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Irish Supreme Court: Man Wins Appeal Over Rearrest After Five Years At Large

Andrew McKeown, Irish Legal News: In November 2008, Mark Finnegan was convicted of an offence under section 112(1)(b) of the Road Traffic Act 1961 in "allowing himself to be carried in a mechanically propelled vehicle without the consent of the owner". In May 2009, at Trim Circuit Criminal Court he received a 16-month sentence. He was placed in Wheatfield Prison, and was transferred in July 2009 to Shelton Abbey Open Centre, an open prison with low security. In 2009, Mr Finnegan escaped from custody at Shelton Abbey by leaving the premises without permission. From this point, "he was unlawfully at large, and so the prison authorities notified Arklow Garda Station". Through human error his escape did not appear on the Garda PULSE system, and so no nationwide alert was raised. He returned to his family home and continued living there. He registered for social welfare using that address. In 2011, he moved to a new address to live with his partner and continued living there until his arrest in 2014. He again claimed social welfare from this address.

Gardaí first attempted to locate Mr Finnegan in June 2014, four years and seven months after he escaped. In August and November 2014, gardaí spoke to Mr Finnegan. It was claimed that he denied his identity during those conversations. On 10 November 2014, Mr Finnegan presented at Tallaght Garda Station on request. There, he was arrested and detained in Wheatfield Prison in relation to the sentence imposed on him in May 2009. Mr Finnegan brought proceedings in the High Court seeking a declaration that his re-arrest was unlawful on the basis of unconstitutional delay. The declaration was granted by Ms Justice Úna Ní Raifertaigh. The Court of Appeal overturned that declaration, with Mr Justice John Hedigan giving the judgment of the court. The judge said that the delay in the arrest was due only to human error. The court observed that whatever the failings of the gardaí, the only credit that could be given to Mr Finnegan was that he had not re-offended since his escape from custody. However, the "escape was in itself an indictable offence and a serious breach of trust in that he had been allowed to transfer from Wheatfield to Shelton Abbey".

Mr Finnegan appealed to the Supreme Court. The court was asked to decide "whether there are any circumstances in which delay on the part of An Garda Síochána in arresting an absconding prisoner can render his arrest and subsequent detention unlawful". He relied on a number of judgments to support his proposition that "the exercise of the coercive powers of the State carries with it an obligation to exercise those powers with constitutional fairness". He submitted that Ms Justice Ní Raifertaigh was correct in finding that the State was obliged to act "with reasonable expedition" due to the fair procedures rights in matters concerning liberty and trial rights guaranteed by Bunreacht na hÉireann. He argued that those rights "are not extinguished upon conviction and lead to corresponding duties on the part of the State in the exercise of its powers". The Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison, the respondents, said that Mr Finnegan had attempted to minimise his conduct by the mischaracterisation of his escape as merely "walking out without permission". They argued that the escape was in itself an indictable offence and a serious breach of trust. Further, he remained unlawfully at large for four years and seven months; during which time he was evading justice. They submitted that when he was finally identified, he misled the gardaí as to his identity.

Mr Justice William McKechnie, giving the judgment of the Supreme Court, cited the decision of Mr Justice Paul Carney in in Dunne v DPP (Unreported, High Court, Carney J., 6 June 1996) in which there had been a delay of over two years in executing an arrest warrant. He was satisfied that the attempts by gardaí to identify Mr Dunne meant that there was no unreasonable delay in his arrest: "A warrant of apprehension is a command issued to the Gardai by a court established under the Constitution to bring a named person before the court to be dealt with according to law. It is not a document which merely vests a discretion in the Guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the court which issued it" Mr Justice McKechnie said that this statement reflected the public interest in the rule of law being upheld.

Applying that criteria to the facts of the present case, Mr Justice McKechnie noted that Mr Finnegan knew that he was unlawfully at large: "At no time after that event took place could he have been under any misapprehension in that respect." However, he found that the "admitted delay" of almost four-and-a-half years before any attempts were made to locate him, the fact that he lived openly and in the locality of his family, that he "engaged in family life and had a daughter with his partner" were all things which the court must consider. He held that "notwithstanding the seriousness of absconding and remaining at large unlawfully, I believe that the factors otherwise identified would make it not simply unjust but also oppressive and invidious to have him returned to serve the balance of his sentence."

