

Coronavirus legislation and interference with economic interests: A1P1 as enforceable under the Human Rights Act 1998

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Overview

In this article we examine the implications of recent coronavirus legislation on protected rights under the first article of the first protocol to the ECHR (**'A1P1'**) which provision applies in the United Kingdom by virtue of the Human Rights Act 1998 (the **'HRA 1998'**).

We focus on the Coronavirus Act 2020 (**'the Act'**) and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 (**'the Regulations'**) (collectively the **'Coronavirus Legislation'**) noting that equivalent issues arise under the near-equivalent provisions introduced in Northern Ireland, Wales and Scotland.

As described below, A1P1 covers a broad range of **economic interests**, for example contractual rights, licenses to carry out an activity, or rights connected to the carrying out of a business or profession. In broad terms it places obligations on public bodies not to interfere with the peaceful enjoyment with protected rights unless such interference is justified by a legitimate aim and proportionate to that aim.

As such, many Convention rights A1P1 rights are **qualified rights**, not absolute rights such that **interference** with the right by way of measures taken in the general interest will generally be unimpeachable *so long* as they taken to meet a legitimate aim and are proportionate. The key principle of **proportionality** is one we deal with in some detail, noting by way of introduction that (i) what is proportionate is fact-specific and so will likely vary over time and (ii) the Government will be given a wide (but not absolute) margin of discretion given the recognised severe widespread and as yet not fully understood health risks caused by the global coronavirus pandemic.

The First Protocol, Article 1 and its application in the UK

A1P1 provides (HRA 1998 Sch.1 Part II):

"The First Protocol

Article 1 Protection of property

- 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the*

public interest and subject to the conditions provided for by law and by the general principles of international law.

2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*

The terms of the provision have been subject to significant consideration by UK courts, by the European Commission of Human Rights, and by the European Court of Human Rights (under HRA 1998 section 2 any domestic court must ‘take into account’ any judgments, decisions and opinions of the latter two *fora* and the UK courts have, absent special circumstances, adopted any clear and consistent jurisprudence from the Strasbourg Court *R (Alconbury Developments Ltd) v SSETR* [2001] UKHL 23 at [26])).

In light of this it is helpful to treat some of the key elements of established interpretation before turning to issues that may arise as regards the Coronavirus legislation.

- It will be seen (by the reference to every “natural or legal person”) that the rights of **corporate bodies** are protected and this is well established in the case law (many of the A1P1 cases referred to in this article relate to the rights of bodies corporate).
- As regards the entitlement to peaceful enjoyment of possessions (A1P1 first sentence) and the rule against *deprivation* of possessions (second sentence), in *National Provincial Building Society v United Kingdom* (1998) 25 EHRR 127 [78] the Court took the view that it is the first sentence that enunciates the *general principle* which then informs interpretation of the remainder of A1P1.
- This was taken a step further in *Beyeler v Italy* (2001) 35 EHRR 52 where the court considered that the ‘deprivation’ provision is only a particular *instance* of interference with peaceful enjoyment. In that and most later cases the courts have typically not found it necessary (or helpful) to distinguish the type of interference by reference to the two concepts on the face of A1P1, and as such A1P1 rights are typically considered encompassed by the single concept of **entitlement to peaceful enjoyment** of possessions.

Economic Interests: “possessions” interpreted widely

It has been consistently held that the term “possessions” in A1P1 “is an autonomous Convention concept” (*Breyer (and ors) v The Department for Energy and Climate Change* [2015] EWCA Civ 408 *per* Lord Dyson M.R. at [42]).

The term “possessions” within A1P1 goes well beyond what may otherwise be the ‘plain meaning’ of physical goods or real property and includes, by way of example:

- Rights connected with pursuing a business (*Crompton v Department of Transport* NW [2003] EWCA Civ 64).
- The right to exercise a profession (*Holder v Law Society* [2003] EWCA Civ 39; *Van Marle v The Netherlands* (1986) 8 EHRR 483).
- Business goodwill in the form of concluded contracts (*Breyer*, above).
- Business goodwill that a restaurant owner has built up (in *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309)
- A landlord’s right to rent and other contractual rights (*Wilson v First County Trust* [2003] UKHL 40 at [39] per Lord Nicholls).

