Coronavirus and Judicial Review in the United Kingdom

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1. – On 6 July 2020, the High Court of Justice for England and Wales (hereinafter "the High Court") delivered a decision (*Dolan and others v. Secretary of State for Health and Social Care and Secretary of State for Education*, 6 July 2020, [2020] EWHC 1786 (Admin)) dealing with the legality of lockdown measures enacted by the United Kingdom (UK) as a reaction to the spread of the Coronavirus (Covid-19).

More specifically, the applicants – Mr. Simon Dolan, Ms. Lauren Monks and another one whose identity remained undisclosed – asked for permission to bring judicial review against the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (hereinafter "the Regulations"). The Regulations were issued by the Secretary of State for Health and Social Care in order to try to stem the spread of the Coronavirus disease and impose significant restrictions on the enjoyment of several individual rights and freedoms. The High Court (in the person of Justice Lewis) refused permission to challenge the Regulations in a full hearing under all the grounds submitted by the applicants.

The present case note, examining the abovementioned decision of the High Court, is structured as follows.

After this short Introduction, Paragraph 2 identifies the legal background of the case, placing the UK reactions to Covid-19 within the major trends followed by Western liberal democracies to tackle the virus and highlighting the main content of UK pieces of legislation that were the object of the High Court's scrutiny.

Paragraph 3 focuses on the claims brought by the applicants against the Regulations made applicable to England and Wales and on the main steps taken by the High Court in its judgment. In doing so, this Paragraph gives some clarification on the mechanism of judicial review in the UK legal system, explaining how it works and why it is a tool of outmost importance for the protection of rights and freedoms.

Paragraph 4 comments the decision, also taking into account the approaches embraced by other courts in the comparative scenario, and sheds light on its main points of interest.

Some brief concluding remarks follow.

2. – Reactions by Western liberal democracies to the "new" threat posed by the Covid-19 virus, which quickly evolved from being an epidemic to the stage of a pandemic,

were quite varied, at least initially (for a detailed comparative analysis, A. Vedaschi, *Il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, in questa *Rivista*, 2020, 1453 ff.). On the one hand, some countries – Italy in the first place – took a restrictive stance since the very beginning, resulting in unprecedented limitations (at least in time of peace) of individual rights and freedoms (on the very first measures adopted by Italy in the wake of the Covid-19 emergency, A. Vedaschi, C. Graziani, *Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation*, in *Verfassungsblog*, 12 March 2020, available at verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/). On the other hand, some countries were sceptical about the fact that Covid-19 was a real threat, and allowed citizens to keep their ordinary habits until the moment in which it became clear that addressing Covid-19 was a pressing need that could not be overlooked or postponed.

The UK and its response to the disease can be classified under this second trend, as Prime Minister, Boris Johnson, was initially reluctant to recognise Coronavirus as an impending and imminent risk for the whole British population and invoked herd immunity as the only reaction to be taken (or, rather, the effect to hope for). Indeed, a similar, if not even more extreme approach was embraced in March 2020 by the then-President of the United States (US), Donald Trump. He repeatedly labelled Covid-19 as a "fake news" and, after resorting to statutory emergency powers that the National Emergency Act and the Stafford Act confer to him, did not enact many of the substantive measures he would be allowed to under these two statutes (see K.L. Scheppele, *Underreactions in a Time of Emergency: America as a Nearly Failed State*, in *Verfassungsblog*, 9 April 2020, available at https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/; see also T. Ginsburg, *Can Emergency Powers Go Too Far?*, in *Tablet*, 23 March 2020, available at https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights).

Differently from the US, the UK, after initial disbelief in the dangerousness of Covid-19, quickly aligned its policies to "Italian-style" lockdown measures. Instead of resorting to existing emergency legislation that could have been used to fight against Coronavirus (i.e. the Civil Contingencies Act 2004), the UK Parliament passed a new law, the Coronavirus Act 2020, specifically intended at providing the legal framework to thwart Covid-19 (a choice that was much criticised by UK scholars, see C. Walker, A. Blick, *Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism*, in *Just Security*, 12 May 2020, available at https://www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism/).

Similar to what happened in other jurisdictions, the UK Coronavirus Act 2020 vested the Executive branch with very extensive powers to try to contain the spread of the virus. For instance, secretaries of states (and even officials of devolved administrations) were authorised to issue their own acts limiting movement of potentially infectious people. They also have the power to turn these measures on and off as needed (see, on the UK response to the pandemic, A. Torre, *Dal Coronavirus alla Corona. Emergenza pandemica ed evoluzione costituzionale nel Regno Unito*, in questa *Rivista*, 2020, 1781 ff.).

