

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL OF ENGLAND AND WALES,

CIVIL DIVISION

Appeal No. C1/2020/1117

The Lord Chief Justice, Lord Justice Singh and Lady Justice King

ON APPEAL FROM THE HIGH COURT OF JUSTICE

Claim No. CO/1860/2020

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

The Honourable Mr Justice Lewis

IN THE MATTER OF THE PUBLIC HEALTH (CONTROL OF DISEASE) ACT 1984

B E T W E E N :

THE QUEEN (On the application of (1) SIMON DOLAN & (2) LAUREN MONKS)

Claimants/Appellants

- and -

THE SECRETARY OF STATE FOR HEALTH & SOCIAL CARE

First Defendant/Respondent

ANNEX TO APPLICATION FOR PERMISSION

THE FACTS, STATUTORY FRAMEWORK, CHRONOLOGY AND RELEVANT ORDERS

- 1 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (**'the Regulations'**) were made on 26th March 2020. The enabling words of the Regulations provided that:

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984(1) [**'the 1984 Act'**, as amended by the Health and Social Care Act 2008].
- 2 The No. 1 Regulations imposed restrictions on the day to day social and economic life of the whole population. They provided that persons may not leave the 'place where they live' save with a reasonable excuse (reg. 6), prevented any 'gathering' of more than two people, a restriction which prevented any political protest (a right protected by Article 11 of the European Convention on Human Rights and Fundamental Freedoms (**'the Convention'**)) (reg 7), prevented all collective worship, a right protected by Article 9 (reg 4), and required categories of businesses to close, so amounting to a deprivation of property protected by Article 1 of Protocol 1 (regs. 4 and 5).
- 3 On 30.04.2020 the Claimants sent a pre-action protocol letter and on 21.5.2020 applied for permission to bring proceedings for judicial review of the decision of the Defendant to make the Regulations. This application was refused by Lewis J on 6.7.2020. On 1.12.2020, the Court of

Appeal of England and Wales allowed the Claimants' appeal against Lewis J's refusal of permission, granted permission for the Claimants to bring judicial review proceedings on the grounds that the Regulations were *ultra vires* the 1984 Act and determined the matter themselves, finding that the Regulations were *intra vires* the 1984 Act.

4 The Claimants' application to bring judicial review proceedings on other grounds was refused by Lewis J and the Court of Appeal, against which there is no domestic appeal. The Third Claimant (a schoolboy known as AB) and the Second Defendant (the Secretary of State for Education) were concerned only with the challenge to the Second Defendant's alleged direction to close schools, which was not given permission by the Court of Appeal and so is not the subject of this appeal.

5 The Appellants renew their application for permission to appeal to the Supreme Court and to certify that the following (slightly revised since permission was requested by the Court of Appeal) is a point of law of general public importance involved in the decision of the Court of Appeal:

Does s 45C of the Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008) grant Ministers the power to impose restrictions on the entire population and entire classes of premises and things, including by restricting gatherings of any more than two people, in the event of or contingent upon there being a serious and imminent threat to public health; and is a Minister limited to imposing restrictions only on persons, premises or things that may be infected and present a risk to public health?

6 The Regulations were the first of scores of regulations made under the 1984 Act imposing restrictions on the whole population in England, Wales and Northern Ireland, most recently the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, due to expire on 2nd February, 2021 and also reliant on the enabling power of s 45C of the 1984 Act. The First and Second Appellants have challenged the imposition of the the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 and similarly named 'High' and 'Very High' Regulations and the 'second lockdown' imposed on 3rd November 2020 by the Health Protection (Coronavirus, Restrictions) (England) Regulations (No. 4) 2020 in separate proceedings, including on the *ultra vires* ground identical to that raised in this appeal.

7 Thus, restrictions on the entire population made under the 1984 Act have been in place continuously for over eight months in different legal jurisdictions of the United Kingdom. Thousands of people have been arrested and prosecuted for breaching them. The issue is plainly one of general public interest and it is a matter of urgency that their lawfulness be determined by the Supreme Court.