The above examples are the kinds of rights most obviously likely to be affected by the Coronavirus Legislation. They are only a few examples of the many cases in which A1P1 has been held to apply in cases of interference with a wide range of economic (or personal financial) interests.

Nonetheless, it is important to recognise that, as summarised by Lord Dyson M.R. in *Breyer* [2015] EWCA Civ 408 at [23] the Strasbourg jurisprudence draws a distinction between

- **marketable goodwill** (goodwill in a business will be ‘*prima facie* protected by A1P1’) and
- ‘mere’ **loss of future profits** which is not a possession.

The factors that may be used to distinguish the former from the latter include marketability (whether the business goodwill can be capitalised) and whether goodwill has been built up in the past and has a present-day value as distinct from something which is only referable to events which may or may not happen in the future (*Breyer* [23] points (iii) and (iv)).

The distinction is not always a simple one, and indeed Lord Dyson M.R. went as far as to say at [44] that “Goodwill is not susceptible to precise definition”. The assessment will necessarily depend on the facts. For instance on the facts of *Breyer* it was held that a range of **concluded contracts** reflect “marketable business goodwill” and so were protected as possessions by A1P1 whilst the anticipation/expectation of further contracts and profits was not a possession. On the facts of *Tre Traktörer AB* the marketable business goodwill was that **built up over time** by a restaurant owner. In

both cases (to anticipate what follows in more detail below) the interference was then relatively easy to establish based on the *real world effect* of the measure at issue.

Coronavirus Legislation and potential impact on economic interests

Possessions

The Coronavirus Legislation impacts economic interests that may be protected under A1P1 in a number of ways. These include, by way of example from the Act: (i) closure of businesses (section 52 and Sch 22 of the Act); (ii) closure of schools and childcare providers (sections 37-38, Schedules 16 and 17 of the Act); (iii) control of ports/airports (section 50 of the Act) and (iv) other areas such as private medical supplies/consumer credit.

As regards the Regulations, Regulations 4-5 provide that a person responsible for carrying on a business listed in the Schedules to the Regulations or the Regulations themselves must during the emergency period close any premises, or part of the premises, and cease to carry on that service. Regulation 6 at the time of drafting only permits individuals to leave their home/residence if there is a reasonable excuse (there is a non-exhaustive list of these, and Government Guidance).

Where firms or individuals establish they have “marketable business goodwill” (see *Breyer v DECC* and the discussion above, noting that this is not always a straightforward issue), individuals and corporate or other bodies *will in principle* have protected possessions. The next issue falling to be considered is whether there has been an interference with those possessions.

Interference

The assessment of whether there has been an interference is relatively (i.e. relative to the more difficult concept of “possessions”) straightforward and essentially based on there being a **real world effect** on the protected possession at issue.

In *Tre Traktörer AB* (above) for instance the (unlawful) *interference* affecting a restaurant owner was the refusal of a licence to serve alcohol on the premises: it was sufficient to show that this interfered with - had *a significant effect on* - the business goodwill (the “possession”) built up by the owner of the restaurant. There was no need to demonstrate this would lead to closure of the business or consider any issue of ‘deprivation’.

In *Breyer v DECC* (above), the interference was *the effect caused* by a Government consultation: “because *as a matter of fact* it did in a real and practical sense interfere with the claimants’ businesses” (see [72]).

It can be seen that there is no need to show (for instance) deprivation (though complete deprivation may be one extreme form of interference); the courts will look at the real-world effect on the possession at issue (e.g. marketable business goodwill).

In our view where it is established that there is a protected “possession” such as marketable business goodwill, in cases of *closure of premises* (albeit ‘temporary’ this is for many months and at time of writing the precise duration is unclear), specifically of business premises, of (private) educational establishments, or of privately run ports and airports there will *typically* be an **interference** with possessions.

For some businesses – for instance those that cannot largely trade online – the interference will be at the extreme end of the scale. A closure of premises may *in effect* equate to complete closure of a business/inability to operate commercially. For others businesses, the impact may be less, but still substantial enough to be an “interference”.

