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By email

Date 8 June 2020
Your ref [REDACTED]
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Dear Sirs

The Queen (on the application of) Simon Dolan & Anor v The Secretary of State for Health & Social Care & Anor

A INTRODUCTION

Our letter of 4 June and your response

We refer to your letter of 5 June 2020 which was sent in response to the letter we had sent to the Home Secretary Priti Patel (and copied to you) on 4 June ("the HS Letter"), the day after she had presented to Parliament the Government's new proposals for a 14 day quarantine for those arriving into the UK.

The legislation itself (affecting only England) was published soon afterwards. This is in the form of the *Health Protection (Coronavirus, International Travel) (England) Regulations 2020* ("the Travel Regulations"). At the time of writing this letter, we understand that similar provisions are in the process of being introduced into law in Scotland and in Wales – albeit very late in the day.

It had been our clients' hope in sending the HS Letter, that the Government would see the sense of suspending the introduction of these very damaging measures, for the reasons set out in the HS Letter, and that it would not be necessary to take legal action in relation to them.

The HS Letter was sent very promptly, within 24 hours of the relevant legislation having been made public. Given that the Travel Regulations were to come into force today, the deadline of Friday evening was perfectly reasonable.

Regrettably, it would seem that the Government remains intend upon pressing forward with the Travel Regulations and we note there was no attempt to respond substantively to the various points made in the HS Letter. We note from reports in the Telegraph this morning that a Home Office spokesman is quoted as saying of the scheme "It is very hard to imagine how it will work in practice."

Pre-action protocol?

In your letter of 5 June, you point out that the HS Letter was not written in the usual pre-action protocol format. With respect, we do not think that is a valid point.

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First, as we have said, in the context of legislation published for the first time on the afternoon of Wednesday 3 June which was due to take effect as the law on Monday 8 June, this is plainly a case falling within paragraph 6 of the Judicial Review Pre-Action Protocol (i.e. it was extremely urgent).

Second, as you are aware, our client is already engaged in judicial review proceedings against the Government in relation to regulations introduced under the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). The Travel Regulations have similarly been purportedly introduced under the 1984 Act. They are, in effect, an extension of the mischief to which our client's existing judicial review proceedings are already addressed. They amount, in effect, to another example of the disproportionate approach that the Government has taken to addressing the issues raised by the Covid-19 outbreak. Moreover, despite the fact that it was the Home Secretary who at all times had taken the lead in presenting the new law to the press and to Parliament, the Travel Regulations were in fact signed into law by the Secretary of State for Health and Social Care ("the SoS"). You are already representing him in these proceedings and you were copied in on the HS Letter when it was sent.

In those circumstances, we do not believe that it is necessary for a claimant in the position of our client to have to, in effect, "start from scratch" by going through the hoops of sending a formal pre-action protocol letter in relation to this issue – particularly one which has only just arisen and which, like the existing lockdown law, is legislation that it is especially urgent to address.

You have said in your 5 June letter that if we were to send what you term "a pre-action protocol compliant letter" to you by Monday 8 June, you would "endeavour to respond by Friday 12 June". You have asked our client to refrain from issuing proceedings in relation to the Travel Regulations in the meantime.

Without prejudice to our contention that a formal pre-action protocol letter is unnecessary (and given the urgency it is clearly not appropriate to afford your client a longer period for a response) we are hereby formally re-addressing our client's complaints about the Travel Regulations to the SoS.

We have reproduced within the body of this letter, much of the material which has already been covered in the HS Letter.

B THE MATTERS BEING CHALLENGED

The Travel Regulations

Our client intends to challenge the Travel Regulations. These apply only in England. They are aimed at requiring non-exempted persons arriving in England from abroad, to self-isolate for a period of 14 days from arrival. (There are now equivalent regulations coming into force in other parts of the UK).

For this purpose, the Travel Regulations require any non-exempted person travelling to England to provide certain information captured on what is termed a "Public Health Passenger Locator Form". This is information provided by the person travelling to the UK (or by someone else on their behalf). It includes details of their name, address, contact details, travel itinerary and intended place where they will self-isolate.

The Travel Regulations impose similar restrictions on those who arrive in England from the common travel area but who have been abroad at any time during the previous 14 days.

A lengthy list of exemptions is provided for in the Travel Regulations. Indeed, as we noted in the HS Letter, out of 22 pages more than half are taken up by explaining who does not have to comply and in what circumstances. Further, even in respect of those persons to whom they do apply, the Travel Regulations depend almost entirely on the voluntary compliance by the individuals concerned with the measures requiring them to self-isolate.

