HIGH COURT OF JUSTICE **Claim No.:**

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

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

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

B E T W E E N :

THE QUEEN
(On the application of SIMON DOLAN)

Claimant

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

First Defendant

- and –

THE SECRETARY OF STATE FOR EDUCATION

Second Defendant

STATEMENT OF FACTS AND GROUNDS AND WRITTEN SUBMISSIONS OF THE CLAIMANT

INTRODUCTION AND SUMMARY

1 The Claimant applies for permission to judicially review the lawfulness of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended) ("the Regulations"), through which restrictions have been imposed on every aspect of personal and public life throughout England and seeks an order that they be quashed as *ultra vires*.

2 As Daniel Kelly J found in relation to similar restrictions imposed in the State of Wisconsin:

> '*The power to confine law-abiding individuals to their homes, commandeer their businesses, forbid private gatherings, ban their intra-state travel, and dictate their personal behavior cannot, in any imaginable universe, be considered a "detail." This comprehensive claim to control virtually every aspect of a person's life is something we normally associate with a prison, not a free society governed by the rule of law*.'[1]

3 And as the Prague Municipal Court found in respect of 'lockdown' restrictions imposed within the Czech Republic:

> *Even in times of crisis… it is necessary to protect not only health, lives and the economy, but also a democratic constitutional and legal state*.[2]

4 The Regulations were amended on 22 April 2020 by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (S.I. 2020/447) ("the Amended Regulations"). The Amended Regulations introduced stricter conditions on the general public, in particular by preventing them from remaining outside their residences rather than restricting them from leaving them save for a 'reasonable excuse'. They were further amended on 13 May, 2020, which made minor changes including allowing the opening of garden centres and golf courses and permitting persons to remain outside for 'recreation', as opposed to simply for exercise.

5 The Claimant also applies for permission to judicially review the decision of the Second Defendant,[3] made on 20 March 2020 and announced by the Prime Minister on that date, to direct the closure of all schools and other educational establishments and asks the Court to quash that public law decision and direction. While no order has been published in the London Gazette pursuant to Part 1 of Sch 16 to the Coronavirus Act 2020 ('the 2020 Act'), any Secretary of State has the power to order school closures under that provision. The decision made to close educational establishments, if and insofar as it was not made

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[1] *Wisconsin Legislature v. Secretary-Designee Andrea Palm* [2020] WI 42, Wisconsin Supreme Court, at para 113

[2] *Dostal v Ministry of Health* No. 14 A 41/2020. Czech original at https://www.justice.cz/documents/14569/0/14+A+41-2020+%28Dost%C3%A1l_mimo%C5%99%C3%A1dn%C3%A1+opat%C5%99en%C3%AD%29_final2A/0c4f37b8-fd5f-4670-a306-0c5fedaa568b; quotation taken from a Google Translate and a certified translation can be supplied.

[3] References to 'the Secretary of State' are, save where further qualified, references to the First Defendant only.

exersing statutory powers:[4] (a) was one that was followed by all maintained and independent schools save where limited direct provision was made for the children of 'key-workers'; and (b) was an administrative decision and was made in circumstances where failure to comply with that direction would have led to an order under the Sch 16 to the Act. The effect of the Regulations is also to close all educational establishments. Further, the opening of schools would contravene reg. 7 preventing 'gatherings', in respect of which there is no exception for gathering at educational institutions. The exceptions to the restriction are limited not inclusive and specifically include gatherings for work purposes but not for educational purposes. [5]

6 The Claimant claims that the Regulations are *ultra vires* s 45C of the Public Health (Control of Diseases) Act 1984 ("the 1984 Act"), the provision relied upon by Her Majesty's Government ("the Government") as delegating powers of secondary legislation by which they may impose the Regulations ('Ground 1')

7 Further and alternatively, the Claimant claims that all or some of the restrictions imposed by the Regulations were unlawful either from: (a) when they were imposed on 26 March 2020; (b) the first review on 16 April 2020; (c) their amendment pursuant to the Amended Regulations on 22 April 2020; (d) the second review on 7 May 2020; or (e) the date on which the Court considers the claim, the Defendant having an ongoing duty of review; on the grounds that the Defendant:

(a) Fettered his discretion by imposing a test before which the restrictions could be lifted, under reg 3(3) and, from 16 April 2020, through the imposition of an additional five tests, each of which had to be satisfied before the restrictions could be eased and that were over-rigid in requiring the Secretary of State to consider only their effect on containing the coronavirus and not whether each of them were the least restrictive means of doing so or proportionate to the harms done by the restrictions, all regulations imposed under s 45C of the 1984 Act being required to be proportionate (pursuant to s 45D) (Ground 1A);

[4] And the Defendants are asked to clarify the statutory or other basis on which educational establishments were closed.
[5] These Grounds adopt the definitions in the 2020 Act: 'the coronavirus' refers specifically and only to the infection SARS-Cov-2; and Covid-19 is the disease developed by a limited number of persons infected with the former.

(b) Thus failed to consider the following relevant considerations before deciding whether to impose the Regulations: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium and long-term consequences of the measures; and (e) whether, in the light of those considerations, less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms (Ground 2B);[6]

(c) Imposed or added conditions that made the restrictions irrational (Ground 2C); and/or

(d) In consequence, imposed restrictions that were not proportionate, contrary to the limitation imposed by s 45D of the 1984 Act (Ground 2D); and

While the Claimant challenges the lawfulness of the Regulations from each of the above dates, he will ask the Court to focus on their lawfulness at the date on which it determines the claim. The Court will inevitably have to consider proportionality on that date and it will be able to do so in the light of far more scientific knowledge about the characteristics of the virus and the means by which it has spread, the infection fatality rate, the risk to those under 60 with no pre-existing health conditions (only 253 of whom have died to date), the effectiveness of the 'lockdown' measures on viral contagion and the harms they have caused. To the extent that the Court might find (against the submissions of the Claimant) that the evidence was too uncertain at an earlier stage to enable the Court to find that the Regulations were disproportionate, that will not (or at least may not) be so at a later date.

8 Further and alternatively, the Claimant claims that all or some of the restrictions from each of the above dates were or are a disproportionate breach of fundamental rights and freedoms protected by Articles 5, 8, 9, 11 and 14 and by Articles 1 and 2 of Protocol 1

[6] These considerations are not exclusive and the Claimant reserves the right to allege that further considerations should have been taken into account in the event of his discovery of evidence subsequent to the issue of these proceedings.

and Article 2 of Protocol 4 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention').

9 The Claimant seeks disclosure of the minutes of the meetings of the Scientific Advisory Group for Emergencies ('SAGE') since the beginning of 2020. These Regulations impose the most far reaching restrictions that have ever been imposed on every individual resident in England and yet the Secretary of State[7] has refused to disclose them or to publish any more than 30 of the 120 papers on which the committee relies. Democratic scrutiny of the Regulations is therefore impossible; and it will be impossible for the Court to determine whether the restrictions were proportionate unless it is able to consider that advice.

10 The Claimant asks the Court to exercise its discretionary remedy to quash the Regulations. If, contrary to the Claimant's case, the Court considers that some restrictions would be proportionate, the Claimant would accept a stay in an order quashing the Regulations of three working days during which a Minister may lay regulations under the Civil Contingencies Act 2004 ('the CCA') that the Court considers would satisfy the requirements of domestic law and the Convention by being the least restrictive means of obtaining the objective of reducing the spread of the coronavirus while not causing disproportionate harm.

11 The Claimant is an entrepreneur who owns fully or partially owns a number of UK businesses which combined employ a total of around 600 people. His company, Jota Aviation Ltd has in recent weeks made numerous flights to transport vital PPE equipment for NHS healthcare professionals and to repatriate British people stranded abroad, as well as flying daily for the Italian Post Office to help keep their goods moving. While he lives abroad, he is a British citizen with both parents living in England who may not visit them or his friends living in England, he may not attend demonstrations against the 'lockdown' policies that he would but for the fact that they are proscribed by the Regulations. The Claimant also relies upon evidence of the circumstances of a selection of the almost 4,000 people who have subscribed over £125,000 to his crowdfunding campaign, large numbers of whom are victims of breaches of each of the Convention relied upon by the Claimant. The Claimant's standing to bring this claim (which is not admitted by the Defendant in

[7] Defendant's response to Claimant's letter before action,14.5.2020

respect of the Convention challenges) is dealt with at paragraphs 232 to 243, at the conclusion of these submissions.

12 These Grounds include fully argued and detailed written submissions that the Claimant accepts are much longer than would normally be filed in judicially reviewed cases. First, this case is of the greatest public importance and gravity. It concerns unprecedented restrictions on fundamental rights that will cause (as is outlined below) exceptional harm on an ever escalating basis (they have been estimated to cost the economy £2.5 billion per day). Secondly, the claim raises a considerable number of legal and factual issues of great complexity. Thirdly, the Court may have to consider this case through a remote hearing and would we beleive be assisted, in those circumstances, by fuller written submissions than it might normally expect. Finally, the Claimant has invited the Court to direct that there should be a rolled up hearing in this case, given the urgency of the challenge, and in that event these fully reasoned grounds can stand as the basis of his case subject to adding a response to the contents of the Defendant's Acknowledgement of Service and any further submissions which the Claimant would wish to make.

13 The Claimant attaches, at Appendix One to these Grounds, the relevant statutory material, namely: (a) Part IIA of the 1984 Act (as inserted by the 2008 Act); (b) The Civil Contingencies Act 2004 ss 1, 19, 21. 22, 26, 27 and 28; (c) Part 1 of Schedule 16 to the 2020 Act; and (c) the Regulations, showing each of the amendments and the date of amendments.

14 The Claimant attaches with these Grounds:

(1) A witness statement of Michael Gardner, introducing evidence of the circumstances of the Claimant and public domain evidence about the chronological background, the statutory history, the pre-action steps and correspondence with the Government, evidence that supports the Claimant's case that the restrictions are disproportionate interferences with Convention rights; the Government's pre-conditions for easing the restrictions and an explanation of the Claimant's application for disclosure of the SAGE minutes and documentation;

(2) A bundle of documentation exhibited to Mr Gardner's witness statement, all of which is also possible to access by hyperlinks in view of the extent of the

documentation; this includes the academic articles relied upon in support of these Grounds; and

(3) A bundle of what it is suggested are the key authorities to which the Court may wish to refer at this stage. If the Court directs that there should be a rolled up hearing, as the Claimant invites it to do, then the authors of these Grounds will try to agree a fuller but manageable bundle of authorities for that hearing.

ALLEGED DELAY

15 The Defendant's contends in its reply to the letter before action that the Court should refuse permission in respect of the challenge to the *vires* of the Regulations under the 1984 Act (but in respect of no other Grounds) on the grounds of delay.[8] There has been no delay in this case. Alternatively, insofar as the Court may find that there has been some delay: (a) it has not been unreasonable or caused by the Claimant; and (b) it should not preclude the Claimant from bringing this claim in circumstances where it is not contended that he cannot challenge the lawfulness of the Regulations from their introduction on HRA and Convention grounds.

