

Written evidence from Prof Stéphanie Laulhé Shaelou, Professor of European Law and Reform, Head, School of Law, and Jean Monnet Module EU-POP Academic Coordinator and Leader, School of Law, Cyprus Campus, University of Central Lancashire ('UCLan Cyprus'); Ms Andrea Manoli, PhD candidate, University of Central Lancashire (UCLan), Research Scholar, School of Law, and Research Fellow, Jean Monnet Module EU-POP, School of Law, UCLan Cyprus, School of Law, UCLan Cyprus; and Ms Xenia Kalatha, LLB student, King's College London, and summer intern, School of Law, UCLan Cyprus (COV0176)

Introduction

1. We refer to the Call for Evidence entitled 'The Government's response to COVID-19: human rights implications', details of which were circulated by the Human Rights (Joint Committee) ('the Committee') on 19 March 2020.¹

2. Accordingly, we have composed this Memorandum in answer to the Committee's Call for Evidence and, more specifically, its request for views on 'what steps need to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant' (first question); 'what will the impact of specific measures taken by the Government to address the COVID-19 pandemic be on human rights in the UK' (second question); and 'which groups will be disproportionately affected by measures taken by the Government to address the COVID-19 pandemic?' (third question). We are grateful to the Committee for issuing this Call.

3. At the outset, we should declare that Prof Stéphanie Laulhé Shaelou is registered on the COVID-19 Outbreak Expert Databases of the UK Parliament on the one hand, and of the UK Government on the other. She has participated to a series of trainings, briefings, surveys and/or outputs in this capacity. We are however submitting this Memorandum as legal academics and scholars based in Cyprus and the UK, but also as EU citizens.²

¹ <https://committees.parliament.uk/work/218/the-governments-response-to-covid19-human-rights-implications/>

² See our full academic profiles at <https://www.uclancyprus.ac.cy/academic/dr-laulhe-shaelou-stephanie/> and <https://www.uclancyprus.ac.cy/academic/andrea-manoli/> respectively for Prof Stéphanie Laulhé Shaelou and Ms Andrea Manoli. See also our scholar profiles on the EU-POP

4. The University of Central Lancashire, Cyprus (UCLan Cyprus),³ is located in Larnaka, and it is now in its eighth year of operation. UCLan Cyprus is the first Branch Campus of the University of Central Lancashire and at the same time a fully licensed University in Cyprus. A unique and innovative model of a Cypriot and British University Educational Experience, accredited by the UK Quality Assurance Agency (QAA) and the Cyprus Agency of Quality Assurance and Accreditation in Higher Education (CYQAA) respectively. UCLan Cyprus operates under the academic umbrella of UCLan UK, and further to the latest political changes of the United Kingdom's exit from the European Union (BREXIT), it is considered a unique University, bridging the UK and Europe in terms of research, academic standards, student experience and student exchange. The completion of studies at UCLan Cyprus will result in a Double Degree from the two Universities, UCLan UK and UCLan Cyprus, recognised not only in Cyprus and the UK, but also across Europe and beyond. Located not far away from the international airport of Larnaka, it is placed in a rural area at the crossroads of several jurisdictions (Republic of Cyprus, UN Buffer Zone and UK Sovereign Base Areas), and in Pyla, the only mixed village of the Island of Cyprus. The University has a mission to serve the local and wider community across frontiers.

5. Before we proceed, we express our sincere condolences to all those in the UK – and around the world – who have lost a family member after contracting coronavirus. We also express our deep gratitude to the members of staff of the National Health Service ('NHS') in the UK, where one of us lives, and of other health services around the world, including the one in the Republic of Cyprus, where two of us live. They have been working courageously under exceptionally difficult circumstances.

6. In the light of the above, but for the reasons identified below, we respectfully recommend that the Call for Evidence should encompass the two sets of recommendations articulated in bold wording below – under the headings entitled 'Recommendation 1', and 'Recommendation 2'. We have articulated each one in the light of the Call's preoccupation with 'the implications of the UK Government's COVID-19 related measures on human rights' and the three interrelated questions set out in the Call for Evidence.

project website: <https://eupopulism.eu/about-us/>

³ <https://www.uclan Cyprus.ac.cy/discover/the-university/uclan-cyprus/>

Recommendation 1

7. The principles of precaution, proportionality and effectiveness, central to the EU, its Member States - both present and past - and their territories, should be upheld by the UK Government in the context of the COVID-19 pandemic when taking measures impacting human rights

8. Adopting Lord Bingham's wider interpretation of the Rule of Law which encompasses human rights,⁴ there ought to be a strict adherence to the Rule of Law. As put by Dicey, it "must at critical junctures be wielded by the executive government of every civilised country".⁵ Therefore, the UK Government, being bound by common law and shared EU values as enshrined in Article 2 TEU, ought to comply with the Rule of Law when drafting and implementing measures at the national level. In particular, there should be a simultaneous consideration and application of the principles of precaution,⁶ proportionality,⁷ and effectiveness,⁸ so as to uphold fundamental rights and freedoms as set out in the Human Rights Act 1998 ('HRA 1998')⁹ and the Charter of Fundamental Rights of the European Union ('EU Charter'),¹⁰ particularly during the COVID-19 pandemic.

