IN THE COURT OF APPEAL, CIVIL DIVISION Appeal No.:

ON APPEAL FROM THE HIGH COURT OF JUSTICE Claim No.: CO/3109/2020

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Sir Ross Cranston, sitting as a High Court Judge

IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, INTERNATIONAL TRAVEL) (ENGLAND) REGULATIONS 2020;

IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, INTERNATIONAL TRAVEL) (ENGLAND) (AMENDMENT) (NO. 10) 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) AB, (2) CD, (3) EF (a child by AB and CD, his litigation friends) and (4) GH (a child by AB and CD, his litigation friends)

Claimants

- and –

THE SECRETARY OF STATE FOR TRANSPORT

First Defendant

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Second Defendant

GROUNDS OF APPEAL AND SKELETON ARGUMENT

INTRODUCTION

1 The Claimants are residents of England who were in Croatia in August 2020, when the Second Defendant imposed regulations requiring them to self-isolate for 14 days on their return to England.

2 This is an appeal against the refusal by Sir Ross Cranston, sitting as a High Court Judge, of the Claimants' application for permission to proceed with a claim for judicial review ('**the Claim**') of regulations imposing a requirement to self-isolate on all (previously all but from a specific list of countries) travellers arriving in England. The Claim was issued in September 2020 and was refused at an oral hearing on 18.3.2021. The Court is referred to the Statement of Facts and Grounds in the judicial review ('**the JR Grounds**') for the background facts as they were at the date on which the claim was issued.[1] Expedition was sought but refused.

3 The Claimants challenge the lawfulness of the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 ('**the International Travel (or IT) Regulations**'), which was imposed to reduce the transmission of SARS-CoV-2 ('**the coronavirus**'; '**the virus**') in June 2020. Inevitably, the factual circumstances have changed since the claim was issued, given that permission was determined over six months later. They were amended to add Croatia in August 2020 by the Health Protection (Coronavirus, International Travel) (England) ('Amendment No. 10) Regulations 2020 ('**the Amendment Regulations**'); and they had been and were amended before and since. But they remain in force in their amended form and continue to impose upon all travellers to England a requirement to self-isolate, previously for 14 and now for 10 days.

4 In summary, the principal material changes to the International Travel Regulations since they were made have been: (a) a requirement to have had a negative PCR test for the coronavirus before being permitted to enter England; (b) the ability of a person to be released from the self-isolation requirement after receiving a negative PCR test after arrival; (c) the reduction of the self-isolation period; (d) the removal of all countries from Schedule A1, which contains countries for which no self-isolation requirement is imposed (albeit the Schedule and provisions relating to it remain and so countries could be added to it through amendments to the Regulations); and (e) the imposition of what is informally known as 'hotel quarantine' for travellers entering England from a number of countries named in Schedule A1.

[1] Defined terms are as in the Grounds.

5 All but two of those amendments make the requirements imposed more stringent. The factual landscape has changed since the claim was issued and will change further between the permission hearing – and not the appeal – if permission is given. That was inevitable. But the fundamental nature of the Regulations that remain in force is unchanged: a requirement to self-isolate imposed on all travellers into England (previously all save those from certain countries) that is at least arguably detention contrary to Article 5 of the ECHR.

6 With one exception,[2] the arguments of fact and law that are raised in this case raise questions of law of general public importance that have not been considered (other than in the judgment being appealed here) in any of the recent judgments on restrictions imposed under the Public Health (Control of Disease) Act 1984 ('**the 1984 Act**') over the past year. In particular: the test for whether Article 5 is engaged in the circumstances in which these Regulations are imposed; the test for the exceptions in Article 5.1(e); and the rationality and proportionality of these particular restrictions.

7 In their Summary Grounds of Resistance ('**the SGR**') the Defendants objected to permission being granted on the grounds of alleged delay and asserted that the claim was academic. By the hearing, they had withdrawn the first objection and accepted that the Court could review the regulations as they are now.

GROUNDS OF APPEAL

8 The appeal is brought on three grounds. To avoid confusion with the JR Grounds, they are referred to in this document as '**the Appeal Grounds**'.

*(1) The learned judge erred in failing to make clear whether he found that the IT Regulations imposed detention on the Claimants and others subject to them and thus engaged Article 5 of the European Convention on Human Rights ('**the Convention**'); in not finding that the IT Regulations do impose detention; and in finding that the qualification in Article 5.1(e) applied and so allowed the IT Regulations to be made even if they imposed detention;*

[2] The exception being whether admittedly materially identical self-isolation conditions to those imposed by the International Travel Regulations, in this case by the he Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020 No 1045), imposed false imprisonment, which was considered in *R (Francis) v Secretary of State* [2020] EWHC 3287 (Admin). See further below, in relation to Ground 1.

