IN THE QUEEN'S BENCH DIVISION **Claim No. CO/1860/2020**

THE ADMINISTRATIVE COURT

AND IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS) (ENGLAND) REGULATIONS 2020;

AND 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; *[(3) AB a child by his litigation friend CD)]*

Claimant

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

First Defendant

- and –

THE SECRETARY OF STATE FOR EDUCATION

Second Defendant

SUPPLEMENTARY GROUNDS

INTRODUCTION

1 Since the claim was issued, there have been significant developments:

(1) The Regulations have been amended twice, on 1 and 12 June 2020;

(2) The Defendants have clarified their position as to the means by which schools closed for all but the children of key workers. Notwithstanding announcements by the Prime Minister and the First Defendant on 20 March 2020 that schools 'would close' and 'would close their gates' and that all maintained and independent schools did just that (save for limited provision for 'key-workers'), the Second Defendant asserts that this was a 'request'. Since March, the Government has announced that a small proportion of primary-school children can return to school. But, while small numbers of them have done so, most cannot attend school at all, those that can may do so only on a limited basis and millions of children remain without any effective education at all.

(3) HM Government ('the Government') has published the SAGE minutes up to 21 May 2020 and a considerable number of reports presented to SAGE, notwithstanding their refusal to disclose the same to the Claimants after their request made in the pre-action protocol letter

('the PAP letter'); a step that allows the court to scrutinise the Defendants' assertion that it acted as it did on scientific advice.

(4) The passage of time has led to the following developments:

(a) A substantial reduction in the number of deaths per day from Covid-19 ('C19') in England;

(b) A substantial reduction in the number of confirmed cases of SARS-CoV-2 ('the coronavirus' or 'the virus', that causes C19 in some cases) in England, notwithstanding a substantial increase in testing;

(c) The continued and substantial easing of 'lockdown' and other restrictions on schools and businesses across Europe; and

2 These Supplementary Grounds set out the Claimant's grounds for review of the Second Defendant's closure of schools and the Regulations as they have been amended, in the light of factual developments since the claim was issued. In particular:

(1) The continued application of the 'five tests' which continue impose absolute conditions before any restrictions can be reduced, fettering the First Defendant's discretion;

(2) The irrationality of the Regulations as they have been amended (supplementary to Ground 2C).

(3) The effect of the evidence of the scientific advice to the Government by SAGE, published since issue, on the Government's case that the court should apply an extremely strict 'margin of appreciation' to its decisions, notwithstanding the severe interferences with fundamental rights. (Supplementary to Ground 3.)

(4) The interferences with fundamental rights that remain in place notwithstanding the changes to the Regulations. (Supplementary to Ground 3.)

(5) The Claimants' position in respect of the school closures in the light of the Second Defendant's position. (Supplementary to Ground 3.)

FIVE TESTS AND THE THREAT TO RE-IMPOSE RESTRICTIONS
(Grounds 2 and 3)

3 The Claimants rely on the evidence of statements by the Prime Minister, the First Defendant and other members of the Cabinet made since the claim was issued. These provide further evidence that, as previously submitted (Grounds in paras 53-58) compliance with the 'Five Tests' are not merely " 'yardsticks' against which the effectiveness, and continued need for the measures, could be assessed" (AoS para 46) but are absolute bars to the reduction of the Regulations.[1]

[1] It is noted that the AoS puts inverted commas around "tests" (eg at para 46), despite that being the term the First Secretary of State, the Prime Minister and the First Defendant have always used.

4 Moreover – and significantly – the Government has expressly threatened to re-impose restrictions in the event the conditions are no longer met (MG4 2.8). Again, this threat would be effected only taking into account that one or more of the Five Tests were no longer met, ignoring the wider considerations as to whether such a measure would be proportionate.

5 The Defendants' position in the AoS thus contradicts not only the public statements of the Prime Minister and First Defendant highlighted in the Grounds but a number of statements made since. All submissions in respect of Ground 2A – which impact upon relevant considerations (Ground 2B), rationality (Ground 2C), 1984 Act proportionality (Ground 2D) and proportionality under the Convention (Ground 3) – remain live.

IRRATIONALITY OF REGULATIONS AS AMENDED
(Ground 2C)

6 The second basis on which the Claimants maintain that the Regulations are irrational because of their inconsistent application and the impossibility of enforcing them, either at all or fairly and uniformly across the population.

