



Francis Taylor Building

15 September 2020
Webinar: Public and Environmental Law

Chairman: Richard Honey

Speakers

Prof. Gordon Anthony

Dr Eloise Ellis

Dr Ciara Brennan



Judicial Review With and Without Government

Gordon Anthony

What is this presentation about?

Three things:

1. Judicial review in the particular setting of NI (“staccato” government, etc).
2. Two cases (*NIHRC* and *Buick*)
3. An argument about the limits to the judicial role?....

Judicial review in Northern Ireland – Some Reference Points

- i. NI is very similar to E&W in terms of the day-to-day principle and practice of JR – procedure, grounds for review, etc.
- ii. But the constitutional context is very different. Mandatory power-sharing; legacy of the NI conflict; stasis in key policy areas (anti-poverty strategies; language rights; abortion; same-sex marriage; etc)
- iii. There have been lots of “politically charged” and “policy laden” cases, both when the local institutions have been sitting and when they have not.
- iv. Have the courts become a forum for “government by default” when the local institutions have not been sitting? (Courts identify gaps in the constitution which are thereafter addressed by legislation enacted at Westminster...)
- v. Is it legitimate for the courts to perform such a role?

Government by default – the two cases

- i. Most recent period of political impasse was between 2017-2020: local institutions not sitting, and no “direct rule” from Westminster. The political emphasis was very much on restoring the local institutions.
- ii. The *NIHRC* and *Buick* cases came to intersect on important questions of government.
- iii. *NIHRC* concerned the law on abortion. This had been a much litigated and controversial topic. Pre-impasse, the Assembly had also been considering the issue of reform, but in a context of polarized opinions.
- iv. *Buick* concerned the powers of civil servants in the absence of Ministers – how far, if at all, could departmental officials take decisions in the absence of “direction and control” from Ministers (article 4 of the Departments (NI) Order 1999)? (On the facts of *Buick*, a departmental official had granted planning permission for a waste incinerator.)
- v. The intersection?

NIHRC

The issues?

- i. Whether the applicant Commission had standing to bring the proceedings.
- ii. Whether the pre-1967 law on abortion was compatible with Articles 3 and 8 ECHR.

The ruling?

- i. Majority ruled that the Commission did not have standing.
- ii. The law was incompatible with the ECHR. (Issue was addressed because it had “been fully argued” and it would “be unrealistic and unhelpful to express” conclusions.)

Buick – the competing arguments

Applicant

- i. Art 4 of the Departments Order: “The functions of a department shall at all times be exercised subject to the direction and control of the Minister”.
- ii. Democratic accountability, etc.
- iii. “Cross-cutting” and Ministerial Code.

Department

- i. Scheme of government recognises that departments exist at one remove from Ministers and can have powers vested in them.
- ii. Legislative scheme within NIA 1998 recognizes that there will be periods of time when Ministers are not in place.
- iii. Westminster legislation on NI budget had impliedly acknowledged that decisions were being taken in the absence of Ministers.

Buick

- Majority in the Court of Appeal considered that article 4 was ambiguous – illegality lay in the fact that the decision was cross-cutting.
- On the powers of civil servants, the said that “*any decision which as a matter of convention or otherwise would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister*”. Other decisions could be taken?

The intersection?

1. *Buick* resulted in legislative intervention at Westminster – The Executive Formation and Exercise of Functions Acts of 2018 and 2019.
2. In the first instance, these clarified the legal basis for civil service decision-making, including on matters of public interest.
3. However, they were also enacted against the background of ongoing political efforts to restore the local institutions.
4. They thus also imposed duties on the Secretary of State in relation to changing (*inter alia*) the law on abortion in the event that the NI institutions were not sitting again by 21 October 2019.
5. No agreement on the local institutions until 8 January 2020 – law on abortion had been amended by regulations in the meantime.

Conclusions?

Two points:

1. JR has performed a very pronounced constitutional role in NI.
2. Questions about the legitimacy of such decision-making. Should it be allowed only when the political institutions are functioning? Or are they more general concerns about the separation of powers etc that are relevant come what may?