16 First, the Defendant relies upon the fact that doubts were expressed about the *vires* of the Regulations from 6 April 2020.[9] The Claimant (a businessman not a lawyer) gives evidence in his witness statement that it had not occurred to challenge the Regulations legally until he had read a news report published on Wednesday 22 April 2020 in the *Express* about another legal article that had been published the previous day; that he read that article the following day (23 April); and that he initiated steps to challenge the Regulations that day. The articles relied upon by the Defendant were published, respectively, on the blog of Lord Anderson QC, the web-page of the Society of Conservative Lawyers and the webpage of Blackstone Chambers. None of them were reported in the national press or broadcast media; and it is understood that the report in the *Express* was the first report in the wider media about potential legal challenges to the

[8] *Ibid*, paras 15-18

[9] With no disrespect to Lord Anderson QC, in his blog on this issue on 26.3.2020 (https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/on) he stated that 'this piece aims not to be authoritative, but to start the debate'; and that, while he was making points that had occurred to him that day, the issue 'deserves to be carefully considered'.

Regulations.[10] With the utmost respect to the learned authors of those articles, they were most unlikely to have been read by anyone other than lawyers and legal academics. The Claimant's solicitor, Michael Gardner, explains in his witness statement the challenging process that was necessary to draft a letter before action in such complex proceedings in the short period between his and junior counsel's instruction and the date of the letter before action, 30 April 2020.

17 Subsequently, the Claimant only delayed issuing these proceedings at the direct request of the Defendant, who not only requested a further week to respond to the letter before action (having been given a week to reply by the Claimant)[11] but said that they would bring any failure to do so to the attention of the Court. While compliance with the pre-action protocol does not excuse a party from the duty to act promptly:[12] (a) the Defendant did not suggest that that proceedings should have been issued without following the protocol and cannot reasonably rely on delay caused by their request; (b) it was reasonable for the Claimant to wait for the Defendant's response in a claim as complex and grave as this; (c) it would not have been reasonable to issue proceedings challenging the *vires* of the Regulations before applying to amend them (or issuing new proceedings) challenging their proportionality, insofar as the proportionality challenge increased the complexity of the proceedings, the Defendant accepting (impliedly) that the proportionality challenge was not unduly delayed; and (d) it has been an extremely labour intensive task finalising the Grounds and the written evidence and putting together the documentation necessary in such a complex and important judicial review.

18 Secondly, and fundamentally, this is not a challenge to a public law *decision* but to secondary legislation, law that continues to apply for as long as it is imposed and that continually applies to different persons and classes of persons – including in particular any person travelling to England from abroad on a daily basis who become subject to its impositions on their ability to leave their residence only on their return. Any one of those individuals could reasonably bring a challenge to this legislation on the day on which they arrived in England but (in the case of those who previously had no other interests in

[10] Lord Sumption had written, extra judicially, criticising the Regulations in the *Sunday Times* but his criticisms were made on constitutional, scientific and political grounds and he did not comment on the law or discuss the possibility of a legal challenge before the letter before action was sent.
[11] Initial response to the Claimant by letter dated 7.5.2020
[12] *R (on the application of Finn-Kelcey) v Milton Keynes Council* [2008] All ER (D) 94 (Oct)

England) not before; and this challenge, supported by almost 4,000 subscribers to its crowdfunding challenge, is brought in the interests of every one of them.

19 Thirdly, the Defendant cannot credibly rely on the fact that the rights of third parties have been affected where the rights that have been infringed are precisely those that the Claimant (in the proportionality challenge) is asking the Court to protect. Nor are these circumstances remotely analogous (for example) to a planning or other administrative decision in which third parties might be prejudiced by expending resources in reliance upon it: the Regulations are expressly stated to be for a limited duration and are reviewable every three weeks.

20 Fourthly, (in relation challenges other than to the *vires* of the Regulations under the 1984 Act) while the question of delay is a matter for the Court, the Defendant is right not to contend that the Court could refuse permission on the grounds that the proportionality challenge was delayed unduly. As has been said, the Defendant has an ongoing duty of review; the Regulations (or any one of them) might become unlawful only after a certain date (when they cease to be proportionate); and the challenge is to the proportionality (and thus lawfulness) of any of the restrictions in the Regulations at the later of: (a) their imposition on 26 March 2020; (b) the first review on 16 April 2020; (c) their amendment pursuant to the Amended Regulations on 22 April 2020; (d) the second review on 7 May 2020; (e) their further amendment by regulations on 13 May (f) the date of issue; or (~~f~~g) the date on which the Court considers the claim.

21 Fifthly, the distinction drawn by the Defendant between the *vires* challenge under the 1984 Act (said to be delayed unduly) and the proportionality challenge is sterile:

(1) Were the proportionality challenge successful the Court could declare that the Regulations were *ultra vires ab initio*, which would have the same effects the Defendant claims would be undesirable as any such declaration in relation to the 1984 Act;

(2) The Court would be very unlikely to consider the 1984 Act challenge in isolation from the proportionality challenge; and it is submitted that it would be highly undesirable for it to take this step, given the importance of all issues being resolved in conjunction and the strong possibility of an appeal by either unsuccessful party; and

(3) Insofar as the rights of third parties are affected by this challenge, they are just as much affected by the challenge to the *vires* of the Regulations under the HRA (as disproportionate breaches of the Convention) as they are by the challenge to *vires* under the 1984 Act;

22 Sixthly, the consequences of a declaration that the Regulations were unlawful are exaggerated by the Defendant. It is probably that fines would have to be repaid and compensation awarded to those unlawfully imprisoned. However: (a) the total fines imposed under the Regulations (around 15,000) can be assumed to be under £1 million at £60 each, which is rather less than the £2.5 billion cost of the lockdown per day; and (b) the police are not above mistakenly charging people in any event, every one of the fines imposed under the 2020 Act having been imposed unlawfully.[13] There is no claim for compensation made with this claim and, insofar as any claims might be brought in consequence of the Government having acted unlawfully, they are far more likely to succeed if brought on the grounds of violations of Convention rights, in respect of which there is not (and could not be) any suggestion of undue delay.

23 In the premises, the Defendant's contention that the Court should refuse permission on this ground is unarguable.

SUMMARY OF THE REGULATIONS

24 In summary, the Regulations (which are included in full in Appendix One to these Grounds) provide as follows (using like sub-paragraphs):

(1) Citation, commencement, application and interpretation provisions;
(2) Revocation and saving provisions;
(3) The definition of the emergency period (starting when they came into force and ending when the Secretary of State terminates each one) and provision for review every 21 days;
(4) Requires premises named in Part 1 of Schedule 2 to close;

[13] https://news.sky.com/story/coronavirus-dozens-wrongly-charged-under-lockdown-laws-cps-says-11988865

(5) Makes further restrictions on the opening of any businesses not named in Part 3 of Schedule 2;

(6) Prevents any person from leaving or (under the amendments of 22 April 2020) remaining outside the place where they live without a 'reasonable excuse', including one of those specified in the Regulations;

(7) Restricts any gathering of more than two people outside the same household save under exceptions including that it is 'essential' for work purposes;

(8) Provides for enforcement, including by persons designated by the Secretary of State or local authorities in addition to police constables and community support officers; and permits those persons to require a

(9) Creates offences of failing to abide by regulations 4, 5, 7 or 8;

(10) Provides for fixed penalty notices to be issued;

(11) Provides for prosecution of offences;

(12) Provides that the Regulations expire six months after the date on which they came into force.

25 The above measures are the some of the most extreme restrictions imposed on fundamental freedoms in the modern era. They confine every person in England to their homes save for limited purposes permitted by the state. Parents may not see their children nor grandparents their grandchildren. Worshipers may not attend their services nor children their schools. Businesses must close, thousands will fail and millions of people will lose their jobs. And all political meetings and public demonstrations are, without exception, proscribed by law.

GROUND ONE: THE REGULATIONS WERE *ULTRA VIRES* THE 1984 ACT

26 The part of the 1984 Act from which the delegated power to make the Regulations purportedly derives, s 45C(1) and (3)(c), is limited to providing for circumstances in which decisions may be made by a public body to impose a 'special restriction or requirement' on an individual or a group of persons; and does not allow secondary legislation imposing restrictions on the entire country. The Regulations are therefore *ultra vires* the 1984 Act.

27 The Regulations were imposed for six months (reg. 12) and subject to review every 21 days (reg. 3(2)). They were passed under the emergency procedure set out in s 45R of the 1984 Act. This requires that they be laid before both Houses of Parliament and that they cease to have effect in the absence of positive resolutions by both Houses within 28 days, but that period does not include any time during which Parliament is prorogued or dissolved or during which both Houses are adjourned for more than four days (s 45R(6)(a)). Moreover, once that initial resolution is passed,[14] there is no further requirement of Parliamentary scrutiny.

28 The above powers of delegated legislation appear in Part IIA of the 1984 Act, which was inserted into the 1984 Act by s 129 of the Health and Social Care Act 2008.

29 The delegated powers by which secondary legislation may be passed may be contrasted with the procedure by which regulations may be made under the CCA. Regulations imposed under the CCA may last no more than 30 days (s 26) and lapse in the absence of positive resolutions by each House within seven days of being laid before Parliament (s 27), including in circumstances in which Parliament is not sitting or has been prorogued (s 28). Thus, while new regulations in the same form may be laid after the first regulations have lapsed, they would still require such a positive resolution.

30 Regulations may be made under the CCA in an 'emergency', which includes 'an event or situation threatening serious damage to human welfare in a place in the United Kingdom' (s 1(1)(a)) or loss of life (s 19). Measures must also be necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency and the need for the provision must be is urgent (s 21(2)-(4)). The scope of the regulations is extremely broad and includes (*inter alia*) provisions appropriate for protecting human life and the provision of services relating to health (s 22(2)(a),(b) and (g)) and may make provision of any kind that could be made by primary legislation or through the Royal Prerogative, including by creating offences of failing to comply with the regulations (ss 22(3)(i) and 23).

31 Section 45C(1) of the 1984 Act provides that:

[14] As it was for the Regulations on 4.5.2020

> *The appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).*

32 Section 45C(3) provides for the circumstances in which regulations may be made. These are limited to those imposing duties on medical practitioners (a), and on local authorities (b) and, under (c):

> *provision… imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.*

33 The restrictions that may be imposed under s 45C(3) are limited to four, set out in sub-section (4):

> *(a) a requirement that a child is to be kept away from school,*
> *(b) a prohibition or restriction relating to the holding of an event or gathering,*
> *(c) a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies or the handling, transport or disposal of human remains, and*
> *(d) a special restriction or requirement.*
>
> (Emphasis added)

34 Sub-paragraphs (a) and (b) are limited to restrictions that apply to any one child or any one event or gathering. Sub-paragraph (c) is not material to these regulations.

35 In the Defendant's reply to the letter before action, it is asserted that:

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

36 The suggestion that s 45F does not apply to these Regulations is wrong. First, sub-section (1) expressly makes 'further provision about' regulations under s 45C, without

qualification. Secondly, it is only through s 45F(2)(b) that the Minister had the power, under these regulations, to 'create offences'. Thirdly, s 45F(5) limits the offences that may be created to those not triable on indictment. Fourthly, s 45F(5A) limits the fine that may be imposed for an offence created under s 45C.

37 Section 45F(6) provides that:

> For the purposes of this Part—
>
> (a) 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)…

38 The Defendant accepts that the regulations that may be made by a Minister (and that it accepts are subject to s 45D(1)) are 'special restrictions and requirements' but does not accept that the above provision applies to regulations made by a Minister. Yet, as can be seen that sub-section – unlike provisions that use the inclusive term 'include' this provision (on which the Defendant places reliance): (a) applies 'for the purposes of this Part', which is to say to all sections within Part IIA; and (b) expresses what the sub-section 'means' without qualification, rather than that it 'includes' restrictions that may be imposed by a JP.