ISSUES AND TREATMENT OF ISSUES BEFORE THE COURT APPEALED FROM

8 In respect of whether the Regulations were *ultra vires* the 1984 Act (the only relevant issue), the Court first set out (paras 45-51) the relevant provisions of the 1984 Act, in particular:

- (1) Section 45C, including (s 45(4)(d)): Ministers may make regulations, as a ‘special restriction or requirement’, defined by s 45(6) as anything that may be ordered by a justice of the peace (‘JP’) under ss 45G, 45H and 45I.
 - (2) Section 45D: the requirement of proportionality and that they be in response to or contingent upon an imminent threat to public health;
 - (3) Section 45F: regulations may create offences;
 - (4) Sections 45G, 45H and 45I: a JP may only make orders against persons, premises or things who ‘are or may be infected or contaminated’;
 - (5) Section 45: powers in sections 45G, 45H and 45I include power to make an order in relation to “a group of persons, things or premises”: see subsection (1).
- 9 The Court dismissed the Claimants’ submission that the Minister may only make orders against a person or group of persons (para 59), finding that
- ‘If all that was required by way of a public health response was orders in respect of individuals or groups of persons, no doubt it would suffice to make an application to a justice of the peace. The purpose of the new regime introduced in 2008 was to cater for the possibility of a much greater public health response which might be needed in order to deal with an epidemic.’
- 10 Avoiding the fact that JPs have powers only over those who may be infected, it held (para 60):
- When section 45C(4)(d) refers to a special restriction or requirement, it does not mean that such a requirement may only be imposed by the Secretary of State in circumstances where an order could be made a justice of the peace. If it were confined in that way, there would be no need for a power to be conferred on the Secretary of State. The true construction of these provisions, in our view, is that a special restriction or requirement is a restriction or requirement of the type which could be imposed by a justice of the peace, for example that a person be subject to restrictions on where he or she goes or with whom he or she has contact: see section 45G(2)(j).
- 11 The Court found (paras 62 and 63) that the breadth of s 45C(1) and the fact that subsection (3)(c) provides that provisions may ‘include in particular’ restrictions including the one relied on by the enabling provision of the Regulations meant that it was ‘abundantly clear’ that ‘when Parliament referred to a special restriction or requirement in paragraph (d), that was not a provision which cuts down the generality of the power conferred on the Secretary of State earlier in section 45C’.
- 12 The Court was ‘reinforced’ in its interpretation by the Explanatory Memorandum to the amendments made in the 2008, an issue dealt with in more detail below.
- 13 Addressing the principle of legality set out in *R v Secretary of State for the Home Department, ex parte Simms* ([2000] 2 AC 115), the Court held (para 68)
- The issue of construction which the *vires* issue raises concerns precisely questions such as whether restrictions on a person’s movement or the persons with whom they may associate can be imposed; or whether premises can be ordered to be closed. There can be no doubt, even on Mr Havers’ submission, that a justice of the peace has all of those powers.

14 And, in so finding, their Lordships failed to address the fact that these powers may only be exercised by a JP where the JP had reason to believe persons, premises or things ‘may be infected or contaminated’.

15 Their Lordships, citing *R (Black) v Secretary of State for Justice* ([2017] UKSC 81) and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* ([2002] UKHL 21), found that it was a necessary implication that ‘the purpose of the amendments that were made in 2008 clearly included giving the relevant Minister the ability to make an effective public health response to a widespread epidemic such as the one that SARS might have caused and which Covid-19 has now caused’ (paras 69-71). These were not points or cases that had been raised by the Defendants in argument, nor did their Lordships ask the Claimants’ counsel to address them in argument.