Police Operation to Put Down Prison Riot Used a Disproportionate Level of Force

In Chamber judgment1 in the case of Kukhalashvili and Others v. Georgia the European Court of Human Rights held, unanimously, that there had been: a violation of Article 2 (right to life) of the European Convention on Human Rights in both its procedural and substantive aspects. The case concerned the death of the applicants' relatives during a police operation to quell a riot in a prison where they were being held. The Court first of all found various failings in the authorities' investigation into the circumstances in which an anti-riot force had put down disturbances in the prison, when the applicants' relatives had been killed. For instance, the initial investigatory steps had been taken by the same institution, the prison department, which had ordered and executed the anti-riot measures. The Court also found that while the law-enforcement officers might have been justified in deciding to use lethal force in the face of shots being fired by prisoners during the riot, the level of force used had not been absolutely necessary. That was shown, among other things, by the lack of proper planning of the law-enforcement response, the fact that the use of lethal force had been indiscriminate and excessive, and because the authorities had failed to provide adequate medical assistance to prisoners afterwards.

The applicants, Sofio Kukhalashvili, Marina Gordadze and Rusudan Chitashvili, are three Georgian nationals who were born in in 1977, 1956, and 1938 respectively and live in Georgia. The first and second applicants are the sister and mother of Z.K. while the third applicant is the mother of A.B. Both men were prisoners in Tbilisi Prison no. 5 who died during a police anti-riot operation at the prison in March 2006. They were aged 23 and 29 respectively. The anti-riot operation took place after disturbances when the authorities removed six alleged high-profile criminal bosses and their close associates from a prison hospital.

The authorities' aim was to reduce the criminal bosses' alleged influence in the prison system but as they were removed by force disturbances broke out in two nearby prisons, Prison no. 1 and no. 5. The authorities subsequently used an anti-riot squad to bring the disturbances in

Prison no. 5, where the rioting was particularly bad, under control. The incident led to the death of seven inmates and the injury of 22 inmates and two prison officers. The applicants subsequently obtained documents from prosecutors on the death of their relatives,showing that both had suffered gunshot wounds. Prosecutors stated separately to each family that lethal force had been used against Z.K. and A.B. "in a moment of extreme urgency". Prosecutors refused to give the applicants the status of civil parties in the cases of their relatives' death. Information supplied by the Government to the Strasbourg Court shows, among other things, that the authorities carried out investigations into the riot and the use of force by the police.

Six prisoners – the alleged criminal bosses and their close associates – were ultimately charged as instigators of the riot and given prison sentences. The trial court established that inmates of Prison no. 5 had thrown pieces of brick and iron at prison officers and that the anti-riot squad had responded with rubber bullets. Inmates had then fired Makarov pistols and gas weapons, carrying on resisting until the intervention of prison officers and anti-riot forces. Prosecutors also began separate cases concerning a possible abuse of power by the police and prisoner officers for opening fire during the riot and on possible murder related to the deaths of Z.K. and A.B. Some investigative measures were taken in the first case but it is not clear whether any were taken as regards Z.K. and A.B.

Decision of the Court Article 2 and Article 13 Obligation to investigate: The Court first examined the applicants' complaints from the point of view of the State's duty to carry out an effective investigation into unlawful or suspicious deaths (the procedural aspect of Article 2), reiterating its case-law on that subject. According to information provided by the Government, an investigation into the use of force by officers at the prison had not begun until June 2006, which for the Court was far too long a delay given the scale of the incident and the prospect that it would not be possible to recover important information after such a long time. Furthermore, the authorities had initially refused to open a separate investigation into the alleged disproportionate use of force, assessing that that ground had already been covered by the investigatory steps in the criminal case against the six alleged riot organisers. However, that investigation had been carried out by the same body which had organised the anti-riot action, the prisons department. Nor had that investigation examined the planning of the operation or the use of lethal or physical force resulting in prisoner deaths and injuries.

