IN THE HIGH COURT OF JUSTICE **Claim No: CO/3109/2020**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

R on the application of

(1) [redacted]

(2) [redacted]

and 2 others[1]

Claimants

and

(1) SECRETARY OF STATE FOR HEALTH & SOCIAL CARE

(2) SECRETARY OF STATE FOR TRANSPORT

Defendants

SKELETON ARGUMENT FOR THE DEFENDANTS

For Permission Hearing on 18 March 2021

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1. This skeleton argument is filed on behalf of the Secretary of State for Health and Social Care and the Secretary of State for Transport (together the "**Defendants**"). The Claimants seek permission to challenge the lawfulness of the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (**"the International Travel Regulations" or "the Regulations"**) as amended by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.10) Regulations 2020 ("**the Croatia Regulations**").

[1] By an Order of Swift J the application for anonymity which was filed on behalf of the Claimants was refused (alongside an application for expedition and disclosure). The Claim has not been withdrawn by the children but they are nevertheless not named in this skeleton argument.

2. By an Order of Mr Justice Murray dated 14 January 2021 this matter has been listed for an oral hearing to consider the Claimants' application for permission to apply for judicial review.

BACKGROUND AND UPDATE

3. The claim arises out of a 14 day period the Claimants spent in self-isolation following their return from Croatia on 29 August 2020. The claim was filed on 2 September 2020. The factual background to the claim is set out at SGD§§4 to 17.

4. In summary, the International Travel Regulations first came into force on 8 June 2020 and have been amended numerous times since. At the relevant time, that is to say when the Claimants were required to self-isolate in late August and early September 2020, Reg. 4 of the Regulations required passengers arriving into England to self-isolate from other persons – in the home, home of friends or family, or a hotel or similar – for a period of 14 days from arrival in the Common Travel Area. Passengers arriving from a list of "exempt" countries and territories[2], set out in Schedule A1 to the Regulations, did not have to self-isolate.

5. Whether countries were included on the list in Schedule A1 was based on risk: that is to say, the risk that passengers arriving from those countries were infected with coronavirus and would bring the virus into England with onward spread. The risk analysis was done by experts at the Joint Biosecurity Centre ("JBC") working in co-ordination with experts at Public Health England ("PHE"). The ultimate decision on whether or not a country or territory should be on the exempt list was taken by the Second Defendant, the Secretary of State for Transport, having regard to information from the JBC and in consultation with the Department for Health and Social Care, Foreign and Commonwealth Office and Home Office.

6. Schedule A1 was amended to remove Croatia with effect from 22 August 2020, hence the need for the Claimants to self-isolate on their return.

[2] For convenience, references to "countries" includes countries and territories.

7. Since the Defendants filed their Summary Grounds on 29 September 2020, there have been a number of developments.

8. From September 2020 the prevalence of COVID-19 in the UK began to rise again very significantly, prompting new national lockdown measures. Whilst at the time that the Claim was brought over 40,000 people had died in the United Kingdom (SGD §5), this now stands at almost 125,000 deaths[3]. Sadly, the Claimants' suggestion that the Court should take judicial notice of the "*relentless decline in deaths*" despite the easing of lockdown measures (SFG §83) has proved to be misconceived.

9. Scientific understanding has developed. Testing capacity has increased. Vaccines have been approved and are now being rolled out across the UK. At the same time, several "variants of concern" have emerged which may have increased transmissibility or severity and/or there is a risk that existing vaccines might be less effective against them.

10. The Regulations have been amended in a number of ways in response to these changing circumstances: testing requirements and arrangements have been introduced; the period of isolation required by reg. 4(7) has been reduced from 14 to 10 days; all countries have been removed from the exempt list in Schedule A1; a "red list" of countries has been introduced in a new Schedule B1; and "hotel quarantine" measures introduced in respect of passengers who are permitted to arrive from those countries.