PROPOSED GROUNDS OF APPEAL AND REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

Proposed ground and permission

16 The proposed ground is simply an answer to the suggested point of law:

The Court of Appeal erred in finding that s 45C of the Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008) grants Ministers the power to impose restrictions on the entire population, including by restricting gatherings of any more than two people, in the event of or contingent upon there being a serious and imminent threat to public health, required by s 45D of the Act; and that a Minister is not limited to imposing restrictions only on persons, premises or things that may be infected and present a risk to public health.

17 The point is one of general public importance that ought to be considered by the Supreme Court for the reasons set out in paras 6 and 7 above. Granting permission would provide for legal certainty of the lawfulness of continuing restrictions on day to day life imposed under the 1984 Act in England, Wales and Northern Ireland. This is not a matter that has received previous consideration by the House of Lords or the Supreme Court.

18 While the Court of Appeal refused permission to appeal to the Supreme Court, they must have found this ground arguable, as it was the sole ground that was given permission and they decided to determine it themselves. It is a matter of public record that the Appellants’ case is supported by a number of Queen’s Counsel and legal academics cited by the Claimants and by Lord Sumption (speaking extra judicially). The Claimants submit that this ground is not only arguable: the Court of Appeal’s decision was clearly wrong and would remove the express restrictions on powers that may be exercised by Ministers.

The guiding principles

19 First, the preamble to the Regulations states expressly that:

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984(1).

20 There are no general enabling words. In consequence ‘...the court must proceed on the basis that the preamble to an SI sets out all the statutory enabling powers that are necessary for its validity’ (*Vibixa Ltd v Komori UK Ltd and others; Polestar Jowetts Ltd v Komori UK Ltd and Others* [2006] EWCA Civ 536, para 22).

21 Secondly, the 1984 Act is subject to the *Simms* principles (131–132):

*“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. **Fundamental rights cannot be overridden by general or ambiguous words.** This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. **In the absence of express language or necessary implication to the contrary**, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual...”*

(Emphasis added)

The enabling provision of the Regulations expressed that the Ministers power was to impose a special restriction or requirement

22 Section 45C(1) of the 1984 Act provides that:

The 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).

23 Section 45C(3) provides for the circumstances in which regulations may be made. These are limited to those imposing duties on medical practitioners (a), and on local authorities (b) and, under (c):

provision... imposing or enabling 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.

24 In finding that these provisions were ‘broad’ (para 62), the Court of Appeal failed to take into account that the restrictions that can be imposed under s 45C(3) are expressly limited to those in sub-section (4):

- (a) *a requirement that a child is to be kept away from school,*
- (b) *a prohibition or restriction relating to the holding of an event or gathering,*
- (c) *a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies or the handling, transport or disposal of human remains, and*
- (d) *a special restriction or requirement.*

25 Thus, the powers granted to Ministers in sub-section (1) are defined by sub-section (3) . Sub-sections (3) and (4) each provide that the powers ‘include in particular’ powers set out in their sub-

sub-sections ((a) to (c) and (a) to (d) respectively) and so those powers *might* be additional to others. However, the preamble to each Regulation clarifies that the enabling power derived from subparagraph (1) is limited to that given by sub-sub-sections (3)(c), which is the only identified sub-sub section of (3). In turn, while sub-section (4) provides that the powers of s (3)(c) ‘include’ those set out in (4)(a)-(d), the preamble identifies only s (4)(d). **Consequently, the only provision relied upon in the enabling words is for the imposition of ‘a special restriction of requirement’.**

Limitation on regulations that may be made as a ‘special restriction or requirement’

26 Section 45F(6) provides that, for the purposes of Part IIA (including s 45C):

(a) a “special restriction or requirement” means a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)...

27 Thus, subject to any undefined residual powers he may have under section 45C(3)(c) – not relied upon by the enabling provision – the Secretary of State was limited to imposing restrictions and requirements that may be imposed by a justice of the peace (‘JP’).

28 Section 45D(3) provides that regulations imposing a special restriction or requirement under 45C(4)(d) may not include those mentioned in section 45G(2)(a), (b), (c) or (d), which include (as (d)) that a person ‘may be kept in isolation or quarantine’.

