IN THE COURT OF APPEAL, CIVIL DIVISION **Appeal No. …….**

ON APPEAL FROM THE HIGH COURT OF JUSTICE **Claim No. CO/1860/2020**

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

The Honourable Mr Justice Lewis

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

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

B E T W E E N :

THE QUEEN
(On the application of

(1) SIMON DOLAN

(2) LAUREN MONKS

(3) AB a child by his litigation friend CD)

Claimants/Appellants

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

First Defendant/First Respondent

- and –

THE SECRETARY OF STATE FOR EDUCATION

Second Defendant/Second Respondent

SKELETON ARGUMENT OF THE CLAIMANTS/APPELLANTS

References to the Claimant's JR bundle are as, for example, #35
and references to the Supplementary Bundle are as, for example, SB TabA1 p35.

INTRODUCTION

1 The Claimants apply for permission to appeal against the refusal by Lewis J, in a judgment dated 6 July, 2020, to allow permission for a judicial review of the imposition and continuing application of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ('the Regulations') in their original and amended forms on three grounds. The Court of Appeal is also

asked to give permission for the judicial review to proceed and, exceptionally, to consider the claim itself; alternatively, to remit it for consideration by a Divisional Court.

2 The Regulations imposed far reaching restrictions on the lives and businesses of the entire population of England, in response to the SARS-CoV-2 virus ('the coronavirus', 'the virus'), which in extreme cases causes the disease Covid-19 ('C19'). The Regulations were amended twice before issue (on 26 April and 12 May 2020) and twice after issue and before the hearing of the application for permission on 2 July 2020 (on 31 May and 12 June 2020). They were repealed after the hearing (on 3 July 2020) and before judgment was handed down and were replaced with the Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations 2020 ('the July Regulations'). (See the Supplementary Authorities' Bundle for the various iterations of the Regulations up to 12 June).

3 The First Claimant is a British businessman resident in Monaco who owns wholly, or a majority controlling share of businesses in the UK, where his parents reside. He is engaged in a campaign against the 'lockdown' restrictions and would protest against them were he permitted to. The Second Claimant is resident in the UK, where her parents and other wider family live, is a practising Roman Catholic and has a child of school age. The Third Claimant (joined by order of Lewis J of 6 July 2020) is a child of school age.

4 The original grounds on which the judicial review was brought ('the JR Grounds', **#16-106**) were as follows:

Ground One: That the Regulations were unlawful because they are outside the powers conferred by Parliament in the Public Health (Control of Disease) Act 1984 (as amended);

Ground Two: That the First Defendant acted unlawfully by:

(2A) Fettering his discretion to review the Regulations by requiring that five tests be met before reviewing the Regulations;

(2B) Failing to take relevant considerations into account in the decision making process (Ground 2B)

(2C) Acting irrationally in making or maintaining the Regulations; and/or

(2D) Failing to act proportionately when deciding whether to impose and not to terminate the Regulations?

Ground Three: That the First Defendant acted unlawfully in imposing or not terminating the Regulations in circumstances where they were a) from the outset, alternatively b) that they had become at any of the dates of review, c) the dates on which they were amended, d) the date of issue or e) the date of the hearing, disproportionate

breaches of the fundamental rights of the Claimants (and those of all or large parts of the population of England) protected by Articles 5, 8, 9, 11 and 14 and Articles 1 and 2 of Protocol 1 of the European Convention of Human Rights and Fundamental Freedoms ('the Convention'), as applied to domestic law by the Human Rights Act 1998 ('the HRA');

5 Following a direction by Swift J on 22 May 2020, the Defendants filed an Acknowledgment of Service and Summary Grounds of Defence ('the AoS') on 12 June 2020 (**SB Tab A2)**.

6 On 23 June 2020, the Claimants applied to amend their Grounds through Supplementary Grounds (**SB Tab A8**) to outline challenges to amendments to the Regulations made since the claim was issued; and to amend the Grounds to challenge (as a breach of the Third Claimant's rights under Article 2 of Protocol 1 to the Convention) the basis on which the Second Defendant had decided to direct, alternatively advise or request, schools to close save for the children of key workers and vulnerable children. This application was made after the Second Defendant confirmed that there was no statutory order to close schools but rather 'advice' or 'requests', notwithstanding the Prime Minister and Second Defendant stating that, aside from the above groups, schools 'must' 'close their gates'. The Second Defendant not having conceded that the Second Claimant could bring a claim on behalf of her son, an application was made to add the (now) Third Claimant (witness statement at **SB Tab C3**). The Claimants also argued that a judicial review of each iteration of the Regulations in force since 26 March would not be academic but that, if it were, it would be in the public interest for a judicial review to proceed; and addressed issues of standing raised by the Defendants (see Claimant's Permission Document ('the Permission Document') at **SB Tab A9**).

7 In his judgment of 5 July 2020 Lewis J allowed the Claimants application to amend some of their grounds (in respect of the Article 5 and 11 challenges: judgment paras 66 and 90 respectively) and ordered that the Third Claimant be joined but refused permission to allow the claim to proceed to a judicial review on all except a part of Ground 3 relating to Article 9. He found that any consideration of the Regulations in force before the date of the hearing would be academic and that it would not be in the public interest to give permission for such a review.