39 The Defendant does not appear to take issue with the application of s 45D(3), which provides that regulations imposing a special restriction or requirement under 45C(4)(d) may not include those mentioned in section 45G(2)(a), (b), (c) or (d), which include (as (d)) that a person 'may be kept in isolation or quarantine'; and argues (at para 25 of the reply to the letter before action) that they apply in circumstances in which a JP may impose a 'restriction' on 'P' – 'P' being a patient subject to an order made by a JP.

40 Section 45(G) applies only to a person who is or may be infected or contaminated; s 45H(2) only to an object; and s 45(I)(2) to premises that 'are or may be infected or contaminated' and where they may present harm to human health. Section 43J(1) provides that these powers may also be used 'to make an order in relation to a group of persons, things or premises'. Each of them gives JPs power to make restrictions only over an individual person, object or premises, or an identified group of them: and only after a judicial decision that each was or may be infected or contaminated.

41 The conditions that must be satisfied before a JP may make a special restriction must be further prescribed by regulations that 'make provision about the evidence that must be available to a justice of the peace' before the justice can be satisfied that 'the person or group of persons is or may be infected, risks infecting others and that it is necessary to make the order' (s 45G(7). This requirement is mirrored in relation to things and premises (respectively) by ss 45H(7) and 45I(7). The Defendant argues that this does not apply where a Minster makes provisions; and yet he accepts that the regulations may only be made where a JP has the power to make a restriction against 'P'.

42 The regulations required by ss 45G(7) were made in the Health Protection (Section 2A Orders) Regs 2010 . Reg 4 of these regulations sets out the details of the evidence without which a JP could not make a decision against a person. These include a medical report by a person suitably qualified with details of (inter alia) signs and symptoms of infection and the outcome of clinical or laboratory tests, a summary of the characteristics of the infection and an assessment of the risk to human health.

43 The Defendant, while arguing that regulations permitted under the Act are of very general effect, nevertheless accepts that the power is based on s 45G(2): restrictions that may be made on a 'patient'. Yet he suggests that provisions as strictly confined as that may be applied, in the absence of any clear words, to every individual in the country.

44 Regulations made under s 45C are further limited by s 45F(2), which applies to all health protection regulations under ss 45B and 45C. This provides that they may confer 'functions' on local authorities and other persons (sub-para (a)), may 'provide for appeals from and reviews of 'decisions' taken under the regulations (sub-para (e)) and provide for the 'resolution of disputes' (sub-para (h)). Further, s 45F(6) of the 1984 Act provides

> *(6) Regulations under s 45C must provide for a right of appeal to a magistrates' court against any 'decision' taken under the regulations by virtue of which a special restriction or requirement is imposed on or in relation to a person, thing or premises.*
>
> *(7) Regulations under section 45C which enable a special restriction or requirement to be imposed by virtue of a decision taken under the regulations must also provide that, if the restriction or requirement is capable of remaining in force in relation to any person, thing or premises for more than a specified period, a specified person may require the*

continuation of the restriction or requirement to be reviewed in accordance with the regulations at specified intervals by a person determined in accordance with the regulations.

(8) In relation to a special restriction or requirement mentioned in section 45G(2)(c) or (d)—

(a) the period specified by virtue of subsection (7) and the intervals specified by virtue of that subsection must be 28 days or less, and

(b) the regulations must require the continuation of the restriction or requirement to be reviewed without an application being made.

(All emphasis added)

Although s 45F applies to any regulations made under 45C, these are the only provisions in that section that relate, solely or at all, to 'special restriction[s] or requirement[s]'.

45 Further, s 45D(2), which provides additional limitations on restrictions made under s 45C, requires that 'regulations provide that a decision to impose such a restriction or requirement' may only be taken if proportionate.

46 Thus:

(1) Section 45F(6) refers to restrictions imposed in relation to a person, thing or premises but cannot apply to s 45C(4)(a) and (b) (which expressly apply to individual persons or premises), as they do not, in contradistinction to those imposed under s 45C(4)(d), provide for regulations imposing a 'special restriction or requirement';

(2) The limitations on special restrictions or requirements in s 45F(6)-(8) apply to restrictions made on individual persons or premises (using the term 'a' or 'any person thing or premises') or groups of premises (under s45J) in the same way as regulations provided for by s 45C(4)(a) and (b);

(3) Section 45F(6) refers specifically to a 'decision' made 'by virtue of which a special restriction or requirement [singular] is [singular] imposed.

(4) Section 45F(7) again refers to a 'decision', again in relation to an individual 'person', 'thing' or 'premises' (or group of the same under s45J) and makes provision for it ending and for its review; and

(5) Section 45F(8) refers to 'a' (singular again) special restriction or requirement;

And, in conclusion, regulations providing for a 'special restriction or requirement' may only provide for the making of an individual decision to be made in relation to an individual person or premises, which in turn must be subject to review. The Regulations, which relate to the entire population and all but a defined class of business premises, are thus *ultra vires* the 1984 Act.

47 The Claimant's first contention is supported by the following considerations:

(1) It cannot be said that every business premises other than those excluded from closure under Schedule 2 to the Regulations 'are or may be infected or contaminated' (a ground for a 'special restriction or requirement' to be imposed to a premises under s 45(I)(2));

(2) A 'special requirement or restriction' may only apply to a person or group of persons if a JP could have made an order against him or her under s 45G(1), which requires that <u>each</u> of the following must apply:

(a) P [the person concerned] is or may be infected or contaminated;

(b) the infection or contamination is one which presents or could present significant harm to human health,

(c) there is a risk that P might infect or contaminate others, and

(d) it is necessary to make the order in order to remove or reduce that risk.

It cannot be suggested that every individual in the country not only 'may' be infected but 'might infect or contaminate others', or that it is 'necessary' to impose restrictions on every person in England in order to remove the risk that every one of them may infect others.

(3) As Robert Craig has argued,[15] Ministers' powers to make regulations under Part 2A of the 1984 Act are limited to some of those that 'can' be imposed by a justice of the peace; and a measure can only imposed if a JP makes a judicial finding that that person is at risk of infection. This supports the argument that a special restriction or requirement may only be imposed after a 'decision', that decision also being subject to review and appeal by s 45F(6)-(8). Not only must such a judicial decision be made, it may <u>only</u> be made after detailed expert evidence (including of tests) has been considered by a JP.

[15] 'Lockdown: a response to Professor King' (<u>https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/</u>), 6.4.2020.

(4) Primary legislation may not authorise conduct that would otherwise constitute a trespass or common law imprisonment save where sanctioned by express words or necessary implication in the statute. (*Morris v Beardmore* [1981] AC 446, 455; *R (Gedi) v Home Secretary* [2016] EWCA Civ 409, [2016] 4 WLR 93). As argued by Tom Hickman QC, Emma Dixon and Rachel Jones[16] the Regulations (especially since their amendment requiring persons not to remain outside their home without a reasonable excuse) would require each individual in England to be subjected to the tort of false imprisonment (*R (Jalloh) v Home Secretary* [2020] UKSC 4).

(5) As Hickman *et al* argue (at para 35(2) the above applies even more strongly to 'the power to remove a person to their home using reasonable force' which 'is even more straightforwardly a power to engage in conduct that, if not sanctioned by law, would be both an imprisonment (during the course of removal) and a trespass to the person, where reasonable force is used to effect the removal.'

(6) Also as argued by Hickman *et al*, *Jalloh*, supports the proposition that the provisions requiring persons to remain at home would also amount to 'quarantine', which (the Government accepts) regulations may not impose on individuals.

(7) As argued by Craig and by Lord Sandhurst QC and Benet Brandreth QC,[17] the 1984 Act is subject to the principles *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115, 131–132 (emphasis added):

> "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.* ***Fundamental rights cannot be overridden by general or ambiguous words.*** *This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.* ***In the absence of express language or necessary implication to the contrary****, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document… What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament."*

[16] 'Coronavirus and Civil Liberties in the UK' (https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4), 6.4.2020.

[17] 'Pardonable in the Heat of a Crisis – Building a Solid Foundation for Action' (https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf), 16.4.2020 (Lord Sandhurst practised at the Bar as Guy Mansfield QC).

(Emphasis added)

In this case, the Government suggests that fundamental rights may be overridden not by primary but by secondary legislation; and does so on the basis an Act granting regulatory powers: (a) expressly stated to apply to patients found in a judicial process to suffer from an infectious disease; and (b) making no mention that they may apply as broadly as to every person in the country.

(8) As argued by Sandhurst and Brandreth:

> The better view, in our opinion, is that the restriction at 45G(2)(j) of the 1984 Act ['that P be subject to restrictions on where P goes or with whom P has contact'] should be read as less restrictive than those in subsections (b) to (d). That would be the case if (j) is read as simply permitting the government to prohibit going to particular locations. But even if that is the case, it does not provide the power to make regs 6 and 8.

(9) As Sandhurst and Brandreth also argue, s 45F(2), which is the only means by which Ministers may make regulations imposing offences and fines, does not allow for the power of arrest or the use of force. That section is very much exclusive not inclusive and without it, no such power exists. Thus, the enforcement powers in reg. 8 that allow for the use of force are *ultra vires*, irrespective of whether other parts of the Regulations are *vires*.

(10) The very term 'special' restriction or requirement supports the contention that it should be used only in narrow, limited and thus <u>special</u> circumstances; and strongly weighs against any suggestion that it might be imposed in <u>all</u> circumstances on every person and all but certain categories of business premises in the country.

(11) The wide powers provided for under the CCA are subject to strict limitations of time and rigorous Parliamentary scrutiny. Parliament, in passing the additional s 45G in the 1984 Act (by s 129 of the Health and Social Care Act 2008) may be imputed to have had in mind that any delegation of the power to make secondary legislation through the 1984 Act would supplement the delegated powers of the CCA (of 2004); and that powers that had the breadth of those delegated under the CCA should only be used under that Act. This is further supported by the fact that Parliament (in passing the 2008 Act) will have been aware that regulations that may be made under the CCA must be subject to much stricter limitations of time and much more rigorous Parliamentary scrutiny than those imposed under the 1984 Act; and the principle (albeit in reference to delegated powers in the same Act), that a

general delegated power cannot be used in a way that would undermine the limitations imposed in relation to delegated powers elsewhere in that Act.[18]

(12) If this were not sufficient to establish the intention of Parliament in providing for regulations imposing a 'special restriction or requirements' and recourse could be made to ministerial statements during the passage of the 2008 Act (by which Part 2A of the 1984 Act was inserted) these also strongly support the above construction, as Craig has observed.[19] Ministers proposing the 2008 legislation in parliament (HL Debates, Vol. 700, Col. 452 (28 March 2008)) claimed that the legislation 'provided significant safeguards… to protect individuals' and made no reference to delegating powers more widely.

48 Some of these arguments are supported by leading practitioners and academics in the articles cited above and also by Lord Anderson QC.[20].