7 Regulation. 6 as amended prevents persons from staying overnight away from their houses save in limited circumstances: replacing a form of 'house imprisonment' with a form of 'overnight curfew'. There is no rational basis for this. Individuals can meet potentially unlimited numbers of persons during the day (providing that they move between gatherings of no more than six people), can shop almost without restriction and can attend another household (although only outside) but cannot stay overnight. Social distancing guidance is, of course, only that.

8 In respect of reg. 7, Mr Gardner observes at para 3.9:

> *'it remained a criminal act under the Regulations for two people not of the same household to gather inside a private property for any purpose not covered by the exceptions in reg 7. Thus, for example, a person could not lawfully invite a friend or family member over for a coffee at their house if the visitor and host both sat inside the house – even in different rooms. But up to six people could lawfully gather on a small roofless balcony outside someone's flat for drinks since that would count as being "outdoors".*

9 The regs. 7 and 7A attempt to micro-manage day to day interactions of individuals through legislation, including in their own homes. They are practically unenforceable, will not be understood by many if not most of the public and can have little rational impact on the Defendants' stated objective of reducting viral spread, even if proportionate. In particular, for example:

(1) They may only be enforced by intrusive surveillance, by law enforcement agencies or neighbours of households, impossible on any meaningful scale would be possible and an extraordinary intrusion into private life were it to be done;

(2) While it would be illegal for a person to invite a new partner or friend to stay overnight, it is lawful for a prostitute to attend a person's house for the purpose of trade (and prostitution and the advertising of it is not unlawful);

(3) Estranged couples can only link with one other household;

(4) This also applies to house-sharers with different families and friendship groups;

(5) It is impossible to see how a court (as it may have to for the regulation to be enforceable) could decide whether households were linked;

(6) There is no provision by which a household can 'unlink' and then link to another household: so, for example, person "O" and their children might decide to become a linked household with the 6 people in household "X", they have an argument and O decides to not to be linked with household X any more; under regulation 7A(5) neither household can now be linked to any other household – there is no time limit for that ban on further linkage.

NEW SCIENTIFIC EVIDENCE SINCE ISSUE AND NEW EVIDENCE OF ADVICE FROM SAGE (Grounds 2D and 3)

10 First, the Court will now be able to consider the advice given by SAGE as the Government published the minutes soon after refusing to disclose them to the Claimants. As Mr Gardner points out in his witness statement (MG4 para 4.3), we now know that SAGE did not advise to implement 'lockdown' restrictions at any of its meetings before the Regulations were imposed on 23 March 2020. The Defendants' fail to cite the scientific evidence that supposedly guided the Government's advice to which they ask for a 'margin of appreciation'.

11 Secondly, since the claim has been filed the Government has much more evidence of data and empirically based scientific research that any responsible and rational government would take into account in determining whether to the continuation of the restrictions is proportionate. The updated data of deaths, infections and the impact on hospital capacity is considered above and has obvious relevance to the proportionality of the continuation of restrictions.

CONTINUED INTERFERANCES WITH FUNDAMENTAL RIGHTS BY THE AMENDED REGULATIONS (Ground 3)

Article 5: deprivation of liberty

12 The Regulations continue to deprive individuals of their liberty since reg. 6 was amended by imposing what is – unless a person has a 'reasonable excuse' – what operates as a 'home curfew' by preventing any person from staying away from his or her residence. The Claimants continue to rely on paras 135-154 of the Grounds (#66-#73) in respect of the previous and current reg. 6. The Claimants rely, in particular, on the finding by the Strasbourg Court that home curfews 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)'[2] and the analysis of the other authorities in the Grounds, albeit with reference to circumstances of 'home curfew' rather than 'house arrest'.

Article 8: private and family life

13 For reasons set out above, in relation to rationality, it remains *unlawful*, save with a 'reasonable excuse' even to stay overnight with one's wider family or friends. So, while a grandparent living alone can 'link' himself or herself to one of his or her children's households and stay with them, two grandparents living together cannot. Moreover, this effectively prevents any actual interraction between family or friends who live long distances away in England and who may only visit each other if they are able to stay overnight.

Article 9: religious and philosophical belief and practice

14 The Regulations have been amended to allow a person to attend a religious building for private prayer but for no other reason. Thus, Muslims may not attend communal Friday prayers, Christians (including the Second Claimant) may not attend services or receive the sacraments, Jews may not attend Shabbat services and so on.