To take an example, the closure of pubs and restaurants is (predictably) having a significant effect on them, with some three quarters of restaurants and bar operators being reported as warning they face an ‘existential threat’ and do not expect their businesses to survive, including under modelling of post-closure social distancing measures¹. Similar impact is being reported as affecting a wide range of business, from childcare, to leisure businesses.

In some sectors the impact of the Coronavirus Legislation, **the effect of the interference**, may be more difficult to disentangle from broader effects to the economy. To take an example, new car sales have just been reported to have an unprecedented downturn in sales², a record fall of 97.3% for April, which is attributed by the headline and in a quote from the SMMT Chief Executive to the shutting of showrooms due to coronavirus measures. In fact, it is likely that the drop is due to a combination of factors, certainly *including* the shutting of showrooms, but also the broader economic impact on consumers and consumer confidence of the coronavirus (job losses/furloughs/uncertainty as to the future). New car sales are a widely reported bellwether of the state of consumer confidence for a reason.

In many cases the effect on (interference with) marketable business goodwill is likely to derive from a combination of two distinct measures introduced by the Coronavirus

¹ <https://www.ft.com/content/007c557b-0c82-4f90-bb77-b87c14b86b2f>

² <https://www.smmt.co.uk/2020/05/record-97-3-fall-for-uk-new-car-market-in-april-as-coronavirus-shuts-showrooms/>

Legislation (and/or by government guidance – guidance may have the same ‘effect’ in practice and so in principle may also be an interference):

- At the time of writing, the requirement to close premises will often be the main impact on many businesses.
- The rules on social distancing (for instance Regulation 6 which at the time of writing requires people to stay at home except where there is a reasonable excuse) will continue to have an impact (see for instance footnote 1 and the ongoing modelling of how restaurants and bars may remain unviable by reason of social distancing rules under consideration).

Once the ‘lockdown’ is relaxed, it will be crucial for the revised social distancing measures to be considered in light of their effect and the justification of restrictions and alternatives (see below, qualified rights and proportionality).

Qualified rights and limits to the State’s interference - proportionality

It will be seen that whilst A1P1 provides for the peaceful enjoyment of possessions the second paragraph of A1P1 states that this is subject to the ability of the State to:

“enforce such laws as it deems necessary ...in the general interest”.

As such, the right to peaceful enjoyment of possessions under A1P1 is not an absolute but a **qualified** right (this is not an unusual result under the ECHR).

Proportionality

The important legal qualifications to restrictions/interferences with possessions were recently set out in *R (on the application of Mott) v Environment Agency* [2018] UKSC 10 at [22] by reference to an ‘authoritative summary of the principles’ in the Grand Chamber of the Strasbourg Court as follows:

*“Not only must an interference with the right of property pursue, on the facts as well as in principle, a ‘legitimate aim’ in the ‘general interest’, but there must also be **a reasonable relation of proportionality** between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual’s property. That requirement is expressed by the **notion of a ‘fair balance’** that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.*

“The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that

*article the court must therefore ascertain whether by reason of the state's interference the person concerned had to bear a **disproportionate and excessive burden.***"

The need to review for proportionality on **an ongoing basis** is well established, and indeed recognised in Regulation 3 of the Regulations, which provides that:

"As soon as the Secretary of State considers that any restrictions or requirements set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State must publish a direction terminating that restriction or requirement."

As indicated in the passage cited (above) in *Mott v Environment Agency*, proportionality involves a consideration of whether a measure is to meet a legitimate aim in the general interest and to achieve **a fair balance** in assessing the impact of the measure. This has been considered to involve the following issues:

- (i) whether the measure in question is suitable and appropriate to achieve the objective pursued; and
- (ii) whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method

[see e.g. *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41]

The courts have emphasised that in considering the 'fair balance', the respect that should be afforded to the legislature will vary according to the subject matter and the circumstances. (*Countryside Alliance v Attorney General* [2007] UKHL 52, at [45]). This is typically referred to as **the margin of discretion** afforded to public bodies in deciding precisely how to achieve a fair balance.