Even after the authorities had opened a separate criminal enquiry into the use of force in June 2006, the applicants had not been involved as victims, depriving them of major procedural rights. The participation of Z.K. and A.B.'s families and public scrutiny of the investigation had thus been virtually non-existent. Lastly, it had still not led to any conclusive findings, a prohibitive delay incompatible with the obligations of Article 2. The Court concluded that the criminal investigation into the use of force by the law-enforcement officers appeared to have been ineffective, given its belated launch, its lack of independence and impartiality, the lack of involvement of the next of kin, and the prohibitive delays. There had thus been a violation of the procedural limb of Article 2. Given that conclusion, the Court found that no separate issue arose under Article 13.Use of force

The Court next examined whether the use of lethal force against the applicants' relatives had been legitimate (the substantive aspect of Article 2). The Court had no direct information about the events at the prison and had to rely on domestic findings. However, the courts were still examining the use of force while no parliament inquiry had been carried out, which the Court found regrettable given the scale of the incident. It was therefore the respondent Government's task to explain in a satisfactory and convincing manner the sequence of events and to produce solid evidence to refute the

applicants' allegations of the disproportionate use of lethal power by State agents. If the Government failed to do so, the Court could draw strong inferences. The Court could also draw on all the evidence at its disposal, including reports by human rights organisations, such as those produced by Amnesty International and Human Rights Watch in this case. The factual findings the Court reached had to be based on the standard of proof "beyond reasonable doubt".

Looking at the evidence to hand, the Court found that the conduct of the inmates who had barricaded themselves into Prison no. 5 and had fired at the law-enforcement officers during the disturbances showed certain signs of being an attempted uprising. The respondent State, confronted with the unlawful violence and the risk of an insurrection, could therefore resort to measures involving potentially lethal force, which could be reconcilable with the aims set out in Article 2 § 2 (a) and (c) of the Convention. However, the question remained whether the recourse to lethal force was "absolutely necessary", especially in the light of the number of people left dead or injured. When assessing the proportionality of the use of lethal force, the Court noted that the authorities had been aware that it was possible that the six alleged criminal bosses and their associates would instigate troubles at the prison during their removal. However, the anti-riot squad had received no specific instructions or orders on the form and intensity of any lethal force that would keep the likelihood of casualties to a minimum. Nor had the Government shown that the anti-riot squad had acted in a controlled and systematic manner with a clear chain of command. According to evidence collected by Human Rights Watch, the authorities had not even known exactly who was in charge of the anti-riot operation.

Apparently the authorities had also not thought of using tear gas or water cannons, which was apparently a consequence of the lack of strategic planning, and no sufficient consideration had been given to the possibility of easing the crisis by conducting negotiations with the barricaded prisoners. The authorities had furthermore failed to provide adequate medical assistance to inmates in Prison no. 5 after the anti-riot operation, although such arrangements should have been made. The Court observed that there were credible reports, documented both by domestic and international observers, that numerous detainees had been ill-treated by special forces agents and even shot in their cells, despite the fact that they had no longer been putting up resistance.

Lastly, neither the domestic authorities nor the respondent Government had provided information about the individual fates of the applicants' two relatives, who had been killed during the operation. The Court concluded that Z.K. and A.B. had died as a result of lethal force which, although pursuing legitimate aims under Article 2, could not be said to have been "absolutely necessary" within the meaning of that provision.

The Court reiterated that the anti-riot operation had not been conducted in a controlled and systematic manner and law-enforcement agents had not received clear orders and instructions aimed at minimising the risk of casualties. The authorities had not considered less violent means of dealing with the security incident, including the possibility of solving the crisis by negotiations. The use of lethal force during the anti-riot operation had been indiscriminate and excessive and the authorities had failed to provide adequate medical assistance to those affected. They had also failed to account for the individual circumstances of the deaths of Z.K. and A.B. The Court concluded that the anti-riot operation had resulted in a violation of Article 2 in its substantive aspect.

Just satisfaction (Article 41) The Court held that Georgia was to pay 40,000 euros (EUR) jointly to the first and second applicants and EUR 32,000 to the third applicant in respect of non-pecuniary damage. It also held that Georgia was to pay EUR 5,400 to the first and second applicants jointly and EUR 3,400 to the third applicant in respect of costs and expenses.