8 In respect of the Article 9 challenge, Lewis J invited submissions on whether the July Regulations would allow gatherings of up to but no more than 30 in religious buildings, as he considered they did; and found that, if they did, any judicial review on that part of Ground 3 would be academic as there would be no interference with the Article 9 right to freedom of worship (judgment paras 85-87). While the Claimants do not agree that such a restriction would not be an interference (it would undoubtedly interfere with the right of the 31st person to attempt to attend a service in St Paul's Cathedral or Friday prayers at the Regent's Park Mosque), reg. 5(4) of the July Regulations

in fact imposes no such restriction on gatherings in public buildings, restricting only gatherings that would be 'raves' under s 63(1) of the Criminal Justice and Public Order Act 1994. Moreover, there are no restrictions on gatherings indoors in private buildings that are not dwellings; and a religious building that was private (because only members could have access) but was not a dwelling would not be subject to any restriction under the July Regulations. Although there is a restriction on religious gatherings in dwellings, it is not suggested that the July Regulations impose a disproportionate interference with Article 9 rights.

9 The Claimants appeal against the order of Lewis J on three grounds ('the CA Grounds', identified alphabetically to avoid confusion with the JR Grounds):

(A) Each of the JR Grounds challenging each iteration of the Regulations were arguable; and (if the Court of Appeal agrees to determine the judicial review substantively) should be upheld; and the Claimants should have been permitted to amend the claim to challenge the interferences to Article 11 and to Article 1 of Protocol 1 to the Convention by the Regulations as amended on 1 June 2020, in addition to their earlier form.

(B) The learned judge erred in refusing permission to amend the Grounds to allow a challenge to the Second Defendant's instruction or request to schools to close, in refusing to give that ground permission; and, if the Court of Appeal agrees to determine the judicial review substantively, it is asked to uphold that ground;

(C) The learned judge erred in finding that any parts of Grounds 2 and 3 of the JR Grounds challenging earlier versions of the Regulations that applied before 2 July were academic; and, recognising that the Court of Appeal would be considering permission to proceed with a judicial review after they were amended, it is asked to find that considering any of the earlier versions of the Regulations before they were amended on 3 July 2020 would not be academic. This is on the grounds that the threat to reimpose them amounts to a 'proposal' to breach Convention rights, contrary to s 7(1) of the HRA. Alternatively, the learned judge erred in finding that it was not in the public interest to proceed with the judicial review (*inter alia*) in circumstances where such a threat has been made and (as set out in the evidence before the Court and highlighted in para 22 of the JR Grounds) 15,000 people had been fined for breaches of the Regulations.

10 Further and alternatively, the Court of Appeal is asked to give permission to challenge the current iteration of the Regulations (as amended on 3 July) on the Grounds that they continue to be *ultra vires* the 1984 Act (JR Grounds 1), the First Defendant fettered his discretion about the circumstances in which they could be eased, failed to take relevant considerations into account, acted irrationally and disproportionately (JR Ground 2) and that they are a disproportionate breach

of the Claimants rights under Articles 8 and 11. If, contrary to the Claimants' position, the Court of Appeal considers that the amended Regulations restrict gatherings of more than 30 people inside public buildings (including religious buildings), permission is sought to challenge this interference with Article 9 rights. It is submitted that this would not in reality represent a new challenge but a continuation of existing challenges to restrictions that remain in moderated form, albeit in respect of replacement Regulations; and that *R (Spahiu) v Secretary of State for the Home Department* ([2019] 1 W.L.R. 1297) does not apply. Alternatively, as the learned Judge found at paragraph 66 of the judgment (citing *Spahiu*), there is a need for a degree of flexibility, as he was prepared to give in respect of the Supplementary Grounds he considered and also the July Grounds he was prepared to consider were it to have continued to interfere (in his view) with Article 9 rights.

SUBSTANTIVE DETERMINATION OF THE JUDICIAL REVIEW BY THE COURT OF APPEAL

11 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.

12 This claim involves a wholesale challenge to some of the most onerous restrictions to personal liberty that have been imposed since the Protectorate, if not ever. They unusually affected every person in England each day, not merely prospectively. They are estimated to have cost the economy up to £2.5 billion per day. It is of the greatest public interest that the challenge is determined by the courts at the highest level. Were the Court of Appeal to agree that the JR Grounds were arguable and permission should be granted, it would be far from the interests of good administration for there to be a substantive hearing in the High Court, followed by a potential appeal to the Court of Appeal and a potential further appeal to the Supreme Court.

13 The Court will be aware that the Administrative Court sensibly ensured that a Divisional Court of the highest level (including the Lord Chief Justice and the Master of the Rolls in each case) sat in the cases of *R (Miller) v the Secretary of State for Exiting the European Union* ([2016] EWHC

2768 (Admin)) and in *R (Miller) v Prime Minister* ([2019] EWHC 2381 (QB)), and that 'leapfrog' appeals to the Supreme Court were permitted under s 12 of the Administration of Justice Act 1969 (as amended). While a certificate could be given by a High Court Judge, if the Court of Appeal determines that the conditions would be satisfied for a 'leapfrog' appeal, it is submitted that it would be in the interests of good administration to retain the matter for itself. Those include (at s (3A) of the 1969 Act) that the matter is of national importance and so significant that only one further stage of appeal would be appropriate from a decision at first instance. It is submitted that these conditions are easily satisfied.