Article 11: assembly and association

15 The original Regulations did not restrict gatherings in private places; and the restrictions on meetings in public places made an exception for the purposes of work. However, as individuals were not permitted (under those versions of the Regulations) to leave their houses save for a reasonable excuse, not including gatherings at another person's residence, it is likely that the restrictions prevented (for example) political meetings at a person's home. They certainly restricted any political protest that was a gathering of more than two people; and any protester at

[2] Grounds, para 140, #67/#68

Speakers Corner (or anywhere else) likely to be considered to encourage a gathering was likely to be considered to have been in breach of the Regulations – as Piers Corbyn was when he was arrested there on 16 May 2020.[3]

16 Regulation 7 now prohibits any gatherings at a *private* as well as public place of more than six people and only if they gather in an outside space; and so any political meeting of more than six people could not take place and no (dry) gathering could were it raining. All political protests remain proscribed, over two months after the German Constitutional Court found such restrictions to be unconstitutional.

17 A relevant consideration regarding the proportionality of these restrictions is the fact that they have consistently been ignored by thousands of people and unenforced by the police for four weeks, since the start of the Black Lives Matter protests in the weekend of 30/31 May 2020. Aside from the fact that the protests over three weeks ago have led to no second 'wave' of infections (undermining the scientific basis for the Regulations), the fact that police forces have decided (rightly and inevitably) that it is impossible to prevent peaceful protests are an important consideration in determining whether such an unprecedented and worrying restriction on an ancient freedom fundamental to the operation of a liberal democracy was or could ever be proportionate.

Article 1 of Protocol 2: deprivation of property

18 The Regulations continue to impose restrictions on economic activity that would be unprecedented even were they were not previously even more restrictive. Aside from still preventing many premises from re-opening (all listed in the current iteration of Schedule 2, which includes almost all of the hospitality industry), it is artificial to consider the economic impact on these businesses without taking into account the effect they have on the economy more widely. With respect to the First Claimant, Mr Gardner gives evidence on the hugely detrimental impact on the turnover and profitability of the airline business the First Claimant owns wholly by the restrictions preventing anyone from leaving their house – or, now, staying overnight in another property. He also gives evidence of a huge impact on the turnover and profitability of his PR company due to the economic collapse caused by the Regulations as a whole. The value of companies is at least detrimentally affected by a reduction in profitability and so this evidence is easily sufficient to establish that the First Claimant is a victim of the deprivation of property by the Regulations.

[3] MG1, para 6.34, #254; Tab D3.19 #1028-#1029.

SCHOOL CLOSURES
(Ground 3: Article 2 of Protocol 1 to the Convention)

The Government's direction to close schools and its effect

19 The Claimants' challenge to the closures of maintained and independent schools was necessarily constrained by the fact that the Government had failed, by the date of issue, to clarify its case as to under what authority they had been required to close, requests to explain its position having been made and been unanswered (MG4, para 5.4). The Defendants have now clarified that not only was no order made under Schedule 16 of the Coronavirus Act 2020 ('the 2020 Act'), despite that power being made available in March 2020, no order or direction was made under any statute; and they assert that the Second Defendant merely made a 'request' that schools should close other than for the children of key-workers (AoS paras 7, 74) or that they were 'asked' to (AoS para 73).

20 A factual account of the closures is set out in the fourth statement of Michael Gardner, (paras 5.1 to 5.4). In fact, the Prime Minister and the Second Defendant announced that schools 'would close' and 'would close their gates' save for vulnerable children and children of key workers (comprising approximately 10% of the school age population). This was stated to be a direction and was treated as such. On 18 March 2020 the schools were told they 'would' close after 20 March 2020 and they duly did. Despite the Government expressing the intention that key-workers would be able to send their children to school each day (and thereby be able to go out to work) there was minimal onsite provision for them (MG4, para 5.5). Official Government figures show that school attendances dropped to almost nothing after the announcement of closures.

21 Mr Gardner highlights the findings of a damning investigation into educational provision by UCL Subsequently, while some maintained schools provided limited online classes for children, most did not (MG4 para 5.7). An estimated 700,000 children[4] do not have access to the internet (MG4 para 5.8) The Government's attempts to provide 4G routers for those children did not start until two months after schools had closed and only a fraction of the required numbers of routers have been delivered (MG4 para 5.8).

22 Particularly concerning is the fact that over one fifth of all pupils, over 2 million children, have done no schoolwork or under one hour a day, children disproportionately within the most deprived families.