GROUND 2: OTHER DOMESTIC LAW CHALLENGES TO THE REGULATIONS

Introduction

49 Section 45D of the 1984 Act provides that:

> *(1) Regulations under section 45C may not include provision imposing a restriction or requirement by virtue of subsection (3)(c) of that section unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
>
> *(2) Regulations under section 45C may not include provision enabling the imposition of a restriction or requirement by virtue of subsection (3)(c) of that section unless the regulations provide that a decision to impose such a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
>
> *(3) …*
>
> *(4) Regulations under section 45C may not include provision enabling the imposition of a special restriction or requirement unless—*

[18] *Bennion on Statutory Interpretation,* s 3.7, citing *R (JM (Zimbabwe)) v Secretary of State for the Home Department* [2017] EWCA Civ 1669 *per* Flaux LJ at [74], [76].
[19] *Ibid*
[20] 'Can we be forced to stay at home? (https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/) 26.3.2020.

(a) the regulations are made in response to a serious and imminent threat to public health, or

(b) imposition of the restriction or requirement is expressed to be contingent on there being such a threat at the time when it is imposed.

(5) For the purposes of this section—

(a) regulations "enable the imposition of a restriction or requirement" if the restriction or requirement is imposed by virtue of a decision taken under the regulations by the appropriate Minister, a local authority or other person;

(b) regulations "impose a restriction or requirement" if the restriction or requirement is imposed without any such decision.

50 Regulation 3(3) provides as follows:

As soon as the Secretary of State considers that any restrictions or requirements set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State must publish a direction terminating that restriction or requirement.

Ground 2A: Fettering Discretion

51 It may be imputed that the Government's decision to impose the Regulations was made on the above basis. The Claimant relies, further, on the Government's public announcements prior to the imposition of the Regulations in support of this contention, which the Claimant sets out in exhibits to the witness statement of Michael Gardner. These provide substantial evidence that the considerations taken into account by the Government were limited to the effect measures would have on restraining the spread of the coronavirus.

52 The Government thus fettered its discretion by imposing an over-rigid test before which the restrictions could be lifted, one that required the Secretary of State to consider only their effect on containing the coronavirus and not whether they were the least restrictive means of doing so or proportionate to the harms done by the restrictions (*British Oxygen Co Ltd v Board of Trade [1971] AC 610*).[21]

[21] It is not suggested – and nor could any reasonable reading of the letter before action be taken to have suggested – that containing the virus is an irrelevant consideration, as the Defendant implausibly suggests was asserted (reply to letter before action, *ibid*, para 37/38).

53 On 16 April 2020[22] the First Secretary of State, announcing the decision not to end their application on that date, made the following statement:

> "Now, in terms of the decisions that lie ahead, we want to be as up front with the British people as we possibly can. So, let me set out 5 specific things which the government will need to be satisfied of before we will consider it safe to adjust any of the current measures.[23]
>
> (Emphasis added)

54 The five tests stated that the government would continue to extend the Regulations until each of the following five conditions were met:

- making sure the NHS could cope;
- a "sustained and consistent" fall in the daily death rate;
- reliable data showing the rate of infection was decreasing to 'manageable levels';
- ensuring the supply of tests and Personal Protective Equipment (PPE) could meet future demand; and
- being confident any adjustments would not risk a second peak.[24]

55 In a written statement to the House of Commons made on 28 April about the review of and amendments to the Regulations the First Secretary of State re-iterated that the 'five conditions' 'would need to be met before the measures were are eased'.[25]

56 In a further press-conference on 7 May 2020, the date by which the Secretary of State was required to have reviewed the restrictions and terminated any that he considered did not meet the statutory test, the First Secretary said that:

> '…And, it's important to say this, at **each** point along the way when we take these decisions, they will be based on the five tests and the scientific advice that we receive…'.
>
> (Emphasis added)

[22] The Regulations were imposed for six months but the Secretary of State has a duty to review them every 21 days (reg. 3(2)) and must terminate them if he decides they are 'no longer necessary' for the reasons quoted in para 59, above (reg. 3(3)).
[23] Witness statement of Michael Gardner, para 2.48 (https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020)
[24] 'UK lockdown extended for 'at least' three weeks' (https://www.bbc.co.uk/news/uk-52313715), 16.4.2020).
[25] Witness Statement of Michael Gardner, para 2.51 (https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-28/HCWS206/)

57 These five tests were re-iterated by the Prime Minister in his press-conference on 10 May 2020. In that speech, he stated that, while there would be a staged relaxation of the 'lockdown' restrictions, each relaxation would be 'subject to all 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.'[26]

58 The Prime Minister and Government have since confirmed in an official paper that each of the above five tests will have to be fulfilled before future relaxations of the 'lockdown' – and the restrictions under the Regulations – can be permitted.[27]

59 The Defendant's approach to these five tests, set out in its reply to the Claimant's letter before action, was disingenuous. They firstly make the implausible suggestion that the Claimant contended that the objective of containing the virus was 'irrelevant' – despite that being a construction of the letter before action directly contradictory to the Claimant's concession (made in no less than nine paragraphs in the letter before action[28]) that containing the virus was a legitimate objective. The Defendant's reply then went on to claim that the Government was 'acutely aware' of the interference posed by the Regulations and the 'obvious economic, health, equalities and social impacts engaged by such unprecedented action' and that 'it is actively monitoring those impacts so far as possible to do so.'[29] Finally, it asserted that:

> '…The Government's approach has been consistently to seek to strike the most appropriate balance possible, having regard to: the lethality of the virus; the ease of its spread; the need to ensure the National Health Service is not overwhelmed such that it can continue to provide necessary medical care to all those who need it; the need to reduce the risk of subsequent surges in infection and mortality; and the adverse economic and social impacts which will or might follow from the restrictions imposed.'[30]

60 While acknowledging (and disputing) the suggestion that the statutory test in reg. 3 (imposed on the Secretary of State at each three-weekly review) was a fetter on the Defendant's discretion, the reply ignored the challenge to the imposition of the five tests.

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[26] Witness statement of Michael Gardner, para 3.19 (https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020)
[27] Witness statement of Michael Gardner, paras 7.10 to 7.14
[28] Witness statement of Michael Gardner, para 3.1 (paragraphs 7, 8, 37, 41, 45, 46, 48, 65 and 69 of the letter before action)
[29] Witness statement of Michael Gardner, para 3.7 Reply to letter before action, *ibid*, para 38
[30] *Ibid*, para 39

The Defendant has thus failed to grapple with the consequence of the formal statements of Government policy made (twice) by the First Secretary, (twice) by the Prime Minister and in a formal Government paper – which is that each of the five tests must be met before any of the restrictions are lifted. Regardless of the 'awareness' of the Government of these considerations, they could not take them into account in determining whether to relax the restrictions if – as the Prime Minister and First Secretary have said they do – they must be satisfied that these tests are each met. The only logical conclusion that can be reached is that the five tests – none of which take into account any consideration other than viral contagion – are the sole determinator of whether the restrictions can be eased. That is – precisely – what the Prime Minister and First Secretary have said.

61 Further, even in the Defendant's response to the letter before action in which they assert the Government's approach, all but the last of the five listed considerations (inconsistently with the stated tests) concern viral contagion. That is to say, the continuation of the exceptional harms and unprecedented interference with fundamental rights caused by the Regulations is – at best and if one is to accept the Defendant's assertion of Government policy in that response over that expressly stated by the Prime Minister and First Secretary – the final one of five considerations, all others relating to viral contagion.

62 The witness statement of Michael Gardner includes (at sub-paragraphs in paragraph 7) a full digest of the evidence that the Government has imposed on itself a requirement to meet all five conditions before it may lessen any of the restrictions.

63 The five tests impose a considerable additional fetter over the Secretary of State's future decisions about whether to relax the Regulations. They do not require Ministers to consider whether the Regulations are, and continue to remain, the least restrictive means of obtaining the object of reduced viral spread or to terminate any restrictions which are not. They fail to take any account of the considerations that should be applied under the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted for that purpose by the UN Economic and Social Council in 1984, and the UN Human Rights Committee ('the Siracusa Principles')[31], considered further below under Ground 2D. Finally and in consequence, they do not allow the Secretary of State to determine whether the continuation of the

[31] http://hrlibrary.umn.edu/instree/siracusaprinciples.html

restrictions in the Regulations (or any one of them) remain proportionate, under s 45D of the 1984 Act, or whether they have become disproportionate infringements of Convention Rights.

64 Under the First Secretary's tests, restrictions would remain if there were (*inter alia*) insufficient tests or the reproduction rate of the virus was not reducing to 'manageable levels'. Each of these tests must be met and no consideration is required – or may even be taken – of whether different or less restrictive means could be attempted or are likely to succeed in reaching that object.

65 While the scientific and comparative evidence[32] concerning the impact of the virus is of key importance, it is not and cannot be the only – or even the overriding – consideration in imposing restrictions of such magnitude that may cause such great harms (as outlined below) and in limiting and removing fundamental human rights.

66 The Government have now admitted these effects at paragraph 1.1 of its Coronavirus recovery plan published on 11 May:

> 'The longer the virus affects the economy, the greater the risks of long-term scarring and permanently lower economic activity, with business failures, persistently higher unemployment and lower earnings. This would damage the sustainability of the public finances and the ability to fund public services including the NHS. It would also likely lead to worse long-run physical and mental health outcomes, with a significant increase in the prevalence of chronic illness.'[33]

And yet it fails to accept that these harms and this scarring are a direct result of its policies; or to take those harms into account, expressly or impliedly, in determining whether to relax the restrictions. The tests measure absolutes: none of them allows for an assessment of proportionality or countervailing harms; and each of them must be achieved before any relaxation is permitted.

67 The discretion of the Secretary of State was thus fettered unduly by an over-rigid approach to determining whether the restrictions were proportionate: (a) before the Regulations

[32] Of alternative means of containing the virus adopted by other countries. There is no evidence that these have been evaluated by government; and Ministers' express announcements suggest that they have not been.

[33] https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy

were imposed; (b) in determining whether to terminate all or any the restrictions at the first review on 16 April 2020; (c) before determining whether to amend the restrictions to the Amended Regulations on 22 April 2020; (d) in determining whether to terminate all or any of the restrictions before the second review on 7 May 2020; or (e) in not terminating all or any of the restrictions at the date on which the Court considers the claim, the Defendant having an ongoing duty of review.

Ground 2B: Failure to take into account relevant considerations

68 The Secretary of State was required to take into account relevant considerations and not to take into account irrelevant considerations (*R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23) at any of the dates specified in paragraph 67 above

69 Restrictions imposed under the 1984 Act are imposed in order to protect public health but may only be imposed if they are proportionate (s 45D), a requirement further to that of the HRA that they must not be disproportionate breaches of Convention rights. The Act does not set out the considerations to be taken into account in determining whether restrictions are proportionate; and the Court must therefore determine whether any particular consideration is relevant or irrelevant before restrictions may be imposed under s 45C of the 1984 Act by reference to the implied objects of the statute, which include that they must be proportionate. Where a matter is of fundamental importance in deciding whether to exercise a power, the decision-maker will be bound to consider that matter: *R v Hillingdon Health Authority, ex p Goodwin; R (on the application of Coghlan) v Chief Constable of Greater Manchester Police* [2004] EWHC 2801 (Admin); *R (on the application of Ireneschild) v Lambeth London Borough Council* [2007] EWCA Civ 234.