(2) The learned judge erred in finding that the IT Regulations were proportionate and rational, including that they were proportionate interferences with the Claimants Article 5 (if engaged) and Article 8 rights, in circumstances where there was no evidence that the Minister had considered anything other than scientific evidence about the transmission of the virus.

*(3) The learned judge erred in finding that it was rational and proportionate for the determination of which countries (including Croatia) were added to or removed from Schedule A1 to be made by the Joint Biosecurity Centre ('**the JBC**') in secret.*

SUBSTANTIVE DETERMINATION OF GROUND ONE OF THE JUDICIAL REVIEW BY THE COURT OF APPEAL

9 The Court of Appeal has the power not merely to give permission for a judicial review to proceed (CPR r. 52.8(5)) but to retain the case and hear the claim itself. This construction of CPR r. 52.8(6) and its predecessor was upheld in *R v Panel on Take-overs and Mergers, ex p Datafin plc* ([1987] QB 815, [1987] 1 All ER 564, CA, at 834), in view of the urgency of the matter. However, it is a power not merely exercised in circumstances of urgency but, as in *R (on the application of Abbasi v Secretary of State for Foreign and Commonwealth Affairs* ([2002] EWCA Civ 1598, where permission was granted and the claim listed before the Court of Appeal two and a half months later), where the case raised important jurisdictional issues (see para 2); and in *R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1014, at para 20) where final disposal of the arguments was only likely to be achieved by a decision of the Court of Appeal. Of significance is this Court's decision to retain and determine for itself the *ultra vires* ground in *R (Dolan) v Secretary of State* ([2020] EWCA Civ 1605), which concerned the Health Protection (Coronavirus, Restrictions) (England) Regulations ('**the Domestic Regulations**'), which imposed the first 'lockdown' imposed in March 2020.

10 The Claimants accept that JR Grounds Three and Four (now Appeal Grounds Two and Three) involve considerations of proportionality. Only limited evidence has been filed by the Defendants and no Detailed Grounds of Resistance. While it would clearly be appropriate to grant permission to proceed with the judicial review if the Court considers it appropriate to grant permission to appeal (to avoid an unnecessary further

permission hearing in the High Court), the Claimants accept that a full hearing in the High Court would be necessary.

11 In respect of Appeal Ground One, however, there are two principal reasons why it would be appropriate for the Court of Appeal to determine the matter for itself.

(1) It raises questions of statutory construction and the application of jurisprudence from the European Court of Human Rights ('**the Strasbourg Court**'). While some claims concerning whether a person is 'detained' do require the consideration of evidence (for example in *Cheshire West and Chester Council v P* [2014] AC 896, which required consideration of the extent of surveillance on a person in a care-home) this does not. The Claimants' contentions are based solely on whether the restrictions imposed by the International Travel Regulations constitute 'detention', when compared to Strasbourg and other jurisprudence.

(2) If Ground One were upheld, it would be determinative of the judicial review. The Court, if it found in favour of the Claimants on Ground One, would be invited still to decide whether to grant permission in respect of Ground Two, in case of a successful appeal by the Defendants. Other than in that eventuality, however, it would be unnecessary for further consideration of Ground Two. Thus, the determination of Ground One by the Court of Appeal would be in the interests of expedition and good administration.

12 If the Court determines Ground One in favour of the Claimant, it is asked to quash the Regulations and to remit the question of damages to the High Court.

THE JUDGMENT OF THE HIGH COURT

13 The learned judge firstly set out the background to the introduction of the IT Regulations in detail. He referred in particular to a number of meetings of SAGE and the advice of experts that gave similar advice to that of the Scientific Advisory Group for Emergencies ('**SAGE**') on 28.4.2020, where it was said that 'as the number of cases in the UK decreases, potential imported cases may increase and it will be possible to estimate total cases. This involves consideration of a number of non-scientific matters

and is a policy question.'[3] He also highlighted advice from Prof Aston on 5.6.2020 (that was consistent with other advice) that imported cases matter most when the UK has a lower level of infection. This advice included the following statement: '[t]he level of tolerable risk from infections being brought in from overseas is not a scientific question.'

