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Your ref: **MG/DOL/0041/00001/WARA**
Our ref: [redacted]

14 May 2020

Dear Sirs

THE HEALTH PROTECTION (CORONAVIRUS) (ENGLAND) REGULATIONS 2020: THE PUBLIC HEALTH (CONTROL OF DISEASES) ACT 1984

We are in receipt of your letter before claim dated 30 April 2020. This response is provided in accordance with the requirements of a judicial review pre-action protocol.

We do not repeat our correspondence of 6 and 8 May 2020 which has already been exchanged in relation to the timing of this response (which complies with the 14 day time frame in the protocol).

Proposed Claimant

Simon Dolan

Proposed Defendant

The Secretary of State for Health and Social Care

We agree that were proceedings to be issued, the proper defendant would be the Secretary of State for Health and Social Care as the relevant representative of Her Majesty's Government. The matters under challenge are decisions of the Government as a whole, and references in this letter are accordingly to the Government.

The Defendant may be contacted via the Government Legal Department ("GLD") at the following address:

[redacted]
Constitutional and Social Care Public Law Team

[redacted]

Government Legal Department
102 Petty France, Westminster, London, SW1H 9GL
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Reference Details

Our reference: [redacted]

Please cite the above reference number on all future pre-action correspondence. [redacted] is the GLD pre-action contact on behalf of the Defendant.

Details of the Decision being Challenged

1. Your letter seeks to challenge the *vires* of the Secretary of State for Health and Social Care to make Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (together, "the Regulations"), in exercise of powers under Part IIA of the Public Health (Control of Disease) Act 1984 ("the 1984 Act"), and the compatibility of the Regulations with various rights set out in the European Convention on Human Rights ("the Convention") and incorporated into English law through the Human Rights Act 1998 ("the HRA"). It appears from your letter that the challenge is to the entirety of the Regulations.

2. Your letter further proposes to challenge the decisions of the Secretary of State for Health and Social Care not to terminate, or otherwise revoke, the Regulations subsequent to their coming into force on 26 March 2020.

3. None of your proposed challenges are arguable. They will be defended and permission opposed.

The Context to the Regulations

4. We note the following significant points of context in relation to the Regulations and the COVID-19 ("the virus") global public health pandemic.

5. First, the Regulations – and the amendments to them – were approved in accordance with the terms of the 1984 Act by the House of Commons on 4 May 2020 and by the House of Lords on 12 May 2020, without a division. The debate and approval by Parliament took place in the light of public commentary about the *vires*, the proportionality and the policy justifications for the Regulations and restrictions contained within them. Parliament was thus aware of the arguments your client raises, but approved the Regulations nonetheless.

6. Second, the entirety of the United Kingdom is presently affected by the public health pandemic caused by the virus. The extremely serious risk to life and health posed by the virus has obliged the Government to take unprecedented, vital steps to limit the ability of the virus to spread, and to reduce the burden on the National Health Service. Both of these aims seek to protect and reduce the risk to the lives of the population, in circumstances in which tens of thousands of people in England have died having tested positive for the virus. Your letter does not take proper account of the severe risk to life the virus poses, both in the United Kingdom and worldwide.

7. Third, the pandemic is a global one. Each country affected is making its own judgments as to the most appropriate measures to reduce the spread of the virus and to protect life, based upon the particular circumstances of the particular country at the particular time. The Regulations are similar to the restrictions imposed by a wide variety of countries, albeit

that no two countries share precisely the same context. The reference in your letter solely to Sweden is inexplicable in this context; as §52 of your letter recognises, the Swedish approach is viewed as "*at odds with the rest of the continent*". The Government's approach and its continual review of the Regulations is informed by the approaches of other countries and international evidence. However, care is needed when using data from other countries as it is often collected and analysed in different ways. Those approaches cannot determine the most appropriate action for the public health position and the risk to life in England.

8. Fourth, whatever the extent of scientific debates relating to the virus, there is no dispute that it is highly contagious and particularly easily spread in gatherings of people. The basic principle underlying the restrictions in the Regulations is to reduce to a minimum the degree to which people gather and mix with those outside of their household. In that context, your letter makes no attempt to explain the basis for your client's arbitrary suggestion that the only restriction he considers could be justified is in respect of gatherings of over 100 people. Your client is entitled to hold that view, but it does not demonstrate any unlawfulness in the approach of the Secretary of State.

