

Public Law webinar mini-series

Developments in public law arising out of Covid 19

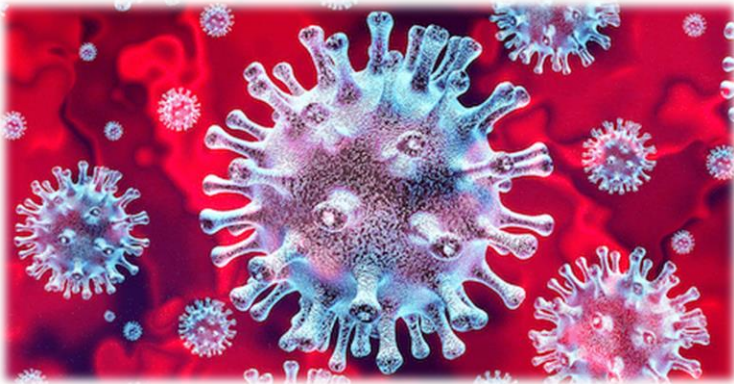
12th May 2021

Chair: Robert Palmer QC
Ian Rogers QC
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DEVELOPMENTS IN PUBLIC LAW ARISING OUT OF COVID

SCOPE OF EMERGENCY EXCEPTIONS



Anneli Howard QC
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EU Initiatives

- 13 March 2020: [Communication](#) re immediate response to economic impact of C-19 – serious economic shock presenting liquidity risks for SMEs and threat to Single Market.
- 19 March 2020 : [Temporary Framework](#) (consol)
- Dedicated 7 day hotline to approve aid within 24
- 3 April 2020: [1st Amendment](#) to TF – C19 R&D
- 8 May 2020: [Second Amendment](#) – liquidity
- 2 July 2020: [Third Amendment](#) – SMEs
- 28 January 2021: Extended to 31 December 2021

UK –EU TCA

- Specific exceptions for emergency measures for public health or public security for trade in goods
- Sectoral exceptions for public health/emergency
- **Art 702:** Thematic cooperation on health security & ad hoc access to Early Warning System
- **Article 364 TCA:** “Subsidies that are granted on a temporary basis to respond to a national or global economic emergency shall be targeted, proportionate and effective in order to remedy that emergency.”

Exceptional occurrences Art 107(2)(b)

- Compensation for sectors particularly hard hit e.g. tourism, transport, culture, hospitality
- Notify for assessment
- Examples:
 - Denmark €12m for event organisers- approved within 24hrs
 - France, Denmark, Sweden, Germany : Tax deferral and guarantees for airlines
 - €200m Slovenian scheme for large companies

Serious economic disturbance

Art 107(3)(b) Temporary Framework

- Affect whole or important part of MS economy
- Undertaking not in difficulty in Dec 2019 but faces difficulties as a result of C-19
- Direct grant, repayable loan, tax relief – max €800k gross per undertaking
- Extended to 31 December 2021
- Onus on Member State to prove that scheme is necessary, appropriate & proportionate
- UK – suspended rail franchises – risk transfer

Domestic emergency powers

Covid vaccines - HMRs

- Prohibition to sell medicinal production without prior marketing authorisation (MA)
- Criminal offence – Regs 45-46 HMRs
- **Temporary exception – Reg 174:**

“Prohibition does not apply...where supply is authorised by the [MHRA] on a temporary basis in response to the suspected or confirmed spread of.. pathogenic agents”
- Temporary authorisation not same as full MA

Defining scope of emergency powers

New Regulation 174 A inserted:

The [MHRA] may attach conditions to that authorisation, those being conditions to which the following are subject—

(a) its recommendation or requirement as to the use of that product for the purposes of regulation 345; and

(b) its authorisation of the sale or supply of that product.

MHRA Conditions of Authorisation

- MHRA published and updated [Conditions of Authorisation](#) from time to time:
- TA Not same as full MA
- Conditions incorporated by reference into TA
- Not deemed to be licensed or approved if use other than the recommended or required use, or breach of any condition
- AZ jointly and separately responsible, with manufacturers for any breach

Thank you!

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The impact of Covid-19 on public law

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Academic claims

- When does a claim become academic in a fast changing legislative environment?
- Pandemic >>> legislator needs to act swiftly, multiple amendments to SIs
- Claimant >>> needs to act promptly to challenge legislation which changes quickly e.g. due to pandemic
- What happens when the legislation is amended before the hearing?

R. (on the application of Dolan) v Secretary of State for Health and Social Care

[2021] 1 WLR 2326, CA

- lawfulness of regulations introducing the "lockdown" in England.
- Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) made on 26 March 2020 and subsequently amended on various occasions: were they ultra vires the Public Health (Control of Diseases) Act 1984, as amended by the Health and Social Care Act 2008?
- Significant amendments by first instance hearing.
- After hearing and before judgment, regulations repealed and replaced.
- Qs for CA: (i) was the claim academic and (ii) if so, should it be permitted to proceed on public interest grounds?