14 Notwithstanding Prof Aston's and SAGE's advice that the level of tolerable risk was not a scientific question, the two Ministerial statements cited by the learned judge, of the Secretaries of State for Home Affairs and Transport, on 3.6.2020 and 6.7.2020 respectively, both referred only to scientific evidence about the risk of transmission of the virus.

15 In respect of JR Ground Two, the learned judge found that the Claimants' made 'powerful submissions that the 14-day self-isolation period provided for constituted detention under Article 5' but concentrated on submissions as to the qualification in Article 5(1)(e). He found that the judgments in *Enhorn v Sweden* ([2005] ECHR 56529/00) and *James v United Kingdom* ([2012] ECHR 25119/09) did not support the Claimants' proposition that the exception did not apply to persons who were or may be infected.

16 The learned judge appeared to find that the Regulations did not impose detention, by finding that the authority of *Dolan*, at paragraphs 92—94, was 'highly persuasive' and (later) by finding that the Claimants' contention that there had been a breach of Article 5 rights was unarguable. This part of the *Dolan* judgment related to the Domestic Regulations that were, as the learned judge accepted, much less onerous than the IT Regulations. If the learned judge did find that the IT Regulations did not impose detention, he failed to outline the 'powerful submissions' that they did not or to distinguish the restrictions imposed by the Domestic Regulations with those imposed by the IT Regulations.

17 The learned judge then considered JR Grounds Three and Four, which challenged the IT Regulations on the grounds of proportionality and rationality.

[3] Quotations are from Counsel's note of the judgment. A transcript is being obtained and perfected grounds, with direct quotations from the transcript and appropriate references, will be filed once it is.

18 The judge acknowledged the application of the proportionality principle in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [28]-[49] and in particular those set out by Lord Sumption at para 20 (see also JR Grounds, para 28):

> [The effect of precedent] can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine
> (i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
> (ii) whether it is rationally connected to the objective;
> (iii) whether a less intrusive measure could have been used; and
> (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.
>
> These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

19 The learned judge noted that 'Mr Hoar also referred to other well-known authorities such as *Pham v Secretary of State for the Home Department* [2015] UKSC 19, where at paras 106 and 114 the judges referred to need to a more rigorous review when fundamental rights were at stake'; and paragraph 31 of *R (Miller) v Prime Minister* ([2019] UKSC 41), in which it was observed '…almost all important decisions made by the executive have a political hue to them' but that '[n]evertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries…' The judge noted the Claimant's submissions that there was no direct scientific evidence of the efficacy of the Regulations and 'no attempt [by the government] to weigh whatever positive effect on transmission on negative effect, such as Article 8 and the economic and social impact of the measures'.

20 The learned judge noted the Claimants' submissions that 's 3 of the Human Rights Act 1998 ('t**he HRA**') could not be construed to give the executive the power to enact secondary legislation that interfered with Convention rights'.

21 The learned judge found that it was not arguable that there was a 'breach' of Article 5. In so doing, he regrettably failed to clarify whether he had found that Article 5 was engaged (because the IT Regulations imposed detention) and whether his finding that

it was not 'breached' was a reference to the fact that (he found) the exception in Article 5.1(e) applied, notwithstanding that the Regulations imposed detention. If so, the learned judge erred in failing to address whether the exercise of the 5.1(e) exception was proportionate.

22 The judge dismissed the Claimants' contention that the impact on the Claimants' Article 8 rights was disproportionate, making five points in support of that decision. While the judge did say that he had considered the 'balance struck' by the Secretaries of State:

(1) He failed to address the Claimants' reliance on the Defendants' concession that the rationality of the restrictions 'as a whole' should be considered (SGR, para 49).

(2) He failed to address the application of the HRA to an assessment of the proportionality of the Regulations on fundamental rights in general, not just the Claimant. Section 3 of the HRA 1998 provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." That is to say, the Public Health Act 1984 and its 2008 amendments must be read 'so far as it is possible' to be compliant with the Convention. Consequently, that Act cannot be construed as giving a Minister the power to enact secondary legislation that interferes disproportionately with Convention rights; and a party may challenge its lawfulness on that basis, whether or not a victim under s 7 of the HRA (*R (Rusbridger) v Attorney General* [2003] UKHL 38, at [21] per Lord Steyn).

(3) Thus, the learned judge erred in failing to consider the rationality of the Regulations and their impact of fundamental rights in general – not just on the Claimants but on society and the economy. While there may only be 'judgements' by Ministers (*Dolan* para 89, relied upon in the judgment below), that does not mean that those judgements are immune from review (*Bank Mellat, Pham, Miller v PM, supra*, all higher authority than *Dolan* and binding on the Court of Appeal).