9. Fifth, as the Explanatory Memorandum to the Regulations notes, the Government initially introduced social distancing guidance on 16 March 2020 reflecting clinical advice as to ways in which to reduce the spread of infection. However, despite some increases in social distancing behaviours over this period, the Secretary of State considered it necessary to increase compliance with these measures by introducing legal restrictions (see §§7.1-4). As the Explanatory Memorandum also explained, the Regulations were introduced, in line with global precedents in countries such as France, Italy and Spain, for two main reasons (§7.6):

   (1) It was critical to take all reasonable steps to prevent the community transmission of the disease where possible; and

   (2) It was essential that the Government retained public trust in its public health protection measures, to ensure that the public continues to engage and comply with interventions designed to protect individuals and communities as the transmission of the virus increased.

10. Sixth, there are fundamental Article 2 rights of the population at stake which the measures in the Regulations seek to protect. The United Kingdom has a positive obligation "*to take appropriate steps to safeguard the lives of those within its jurisdiction*" and to do "*all that could have been required of it to prevent…life from being avoidably put at risk*": *LCB v United Kingdom* (1997) 27 EHRR 212 at §36. This obligation extends to the public health context: *Stoyanovi v Bulgaria* (App. No. 42980/04) at §60. This duty weighs heavily in any balancing exercise, and in any assessment of the measures the Government has adopted in the Regulations. Your analysis does not take any account of this and is untenable.

Standing and Victim Status

11. Your letter at §39 sets out that the following Convention rights are engaged: Article 5, Article 8, Article 9, Article 11, Article 14, Article 1 of the First Protocol and Article 2 of the First Protocol. We do not dispute that the Regulations engage all of these rights, save for Article 5 which we address further below.

12. However, you will be aware that your client may only bring proceedings in reliance on the HRA if he is a victim of the allegedly unlawful act: section 7(1) HRA. You do not explain which of these rights (if any) are said to be engaged in respect of your client. Whilst we acknowledge that your client will be affected as a member of the general population, it is

not at all clear how the restrictions are said to be a disproportionate or unjustified interference with his individual rights. An allegation of a breach of human rights (and victim status) must be addressed by reference to an individual's circumstances and your letter is thus deficient in this regard: see *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92 at §117 *per* Beatson LJ.

13. Nor do we accept that your client would be entitled to circumvent the requirements of section 7 HRA by asserting that the generic requirement in s.45D(1) of the 1984 Act that the restriction or requirement imposed is proportionate and entitles him to rely – in substance – on Convention rights of which he is not a victim. He does not have standing to do so, and cannot create such in reliance on those who have crowdfunded his proposed claim, about whose circumstances nothing is known.

14. For the avoidance of doubt, we are content to assume for present purposes that your client has standing to challenge the *vires* of the Regulations as a person who is subject to at least some of the restrictions and requirements set out in them.

Delay

15. In respect of your proposed challenge asserting that the Government had no power under s.45C of the 1984 Act to make the Regulations, your client has failed to act or bring his claim promptly, as required by CPR rule 54.5(1)(a). You will be aware that the requirement to bring a claim for judicial review promptly is a free-standing one, separate and additional to the three month time limit.

16. The Regulations came into effect on 26 March 2020, the public having been informed of their substance by the Prime Minister on 23 March. The theoretical arguments about whether the Regulations were or were not *ultra vires* the 1984 Act to which you refer in your letter (at §§27-28) began to be published by legal commentators the same day (by Lord Anderson QC) and over the following fortnight (Robert Craig, 6 April; Tom Hickman QC, Emma Dixon & Rachel Jones, 6 April). These are the same arguments which are now advanced in your letter of 30 April 2020. No reason is given in your letter as to why this argument of statutory interpretation was not advanced, at least in correspondence, by your client immediately, or at least well before the date of your letter.

17. The requirement to act promptly is especially significant in circumstances where a failure to do so will give rise to a detriment to good administration – here of the most serious kind – and where the challenge will affect the position of third parties, which here includes all those who have complied with the law and those who have not, receiving fixed penalty notices as a result. The unprecedented nature of the Regulations, their effect, and the public awareness of them means that the duty on your client to act promptly was a particularly strong one.