29 Section 45G, 45H and 45I applies only to a person, thing or premises who or which is or may be infected or contaminated; and where they or it may present harm to human health. The Court of Appeal acknowledged that Parliament ‘intended the Secretary of State’ to be able to make orders other than those excluded; but eluded the fact that those orders can only be made where the above conditions are satisfied. Section 43J(1) provides that these powers may also be used ‘to make an order in relation to a group of persons, things or premises’, but only (in relation to JPs) after a judicial decision that each was or may be infected or contaminated (see ss 45J(3) to (5)).

30 There is no basis for finding (as the Court of Appeal did at para 59) that Ministers may make any restrictions of the ‘type’ that JPs may make. Ministers may only make regulations that may be made by JPs and those may only be imposed on persons, premises or things that ‘may be infected’. The ‘type’ of restrictions open to them is defined not merely by what actions may be restricted but by who or what may be subject to those restrictions. The Court of Appeal found that the words were not ‘general and ambiguous (para 68). This is correct but for the opposite reason. The

provisions expressly grant Ministers powers only over persons, premises or things that ‘are or may be infected or contaminated’.¹

31 Nor is it possible to deduce (as the Court of Appeal did) that it was a ‘necessary implication’ that ministers must have powers wider than those expressly conferred because Parliament’s intention was to ‘[give] the relevant Minister the ability to make an effective public health response to a widespread epidemic such as the one that SARS might have caused and which Covid-19 has now caused.’ (para 71). Such reasoning is the sort of ‘cart before the horse’ approach that was cautioned against by the Supreme Court in *J v Welsh Ministers* [2018] UKSC 66 [24]:

“With the greatest of respect to the Court of Appeal, this approach puts the cart before the horse. It takes the assumed purpose of a CTO [community treatment order] – the gradual reintegration of the patient into the community – and works back from that to imply powers into the MHA [Mental Health Act] which are simply not there. We have to start from the simple proposition that to deprive a person of his liberty is to interfere with a fundamental right—the right to liberty of the person. It is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights.”

32 The ‘cart’ in this case is the supposition that Parliament ‘must’ have intended to confer powers on Ministers to restrict persons other than those who ‘may be infected’ because those were the restrictions the Minister – in this case – decided were necessary. Not only is there no basis for finding that that was Parliament’s purpose, Parliament expressly limited the powers that may be exercised by Ministers to those that may be exercised by JPs; and limited those, in turn, to powers over persons, premises or things that ‘may be infected’.

The requirement to stay at the place where you live in the No. 4 Regulations is *ultra vires* the 1984 Act as it amounts to the tort of false imprisonment and is a requirement to isolate or quarantine

33 Primary legislation may not authorise conduct that would otherwise be common law imprisonment save where sanctioned by express words or necessary implication (*Morris v Beardmore* [1981] AC 446, 455; *R (Gedi) v Home Secretary* [2016] EWCA Civ 409, [2016] 4 WLR 93); and powers to impose a ‘special restriction or requirement’ exclude the power to impose a requirement to isolate or quarantine. The ‘stay at home’ restrictions amounted both to false imprisonment and to a requirement to isolate or quarantine.

34 In *R v Rumble* [2003] EWCA Crim 770, that a defendant in a magistrates’ court had surrendered to his bail was sufficient to allow a finding that he was in custody ‘even though there was... nothing to prevent his escaping.... The point is that the person is obliged to stay where he is ordered to

¹ ‘May be infected’ means that there is an evidential basis for finding that a person may be infected: ss 45G(7) 45H(7) and 45H(8) only permits JPs to make an order on the basis of evidence that a person, premises or thing is infected; see also regulation 4 of The Health Protection (Part 2A Orders) Regulations 2010 No.658.

stay...’. In *R (Jalloh) v Home Secretary* [2020] UKSC 4, the Supreme Court held that a control order that defined the place where the claimant could stay was determinative of whether the claimant had been falsely imprisoned:

The fact that the claimant did from time to time ignore his curfew for reasons that seemed good to him makes no difference to his situation while he was obeying it... he is imprisoned while he is where the defendant wants him to be.