(4) No evidence was presented by the Secretaries of State that they had even considered any factors other than transmission of the virus, let alone how they addressed those considerations.

23 The learned judge then considered the *vires* challenge raised by JR Ground One. This is not being pursued in this appeal but, as in the JR Grounds, the evidence of the lack of express scientific advice relied on in JR Ground One is relied upon in JR Grounds Three and Four and (here) Appeal Ground Two.

24 JR Ground Five related to the means by which countries were added to or removed from Schedule A1. The learned judge failed to address the argument that there was no evidence about the factors that would be taken into account by the JBC or that the JBC (unlike SAGE) made its decisions in secret (no minutes or its meetings or any other documents relating to its decisions having been published since its inception).

25 JR Ground Six related to the decision of the Secretary of State (implemented through the Amendment Regulations) to remove Croatia from Schedule A1. The learned judge found that Annex A to the SGR provides an answer to the Claimants' submissions that there was no evidence of the reasoning behind the removal from Croatia from Schedule A1. This Ground is being pursued as part of Appeal Ground Three.

APPEAL GROUND ONE: INDISCRIMINATE DETENTION IS NOT PERMITTED BY ARTICLE 5 OF THE CONVENTION

*The learned judge erred in failing to make clear whether he found that the IT Regulations imposed detention on the Claimants and others subject to them and thus engaged Article 5 of the European Convention on Human Rights ('**the Convention**'); in not finding that the IT Regulations do impose detention; and in finding that the qualification in Article 5.1(e) applied and so allowed the IT Regulations to be made even if they imposed detention.*

Is Article 5 engaged?

Grounds: paras 92-98
SGR: paras 30-34

26 The below submissions mirror those made in the Claimants' skeleton argument filed for the permission hearing. While found to be 'powerful', the learned judge either did

not resolve the question of whether Article 5 is engaged – because the IT Regulations impose detention – or he found that it was not but did not explain why (save by a brief reliance on para 89 of *Dolan*, which related to different, less onerous, restrictions).

27 Since the Grounds and the SGR were filed, the Divisional Court has considered the effect of similar provisions in the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 ('the Track and Trace Regulations') (*R (Francis) v Secretary of State* [2020] EWHC 3287 (Admin)). The self-isolation provisions of the Track and Trace and the International Travel Regulations are materially identical to each other. Regulation 4 (3)(a) of the International Travel Regulations is identical to 2(3)(a) of the Track and Trace Regulations and the limited exceptions to the self-isolation requirements in that part of both Regulations are materially identical, albeit arranged somewhat differently.

28 The Court found, in *Francis*, that those Regulations did not impose a requirement to 'isolate' or 'quarantine'. Sections 45C and 45G (applying to domestic regulations) specifically excludes from the Minister the power to impose 'isolation or quarantine' on a patient. The definition of both is considered in detail by Hickinbottom LJ in *Francis* (paras 34-57). But s 45B does not impose that restriction and the court need not consider whether the Regulations impose either isolation or quarantine (nor is that contention any part of the claim).

29 The Divisional Court did go on to consider 'detention' in *Francis* but only in relation to whether the self-isolation requirements constituted 'false imprisonment' (pursuant to *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4). The application of Article 5 was not considered judicially.[4] Insofar as the Divisional Court relied upon the Court of Appeal's judgment in *Dolan* (at para 64 of *Francis*) that was a review of a requirement that a person be required to stay overnight at their place of residence (which was the modified restriction introduced in June 2020 and reviewed) not that he or she may not leave it without a reasonable excuse. It does not take the Defendants' case any further.

[4] The court will also note that the Divisional Court did not have the assistance of counsel to the claimant in *Francis*, in which the claimant represented himself.

30 Thus, *Francis* is not a precedent for the suggestion that it is not arguable that the claim does not engage Article 5. Paragraphs 92-98 of the Grounds are repeated and are clearly arguable.

31 Nor do the distinctions raised by the Defendants at para 31 of the SGR answer the Claimants' primary case, which is that the circumstances of their 'self-isolation' were no less onerous than the home curfew or house arrest which have been found to constitute detention (*SSHD v AP* at [2-4]; *SSHD v GG* [2016] EWHC 1193 (Admin) at [36]); *Pekov v Bulgaria* [2006] ECHR 50358/99). In particular, and responding to each of the similarly numbered sub-paragraphs of para 31 of the SGR:

(1) The duration of confinement cannot be material where it lasts for several days. Cases in which imprisonment at common law has been found not to constitute detention include those where the confinement was for a few hours and justified by the common law of necessity (by 'kettling': *Austin v Comr of Police of the Metropolis* [2008] QB 660) and where a person was forced to remain in his house for a 'very short time' (*Walker v Comr of Police of the Metropolis* [2015] 1 WLR 312) (see *Jalloh*, para 30). Unsurprisingly, the Defendants are unable to posit any precedent in which it was found that confinement for over one week did not constitute 'detention' because of the 'short' duration.