[4] https://www.theguardian.com/technology/2020/jun/15/uk-children-reliable-broadband-coronavirus-lockdown-education

23 If schools remain closed until the end of the summer term, children and teenagers will have been deprived of an onsite contact education (and some of any education at all) for one and a half terms. All GCSE and A'Level examinations were cancelled and students are to be given grades based on their teachers' predictions, with the ability to undertake exams in September if they wish. These courses last for six terms and so any teenagers undertaking them will have been deprived of contact lessons (and some of any lessons) for one quarter of their entire course. An entire generation will be marked by a lack of education relative to the rest of the future working population; and particularly teenagers over the age of 14.

24 While the Government announced that schools would provide limited provision from 1 June 2020, this has had limited impact. While some primary school children in some age groups have been able to return, most age groups have not been and no secondary school children have returned save for limited provision for Years 10 and 12. As of 11 June, just 9.1% of the nine million primary and secondary school pupils were attending school (MG4 para 5.5).

25 Moreover, the guidance to schools imposing social distancing and requiring closures will have the effect that at least half of any particular class will not be able to attend at any given time and will reduce the education to be provided

26 The Defendants raise four defences to the claim relating to school closures: standing, delay, that the claim has become 'academic' and that there is no arguable breach (AoS para 7). These are addressed in turn below. First, the Claimants set out their position about the nature of the Government's direction to close schools.

The direction and its reviewability

27 The suggestion that schools were 'requested' or 'advised' to close is (to use a phrase favoured by the Defendants) absurd. The Prime Minister and the Defendant announced, in press-conferences at peak viewing times intended to be watched by the whole nation, that they would 'close their gates'. They did so in circumstances where the heads and governing bodies could reasonably have known that the Secretary of State had the power to close schools under Schedule 16 to the 2020 Act. As a result of that announcement, all maintained schools closed to all but 'key-workers', which provision was extremely thin. All independent schools closed. The effect of these announcements was identical to an order being made clothed with statutory authority. They were a direction, not a request.

28 Even if the announcements were only 'requests', they amounted to the strongest form of 'guidance', particularly in view of the Government's assertion that closures were necessary to

resist viral spread in circumstances where it was making the (now discredited) claim that the virus would otherwise kill 500,000 people. Since 1 June 2020, the reverse of the closures has been limited, over two million children remain with almost no education and it is extremely limited for those with access to schools, all as a result of directions or (at least) guidance by the Government.

29 Guidance has long been held capable of being reviewed judicially (*Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273 and many other cases). In this case, the announcements by the Prime Minister and Defendants were at their lowest guidance to close to all pupils save children of key-workers and vulnerable children.

Standing

30 An application has been made to join the Third Claimant. He undoubtedly has standing. He does not own his own laptop and has to share it with his mother, who in turn must use it to work. He is given extremely limited provision of education outside his school hours (MG3 para 2.10).

31 The Second Defendant relies on the judgment of *Sahin v Turkey* (2007) 44 EHRR 5), in which it was said that restrictions must impair the 'very essence' of an education. However, he accepts (as he must) that the Court is bound by the House of Lords judgment in *Ali* and his case is inconsistent with the part of the judgment (para 24) from which it quotes. As Lord Bingham put it in that paragraph:

> *There is no right to education of a particular kind or quality, other than that prevailing in the state…. The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for* ***such pupils****?*".
>
> (Emphasis added)

32 In an assenting judgment, Lord Hoffman found that a child would be deprived of his education if he did not receive 'the basic minimum of education *available under the domestic system*' (para 57). That case and other Strasbourg authorities in which claims were not upheld concerned children denied the ability to attend certain schools or unable to access particular educational provision but who were able to attend regular schools. And in those in claims that were upheld (such as *Timishev v Russia* [2005] ECHR 55762/00, cited in para 55 of *Ali*) a child had not been permitted to attend any school.

33 That minimum is the form of education that the state provides to all children that is made available by law in normal circumstances: full school days, five days per week with reasonable holidays.

Children have a right to be taught a National Curriculum that gives them a thorough grounding in all relevant subjects up to age 14, a thorough GCSE course teaching English, maths, science and other academic subjects. Education is now compulsory up to the age of 18 and teenagers between 16 and 18 have the right to an academic or vocational education of their choice. That is the '*basic minimum*' education available to '*such pupils*' '*under the domestic system*' that is '*prevailing in the state*'.

34 The Second Claimant has a school age child who has been completely deprived of any access to taught classes until June and has since been limited to two classes per day (see Witness Statement of Lauren Monks at #1194. and the Court is asked to find that she may bring an action on his behalf, by analogy with relatives of deceased victims of breaches of Article 2 of the Convention (*Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, Grounds para 242(6)).