Challenge of Social Distancing in Prisons Discussed

Lord Chancellor Robert Buckland Tuesday7th April, told the Commons Justice Committee releasing up to 4,000 low-risk prisoners balances the fear of coronavirus spreading in prisons with maintaining public confidence about freeing convicts early. New powers introduced this week mean up to 4,000 could be released on licence conditions under orders to stay at home, and with electronic tags to monitor them so that they can be returned to prison if they don't.

Howerver, there are concerns that releasing those prisoners will not be enough to prevent the spread of the virus within prisons, where 116 inmates were confirmed as testing positive within 43 prisons by Monday evening. The Chief Executive of the Prison Service, Dr Jo Farrar, confirmed to the Committee that the prison population would, on present figures, have to be cut by between 10,000 and 15,000, from a current total of just under 83,000 in England and Wales, to allow all prisoners to live in a single cell.

That isn't the Government's aim now, though – prison population is expected to fall with fewer prisoners being jailed by the courts, normal departures from prison at the end of sentences, and plans in place to 'cohort' those who are, and are not, suffering from the virus, or who are particularly vulnerable. Few prisoners have so far been released. They include six pregnant prisoners – with plans to release up to 70 pregnant women and mothers with babies. Other new measures to release up to 4,000 offenders assessed as low risk, and with accommodation to go to, are likely to kick in more strongly after the Easter weekend.

During a virtual online evidence session the Justice Secretary, Robert Buckland QC MP, told the Committee the corona pandemic had created "an emergency" in the country and that given the stresses the public faced because of it, they deserved peace of mind on the matter of early releases; those prisoners released early, he said, would be tagged with GPS devices as this "gives the public the reassurance they are looking for". The Justice Committee hearing with Robert Buckland took place virtually online because the MPs on the Committee were in their constituencies during the Parliamentary Easter Recess.Meanwhile, intensive work is taking place across the wider House of Commons to ensure that the House can continue to scrutinise government actions during the pandemic.

Inquests Into Deaths in Custody During the Corona Panic Pandemic

Gideon Barth, 1 Crown Office Row: Not all deaths in custody mandate an Article 2 inquest (see R (Tainton) v HM Senior Coroner for Preston and West Lancashire [2016] EWHC 1396 (Admin); R (Tyrell) v HM Senior Coroner for County Durham and Darlington [2016] EWHC 1892 (Admin)). An Article 2-compliant inquest must be undertaken when there has been an arguable breach of the substantive obligation to protect life. When a death occurs in custody, Article 2 will be engaged if there have been any arguable failings in the care provided. The new Coronavirus Act 2020 will not change this. The real questions will be whether the deceased died as a result of failings on the part of the prison. There will undoubtedly be questions asked about the steps taken by the prison to protect prisoners, especially those identified to be at risk, whether because of an underlying health condition or their age.

The Government recently issued guidance on the steps being taken in prisons and other state detention centres to isolate prisoners and staff who develop symptoms. For example, any prisoner or detainee with a new, continuous cough or high temperature should be placed in protective isolation for 7 days. Where necessary, if there are multiple cases, 'cohorting' or gathering a number of potentially infected cases together may be appropriate. Staff who become unwell

with the symptoms are to go home. A prima facie failure to comply properly with this medical guidance is likely to lead to an Article 2 inquest. For example, if an individual is not isolated after showing symptoms, and another prisoner or detainee develops symptoms having come into close contact with them, this may represent a failing by the prison. One interesting question is how far Coroners will be willing to go in Article 2 inquests in considering whether the steps taken in prisons and detention centres were sufficient to protect prisoners and detainees.

There has been a wealth of criticism about the sluggishness of the Government's response to the crisis, and there remain questions about the discrepancy between the World Health Organisation (WHO) recommendation of 14 days self-isolation compared to the Government's advice of only 7 days. It seems unlikely that any coroners would be willing to call evidence looking at the timing of the Government's decisions or the appropriateness of this advice. The Government has also responded to calls for prisons to release some prisoners early, or release remand prisoners, to combat overcrowding, by releasing up to 4,000 'low-risk offenders' on licence. If a death occurs as a result of prisoners being required to share cells with those who have tested positive for the virus, serious questions may be asked at an inquest. Nevertheless, establishing any causative link between any decision/care and the death is likely to be difficult. It might be necessary to rely on the power to leave to the jury potentially causative factors (per R (Lewis) v HM Coroner for the Mid and North Division of Shropshire [2009] EWCA Civ 1403).