CA GROUND (A): ARGUABILITY OF THE JUDICIAL REVIEW GROUNDS

Introduction

14 The Claimant relies entirely on the JR Grounds and Supplementary Grounds, the relevant parts of which are summarised below and which the Court is asked to read, alongside the relevant extract of the judgment, before considering the below submissions. The JR and Supplementary Grounds are at least strongly arguable. As this is the only decision that must be made (unless and until a substantive hearing if the Court of Appeal decides to retain the matter), submissions on the failings of the judgment below will be limited; and, as it is an appeal in the form of a renewal of an application for permission, the failure to challenge a finding of fact or law does not equate to acceptance of the same by the Claimants.

15 The judge's approach to determining arguability was, with respect, over-rigid and gave far too high a margin of discretion to Ministers exercising powers that have been subject to very little Parliamentary scrutiny. At the outset, the learned judge draws attention to the harms relied upon by the Claimants (at para 5) and, correctly, observes that judicial review may challenge that a public body (including through secondary legislation) has acted compatibly with Convention rights (at para 6). These findings rest uneasily with his finding at paragraph 7 which is, with respect, wrong:

> "The court is not responsible for making political, social, or economic choices. The court is not responsible for determining how best to respond to the risks to public health posed by the emergence of a novel coronavirus. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies."

16 The Claimants did not ask the Court how best to respond to the risks posed by the virus but they *did,* legitimately, ask the court to review whether, in making those decisions it fettered its discretion (Ground 1A) and failed to take into account relevant considerations (2B); and whether the Regulations and school closures were irrational (2C), disproportionate (2D) or disproportionate breaches of Convention rights (3). As was submitted at para 111 of the Grounds, the Supreme Court recently held that:

> '…although the courts cannot decide political questions, the fact that a legal dispute… arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it… almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries…
>
> '…the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts…'
>
> (*R (Miller) v Prime Minister* [2019] UKSC 41)

17 As submitted at para 112 of the JR Grounds

> 'That judgment related to the exercise of the Royal Prerogative over matters of 'high policy' in circumstances traditionally understood to have been non-justiciable and which did not engage Convention (or any individual) rights. A statute making sweeping encroachments on the rights and freedoms of individuals in many and various domains falls more easily and necessarily within the ambit of the Court to review and, if necessary, quash.'

18 The harmful effect of restrictions on fundamental rights are not merely 'matters for legitimate public debate' (judgment, para 5), they are fundamental to considerations of rationality and proportionality. With respect, the margin given the government by the learned judge was so great and the consideration of the above harms so limited that his judgment is difficult to reconcile with the proactive approach that must be taken under the Human Rights Act.

Ground One: *vires* under the 1984 Act

Judgment: paras 34-36
JR Grounds: paras 26-48, ***#26-35;***
AoS: paras 35-43, ***SB TabA2 11-13)****.*

19 It is submitted that this Ground is at least strongly arguable. The various arguments made by no less than five Queen's Counsel and three other legal academics and barristers in four publications, all set out in the JR Grounds, at least call for consideration and yet were ignored in the learned judge's discussion. The only consideration of these eleven pages of detailed submissions – and the learned articles cited amounting to tens of pages more – is a dismissive summary of ten lines in para 35 of the judgment (which fails to consider most of the submissions).

20 The learned judge held, at para 42 of the judgment, that:

> "The wording in section 45C of the 1984 Act is clear. It is intended to enable the Secretary of State to make general regulations to combat the spread of infection. The provisions that may be made "include" the type of orders that a magistrate could make, such as restrictions on movement and contact and requirements to abstain from working or trading. The provisions are not intended to limit the Secretary of State to making the kind of individualised orders in relation to particular individuals who or are may be infected. Similar provisions apply in relation to premises and things."

21 This reference was in relation to the introduction to sub-sections 45C(3) and (4) of the 1984 Act. Sub-section (3) provided that regulations under sub-section (1) '*may in particular include'* three things including (at (c)) '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'; and sub-section (4) provides that the restrictions under sub-section (3)(c) 'include in particular' (d) 'a special restriction or requirement'.

22 As set out in the JR Grounds, s45C(6)(a) provides that, for the purposes of this Part of the Act, 'a "special restriction or requirement" means a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)'. Notably, this provision does not state that a 'special restriction or requirement' can 'include' powers exercised under ss 45G(2), etc, but that it 'means' a restriction imposed under these provisions. These restrictions are those that may only imposed if a person or premises may be infected, as set out in the JR Grounds.

23 The introduction to the Regulations states expressly that:

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

24 There are no general enabling words and, thus, no basis for the Defendants to establish that it derives its powers from anything other than the above enabling provisions and that '…the court must proceed on the basis that the preamble to an SI sets out all the statutory enabling powers that are necessary for its validity' (*Vibixa Ltd v Komori UK Ltd and others; Polestar Jowetts Ltd v Komori UK Ltd and Others* [2006] EWCA Civ 536, para 22). The learned judge therefore fell into error when he concluded that *because* powers under s45C are introduced as 'including' a 'special restriction and requirement' and that this is not an exclusive introduction, they could have included provisions not enabled by s45(C)(4)(d) and (6) *in this case.* That is to ignore the narrowly constituted enabling power.