35 The Defendants have not taken issue with the fact that the Court, once it finds that a claimant has standing to challenge interferences with his Convention rights caused by a statute or public law decision that has much wider effects, must consider the proportionality of the measures taken on the whole of the population affected. To argue otherwise would be absurd – a court could order the re-opening of one Mosque (if, for example, it upholds the live claim in *Hussain* to which the Defendants refer) or one school and no others. It is beyond question that there are many children who, through lack of access to the internet or equipment or lack of minimal educational provision, continue to be deprived of their education. This is an important consideration if the Court finds that the Second Claimant (through her son) *[or the Third Claimant]* did or would have had standing but do no longer.

Alleged delay

36 The Claimants set out their position on delay comprehensively at paras 15-23 of the Grounds (#22-#25), which are repeated. The proposed challenge to the denial of educational provision was raised with the Defendants within the PAP letter. While the Defendants took issue with the 'victim' status of the First Claimant in that issue, the Second Claimant (who has a school aged son deprived of his education) was joined, without objection, just after the claim was issued and before it was served.

37 The Defendants failed to answer reasonable questions as to how they explain the legal basis of the closure of a fundamental and essential public service at any point until the filing of the AoS, in spite of the express announcements by the Prime Minister and Defendants supposedly 'closing' schools. This has meant that it is not until now that the Claimants can address that position.

38 The Defendants' reliance on delay in response to a challenge to the interference with a Convention right is at variance with their failure to rely on delay in relation to Convention challenges in their reply to the PAP letter: see para 15 and 18, in which they rely on delay expressly only in respect of the challenge to the *vires* of the Regulations under Ground 1 (#929). The challenge to the closures of schools was expressly made within the PAP letter and was made on Convention grounds (para 39(7), #893). In its response to the PAP letter, not only did the Defendants acknowledge a challenge to the deprivation of education, it expressly accepted that A2P1 was engaged by the steps it had taken (para 11, #928) and made no attempt to address the means by which schools had been closed in its response to that letter, which it did only by asserting (wrongly) that A2P1 is a 'qualified right' and justifying the proportionality of the closure of schools together with all other rights.

39 The Government now dispute that the effect of reg. 7 was to require the closure of all schools because they are private not public places (fn 36 at p 21) and that the original iteration of reg. 7 barred gatherings only in public places (they were amended on 1 June 2020 to ban gatherings in private and public places but with a much longer list of exceptions including for educational premises).

40 It was reasonable of the Defendants not to raise delay in respect of any Convention grounds and their subsequent reliance on it in relation to this (and perhaps other) Convention grounds is unfounded. Not only is the interference ongoing, but restrictions and directions/requests and/or guidance that might have been proportionate in March may not be at a later stage – because of the greater knowledge of the virus, particularly as it relates to children, the changing scientific advice, the much lower death and infection rates or for any other reason.

41 The assertion that there would be prejudice to 'good administration' is advanced on the basis that 'those involved in the education system [must be] clear where they stand' after they have 'acted on' a 'request' by the Second Defendant (AoS, para 81). What that actually means is that a claim cannot be advanced on behalf of children denied an education because, if successful, it would reveal that children, parents and teachers they would have 'acted upon' and been 'clear' about 'instructions' depriving the former of fundamental rights. Given that the Government claims to be attempting to re-open schools in any event, this is a nonsensical argument.

Breach of the right under Article 2, Protocol 1 to the Convention

42 As set out in the Grounds, A2P1 rights are negative rights unqualified by their relationship with other rights. If *[the Third Claimant and]* other children have been deprived of the minimum education to which they are entitled 'under the domestic system' this element of the claim must

succeed. This is not a case concerning the right to be educated in accordance with philosophical or religious convictions (protected by A2P1) or where there is any (related) interaction with the right to private or family life or religious conviction. The actions of the Prime Minister and Defendants through their directions or 'requests' have deprived millions of children of the minimum education to which they are entitled and hundreds of thousands of children of any education at all.

43 It is no defence that the deprivation has been proportionate or that it has been temporary – the only circumstances in which the deprivation of education may be permitted is where a member state registers a derogation with the Council of Europe under Article 18 and that derogation is upheld.