In considering measures to minimise the threat to public health by the coronavirus, the seriousness of impact will certainly be given very great weight. Indeed, we expect that the Government will generally be given **a wide margin of discretion** in light of a number of factors including:

- The severe and unprecedented nature of the impact and the ongoing risks to public health posed by the global pandemic.
- The uncertainty inherent in considering the spread of the pandemic/steps required to control it (which will need to be informed by the latest scientific knowledge).

However, as the UKSC stated in *Mott v Environment Agency* the Appellant in that case was right to emphasise the special importance to be attached to the protection of the environment (in effect to give great weight to the need to protect it and in effect give the Government a wide margin of discretion in this field) but this did not detract from the need to draw a “fair balance”, nor from the potential relevance of compensation.

An ongoing requirement

In light of the case law (including that measures must be **necessary** and the **least onerous** necessary) the Government must be responsive to scientific knowledge as it evolves and respond to update guidance (and legislation) so that economic interests are not subject to interference which is greater in scope or of longer duration than is justified.

It will also be important for the Government to consider the consistency of measures. For example, as the lockdown measures eventually ease care should be taken to ensure that there is proper justification for allowing certain businesses to operate while others are not. A legislative scheme which has an arbitrary or irrational effect, is more likely to fail to strike a fair balance between competing private and public interests (*R (Kensall) v Secretary of State for Environment* [2003] EWHC Admin 459).

This is particularly relevant where certain businesses are allowed to operate while others are not during a phased easing of lockdown measures: first, the phasing may on its face take different approaches to different businesses (which may well be justified, but requires consideration); alternatively there may be a *de facto* difference in impact (which, likewise, may be justified but should not simply be ignored).

Fact specific assessment

It is in the nature of establishing a ‘fair balance’ that much will depend on the facts. The high risk to public health may justify what would otherwise be considered extreme measures. The Government has struck a balance for the time being, it is not in every respect as intrusive as other countries, and it is clearly considering revisions and easing of restrictions on a ‘phased’ basis.

We do not suggest this is a litigators’ charter, or that the Government’s wide margin of discretion will dissipate, but the need for a fact specific assessment with evolving knowledge and facts (including levels of infection, duration of impact on businesses) will require careful consideration and difficult judgment calls.

The Government human rights memorandum relating to the Act – an example of some of the complexities

The Government human rights memorandum was prepared by the Government (specifically the Department of Health and Social Care, the ‘**Department**’) to assist the Joint Committee on Human Rights with its scrutiny of the Coronavirus Bill’s human rights implications before the Act was passed.³

Whilst the Department’s memorandum is generally accurate, the analysis at paragraphs at 78-82 is helpful to illustrate just some of the difficulties and risk of error in legal assessment. The passage relates to the A1P1 issues that may arise in respect of temporary **closure orders** for a broad range of educational establishments, training establishments, and childcare providers (see paragraph 58 which describes the scope of the powers under consideration). Taking those paragraphs in turn:

- Paragraph 78 sets out the scope of **possessions** under consideration. The Department suggests that various providers of childcare, education and training establishments may have certain protected possessions “because these institutions **own property** or have rights to use property in a particular way”. The failure by Department to consider other **economic interests** included under the autonomous Convention meaning (e.g. marketable business goodwill) as opposed to a near-literal interpretation of ‘property’ in national law is a serious flaw. This is reflected by the discussion at paragraph 79 which unduly focuses on real property (i.e. land rights).
- At Paragraph 80 it is suggested that even a measure such as an order *to close a business for many months* (for instance childcare or private education or training establishments) would ‘*constitute a control of use, rather than a total deprivation of property*’. The use of the terminology of ‘deprivation’ without any explanation or further analysis is of concern. As we have noted above, it is now well established that the ‘deprivation’ aspect of A1P1 is but one instance of an interference with peaceful enjoyment of possessions (see also *Mott v Environment Agency* [32] deprecating the use of the distinction and going on to focus on **actual effect** on the fisherman with a restricted fishing licence).
- The analysis at paragraph 82 is difficult to untangle, but it may be based on the distinction in *Breyer v DECC* between ‘business goodwill’ on the one hand and mere expectation of profits on the other. However, the existence of and effect on marketable business goodwill will be fact specific, it cannot be dismissed as

³ Memorandum to the Joint Committee on Human Rights The Coronavirus Bill 2020 (20 March 2020) <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Memorandum%20to%20the%20Joint%20Committee%20on%20Human%20Rights%20-%20The%20Coronavirus%20Bill%202020.pdf>

an issue in its entirety as a 'loss of profits' or on the basis any interference is not permanent.