The Travel Regulations are, in our view, so full of irrationality and exceptions as to be worthless as a serious public health measure. Yet their impact on whole sectors of UK industry such as the aviation, travel and leisure sectors and their impact on the freedom of millions of people to travel are severe – and have been well publicised in the media. Further, the Travel Regulations interfere with the civil liberties of UK citizens and those from the EU, as well as other countries.

They are another example of how the Government is taking a disproportionate and blanket "one size fits all" approach to tackling the Covid-19 outbreak – to the detriment of the country and those whose livelihoods are put at risk by the new measures.

If first reports in the press today are to be believed, the implementation of the Travel Regulations is going to be chaotic, at best.

C THE ISSUES

The impact of the Travel Regulations: serious harms

The imposition of a 14 day self-isolation requirement on UK citizens returning from abroad or on non-UK citizens travelling to the UK, will have a devastating effect on the aviation and travel industries which have already been severely affected by the Lockdown Regulations since March.¹ Indeed, so obvious will be the damage that we almost hardly need spell it out here.

Very few people in England (except perhaps the very wealthy and those who no longer have to work) are going to book any kind of holiday abroad if, on their return, they will be compelled to self-isolate for 14 days. For those who cannot work from home, the vast majority of working people in England do not have sufficient holiday entitlement to allow them to tag on an extra 14 days off work to their holidays or else cannot afford to have 14 days of unpaid leave. So the effect of the Travel Regulations will be to virtually end all further bookings of flights and trips abroad. The same applies to self-employed people and to the vast majority of business travellers.

For those who wish to visit England as tourists from overseas, for obvious reasons, few people will do so if they know they will have to spend 14 days stuck in isolation in a hotel room or other place before they are allowed to lawfully do anything else. Business travel will similarly be severely affected for the same reasons.

Not only will the Travel Regulations decimate the income of airlines and travel companies but the knock on effects will be even more wide ranging – and damaging.

As well as the jobs directly lost at airlines and travel companies, the whole support infrastructure and linked sectors will similarly be devastated. Businesses such as airports, retail outlets at airports, maintenance providers, airline meal providers and caterers, manufacturers of spare parts - none will be spared the continued loss of income that will be caused to them and their employees.

For the domestic tourist industry, it is true that to an extent, the reduction in foreign visitors may be partially offset by the increase in the number of English residents holidaying at home. But there is no way that this will adequately compensate for the huge fall in foreign tourists and business people who would normally fill up the hotels, restaurants and principal tourist attractions – even if social distancing guidelines were still to be in force.

For many millions of people, especially with children of school age, their only opportunity to go abroad on holiday would be during school holidays and that opportunity will be denied them this summer.

It is therefore the case that huge damage will be caused to very important sectors of the economy – to the detriment of all – by the Travel Regulations. But what is worse is that it is very difficult to see how those same regulations can make any material difference when it comes to protecting public health. That is quite apart from the fact that the threat posed to the majority of the population by Covid-19 is so modest.

The imposition of a mandatory requirement for people to remain under de facto house arrest in their accommodation, subject to severe limitations on their right to leave that accommodation, are a significant interference in personal liberty.

It is submitted that in order to impose such draconian laws, there must be a strong and cogent justification for doing so. The only possible justification that the Government has so far attempted to put forward is

¹ <https://www.theguardian.com/business/2020/jun/01/more-than-200-uk-travel-and-hospitality-firms-want-quarantine-u-turn>

that the measures are a necessary and proportionate response to the ongoing public health threat posed by Covid-19. Yet, nowhere in her statement to Parliament on 3 June or in her answers to questions posed by MPs, did the Home Secretary put forward any details of the scientific basis for imposing the Travel Regulations. Nor is there any indication in the most recently released minutes of SAGE, to support the new measures. Indeed at least one scientist on SAGE has since contradicted the idea that such laws are appropriate (see below).

In his existing judicial review proceedings, our client has not only challenged the lawfulness of the Lockdown Regulations as having been made "ultra vires" under the original 1984 Act of Parliament relied upon in making them, but he has also claimed that they are disproportionate to the threat posed by Covid-19.