Jury - Section 30 of the Coronavirus Act 2020 provides that, for the purposes of an inquest, COVID-19 is not a notifiable disease so that a jury is not mandatory for a COVID-19 related death under section 7(2)(c) of the Coroners and Justice Act 2009. This should not make a difference to deaths in custody. An inquest into a death from COVID-19 in prison will not, of itself, require a jury. However, if there are concerns that there were failures which resulted in the individual dying from COVID-19, such that the death could not be considered a 'natural death', then the obligation to empanel a jury will still arise under section 7(2)(a).

Delay - Inquests into deaths in custody normally take some time before the hearing is listed. This is because investigations by the Prisons and Probation Ombudsman (PPO) and other organisations normally take place in advance. The previous special edition of the 1 Crown Office Row Quarterly Medical Law Review dealt with how long hearings will be adjourned for. It is likely that this pandemic will delay these cases even further.

Leviathan Unshackled?

Dominic Ruck Keene: The response to the Covid-19 pandemic by governments across the world has thrown into sharp relief the fact that at a time of crisis the institutions and functions of Nation States are still the key structures responsible for the most basic duty of protecting their citizen's lives. In the United Kingdom, the recent weeks have seen interventions by the Government in the economy and in the freedom of movement that are commonly seen as unparalleled in the post 1945 era.

At present questioning and challenging the necessity and scale of those interventions, as well as how they are implemented in practice has very largely been restricted to the media, rather than through the courts. However, that will not necessarily last. Indeed a pre-action letter has already been sent on behalf of two families with autistic children whose conditions necessitate them leaving the house more than once a day for their own well-being, requesting a reconsideration of the policy that people are only allowed to leave their house for exercise once.

The nature and breadth of the government's actions touch as they do effectively the entire population to a greater or lesser degree, and involve decisions affecting so many aspects of daily lives. This of course means that judges are likely to be highly sensitive to the dangers of perceived attempts to use the courts to intervene inappropriately in highly complex matters of scientific, health and economic policy. This is in particular likely to be so given the pre-existing debate on whether there is an issue over judicial activism and a requirement to limit judicial review.

Nevertheless, there are a number of groups of key Supreme Court judgments that may indicate potential areas of tension between the need to allow the Executive the greatest possible discretion within the law to address the novel type of crisis currently before it, and the 'rule of law' taken at its broadest.

The role of the courts generally The first collection of cases is those dealing with the general principle that even in a crisis and even where issues are 'political' the courts still have a role to play: As stated by the House of Lords in R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295: "There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals … The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament…"

Similarly, in R (Miller) v Prime Minister[2019] UKSC 41, the Supreme Court emphasised that: "…although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries… the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts…"

Conversely, there have also been clear statements as to the limits of the power of the courts, in particular, through challenging Parliamentary sovereignty as expressed in the passing of statutes and statutory instruments – in this context the Coronavirus Act 2000 and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. For example, in R (Miller) v Secretary of State for Exiting The European Union[2017] UKSC 5: "..in the broadest sense, the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided. The law is made in or under statutes, but there are areas where the law has long been laid down and developed by judges themselves: that is the common law. However, it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, ie by Acts of Parliament.

This is because Parliamentary sovereignty is a fundamental principle of the UK constitution…. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament."

It is worth noting that the Government has chosen not to derogate from the ECHR under

Article 15. Nevertheless, on 25 March 2020, Hayden J. held in BP v Surrey CC [2020] EWCOP 17 that "It strikes me as redundant of any contrary argument that we are facing "a public emergency" which is "threatening the life of the nation", to use the phraseology of Article 15. That is not a sentence that I or any other judge of my generation would ever have anticipated writing. The striking enormity of it has caused me to reflect, at considerable length, before committing it to print. Article 5 protects the fundamental human right both to liberty and, it must be emphasised, to security. It requires powerful reasons to justify any derogation. Those reasons must be confirmed on solid and compelling evidence before any court finds them to be established. The spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential."

Unlawful detention: The second group consists of cases concerning common law unlawful detention or false imprisonment. The context here is the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 that provide: "6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse" and gives a non exhaustive list of reasonable excuses.