9. Under EU principles and rules, as passed on and deeply rooted in the UK legal order following 40 years of European integration, the principle of precaution is invocable where there is a potential risk according to scientific research, in order to 'mitigate the risk' of adverse effects to human life or health.¹¹ The principle of precaution is therefore "an essential legal imperative" and "one of the underlying legal concepts for decision-making",¹² serving as a safeguard for human rights under the HRA 1998 and the EU Charter. In cases of

⁴ Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67.

⁵ A.V. Dicey, *The Law of the Constitution* (OUP 2013) 273.

⁶ Communication by the European Commission on the precautionary principle in the EU (COM(2000) 1 final) setting out common guidelines <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A132042>

⁷ Article 3 TEU; *ibid.*

⁸ T. Tridimas, 'Fundamental Rights, General Principles of EU law, and the Charter', (2017) *Cambridge Yearbook of European Legal Studies* <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/fundamental-rights-general-principles-of-eu-law-and-the-charter/C7038A5654279637124D2F929351F074>

⁹ Human Rights Act 1998 (HRA 1998).

¹⁰ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

¹¹ <https://europeanlawblog.eu/2020/04/06/the-corona-crisis-and-the-overall-imperative-of-precaution/>

¹² *ibid.*

emergency such as the coronavirus pandemic, which threaten basic human rights including the right to life¹³ and/or liberty and security,¹⁴ precautionary measures which correspond to the calculated risk as set out by scientific research are essential in the general public interest. Precautionary measures not only sustain human rights but also guard against their potential violation, in turn upholding the wider interpretation of the Rule of Law.

10. Precautionary measures that restrict basic freedoms and rights ought to be proportionate.¹⁵ Under Article 5(1)(e) Schedule 1 HRA 1998, there can be a lawful deprivation of liberty to prevent the spreading of diseases, subject to an objectively justified limitation to a fundamental right. The duration of the deprivation cannot however be indefinite. To give effect to rights under the HRA 1998 ‘in a way compatible with the Convention rights’¹⁶ as enshrined in the European Convention on Human Rights (‘ECHR’),¹⁷ a balance ought to be struck between individual rights and the general public interest. Proportionality is also an assessment based on rationality. On this basis, herd immunity may serve as a way to combat the coronavirus pandemic, provided it constitutes a least intrusive measure adopted as an inevitable and rational justification to the restriction of fundamental freedoms and rights.

11. In *Stephen Dolan, Lauren Monks and AB vs. Secretary of State for Health and Social Care and Secretary of State for Education* [2020] EWHC 1786 (Admin),¹⁸ a claim for judicial review, the Honourable Mr Justice Lewis applied the principles of necessity and proportionality to a range of human rights as enshrined in the HRA 1998 and invoked by the Claimants.¹⁹ They sought in particular the assessment of the rationality and appropriateness of the measures taken by the UK Government under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as amended. Mr Justice Lewis examined the “five elements ensuring that the NHS has the capacity to cope”

¹³ Schedule 1 Article 2 HRA 1998.

¹⁴ Schedule 1 Article 5 HRA 1998.

¹⁵ EU Agency for Fundamental Rights, ‘Coronavirus pandemic in the EU – Fundamental rights implications’ (2020) 7, 12-3 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf

¹⁶ Article 3(1) HRA 1998.

¹⁷ https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁸ *Stephen Dolan, Lauren Monks and AB vs. Secretary of State for Health and Social Care and Secretary of State for Education* [2020] EWHC 1786 (Admin), <https://www.bailii.org/ew/cases/EWHC/Admin/2020/1786.html>

¹⁹ *Ibid*, para 60.

and referred to their lawfulness and “rational method of assessing the risks posed by coronavirus and the ability to cope with the coronavirus” as overriding priority.²⁰ The analysis was limited to the assessment of necessity and proportionality in the domestic legal order, with no consideration of any legal issues as may arise from EU law.

12. In addition to a necessary and proportionate application of measures, there should also be adherence to the principle of effectiveness which has become ‘a fundamental cornerstone’ of the protection of EU and Convention rights and freedoms.²¹ Both under the ECHR and EU law, States have positive obligations under the principle of effectiveness to ensure, for example, that there is access to judicial remedies or legal assistance. By ensuring that national procedural law does not render it impossible or excessively difficult to enforce rights, citizens may exercise their rights derived from national procedural law as well as EU law.²²

13. In summary, adherence to the principle of precaution is essential as it serves as a responsive mechanism in the event of a calculated scientific risk, so as to guard against possible future violations of human rights. Likewise, proportionality helps to strike a rational balance between the limitation of a fundamental right and the general public interest. Lastly, there ought to be adherence to the wider interpretation of the effectiveness principle so as to ensure that citizens can enforce their fundamental rights and freedoms as set out in the HRA 1998 and the EU Charter.