(Para 26)²

35 If Article 5 is engaged by the requirement not to leave a place where a person is living, as the Claimants submit on grounds set out below, those restrictions are *ultra vires* as s 45G(2)(d) prevents a JP from requiring a person to be kept in isolation or quarantine. In *De Tommaso v Italy* (2017) 65 EHRR 19, the Strasbourg Court found that:

“[81] ...the requirement to take account of the ‘type’ and ‘manner of implementation’ of the measure in question ... enables [the Court] to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in a modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good...”.

36 A consideration is whether the control by the State inhibits the extent to which a person can “*have a social life and maintain relations with the outside world*” (*De Tommaso* at para 49). The Strasbourg Court has found that home curfews or house arrest are a deprivation of liberty despite the fact that ‘the authorities responsible for monitoring compliance with it were far away, which allowed him to breach it with impunity’ (*Pekov v Bulgaria* [2006] ECHR 50358/99, para 73).

37 Under the Regulations, every individual in England was required to remain at their residence save where they leave it with a reasonable excuse (reg. 5), on pain of criminal sanction. Moreover, not only could they be directed to return to the place where they are living by an officer or other authorised person (reg. 8(3)), such persons may “take such action as is necessary to enforce” the Regulation (reg. 8(1)). A reasonable officer may consider that using force is action ‘necessary to enforce’ the stay-home restriction, which they may take under Regulation 19(1).

The explanatory memorandum to the 2008 amendments and the International Health Regulations

38 As did Lewis J, the Court of Appeal relied upon the explanatory memorandum to the 2008 Act, which relied in turn on the International Health Regulations 2005 (‘IHR’). Such reliance is misplaed. Paragraphs 29 of the explanatory memorandum merely states that the amendments were intended to update out of date parts of the 1984 Act and that there is nothing... to suggest that the ‘updating’ was intended to confer new and extraordinarily far reaching powers on Ministers to interfere with the fundamental rights of the entire population. Moreover, the only “*matters that are*

² See ‘Coronavirus and Civil Liberties in the UK’ by Tom Hickman QC, Emma Dixon and Rachel Jones (https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4), 6.4.2020.

now of concern” that are referred to in paragraph 29 explanatory memorandum are “*contamination by chemicals or radiation*”.³

39 While the IHR’s reference to the need to take an ‘all hazards’ approach to dealing with public health crises was cited by the explanatory memorandum (para 30), the specific measures contemplated did not include the sort of population wide ‘lockdown’ restrictions that the Secretary of State contends Part 2A entitles him to impose. Rather, Article 18.1 of the IHR suggests only ‘advice’ to states, including placing ‘suspect persons’ under observation, quarantining ‘suspect persons’, tracing contacts of ‘suspect or affected persons’. There is no suggestion of measures restricting persons other than those who may be infected, still less the entire population or whole categories of premises.

40 The reality is that the explanatory memorandum provides little or no real assistance in relation to the issues of interpretation that arise in this case. SARS may have been recognised as a “*new threat*” but it does not even begin to follow that the statutory intent in Part 2A was to afford the Secretary of State colossal powers to restrict the liberty of the population as a whole.

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4th December, 2020

³ See paras 72-75 in ‘Were the March 2020 lockdown restrictions lawfully imposed?’ Emmet Coldrick, barrister, 23 September 2020 (https://drive.google.com/file/d/1CDn2n_uHil44Hk3T5ggLwxfk-q2xRpeC/view), an article summarised : <https://ukhumanrightsblog.com/2020/09/25/were-the-march-2020-lockdown-restrictions-lawfully-imposed-part-2-emmet-coldrick/>.