in violation of an absolute right, such as Article 3 (freedom from torture and inhuman or degrading treatment or punishment) or Article 2 itself where the threat to life posed is more serious than the threat to life the lockdown protects against. Some of the examples which have arisen to date are examined in the following

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[66] It is also open to a UK court to adopt a different approach to interpretation and application of Article 5(1)(e) under the HRA.

[67] Section 3, HRA. Where problems arise, this is by far the quickest route to protection and does not require the intervention of Parliament.

[68] *R. (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [34]

[69] See the Report from the Joint Committee on Human Rights, op cit and T. Hickman, E. Dixon and R. Jones, 'Coronavirus and Civil Liberties in the UK' https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/

[70] To be 'necessary', relevant and sufficient reasons must be given to justify the restriction; the restriction must correspond to a pressing social need; and the restriction must be proportionate to the legitimate aim pursued.

paragraphs. There will most likely be more as the situation develops and this should not be considered a definitive list.

6.1 Domestic violence

Since lockdown came into effect, there has been a dramatic increase in the incidents of domestic violence reported. On 4 April 2020 it was reported that more than 25 organisations helping domestic violence victims 'have reported an increase in their caseload since the start of the UK's coronavirus epidemic'.[71] On 9 April 2020 Refuge, the UK's largest charity supporting women and children against domestic violence, reported a 700 percent increase in traffic to the National Domestic Abuse Helpline website it runs. This was following a media push to ensure that women know they can access help during lockdown.[72] On 15 April 2020 it was reported that at least 16 suspected domestic abuse killings have been identified by campaigners since the lockdown was imposed.[73]

Article 3 of the EHCR protects against inhuman and degrading treatment and the state is under a positive duty to protect against this.[74] As discussed in Part 1 of this note, Article 2 of the ECHR imposes a positive duty on the state to protect against a real and immediate risk to life. Being able to leave the house 'to avoid or escape risk of injury or harm' is already recognised as a 'reasonable excuse' in the government guidance.[75] But such is the scale of the problem that the government has also now launched a campaign to help victims of domestic abuse 'At home shouldn't mean at risk' and provided specific guidance on support for victims of domestic abuse.[76] But much more is required including adequate funding to make sure the campaign is effective and emergency funding to ensure charities supporting victims are able to continue their work.

6.2 Discrimination – disproportionate negative impact

As already noted, lockdown is an interference with the rights to private life and family life (Article 8), freedom of religion (Article 9), freedom of expression (Article 10) and freedom of assembly (Article 11). For most it is a necessary and proportionate measure given the number of lives at stake. But, as with all blanket interferences with rights, there are those for whom it is not proportionate. Given their personal circumstances, they are suffering from a disproportionate and negative impact. Whilst for these individuals it is possible to argue, for example, that the interference with private life fails to strike a fair balance between their own rights and the protection of the right to life of others, an alternate route is to use Article 14 ECHR which protects against discrimination in the enjoyment of Convention rights.

When applying Article 14, a structured approach, posing a series of questions, is normally utilised. The most well-known is the list formulated by Brooke LJ in *Michalak*,[77] later modified by the Court of Appeal in *Carson*.[78] The questions are as follows:

> (1) Do the facts fall within the ambit of one or more of the Convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put

[71] M. Townsend, 'Domestic abuse cases soar as lockdown takes its toll', *The Guardian*, 4 April 2020.
[72] https://www.refuge.org.uk/refuge-sees-700-increase-in-website-visits/
[73] J. Grierson, 'Domestic abuse killings 'more than double' amid COVID-19 lockdown', *The Guardian*, 15 April 2020.
[74] *In re E (a child)* [2008] UKHL 66
[75] https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do
[76] https://www.gov.uk/government/publications/coronavirus-COVID-19-and-domestic-abuse/coronavirus-COVID-19-support-for-victims-of-domestic-abuse
[77] *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617. The questions were first formulated in *St Brice v London Borough of Southwark* [2001] EWCA Civ 1138, [2002] 1 WLR 1537.
[78] *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.

> forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?[79]

This framework has also been employed in more recent Supreme Court jurisprudence including the judgments in *DA* and *Stott*.[80]

With respect to the first question, as already noted, the facts are likely to fall within the ambit of one or more of the Convention rights ranging from Article 2-Article 11 ECHR. There is also a difference in treatment, but this is not direct discrimination (a failure to treat like cases alike) but indirect discrimination (a failure to treat differently persons whose situations are significantly different). In her judgment in *SG*[81] Lady Hale explained the concept of indirect sex discrimination as follows:

> In indirect discrimination, by definition, women and men are treated in the same way. The measure in question is neutral on its face. It is not (necessarily) targeted at women or intended to treat them less favourably than men. Men also suffer from it. But women are disproportionally affected, either because there are many more of them affected by it than men, or because they will find it harder to comply with it. It is therefore the measure itself which has to be justified, rather than the fact that women are disproportionately affected by it.[82]

The next step is to identify a ground of discrimination and unlike anti-discrimination law, Article 14 is not limited in respect of what types of discrimination it prohibits. Some grounds are set out in the Article itself, but also prohibited is discrimination based on 'other status'. The 'other status' grounds for potential discrimination here are numerous and could include status as homeless, a lone parent, disabled, an asylum seeker or a resident of Scotland (as opposed to England).

As discussed in Part 1 of this note, Article 14 is not an absolute right and differences in treatment can be justified but in common with Article 1 Protocol No 1, no legitimate objectives are set out in Article 14. The objective here would be fulfilling the Article 2 duty to protect life. The next step is determining whether or not there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[83] In its judgment in *Steinfeld*[84] the Supreme Court confirmed that the test of justification in relation qualified Convention rights such as Article 14 was that summarised in *Quila*:

> (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?[85]

With respect to the disproportionate impact of the lockdown, some successful arguments have already been made and government guidance amended without the need for court proceedings. For

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[79] As set out by Lord Steyn in *R (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196, [42].

[80] *R. (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289; *R. (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831. See also *In the Matter of an Application by McLaughlin for Judicial Review* [2018] UKSC 48, [2018] 1 WLR 4250.

[81] *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 47

[82] [189]

[83] *Ghaidan* v Godin-Mendoza [2004] UKHL 30, per Lord Nicholls at [18].

[84] *R. (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32.

[85] [41] *Steinfeld* ibid quoting from *R. (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] AC 621 at [45].

example, following pre-action correspondence, on 8 April 2020 the government confirmed that it had amended the guidance[86] to make it clear that those with health conditions that required them to leave their homes more than once per day, and travel beyond their local area, were expressly permitted to do so. The claim seeking this clarification had been brought by two families with children with autism spectrum disorder whose conditions made it necessary for them to leave the house more than once a day for their own well-being.[87]

Another claim, not yet determined, has been brought by The Good Law Project to establish the right of every school-age child in England who is being taught remotely to a laptop or tablet and to internet connectivity in their home.[88]

6.3 Self-imposed restrictions

As the lockdown and the message to stay at home and save lives continues, it is also important to consider those who are taking the lockdown so seriously that they are not seeking vital medical treatment, or taking sufficient steps, if it is possible for them to do so, to stave off serious damage to their mental health. The Police Federation has claimed that there were early indications of a rise in suicides during the first fortnight of the lockdown.[89] It was reported on 16 April that there has also been a sharp rise in the number of seriously ill people dying at home because they are reluctant to call for an ambulance:

> Leading medical organisations have voiced anxiety that some people are inadvertently damaging their own health, and even risking their life, by shunning NHS care. People are either too scared to go to hospital or do not want to add to the strain on the NHS when it is under its greatest ever pressure with COVID-19, they said.[90]

Here the government is in a difficult position. To publicly campaign that its central message 'stay home and save lives' is subject to exception in these instances[91] could result in the gains from the lockdown being lost. But this is a serious problem with lives at risk and a much clearer message that attending hospital for other serious problems is possible is needed. As the experience of Italy demonstrates, it will also be important, once lockdown is eased, that enduring fear does not prevent people looking after their mental health and seeking medical treatment where this is needed.