25 It is submitted that, for this reason, the arguments set out by the Claimants should succeed. But they are at least strongly arguable.

Ground 2A: fettering discretion

Judgment: paras 49-52;
JR Grounds: paras 51-67, ***#36-41;***
AoS: paras 44-46, ***SB TabA2 13/14****.*

26 It is surprising that the learned judge, who had 'read all the material to which the claimants and the defendant have drawn my attention' fails to address any of the statements of the Prime

Minister, the First Secretary of State and the First Defendant cited in the JR Grounds and the witness statement of Michael Gardner. Rather, he relies exclusively on the self-serving document produced by the Government, "Our plan to rebuild: the UK Government's Covid-19 recovery strategy" ('Our Plan to Rebuild') (**#538-#578**, Tab D1.49). He also wrongly states that this document was 'updated' on 12 May 2020, when that was in fact its date of publication: that is to say, almost four weeks after the first review (on 16 April 2020). It is difficult to see how this document could be preferred, as an aid to the government's approach before that date (including when the 'Five Tests' were first announced by the First Secretary of State on 16 April 2020), to the express statements by Ministers.

27 For example, only two days before that document was published (as set out in para 57 of the JR Grounds, emphasis added) the Prime Minister:

> …stated that, while there would be a staged relaxation of the 'lockdown' restrictions, <u>each</u> relaxation would be 'subject to <u>all</u> these conditions and further scientific advice' and that 'we will be driven not by mere hope or economic necessity. We are going to be driven by the science, the data and public health.'

28 It is, with respect, impossible to reconcile this and other speeches with the learned judge's conclusion that: (1) the language in 'Our Plan to Rebuild' is the best, let alone only, means of determining the Government's decision making; or (2) that the Government was not fettering its discretion. Let alone that that construction was not even arguable. The five tests were not, to use the learned Judge's words "tests, or a means for assessing the risk posed by the Coronavirus." They were, according to repeated Ministerial statements, tests for determining whether to modify or ease the Regulations.

29 Further, far from being a 'fair reading' of 'Our Plan to Rebuild', the learned judge's analysis fails even to address that document's own consideration of the 'Five Tests', at para 1.2 (**#546**). After setting out the tests, this states that 'The Government's priority is to protect the public and save lives; it <u>will</u> <u>ensure</u> any adjustments made <u>are</u> compatible with these five tests' (emphasis added). This is an express statement that each of the tests must be met before any change to the restrictions are made. Any analysis of the Government's policy is neither 'fair' nor complete without analysing the effect of this statement; and such an analysis would be neither fair nor complete without consideration of the express statements about the application of these Five Tests by the Prime Minister and other Ministers.

30 Thus, the Five Tests are not *part* of the considerations that will be taken before easing of the restrictions is (or was) contemplated; they must be met before *any* further considerations of

anything other than viral contagion are taken into account: including health (other than as is affected by the virus), social, educational and economic. Fettering its discretion, on any view.

Ground 2B: failure to have regard to relevant considerations

Judgment: paras 53/54;
JR Grounds: paras 68-72, ***#41/42;***
AoS: paras 47-49, ***SB TabA2 14-15****.*

31 If it is arguable that the Government fettered its discretion, it must be arguable that it failed to take into account relevant considerations, at each stage from 16 April 2020, before deciding whether to relax the restrictions. The conclusion of the learned judge that this is not so (at para 54 of the judgment) is, with respect, entirely reliant on his flawed analysis of the application of the Five Tests.

32 Particularly striking is the learned judge's finding that it is 'clear' from the evidence that 'all' relevant matters 'have been considered in the decision-making process and continue to be taken into account in the reviews.' The learned judge will have known, having read Mr Gardner's witness statement, that the Government has failed to publish any summary of any of the 'reviews' it should have undertaken every three (and later every four) weeks (MG4, para 1.2, **SB TabE1 p 2**) and that this observation was made in Parliament by Mr Julian Madders MP, who stated that the First Defendant, in answer to his request for publication of the reviews, refused even to answer the question (MG4, para 3.13 (reference there to *Hansard*), **SB TabE1 p 8**). Indeed, the Government has failed to provide any evidence that it has even held these reviews.

33 The learned judge's final sentence in respect of this Ground is that 'as a matter of law, it cannot be argued that the government has not had regard to those considerations in reaching its decision on where the balance should be struck.' This is not in fact a question of law but a mixed question of fact and law. The learned judge's conclusion is impossible to reconcile with the facts. There is no evidence that reviews were even held; and the evidence of its application of the 'Five Tests' at least strongly suggests it did not take into account any wider considerations (when reviewing the Regulations if it ever did so) until it was satisfied that each of the Five Tests were met.