18. For this reason alone, the Court will be invited to refuse permission on this basis in relation to your proposed challenge to the Regulations as *ultra vires* the 1984 Act.

The *Vires* Challenge

19. The Regulations were made pursuant to the powers under Part IIA of the 1984 Act. Those provisions were inserted by Part III of the Health and Social Care Act 2008 ("the 2008 Act") with the intention of enabling public health measures of this nature to be introduced where necessary to meet a pandemic of this kind. The Explanatory Notes (§§29-30) to Part III of the 2008 Act explained the need for the legislation to be updated to take account of

the changing nature of health threats following SARS and the World Health Organisation's new International Health Regulations 2005, in particular:

> "*30…The previous International Health Regulations (1969) were concerned with action at international borders in relation to three specific infectious diseases (cholera, plague and yellow fever), but increasingly were recognised as unable to deal with new threats, such as SARS. The new IHR are concerned with infectious diseases generally, and also with contamination. They also pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks. The IHR came into effect in June 2007. This Act amends the Public Health Act 1984 to enable IHR to be implemented, including WHO recommendations issued under them.*"

20. Section 45C(1) of the 1984 Act provides:

> "*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).*"

21. By s.45C(2), the power may be exercised (a) in relation to infection or contamination generally or in relation to particular forms of contamination or infection; and (b) so as to make provisions of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances.

22. By s.45C(3), regulations under s.45C(1) "*may in particular <u>include</u>*" (emphasis added) 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*": (3)(c). The intention is thus to enable provision to be made to impose appropriate restrictions which are necessary for a major public health crisis such as this, and with a view to protecting the public from the risks that it poses. As to the nature of the restrictions referred to in s.45C(3)(c), s.45C(4) provides that those restrictions "*<u>include</u> in particular…(d) a special restriction or requirement*" (emphasis added).

23. Given the arguments advanced in your letter, it should be noted that neither s.45C(3) nor s.45C(4) purport to be an exhaustive list, and that the terms of s.45C(3)(c), as quoted, are in the plural. The repeated references in your letter at §§18-20 to these provisions being "*limited*" are obviously wrong.

24. By s.45C(6), a special restriction or requirement means "*a restriction of requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)*". This in turn is subject to s.45D(3) which provides that regulations under s.45C may not include a special restriction or requirement mentioned in s.45G(2)(a)-(d) inclusive. There is no such prohibition in relation to s.45I, concerning premises.

25. The special restrictions are those set out in s.45G(2). Section 45G(1) contains the powers for magistrates to impose health protection orders on individuals (as opposed to the Ministerial regulation making power set out in s.45C above). The requirements which a magistrate may impose are set out in s.45G(2); it is these requirements which also constitute "*special requirements or restrictions*" which may be included in regulations under s.45C:

"*(2) The order may impose on or in relation to P one or more of the following restrictions or requirements—*

(e) that P be disinfected or decontaminated;

(f) that P wear protective clothing;

(g) that P provide information or answer questions about P's health or other circumstances;

(h) that P's health be monitored and the results reported;

(i) that P attend training or advice sessions on how to reduce the risk of infecting or contaminating others;

(j) that P be subject to restrictions on where P goes or with whom P has contact;

(k) that P abstain from working or trading."

26. Accordingly, there is power under ss.45C(1), (3)(c), (4)(d) and s.45G(2)(j) to make regulations to impose restrictions on individuals for the purpose of protecting against a public health threat, which include special restrictions on individuals as to "*where [they] go or with whom [they] have contact*". These provisions provide the specific *vires* for regulations 6 and 7.

27. The equivalent provisions in s.45I(2) provide the power to make regulations closing premises: i.e. regulations 4 and 5.

28. Your letter sets out at §§§24-26 some of the provisions of s.45F. These are irrelevant: they apply to regulations to which s.45D(2) applies. The breadth of s.45C(1) encompasses the making of regulations which sub-delegates a power to impose restrictions or requirements by the decision of a particular person, who may be a Minister, a local authority or any other person: see s.45D(2) and (5). It is to this form of sub-delegation, to which no direct Parliamentary control would apply at all, that s.45F applies additional safeguards. The Regulations did not adopt this approach; the restrictions and requirements contained in the Regulations are imposed by secondary legislation and not by subsequent decision. They are ones to which s.45D(1) applies and not s.45D(2). Nonetheless, the different types of regulations envisaged by Parliament in enacting Part IIA of the 1984 Act are significant pointers away from the artificial and narrow approach adopted in your letter.