(2) Reg. 4(1) requires a passenger entering England to inform the authorities of the place where he is to be self-isolated. The choice of accommodation is no different from a person subject to home arrest, which is a deprivation of liberty even if 'the authorities responsible for monitoring compliance with it were far away, which allowed him to breach it with impunity' (*Pekov*, para 73).

(3) No prisoner is required to isolate from a person providing him with medical care.

(4) While being able to remain together as a family may mean that a person was not 'isolated', it does not mean that they were not detained; and any person subject to home curfew or house arrest will be able to 'self-isolate' with his family.

(5) The refugees in *ZA v Russia* (Applications nos. 61411/15), relied upon by the Defendants, were able to leave the country without consent but were still forced to remain in one place and still found to be detained.

(6) The circumstances in which the Claimants were able to leave home were exclusive not (as they were under the Restriction Regulations) inclusive: they were limited to those exceptions set out in the Regulations. All but the last of the 'range of reasons' (medical treatment, to avoid injury or escape harm) relied upon by the Claimants would be expected in any form of home curfew or house arrest and would be justified by the common law of necessity in any event. Only in 'exceptional circumstances' may a person obtain 'necessities'.

(7) While a person can change the place where he self-isolates (reg. 4(9)(g)(iii)) this is no different to the claimant in *Pekov*, '[d]uring the period when the applicant was under house arrest, he changed his address several times for health reasons and because of difficulties in finding employment, each time notifying the investigator in charge of his case by mail' (*Pekov*, para 42).

The above passage of *Pekov* establishes that the claimant in that case was able to leave his house to go out to work, which makes the detention in his case *less onerous* than that of those subject to the self-isolation requirements of Regulations, who are not permitted to leave their house to go to work. (*Ie*, while the self-isolation requirement does not apply to some categories of worker, where it does apply there is no exception allowing the person self-isolating (including the First and Second Claimants) to leave his house to attend work).

(8) The lack of supervision was no barrier to confinement being considered detention in *Pekov* or *Enhorn v Sweden* ([2005] ECHR 56529/00 at paras 32 in fine, 33, 47 and 55). Although a false-imprisonment case, *R v Rumble* (2003) 167 JP 205 is also of some relevance. As Lady Hale summarised it in *Jalloh*: 'The defendant in a magistrates' court who had surrendered to his bail was in custody even though there was no dock, no usher, nor security staff and thus nothing to prevent his escaping (as indeed he did). The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.' Again, any person subject to home curfew or home arrest will be able to work from home or keep in contact with friends or family by telephone; as indeed (in principle and subject only to prison rules) could any prisoner.[5]

[5] One is reminded that *The Pilgrims Progress* (*The Pilgrim's Progress from This World, to That Which Is to Come'*, John Bunyan, 1678) and *The Ballard of Reading Gaol* (Oscar Wilde, 1897) were written in prison.

(9) The existence of a fixed penalty notice scheme is irrelevant where it is a criminal offence to contravene the requirement.

Further, in respect of enforcement:

(10) An authorised person (police officer or person authorised by the Secretary of State or a local authority) can direct a person (P) to return to where he is self-isolating or remove him to accommodation 'facilitated by the Secretary of State' if the authorised person has reason to believe that P is outside of the place where he is self-isolating (reg. 5(1)).

(11) Under a regulation inserted on 15.2.2021, a constable may enter premises to search for a person (P) suspected of committing an offence of contravening the requirement to self-isolate, if he has reasonable grounds for believing that P is in the premises (reg.5A).

32 On the contrary, it is wholly irrelevant that countries were added and removed (SGR, para 33), as it is that the Claimants could have left the country to avoid detention. Moreover, the First Claimant has unavoidable commitments in Croatia. The Defendants' suggestion that the Claimants could have avoided detention by making themselves aware of the countries listed in Schedule A1 is particularly ill-judged given that he was within Croatia when it was removed from that list.

