Adjusting to COVID-19 under the English Criminal Justice System

Rudi Fortson

eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

From early 2020, the four nations of the United Kingdom (England, Wales, Scotland and Northern Ireland) enacted (at the time of writing) some 920 pieces of legislation in which the word "coronavirus" appears in the title. Nearly all of it is secondary legislation and much of it amends earlier versions to reflect changing conditions. There is scarcely any aspect of UK life that has not been subject to, or impacted by, coronavirus legislation that has been enforced, in large part, by coercive criminal sanctions albeit tempered by a significant degree of administrative, policing and prosecutorial discretion. This article discusses that legislation, its impact on the rule of law, on UK constitutional doctrines, on institutions, on the criminal courts, and (above all) on persons whose daily life was severely impacted by COVID-19 legislation.

AUTHOR

Rudi Fortson

Barrister and Visiting Professor of Law at Queen Mary University of London

CITE THIS ARTICLE

Fortson, R. (2021). Adjusting to COVID-19 under the English Criminal Justice System. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2021-017

Published in eucrim 2021, Vol. 16(2) pp 116 – 122

https://eucrim.eu

ISSN:

I. COVID-19 and the Notion of "Law"

The general public in the UK have been on a steep learning curve as they had to assimilate legislation (that mandates compliance) together with accompanying Government 'Guidance' (that does not have the force of law *unless* a legislative measure states otherwise). Unsurprisingly, the tendency has been to conflate those sources, resulting in widespread confusion over actual legal requirements.[1]

UK coronavirus legislation has served to demonstrate that "criminalisation" is a nuanced concept, and that the notion of "lawfulness" may say as much about conduct that is permitted as it may about conduct that is prohibited. European lawyers may think the latter statement to be self-evident (applying the notion that actions are "legal" if they are expressly authorised in law). By contrast, a view, once widely held by English jurists, was that "England….is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden" (Sir *Robert Megarry* V-C).[2] This statement was cited by Lord *Sales* JSC[3] (Justice of the UK Supreme Court) who opined in *Regina v Copeland* that "[t]here is no other sensible criterion of lawfulness to be applied:"[4]

…the general requirement that the criminal law should be clear and give fair notice to an individual of the boundaries of what he may do without attracting criminal liability supports this interpretation: "a person should not be penalised except under clear law", sometimes called the "principle against doubtful penalisation."[5]

The traditional English notion of 'lawfulness' was arguably outdated before the pandemic, but coronavirus legislation that enacted prohibitions, restrictions and permissions to regulate the actions of millions of people in the UK has challenged that notion to the limit.

II. COVID-19 Legislation and Penalising Conduct

1. Enacting COVID-19 laws

On 25 March 2020, the Coronavirus Act 2020 received Royal Assent. It enacted (among many other provisions) a power to require information relating to food supply chains (section 25); a power to suspend port operations (section 50); powers relating to potentially infectious persons (section 51); powers to issue directions relating to events, gatherings and premises (section 52); and the use of video and audio technology in criminal and civil proceedings (sections 53-57; and schedules 23-25).

However, the majority of coronavirus *regulations*, which have impacted on the movement and actions of persons, were not made under the 2020 Act, but under the 1984 Public Health (Control of Disease) Act ("PHA"). The latter was significantly amended by the Health and Social Care Act 2008, which inserted into the PHA wide-ranging "Public Health Protection" measures (sections 45A to 45T). The Government's aim was to take an 'all hazards' approach to health as reflected in the World Health Organization's International Health Regulations 2005 (which came into effect in 2007) and to address threats such as SARS[6].[7]

Section 45C(1) of the PHA provides that "[t]he appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)". The Minister may impose or enable the imposition of "restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health" (s.45C(3)). Section 45F(2) stipulates that regulations may (among other things), (a) confer functions on local authorities

and other persons; (b) create offences; (c) enable a court to order a person convicted of any such offence to take or pay for remedial action in appropriate circumstances; and (d) enact statutory measures for the execution and enforcement of restrictions and requirements imposed by or under the regulations.