6.4 Closure of businesses and compensation

Finally, it is important to consider the human rights implications of the requirement to close premises and businesses during the lockdown.[92] There are a number of human rights engaged including Article 8 private life, but given the loss of income involved, the most relevant is Article 1 Protocol 1 ECHR which protects property. As property has not been confiscated, for the purposes of Article 1 Protocol 1, this would be characterised as a 'control' on the use of possessions in

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[86] https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do See para [15]

[87] See further S. Broach, 'Why the coronavirus lockdown adjustment for people with disabilities and mental health conditions was the right thing to do' https://www.specialneedsjungle.com/why-lockdown-adjustments-people-disabilities-mental-health-conditions-right-thing/

[88] See further https://goodlawproject.org/case/children-will-be-left-behind/

[89] M. Robinson, 'Coronavirus lockdown has led to increase in suicides' *The Daily Mail*, 6 April 2020

[90] D. Campbell, S, Marsh and S. Johnson, 'Warning as UK coronavirus outbreak leads to sharp rise in deaths at home' *The Guardian*, 16 April 2020.

[91] As set out in the guidance para [1] https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others

[92] Regulations 4-5 Health Protection (Coronavirus Restrictions) (England) Regulations 2020.

accordance with the general interest.[93] Interferences with property in this way are also covered by this right.

Article 1 Protocol 1 is a qualified right. In his judgment in *Axa*[94] Lord Reed held that justification for interference was to be determined as follows:

> If an interference has been established, it is then necessary to consider whether it constitutes a violation. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focuses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[95]

Here, as in relation to other qualified rights, the justification would be Article 2 and protection of life. However, the process of justification proceeds slightly differently where Article 1 Protocol 1 is engaged. First, considerable deference is shown by courts where the subject matter engages social or economic policy.[96] Second, where there is a control on the use of possessions, rather than a deprivation, the payment of compensation is not normally required for the interference to be justifiable. This is so even if the legislation in general terms affects some people more than others.[97] However, in its judgment in *Mott*[98] the Supreme Court did not determine if the licence conditions imposed on a salmon fisherman limiting his catch amounted to deprivation or control holding that it was still necessary to consider proportionality. Given the severity and disproportion of the impact on the claimant, in agreement with the lower courts it concluded that compensation must be paid.

A number of business support measures have already been announced.[99] Whether or not these meet the requirements of Article 1 Protocol 1 in the current context remains to be seen.

7. Access to information

7.1 A right of access to information

Article 10 ECHR protects the right to freedom of expression. There is a large body of HRA jurisprudence concerning the interpretation and application of this right and it is crucial for journalists seeking to give the fullest picture of the government's handling of the current crisis. Protection of whistleblowers is also vital[100] and it is important to remember that it was in part due to the suppression of freedom of expression in China that COVID-19 was able to spread.[101]

As the crisis unfolds, access to accurate information from the state is becoming more important. However, in the UK under the HRA Article 10 has not been interpreted to include a right of access to information. This conclusion was first reached by the Supreme Court in its judgment in *Sugar*.[102] Two

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[93] See *R v Secretary of State for Health, ex p Eastside Cheese Co* [1999] 3 CMLR 12 concerning an emergency control order made in relation to a cheese manufacturer following a boy becoming serious ill with E. coli.
[94] *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46
[95] Ibid, [108]. See also *In the Matter of Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016 at [45] per Lord Mance
[96] *Axa General Insurance*, op cit
[97] *R. (Trailer & Marina (Leven) Ltd) v Secretary of State for the Environment* [2004] EWCA Civ 1580, [58].
[98] *R. (Mott) v Environment Agency* [2018] UKSC 10.
[99] https://www.gov.uk/government/collections/financial-support-for-businesses-during-coronavirus-COVID-19
[100] See further G. Letsas and V. Mantouvalou, 'Is gagging NHS workers lawful? Coronavirus and freedom of speech' https://uklabourlawblog.com/2020/04/14/is-gagging-nhs-workers-lawful-coronavirus-and-freedom-of-speech-by-george-letsas-and-virginia-mantouvalou/
[101] H. Leung, 'Whistleblower Doctor Who Sounded Alarm on Coronavirus Dies in China', *Time*, 7 February 2020.
[102] *Sugar v BBC* [2012] UKSC 4

years later it had the opportunity to reconsider in its judgment in *Kennedy*[103] where it was argued, on the basis of supportive ECtHR authority, that Article 10 conferred a positive right to receive information from public authorities and an obligation on public authorities to impart information unless withholding was justified under Article 10(2).