33 The Strasbourg Court has found that a person may be detained even where he is not under supervision or surveillance, provided he is required to stay in a place by law (in particular in *Pekov*). Paragraph 34 of the SGR wrongly asserts that the court should have regard to the 'acid test' set out by Supreme Court in *Cheshire West and Chester Council v P* (*supra*). That case concerned the detention of old and vulnerable patients who may lack capacity. Had the Defendants quoted the whole paragraph in which the term is used, it would have been apparent that the 'acid test' set out is peculiar to 'those' cases:

> [48] So is there an acid test for the deprivation of liberty <u>in these cases</u>? I entirely sympathise with the desire of Munby LJ to produce such a test and thus to avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Ms Richards is right to say that the Guzzardi test is repeated in all the cases, irrespective of context. If any of <u>these cases</u> went to Strasbourg, we could confidently predict that it would be repeated once more.

> But these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty. *P, MIG* and *MEG* are, for perfectly understandable reasons, not free to go anywhere without permission and close supervision. So what are the particular features of their 'concrete situation' on which we need to focus?
>
> (Emphasis added)

34 A vulnerable patient not subject to a specific legal requirement to stay at a care home is detained only if she is under constant supervision. That must be right. But that does not mean that a person who is under an ongoing legal requirement to remain in one place is not detained. Further and in any event, there is some supervision over a person self-isolating, as the police or other persons authorised by the Secretary of State can and do check whether individuals are isolating where they are required to be.

35 Finally, reliance is placed by the Claimants on their assertion that they were subject to false imprisonment, which was determined against the claimant in relation to materially identical provisions in *Francis*. This judgment, that of another panel of the High Court, is not binding upon the court, although of course highly persuasive. It is respectfully submitted that it is at least arguable that the decision was wrong. While the considerations set out in para 27 principally address the question of detention, they are not irrelevant to the question of whether 'self-isolation' can constitute false imprisonment; neither *Pekov, Austin,* nor *ZA* were cited in the judgment or, it can reasonably be assumed, by any of the parties; and the court arguably gave too little account for the requirement (under the Track and Trace and the International Travel Regulations) that a person notify the Secretary of State of the place where he is are isolating. However, as the Supreme Court held in *Jalloh*, the two concepts of false imprisonment and detention are not identical and were not aligned.

36 In the premises, the Claimants were detained and their Article 5 rights were engaged.

The qualification in Article 5.1(e) does not allow indiscriminate quarantine by country

Grounds: paras 99-105
SGR: paras 35/36

37 This subject was given no judicial consideration in either *Dolan* or *Francis*. The learned judge erred in finding that the qualification applies. The arguments of the Claimants

(set out fully in the JR Grounds and so not repeated) should be preferred to those of the Defendants: in particular, that detention can only be permitted of those who are at least potentially infected.

38 Further, this construction (to include potentially infected persons but not others) is supported by the qualification on the powers in Part IIA of the 1984 Act that apply to domestic regulations (under s 45C rather than s 45B). Section 45G(2)(d) does permit a person 'P' to be 'kept in isolation or quarantine' but only where a JP is satisfied that P (*inter alia*) *may* be infected and there is a risk that P may infect others. (As observed above, regulations imposing special restrictions cannot impose this form of quarantine: s 45D(3).) Section 19 of the HRA requires that the Minister declare that a Bill is considered to be compatible or that he cannot make such a declaration but that the government nevertheless wishes it to become law; and a declaration of compatibility was made of the 2008 Act (by which Part IIA was inserted into the 1984 Act) before it was passed into law. Parliament can thus be presumed to have intended, in passing amendments to the 1984 Act in 2008, to pass legislation in conformity with Article 5; and to have considered that the above limitations were consistent with those of Article 5.1(e). It cannot reasonably be said every person entering England from a country not on Schedule A1 (currently, every other country in the world outside the common travel area) 'may be infected' or that there was a risk of each one of them infecting others.

APPEAL GROUND TWO: RATIONALITY AND PROPORTIONALITY

The learned judge erred in finding that the IT Regulations were proportionate and rational, including that they were proportionate interferences with the Claimants Article 5 (if engaged) and Article 8 rights, in circumstances where there was no evidence that the Minister had considered anything other than scientific evidence about the transmission of the virus.

Scientific advice (advanced in support of JR Ground One): paras 80-89
SGR: paras 22-28

JR Grounds Three and Four: paras 106-136
SGR: paras 38-56

39 The key error made by the learned judge, with respect, was this. While he acknowledged that the policy to impose the Regulations is subject to review and that

Ministers must balance the effect of the restrictions on transmission of the virus against their negative effect, he failed to address the fact that they appear to have done no such thing. The Defendants have filed no evidence – or even asserted in written submissions – that they have balanced the effect on transmission against the negative effects of the Regulations. Thus, not only is the court unable to review the factors taken into account by the Secretaries of State, appears that they did not take them into account at all.