29. There is no need for the "*special restrictions*" as defined in s.45C(6)(a) to comply with the requirements in s.45G(1), as though they were being imposed by a magistrate in respect of a single individual. That is a misreading of the relevant legislative provisions.

30. Although a magistrate making an order under s.45G(2) would have to ensure that the s.45G(1) criteria were fulfilled with (including that the person is or may be infected or contaminated), the context and relevant power here is different. The Regulations are not bound by the criteria in s.45G(1), because they are not making a person-specific order (as a magistrate is doing under that power), but instead are applying to the population at large. Section 45C(6)(a) restricts the special restrictions that can be made by reference to s.45G(2) but not s.45G(1). This also makes practical sense in the context of the statutory regime where the Secretary of State has powers under s.45C(1) to make regulations for the population at large.

31. Once the misconception relating to s.45D(2) and s.45F is dispensed with, the analysis in your letter to the contrary appears to be almost entirely predicated on the use of the singular in some of the provisions. As to this: (i) not all of the relevant provisions use the singular (see s.45C(3)(c)); (ii) the use of the singular in some instances is indicative of a specific and readily comprehensible obligation, such as that on the Minister in s.45D(1) to satisfy

himself that each restriction or requirement is proportionate to what is sought to be achieved; and (iii) s.6(c) of the Interpretation Act 1978 provides that unless the contrary intention appears, the singular includes the plural, and vice versa. The use of the singular in s.45G in relation to special requirements or restrictions reflects the usual context of that provision – individual decisions by Magistrates – but does not determine the scope of the provision when used in a more general context.

32. The legislative scheme under the 1984 Act, including by reference to its public health purpose, is clear in authorising the relevant restrictions. You do not dispute that the powers of the 1984 Act authorise such restrictions in an individual case even though such restrictions would otherwise amount to torts; they are therefore sufficiently clear to authorise equivalent restrictions on a wider basis.

33. In addition, we draw attention to the fact that the Joint Committee on Statutory Instruments, which has the role of drawing regulations to the attention of Parliament to a statutory instrument which it considers to be of doubtful *vires*, considered the Regulations and did not report them to either House: Ninth Report of Session 2019-21 (HL 53, HC 75-ix).

34. Finally, we do not understand the relevance of your reference to the Civil Contingencies Act 2004. If the Government had the power to make the Regulations under the 1984 Act, the fact that it may have the power to make similar provisions under a different statutory scheme is nothing to the point. There can be no criticism of the Government using powers specifically designed for public health emergencies, over more general powers. If the Government did not have the power under the 1984 Act (which it does), but you say that it did under the Civil Contingencies Act have the power to enact the same restrictions, it is pointless in substance to advance the *vires* challenge at all.

35. For all these reasons, your proposed challenge to the *vires* of the Regulations is unarguable.

The s.45D Challenge

36. Your letter asserts at §33 that the requirement in s.45D(1) "*that the restriction or requirement [in the Regulations] is proportionate to what is sought to be achieved by imposing it*" is a more onerous test than that of proportionality under the Convention. This is plainly wrong. The positive and negative formulations you rely upon cannot sensibly mean anything different. Your analysis omits the critical language of s.45D(1); the requirement of proportionality is not a free-standing one, but is only that the Minister when making the Regulations "*considers*" that the restriction or requirement is proportionate to what is sought to be achieved. The Government's view is most assuredly not subject to a "*positive decision by the Court on the merits*"; it would require your client to establish that the Regulations were irrational. Your client could not hope to meet such a threshold, and your letter conspicuously does not advance such a claim.

37. Instead your letter seeks to formulate a claim that the Government has failed to take into account relevant considerations and taken into account irrelevant considerations. This appears to be based upon the undisputed fact that the Regulations were made considering "*the effect measures would have on limiting the spread of the coronavirus*".