Ground 2C: irrationality

Judgment: paras 55/56;
JR Grounds: paras 73-79, ***#42/46;***
Sup Grounds: paras 6-9, ***SB TabA8 pp 3/4***
AoS: paras 50-53, ***SB TabA2 15-16****.*

34 The learned judge simply failed to engage with the detailed submissions on rationality, supported by the extensive evidence of (unchallengable) data exhibited by Mr Gardner's witness statements

in support of the Grounds and Supplementary Grounds (as cited in both). It is, with respect, inadequate simply to accept the Government's assertion that the steps taken were necessary because of the risk of transmission to the general population without addressing the evidence in support of that proposition. Even applying the margin of discretion in respect of proportionality (to which this Ground is closely aligned – see below) it is necessary to have regard to evidence. Moreover, the learned judge failed to address whether the restrictions were rational in the light of less restrictive measures that could have been imposed – particularly advice to shield given to those who are vulnerable (either by virtue of age or pre-existing conditions).

35 The learned judge failed entirely to address the submissions relating to the irrational basis of the Regulations as they were in May and June 2020, as addressed first in the JR Grounds and the witness statement of Mr Gardner and in the Supplementary Grounds.

Ground 2D and 3: proportionality and the correct margin of discretion

Judgment: paras 57-63;
JR Grounds: paras 80-92 and 93-129, ***#46-51 and #52-65;***
Sup Grounds: paras 10/11, ***SB TabA8 p 4****;*
AoS: paras 54-58, ***SB TabA2 16****.*

Proportionality under s 45D

36 First, the learned judge erred in finding that the Secretary of State was obliged to terminate any restriction 'as soon as he considers it is no longer necessary for combatting the spread of infection' (judgment, para 58). The requirement under s 45D – and the HRA as it applies to Convention rights – is to terminate them as soon as he finds that they are not *proportionate*. In considering that question, the Secretary of State cannot simply have regard to the risk of infection. That would (in extremis) allow him to impose the most sweeping restrictions however serious – or not serious – the virus was, providing that those restrictions were 'necessary' to reduce contagion. Indeed, this finding is impossible to reconcile with the learned judge's finding (in respect of fettering discretion) that the Secretary of State *did* consider wider facts and that he was *obliged* to do so.

37 Secondly, the learned judge failed to have any regard to the absence of any evidence that the Government had indeed reviewed the necessity of the Regulations at each stage, let alone evidence of the considerations they had taken into account at each stage. This was in spite of his finding (correctly) that the First Defendant was obliged to terminate the Regulations as soon as he considered, in a review, that they were no longer proportionate.

38 Thirdly, in paragraphs 61 and 62 the learned judge accepted the Defendants' assertions without any (or at least any adequate) consideration of the evidence. Not only did he fail to engage with

the Claimants evidence, he made material errors of fact. These include finding that there were reviews (as above, there is no evidence for this, let alone the factors considered within them) and that the threat to NHS capacity grew after 26 March. In fact, deaths peaked at 8 April and the threat to critical care had reduced considerably by the date of the first review on 16 April 2020, which the learned judge will have noted from Mr Gardner's first witness statement at para 5.63, in which he gives a running commentary by reference to the Government's own statements of how many critical care beds were available. As at the first review, there were more beds available than ever and there was also the capacity of the Nightingale hospitals. This is particularly important because the Government's sole initial justification for the imposition of the Regulations was that it was necessary to 'protect the NHS'.

The correct margin of discretion

39 This matter, addressed in detail with much consideration of the caselaw at paras 93-129 of the JR Grounds, was not addressed in any way by the learned judge. It is critical to his determination of whether the First Defendant acted proportionately. His failure to address the test is fatal to his findings that the proportionality challenge was unarguable.

Ground 3: Convention Rights

Preliminary Issue: relevance of Article 2

Judgment: paras 48;
JR Grounds: paras 197-213, ***#85-91;***
AoS: paras 2-4, ***SB TabA2 1-3****.*

40 Regrettably, the learned judge failed to address the Claimants analysis as to the true relevance of Article 2 to considerations of proportionality, particularly in respect of the positive obligations asserted in paragraph 4a of the AoS. The Claimants continue to rely on the above analysis, which demonstrates that the Strasbourg caselaw cannot be constructed as applying positive obligations to impose restrictions on the fundamental rights of the entire population; and that, while the preservation of life is a relevant consideration in determining proportionality, the positive obligations in the case law relied upon by the Government are limited to the obligation to intervene in particular discreet circumstances, to provide protections through security and the criminal law and to investigate loss of life.

Article 5

Judgment: paras 64-73;
JR Grounds: paras 135-154, ***#66-73;***
Sup Grounds: para 12, ***SB TabA8 p 5****;*
AoS: paras 61, ***SB TabA2 pp 17/18****.*

41 The learned judge failed to consider in any way the Claimants' case in respect of the Regulations as originally imposed and amended prior to 1 June 2020. This is addressed in Ground C of the CA Grounds (below). If the Court of Appeal finds that consideration of the interference when the Regulations prevented persons from leaving their homes without a reasonable excuse are not academic or that it is in the public interest that they be considered, it will have to consider afresh whether this Ground is arguable (and, if it decides to retain the claim, whether to uphold it): the learned judge did not consider the earlier iterations of the Regulations as he found them to be academic. It is submitted that they are clearly arguable and the cursory reply by the Defendants fails to address the Claimants' detailed submissions.