11. Finally, since the Defendants filed their Summary Grounds the Court of Appeal and the Divisional Court have given judgment in two cases concerning domestic Coronavirus restrictions: *R (Dolan & Ors) v Secretary of State for Health and Social Care & Secretary of State for Education* [2020] EWCA Civ 1605 and *R (Francis) v Secretary of State for Health and Social Care* [2020] EWHC 3287 (Admin). Those cases strongly support the Defendants' case, for the reasons explained further below.

DELAY/CLAIM ACADEMIC

12. The Defendants do not take any point on delay nor on the basis that the claim was academic at the time it was filed. In its Summary Grounds §18 the Defendants raised these issues

[3] Deaths within 28 days of a positive test. Deaths with Covid on the death certificate total over 140,000.

only insofar as the Claimants sought to challenge the Regulations as originally introduced in June 2020. The Claimants have clarified in their skeleton argument that the challenge is to the Regulations as they were at the date the claim was issued so these points no longer arise.

13. An issue arises as to the extent to which the claim is academic as a result of amendments and changes since the claim was issued. The Court of Appeal considered this issue in relation to out-of-date lockdown regulations in *Dolan* (see §§36 to 42). It held that, save with respect to the issue of *vires*, the claim was academic and there was no good reason in the public interest for them to be considered. The same is true in the present case, insofar as the Claimants seek to challenge lawfulness of the Regulations under grounds 4, 5 and 6.

14. Grounds 4 and 5 challenge the proportionality and rationality of the Regulations *in general*, having regard to the evidence that supported them at the time they were made. As already explained, the Regulations have now been substantially amended and the relevant factual background (in particular, as a result of the introduction of vaccines and the emergence of new variants) has completely changed. Any ruling on the general rationality/proportionality of the Regulations would therefore be academic and would serve no useful precedent for the future.

SUBSTANTIVE RESPONSE TO THE CLAIMANTS' CLAIM

15. The substantive response to the Claimants' case is set out at SGD §§19-64.

Standard of Review

16. The Defendants' submissions concerning the standard of review are set out at §§19 to 21 SGD. They are powerfully supported by the decision of the Court of Appeal in *Dolan*: see §§89 and 90. In short, the claim challenges measures introduced in circumstances where: (a) the Defendants have had to make difficult judgments about medical and scientific issues after taking advice from experts; and (b) they have had to balance competing considerations (concerning public health, the impact on economy and society, and the impact on individuals and their rights) in circumstances where there are powerfully expressed conflicting views. The Court should therefore be slow to intervene, recognising that the difficult balances struck are "*quintessentially a matter of political judgment*."

Ground 1: *Ultra vires*

17. The Claimants allege the Regulations are *ultra vires* the enabling legislation, namely s. 45B of the Public Health (Control of Disease) Act 1984 ("the 1984 Act").

18. Section 45B provides:

> *"(1) The appropriate Minister may by regulations make provision–*
>
> *(a) for preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place"*

19. The Defendants' response is set out at their SGD §§22 to 28. The Regulations clearly fall squarely within the enabling legislation. There can be no doubt that COVID-19 is a serious danger to public health. It was brought into the UK by international travellers and has spread into the community with devastating loss of life. Section 45B is an inherently precautionary provision. Imposing a requirement on passengers arriving into England to self-isolate for a period of 14 days, in order to prevent further spread of the disease, is clearly "*a provision … for preventing danger to public health*". See also *Dolan* (CA) at §§59 and 65.

20. The Claimants do not now appear to contend otherwise. Rather, their skeleton argument alleges that there is a lack of scientific evidence demonstrating that the self-isolation measure in the Regulations was "necessary" for preventing danger to public health (§§18 to 21 of their Skeleton). But as to this, the existence of scientific advice and "necessity" does not go to *vires*: there is no test of "necessity" in the 1984 Act[4] and nothing mandating scientific advice (or scientific advice of any particular kind) to be obtained before Regulations imposing a measure may be made.

21. In any event, scientific advice was taken by the Defendants and the measures in the Regulations are clearly necessary and proportionate: see further below.

[4] *Cf* the express restriction imposed by s. 45D(1) on the power to make domestic health regulations under 45C, namely that the relevant Minister considers the restriction or requirement to be proportionate.