Yet the Regulations that were challenged in the case under analysis were not adopted pursuant to the Coronavirus Act 2020. These Regulations were issued on 26 March (i.e. the day after the Coronavirus Act 2020 received royal assent), but under a different statute, the Health Protection (Control of Diseases) Act 1984 (as amended by the Health Protection Act 2008). Given the UK failure to invoke the Civil Contingencies Act 2004, the Health Protection (Control of Diseases) Act 1984 would

have been the only piece of emergency legislation to be applied during the Covid-19 crisis, if Parliament had not approved the Coronavirus Act 2020.

Under the 1984 Act (§§ 45B and 45C), the Secretary of State for Health and Social Care, as well as other secretaries of state, each one for the areas of their competence, are enabled to make regulations to give effect to international arrangements (e.g. the recommendations of the World Health Organizations) and to «prevent, protect against, control or provide a public health response to the incidence or spread of infection or contamination in England and Wales».

The Regulations that are the object of Court's scrutiny in *Dolan* were adopted under Section 45C of the 1984 Act. Unlike administrative acts taken on the basis of the Coronavirus Act, which have an individual reach, since they are directed to designated people who showed Covid-19 symptoms and could therefore endanger public health, these Regulations have a general scope of application and are binding to the whole population of England and Wales.

The key content of the Regulations (as enacted in their original version, which was then amended several times because of the changes in the evolution of the infection) can be briefly summarised as follows.

First, non-essential businesses, shops and schools were shut down. So were places of worship, except for very limited ceremonies, such as funerals with a small number of people.

Second, free movement was restricted. Unless they could demonstrate to have a «reasonable excuse» to do so, citizens could not leave the place where they lived.

Third, all gatherings in public places were forbidden. Exceptions were made only for people who came from the same household or who had specific reason, as work, to meet each other.

These Regulations, different from other legal sources issued by Executive bodies to tackle the pandemic in the UK, were not enacted following to the so-called affirmative procedure. The latter is a procedure under which a regulation is laid before Parliament and, if Parliament approves it, the regulation has the same legal force as a law for a certain period of time (usually 28 or 40 days). After the expiry of this term, the Houses (or, in some cases, only the House of Commons) can either approve the regulation again or do nothing (in this latter event, the regulation loses its effects). Despite not being approved through this procedure, the concerned Regulations were set to expire anyway six months after they were made. Moreover, restrictions contained thereof needed to be reviewed by the Secretary of State every 21 days, in order to make sure that they were still necessary to safeguard public health. Hence, no prior nor subsequent parliamentary scrutiny was ever provided on the Regulations (curiously, however, lack of any parliamentary role was not among the grounds alleged by Mr. Dolan and other applicants to challenge the Regulations).

3. – The applicants challenged the Regulations on the basis of eight grounds. Two of these claims relied on considerations stemming from alleged incompatibility with UK public law principles and provisions of domestic legislation, while other six concerned envisaged non-compliance with the European Convention of Human Rights ("ECHR" or "the Convention") and its Protocols, incorporated in UK law by the Human Rights Act 1998 (on the incorporation of the Human Rights Act 1998, see G.F. Ferrari, *La Convenzione europea e la sua "incorporation" nel Regno Unito*, in *Diritto Pubblico Comparato ed Europeo*, 1999, 125 ff.).

A description of these eight claims is useful in order to better understand how each of them was addressed by the High Court.

First, the applicants argued that the Regulations were made *ultra vires*, i.e. outside of the powers conferred to the Secretary of State by Parliament with the Health

Protection (Control of Diseases) Act 1984. According to the applicants, the Secretary can only take individualised, and not generalised measures in cases as the Covid-19 pandemic.

Second, Mr. Dolan and the others claimed that the Regulations violated the proportionality requirement embodied in the 1984 Act. Actually, the 1984 Act requires that the Secretary of State, when he takes measures to preserve public health, has to make sure that they are «proportionate to what is sought to be achieved» (§ 45D). To the claimants, factors as the increase of domestic violence due to lockdown and economic consequences of the restrictions were too high a price to pay for (uncertain) containment of the spread of the virus sought by the enacted limitations.

Third, and shifting to the first of the (many) claims presented under the ECHR, the applicants complained that Article 5 ECHR was infringed. As widely known, according to this provision, «[n]o one shall be deprived of his liberty save in [cases listed by the same article] and in accordance with a procedure prescribed by law». No law had set up the procedure triggered by the Secretary of State to limit personal freedom, the claimants submitted.