Having made those comments, we should also remark that it is well understood that the Bill (now the Coronavirus Act) was drafted under extreme time pressure and no doubt the Memorandum likewise. Further, despite some confusion in the passages above over (1) scope of "possessions" as an autonomous Convention concept and (2) what amounts to interference, the Memorandum at paragraph 83 then turns to the alternative, considering the position if there were 'an interference with A1P1' (sic). The analysis as to the assessment of pursuing a legitimate aim by proportionate means at paragraphs 83-85 is difficult to fault.

Remedies and impact of the HRA 1998

It is unlawful for a public authority to act in a way that is incompatible with a Convention right (section 6(1) HRA 1998). We focus here on only the key provisions most likely to be of relevance.

Under section 3 of the HRA 1998, so far as it is possible to do so, UK primary and subordinate legislation must be read and given effect to in a way that is compatible with the Convention (as per section 3(1) of the HRA 1998). This may be the first avenue to consider if an issue arises: can the existing provisions be interpreted and given effect to so as to avoid an unlawful interference with possessions contrary to A1P1.

Failing that, and failing other resolution, ultimately proceedings may be brought by a victim of breach against a public authority relying on a Convention right on the basis that a public authority has acted (or proposes to act) in a way that is incompatible with a Convention right (section 7(1) HRA 1998).

Section 8(2) of the HRA 1998 deals with judicial remedies and states that court can:

- Grant "any such relief or remedy ... within its powers".
- Grant damages where it has the power to do so.
- Order the payment of compensation, in civil proceedings.

In the evolving context of the Coronavirus Legislation (and guidance), it may be that if litigation cannot be avoided, it is brought as early as possible to prevent ongoing interference with property rights. However, failing a prompt effective remedy such that there are losses, actions for and the award of damages are more common than under other Convention Rights (essentially for the reason that it is the gravamen of a claim for breach of A1P1 that "possessions" – for instance business goodwill which has a real value at the time of interference – have been unlawfully affected).

In *R (on the application of Infinis Plc) v Gas and Electricity Markets Authority* [2013] EWCA Civ 70 the court held that as *Infinis* had been wrongly deprived of a pecuniary benefit to which it was entitled the amount of the "lost" benefit could be readily calculated and so full damages were awarded on a *restitutio in integrum* basis. In *Breyer v DECC*, having decided the preliminary issues (unlawful interference with possessions), the matter is now before the Court to assess damages caused by the detrimental effect on business goodwill caused by a Government consultation.

Conclusion

It is now trite but nonetheless true to acknowledge that the coronavirus pandemic has raised unprecedented public health risks. The Coronavirus Legislation (and guidance on it) in turn entails highly intrusive measures which interfere with the normal running of businesses, fulfilment of contracts and individuals' possessions. The impact on economic interests is thus also unprecedented (certainly in times of peace and since the HRA 1998 came into force).

This situation brings to the fore, as regards A1P1, the need for a 'fair balance' between (i) the need to take what are likely to continue to be onerous measures to ensure public health in the general interest and (ii) to ensure (economic) rights are not merely overridden by measures that go beyond what is necessary and proportionate.

Achieving this fair balance will involve carefully considered judgment and the Government will be given a wide margin of discretion. But it is necessarily not an absolute discretion, and this is so not for arid or abstract legal reasons.

The 'fair balance' at issue is not as 'simple' as weighing up public health risks against rights concerning 'possessions'. At the time of writing it is clear that the measures (affecting A1P1 rights) are posing an 'existential threat' to some businesses, to the livelihoods of individuals. The interference with/effect on 'economic rights' and the state of physical and mental health is becoming ever more closely intertwined.