Such regulations must be laid before Parliament but this is subject to an "emergency procedure" by which an instrument containing health protection measures may be made provided that it declares that "the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being [laid before Parliament] and approved" (s.45R(2)). A number of COVID-19 regulations have been made in this way and brought into force. Shortly thereafter, they were laid before Parliament (and presumably approved).[8] Measures that are introduced on the basis of a state of emergency challenge fundamental legal and constitutional principles.[9] Certain COVID-19 regulations required (among other things) specified premises and business to close or to provide a restricted service; and/or mandated that "no person may leave the place where they are living without reasonable excuse"[10] (subject to certain exceptions); and/or that "no person may participate in a gathering in a public place of more than [x] people" (save in specified circumstances).[11]

2. Criminalisation and penalisation

By section 45F(5) PHA, "health protection regulations "may not create an offence triable on indictment (that is to say, triable in a Crown Court) or punishable with imprisonment. However, the regulations could – and did – create 'summary offences' (that is to say, triable in a Magistrates' Court) punishable by way of a fine or a "fixed penalty notice". The aim of the latter was clearly intended to avoid giving offenders a criminal record for one or more breaches of the regulations, but this required police officers to correctly identify an actual breach – and this they could only do if the law was clear and if penalisation was not doubtful.

In practice, penalisation often occupied grey areas of the coronavirus regulations. Thus, when regulations specified that persons (and groups of persons) were not permitted to "mingle",[12] it was left to individuals and to the police to work out in their minds what this expression meant.[13] Insofar as the regulations prohibited certain conduct in the absence of a "reasonable excuse" (e.g., leaving home or travelling outside the UK, or failing to comply with a restriction[14]) the limits of that defence were illustrated (to some extent) by situations, particularised in the regulations, each of which constituted a "reasonable excuse". However, much was left to personal judgment.[15]

Although a statutory defence of "reasonable excuse" might be thought to offend the 'principle against doubtful penalisation', it is available under English law in respect of many statutory offences.[16] In some contexts (such as restricting the right of persons to gather to protest) the defence of "reasonable excuse" may be the means by which the legislation in question satisfies Arts. 10 and 11 of the ECHR (and Arts. 10 and 11 of the UK Human Rights Act 1998) – the rights to freedom of expression and to freedom of assembly/association.[17]

Occasionally, one open-textured expression in a regulation was linked with another, thereby compounding problems of interpretation and comprehension. For example, there had been a statutory requirement on persons (in specified areas of England) not to "leave or be outside of the place where they are living without reasonable excuse"[18] save when "reasonably necessary…to take exercise outside".[19] Although Government guidance stated that "exercise" "should be limited to once per day, and you should not travel outside your local area", this was not incorporated within the regulations (and thus the guidance lacked the force of law) and there was no legal definition of "local area".[20] Two women, who were fined £200 each when they drove five miles for a walk, had their fixed penalties withdrawn.[21] In those circumstances, and given the actual law that applied, the final outcome was inevitable.

3. Public confidence in the law and law enforcement

A defence of "reasonable excuse" usually gives rise to few problems in practice (e.g. legislation relating to offensive weapons and firearms). This may be because few persons have offensive weapons with them in public places and thus, making a judgment on the merits of a given case, is relatively straightforward. By contrast, the COVID-19 legislation imposed obligations on millions of people to desist from doing much that they would normally do (or even be expected to do).[22] Accordingly, those who construed the 'rules' restrictively were often ready to accuse others of 'breaking' them when, in fact, the legal position was unclear. Sometimes public reaction to a perceived breach, 'boiled over'. At a time when national travelling restrictions were in place, it was reported that the Prime Minister's then Chief Adviser (*Dominic Cummings*) travelled from London to Durham having gone to work at Downing Street (after his wife became ill with COVID-19 symptoms) rather than isolating at home for 14 days. It was reported further that, whilst staying away from his home in London, the Adviser made a journey to Barnard Castle. The Director of Public Prosecutions (DPP) decided not to refer the case to the police for investigation of a potential breach the regulations[23] and/or a potential offence of public nuisance, contrary to common law. A member of the public unsuccessfully sought the permission of the Administrative Court to challenge that decision by way of judicial review (*R (on the application of) Redston v DPP*[24]). The judgment focused on the question of whether or not the DPP had power to refer (or even to 'nudge') a case to the police for investigation. The Court concluded that the DPP had no such power because "such power or discretion would run counter to the distinction between investigative responsibility and prosecutorial responsibility which is so clearly expressed in the [Prosecution of Offences Act 1985]". The Court considered that even a 'nudge' would represent "an impermissible trespass over the investigation/prosecution boundary" (per Lady Justice *Carr* DBE).