42 In respect of the Regulations that applied from 1 June 2020, the learned judge failed to have any regard to *Pekov v Bulgaria* ([2006] ECHR 50358/99, at para 73), notwithstanding reliance placed upon it in the Supplementary Grounds. He also failed to have adequate regard for the Claimants detailed analysis of the caselaw relating to the relationship between deprivation of liberty and the tort of false imprisonment – that went well beyond the findings in *Jalloh* – set out in the JR Grounds. It is submitted that it is at least arguable that a restriction preventing persons from staying overnight at anywhere other than their residence (unless they have a reasonable excuse, which most will not have) is equivalent to an overnight curfew and that the challenge to the post-June Regulations as an interference with Article 5 is at least arguable.

43 The Claimants accept that the July Regulations do not interfere with their Article 5 rights.

Article 8: private and family life

Judgment: paras 74-78;
JR Grounds: paras 155-159, ***#73-74;***
Sup Grounds: para 13, ***SB TabA8 p 5****;*
AoS: paras 62/63, ***SB TabA2 p 18****.*

44 The learned judge only considered the restrictions as they applied after 1 June. If the Court of Appeal, upholding CA Ground C, finds that they should be reviewed, they are asked to consider the challenge to the restrictions as they originally applied, this not having been addressed by the learned judge.

45 In respect of the Regulations as they applied from 1 June 2020, the learned judge's dismissal of the interference as 'proportionate', on the grounds that they seek to impose a legitimate aim fails to address the next stages of the *Bank Mellot v HMT (No 2)* ([2013] UKSC 39) principles and other tests of proportionality. It is of note that these principles are not outlined in the judgment. The learned judge fails to address either the severity of the interference or (at least adequately) the harms that it will cause, by application to the evidence or the case law.

46 The Regulations imposed on 1 June 2020 would, but for the earlier restrictions, have been perhaps the most restrictive interference with the private and family lives of the entire population in English history. Never before has the law imposed a legal requirement to stay at one's own home on the entire population; or has it restricted to six the number of persons one can visit or see. The fact that this is somewhat less restrictive than the extraordinary restrictions imposed in March entirely fails to grapple with the severity of the interference. The reference by the learned judge to the possibility of 'modern communications' within the hearing and the suggestion that access to telephones and 'if available' internet facilities is hardly sufficient to address the interference.

47 The learned judge failed even to address the argument (raised in the hearing) that any human contact between parent and child, siblings or close friends would have been impossible (under the Regulations after 1 June 2020) if they lived long distances away (for example Exeter and Manchester, if not shorter distances), where visits would only be possible were a person able to stay overnight.

48 In the premises, this challenge is strongly arguable and, for the reasons outlined in the JR Grounds, should be upheld.

Article 9: religious practice

Judgment: paras 79-87;
*JR Grounds: paras 160-168, #**74-76;***
*Sup Grounds: para 14, **SB TabA8 p 5**;*
*AoS: paras 64-66, **SB TabA2 pp 18/19**.*

49 The learned judge would have given permission for the challenge to the Regulations as they were from 1 June 2020 to proceed in respect of the interferences to Article 9. If the Court of Appeal agrees that the challenge is either not academic (due to the threat that the restrictions could be reimposed) or that it is in the public interest to review the original Regulations even though academic, permission should be granted in respect of this Ground.

50 For the reasons set out in para 8 above, it is not suggested that the July Regulations impose a disproportionate interference with Article 9 rights.

Article 11: assembly and association

Judgment: paras 88-96;
JR Grounds: paras 169-178, ***#77-80;***
Sup Grounds: paras 15-17, ***SB TabA8 pp 5/6****;*
AoS: paras 67, ***SB TabA2 pp 19/20****.*

51 The learned judge, with respect, fails adequately to consider either the gravity of the interference or the spectrum of considerations that should be taken into account in determining whether it is proportionate. His finding that they are made under Regulations 'made pursuant to an Act of Parliament' (judgment, para 95) is, with respect, of no relevance to the proportionality test: were they not they would be *ultra vires* in any event and these restrictions were imposed under the emergency procedure with no Parliamentary scrutiny for weeks after their imposition.

52 In order adequately to determine whether the unprecedented restriction of these 'precious rights' was proportionate, the learned judge should have considered and applied, as a minimum: (a) the appropriate test of proportionality; (b) the appropriate margin of discretion that should be given to the government in a Convention challenge in the domestic courts; (c) the gravity of the interference; (c) the evidence of the need for the measure; (d) whether the measure was itself effective (in respect of which the failure of the police to enforce the regulations on the Black Lives Matter protests – a fact to which judicial notice can be given and which was relied upon in the Supplementary Grounds – is relevant); and (e) whether the harms to cardinal democratic rights caused by the interference were proportionate. Rather, the learned judge simply made findings that there was a pandemic of a highly infectious disease that was spreading, with no effective treatment, and that the measures were time limited. This is a wholly inadequate analysis for the consideration of such unprecedented measures.

53 Finally, the finding that these circumstances were 'possibly unique' was not one that could reasonably be made. Aside from the far greater severity and mortality of 'Spanish Flu' in 1918, both 'Hong Kong Flu' of 1957 and 'Asian Flu' of 1968/69 had greater mortality. It is notable that Swift J (in *R (Hussain) v Secretary of State* [2020] EWHC 1392 (Admin)). more accurately described this as a health crisis that was unprecedented for half a century.