38. We do not understand this ground of challenge. On no possible basis could it be argued that limiting the spread of the virus was irrelevant, yet that seems to be the core of your client's position. The Government is acutely aware of the significant degree of interference the Regulations pose, and of the obvious economic, health, equalities and social impacts engaged by such unprecedented action. It is actively monitoring those impacts so far as

possible to do so. The idea, advanced at §37, that the Government made these unprecedented Regulations – and has maintained them in place to date – without recognising that there would be a significant economic impact, or that the restrictions would not make life for some difficult in a variety of ways is absurd. The Government has had regard to all relevant considerations at all times. It is matter for the Government alone, subject only to rationality review, what considerations are relevant and what weight to attribute to them: *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37.

39. The Government's approach has been consistently to seek to strike the most appropriate balance possible, having regard to: the lethality of the virus; the ease of its spread; the need to ensure the National Health Service is not overwhelmed such that it can continue to provide necessary medical care to all those who need it; the need to reduce the risk of subsequent surges in infection and mortality; and the adverse economic and social impacts which will or might follow from the restrictions imposed. The fact that the need to contain the spread of the virus is the purpose of the Regulations (in accordance with s.45C(1)) does not mean that it operates as a legal fetter on that decision-making: the Government has been keeping the Regulations under constant review, by reference to the developing circumstances, evidence and advice, evaluating how and when to reduce or remove the restrictions imposed.

40. The common law challenge to the Regulations, based upon s.45D, or fettering or relevancy of considerations, is unarguable.

The Convention Challenge

Proportionality

41. The principles applicable to proportionality under the Convention are now well-established, and were summarised in *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700. The approach in your letter appears to seek to rely on different principles, without explaining why or on what basis the established approach should be departed from (or, indeed, whether there is any difference in substance in any event).

42. We observe that:

    (1) The 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' were adopted in relation to a different international human rights instrument.

    (2) No judgment of the European Court of Human Rights has placed any reliance on the Siracusa Principles and they appear only to have been cited in relation to derogations from fundamental rights. The United Kingdom has not derogated from the Convention in relation to the present pandemic.

    (3) It is not correct to assert that the Siracusa Principles are "*developed and adopted for that purpose during public health crises*" (your letter at §34); they apply to public health crises in the same way as to all other contexts. The sole public health content of the Siracusa Principles is contained in §§25-26, upon which you place no reliance.

    (4) We do not understand the basis in the Siracusa Principles for the fifth and sixth bullet points you set out at §35 of your letter. There is no reference in the Siracusa Principles to "*scientific evidence*", and the sixth bullet point appears to be derived from content which relates to derogations and limitations. We take no issue with bullet points one to four, all of which do no more than reflect the approach of the case law under the

Convention in any event, and the Regulations are consistent with all of the Siracusa Principles however selected or defined.

43. In the present context, the Government's striking of the balance between the competing rights and interests will be afforded a considerable margin of judgment.

(1) In the well-known case of *R v Secretary of State for Health ex p Eastside Cheese Co* [1999] 3 CMLR 123, Lord Bingham CJ held at §43 that "*the maintenance of public health must be regarded as a very important objective and must carry great weight in the balancing exercise*". In *R (British American Tobacco UK Ltd) v The Secretary of State for Health* [2016] EWCA Civ 1182; [2017] QB 149, the Court of Appeal held at §196 that "*the protection of public health is recognised in law as one of the highest of all public interests that can be prayed in aid*".

(2) A wide margin will be afforded to decisions based upon scientific evidence, and particularly predictive evidence: *Eastside Cheese* at §48 ("*on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers*") and *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417.

(3) The Grand Chamber of the European Court of Human Rights has taken the same approach, holding in *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28 at §199 that "*The Court reiterates in this regard that, except in cases of manifest arbitrariness or error, it is not the Court's function to call into question the findings of fact made by the domestic authorities, particularly when it comes to scientific expert assessments, which by definition call for specific and detailed knowledge of the subject.*"

(4) As Lord Sumption explained at §32 of *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945, some types of judgment of the Government can only sensibly be assessed on a rationality basis: "*This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends on a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range. A case like the present one is perhaps the archetypal example. Fourthly, although a recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention, because it reflects an expectation that in a democracy a person charged with making assessments of this kind should be politically responsible for them. Ministers are politically responsible for the consequences of their decision. Judges are not. These considerations are particularly important in the context of decisions about national security on which, as Lord Hoffmann pointed out in Rehman, "the cost of failure can be high". It is pre-eminently an area in which the responsibility for a judgment that proves to be wrong should go hand in hand with political removability*" (emphasis added). The response to the present pandemic is, in this respect, closely analogous to a matter of national security.