4. Miscarriages of justice

In May 2021, the Crown Prosecution Service published its 'review findings' for prosecutions under the Coronavirus Act 2020 and the Health Protection Regulations between 26 March 2020 and 31 March 2021.[25] Of 1,821 finalised cases, 549 cases were identified by prosecutors as having been incorrectly charged and these were either withdrawn or set aside. Most cases (1,551) were brought under the Regulations. The majority of those cases (82%: 1,272) had been correctly charged. Of the 270 cases charged under the Coronavirus Act 2020, all had been incorrectly charged and thus failed. The UK Parliamentary Joint Committee on Human Rights remarked that:

It is astonishing that the Coronavirus Act is still being misunderstood and wrongly applied by police to such an extent that every single criminal charge brought under the Act has been brought incorrectly. While the coronavirus Regulations have changed frequently, the Act has not, and there is no reason for such mistakes to continue.[26]

III. The Impact of COVID-19 on Traditional UK Doctrines and Processes – the Example of Open Justice

Some COVID-19 restrictions threatened to compromise certain well-established doctrines, practices and processes that are the essence of the UK constitution. Many aspects of UK democracy are enshrined in law and they may also be supported or circumscribed by the criminal law. Quite apart from legal rules pertaining to freedom of expression[27] and the right to protest, there are (for example) rules that *oblige* certain meetings to be held (for example, certain company meetings).[28]

The criminal courts operate under the principle of 'open justice'. Except in rare situations, criminal proceedings are conducted in open court. Typically, all the participants will be physically present in the courtroom. Members of the public and the press may occupy a dedicated part of the courtroom to observe the proceedings. Ensuring that proceedings are compliant with the ECHR/the Human Rights Act 1998[29] is of paramount importance. Accordingly, the Coronavirus Act 2020 made extensive provision for conducting criminal proceedings in ways that would respect public health whilst maintaining the traditional concepts of open justice and due process. As a recent report stressed:

[Fairness] in criminal proceedings can be undermined if new technologies are deployed in ways that do not take into account the specific needs of the defence in the digital era.[30]

Some statutory COVID-19 measures (see, for example, 1 and 2 below) have extended or modified pre-existing procedures for conducting criminal proceedings whilst 'achieving best evidence'[31] in those proceedings.

1. Live audio and live video links

Provisions enacted under the Criminal Justice Act (CJA) 2003 (for example, the provision of "live links"[32] in criminal proceedings: section 51) were modified so that a person (other than a member of a jury[33]) "may, if the court so directs, take part in eligible criminal proceedings through (a) a live audio link, or (b) a live video link".[34] Such proceedings included a summary trial or a trial on indictment, and an appeal to the Court of Appeal (Criminal Division).[35] A "live audio link" meant a "live telephone link or other arrangement" which enabled a participant to hear and to be heard by every other person "taking part in the proceedings who are not in the same location".[36] Similarly, a "live video link" meant "a live television link or other arrangement" which enabled a participant and "all other persons taking part in the proceedings" to see and hear that person.[37] The court could not give an audio/video live-link direction *unless* the court was satisfied that it was "in the interests of justice" for the person concerned to take part in the proceedings in that way *and* the parties to the proceedings had been given the opportunity to make representations.[38] Where the defendant was under 18 years of age (or the court decided to continue to deal with the case as if the defendant had not attained that age) the "youth offending team" had to be given the opportunity to make representations before proceeding by way of a live link.[39]

A live-link direction could only be given once the court had considered "all the circumstances of the case"[40] including (but not limited to) the factors set out in modified s.51(7), CJA 2003.[41] Section 51(4B) and schd. 3A, CJA 2003, placed some limitations and prohibitions on the use of live links.[42] When evidence was given by live link, it was open to the judge to give the jury (if there was one) "such direction as he thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the proceedings are held."[43]

Powers under the Crime and Disorder Act 1998 were also modified by the Coronavirus Act 2020[44] to encompass preliminary hearings, sentencing and enforcement hearings[45] so that such hearings could be conducted by way of an audio or video live link if it was in the interests of justice to do so.[46]

2. Conducting and managing remote hearings

As a result of the statutory modifications mentioned above, remote court hearings emerged in two forms. The first was an all-virtual hearing, and the second was a hybrid hearing. Different judges adopted slightly different practices. Some judges were located away from a court centre when conducting (for example) a preliminary hearing, but other judges attended the centre in person. As for the former, it must be remembered that some judges were especially vulnerable to contracting COVID-19 and thus they required a

degree of 'shielding'. The hybrid version involved key participants attending court premises (typically, defendants, advocates, judges, and jurors (if any)) but evidence might be given by live link. In some cases, the advocates were required to 'self-isolate' (having tested positive for COVID-19) but they were able to participate via a live link.