44 The Second Defendant sets out 'examples' of steps to mitigate the deprivation he has caused. At best, they are poor attempts to mitigate that denial that cannot (on any view) have assisted all children, can only have had a limited effect on most children and appear to do little more than keep children occupied with vaguely 'educational' projects, rather than providing them with the education in the National Curriculum of which they are being deprived. In general, they fail to deal with two fundamental problems with the requirement of parents to home-school their children (either in conjugation with online teaching, if they are lucky, or by using 'online resources'), that no steps can mitigate:

(1) Few parents are educated to the standard of teachers and almost none can reasonably be expected to be educated to the standard of specialist subject teachers for <u>all</u> teachers of the range of subjects taught at secondary school; and

(2) In most households both parents work and yet they will be expected to educate their children (particularly if no online classes are provided) while both work – most during normal working hours during which their children must be educated.

It is no answer to say that parents have the right to home-school their children. This is a matter of parental choice but parents are only likely to choose to do so if they consider themselves able to provide a thorough education for their children, they are subject to inspection and (most importantly) the right to do so does not displace a child's right to be educated at school.

45 Dealing in turn with the Second Defendant's 'examples' of mitigating steps taken (AoS para 74), using like sub-paragraph letters:

(a) Online resources are of no use for children without access to the internet or any computing facilities and of minimal use to children who *[(like the Third Claimant)]* must share laptop

or other computers with other members of the family (either other children also needing an education or parents working from home). The Second Defendant fails to set out how such children can have 'educational activities' created 'in a range of formats'; and this will obviously fail to provide children with an education of any substance, let alone the National Curriculum which is their minimal entitlement.

(b) The Second Defendant appears to expect that online guidance to parents is sufficient to replicate the extensive specialist education and experience of teachers.

(c) No examples are given of the educational provision of the BBC, let alone how it provides education in each subject for each year group studying the National Curriculum.

(d) No attempt is made to explain how the 'video lessons' (presumably not VHS) have been distributed to schools or parents or what proportion of schools or children have been able to access them.

(e) The lockdown restrictions are estimated to cost the country £2.5 billion per day and the Government is expected to borrow over £300 billion, which will be paid back by the children whose education it is denying. Yet it can only say that it has 'committed' (but presumably not spent) 'over £100 million' to 'support remote education'. Embarrassingly, the AoS dated almost three months after the closure of schools can only say that it has 'ordered' 200,000 laptops and tablets – a pitifully small number considering the number of children who do not have their own laptops *[(including the Third Claimant)]* or access to any computer.

(f) Given the greatly increased use of telecommunications from residential premises as a result of the restrictions, the Education Secretary's unparticularised attempts to 'work with' providers to 'make it easier' for families to access mobile data does little to inspire confidence.

CONCLUSION

46 In the premises, there remain live and important challenges to the Regulations under each of the Grounds and in respect of each Convention on which Ground 3 is brought. The question of whether any challenges that might be found to be academic should be given permission is addressed elsewhere.

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Claimant

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First Defendant

- and –

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Second Defendant

CLAIMANTS' PERMISSION DOCUMENT

References to the Claimants' Judicial Review are as, for example, #35

INTRODUCTION

1 The Claimants apply for permission to judicially review the lawfulness of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended) ("the Regulations") and the order/s, alternatively direction/s, and guidance that have caused the closure of schools for the vast majority of children in England and which continue to deprive the great majority of children of an education.

2 The Claimants continue seek permission to challenge all provisions of the existing and former Regulations by way of judicial review.

3 The Court has the discretion to address an issue that has become academic in relation to issues of law applying to facts (or regulations) that no longer affect an individual claimant but are of general public importance (*R v Secretary of State for the Home Department, ex p Adan* [1999] 4 All ER 774 at 781–782, CA, per Lord Woolf MR; *Abdi v Secretary of State for the Home Department* [1996] 1 All ER 641). In respect of those provisions that have been amended, it is submitted that

review of those measures is not academic because of the threat to re-impose them and that, even if a challenge has become academic, the issues to be determined in such a review are a matter of general public importance.

4 This document, filed in accordance with the Order of Lewis J dated 16 June 2020, addresses, by reference to paragraphs in the Statement of Facts and Grounds ('the Grounds') and the Supplementary Grounds, the grounds on which the Claimants seek to challenge a particular provision or decision. It does so by reference to Grounds 1, 2A-2D and 3 of the Grounds. Where the justiciability of the consideration of any one Ground is challenged, either because it is said to be academic or because none of the Claimants have standing, that issue is addressed in respect of each Ground in turn. The question of delay (save in respect of schools) is addressed in the Grounds (paras 15-23, #22-#25).