The core principles concerning unlawful detention were very recently considered in R (Jollah) v SSHD [2020] UKSC 4, where the Supreme Court considered whether a curfew imposed for immigration purposes amounted to imprisonment. The SSHD argued that imprisonment requires constraint on a person's freedom of movement, usually by physical or human barriers, such as locked doors or guards. Voluntary compliance with a request or instruction was not enough. In the case of the Claimant in Jollah, the SSHD argued that he had not been locked into his house, there were no guards to prevent his leaving, and there were no other way in which he was physically prevented from leaving home. The Supreme Court disagreed and defined false imprisonment at [24] as an act of a defendant that directly and intentionally causes the confinement of a claimant within an area delimited by the defendant –

"The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process… The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not."

In principle in light of Jollah, the Coronavirus 'lockdown' potentially does equate to 'detention' for those required to remain at home unless they have 'reasonable excuse' to leave – this is likely to lead close judicial scrutiny as to the extent to which the policy and practice is consistent with the legislative authority for that detention. See further Robert Craig's article on this Blog on whether the Regulations are ultra vires – Lockdown.

Further, in R (DN- Rwanda) v SSHD[2020] UKSC 7 the Supreme Court also rejected the idea of a 'pragmatic and empirical' approach being applied when reviewing the legality of decisions to detain as an unacceptable approach when considering the available defences to a common law tort as "well-established and fundamental as that of false imprisonment."

It is worth remembering that in R (Hemmati) v SSHD [2019] USKC 56 the Supreme Court emphasised that a purported lawful authority to detain may be impugned either because the defendant has acted in excess of jurisdiction or because the jurisdiction has been wrongly exercised. Both species of error render an executive act ultra vires, unlawful and a nullity.

There is no difference between a detention which is unlawful because there was no statutory power to detain and a detention which is unlawful because the decision to detain, although authorised by the statute, was made in breach of a rule of public law.

Lastly, although 8 years old, the Supreme Court's decision in R (Lumba) v SSHD [2012] 1 AC 245 is still of critical importance to questions of unlawful detention in particular as to whether decisions either to detain or to enforce detention are potentially made in breach of public law. As Lord Dyson emphasised: "It is not in dispute that the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort."

Further, Lord Dyson held both that policies concerning detention must be consistently applied, and a public policy must be followed unless there are good reasons for not doing so. In addition is a right to know what the currently existing policy is: "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised…What must… be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

This will potentially be relevant if there are challenges arise out of any alleged inconsistency in the different approaches adopted by various police forces or from any alleged lack of clarity as to what constitutes a 'reasonable excuse' – such as whether travelling to take exercise is a reasonable excuse. While the idea of 'reasonable excuse' is a known concept in criminal law, from e.g. firearms legislation, there have been a number of commentators (such as Lord Sumption) who have argued that there has been a gap between the level and type of detention authorised under the Regulations and that being enforced by the police acting under various forms of guidance from Ministers.

Article 2: The third group of cases is those concerning the obligations under 'the operational duty' limb of Article 2 by which in certain circumstances the State can be required to take reasonable preventative operational measures to safeguard lives of those within its jurisdiction against real and immediate risks to life. Breaches of that duty can be a result of 'systemic' or 'operational' failings. The positive obligations are engaged in context of any activity, whether public or not, in which the right to life may be at stake: Öneryıldız v. Turkey(Application no. 48939/99). As noted, for example, by Lord Dyson in Rabone v Pennine Care NHS Trust [2012] 2 AC 72, the ECtHR has identified a number of different circumstances in which such an operational duty can require: "No decision of the ECtHR has been cited to us where the court clearly articulates the criteria by which it decides whether an article 2 operational duty exists in any particular circumstances. It is therefore necessary to see whether the cases give some clue as to why the operational duty has been found to exist in some circumstances and not in others. There are certain indicia which point the way. As Miss Richards and Mr Bowen submit, the operational duty will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control). The paradigm example of assumption of responsibility is where the state has detained an individual, whether in prison, in a psychiatric hospital, in an immigration detention centre or otherwise. The operational obligations apply to all detainees, but are particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition…"

"When finding that the article 2 operational duty has been breached, the ECtHR has repeatedly emphasised the vulnerability of the victim as a relevant consideration. In circumstances of sufficient vulnerability, the ECtHR has been prepared to find a breach of the operational duty even where

there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect a child who to its knowledge is at risk of abuse as in Z v United Kingdom (2001) 34 EHRR 97 . It is not relevant for the present purposes that this was a complaint of breach of article 3 rather than article 2 .