This is because we know from many weeks of data collected since it first affected the UK, that Covid-19 overwhelmingly affects primarily the elderly and those with pre-existing health conditions, not the vast majority of the working population. Young people and children are scarcely affected at all. Indeed, as of the latest available figures published by NHS England, we note that out of a population of 56 million people in England alone, since the outbreak started, Covid-19 has been cited on the death certificates of just 290 people who died in hospital in England under the age of 60 with no pre-existing health condition.² Its threat to the health of the vast majority of the population is therefore demonstrably minimal. This is even more so now that infection rates have fallen sharply – particularly in the community outside of hospitals and care homes - NHS critical care capacity has been expanded and issues with supply of PPE and testing are being increasingly overcome.

Undeniably tragic though any deaths are to the people concerned and their loved ones, the NHS England figures graphically illustrate our client's central point: i.e. that the Lockdown Regulations imposed on the whole population have been completely out of all proportion to the threat posed by Covid-19. They are out of proportion because of their blanket application to the whole population, causing huge harm to public health, the education of children, to the nation's economy and to precious, hard won civil liberties. Now the Travel Regulations have been introduced against that background.

In the circumstances, our clients challenge the lawfulness of the Travel Regulations on a number of grounds.

Illegality: the 1984 Act

The Travel Regulations are purportedly made under powers conferred on the Government by sections 45B, 45F(2) and 45P(2) of the 1984 Act. Section 45B allows the authorities to make regulations "*preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place*".

On the face of it, we cannot see how the Travel Regulations achieve this aim of "preventing danger to public health".

Persons arriving in England (including those infected with Covid-19) are either exempted from restrictions under the Travel Regulations, or else they are still allowed to enter the country and carry on activities (e.g. use public transport) whereby they may well pose a danger to public health. We do not see how the Travel Regulations are "preventing danger to public health" which is the purpose for which the Secretary of State can make regulations under s45B.

Regulations made under section 45B of the 1984 Act are not subject to the same statutory requirements of proportionality as those made for domestic purposes under s45C of the 1984 Act. Nor do the same requirements and safeguards apply (which our client argues in his judicial review proceedings render the Lockdown Regulations ultra vires). The Travel Regulations nevertheless purport to regulate the conduct and activities of persons in England – including UK citizens – when they are well away from any aircraft,

² See deaths by condition tab of weekly deaths link at <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/>

vessel or other conveyance they may have arrived on. The Travel Regulations purport to govern what those people must do once they are at their chosen accommodation.

It is already the case that our clients contend that the Government's Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 are ultra vires the 1984. Our clients contend that the Travel Regulations, albeit for different reasons, are likewise ultra vires.

Irrationality

The case against the Travel Regulations on irrationality grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1K.B 41*) is particularly strong. It must at all times be borne in mind that the stated purpose of these measures is to protect public health from the threat of Covid-19. Given the obvious and enormous impact of the new laws on the sectors most affected, the SoS must be able to demonstrate that the Travel Regulations will provide such benefits to public health.

The reasons why the Travel Regulations represent irrational decision-making are many.

First, we would make the obvious comment that it simply does not appear rational that the Travel Regulations are being imposed only now, when infection rates in the UK (at least outside of care homes and hospitals) have fallen away dramatically and where the same has happened – only more so - in many countries overseas.

Why did the Government allow the continued unchecked arrival into the UK of many thousands of travellers from areas known at the time to be heavily affected by Covid-19 (e.g. Northern Italy, Spain, Wuhan, Iran etc) at the start of the pandemic and even long after the imposition of the Lockdown Regulations? Why, even while UK citizens were confined to their own homes on penalty of committing a criminal offence, were travellers arriving into the UK's airports allowed to pass unchecked and flow onto public transport and out into the wider community? But, now, we are told, there must be restrictions on such persons (albeit restrictions that are full of holes). This is irrational.

Secondly, we are now in a situation where many countries have either eliminated or massively reduced Covid-19 infections, in many cases to rates far below those that are still being seen in England. New Zealand for example has had no cases at all for nearly two weeks. Even some European countries such as Greece have dramatically fewer infection rates than the UK.

In those circumstances, how can it be that people who live in the most heavily infected areas of the UK and who have travelled directly abroad to somewhere like Greece, could pose a higher risk to health when they return directly to the UK, when compared to the risk they would pose from mixing with people within their local community? There is no attempt in the Travel Regulations to have any regard to the risk posed by travel from a particular country.

Such a blanket approach in the Travel Regulations – irrespective of whether persons are travelling directly from a low infection country – makes no sense in public health terms and is clearly irrational. (See also in this regard the comments of Prof Robert Dingwall below).

Thirdly, other countries, including in Europe, announced as long ago as 18 May plans to ease their own border restrictions and many of them are now doing so with effect from the middle of June – almost precisely at the time when the UK is introducing quarantine measures.³ The EU has encouraged this move to reopen borders. Those reopening their borders to travellers include countries such as Austria, France, Germany, the Netherlands, Greece and others.