5 Notwithstanding that the closure of schools was challenged in the PAP letter and the Grounds, the Defendants failed, until they filed the Acknowledgment of Service, to clarify the basis on which schools (in the Second Defendant's and Prime Minister's words) were required to 'close their gates' for all but the children of key workers. The Claimants have thus had to set out their position in relation to schools in Supplementary Grounds (paras 19-45), which also set out the grounds on which review is sought of amended and/or new restrictions in the Regulations. The Supplementary Grounds address the question of standing and alleged delay in relation to the challenge relating to schools. Whether that challenge is academic is addressed below.

GROUND 1

6 This Ground is relied upon for the reasons set out in the Grounds (paras 26-48, #26-35), which apply equally to any restrictions on the general population and on businesses.

7 Paragraphs 47(4)-(6) of the Grounds (#33) apply particularly to the old version of reg. 6 by which persons were required to remain at home without reasonable excuse. Paragraph 47(5) should be read in conjunction with para 47(9): the 1984 Act does not allow for regulations providing for the power of arrest. The Claimants also ask the Court to review the *vires* of the new reg. 7A under the 1984 Act (as well as under the other Grounds).

8 Insofar as these sub-paragraphs may apply only to the original version of reg. 6, it is in the general public interest to review them for reasons set out in paras 14-17 below in respect of Article 5 (under Ground 3).

GROUNDS 2A-2C

9 **Grounds 2A and 2B** are closely connected as the alleged fettering of discretion (2A) led to the failure to take into account relevant considerations (2B). They are relied upon for reasons set out in the Grounds at paras 51-72 (#36-#42); and they are live and relevant challenges, as submitted in paras 3-5 of the Supplementary Grounds.

10 **Ground 2C** is relied upon for reasons set out in paras 73-79 of the Grounds (#42-#46) and remains live as submitted in paras 6-9 of the Supplementary Grounds.

GROUNDS 2D AND 3

11 These are considered together as they are both challenges to the proportionality of the Regulations (under s 45D of the 1984 Act and the Convention, respectively).

12 **Ground 2D** is set out at paras 80-92 of the Grounds (#46-#51). The significant evidential development has been the release of the SAGE minutes, revealing that the Government was not advised by SAGE to impose a 'lockdown', and new data and the decline in infections and cases that has occurred since issue, as submitted in paras 10 and 11 of the Supplementary Grounds with reference to the fourth witness statement of Michael Gardner.

13 The general submissions made in respect of **Ground 3** in paras 93-134 and 197-231 of the Grounds (#51-#66 and #85-#97) are maintained; as are the submissions with regard to the standing of the Claimants as 'victims' of breaches of Convention rights, pursuant to s 7 of the HRA at paras 232-244 (#97-#101).

14 The challenge under **Article 5** of the Convention (paras 135-154, #66-#73) is maintained in full in respect of the original version of reg. 6 (and as it was amended to require persons to remain at home, rather than not to leave their residence, without a reasonable excuse), even if the Court finds it to be academic. It is difficult to see a greater public interest than a review of such an extraordinary restriction as one confining the entire population to their homes, one alien to any reaction to any public health crises ever before imposed.

15 As set out in paras 3-5 of the Supplementary Grounds, the First Defendant and the Prime Minister have made express threats to re-impose restrictions since removed in the event that any one of the 'Five Tests' were no longer met (and – according to their express statements – irrespective of the wider proportionality test they should apply). It is therefore of real and not merely academic importance if those restrictions were unlawful. This is all the more so as Article 5 is an unqualified

right: if the Court finds that it was breached by the original versions of the Regulations, the future imposition of such restrictions would be unlawful (absent a lawful derogation from the Convention) irrespective of whether the conditions at the time might make it proportionate.

16 So far as the current version of reg. 6 is concerned, the Claimants rely on para 12 of the Supplementary Grounds in support of their submission that the restriction preventing a person from staying overnight amounts, according to the authorities relied upon in the Grounds, to an 'overnight curfew' and thus a deprivation of liberty contrary to Article 5.

17 Further, for reasons set out in para 14 of the Permission Document, it is submitted that there is an overwhelming (or at least sufficiently strong) public interest to examine the proportionality of the extraordinary restriction on liberty imposed by the original iteration of reg. 6 and the second version, which prevented persons from remaining outside, rather than leaving, their residences without a reasonable excuse.

