

Common law grounds for commercial judicial review in the time of COVID19

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The “traditional grounds”

1. Illegality/ unlawfulness

2. Irrationality

3. Procedural unfairness

- Breach of Human Rights/ EU law is a form of “illegality.”
- Apply both to “rule makings” and individualised decisions.

Focus on 3 examples

1. An illegality challenge to a rule
(mismatching)
2. An irrationality challenge to a policy
3. Legitimate expectations

(1) A mismatch challenge

- **Where**
 - **Regulations don't fit the governing statutory power**
 - **Guidance doesn't fit the regulations**

Example

- **social distancing**: Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“Restrictions Regulations”) reg 6 and Government Guidance on social distancing.
- **business closure restrictions** under reg 4 and Schedule 2 and Government guidance.

Key legal questions for a mismatch challenge

1. Is the challenged measure capable of lawful implementation?

- *Bayer v NHS Darlington CCG* [2020] EWCA Civ 449

2. Does it go beyond/ fall short of the primary duty/ power?

- *King v Electricity Commissioners* [1924] 1 K.B. 171

3. Is it inconsistent with the statutory purpose?

- *Padfield v Ministry of Agriculture Fisheries and Food* [1968] A.C. 997

(2) An irrationality challenge to a policy or practice

1. Systemic challenges

- *R(C) v Secretary of State for Work and Pensions*
[2015] EWHC 1607 (Admin)

2. Consistency challenges

- *R(Gallaher Group Ltd)v Competition and Markets Authority* [2018] UKSC 25

3. Overly rigid policies

- *British Oxygen v Department for Trade* [1971] A.C. 610

(3) Legitimate expectations

United Policyholders Group and others v Attorney General of Trinidad and Tobago [2016] 1 WLR 3383

1. **Statement** (or occasionally conduct) by a public authority for its own purposes
2. Which is **clear, unambiguous and devoid of relevant qualification**
3. To an **identifiable** defined **person or group**
4. Either
 1. in **return for action** by the person or group, or
 2. on the basis of which the person or group has **acted to its detriment,**
5. Which the public authority **cannot satisfactorily explain** (burden on authority to provide explanation).

How can a legitimate expectation help us?

1. To obtain a **substantive benefit** which has been denied (to challenge a sanction/ charge/ tax).
 - *R(Patel) v General Medical Council* [2013] 1 W.L.R. 2801 – changing goal posts for qualification.
 2. To obtain **procedural protection/ a consultation** to occur before a decision is made
 - *R. (on the application of Bhatt Murphy (A Firm)) v Independent Assessor* [2008] EWCA Civ 755 – removal of a government scheme for ex gratia payments without consultation)
- The Government has started writing “letters” to certain sectors (eg the construction industry)

Business critical measures and COVID

19

- **Business closures** under the Restrictions Regulations or s 37 or 38 of the Coronavirus Act 2020
- Social distancing Regs and guidance and business operation/feasibility
- **Administration of the government assistance schemes:** eg
 - Coronavirus Job Retention Scheme (Furlough) (HMRC administered as of direction of 15 April 2020)
 - Government loan schemes
 - Rural payments
 - PPE supply chain
- **Local authority** measures
- **Devolution** issues (differences between England, Scotland, Wales and NI)
- Investigatory powers and **data** capture

Malawi high court sets aside coronavirus lockdown pending review

3 MIN READ



BLANTYRE (Reuters) - A Malawi high court on Friday granted a temporary injunction against the the government's 21-day coronavirus lockdown period due to start on Saturday, pending a judicial review within seven days.

Justice Kenyatta Nyirenda set aside the lockdown in response to a challenge by the Malawi Human Rights Defenders Coalition (HRDC), which argued that more consultation was needed to prevent harm to the poorest and most vulnerable of society.

Small-scale traders, often young people, had been staging protests in the three major cities against the lockdown plan, carrying placards declaring that it would be better to contract the virus than die of hunger because

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2. Priming the net: FOIA and information requests
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4. Timing
5. Costing/ funding
6. Presentational issues



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