Dolan: Academic claim

- (i) Yes, clearly academic
- “In our view, the present claim is clearly academic. The regulations under challenge have been repealed. The crucial question is whether, nevertheless, this Court should permit the claim for judicial review to proceed in the public interest and, if so, on what grounds.” (para 39)

Dolan: Public interest

- (ii) Should it proceed? Yes, in relation to the vires issue
- “There is a discretion to hear disputes which have become academic but the discretion, even in the area of public law, must be exercised with caution; appeals which are academic between the parties should not be heard ‘unless there is a good reason in the public interest for doing so’.” (para 40)
- “[I]t would serve the public interest... to decide that issue now rather than leave it, for example, to be raised potentially by way of defence in criminal proceedings in the Magistrates’ Court and no doubt on appeal from there to the higher courts. In *Boddington v British Transport Police* [1999] 2 AC 143 the House of Lords held that a public law argument about the vires of an instrument in which a criminal offence is created can be raised by way of defence in criminal proceedings. Furthermore, the question [of vires] continues to be a live issue even though the particular regulations under challenge have been repealed. New regulations continue to be made under the same enabling power.” (para 41)

Dolan: time limits (in a pandemic?)

- an application for judicial review must be filed “promptly” and “in any event not later than three months after the grounds to make the claim first arose”: see CPR 54.5(1)(a) and (b)
- The time limit for a claim under the HRA is normally one year but this is subject to any stricter time limit in relation to the procedure in question (in this case judicial review): see section 7(5)(a) and (b) of the HRA

Dolan CA: serious doubts about 2 mths complying with “promptness”

- “serious doubts about whether it was in fact made promptly” (para 35)
- (1) called for very quick action indeed given the fast-moving situation from late March.
- (2) many third parties were potentially affected by the challenge, not least in possible criminal proceedings.
- (3) the issue of *vires* was one which was the subject of public debate, certainly amongst lawyers, immediately around the time that the regulations were first made in late March. It could have been dealt with very quickly.
- (4) one of the arguments that was made before us as to why this Court should grant permission to bring a claim for judicial review even if the case has become academic is that otherwise a claim could never be brought because the regulations have been changed many times. If anything, that point underlines how important it is for a challenge such as this to be brought very soon after the regulations are made. In our view, **this is not a case in which it should have taken almost two months until the claim form was filed, on 21 May 2020.**

Dolan: procedural rigour I – “rolling approach” to JR

- fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment.
- no hard and fast rule, but better if judicial review proceedings are not treated as “rolling” or “evolving”
- particularly in a context like the present, where the regulations have been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time.
- E.g. Application to amend SFG to challenge amended regs of 3.7.20 (correct not to pursue)

Dolan: procedural rigour II (length and complexity)

- 87pp SFG + 13pp Supp Grounds
- Not compatible with Adm Court JR Guide 2020, para 6.3.1.1: the document “should be as concise as reasonably possible, while setting out the claimant’s arguments. The grounds must be stated shortly”
- a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review.
- CPR PD54A (including length of grounds and skeletons) recast
- <https://www.judiciary.uk/wp-content/uploads/2021/05/131st-PDMD-SIGNED.pdf>

Practice point: Covid and in person hearings

- LCJ: new guidance which no longer states that the default position should be to hold a remote hearing, but that “Over the next few weeks and months as the number of people who have been vaccinated against COVID increases and restrictions begin to ease across England and Wales, it will be possible and desirable to increase attendance in person where it is safe and in the interests of justice.”

In person hearings

- The Bar Council website states:-
- *“Do “clinically vulnerable people” have to attend hearings in person?”*
- *Some people are considered to be “clinically vulnerable”, meaning they are at higher risk of severe illness from coronavirus. These include those who are aged 70 and over and those who have an underlying health condition, including pregnancy. Current government advice is that these people should take particular care to minimise contact with others outside their household. There are also those at even higher risk, the “clinically extremely vulnerable”, who are advised to continue to stay at home and be “shielded”.*
- *If you fall into either the clinically vulnerable or clinically extremely vulnerable categories, you should not be compelled to attend a hearing in person. If it is not possible for you to attend the hearing remotely, after discussion with the court and your client, you may need to withdraw from the case.*
- *If you live with someone who is clinically extremely vulnerable, you are not required to be “shielded” yourself but you should carefully follow the guidance on social distancing. If you feel that doing so is not compatible with attending a hearing in person, you should discuss this with the court and your client.”*

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