Fourth, the applicants tried to demonstrate that the Regulations breached Article 8 ECHR, protecting private and family life of each individual, insofar as they prevented family members and friends from meeting each other.

The fifth claim concerned the alleged violation of Article 9 ECHR – safeguarding each individual's freedom to manifest their religion – due to the fact that, at least for some weeks, all places of worship was closed, with very limited exceptions.

The sixth ground of complaint dealt with Article 11 of the Convention (freedom of peaceful assembly and of association), as no one could meet people – different from those coming from the same household – in public places (and, after an amendment to the Regulation, not even in private premises).

The seventh issue submitted to the High Court had to do with the right to property, protected by Article 1 of the First Protocol to the ECHR. In the first claimant's view, loss of revenue caused to his company by the shutdown of commercial activities can be equated to an infringement of private property.

The eighth claim was about the violation of Article 2 of the First Protocol to the ECHR, guaranteeing the right to access to education, which would be frustrated by the closure of schools during the pandemic.

Based on these eight grounds, the applicants asked the High Court permission to apply for judicial review, challenging the Regulations.

In the UK, judicial review is a procedure allowing any citizen to challenge the lawfulness of an act of public powers (including decisions of the central government, but also of local authorities or other bodies that perform a public function). Given the lack, in the British legal system, of a fully-fledged mechanism of constitutional adjudication (see A. Torre, *La giustizia costituzionale nel Regno Unito: caratteri, istituzioni, prospettive*, in L. Mezzetti (ed.), *Modelli di giustizia costituzionale comparata*, Padua, Cedam, 2009, 317 ff.), judicial review is the main tool allowing, on the one side, the protection and enforcement of citizens' rights and freedoms and the upkeeping of the rule of law, as well as, on the other side, the performing of a quasi-constitutional role of courts (on this topic, A. Street, *Judicial Review and the Rule of Law. Who Is in Control?*, London, The Constitution Society, 2013). In order for a judicial review request to be examined, the applicant(s) must convince the court that their case is "arguable", i.e. that the merit of the claim is, at least *prima facie*, well-founded.

Only if the court (usually, an individual judge) rules the case "arguable", it will grant permission to proceed in a full hearing. Such a permission was not granted to the applicants of the *Dolan* case, since the High Court held that none of the eight submitted grounds was "arguable".

As regards the first ground (i.e. that the Regulations were adopted *ultra vires*), the High Court maintained that the wording of the Health Protection (Control of Diseases) Act 1984 is very clear and excludes such possibility. The 1984 Act provides (§ 45D) that the Secretary of State may «make provisions of a general nature». Hence, there is no point in arguing – as the applicants did – that the Secretary of State should have taken only individualised measures (as per the Coronavirus Act 2020).

The High Court denied also the second claim, focused on alleged lack of the requirement of proportionality, as prescribed by the 1984 Act. To the Court, all measures enacted by the Secretary of State pursued the legitimate aim of reducing Covid-19 transmission and they were appropriate and not excessive to tackle the factual situation. As a matter of fact, the Court said, in the period in which the claimants lodged their application, the count of deaths had sharply increased and the National Health System was showing a reduced capacity to deal with the growing number of cases.

Regarding the third claim, presented under Article 5 ECHR, the High Court ruled it ill-founded, since UK lockdown measures cannot be considered to amount to a deprivation of personal freedom within the meaning of the Convention. Article 5 ECHR concerns, in the Court's view based on the case law of the European Court of Human Rights and of the (now abolished) House of Lords Appellate Committee, only circumstances of imprisonment and detention.

The fourth claim was rejected, too. The High Court ruled that, although the Regulation had certainly an impact on Article 8 ECHR rights, such restrictions were undoubtedly justified in the light of the legitimate aim they pursued (i.e. safeguarding public health).

Article 9 ECHR ground of complaint – substantiating the applicants' fifth issue – was not considered, because, at the time of the hearing, churches and other places of worship had been already opened again to the public, although some limitations were still into force.

On the alleged violation of Article 11 ECHR, i.e. the sixth claim, the High Court followed a reasoning resembling the one about Article 8 ECHR. Albeit there is no doubt that freedom of assembly is restricted, such restriction is totally justified due to the huge threat posed by the pandemic. As Articles 8 and 9 (and many other conventional rights), Article 11 ECHR does not enshrine an absolute right, so the Court engaged in the usual three-steps proportionality test to assess its limitation (on proportionality, see A. Stone Sweet, J. Mathews, *Proportionality Balancing and Constitutional Governance. A Comparative and Global Approach*, Oxford, Oxford University Press, 2019).