(5) As discussed in detail in *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2016] AC 697 at §§57-61 (on which you otherwise rely), a wider margin is given, particularly in the application of the proportionality test in EU law, to measures taken on a precautionary basis to protect public health even where the scientific evidence is uncertain or developing.

44. These general principles are further borne out in the case law decided in the current pandemic to date.

(1) The Divisional Court explained the role of the courts in *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) at §27: "*we must emphasise that it is the role of the court to assess the legality of the Secretary of State's actions, not to second-guess legitimate operational choices. The circumstances presented by the COVID-19 pandemic are unprecedented and are unfolding hour by hour and day by day. Within sensible bounds the Secretary of State must be permitted to anticipate such events as she considers appropriate and respond to events as they unfold. As matters stand, it does seem to us that she has taken and will no doubt continue to take prudent measures, both precautionary and reactive.*"

(2) The margin to be afforded to the Government is particularly extensive when faced with difficult balancing exercises in what Chamberlain J correctly described in *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB) as "*the most serious public health emergency for a century*": at §56. That case concerned a claim for possession by an NHS Trust of a hospital bed, removing a patient who did not wish to leave to care provided elsewhere, because of a need to create capacity to tend to COVID-19 cases. MB sought to rely on public law breaches on the part of the Trust to avoid possession, including breaches of Articles 8 and 14. At §§59-61, Chamberlain J dismissed all those arguments, including by reference to the context of a public health emergency.

45. It is, accordingly, of little relevance that your letter is able to refer to papers by, or (more usually) newspaper articles referring to, scientists of different types who express views which differ to varying degrees with the measures contained in the Regulations and the Government's approach to dealing with the virus and the public health emergency the virus has caused. That there is not uniformity in every respect in relation to the pandemic is neither surprising nor determinative of the legality or proportionality of the Regulations. The Government is advised by expert scientific advisors, who are constantly reviewing and updating their advice in the light of the developing evidence and wider scientific thinking.

46. The proportionality of the Regulations is further underlined by:

(1) The mandatory 21-day review period set by the Regulations themselves (regulation 3(2)), which requires the Government to keep the Regulations under constant review.

(2) The regulation 3(3) duty on the Secretary of State to terminate a restriction or requirement by direction as soon as he considers it to be no longer necessary "*to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus*".

(3) The six-month expiry period: regulation 12.

(4) The reasonable excuse defence afforded to the principal criminal offences contained in the Regulations: regulations 6(1) and 9(1).

47. Accordingly, the Government rejects your client's assertion that the Regulations do not adopt the least restrictive interference necessary to achieve the critical aims which the Regulations pursue: the reduction of the spread of the virus and the reduction in the risk to the lives of the population. In particular, as noted above and as set out in the Explanatory Memorandum to the Regulations, the Government took the step of introducing the Regulations only after less restrictive measures, in the form of guidance and some business closures, had been attempted.

48. It further rejects that the Regulations fail to strike a fair balance between the undoubted interference with various Convention rights, and the consequential difficulties the restrictions impose or cause for some of those subject to them, and the fundamental right to life and the protection of public health. The Regulations are well within the wide margin to be afforded to the Government in this context.

49. The Regulations were and remain proportionate, applying any test or principles conceivably relevant. As soon as any restriction ceases to be necessary, having regard to the evidence available to the Government, that restriction will be revised or terminated in accordance with the Regulations.

Specific Convention Rights

50. As noted above, very little of your letter addresses any specific Convention rights, and still less by reference to the position of your client. It is, accordingly, unnecessary save in one respect to deal with those specific rights in this letter.

51. We do, however, make clear that Article 5 is not engaged by regulation 6 (and your citation of *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4; [2020] 2 WLR 418 is irrelevant: it was not an Article 5 case at all). A deprivation of liberty depends on whether a person is <u>both</u> not free to leave wherever they are <u>and</u> subject to continuous supervision and control: see *Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] AC 896. Baroness Hale encapsulated the scope of Article 5(1) ECHR as follows at §46: "*This is not a right to do or go where one pleases. It is a more focused right, not to be deprived of that physical liberty.*" Regulation 6 does not mean that people are not free to leave their homes: it requires people to stay at home unless they have a reasonable excuse to leave their home, and the list in regulation 6(2) is not exhaustive. Moreover, they are not under supervision and control in their own homes. Applying the *Cheshire West* formulation, neither of the necessary limbs are present such as to give rise to detention.