The UK followed those other countries by introducing a lockdown in March when they had already done so. Yet in relation to the imposition of border controls, the UK failed to implement any kind of self-isolation or equivalent controls when other European countries did so. Yet now, it finally does so at the very moment when they are relaxing those rules. This is irrational.

³ <https://www.theguardian.com/travel/2020/may/18/europe-holidays-which-european-countries-are-easing-coronavirus-travel-restrictions-lockdown-measures>

Fourthly, in her statement to Parliament on 3 June, the Home Secretary stated as follows:

"The scientific advice is that imported cases of the virus pose a more significant threat to our national effort and our recovery."

"Travellers from overseas, could become a higher proportion of the overall number of infections in the UK and therefore increase the spread of the disease."

"The government is therefore taking a proportionate and time-limited approach to protect the health of the British public."

As regards the "scientific advice", we cannot see any reference to such scientific advice in any of the most recent minutes of SAGE that have been published so far following our client's judicial review proceedings. This is in spite of the fact that the proposal to impose a quarantine law was first mooted as far back as 9 May. SAGE does not once mention in any of the May minutes so far published, the need for a new quarantine procedure for incoming international arrivals.

The Home Secretary did not refer to any details of what specific scientific advice there was to justify the imposition of the Travel Regulations. Nor, in answer to questions in Parliament on 2 June following her statement, did she do so either – as a reading of the relevant Hansard transcript makes clear.⁴

Where is the scientific advice referred to by the Home Secretary in her statement to Parliament? If there is any such advice, how does it square with the points we have made above about the timing of these measures and the huge loopholes in the quarantine measures they purport to introduce? Why are they necessary now on a blanket basis, including where travel is from countries that have lower infection rates than the UK?

Moreover, on 4 June Professor Robert Dingwall, a scientist who is a member of SAGE appeared on the BBC's Radio 4 Today programme where he appeared to contradict what the Home Secretary had told Parliament.

Prof Dingwall said this of moves to impose traveller quarantine measures in the UK:

"We are not seeing new clusters that are taking off from people who have been travelling abroad."

I think we would really need to get the level in this country significantly further down before quarantine started to become a useful measure."

That I think, even then, we would have to see something that is targeted on countries with a significantly higher level of community transmission than ourselves – and there aren't too many of those around, I'm afraid."⁵

On the face of it, it is impossible to square Dr Dingwall's comments with the Home Secretary's claim that the scientific advice is clear that the Travel Regulations are necessary. He has clearly said that infections in the UK remain too high for such measures to make any difference – exactly the same advice that SAGE was giving to the Government (rightly or wrongly) back in February and March.

Our clients submit that if (as seems to be the case) there is no convincing scientific advice at all to support the making of the Travel Regulations, then this is a further example of their irrationality.

Fifthly, we adopt what was said under section 5 of the HS Letter. The Travel Regulations are such that even if someone complies fully with them, that person could still infect large numbers of the public with

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<https://hansard.parliament.uk/Commons/2020-06-03/debates/0E489EED-CCDC-4466-A967-48947B5BDA03/Covid-19UKBorderHealthMeasures>

⁵ <https://www.kentonline.co.uk/news/national/sage-scientist-casts-doubt-on-quarantine-plans-4901/>

Covid-19. This is because they can travel to their accommodation via public transport and so come into contact with large numbers of people in an enclosed space where they might well pass on the virus to a significant degree. They can also "self-isolate" in the company of other people in the same household – who are not then automatically subject themselves to isolation.

Thus there are numerous means by which even those who follow the quarantine procedure in the Travel Regulations can infect others. The supposed benefits to public health of the measures are undermined by these features. This is no way to operate a proper, viable quarantine scheme.

Finally, the Home Secretary has stated that the measures are "proportionate".

But our clients submit that cannot be the case in the light of huge damage that the measures are undoubtedly doing to the livelihoods and industry sectors affected, the modest health risks posed to the majority by Covid-19, and the gaping holes and flaws in the Travel Regulations themselves which mean that they are not true quarantine measures anyway.

It is also puzzling in the extreme that whilst the Government tells us it has massively ramped up its testing capacity, no attempt is being made to use the testing of incoming travellers for Covid-19 as an alternative or mitigating element to its travel restrictions. It may not be practicable for there to be testing of all incoming travellers at the point of entry. But there is not even an attempt to offer testing to those who ask for it, as an alternative to self-isolation. If – as is the case anyway under the Travel Regulations – people who might have Covid-19 are allowed into the country, then why can they not take a test which, if negative, could enable them to be released early from such quarantine or avoid it altogether?