Concerning the seventh issue, i.e. the breach of the right to property, the High Court ruled that a reduced income of a company can in no way be considered as an interference with the right to private property.

And on the eight and last claim, the High Court stated that closing schools' physical premises does not impact on the right to education, since no school is prevented from providing education through other means, namely remote teaching. Rather, schools are *obliged* to keep ensuring education to children through technology tools and, anyway, the government is committed to allow schools to re-open as soon as the situation makes it feasible.

4. – This decision of the High Court of England and Wales addressed many troublesome aspects arising from the reaction to Covid-19. Although many other courts in several other jurisdictions reviewed legal issues deriving from the pandemic, one can say that the *Dolan* case is among the controversies in which the highest number of different legal matters were examined within the same application. As seen, the High Court's scrutiny spanned from the principle of proportionality, to freedom of worship, to freedom of assembly, to many more fields. Most of judgments taken by courts around

the world, instead, focused on single issues (for example, the closure of places of worship, the prohibition of gatherings and manifestations, etc.).

In giving such a wide overview (or, rather, in performing this wide-ranging judicial scrutiny) on UK lockdown measures, the ruling on the High Court in *Dolan* places itself among those decisions in which public health considerations were deemed to prevail – at least temporarily and due to emergency circumstances caused by the Coronavirus – over many rights and freedoms.

Nevertheless, unlike other domestic courts that struck a similar balance, it cannot be said that the High Court acted deferentially towards the political powers. In fact, while courts of other jurisdictions came to similar conclusions simply pointing out the political discretion of Executive branches (thus resorting to a sort of "political question" doctrine), the High Court of England and Wales made public health outweigh other rights and freedoms through a careful and thorough examination of factual circumstances concerning the pandemic context and of the choices made by political authorities.

In order to demonstrate this statement, it is worth going through and examining more in details some steps of the reasoning of the High Court, comparing them, where possible, with the stances taken by other domestic courts on the same issues (or at least on similar ones).

The first point that deserves to be mentioned is the High Court's approach to the lack of proportionality alleged by the applicants. The High Court could have stopped to the statement according to which «[t]here is no arguable basis for concluding that the decision to make the Regulations or to maintain them in force [...] was irrational» (*Dolan*, cited above, § 55) and to remark, as other UK courts did in the past, that it is up to the Executive, «under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to the public health risks» (per Lord Chief Justice Bingham in *R v. Secretary of State for Health ex parte Eastside Cheese Company* [1999] 1 CMLR 123, § 50, cited in *Dolan*, cited above, at § 59). Yet the High Court decided to go beyond that stage. In order to demonstrate that the Secretary of State's actions was rational, proportionate and, therefore, legitimate, the High Court engaged in a careful review of facts and figures concerning deaths due to the Covid-19 and, more in general, regarding the number of infected people and the pressure on the National Health System.

Other courts, called to adjudicate a similar issue – i.e. alleged lack of proportionality of measures taken to fight the pandemic – restrained themselves to mere assessment that the Executive's action was not irrational.

Some decisions of Italian administrative courts are significant in this regard. When they were called to rule on limitations of rights taken by decrees of the President of the Council of Ministers, by acts of the Presidents of Regional Executives or even by acts of local administrations, these courts often ruled that those measure did not lack a rational basis, since a legitimate aim was pursued. They further stated that the assessment on whether (or not) adopted means were proportionate to pursued goal was to be left at the political discretion of the Executive (see, among others, TAR Campania, decree no. 416, 18 March 2020; TAR Friuli, order no. 61, 10 April 2020; TAR Veneto, decree no. 205, 21 April 2020; TAR Lazio, order no. 3453/2020, 4 May 2020).

Similarly, after lower courts took different stances (US District Court for the Southern District of California, Case No. 3:20-cv-865-BAS, Honorable Cynthia A. Bashant, 15 May 2020; US Court of Appeals for the Ninth Circuit, *South Bay United Pentecostal Church et al. v. Newsom et al.*, No. 20- 55533, 22 May 2020), the US Supreme Court (*South Bay United Pentecostal Church et al. v. Gavin Newsome, Governor of California et al.*, 590 U.S. __ (2020)), in upholding the Governor of California's decision to limit access to places of worship, referred to public health as a «sensitive issue», not to be adjudicated by unelected bodies (as the US Supreme Court is), but to be left at the sole

discretion of political bodies, legitimised by democratic elections. Thereby, even if implicitly, this decision of the US Supreme Court identifies public health matter as "political question" (see C. Graziani, *Libertà di culto e pandemia (Covid-19): la Corte Suprema degli Stati Uniti divisa*, in *Consulta OnLine*, 2020, 357 ff.). However, this approach of the Supreme Court has been recently reversed by the *Harvest Rock Church* judgment (see *Harvest Rock Church, et al. v. Newsom, Governor of California*, No. 20A94, 592 U.S. ___ (2020), 3 December 2020; see also *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, No. 20A87, 592 U.S. __ (2020), 25 November 2020). Justice Coney-Barrett, recently appointed by President Donald Trump, played a crucial role in this *révirement*, as she cast the deciding vote to determine the 5-4 majority of the ruling.