40 This is notwithstanding that – as acknowledged by the learned judge:

(1) Section 3 of the HRA 1998 provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." That is to say, the Public Health Act 1984 and its 2008 amendments must be read 'so far as it is possible' to be compliant with the Convention. Consequently, that Act cannot be construed as giving a Minister the power to enact secondary legislation that interferes disproportionately with Convention rights; and a party may challenge its lawfulness on that basis whether or not a victim under s 7 of the HRA (*R (Rusbridger) v Attorney General* [2003] UKHL 38, at [21] per Lord Steyn).

(2) A more rigorous and intensive review is necessary when fundamental rights are at stake (*Pham*, paras 114);

(3) It is necessary to 'balance the severity of the effects [of the restrictions] on the rights of the persons detained against the importance of the objective.' (*A v Secretary of State for the Home Department* [2004] UKHL 56);

(4) 'There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference' (*Pham*, para 106);

(5) The domestic courts are in a better position to assess local needs and conditions and they may apply a stricter standard than the Strasbourg Court when considering whether measures are proportionate or whether less restrictive means might obtain the object, an objective question based on the merits, not whether the decision maker has considered each less restrictive measure (*Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19, per Baroness Hale at para 31);

(6) Where there is no impact assessment (as here) the "margin of appreciation dwindles to the nugatory in connection with [the court's] assessment of the evidential terrain it purports to cover" (*R (FACT) v Secretary of State for DEFRA* [2020] EWCA Civ 649 at [100]); and, even if there had been an initial failure to carry out an impact assessment, there has been ample time and several reviews of the Regulations and so there is no reasonable excuse for the continuing failure to have carried out and considered an impact assessment;

(7) Where there is no (or an inadequate) impact assessment 'In that case, the evidence placed before Parliament before it makes regulations is 'inadequate' that 'gap' may be 'plugged' but only be 'evidence and analysis before the Court', which in the *FACT* case included the Woodnewton Report and the detailed response of the respondent were considered (*FACT*, para 98); so either: (a) there is a sufficient impact assessment to enable the Court to be satisfied that the decision was reasonable, rational and proportionate; or (b) the Court may determine that it was if it can consider the evidence that was before the Minister.

41 In respect of proportionality and rationality in general, the Defendants concede that the rationality of the restrictions 'as a whole' should be considered (SGR, para 49). The Claimants agree. So, too, should their proportionality, including its impact upon fundamental rights in general.

42 The Claimants primary case is that there is no evidence that the Defendants: (a) were advised on the efficacy of the restrictions imposed; (b) considered any evidence of their efficacy; and (c) made any attempt to weigh any positive attempt against its negative consequences; and that, in consequence, (d) they cannot satisfy the *Bank Mellot* test of proportionality. It is not sufficient (as they do in paras 51-56 of the SGR) to assert that the tests are met because of the severity of the pandemic and because the Secretaries of State have judged them necessary.

43 In the first instance, the Claimants rely on their submissions about the inability of the Defendants to rely on medical advice to support the imposition of this policy, through secondary legislation, set out under JR Ground One in the JR Grounds. The Grounds set out in detail, by reference to evidence of SAGE Minutes, the absence of any positive advice by the government's primary scientific advisory body prior to the Regulations

being made (see paras 39 to 46 and in particular para 45, in which the minutes are summarised) and that they failed to support them publicly after they were made (paras 47-51).

44 The only response to this by the Defendants, is that the CMOs advised on 9.5.2020 that 'once domestic transmission was low, imported cases *could* become a material issue and quarantining for 14 days persons arriving from a country with a higher rate of COVID-19 than the UK *may* have a useful impact on the epidemic in the UK' (quoted at 7 of the SGR, emphasis added). This does not begin to resemble advice that they *were* necessary. Without making any disclosure of the nature or context of the advice by someone other than the government's chief medical officer, the Defendants assert, weakly, that the Chief Scientific Adviser to the Home Office advised *in similar terms* in late May and early June 2020' (emphasis added). That is the entirety of the Defendants' assertion and evidence about the presence or absence of advice.

45 This advice was relied upon heavily by the learned judge (as set out above). Yet the height of the evidence of the government's advisers was that regulations might be appropriate at some point **but that the tolerance for greater risk of infection was a political and not a scientific matter**. Without **any** evidence of any of the considerations taken into account by Ministers – as opposed to the scientific advice they received – it is impossible for the Court to assess the rationality and proportionality of the policy.