Conducting contested trials on indictment (with a jury) under strict COVID-19 conditions ('lockdown') was often a challenging experience, especially in cases involving two or more defendants charged jointly. Courts (and their equipment) were not designed with a pandemic in mind. Participants had to be kept 'socially distanced' from each other, and this included the lawyers, jurors, and defendants. Some court 'docks' were not of sufficient size to seat two or more defendants in a 'socially distanced' way (e.g. 2 metres apart) and thus a trial might require two courts to conduct it. Each court had to be equipped with audio and video live links to ensure that each participant was in sight and hearing of each other (except where a witness had been granted 'special measures' that entitled him or her to give evidence out of sight of one or more persons or class of persons). The two courts had to be in communication with each other and be in a position to receive and to transmit video and audio data to other locations (e.g. where a witness was located).

Static cameras in a courtroom, which were designed to focus on (e.g. the judge), might not capture a 'head-and-shoulders' image of a witness or to stream an image of the dock in the neighbouring court. In an English criminal trial, the demeanour of persons (especially witnesses) is regarded – mistakenly or otherwise[47] – as a matter of considerable importance.

The use of live-link technology in court proceedings requires a stable and reliable connection that may be required to stream data for many hours. Sound and video quality is obviously important. But the live streaming and broadcasting of data must also be secure and free from interception or other misuse. Even before the pandemic, data 'platforms' (approved by the Ministry of Justice) were in existence (and updated) to achieve and to maintain data protection standards as well as traditional procedural requirements (for example, the unauthorised photographing or audio recording of criminal proceedings).

It has been pointed out (fairly) by *Sorabji* and *Vaughan* that "the senior judiciary relied predominately on soft law in the form of judicial guidance and protocols to manage the system"[48] (that is to say, the criminal justice system) with the aim of maintaining individual and public health whilst endeavouring to proceed with court business in accordance with substantive and procedural law).[49] Similarly, local court centres took steps to manage their premises and caseload, and they adjusted certain in-court practices to promote the health and wellbeing of court users.

However, slip-ups (hopefully exceedingly rare) did occur. In the civil case of *Gubarev and Anor v Orbis Business Intelligence Ltd and Anor*,[50] a 'Zoom' link to the live streaming of court proceedings had mistakenly been provided to (among others) certain persons connected with the claimants. The observations of Dame *Victoria Sharp* P (giving the judgment of the court) powerfully illustrate some of the difficulties confronting judges and practitioners when a hybrid hearing is being conducted:

50. …. whether a court hearing is a remote hearing or a hybrid hearing….or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm.

51. In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see…that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain

order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

52. Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed.

IV. The Future

There is no doubt that much has been learned by policy makers and by legal practitioners from the COVID-19 experience in the conduct of criminal proceedings. Case management hearings and uncontentious matters are ideally suited to virtual/remote hearings. However, receiving and giving evidence remotely has significant drawbacks – especially if the technology does not replicate (as close as possible) the experience of giving evidence in the normal way. Interrupted transmission, poor sound quality, or delays in transmission (between question and answer) and poor video quality, are not conducive (it is submitted) to receiving the best evidence. Gestures and facial expressions made by a witness over a video link (especially in close-up) may or may not be distracting, and those expressions may or may not be meaningful of the reliability and credibility of that witness' testimony. Further research into evidence that is given by live link is arguably warranted. The COVID-19 experience also reinforces the correctness of Sir *Robert Megarry's* statement that the criminal law "should be clear and give fair notice to an individual of the boundaries of what he may do without attracting criminal liability".