There is also the obvious point that it is disproportionate to apply the quarantine to direct arrivals from countries which have low infection rates and to make no distinction in the measures between such countries and those whose infection rates are much higher.

The above are by no means an exhaustive list of examples of how the Travel Regulations are irrational and so much so, that no reasonable decision maker in the position of the SoS could possibly have introduced such legislation.

We reserve the right to produce further examples in support of our client's case on irrationality – and indeed proportionality.

Other grounds of challenge

In addition to the strong illegality and irrationality points raised above, our client challenges the lawfulness of the Travel Regulations on other grounds.

For example, although the UK has left the European Union, it remains subject to EU law for so long as the country remains within the transition period provided for in the Withdrawal Agreement. That period will not end – at the earliest – until 31 December 2020. EU law continues to enjoy supremacy over our own domestic law for the time being. This includes the rules concerning free movement of people and workers and the right of free access to access services guaranteed under the Treaty on the Functioning of the European Union.⁶

Whilst the Travel Regulations specifically exempt those who may live outside England and who travel here to work at least once per week (or vice versa), that is not sufficient to deal with objections as to the right of EU citizens to move freely to and from the UK – as well as within the UK. The Travel Regulations appear to impose a disproportionate interference with such rights, contrary to EU law. Why should a German tourist who wants to visit England for a long weekend, for example, be subject to a compulsory 14 day quarantine, whereas a Belgian businessman who regularly travels to England and back for work is not? Germany and Belgium have had very different experiences in terms of how severely they have been affected by Covid-19.

Another area where the Travel Regulations are open to challenge is via the Human Rights Act 1998. Under that Act, individuals whose rights under the European Convention on Human Rights ("the Convention") are

⁶ See in particular Articles 20, 21, 45 and 49-62 of the TFEU

interfered with by the Government have the right to bring proceedings to enforce their Convention rights. The Travel Regulations clearly impinge on the human rights of our client, amongst others in a number of respects.

His right to the peaceful enjoyment of his property enshrined in Article 1 of Protocol 1 of the Convention is engaged by virtue of his owning and running an airline business (Jota Aviation Ltd). The goodwill in that business is being damaged by the Travel Regulations (just as it is by the Lockdown Regulations). Moreover, like the thousands of UK citizens resident in England who have contributed funds to our client's crowdfunding campaign for the judicial review of the Lockdown Regulations, our client is himself affected by the requirements for self-isolation imposed by the Travel Regulations should he visit England while they are in force, which engage upon his right not to be deprived of his liberty (through the requirement to self-isolate) under Article 5 of the Convention.⁷ The second claimant, Ms Monks is likewise affected by the Travel Regulations since she would be subject to the 14 day compulsory self-isolation if she were to go on holiday or for business abroad.

D. RELIEF SOUGHT

The Claimants seek a mandatory order quashing the Travel Regulations in their entirety.

E DOCUMENTS AND FURTHER INFORMATION SOUGHT

The Claimants request disclosure of the SAGE meeting minutes in which SAGE advised the Government to introduce travel restrictions of the nature contained in the Travel Regulations.

F PROTOCOL FORMALITIES .

As we have said, in the circumstances we do not see that our clients have to follow the pre-action protocol in relation to this matter, but for the record, as regards the other information required by the protocol we set this out below.

Proposed claimants

The proposed claimants are the existing claimants in the current action Simon Dolan and Lauren Monks.

Proposed defendant

The proposed defendant is the Secretary of State for Health and Social Care.

Interested Parties

There are no interested parties.

Claimant's legal advisers

The claimants' legal advisers and their reference and contact details remain unchanged from the existing proceedings and documents can be served on the claimants via email at the same email address ██████████@wedlakebell.com.

Defendant's legal advisers

The defendant's legal advisers remain unchanged.

Alternative dispute resolution

In view of the stance taken by the SoS in the proceedings, we see no merit in pursuing alternative dispute resolution at this time.

⁷ And it cannot rationally be argued that any person travelling to England directly from a very low infection country might be infected with the virus (Article 5.2(e)).

Time for a response

The SoS is requested to respond to this letter as soon as possible and in any event by no later than 4pm on 12 June 2020.

Yours faithfully

Wedlake Bell LLP

Wedlake Bell LLP

cc