Article 14: discrimination

54 It being accepted that the Claimants did not suffer indirect discrimination, this JR Ground was not pursued. However, the Claimants continue to rely on the submissions in respect of this Ground (at paras 179-184, **#80-82**) in support of their contention that the Regulations were irrational and disproportionate.

Article 1, Protocol 1: deprivation of property

Judgment: paras 87-105;
JR Grounds: paras 185-190, ***#82-84;***
Sup Grounds: para 18, ***SB TabA8 p 6****;*
AoS: paras 68-71, ***SB TabA2 pp 20****.*

55 The submissions in the Grounds and Supplementary Grounds and the evidence relied upon are sufficient to establish a loss of goodwill of the two companies the First Claimant owns outright or owns a controlling interest in. The First Claimant gave evidence that his PR company had lost £2.4 million. It is at least arguable that a loss of that much revenue will inevitably damage the goodwill value of anything but the largest companies. In respect of Jota Aviation, it is at least arguable that the restrictions on people leaving their homes or staying elsewhere overnight had an adverse effect on the revenue of that business sufficient to affect its goodwill value.

56 If it is arguable that there has been an interference, the submissions and evidence of the Claimants in respect of proportionality generally are all relevant considerations that should have been taken into account by the learned judge in determining arguability; and it is submitted that this part of the claim was arguable.

CA GROUND (B): AMENDMENT AND DIRECTION/ADVICE TO CLOSE SCHOOLS

Judgment: paras 106-112;
JR Grounds: paras 191-213, ***#84-91;***
Sup Grounds: para 19-45, ***SB TabA8 p 7-13****;*
AoS: paras 72-83, ***SB TabA2 pp 21-24****.*

57 The learned judge failed to address adequately the basis for the application to amend the JR Grounds to address specifically the basis on which the Second Defendant caused schools to close. Although expressed by him and the Prime Minister as directions that schools should close (as outlined in the JR Grounds and the Supplementary Grounds and evidence in support) they were at least (even on the Second Defendant's case) 'requests' or 'advice.

58 The nature of the direction or advice can be gauged from the response by schools and local education authorities. As outlined in the evidence of Mr Gardner, school attendance was 3.7 % after the 'advice' and went below 1 % of pupils thereafter (MG4, para 5.5, **SB TabE1 p 11**) – and this is despite the Government having supposedly intended for schools to be open *onsite* to the 10 % of children who were vulnerable or the children of key-workers. The direction/advice was *at least* guidance.

59 The learned judge failed to take into account (at least expressly) the caselaw cited by the Claimants that guidance is judicially reviewable (Supp Grounds para 29, **SB Tab A8 p 9**). It is

not sufficient for the learned judge to say that there was no 'legal measure' or 'order' made under statute: the 'guidance' of the Secretary of State was identified by the Claimants, led to the closure of schools to almost all pupils and is judicially reviewable.

60 The learned judge failed to address any of the detailed arguments set out by the Claimants in the JR Grounds and Supplementary Grounds, namely: (a) the nature of the right (that it is an absolute right not to be deprived of an education that applies unless there is a derogation); (b) the test to be applied (that addresses the general nature of education provided to children in the state – that is to say five days a week and the national curriculum); and (proportionality not being a defence available to the Second Defendant) (c) whether the interference amounted to a deprivation. The challenge was at least strongly arguable and it is submitted it is all but unanswerable that millions of children (including the Third Claimant) have been deprived of the minimum educational provision provided in England; and that this deprivation has been caused (or at least contributed to) by the Second Defendant's 'guidance' that these schools should close.

61 At the date of appeal the claim is not academic, contrary to the finding of the learned judge at para 112 of the judgment, as the vast majority of children are not attending school. The current policy of the government is, as the learned judge says (at para 111) that there should be a 'phased' return: meaning that most children have not returned, even if it is government policy that they return by September.

62 Finally, if this appeal is heard after the close of the summer term and government policy remains that all children should return to school in September 2020, it is submitted that the claim is not academic or, alternatively, that it would be in the public interest to consider it. The government continues to threaten that 'lockdown' measures may return and these include the closure of some or all schools (see the speeches cited by in Mr Gardner's fourth witness statement). There is therefore a threat of the deprivation of education, that is not an academic question as it is justiciable under s 7(1) of the HRA. Alternatively, if the claim is 'academic', it is difficult to see a much greater public interest than the determination of whether the government deprived millions of children of their education for one and a half terms – which is quarter of a GCSE or A'Level course.

CA GROUND (C): WHETHER ANY PARTS OF THE CHALLENGE ARE ACADEMIC

63 In respect of all restrictions imposed before the hearing of the permission application on 2 July 2020, the judge found that consideration of the domestic law challenges under Ground 2 and interferences to Convention rights under Ground 3 would be academic and that it was not in the public interest for those challenges to proceed. The judgment addresses these issues at paragraphs

31-33. The Claimants case in respect of this issue was set out in their Permission Document (ordered by Lewis J) (**SB, TabA9**).