70 The restrictions may only be proportionate if the positive effect of their imposition on the coronavirus relative to less restrictive measures (if any) is not outweighed by the harms they might cause; and the Secretary of State was required to have had regard to the gravity and magnitude of the effects and consequences of the restrictions on fundamental rights in respect of every area of national life.[34] This duty to take into account those

[34] *R v Secretary of State for the Home Department, ex p Quaquah* [1999] All ER (D) 1437; *R (on the application of Goldsmith) v Wandsworth London Borough Council* [2004] EWCA Civ 1170.

considerations in coming to a decision is independent and complementary to its duty not to impose restrictions disproportionate to the exercise of fundamental rights (pursuant to s 6(1) of the HRA). Those effects are of 'fundamental importance' to the decision whether to impose the measures.

71 The Government could only make this determination after adequate consideration of (at least) the following: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; and in particular the unreliability of the evidence of Prof Ferguson and the Imperial College teams (as set out in para 92 below); (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium- and long-term consequence of the measures; and (e) whether, in the light of those considerations, whether less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms.[35]

72 Where the decision-maker has unreasonably attributed too much weight to a particular issue the courts will intervene: see eg *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419 at 427–428, CA, *per* Stocker LJ; *R v South Gloucestershire Housing Benefit Review Board, ex p Dadds* (1996) 29 HLR 700).

Ground 2C: Irrationality

73 The Claimant contends that all or some of the restrictions either in the form as originally imposed, in the form in which they appear after the amendments to the Regulations made on 13 May 2020 or at the date of review are irrational. Where considering 'manifest unreasonableness' which interferes with fundamental rights, the Court must quash an act or decision where there is no objective justification for that interference.[36]

[35] These considerations are not exclusive and the Claimant reserves the right to allege that further considerations should have been taken into account in the event further evidence comes to light after proceedings are issued.
[36] *Brown v Stott* [2003] 1 AC 681 at 720, [2001] 2 All ER 97 at 130, PC

74 Further and alternatively, if and to the extent that the Court does not consider that some or all of the restrictions must be quashed on this ground alone, the Claimant relies on them in support of Ground 2D (proportionality under s 45D) and Ground 3 (disproportionate interference with Convention rights contrary to s 7 of the HRA).

75 First, the Claimant contends that it was irrational and disproportionate to impose a 'lockdown' on the entire country for a virus that was known to pose little risk of mortality or serious illness to the healthy working population, while posing much greater risks to those with pre-existing health conditions and, particularly, those over 70 years old. The Claimant relies on the publicly available evidence exhibited by Michael Gardner to establish what was known to the Government at the date on which the Regulations were first imposed and, alternatively, at the date on which the Regulations were amended for the second time on 13 May 2020 or at later dates up to the date of the hearing. It is submitted that the evidence demonstrates that restrictions applying to the social, business, educational and daily lives of the entire population was irrational in view of the following facts:

(1) That children are extremely unlikely to be able to pass the virus to any others;[37]
(2) That children and young persons under 20 are exceptionally unlikely to be caused a fatal illness by the virus, only 12 of them having died (only 3 of whom had no pre-existing conditions) up to 14 May 2020 relative to almost 1,000 deaths of those between 1-15 in the entire population across 2018; [38]
(3) That adults under 60 with no pre-existing conditions are exceptionally unlikely to die of the virus, there having been only 253 such deaths until 14 May, 2020;[39] and
(4) That there have been just over 2,000 deaths of persons under 60 (including those with pre-existing health conditions) up to 14 May 2020.[40]

76 In considering the rationality of the decision to impose restrictions, the Court is asked to consider the exceptional harms caused to the liberties, health, prosperity, education and society of the whole country by these Regulations, as outlined under Ground 3 in relation

[37] Witness statement of Michael Gardner, paras 5.13 to 5.20 and paras 5.49 to 5.52
[38] *Ibid*, paras 5.51 and 5.52 - https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/
[39] *Ibid*, paras 5.51 and 5.52
[40] *Ibid*, para 5.52

to each of the Convention rights engaged and under paras 214 to 219, relying on evidence in publicly available material exhibited by Michael Gardner. Whether on irrationality grounds alone or (alternatively) under Grounds 2D and 3, these impositions cannot be justified relative to less restrictive measures or advice given to or imposed those outside the healthy, working aged population.

77 Secondly, the Claimant relies on the witness statement of Michael Gardner, at paragraphs 4.9 to 4.17, in which he points out a number of examples of the irrational nature of the restrictions, particularly but not exclusively in relation to their current form. These include but are not limited to the following:

(1) No restrictions are imposed on gatherings in workplaces or (given that it remains open) on gatherings within buses, trains or other forms of public transport or on railway, underground or bus stations; and this includes the fact that no restrictions on such gatherings require the 'social distancing' recommended in Government guidance. Yet the Regulations proscribe all social gatherings – including of very small numbers over 2 including all political gatherings or protests and all religious gatherings (inside or outside religious buildings).

(2) The Regulations appear to proscribe all gatherings in educational institutions, which on their face would proscribe the opening of any schools. Regulation 5 provides that all gatherings are unlawful except where they are for a limited number of purposes not including educational establishments; and gatherings within workplaces are specifically permitted (save where the businesses must close under other parts of the Regulations) but not within educational establishments.. This is despite the very limited exceptions that the Government has *announced* applies to the children of 'key-workers', which on its face does not excuse those schools from Regulation 5.

(3) The restrictions on educational establishments are irrational in the face of the evidence that the risk to children posed by the virus is far less than other risks they face; and their potential for infecting others so low.

(4) Since the amendments to the Regulations on 13 May 2020 it is possible for estate agents to visit unlimited numbers of properties, potentially infecting all of them, yet it is not possible for an individual to visit and stay with one other household – including his or her parents, siblings or children.

(5) Since the above amendments, it is possible to meet one but only one individual from outside one's household but only in a public place. Thus, one may meet only one parent at a time; and yet there is nothing to stop a person from meeting individual friends or family members in succession.

(6) There are no statutory restrictions on shopping in premises that are permitted to open, all of which contain large numbers of items that will inevitably be handled by many individuals, something which is far more likely to spread a virus then walking close to another person without touching them. Yet one may not attend a church even if measures were imposed requiring social distancing. This is not simply a matter of putting Mammon over God (while it may not be sufficient to live on bread alone[41] it is necessary to eat) but an irrational consequence of the Regulations, quite apart from their impact on religious freedoms.

(7) One may not visit a second home even if no other person is there, yet there is no restriction on tradesmen or women attending one's own property (including cleaners who, notwithstanding government guidance, have never been restricted from attending properties);

(8) While hair and beauty salons are banned from opening, there is no restriction on a barber from attending one's own home, where social distancing would be impossible to practice;

(9) One may play tennis with only one member of another household[42] despite the game being played at a ('social') distance; and

(10) It is impossible to start a physical relationship with anyone, even for young and physically fit individuals (at almost no risk of complications from the virus) or for those who have both had the virus; that it is arguable that an exception to this proposition is that two persons could lawfully engage in a physical relationship were they in a public place (since the Regulations were amended, there being no requirement for 'social distancing' under the Regulations provided no other laws were broken[43]) but not in their own homes is another indicator of the absurd consequences of the Regulations;

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[41] Matthew, 4:4

[42] Reg. 6(2)(ba), which permits recreation with one other member of another household; and para 44 of Part 3 of Schedule 3, which permits outdoor sports courts to open; both of which were exceptions added on 13.5.2020

[43] Which of course they may be.

78 These are but some examples and the Claimant reserves the right to rely on others. Singularly and collectively, they demonstrate that the Regulations are not a rational means of preventing viral spread; and, alternatively (pursuant to Grounds 2D and 3) that they are a disproportionate means of doing so.

79 It will be noted that the Regulations, in many respects, impose more onerous restrictions on those unable to exercise their Convention rights than those who do not. Not only is this irrational but it is a ground on which the Claimant relies, further and in the alternative, in support of his case that the Regulations are disproportionate, both as a domestic ground of judicial review (Ground 2D) and, under Ground 3, as breaches of those Convention rights.

Ground 2D: Implementing or not terminating the Regulations was not proportionate under the 1984 Act

80 Section 45D provides that the regulations were or became *ultra vires* if the Secretary of State did not consider, before deciding to implement them, that they were not proportionate. The Claimant's and Defendant's representatives have differed on the test that could therefore be imposed by the Court, under this section.[44] It is the Defendant's contention that the test is lower than that under the HRA, in that it applies to the subjective determination of the Minister, with the effect that the Court may only set them aside if it finds that the Minister's determination (presumably, although the Government does not go that far) at the date on which the Regulations were imposed.

81 It is submitted that the distinction between a proportionality challenge under s 45D and under the HRA may, in fact, be a sterile one:

(1) As the Defendant concedes, the 1984 Act test must be applied objectively (albeit the concession extends only so far as that the Minister's assessment must be rational).

(2) The fact that the Regulations must be reviewed every three weeks requires the Minister to make a 'decision' that they should remain; and that 'decision' is subject

[44] Letter before action, *ibid*, para 33; reply to letter before action, *ibid*, para 36.

to s 45D, requiring that the Minister be satisfied that the restrictions he does not terminate are proportionate; and the proportionality requirement is thus imposed at least on each of these three week intervals in view of evidence known to the Minister at that date;

(3) Parliament was aware at the date of the material amendments to the 1984 Act (in 2008) that the regulations made under it would be subject to the provisions of the HRA, by which not only could they be declared *ultra vires ab initio* but at any point at which they were found to become disproportionate; and

(4) In conclusion, it is difficult to see why Parliament would intend the Court to implement a tougher test than it would under the HRA; but, even if it did, that would be of no effect given the latter's application.

82 The parties have also disagreed as to the starting point for a determination of the proportionality of the Regulations.[45] The Claimant maintains that the Siracusa Principles are a relevant and important means of determining restrictions on fundamental rights that have such comprehensive application across the entire population. The courts are bound to have close regard to principles accepted by international bodies, particularly given their close adherence to overarching principles of proportionality developed by the Strasbourg Court and the domestic courts (*Demir v Turkey* [2015] ECHR 316 at [85]–[86], ECtHR). They are principles of international law developed and adopted for that purpose during public health crises, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms. They incorporate well established proportionality principles and must be considered alongside the proportionality of restrictions of individual rights, all of which will also be relevant to the determination of the challenge.