46 The submissions of the Defendants do not answer the test on rationality and proportionality. In response to similarly numbered points at paragraphs 41 to 43.

47 First, the bare assertion that individuals returning from countries with a higher incidence of the virus may be at a higher rate of infection than those in the UK (or, now, those entering from *all* other countries) may or may not be right but does not, in itself, demonstrate that the measures are rational and proportionate.

48 Secondly, the fact that the detention (alternatively, significant restriction on movement and interaction with others that engaged Article 8 rights), could have been more onerous does not sustain the Defendants' case unless it is first able to justify the rationality and proportionality of the measure. In that respect, they cannot point to any medical

evidence in support prior to its imposition and they make no attempt to engage in any analysis justifying it by reference to the *Bank Mellot* test. (This applies also to para 46 of the SGR.)

49 Thirdly, this paragraph of the SGR (43) is pure assertion unsupported by any evidence. The Court should not accept the assertion of the content of scientific advice without its full disclosure. It is otherwise impossible to subject it to any analysis or scrutiny. Moreover, while the court is required to give the government a margin of discretion:

(1) There was no scientific evidence as to the efficacy of these restrictions before they were implemented;

(2) The Defendants have not sought to introduce any evidence of its efficacy at the date on which they filed the SGR or subsequently (and it is far too late for them to be permitted to do so if any such attempt is made before the permission hearing); and

(3) There is no evidence that the government have even considered, at any stage, whether whatever positive effect these measures might have on transmission of this one virus outweighs their negative effect on the fundamental rights of those affected or its economic and social effects (which it is bound to consider before deciding whether it is rational, even if that does not go to any of the fundamental rights of these particular Claimants).

50 In summary, it cannot be sufficient for Secretaries of State to assert that a measure that impacts upon the Claimants' fundamental rights (on the Claimants' case) and (on any view) has considerably disruptive effects on individuals' freedom of movement on the economy is rational or proportionate simply because they assert that it is. The existence of a pandemic does not strip from the court its duty to analyse rationality and proportionality according to evidence and analysis, not bare assertion.

APPEAL GROUND THREE: THE POLICY OF INCLUDING AND EXCLUDING COUNTRIES, INCLUDING CROATIA, FROM SCHEDULE A1

The learned judge erred in finding that it was rational and proportionate for the determination of which countries were added to or removed from Schedule A1 to be made by the Joint Biosecurity Centre ('the JBC') in secret.

Grounds: paras 137-143
SGR: paras 57-64

51 The learned judge erred in failing to address the below submissions, which it is submitted are arguable.

52 While there are currently no countries on Schedule A1, the Schedule remains and the Minister would be able to add or remove countries from it were the International Travel Regulations amended.

53 The government has chosen not to disclose or to publish any of the minutes from the Joint Biosecurity Committee or any documents explaining decisions to add or remove countries from . The policy outlined in paras 12-15 of the SGR amounts to the most detailed account of government policy to be disclosed heretofore (far more detailed than the Ministerial announcement relied upon by the Defendants) but cannot be scrutinised in the absence of the publication or disclosure of the JBC minutes.

54 It is evident from the policy that the government takes no account of factors other than the transmission of the virus in deciding whether to add or remove countries from Sch A1. Alternatively, there is no evidence about what factors other than transmission it takes into account. Each of these decisions affect thousands to hundreds of thousands of travellers and have a direct economic impact. While it is accepted that the decisions are those that must be taken by government on a day-to-day basis, that does not and cannot make them immune from scrutiny.

55 Similarly, the Court cannot scrutinise the rationality and/or proportionality of the decision to remove Croatia from Schedule A1 without disclosure of the minutes and

evidence relied upon in support of the meetings that led to the advice to remove it from the Schedule.

56 In circumstances where the Minister relies on expert advice given by a committee – particularly where that advice is tendered to such a fact specific question and where it is reasonable to expect that the Minister will invariably follow that advice – the decision cannot be scrutinised without scrutiny of the committee's decision.

CONCLUSION

57 The Court is respectfully asked to:

(1) Grant permission for Appeal Ground One, retain that part of the judicial review and determine it in favour of the Claimants;

(2) Quash the International Travel Regulations;

(3) Remit the determination of damages to the High Court;

(4) Grant permission for Appeal Grounds Two.

58 grant permission and to give directions for the hearing of the judicial review.

25th March, 2021

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