The majority held that the Grand Chamber statements on Article 10 'should continue to be regarded as reflecting a valid general principle' that Article 10 does not contain a prima facie duty of disclosure of all matters of public interest.[104] On this question Lords Wilson and Carnwath dissented. Lord Wilson held that the Supreme Court should now conclude that a right 'to require an unwilling public authority to disclose information can arise under Article 10.'[105] Whilst a reversal of this line of authority from the Supreme Court based on recent ECtHR seems unlikely in the short term, developing a stronger right of access to public interest information will be unlikely to diminish in importance over the next few years.[106]

7.2 Controlling false information

The COVID-19 pandemic has generated a plethora of false information. One false conspiracy theory links 5G towers to the COVID-19 pandemic. Others have suggested fake cures and remedies. As these predominantly spread via unregulated privately owned social media platforms, such as Facebook and WhatsApp, the government, and other users, can only alert them to the problem and hope that action will be taken. This has had some success to date. It has been reported that Facebook has deleted two groups promoting conspiracy theories;[107] WhatsApp has limited users to only being able to forward a message one chat at a time if it has already been shared five or more times; and YouTube has banned all conspiracy theory videos linking COVID-19 to 5G.[108]

7.3 Lack of information from government

Messages from the government concerning issues such as testing, deaths in care homes, personal protective equipment for NHS staff and others, and the limits of lockdown have been evasive and unclear. The names of those who serve on the government's Scientific Advisory Group for Emergencies (SAGE) have not even been made public. The Leader of the Labour Party, Keir Starmer, wrote to the government on 14 April 2020 asking it to commit to setting out the criteria it would be using to inform how and when it intends to ease the lockdown; publish its exit strategy; and outlining the sectors of the economy and the core public services likely to see restrictions eased. At the time of writing there has been no response apart from health secretary Matt Hancock expressing frustration about being asked to explain the exit strategy. It is widely believed that there actually is no exit plan yet.[109]

As already noted, Article 10 confers no right of access to public interest information. But other Convention rights contain procedural guarantees including the rights to private life and family life protected by Article 8. In certain circumstances, this can afford a right of access to information. In its judgment in *Hardy and Maile v UK*[110] which concerned the regulation of hazardous activities and the dissemination of relevant information, the ECtHR held as follows:

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[103] *Kennedy v The Charity Commission* [2014] UKSC 20

[104] [94], Lord Mance, with whom Lords Neuberger and Clarke agreed, and Lord Toulson with whom Lords Neuberger and Clarke agreed, at [145].

[105] [189]. Lord Carnwath at [219]

[106] There is also the Freedom of Information Act 2000 but this is unlikely to be of much utility given the numerous exemptions it contains.

[107] A. Cuthbertson, 'Dangerous conspiracy theories still spreading', *The Independent*, 15 April 2020.

[108] L. Kelion, 'Coronavirus: YouTube tightens rules after David Icke 5G interview', *BBC News*, 7 April 2020.

[109] R. Mason, 'UK needs lockdown exit strategy, says key coronavirus adviser', *The Guardian*, 16 April 2020.

[110] ECtHR, Application no. 31965/07, 14 February 2012

> The Court has previously indicated that respect for private and family life under Article 8 further requires that where a Government engages in hazardous activities which might have hidden adverse consequences on the health of those involved in such activities, and where no considerations of national security arise, an effective and accessible procedure must be established which enables such persons to seek all relevant and appropriate information.[111]

In the circumstances of that case, the Court concluded that the authorities had provided information as required by Article 8 and that there was an effective and accessible procedure by which the applicants could seek any further relevant and appropriate information should they so wish.[112] Whilst a similar duty might not arise at the current point in lockdown, it is not difficult to imagine it arising in the near future if no information about an exit strategy is provided.