83 The Siracusa Principles were themselves given judicial recognition by the Strasbourg Court in *A and others v United Kingdom* ([2009] ECHR 3455/05), having received

[45] Letter before action, ibid, paras 34/35; reply to letter before action, ibid, paras 41/42

domestic judicial recognition in that case by Lord Bingham[46] and subsequently[47], as well as in other common law jurisdictions.[4849]

84 The Principles require that any limitations to rights recognised by the Convention should be imposed only subject to 17 listed conditions (in 14 sections but limitation 10 has four separate conditions). The World Health Organisation has summarised the Siracusa Principles that apply in circumstances of involuntary detention for public health reasons as follows, although the limitations apply to any restrictions to rights preserved by the Covenant:

- The restriction is provided for and carried out in accordance with the law;
- The restriction is in the interest of a legitimate objective of general interest;
- The restriction is strictly necessary in a democratic society to achieve the objective;
- There are no less intrusive and restrictive means available to reach the same objective;
- The restriction is based on scientific evidence and not drafted or imposed arbitrarily i.e. in an unreasonable or otherwise discriminatory manner.[50]

85 These are a summary only. Further important conditions not summarised above are as follows:

- No limitation shall be applied in an arbitrary manner (7);
- Every limitation imposed shall be subject to the possibility of challenge and remedy against its abusive application (8);

[46] *R (A) v Secretary of State for the Home Department* [2005] 3 All ER 169 (at paras 19, 21 and 36)
[47] *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, para 67
[48] See *Quilter and others v Attorney General of New Zealand* (1997) 3 BHRC 461 at 477, Court of Appeal of New Zealand; *R v Hansen* [2008] 1 LRC 26, New Zealand Supreme Court; *HKSAR v Fong Kwok Shan Christine* (2017) 44 BHRC 470, Hong Kong AA Final Court of Appeal; *Coetzee v Government of the Republic of South Africa and Others* [1995] 4 LRC 220, Constitutional Court of South Africa.
[49] While *A* was, as the Defendant's lawyers point out (reply to letter before action, para 42(2)) a case concerning an attempted derogation from the Convention, the Strasbourg and domestic courts did not suggest it would have any less relevance in non-derogation proportionality cases; and the Principles have just as much application in determining proportionality as they do in determining the lawfulness of an asserted derogation.
[50] https://www.who.int/tb/features_archive/involuntary_treatment/en/. Although, as the Defendant states, there is no reference to scientific evidence, the Principles themselves state that the burden for justifying restrictions on fundamental rights lies on the state; and it stands to reason that, where that justification is raised on the basis of containing a virus, it may only be advanced in reliance on scientific grounds.

- Limitations shall be proportionate to the legitimate aim (10 (d)); and
- The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state (12).

86 Although more detailed, these Principles are consistent with the summary of the proportionality test deduced from precedent by Lord Sumption in *Bank Mellat v HMT (No 2))*[2013] UKSC 39, see paragraph 107, below).

87 A restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been attained "equally well by measures that were less restrictive of a fundamental freedom" (*R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41).

88 The gravity of the effects and consequences of restrictions made under the Regulations are extreme and affect every area of national life. In such circumstances, they could only be proportionate if the positive effect of their imposition on the coronavirus (if any) relative to less restrictive measures was not outweighed by the harms they might cause. In determining whether the positive requirement of proportionality (applied by s 45D of the 1984 Act) is met, the Court is directed to the Claimant's submissions that the Regulations are disproportionate breaches of Convention rights set out in paras 130-197 below; albeit that the burden under s 45D is for the Government to establish that they are proportionate, rather than (under the HRA) for the Claimant to establish that they are disproportionate.

89 Further and alternatively, the Secretary of State erred, on or before any of the dates specified in paragraph 39 above, by having any, alternatively a disproportionate, regard to the modelling and other evidence of Professor Neil Ferguson and his team at Imperial College London; and he could not have come to a reasonable decision that the restrictions were proportionate having had any regard to this evidence; alternatively, any regard to findings that was not supported by other reliable scientific evidence. Insofar as some or any regard to this evidence may have been justified at an earlier date, this evidence was so discredited by the date on which these Grounds are filed that no reasonable public body could have had any continuing regard to it.

90 The Claimant relies in support of this ground on the evidence of Michael Gardner, in which he refers to and exhibits are large number of source material.

91 First, the Claimant relies on Ground 3C, in the alternative, in support of his contention that the decision to impose restrictions on the entire population rather was, in addition to being irrational, disproportionate.

92 Secondly, the Claimant relies upon the following:

(1) The predictions Prof Ferguson and Imperial College had made about previous public health risks to the British population, in particular in respect of variant CJD (where he forecast that up to 138,000 people would die from the disease, the true number being 1,000 times less);[51]
(2) That the modelling of the Imperial College team was not peer reviewed;
(3) The predictions he and his team made, based upon computer generated modelling, about the spread of and fatality rates caused by particular viral infections, including Avian Flu and (in respect of other coronavirus infections) SARS and MERS;[52]
(4) That his modelling was on the basis of a fatality rate of over 1%, when the true fatality rate is now known to be between 0.2 and 0.3%;[53]
(5) That his modelling failed to take into account that children under 13 are very unlikely to be able to become infected or to infect others;[54]
(6) The analysis that the computer coding on which his modelling is based has numerous errors[55], which leads to different predictions where the same data is imputed;
(7) A prediction made *using Prof Ferguson's modelling*, dated 15 April 2020, of the death rates in Sweden were they to continue with lighter social distancing policies,[56] which predicted that the death rate would exceed 40,000 shortly after May 1, 2020

[51] Witness statement of Michael Gardner, para 5.30
[52] Gardner para 5.30
[53] Gardner paras 5.54-5.55
[54] Gardner para 5.51
[55] Gardner paras 5.35 and 5.40
[56] Gardner para 5.42 'Intervention strategies against COVID-19 and their estimated impact on Swedish healthcare capacity',, Uppsala University and others (https://www.medrxiv.org/content/10.1101/2020.04.11.20062133v1.full.pdf) 15.4.2020

and continue to rise to almost 100,000 deaths by June; whereas the true death rate by 29 April 2020 was 2,462 (15 times lower) and, by 10 May 2020, 3,220;[57] and/or

(8) Any other publicly available evidence that should reasonably be known to the Government or evidence not in the public domain known to the Government that undermines the analysis of Prof Ferguson and Imperial College.

While the Court may find that the Government might have been entitled not to take some of the above into account before imposing the Regulations (and could not have taken other considerations into account where they would have been reliant upon evidence not available to them at that or later dates), all the above evidence was available to them by the date of the second review (on 7 May 2020).

GROUND 3: THE REGULATIONS ARE DISPROPORTIONATE BREACHES OF CONVENTION RIGHTS

The failure to derogate from the Convention

93 Before implementing the Regulations, the Government chose not to exercise a derogation from the Convention under Article 15. Under s 14 of the HRA, derogations are subject to review by the domestic courts and by the European Court of Human Rights ('the Strasbourg Court')[58]. If restrictions reliant on a derogation of which the Strasbourg Court is notified are imposed other than in primary legislation, they may be voided by the domestic courts if they could not otherwise be justified under exceptions to the rights engaged. The test to be applied is whether there is *'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'*[59]. The Council of Europe recently published a 'toolkit' for member states considering exercising their qualified right to derogate [60]

[57] Public Health Agency of Sweeden (https://experience.arcgis.com/experience/09f821667ce64bf7be6f9f87457ed9aa, in Swedish)
[58] *A v Secretary of State for the Home Department* [2004] UKHL 56
[59] *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.
[60] Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis (https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40), 7.4.2020.

94 Derogations may remove the enforceability of any Convention rights save the right to life (other than in respect of deaths resulting from lawful acts of war), the prohibition of torture and inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, freedom from the application of retrospective criminal laws and the right not to be subject to the death penalty (added by Articles 2 and 3 of Protocol 6).[61] A derogation may only be exercised in a time of war or 'a public emergency threatening the life of the nation'; and may only be exercised lawfully to the extent strictly required by the exigencies of the situation,[62] provided that such measures are not inconsistent with its other obligations under international law[63].

95 There have been at least ten derogations registered as a result of the coronavirus epidemic, albeit they tend to be in relation to specific measures and are not concerned with the lockdown provisions in general.[64] Yet the United Kingdom has failed to register any derogation, notwithstanding the extraordinary curtailments on fundamental rights and freedoms imposed by the Regulations; and nor have France, Italy and Spain, despite yet more stringent 'lockdowns'. The Court should consider the proportionality of the measures in the light of this, the Government not contending that the high threshold required for a derogation has been reached. Further, it is submitted that a virus which, while undoubtedly dangerous and life threatening to elderly and unwell individuals, appears to have a mortality rate of around 0.37%[65] and has been a possible cause of death for only 253 persons under 60 with no underlying health conditions, could not be considered to threaten the life of the nation to the extent that it is necessary to have confined the whole country to their homes.[66] [67]

[61] A state may not derogate from the prohibition on double jeopardy in Article 3 of Protocol 6, but the UK has not implemented that Protocol and has permitted the re-conviction of acquitted defendants in limited circumstances.
[62] Article 15.1 of the Convention.
[63] *A, ibid,* para 68, *per* Lord Bingham.
[64] Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms.
[65] Witness statement of Michael Gardner para 5.55
[66] It is of note that Hayden J has opined, *obiter*, that these circumstances do constitute a public emergency threatening the life of the nation, although he so remarked on hearing an emergency application and apparently without hearing extensive argument on the issue (which could not have had any bearing on his decision in the absence of derogation): *BP v Surrey CC* [2020] EWCOP 17. Counsel to the Claimant are grateful to Dominic Ruck Keene for drawing their attention to this judgment in 'Leviathan unshackled' (https://ukhumanrightsblog.com/2020/04/10/leviathan-unshackled/), 10.4.2020.
[67] See, further, Holcroft–Emmess, Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification (https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/), EJIL 10.4.2020.

Evaluating whether the impact of the Regulations on Convention rights was or is disproportionate

96 The exceptions and qualifications to the above rights are each expressed somewhat differently and have developed their own case law, all of which is relevant, and which supports the Claimant's position that the measures are disproportionate. However, the Regulations restricting movement and gatherings are a code limiting the exercise of all the above rights; and the Court could not determine their proportionality without considering their impact on each of the rights engaged. For example, by restricting individuals to their residences their liberty is impacted; they are unable to associate personally or to assemble, to attend religious services or educational establishments or to visit their close relations; and these (and more specific) restrictions affect the profitability, goodwill and survival of numerous businesses.

97 Where the court is asked to determine the lawfulness of a statutory code of such wide ranging impact on the whole of society and that restricts so gravely the rights and freedoms of individuals, it would be inadequate to consider the proportionality of each measure in isolation. Each measure impacts across a large and indivisible nexus of rights. Thus, the proportionality of the Regulations must be considered 'globally'. In doing so, the Siracusa Principles, developed for the particular purpose of determining the proportionality of public health measures up to and including quarantine, imposes tests that mirror quite closely those applied by the Strasbourg Court in *De Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others (Antigua and Barbuda)* [1998] UKPC 30, as clarified by Lord Sumption in *Bank Mellat* (*supra*).

98 This part of the submissions deals in turn with the following:

(1) The intensity of the review of the Government's decision that the Regulations are the least restrictive measures necessary and proportionate to prevent loss of life; and

(2) The means by which the Court may determine the underlying facts from which the Government may determine its policy; and

(3) The body of evidence that demonstrates that it was at the date on which the Regulations were imposed – alternatively that it was since or is now in the light of

evidence now available – unreasonable for the Government to rely, or to continue to rely, on that evidence.

99 The Claimant emphasises that the scientific evidence is only one element in the balancing exercise the Court must undertake in determining the proportionality of the Regulations. Even if, which is denied, it was (and/or still is) entitled to accept the evidence as it was presented to it, it is was still obliged to weigh the interference to Convention rights and harms in general in the balance before deciding whether the restrictions (or any of them) were proportionate; and the Court must take those interferences and harms into account in determining proportionality.