This brief comparative overview is also useful to remark that, although public health matters are often classified as technical issues, their political implications cannot be overlooked, to the point that some courts regarded public health as a fully-fledged political question.

The second noteworthy aspect of *Dolan* is the careful interpretation that the High Court carried out regarding rights (and their grounds of restrictions) enshrined in the ECHR. This is particularly evident if one takes into account the excerpts of the ruling where the High Court examines Article 5 ECHR complaints. In holding that Article 5 only covers situations of detention or imprisonment or anyway involving solitary confinement and difficulties in getting facilities and essential goods, the High Court referred not only to previous domestic decisions (see, specifically, the House of Lords in *Secretary of State for the Home Department v. JJ* [2008] A.C. 385), but also to existing case law of the European Court of Human Rights (*Guzzardi v. Italy* (1980) 2 EHRR 3). Reliance on domestic and supranational case law reveals the effort to carry out a substantive analysis of the concept of "deprivation of liberty", in the meaning that not only national judges, but also the Court of Strasbourg, give to it. Additionally, the concurrence of domestic and supranational precedents to infer the interpretation of a conventional provision contributes to reinforce the idea of the ECHR as the real "bill of rights" of the United Kingdom.

A third remarkable factor is the differentiation made by the High Court between the right to education and the closure of schools. As said, the High Court maintained that the latter has no impact on the former, as schools can carry on their activity through online devices. The High Court pursued an innovative reading of the right to education – otherwise traditionally associated to the physical premises of schools – without renouncing to show itself well aware of the added value, in social and relational terms, that going to school offers to students. In fact, the Court promptly highlighted that, notwithstanding the possibility to implement the right to education thanks to technology, the government had to take any possible effort, compatible with the evolution of the pandemic, to ensure that children went back to school as soon as possible.

5. – In conclusion, the *Dolan* judgment of the High Court of Justice for England and Wales proves that it is possible for a court to rule that individual rights and freedoms shall be (temporarily) outweighed by other considerations aimed at enhancing other legitimate aims (in this case, public health), without taking a deferential approach toward the political powers. Such deference is something that often happens when emergency circumstances are in place, as many cases dealing with judicial review of counter-terrorism measures – not only in the UK – show (on judicial deference in the context of national security, see A. Vedaschi, *The Dark Side of Counter-Terrorism:* Arcana Imperii *and* Salus Rei Publicae, in 66 *The American Journal of Comparative Law*, 4/2018, 877 ff., 923; for an interesting parallel between public health and national

Note e commenti – *DPCE on line*, 2020/4
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security, see the reasoning of Supreme Court of Israel (sitting as the High Court of Justice), *Ben Meir v. Prime Minister*, 26 April 2020, HCJ 2109/20, 2135/20, 2141/20, 2187/20).

Thanks to its careful assessment, taking into account scientific data, factual background and previous case law, the High Court engaged in a persuasive reasoning, which does not take the prevalence of the Executive in emergency matters for granted, but thoroughly reads legal measures in the light of the existing factual situation and scientific knowledge (on the relationship between courts and science in times of Covid-19, A. Pin, *Giudicare la pandemia con la proporzionalità. Le misure anti-Covid-19, il vaglio giudiziario e il diritto comparator*, in questa *Rivista*, 2020, 2581 ff.). In this way, the High Court seems to fully perform that role that is traditionally entrusted with the Judiciary branch, i.e. to interpret the legal provisions in an impartial and independent way and to apply norms to concrete cases, without limiting themselves to the task of a Montesquieu-style "*bouche de la loi*".

The *Dolan* judgment of the High Court was affirmed by the Court of Appeals for England and Wales on 1 December 2020 (*Dolan and others v. Secretary of State for Health and Social Care and Secretary of State and Secretary of State for Education*, 1 December 2020, [2020] EWCA Civ 1605) and the applicants have recently challenged the decision of the second instance court before the UK Supreme Court. Whatever the outcome will be, it is desirable that also the last instance Court justifies its conclusions through a reasoning as in-depth and evidence-based as the one of the High Court.

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