52. But even if regulation 6 were a deprivation of liberty, it would be justified under Article 5(1)(e) which permits the "*lawful detention of persons for the prevention of the spreading of infectious diseases*". The prevention of the spreading of infectious disease is exactly the purpose of regulation 6. Your letter asserts, without authority, that the "*only public health qualification to this right permits <u>an individual</u> to be quarantined*" (at §39(i), emphasis added). The language of Article 5(1)(e) is not limited to a single individual, or even to infected persons; what can be justified depends on the disease and how it is spread.

53. All of the other Convention rights cited are qualified rights and are subject to the proportionality analysis set out above. The Regulations do not breach any Convention right.

The Challenge to the Continuation of the Regulations

54. Your letter advances a further, or alternative, challenge to the maintenance of the Regulations following the review of 16 April 2020. So far as this simply repeats the s.45D,

common law and Convention challenges, they add nothing and are rejected for the same reasons.

55. The only additional argument advanced in relation to the continuation of the Regulations is the assertion that the Government imposed upon itself an unlawful fetter by the announcement of five tests which would guide its approach to easing of restrictions.

56. The characterisation of these tests as a fetter is misconceived. They seek to explain how the Government will approach assessing the public health side of the balance it is continually striking and reviewing in the Regulations. They do not purport to set out the only factors the Government will take into account, including developing evidence of economic, health and other social harm caused by the restrictions. The Government is acutely aware of these other factors. The provision of greater clarity is not a fetter and none of the tests set out by the Government could be irrelevant considerations. Nor do they, or could they, supplant a holistic assessment of the proportionality of the Regulations; rather, they inform how that assessment will, in part, be carried out. Where the Government has reached the conclusion that the overall balance struck can be altered in favour of reducing the level of restrictions imposed by the Regulations, to retain their overall proportionality in accordance with regulation 3(3), it has acted to do so: e.g. The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No.2) Regulations 2020.

57. The Prime Minister's address to the public on Sunday 10 May 2020, and his statement to Parliament on 11 May 2020, further emphasised and explained: (i) how the Government intends to apply the 'five tests' to progress a gradual reduction in restrictions; (ii) the significance of wider economic and social concerns to the decision-making process, balanced against the ongoing risk to life; and (iii) the need to take a flexible position, responsive to changes in the evidence and advice as the situation develops. Plainly none of that can be said to be approaching even arguably unlawful.

Action Requested

58. For the above reasons, the Government does not agree that the Regulations are unlawful and must be revoked or repealed.

59. For the avoidance of doubt, any claim for judicial review issued will be defended and permission opposed.

Details of Other Interested Parties

60. There are no other interested parties.

Alternative Dispute Resolution

61. Alternative dispute resolution is not practical. The 'proposal' of your client entirely fails to address the public health of the population and would materially increase the risk to life. The Prime Minister has, on Sunday 10 May 2020, provided a broad overview of the Government's approach to reducing the restrictions imposed in the Regulations, and further details in his statement to Parliament on Monday 11 May 2020.

Requests for Information and Documents

62. Your letter seeks disclosure of all SAGE minutes from the beginning of 2020. The Government has published extensive documentation relating to the advice provided by SAGE concerning the pandemic at: https://www.gov.uk/government/groups/scientific-

advisory-group-for-emergencies-sage-coronavirus-covid-19-response. That page is updated on a regular basis. It is neither necessary nor appropriate to disclose further documents in response to this proposed claim.

Address for Further Correspondence and Service of Court Documents

63. All future pre-action correspondence should be sent to, and in the event that proceedings are later issued, documents should be served on, the following address:

[redacted]
Constitutional and Social Care Public Law Team
Government Legal Department
102 Petty France, Westminster, London, SW1H 9GL
DX 123243 Westminster 12
By email: [redacted]

64. Please acknowledge receipt of this letter.

Yours faithfully

[redacted]

For the Treasury Solicitor
[redacted]