Finally, as discussed in Part 1 of this note, there are also the duties to investigate under Articles 2 and 3. Whilst these are not usually deployed to secure access to information in the short term, in the present circumstances a court ordered inquiry into questions such as the absence of suitable personal protective equipment for NHS and other frontline staff and the failures in testing could expose government decision making to much needed scrutiny.

8. Lifting lockdown – surveillance and privacy

At the time of writing it has just been reported that a three-week lockdown extension is likely to be approved but, as already noted, there is yet no published exit strategy. Despite this, from the experience of other countries, and the advice of experts, testing and some form of contact-tracing will be necessary. Writing in *The Guardian* on 16 April, Professor Helen Ward stated as follows:

> So where to now? Once again, public health experience, including modelling, leads to some very clear recommendations. First, find cases in the community as well as hospitals and care homes; isolate them, and trace their contacts using a combination of local public health teams and digital tools.
>
> Second, know your epidemic. Track the epidemic nationally and locally using NHS, public health and digital surveillance to see where cases are continuing to spread. This will be essential so that we can start to lift the lockdown while shielding the population from hotspots of transmission. Build community resilience by providing local support for vulnerable people affected by the virus and the negative impact of the control measures.
>
> Third, ensure transmission is suppressed in hospitals, care homes and workplaces through the right protective equipment, testing, distancing and hygiene. Investigate the differential effects on black and minority ethnic groups, and provide appropriate protection.
>
> Fourth, ensure that the most vulnerable, socially and medically, are fully protected through simple access to a basic income, rights for migrants, and safety for those affected by domestic violence.

[111] [246] citing *McGinley and Egan v UK*, Application no. 21825/93, 28 January 2000 and *Roche v UK*, Application no. 32555/96, 19 October 2005

[112] [249]

Already concerns are being raised at the interference with privacy which will be necessary to facilitate the lifting of strict lockdown.[113] Article 8 ECHR protects the right to respect for private life. The taking, retention and disclosure of the type of information needed will involve clear interferences with private life including private information (medical records, your location, your contacts) and autonomy (control over information about you). However, Article 8 is a qualified right and interferences are permissible for a variety of reasons including the rights of others (Article 2 right to life) and for the economic well-being of the country.[114] There is a pressing need to get the economy moving again, at least in limited form. A recent report from the Office for Budget Responsibility warning that the UK economy could shrink by a record 35 percent by June.[115]

Justifications for interferences with private life to facilitate lifting the lockdown must be 'in accordance with the law' which has the same meaning as 'prescribed by law'. This lawfulness aspect of Article 8 is a vital tool for the ECtHR which has used it to shape the response of human rights law to the proliferation of state databases and other measures of surveillance.[116] The measures must also be necessary and on this question, in its judgment in *Marper v UK*, the Grand Chamber of the ECtHR held as follows:

> The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article . . . The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored . . . The domestic law must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse . . . The above considerations are especially valid as regards the protection of special categories of more sensitive data.[117]

With Parliament set to resume on 21 April 2020, it is vitally important that work starts as soon as possible on drafting the appropriate, and human rights compatible, legal framework including as wide a consultation as possible.

[113] See, for example, E. Selinger, 'The lasting privacy and civil liberties impacts of responses to COVID-19' https://www.oecd-forum.org/users/386048-evan-selinger/posts/65529-the-lasting-privacy-and-civil-liberties-impacts-of-responses-to-COVID-19

[114] Article 8(2).

[115] https://obr.uk/efo/economic-and-fiscal-outlook-march-2020/ Numerous claims have been made about the various violations of human rights, including deaths, which will result from a recession but at this point, the evidence for such claims is not clear.

[116] See European Court of Human Rights *Personal data protection*, February 2020 https://www.echr.coe.int/Documents/FS_Data_ENG.pdf

[117] [103]