A further factor is the nature of the risk. Is it an "ordinary" risk of the kind that individuals in the relevant category should reasonably be expected to take or is it an exceptional risk? Thus in Stoyanovi v Bulgaria (Application No 42980/04) (unreported) given 9 November 2010, the ECtHR rejected an application made by the family of a soldier who died during a parachute exercise. At paras 59–61, the court drew a distinction between risks which a soldier must expect as an incident of his ordinary military duties and "'dangerous' situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards". An operational obligation would only arise in the latter situation." [Emphasis added]

In the context of the lockdown, it is worth noting that in Rabone itself, Lord Dyson held that an informally admitted psychiatric patient was within the scope of the Article 2 operational duty held that: "She had been admitted to hospital because she was a real suicide risk. By reason of her mental state, she was extremely vulnerable. The trust assumed responsibility for her. She was under its control. Although she was not a detained patient, it is clear that, if she had insisted on leaving the hospital, the authorities could and should have exercised their powers under the MHA to prevent her from doing so. In fact, however, the judge found that, if the trust had refused to allow her to leave, she would not have insisted on leaving. This demonstrates the control that the trust was exercising over Melanie."

Further, the ECtHR has also expanded the potential scenarios to include responsibility for dangers "for which in some way the state is responsible." In Watts v United Kingdom [2010] 51 EHRR SE 66 , the applicant complained that her transfer from her existing care home to another care home would reduce her life expectancy. The court held that a badly managed transfer of elderly residents of a care home could well have a negative impact on their life expectancy as a result of the general frailty and resistance to change of older people.

In the context of environmental disasters over which States have no control, the obligation of the State to take preventive operational measures comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of natural phenomena in order to reduce their catastrophic impact to a minimum: M. Özel and Others v. Turkey (Application no 14350/05).

The relevance of Article 2 in the context of Coronavirus potentially lies in three areas: (1) in general whether prior to 2020 the State took appropriate measures in light of its actual or constructive knowledge to deal with the potentially catastrophic impact of a pandemic such as Coronavirus; (2) specifically whether appropriate planning and procurement was implemented prior to the onset of the pandemic with respect of the provision of PPE to NHS and other 'frontline' key workers. This is leaving aside any overlapping common law duties on employers to provide safe places and systems of work. In this context the claims brought against the MOD over the provision of appropriate equipment to servicemen in Iraq and Afghanistan are potentially highly relevant. See the reference in Smith v MOD [2013] UKSC 41 to both the systemic and operational duties in principle possibly applying to the procurement of protective military equipment; (3) with particular regard to those groups who are likely to be a heightened risk as a result of being in 'detention' during any lockdown (such as victims of domestic abuse or those suffering from mental or physical health conditions which may deteriorate as a result of confinement), whether appropriate measures have been taken in light of any identifiable real and immediate risk to life.

Assumption of Responsibility: The final cases potentially relevant to the State's duties during the Coronavirus crisis are those dealing with assumption of responsibility.

As recently re-iterated in CN v Poole BC[2019] UKSC 25, when considering whether a public authority has assumed a common law duty by doing what it is authorised or required to do under a statute, that duty has to arise out of the consequent relationship between the public authority and the individual. The Supreme Court held that the necessary assumption of responsibility could arise out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme, which included the custody of prisoners. Further, "…a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care……the concept of an assumption of responsibility is not confined to the provision of information or advice. It can also apply where, as Lord Goff put it in Spring v Guardian Assurance plc , the claimant entrusts the defendant with the conduct of his affairs, in general or in particular. Such situations can arise where the defendant undertakes the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such car."

In respect of those vulnerable individuals who the Government has advised to remain self isolated for 12 weeks and indicated that it will ensure they are provided with medical and food supplies, it could be argued that those individuals would reasonably rely on those promises of support and that there has been an 'assumption of responsibility' towards them such that there is a duty of care on the relevant departments to ensure appropriate support is given.