Ground 2: Article 5 ECHR

Deprivation of liberty

22. The Claimants allege that the self-isolation measure imposed on them amounted to a deprivation of their liberty under Article 5 ECHR. The Defendants' response is set out at SGD §§29 to 34: the requirement to self-isolate amounts to a restriction on movement but does not constitute a deprivation of liberty.

23. The Defendants' submissions are supported by the decision of the Court of Appeal in *Dolan*. The Court of Appeal, considering the requirement to stay at home under the original "lockdown" restrictions imposed in March 2020[5], held that it was it was unarguable that the requirement amounted to a deprivation of liberty: §§93 to 94. The differences[6] between the lockdown regulations and the International Travel Regulations do not lead to any different conclusion in the present case. See also the judgment of the Divisional Court in *Francis* at §§63 to 64, deciding that a nearly identical self-isolation measure to the one in issue in the present case[7] did not involve a person being "imprisoned" or "detained" at common law. Whilst the Claimants submit that Francis is not binding (§31 of their Skeleton), as a judgment of the Divisional Court, "*it is difficult to imagine that a single judge…would ever depart*" from such a decision: see *R v Manchester Coroner, ex parte Tal* [1985] QB 67 (at 81).

24. The Claimants seek in the Skeleton argument to distinguish *Dolan* and *Francis* but there are no proper grounds of distinction:

    (1) It is wrong to submit that *Dolan* only addressed the requirement to stay overnight. *Dolan* also considered the far more significant original stay at home "*lockdown*" requirement: see §19 and §§92 to 94.

[5] See reg. 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350)
[6] Regulation 6(1) as originally made prevented persons from leaving their house "*without reasonable excuse*" and provided a non-exhaustive list of such excuses; reg. 4(9) in the International Travel Regulations prevents (for a period of 14 days) persons from leaving the place they are self-isolating save for reasons set out in reg 4(9)(a) to (f) or "*in exceptional circumstances*" and provides a non-exhaustive list of such circumstances in reg 4(9)(g).
[7] Under the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, reg. 2(3)(a). The International Travel Regulations includes some wider exemptions, such as allowing individuals to leave the place of self-isolation "on compassionate grounds".

(2) It is also wrong to submit that "*the application of Article 5 was not considered judicially*" (§25 of their Skeleton) in the similar case of *Francis*. The reason that there was not significant analysis of the Article 5 position was because Chamberlain J had refused permission on that ground on the basis that Article 5(1)(e) would apply in any event (permission was also refused in respect of rationality).

(3) The Claimants (at §27 of their Skeleton) are simply repeating the arguments which were rejected in *Dolan* and *Francis*.

25. This ground remains unarguable.

Article 5(1)(e): "indiscriminate quarantine by country"

26. The Claimants' argument on this point is not clear. It appears to be that Article 5(1)(e) only permits detention where it is shown that a person is or may be infectious, based on an evaluation of their individual circumstances. This issue only arises if, contrary to the submission above, the Court considers that it is arguable that the Claimants were deprived of their liberty during the period of their self-isolation.

27. The Defendants response is set out in their SGs at §§35 and 36. The Claimants' interpretation of Article 5(1)(e) is: (a) contrary to its express wording (which permits "*the lawful detention of persons for the prevention of the spreading of infectious diseases*"); (b) contrary to the clear purpose of Article 5(1)(e), as it would inhibit the state from taking measures necessary to protect public health; and (c) unsupported by any authority. The point is unarguable.

Ground 3: Disproportionate interference with rights under Articles 5 and 8

28. Again, the question of justification for interference with the right to liberty under Article 5 only arises if, contrary to the submission above, the Court considers it arguable that the Claimants were deprived of their liberty during their period of self-isolation. The Defendant accepts that there was some interference with the Claimants' rights under Article 8 (though minimal, for the reasons set out SGDs §46).

29. The Defendants' response on justification is set out at SGD §§38 to 47. There can be no doubt of the immense harm caused by the spread of Coronavirus and the need for measures to limit it. The Second Defendant's judgment that passengers returning from Croatia should self-isolate took into account expert evidence of the need to protect public health and balanced it against other factors including wider economic and social impact, and the impact on individuals: see SGDs §§11 and 17.