Determining what is the least restrictive means of obtaining a legitimate aim and the intensity of review

100 This question is a familiar feature of the caselaw concerning proportionality developed by the Strasbourg Court, in addition to being an express test applied by the Siracusa Principles.[68] A restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been used to achieve the legitimate aim, although a challenge will not succeed merely by establishing that alternative methods *could* have been used to achieve the aim.[69] The domestic courts must engage in 'anxious scrutiny' of decisions affecting fundamental rights;[70] and, being in a better position to assess local needs and conditions, apply a stricter standard than the Strasbourg Court while allowing the domestic public authority a 'discretionary area of judgment' within which the court will not interfere.[71] The question is an objective one based on the merits, not whether the decision maker has considered each less restrictive measure.[72]

[68] See, for example, *Campbell v United Kingdom* (1992) 15 EHRR 137, ECtHR.
[69] *Mellacher v Austria* (1989) 12 EHRR 391; *Sejdic v Bosnia and Herzegovina* (2009) 28 BHRC 201, ECtHR
[70] See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [26]–[27], *per* Lord Steyn; *R (on the application of Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36 at [9], *per* Lord Bingham of Cornhill; *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [16], per Lord Bingham of Cornhill
[71] See *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 843–844 and 993–994, HL, per Lord Hope of Craighead; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105, (reversed on appeal but not on this point [2007] UKHL 11); *Sheffield City Council v Smart* [2002] EWCA Civ 04 at [42], *per* Laws LJ; *Brown v Stott* [2003] 1 AC 681 at 703, 710–711.
nsport Roth GmbH v
[72] *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19, *per* Baroness Hale at para 31

101 Where the proportionality of secondary legislation under the Convention is determined by a domestic court, the Supreme Court has observed that the 'margin of appreciation' is not applicable[73] and that any 'margin of discretion' may be narrow[74]. The Court of Appeal, in *R (British and American Tobacco and Others) v Secretary of State for Health* ([2016] EWCA Civ 1182 a challenge to the proportionality of secondary legislation imposed on public health grounds relied upon by the Defendant[75]) found that it would be appropriate for a domestic court to apply a test of objective reasonableness rather than a margin of appreciation (at para 227).

102 Where considering decisions based upon an evaluation of evidence (including scientific evidence), the Court should intervene where there was no sufficient evidence, available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view (including of the need for secondary legislation).[76]

103 The Court of Justice of the European Union ('the CJEU') has addressed the question of proportionality in relation to public health measures, holding that:

> '…national rules or practices likely to have a restrictive effect, or having such an effect, on imports are compatible with the Treaty only to the extent to which they are necessary for the effective protection of health and life of humans. A national rule or practice cannot benefit from the derogation provided for in art 30 EC if the health and life of humans may be protected just as effectively by measures which are less restrictive of intra-Community trade (see, to that effect, the *Deutscher Apothekerverband* case[77] (para 104)).'[78]

104 The Court of Appeal has held[79] that the test of proportionality applied to public health measures, again by EU law, was as set out in *R v Minister of Agriculture, Fisheries and Food, Ex parte Federation Européenne de la Santé Animale (FEDESA) and Others* ([1990] ECR I-4023, para 13), namely:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the

[73] *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, paras 44 and 55
[74] *R (Steinfeld and Keidan) Secretary of State for International Development* [2018] UKSC 32
[75] Reply to letter before action, *ibid*, para 43(1)
[76] *Stefan v General Medical Council* [2002] UKPC 10 at [6]; *Office of Fair Trading v IBA Healthcare Ltd* [2004] EWCA Civ 142 at [93], *per* Carnwath LJ
[77] (2003) 81 BMLR 33.
[78] *Rosengren and others v Riksåklagaren* [2009] All ER (EC) 455, para 43.
[79] *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, at paras 20 and 48

prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

(Emphasis added)

105 Considering and applying the above principle, the Supreme Court formulated the means by which the 'least restrictive' test should be applied (again, in relation to EU law):

> '*This margin of appreciation applies to the member state's decision as to the level of protection of the public interest in question which it considers appropriate, and to its selection of an appropriate means by which that protection can be provided. Having exercised its discretion, however, the member state must act proportionately within the confines of its choice. A national measure will not, therefore, be proportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive of a fundamental freedom: see, for example,* Rosengren v Riksaklagaren [supra]... (para 43).'
>
> *(R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, para 66.)

106 And, to the extent that the exercise of the power of delegated legislation might be treated similarly to any other public law decision, the test to be applied by the court is not to determine whether the decision maker failed adequately to take potential restrictions of Convention rights into account, but whether an objective consideration leads to the conclusion that such restrictions are disproportionate.[80]

107 Applying the case law, Lord Sumption formulated a test to be applied in determining whether restrictive measures are proportionate:

> [*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.*

[80] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, para 68, *per* Lord Hoffman. It should be noted, however, that this was in reference to potential breaches of Article 9 in particular, it being concerned with 'substance, not procedure'.

> *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.*
> (*Bank Mellat, supra*, paras 20)

108 In an assenting judgment in the same case, Lord Reed observed that the case of *A v Secretary of State for the Home Department* (*supra, fn 16*) was 'more problematic' (para 95). At para 96, he summarises the opinions of the Lords of Appeal in *A* (emphasis added):

> *Lord Bingham did not explicitly apply the three* De Freitas *criteria or the fuller Oakes analysis (to which he referred at para 30), but in the passage cited appears to balance the severity of the effects on the rights of the persons detained against the importance of the objective: that is to say, step four in the* [De Freitas] *analysis. Lord Hope of Craighead focused on the question whether there was some other way of dealing with the emergency which would not be incompatible with the Convention rights (para 124): in other words, a test of necessity. Lord Scott of Foscote also considered that the legislation failed to meet the necessity test, since it had not been shown that monitoring arrangements or movement restrictions would not suffice (para 155) [as did Lord Rodger and Baroness Hale].*

109 Support for a more intensive test of judicial review of secondary legislation impacting on fundamental rights can be found in the (assenting) judgment of Lord Mance in *Re P and others (adoption: unmarried couple)* ([2008] UKHL 38), in which he found that:

> [130] *…In the case of subordinate legislation like the Adoption (Northern Ireland) Order 1987,* [*and*] *in performing their duties under ss 3 and 6, courts must of course give appropriate weight to considerations of relative institutional competence, that is 'to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies': see* Brown v Stott (Procurator Fiscal, Dunfermline) *(2000) 11 BHRC 179 at 196, though the precise weight will depend on inter alia the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise: see* R v DPP, ex p Kebeline *[1999] 4 All ER 801 at 844 per Lord Hope of Craighead.*

110 As Lord Sumption put it, more concisely:

> *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 v Secretary of State for the Home Department* [2015] 3 All ER 1015, para 106)

111 Moreover, 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…'[81]

112 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.

113 The two authorities decided in challenges to individual and narrow public decisions in response to the coronavirus epidemic, relied upon by the Defendant,[82] are of no relevance. They concerned decisions made about the risk to the health of individuals and classes of persons subject to immigration detention or who were being treated in hospital. The Court will obviously be slow to intervene in relation to operational decisions of such nature made on the basis of scientific advice. The contrast with a statutory scheme restricting the ability of the entire population to go about their social, educational, political, religious or economic lives could not be greater.

114 The following considerations (set out in detail weigh in favour of the 'sliding scale' requiring a greater 'cogency' in the justification for the interference with these rights and a greater intensity of judicial review:

(1) That the restrictions are imposed on every individual in the country;

(2) The magnitude of their impact on such a large nexus of rights and freedoms;

(3) That the restrictions prevent society from functioning as it has traditionally;

[81] *R (Miller) v Prime Minister*, *ibid,* paras 31 and 33.

[82] *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) at §27: *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB), cited at para 44 of the reply to letter before action, *ibid*. The assertion of the seriousness of the outbreak of coronavirus by a judge who heard no argument on the issue is, with respect, not relevant to the determination of these proceedings.

(4) That they have curtailed economic activity to such an extent that it is functioning at under 50 % of its capacity, with the extraordinarily serious harm that will cause to the livelihoods of millions;

(5) The effect the restrictions have had on treatment – and thereby on deaths caused and lives shortened by – cancer, heart disease and other potentially terminal conditions, in addition to the long-term effect on public health and life-expectancy of the economic damage caused;

(6) The uncertain nature of the scientific justification for the measures. While the courts are traditionally reluctant to enter into areas of scientific controversy, where the cause, means of spread and means of tackling the virus are so uncertain relative to much more certain harms, the executive has correspondingly lower justification for using it as a basis for applying such exceptional restrictions on freedoms and livelihoods; and

(7) That such exceptional restrictions were imposed with no initial Parliamentary scrutiny, very limited subsequent scrutiny and under an Act that did not impose a fixed period before initial scrutiny or require regular (or any) scrutiny thereafter, unlike under the CCA.[83]

115 In very few of the cases in which the domestic, Strasbourg and Luxemburg Courts have prescribed the limitations of judicial review have more than a small number of the above considerations applied collectively; and there have been no circumstances in modern times in which all of them have applied. There is thus no true precedent for a judicial review of Regulations as wide as these; and deference to executive acts should, accordingly, be far more limited than the Courts have been content to grant it heretofore.[84]

[83] See above in relation to Ground 1.

[84] While there have been judgments relating to measures of public bodies during the coronavirus epidemic itself (see, for example, *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB),) they are of limited relevance as they relate to micro-decisions of an operational nature relating to a very limited area (such as the provision of hospital beds) that have nothing like the far reaching consequences of the Regulations.

How should the Court evaluate evidence of the nature and seriousness of the virus, the efficacy of the Regulations relative to less restrictive means and of harms caused by the restrictions?

116 Any court reviewing the proportionality (and thus lawfulness) of the Regulations would need to decide how to evaluate the factual basis for the government's decision to impose them. The factual basis for the decision is and the proportionality of the decision based on that appreciation of the facts a matter for the court (applying the margin of appreciation). It is reasonable to assume the underlying facts found by the Government to justify the restrictions are that: (i) the form of social distancing they enforce will reduce the spread of the virus; and (ii) it will, in turn, reduce the death rate to an extent that the NHS can cope with the increased demands.

117 An example of the manner in which a domestic court measured the proportionality of secondary legislation justified on the grounds of public health and determined the relevant margin of appreciation was *R (British and American Tobacco and Others) v Secretary of State for Health* ('*BAT'* [2016] EWCA Civ 1182). At paras 189 and 192 the Court of Appeal set out (with ultimate approval) the approach of the trial judge, which was as follows: (a) '"*taking all the evidence at face value", [determining] whether the Secretary of State has placed before the court sufficient evidence to establish that the Regulations are appropriate and suitable*'; (b) considering whether this *prima facie* conclusion "*is affected by other factors relating to the probative value of the claimants' quantitative evidence and other margin of appreciation factors*", which he determined by considering evidence adduced by the claimants; (c) (para 192) consider whether the statute strikes a 'necessary and fair balance'.

118 This approach is less deferential than the approach to scientific evidence that has been applied in judicial reviews of expert decision makers, such as that summarised in *R (Mott) v Environment Agency & Another* ([2016] EWCA Civ 564, at para 77:

> *More broadly, in* [R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department] *[2008] EWCA Civ 417[85] May LJ stated at [1] that scientific analysis "is not immune from lawyers' analysis" but a reviewing court must be "careful not to substitute its own inexpert view of the science for a tenable expert opinion". A reviewing court should be very slow to conclude that the expert and experienced decision-maker assigned the task by statute has reached a*

[85] Relied upon by the Defendant in his reply to the letter before action, para 43(2)

> *perverse scientific conclusion. May LJ also stated at [15] that the assessment of the effect on animals of tests which were part of research into the functioning of the human brain made when a project is licensed is a predictive assessment. The dividing lines between the different categories of effect "are more a matter of scientific judgment than legal analysis". So too, in my judgment is the adequacy of a model used to estimate percentages of fish originating from a given river or whether a fishery exploits "predominantly mixed stocks".*

119 But judicial reviews of such decisions (including in the other cases summarised in *Mott* at paragraphs 66-77) are substantively and categorically different to those in which the lawfulness of secondary legislation is challenged on the grounds of its compatibility with Convention rights; and particularly so in circumstances of such fundamental encroachments as in this case. The proportionality considerations set out in the previous section and the application of the 'sliding scale' must lead to the conclusion that the Court should apply a more anxious scrutiny of scientific evidence on which rests a decision not about the adverse effects of testing on marmosets (*Abolition of Vivisection*) or the management of sea trout and salmon fishing (*Mott*) but the ability of the State to withdraw the right to liberty, association, religious freedom, education and more of every individual due to reasoning resting, only, on particular scientific evidence.