Covid-19 and the Constitution

Dr Eloise E C Ellis



Three aspects of particular constitutional interest for discussion today

- Making of urgent or 'emergency' legislation
- Legal challenge, by way of judicial review, to the legality of the 'lockdown' measures
- Changes to Parliamentary procedures and working methods in response to the pandemic

– Also question of what is 'guidance' and what is 'law'



United Kingdom – four nations

- Emergency Powers in existing legislation
 - England & Wales: **Public Health (Control of Disease) Act 1984** (as amended by the Health Protection Act 2008)
 - Public Health etc. (Scotland) Act 2008
 - Public Health Act (Northern Ireland) 1967
- As lockdown restrictions began to ease, differences between the different nations in the UK became more apparent
 - Lack of clarity/co-ordination
 - Also now from 14th September – different restrictions imposed...

The legislative framework – England

Primary Legislation

- **Coronavirus Act 2020 - new**
- **Public Health (Control of Disease) Act 1984 - existing**

Coronavirus Act 2020

- came into force 25 March 2020
- ‘fast-tracked’ through Parliamentary legislative process
- *‘extraordinary measures that do not apply in normal circumstances...legislation is **time-limited to two years** (s.89, s.98)*
- *lifetime of the Act can itself be ended early (but also extended s.90)*
- Six-monthly Parliamentary reviews (s.98)
- Government reports every two months on use of the Act

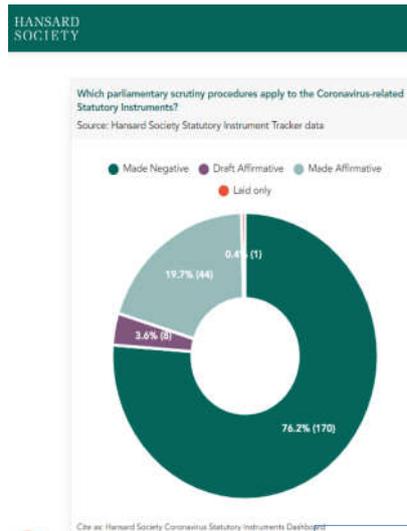
The 'lockdown regulations'

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350)

- Made by SofS in exercise of the powers conferred by...the Public Health (Control of Disease) Act 1984 in response to the serious and imminent threat to public health... posed by...coronavirus 2...England.
- The Secretary of State **considers** that the restrictions and requirements imposed by these Regulations **are proportionate** to what they seek to achieve, which is a public health response to that threat.
- In accordance with section 45R of that [Public Health (Control of Diseases) Act 1984] Act the Secretary of State **is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.**
- 'lockdown regulations' under the **made affirmative procedure** - allows a measure to come into effect immediately, but requires retrospective parliamentary approval to continue
- Regulations were approved by Parliament on 4th May 2020
- SofS to review at least every 28 days

Secondary Legislation (England)

- **Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350) the 'Lockdown Regulations'** (made by SofS for Health on 26 March)
- The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684) – (laid on 3 July) revoked and replaced the previous regulations (original and amending) since itself amended a number of times
- The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (S.I. 2020/791)
- **New 'rule of six'**: The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020 (S.I. 2020/986)



Data at 14th
September
2020

Lack of adequate scrutiny One example...

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020:

- **6.—(1)** During the emergency period, **no person may leave the place where they are living without reasonable excuse.**
- (2) For the purposes of paragraph (1), a reasonable excuse includes the need—
- (a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;
- (b) to take exercise either alone or with other members of their household;

Etc....

The Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020:

- In regulation 6— (a) in paragraph (1), after “leave” insert “or be outside of”;

Amended version - ***“no person may leave or be outside of the place where they are living without reasonable excuse”***

*Explanatory note states - “Regulation 6 is amended to **clarify** that under regulation 6(1), the prohibition applies both to leaving the place where a person is living without reasonable excuse, ad also to staying outside that place without reasonable excuse.”*

JR Challenge to legality of ‘lockdown regulations’

- [*Dolan & Ors v Secretary of State for Health And Social Care & Anor \[2020\] EWHC 1786 \(Admin\)*](#)
- High Court considered wording of the ‘special restrictions power’ in the 1984 Act – concluded that it gives the Government the power to make ‘special restrictions’ which apply to everyone across England.
- Permission for JR **refused** by High Court

- Order issued on 4 August which adjourned the application to a two-day oral hearing (in Court of Appeal)

*‘...the challenged regulations...**potentially raise fundamental issues concerning the proper spheres for democratically accountable ministers of the government and judges.** Furthermore, albeit not in the same form, substantial restrictions on public life remain in place and it is possible that further restrictions will be (re)imposed in the future. **Therefore, I am persuaded that the grounds should be considered by the full court, in open court, and the applicants given an opportunity to make good their case, at least on arguability.**’*

Parliamentary Procedures and Working Methods (I)

- Select Committees – during Easter Recess
- Temporary change to Standing Orders
- Reduced number of divisions (votes)
- Virtual Prime Minister’s Questions (PMQs)

Parliamentary Procedures and Working Methods (II)

- Hybrid Proceedings – up to 50 MPs in Commons Chamber plus 120 virtually
 - For ‘scrutiny proceedings’
 - Extended to ‘substantive proceedings’
- Key roles – driving this forward were Speaker of House, Sir Lindsay Hoyle and Chair of Procedure Committee (Commons) and the Lord Speaker, Lord Fowler (in Lords)
- Remote/Electronic Voting....now... Proxy Voting
- Differences between House of Commons and House of Lords

Conclusions/Final Thoughts

‘The pandemic must not be an opportunity to strengthen governments against parliaments’

Accountability

Proportionality

Scrutiny



DELIVERING ENVIRONMENTAL JUSTICE THROUGH NEW MODES OF COLLABORATION

DR CIARA BRENNAN, SEPTEMBER 2020

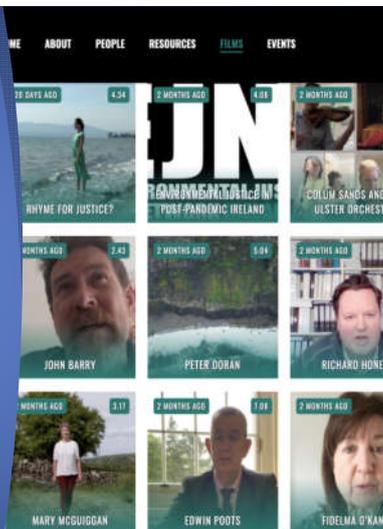
A challenging context

- History of dysfunction
 - Environmental governance in disarray
 - Contending with a legacy of neglect
 - Problematic decisions continue
- Brexit-related uncertainty
 - Removal of accountability and scrutiny mechanisms
 - Continued lack of clarity about post-Brexit plans
 - Concern that further deterioration might occur
- A shared environment
 - Environmental challenges & the border in Ireland
 - Express provision for cooperation between NI & ROI
 - Under-developed cross-border cooperation




Building bridges

- Capacity building & knowledge exchange
 - Resource development
 - Advice and triage
 - Connecting stakeholders
- Strategic collaborations
 - Mapping expertise, experience & activities
 - Co-producing & co-designing useful outputs
 - Uncovering new perspectives on old problems
- Outreach and support
 - Recording testimonies
 - Discovering research user needs
 - Providing platforms



Reflections on the EJNI experience

- New perspectives are emerging
 - Different ways of viewing problems are beginning to lead to novel solutions
- Transdisciplinary research is hard
 - Complexity & scale of the problems becoming more clear
 - The importance of communication and managing expectations
 - Collaborating in different 'languages'
- The transformative power of law?
 - Novel applications of legislation and procedures
 - Limitations of law within a problematic governance system



References & Contacts

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