HMP Nottingham – Levels of Violence Still Far Too High

HMP Nottingham, a local prison holding nearly 800 men, showed commendable improvement two years after it was assessed as fundamentally unsafe, triggering HM Inspectorate of Prisons' first Urgent Notification (UN). In January 2018, the prison was found to have consistently failed over three inspections to achieve acceptable standards in any of the Inspectorate's healthy prison tests. Safety had been poor over the three inspections. The UN was issued but a follow-up independent review of progress (IRP) in late 2018 found little urgent effort to tackle the many problems. By contrast, when inspectors visited again in January 2020, the prison, under a new governor and with a population reduced from 1,000 to around 800, presented a more positive picture. Peter Clarke, HM Chief Inspector of Prisons, said: "It was gratifying to find that there had at long last been some real change at Nottingham. There had been improvements in three of our tests of a healthy prison, and we came away with some confidence that the improvements could be sustained and built upon if the leadership and energy that was now evident could be maintained into the future."

In terms of safety, although there was much troubling data and levels of violence were still far too high, inspectors felt able to raise their judgement from poor to not sufficiently good. Too many prisoners still felt unsafe, there was still far too much violence and not enough was yet being done to counter it effectively. However, security had now improved and was beginning to have a positive impact. Mr Clarke added: "a body scanner was now being used to very good effect, leading to regular finds of secreted contraband that would not otherwise have been detected." Care for those in crisis had been a central concern in 2018. In 2020, inspectors were concerned that the number of self-harm incidents had increased substantially. In addition, there had been four self-inflicted deaths over two years and inspectors were concerned that Prisons and Probation Ombudsman (PPO) recommendations following self-inflicted deaths had not always been addressed adequately. However, the quality of assessment, care in custody and teamwork (ACCT) documentation for prisoners at risk of suicide or self-harm had improved, and prisoners were positive about the support they received. Healthcare had improved at Nottingham and work in equality and diversity was in the early stages of improving. Inspectors also found that relationships between staff and prisoners had improved, despite continuing problems with lack of basic kit, clothing and bedding. There had also been significant improvements in rehabilitation and release planning though there remained much to do.

Overall, Mr Clarke said: "I hope this inspection can at long last mark a watershed in the troubled history of Nottingham. For many years it had a well-deserved reputation for being an unsafe prison. There is still a huge amount to do, but it would be wrong not to recognise the impressive progress that has been made since the poor findings of the IRP in November 2018. When a previously poorly performing prison improves, I have seen how it is possible for a new and optimistic culture, offering real care for prisoners and a better chance for them to rehabilitate, can take hold. I hope that can be achieved at Nottingham, as it could underpin future progress. All too often we have seen improvements in prisons prove to be fragile. The greatest risks have come from complacency or lack of consistency in leadership. I hope that neither will be the case at Nottingham, and that the highly creditable progress at this complex and challenging prison can be sustained into the future."

Russia: Prison Ablaze In Angarsk Siberia After Inmates Riot

A fire has engulfed large parts of a prison in Russia's Siberia region following a riot by inmates who accused guards of mistreating them. The area around the high-security Penal Colony No 15 in Angarsk has been sealed off and security forces deployed. There are reports of casualties but their number is unclear. Russia's penal service said inmates had "attacked a guard" who had to be taken to hospital. Officials said the unrest was under control and investigators had opened an investigation. However, human rights groups said rioting had broken out after an inmate was beaten by a prison officer.One group published a link to a video of an inmate with bloody bandages around his arm who said he had been choked and beaten by guards and had then cut his wrists in protest. A spokesperson for the group Siberia Without Torture told AFP news agency riot police had surrounded the prison and a fire was raging on the grounds. Three buildings were razed including a woodwork factory, state-owned news agency Tass says. The prison, 2,500 miles (4,000km) east of Moscow, holds about 1,200 inmates.

Serving Prisoners Supported by MOJUK: Walib Habid, Giovanni Di Stefano, Naweed Ali, Khobaib Hussain, Mohibur Rahman, Tahir Aziz, Roger Khan, Wang Yam, Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Robert Knapp, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Peter Hannigan.