---

1. For example, when 'lockdown' eased on the 17th May 2021 (under "step 3" of the UK Government's "roadmap"), politicians and commentators opined whether it would be permissible for persons to "hug" each other and perhaps to "shake hands". In fact, the *regulations* never expressly forbade the shaking of hands or even hugging within permitted groups of persons.↩
2. *Malone v Metropolitan Police Comr* [1979] Ch 344, at 357.↩
3. In support of a majority decision of the UK Supreme Court in *R v Copeland* [2020] UKSC 8.↩
4. *R v Copeland* [2020] UKSC 8, at [28].↩
5. Citing Bennion, *Statutory Interpretation*, 7th ed. 2017, section 27.1.↩
6. Severe Acute Respiratory Syndrome.↩
7. See the Explanatory Notes to the Health and Social Care Act 2008.↩
8. See on the application of *Dolan and others* [2020] EWCA Civ 1605, at [86].↩
9. For invaluable discussions on this topic, see V. Mitsilegas, 'Responding to Covid-19: Surveillance, Trust and the Rule of Law', *Responding to Covid-19 blog* (Queen Mary University of London - Criminal Justice Centre), 26 May 2020, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/responding-to-covid-19-surveillance-trust-and-the-rule-of-law.html>; E. Guild, 'EU Fundamental Rights, Human Rights and Free Movement in times of Covid19', *Responding to Covid-19 blog* (Queen Mary University of London - Criminal Justice Centre), 24 July 2020, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/eu-fundamental-rights-human-rights-and-free-movement-in-times-of-covid19.html>. All hyperlinks in this article were last accessed on 1 July 2021.↩
10. For example, SI 2020 No.350.↩
11. For example, SI 2020 No.350.↩
12. For example, SI 2020, No.986.↩
13. See R. Fortson, 'Mingling and the Rule of Six', *Responding to Covid-19 blog* (Queen Mary University of London - Criminal Justice Centre), 16 September 2020, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/mingling-and-the-rule-of-six.html>.↩
14. For example, SI 2020 No.1374.↩
15. See R. Fortson, 'Open textured legislation in the times of Covid-19: 'reasonable excuse' and legal certainty', *Responding to Covid-19 blog* (Queen Mary University of London – Criminal Justice Centre), 2 June 2020, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/open-textured-legislation-in-the-times-of-covid-19-reasonable-excuse-and-legal-certainty.html>.↩
16. See, for example, the Laser Misuse (Vehicles) Act 2018; the Firearms Act 1968; Human Medicines Regulations 2012.↩