64 The restrictions requiring persons to remain in their residences without a reasonable excuse were in force at the date of issue.

65 The learned judge erred, firstly, in failing to consider, adequately or at all, whether the restrictions were truly academic. A Claimant may bring judicial review proceedings challenging a 'propos[al]' to interfere with Convention rights: s 7(1) of the HRA. As outlined in the Supplementary Grounds, the evidence of Mr Gardner and the Permission Document, the Prime Minister and the First Defendant have both threatened to reimpose restrictions in the event any of the Five Tests are not met.

66 Since the permission hearing, the First Defendant imposed (on 2 July 2020) the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 ('the Leicester Regulations'). These Regulations were announced by the First Defendant in view of a supposed 'spike' in coronavirus infections. It will be noted that the Leicester Regulations impose substantively identical restrictions on businesses and on individuals as were imposed before 3 July 2020 – essentially, they retain the old statutory scheme for Leicester. This is easily sufficient evidence that the Government would reimpose substantively identical restrictions on other areas – or even regions or the whole country (it expressly not having ruled this out) – if infection increases.

67 Alternatively, there is a substantial public interest in a judicial review of the original and amended Regulations (imposed before the July Regulations) proceeding for at least four reasons:

(1) The Regulations imposed unprecedented restrictions on the lives, society, health and economic activity of every person in England, including – for the first time in history – removing the absolute right to leave their homes, meet their family and engage in political protest for any reason; and including wholesale restrictions on worship greater than were imposed on any religious community since the Catholic Relief Act 1778. It is strongly arguable that those restrictions were unlawful and breached fundamental rights. It is certain that they caused exceptional harms (irrespective of whether they might ultimately be found proportionate). And it is almost impossible to think of a previous example of legal restrictions imposed and then eased where there was a greater public interest in a review of their lawfulness.

(2) Even if the threat of reimposition is found not to engage s 7(1) of the HRA, it is an especially important material factor. This and any future government – and electorate – should know

whether (and/or in what circumstances) restrictions of this severity can or may be proportionate.

(3) Over 15,000 people have had fines and criminal records imposed as a result of Regulations that may be unlawful.

(4) Many others await court hearings for allegations of criminal offending under the Regulations. These individuals include Piers Corbyn, referred to in the Grounds and who (it is a matter of public record) faces trial in respect of two criminal charges under the Regulations for having engaged in anti -lockdown demonstrations on 16 and 30 May 2020 at Speakers' Corner, Hyde Park, a trial that has been is fixed for 23 October 2020.

CONTINUING INTERFERENCES WITH FUNDAMENTAL RIGHTS UNDER THE JULY REGULATIONS

68 It is submitted that the amendments to the JR Grounds allowed by the learned judge were not truly new challenges but the re-framing of existing challenges to address the fact that, while retaining some restrictions, they eased others.

69 The Claimants recognise that the learned judge did not consider the extent of the July Regulations save in respect of its potential interference with Article 9. Thus, this part of the JR Grounds is not truly a ground of appeal but a request for the Court of Appeal to give permission to amend the JR Grounds to permit challenges to limited parts of the July Regulations. While the July Regulations are not on their face amendments to the Regulations, they are in effect.

70 The July Regulations continue to impose restrictions on rights under Article 8 and Article 11.

71 In respect of Article 8 rights, they prevent any gathering at a dwelling, which would include a wedding party or a wake. They prevent any gathering outdoors in a public place – which would include the above if held outside and also gatherings by the graveside after a funeral – save where the exceptions in reg. 5 apply. These are real interferences that will have material effects on the lives of individuals and must be viewed in comparison to normal circumstances rather than in comparison to the much greater restrictions that applied heretofore. While it is accepted that these restrictions are significantly less severe than previously, that is not to say that they are rational or proportionate given the extent to which the infection has decreased. While it is accepted that any maximum number is inevitably arbitrary, there is no evidence of any scientific advice that justifies restrictions of up to 30 rather than (for example) 50 or 100.

72 The interference with Article 11 rights is obvious and severe. The July Regulations proscribe any demonstration in any outdoor public place greater than 30 save where the exceptions in reg. 5

apply. It is noted that these include that a 'political body' organises the gathering and has conducted a risk assessment. This does not allow an individual (such as the First Claimant, who has founded an organisation, 'Keep Britain Free', to campaign against the restrictions; or Mr Piers Corbyn) who is not a 'political body' to organise such a demonstration. And the requirement to hold a risk assessment will have a chilling effect on the ability of 'political bodies' to organise and demonstrate without being subject to scrutiny by government bodies or the courts. Finally, the restrictions fail to take into account the practical inability or (understandable) unwillingness of police forces to enforce restrictions on the right to protest, as demonstrated through the Black Lives Matter protests since May 2020.

CONCLUSION

73 In the premises, the Court is asked to give permission for a judicial review of each iteration of the Regulations to proceed, to give permission to amend the JR Grounds to include the Supplementary Grounds, to give permission to amend the JR Grounds to include a review of the July Grounds and to retain and determine the judicial review, pursuant to CPR r. 52.8(6)

PHILIP HAVERS QC

FRANCIS HOAR

WEDLAKE BELL LLP

13 July 2020