14. In response to the specific first question of the Call for Evidence, we submit that at least pending the completion of the post-Brexit transitional period and in the framework of the EU-UK Withdrawal Agreement, which entered into force on 1 February 2020,²³ with reference in particular to Title X Chapter 1 on Union Judicial and Administrative Procedures, any steps to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant need to

²⁰ Ibid, para 50.

²¹ Daniel Rietiker, “The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis” (2010) 79 *Nordic Journal of International Law* 245,257.

²² Case C 555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21, para 53.

²³ Official Journal of the European Union C 384 I/1 12.11.2019.

entail a test of compliance with the principles of precaution, proportionality and effectiveness as may be embedded in domestic and EU law.

15. In response to the specific second question of the Call for Evidence, we submit that at least pending the completion of the post-Brexit transitional period and in the framework of the EU-UK Withdrawal Agreement, which entered into force on 1 February 2020, with reference in particular to Title X Chapter 1 on Union Judicial and Administrative Procedures, the impact of specific measures taken by the Government to address the COVID-19 pandemic on human rights in the UK could be mitigated by applying a careful test of compliance with the principles of precaution, proportionality and effectiveness across human rights enshrined in the HRA and EU law instruments.

Recommendation 2

16. The precautionary, proportionate and effective coordination of measures between the EU, its Member States enjoying a special relation with the UK, such as the Republic of Ireland and the Republic of Cyprus, and the UK (including any territories thereof), is of essence to the upholding of human rights by the UK Government during the COVID-19 pandemic.

17. In response to the specific third question of the Call for Evidence, we submit that at least pending the completion of the post-Brexit transitional period and in the framework of the EU-UK Withdrawal Agreement, which entered into force on 1 February 2020, groups of citizens and/or residents located outside of Great Britain into adjacent or otherwise related British territories may be disproportionately affected by measures the UK Government may take without due consideration of the impact of such measures on the human rights of such citizens and residents. This is particularly so in the event of an insufficient precautionary, proportionate and effective coordination of measures between the EU, its Member States enjoying a special relation with the UK, such as the Republic of Ireland and the Republic of Cyprus, and the UK (including any territories thereof),

when taking measures during the COVID-19 pandemic by the UK Government.

18. Two of the authors of the present Memorandum have developed elsewhere the deeply rooted ties between the Islands of Cyprus and Great Britain respectively and the arguments supporting the recommendation made in paragraph 16 above, in comparison in particular with the UK-Irish border.²⁴ We would like to invite members of the Committee to read this publication. We would like to believe that our arguments are self-explanatory.

19. In order to further ascertain the rights of citizens and residents outside of Great Britain, who may be disproportionately affected by COVID-19 measures taken by the UK Government, we would like to quote the following Recital of the EU-UK Withdrawal Agreement, Protocol on Ireland/Northern Ireland, recognising: “that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship, as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship"”.²⁵

20. In comparison with other European nations, travel restrictions were reportedly delayed in Ireland and Northern Ireland, similarly to Great Britain.²⁶ The ratio of testing between the two countries and the territory of Northern Ireland appears unequal,²⁷ with less monitoring in the UK and fewer restrictions on movement in Ireland and Northern Ireland. The easing of lockdown measures does not appear to be coordinated either. The Irish government has concluded that pubs, bars, hotel bars, nightclubs and casinos will remain closed until 10 August, therefore delaying Phase 4 of the plan to ease lockdown.²⁸ Northern Ireland however has permitted the opening of pubs, hotels and restaurants since 3 July, following Great Britain.

²⁴ <https://lawblog.uclancyprus.ac.cy/the-islands-of-cyprus-and-great-britain-in-times-of-covid-19-pandemic-variations-on-the-rule-of-law-in-and-out-of-the-eu/>

²⁵ Official Journal of the European Union C 384 I/1 12.11.2019, 93.

²⁶ <https://www.gov.ie/en/publication/e885b2-covid-19-coronavirus-travel-advice/>

²⁷ <https://ourworldindata.org/coronavirus-testing>

²⁸ <https://www.bbc.com/news/world-europe-53424074>

21. By way of conclusion, we submit that the COVID-19 pandemic has reinstated and reinforced the need for effective international and regional coordination to which the UK needs to contribute, and can benefit from, even in a post-Brexit era. This is also true of the British Overseas Territories. Enhanced coordination and solidarity are also required during the de-escalation and recovery phases of the pandemic.²⁹ These may be aspects of Brexit, exposed by the pandemic, not sufficiently assessed in the context of negotiations, potentially to the detriment of the protection of human rights by the UK Government.

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²⁹ <https://theconversation.com/why-the-coronavirus-crisis-is-still-a-moment-of-opportunity-for-the-european-union-136877>