30. In these circumstances there is no proper basis on which the Court can hold that the measure was disproportionate. The Court of Appeal's judgment in *Dolan* strongly supports this submission. The Court of Appeal held that (the far greater interference) with Article 8 ECHR resulting from general lockdown restrictions imposed on the population as a whole was "*unarguably proportionate"*: §96.

31. The Claimants' case on justification appears to rest on the assertion that there was no scientific or medical advice to support the need for their self-isolation. (Skeleton §35 to 41) This is wrong:

    (1) The requirement for passengers arriving from Croatia to self-isolate was imposed having regard to the expert evidence on the risk posed by such passengers given by the JBC: see SGDs §§12 to 16 and Annex A.

    (2) Self-isolation for the period of infectivity was imposed as the appropriate measure to mitigate the risk of transmission of the virus on expert advice: see SGDs §7.[8]

    (3) This advice has since been confirmed by overwhelming scientific support for border measures including self-isolation and quarantine.[9]

32. The imposition of the self-isolation measure on the Claimants, to the extent that it interfered with their rights under Article 5 or 8, was accordingly unarguably proportionate.

[8] See e.g. the advice of the Chief Scientific Adviser to the Home Office (referred to at §7 SGD) published in June 2020 https://committees.parliament.uk/publications/1393/documents/12778/default/

[9] See eg. the paper prepared by DfT and FCDO for the SAGE meeting of 21 January 2021 (https://www.gov.uk/government/publications/dft-and-fcdo-international-importation-border-and-travel-measures-21-january-2021) and the SAGE minutes of that meeting (https://www.gov.uk/government/publications/sage-77-minutes-coronavirus-covid-19-response-21-january-2021/sage-77-minutes-coronavirus-covid-19-response-21-january-2021).

Ground 4: rationality and proportionality "in general"

33. The Claimants appear to challenge the Regulations on the basis that they are disproportionate "in general" having regard to interference with Convention rights. But the function of the Court in the present case is to determine whether the Regulations infringed the Claimants' rights under Articles 5 and 8, having regard to the facts of their individual case. There was no infringement for the reasons set out above. That being the case, the Claimants cannot make out a case that the Regulations nevertheless constitute a disproportionate interference with Convention rights in the abstract.

34. It is not clear if the Claimants' continue to challenge the Regulations on the ground that they are "generally" irrational. In any event, the ground remains unarguable. In *Dolan* the Court of Appeal dismissed a similar rationality challenge to the "lockdown" regulations (which imposed restrictions on the entire population for a significant period of time) as unarguable: see §§ 84 to 90. *A fortiori,* the measures which affect individuals who voluntarily travel during the pandemic and which only require a short period of self-isolation, are rational and proportionate.

35. The Defendants note that the Claimants make an 'evidence' point: the Claimants in their skeleton argument assert there is a lack of evidence to support the Defendants' position. This is a judicial review in which the Defendants, in accordance with their duty of candour, have summarised the relevant factual background and advice and matters considered by them. There is no basis on which permission should be granted simply to enable the Claimant to obtain further documentary disclosure.

Ground 5 & 6: Rationality and proportionality in relation to Schedule A1 and removal of Croatia

36. The basis on which countries were added or removed from Schedule A1 is fully explained in the SGDs at §§12 to 15, and the basis for the removal of Croatia explained at SGD §16 and Annex A.

37. There is no proper ground on which the approach in general, or to Croatia in particular, can be impugned as irrational. The Claimants appear to advance their case under this heading on the basis that the JBC has not published minutes of its meetings (§42 to 46 of their Skeleton). To clarify, the JBC provides evidence and a risk analysis but does not conduct its own meetings to make judgements or formal decisions. Permission to proceed with judicial review is not simply granted on the basis that further (unparticularised) scrutiny would be beneficial or for the purpose of disclosure of documents. This ground remains unarguable.

CONCLUSION

38. For all these reasons, the Court is invited to refuse permission on all grounds.

CECILIA IVIMY

JULIAN BLAKE

12 March 2021