18 **Article 8** is relied upon on grounds set out in paras 155-159 of the Grounds (#73-#74). If the Court considers that the original restrictions in reg. 6 did not engage Article 5, it is a matter of general public importance that the proportionality of their exceptional restrictions on Article 8 rights be reviewed. The current restrictions continue to impose onerous and unprecedented restrictions on the circumstances in which close families and friends may to interact or (where they live too far away to see relations or friends without an overnight stay), even see them at all, as set out in para 13 of the Supplementary Grounds; and the challenge to their proportionality, also in view of the submissions made about their rationality in the Grounds and Supplementary Grounds, is at least strongly arguable.

19 **Article 9** is engaged almost exactly as it was under the original Regulations, the only change being that private prayer inside a religious building is now permitted. This is addressed in paras 160-168 (#74-#76) and in para 14 of the Supplementary Grounds.

20 **Article 11** is also engaged almost exactly as it was and is addressed in paras 169-178 of the Grounds (#77-#80) and paras 15-17 of the Supplementary Grounds (which address the changes to the Regulations).

21 **Article 1 of Protocol 2**: the Claimants rely on paras 185 to 190 (#82-#84) of the Grounds in respect of the test – that the Claimant meets – to be applied in deciding whether a person or company has been deprived of its property. That is, has or might the goodwill value of the business be affected by proposed or actual legislation (*Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408, Grounds para 185, #82). This test is ignored or misapplied by the Defendants by their assertion (not backed by authority) that A1P1 is not

engaged where Regulations affect only the 'control of use of property'. Where that 'control of use' affects or may affect the goodwill value, the test is of course met. Indeed, it is a surprising argument to suggest (in the case of restaurants, for example) that the prevention of them trading *at all* could not engage rights protected by A1P1.

22 The First Claimant's standing and 'victim status' is addressed in para 236 of the Grounds (#98-#99). The Defendants state, wrongly, that the Claimants 'conceded' that the First Claimant was not a 'victim' of a deprivation of his property (AoS para 77). In fact, paragraph 236 that they cite submits that a claim can be brought by a natural person as a 'victim' where he is the sole shareholder of a company that has been deprived of its property; and that the First Claimant is a 'victim' under A1P1.[1]

23 Further, the grounds for the Strasbourg Court finding (in *Ankarcrona*) that the shareholder could be a 'victim' where his company has been deprived of its property are that there was 'no risk of differences of opinion among shareholders… and a board of director'. The First Claimant has a majority and controlling interest in his PR company. Thus, as there is no risk of such a difference of opinion he also has 'victim' status for the deprivation of property (through the reduction in its goodwill value) of that company.

24 **Article 2 of Protocol 1**: the Claimants' position in respect of education is set out in paras 191-196 of the Grounds (#84/#85) and in paras 19-45 of the Supplementary Grounds. The Supplementary Grounds also address the question of delay and the standing of the Second Claimant *[and (if he is joined) of the Third Claimant]*.

25 The decisions, 'advice', 'request' and/or 'guidance' that led to schools closing for all but a tiny number of children is not academic for *[the Third Claimant or]* for the son of the Second Claimant. They are denied the minimum provision of education that, but for the direction by the Government and its guidance that is the subject of the challenge, they would have been entitled to by law.

26 Insofar as that might be found not to be the case, *[because the Third Claimant has access to two contact days of teaching,]* it is far from academic for the majority of children who are deprived of any contact days at school; and particularly for over two million children who have been without any more than one hour's education per day since March, either because of the lack of any internet or IT facilities, disengagement due to the absence of contact or otherwise (all of which are evidenced in MG4). In this case, millions of children continue to be denied an education

[1] *Bank Mellat v HM Treasury (No 3)* [2017] 2 All ER 139, at paras 27/28; *Ankarcrona v Sweden* (App No 35178/97) (27 June 2000, unreported).

and most others are denied the minimum standard of education to which they would normally have a statutory right. There is a very a great public interest in determining whether the Government's deprivation of education of children since March and the continued deprivation of education from most children was or is lawful.

DISCLOSURE

27 At para 245 of the Grounds (#101/#102) and section 8 of the first witness statement of Michael Gardner (#257-#265) the Claimants make an application for disclosure of the minutes and supporting documents of SAGE. These have now been published up to May 2020 but disclosure of the remaining minutes to date is still sought on the grounds there set out. While it is accepted that a short period between meetings and publication will be needed for clarification of the accuracy of the minutes, it is not accepted that there is any reason for any more protracted delay.

REMEDIES

28 The Claimants continue to seek to quash the Regulations in full.

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23 June 2020