17. Consider *the application of Dolan and others*, [2020] EWCA Civ 1605, and *Leigh and others v Commissioner of the Police of the Metropolis,* [2021] EWHC 661 (Admin).↩
18. For example, the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020 No. 1374, as amended by SI 2021 No.8).↩
19. Para.2(2), Schd.3A; Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020 No. 1374, as amended by SI 2021 No.8).↩
20. See R. Fortson, 'Conflating "Guidance" and "Rules"-Restrictions on "Exercise" during the Jan 21 Covid Lockdown', *Responding to Covid-19 blog* (Queen Mary University of London – Criminal Justice Centre), 14 January 2021, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/conflating-guidance-and-rules---restrictions-on-exercise-during-the-jan-21-covid-lockdown.html>.↩
21. BBC News online: 'Covid: Women fined for going for a walk receive police apology', <https://www.bbc.co.uk/news/uk-england-derbyshire-55625062>.↩
22. A deeply troubling consequence of the COVID-19 lockdown is the reported incidence of domestic violence and other abuses: see E. Lynch and E. Guild, 'The impact of increasing domestic violence as a result of COVID-19 on those with insecure immigration status', *Responding to Covid-19 blog* (Queen Mary University of London – Criminal Justice Centre), 22 July 2020, <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/the-impact-of-increasing-domestic-violence-as-a-result-of-covid-19-on-those-with-insecure-immigration-status.html>; see also the Office for National Statistics, '*Domestic abuse during the coronavirus (COVID-19) pandemic, England and Wales: November 2020*'; and J. Kelly, 'Coronavirus: Domestic abuse an "epidemic beneath a pandemic"', *BBC News*, 23 March 21, <https://www.bbc.co.uk/news/uk-56491643>.↩
23. Specifically, regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350).↩
24. [2020] EWHC 2962 (Admin).↩
25. <https://www.cps.gov.uk/cps/news/cps-review-findings-first-year-coronavirus-prosecutions>. The CPS point out that the figures are provisional.↩
26. <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1364/136408.htm#_idTextAnchor018>, para. 57.↩
27. Noting section 10 of the Human Rights Act 1998: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."↩
28. For example, consider s.336 of the Companies Act 2006 that requires every public company (s.336(1)) and every private "traded company" (s. 336(1A)) to hold an Annual General Meeting. A failure to comply with s.336(1) or (1A) is an offence: s.336(3): see section 37 and Schedule14 of the Corporate Insolvency and Governance Act 2020 that, for a limited period, permitted Annual General Meetings to be held, and for any votes to be cast, "by electronic means or any other means" (schedule 14, para.3).↩
29. With particular reference to Arts. 5, 6 and 7 of the ECHR and Human Rights Act 1998.↩
30. S. Carrera, V. Mitsilegas and M. Stefan, 'Criminal Justice, Fundamental Rights and the Rule of Law in the Digital Age', *Centre for European Policy Studies (CEPS),* Brussels May 2021, <https://www.ceps.eu/ceps-publications/criminal-justice-fundamental-rights-and-the-rule-of-law-in-the-digital-age/>.↩
31. The expression "achieving best evidence in criminal proceedings" has been something of a mantra that has been uttered by policy makers in England and Wales for several years: see, for example, 'Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures', Ministry of Justice, 2011: <https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf>↩
32. Defined by section 56(2) of the CJA 2002 as, "a live television link or other arrangement by which a witness, while at a place in the United Kingdom which is outside the building where the proceedings are being held, is able to see and hear a person at the place where the proceedings are being held and to be seen and heard by the following persons."↩
33. Section 51(1B), CJA 2003 as substituted by the CA 2020, schd.23, para.2.↩
34. Section 51(1), CJA 2003 as substituted by the CA 2020, schd.23, para.2.↩
35. Section 51(2), CJA 2003 as substituted by the CA 2020, schd.23, para.2.↩
36. Section 56(2B), CJA 2003 as substituted by the CA 2020, schd.23.↩
37. Section 56(2D), CJA 2003.↩
38. Section 51(4), CJA 2003 as substituted by the CA 2020, schd.23, para.2.↩
39. Section 51(4), CJA 2003 as substituted by the CA 2020, schd.23, para.2.↩
40. Section 51(6), CJA 2003 as substituted by the CA 2020, schd.23, para.2↩
41. "Those circumstances include in particular (a) in the case of a direction relating to a witness - (i) the importance of the witness's evidence to the proceedings; (ii) whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence; (b) in the case of a direction relating to any participant in the proceedings - (i) the availability of the person; (ii) the need for the person to attend in person; (iii) the views of the person; (iv) the suitability of the facilities at the place where the person would take part in the proceedings in accordance with the direction; (v) whether the person will be able to take part in the proceedings effectively if he or she takes part in accordance with the direction."↩
42. See s.51(4B) and schedule 3A of the CJA 2003 (as modified by the CA 2020).↩
43. Section 54(2), CJA 2003 as substituted by the CA 2020.↩
44. By having inserted Part 3A into the Crime and Disorder Act 1998.↩
45. Section 57A(1) of the Crime and Disorder Act 1998 as modified by the CA 2020.↩
46. Sections 57B, s.57E and s.57F (respectively) of the Crime and Disorder Act 1998 as modified by the CA 2020.↩
47. Much has been written on this topic. Consider, for example, M. Stone, 'Instant lie detection? Demeanour and credibility in criminal trials', [1991] *Crim. L.R.*, 821-830; J.R. Spencer, 'Orality and the evidence of absent witnesses', [1994] *Crim.L.R.*, 628-644; S. Phillimore, 'Credibility versus de-

meanour - the impact of remote court hearings', (2020) 50 *Fam. Law* , 971-972; Q. Amna, 'Relying on Demeanour Evidence to Assess Credibility during Trial - A Critical Examination' (January 1, 2014), SSRN: <https://ssrn.com/abstract=2384966> or <http://dx.doi.org/10.2139/ssrn.2384966>.↩

48. Readers must not be confused by the expression "soft law" as used by *Sorabji* and *Vaughan*. The guidance did not constitute actual law but it carried considerable persuasive authority having been given by senior judges such as the Lord Chief Justice.↩
49. J. Sorabji and S Vaughan, '"This Is Not A Rule": COVID-19 in England & Wales and Criminal Justice Governance via Guidance', (2021) 12 *European Journal of Risk Regulation*, 143-158.↩
50. [2020] EWHC 2167 (QB).↩

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union