120 Moreover, the court is not reviewing a scientific decision. It is reviewing legislation that affects every area of national life and that will affect the future prosperity of the United Kingdom that is justified by one consideration (viral spread and its likely mortality) – at the expense it would appear of all others – relying only upon a narrow basis of scientific opinion.

121 There is in fact no real precedent (certainly not in English law) for the test that should be applied to scientific evidence in this case. Indeed, there is no precedent for the judicial review of restrictions as extreme as these: restrictions that (amongst other things) will cause greater economic harm to the United Kingdom in one year than at any point in the last 300 years – its entire history. The reliability, evidential base, modelling assumptions and more of that evidence are fundamental to any determination about whether it was proportionate for the State to strip or limit those rights.

122 It is not for the Claimant to prove his right – and his countrymen's – to ancient liberties, it is for the State to establish that it is proportionate to withdraw each one of them. The consequence of this burden is that the State should only be permitted to limit those rights

if it can establish that the scientific evidence on which it relies is reliable and accurate. Not only should the Court evaluate evidence justifying secondary legislation (as it did in *BAT*, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 and in other cases), it should be slow to accept that that evidence is sufficient to justify restrictions causing harm on such an historic scale unless it is untainted by uncertainty and scientific controversy.

123 And yet Professor Ferguson's modelling evidence was not even peer reviewed.

124 Further, since the Regulations and educational closures are ongoing any judicial review must determine whether (applying the margin of appreciation) there is a sufficient evidential basis to find that the Regulations are the least restrictive means of restricting the spread of the virus, relative to the harms they cause, on the day of the review: it is within the power of the Secretary of State to terminate them at any time and any failure to do so where the proportionality test (whether through applying the *Bank Mellot* or Siracusa Principles) was not satisfied would render the restrictions (individually or as a whole) *ultra vires*.

125 The Claimant submits that the Court should evaluate the Regulations as follows: (i) determine the appreciation of the facts upon which the policy was based; (ii) consider whether that appreciation was rational and continues to be rational on the basis of all the evidence before the government and that they should reasonably take into account at the date of the review; and (iii) determine on the basis of that evidence whether the interferences are the least restrictive means of obtaining the objective of containing the virus while not causing disproportionate harms, and thus a proportionate response, based on a rational factual appreciation of the facts at the date of the review.

126 Evaluation of comparative evidence is critical to any decision that the restrictions are either the least intrusive and restrictive available to reach the objective of reducing viral spread or are strictly necessary in a democratic society to achieve that objective. It is impossible to make either decision without it; and the apparent failure of the government to do so before imposing the Regulations or failing to terminate them can only undermine the suggestion that they are both proportionate and necessary.

Failure to consider relevant considerations and assessment of the scientific justification for the restrictions

127 The Claimant relies upon the evidence of Michael Gardner, in which he draws attention to and exhibits evidence of the following:

(1) Official Government and other papers relating to pandemic preparation, which contain analysis that questions the effectiveness of the extreme social distancing measures and 'lockdowns';

(2) The extent to which the Government relied on the evidence of Prof Neil Ferguson and Imperial College, as outlined in paragraph (**WS paras 2.14 and 2.23**);

(3) The serious flaws in Prof Ferguson's credibility, and his analysis, including the coding on which he based his modelling, flaws with his predictions, evidence that his predictions exaggerated fatality rates by orders of magnitude (including that his modelling, applied to Sweden, predicted 15 times more deaths than actually occurred) (**WS para 5.42)**;

(4) Grounds to consider that the official number of Covid-19 fatalities inflates substantially the number of those whose death was caused by the virus, including that they include all those who have had a positive test for the coronavirus (not necessarily a finding that they have developed Covid-19) and those who have not tested positive for the virus but whom a clinician reasonably believes may have been infected with it **(WS para 5.53);;**

(5) Substantial evidence about the inability of children to pass the virus to others and the evidence of a fatality rate that is statistically zero[86] (**WS 5.14 and 5.51-5.52);**

(6) The fact that only 253 people under 65 with no pre-existing health conditions have died (the least likely to have shielded and most likely to have been in contact with the most number of people) and just over 2,000 under 65 (including those with pre-existing conditions) have died in total. (**WS 5.51**)

(7) The evidence that the rate at which infections across the general population cause the development of the Covid-19 disease (as opposed to infection with the virus)

[86] 12 children and teenagers under 20 have died in circumstances where Covid-19 was mentioned on their death certificates compared to 166 victims of seasonal flu in 2018 and a total of around 1,000 deaths of children between 1 and 15 in 2019; references in witness statement.

and mortality is substantially lower than appears from the total death rate in view of the fact that:

(a) A large proportion of deaths in care-homes have been caused by the discharge of patients from hospitals to care-homes (suggesting that these infections were not caused by contact with those outside care homes, quite apart from the fact that residents of care-homes could be shielded from infection without a 'lockdown'); and

(b) A substantial number of patients in hospital can reasonably be assumed to have been infected in hospital rather than in the general community. While the NHS have been asked for and refused to provide this information this can reasonably be presumed given the hugely disproportionate number of patients to have died from Covid-19 (including in older age brackets) who have had underlying health conditions;

(8) Evidence from studies around the world that the true infection fatality rate is only around 0.37% (which can be contrasted with the assumption behind the Ferguson model that it was 1 %) (**WS at 5.55**);

(9) Evidence that the true rate at which 'herd immunity' is likely to be achieved is substantially lower (well below 50 %) then the 80 % assumed by Prof Ferguson; and

(10) Comparative evidence from around the world that 'lockdowns' have had limited or no effect on containing the virus.

128 In respect of all evidence, where the evidence was not available at the date on which the Regulations were imposed (26 March 2020) but was available on the date of the first or second review (on 16 April 2020 and 7 May 2020), on which the Regulations were amended (on 12 May 2020), on which these grounds were filed or on the date of the court hearing, the Claimant contends that it should have been taken into account on those dates. The Government has an ongoing duty (under s 45D as well as under the HRA) to ensure that the Regulations continue to be proportionate as the least restrictive means of obtaining the objective of containing the virus without causing disproportionate harms to Convention rights.

129 This evidence should be taken into account in determining whether the Court can be satisfied, applying a 'sliding scale' reflecting the magnitude of the interferences with

fundamental rights, that the restrictions are the least restrictive means of obtaining a legitimate aim weighing the harms they have done to those Convention rights; and the Claimant relies upon the submissions at the beginning of this section in that respect.

Interference with particular Convention rights

Introduction

130 The right to liberty is subject to defined and limited exceptions that include only one that could be material, under Article 5(1)(e), that *"the lawful detention of persons for the prevention of the spreading of infectious diseases…*". The Claimant contends that: (a) that Convention right is engaged; and (b) the exception is not. If that is so, all restrictions depriving individuals of their liberty through requiring them to remain in their residences without a reasonable excuse are an impermissible interference with Convention rights and unlawful.

131 Similarly, the right not to be deprived of an education under Article 2 of Protocol 1 is qualified only (in summary) to the extent that it does not impact upon other Convention rights by permitting parents to choose an education for their children that respects their religious beliefs. While imposing a low threshold as to what amounts to a denial of an education, it is otherwise an absolute right subject only to derogation from the Convention.

132 Other rights and freedoms affected by the Regulations are qualified rights and interference may be justified if proportionate and in pursuit of a legitimate aim. Case law relating to the extent to which interference with fundamental rights may be justified is, however, limited in its application; and there are no precedents for restrictions as broad and of such magnitude as these. It is for that reason that the Claimant's primary submission is that the restrictions and the proportionality of their impact on all relevant Convention rights must be considered generally with reference to the Siracusa and *Bank Mellot* principles.

133 Before each of the qualified rights may be justified through the application of the proportionality principle, they must each be lawful and imposed for a legitimate aim. The requirement of lawfulness would be met (were the domestic grounds 1 and 2 unsuccessful) but for the restrictions being found to be disproportionate interfereances with Convention rights (which is a later consideration).

134 The Claimant concedes that restrictions imposed to contain a public health crisis may, in principle, be imposed for a legitimate objective. That is not to say that it is conceded that it is legitimate to place that objective above all other considerations, including interferences with Convention rights; still less to exclude all those considerations from any decision about whether they should be terminated, as the Claimant contends the Government has done. However, this objection is so closely related to considerations of proportionality that it is not developed independently.

Liberty: Article 5

Engagement and scope

135 As Lord Bingham has said:

> *In urging the fundamental importance of the right to personal freedom… the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. Recent statements, not in themselves remarkable, may be found in* In re S-C (Mental Patient: Habeas Corpus) *[1996] QB 599, 603 and* In re Wasfi Suleman Mahmod *[1995] Imm A R 311, 314. In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. In* Kurt v Turkey *(1998) 27 EHRR 373, para 122, it referred to "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities" and to the need to interpret narrowly any exception to "a most basic guarantee of individual freedom". In* Garcia Alva v Germany *(2001) 37 EHRR 335, para 39, it referred to "the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned"…*
>
> (*R (A) v Secretary of State for the Home Department, supra,* para 36)

136 In a series of decisions, the Strasbourg Court has found that whether the state has deprived a person of liberty is dependent on the type, duration, effects and manner of implementation of the measure in question; and deprivation can be distinguished from restriction by degree and intensity not just nature or substance. The deprivation of liberty need not be the detention of a person in in prison or strict arrest (*Guzzardi v Italy (*1980)

3 EHRR 333 at [95]; *De Tommaso v Italy* (2017) 65 EHRR 19; *SSHD v JJ* [2008] 1 AC 385; *SSHD v AP* [2010] UKSC 24).[87]

137 In *De Tomasso*, the Strasbourg Court found that:

> *"[81] …the requirement to take account of the 'type' and 'manner of implementation' of the measure in question … enables [the Court] to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in a modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good…*".

138 A consideration is whether the control by the State inhibits the extent to which a person can *"have a social life and maintain relations with the outside world"* (*De Tommaso* at para 49). Control orders, which restricted terrorist suspects to curfew of more than 18 hours a day were found to amount to the deprivation of liberty, particularly given the effect of social isolation (*SSHD v AP* at [2-4]; *SSHD v GG* [2016] EWHC 1193 (Admin) at [36]). The conditions under which those subjected to control orders may leave their residences was limited to 'exceptional' circumstances; and the orders were monitored and enforced by electronic tags and the criminal law.

139 While the Strasbourg Court has found that '*the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today*' it has added that 'this does not, however, mean that to respond to present-day needs, conditions, views or standards the Court… can whittle down an existing right or create a new "exception" or "justification" which is not expressly recognised in the Convention (see, for example, *Engel and Others*, § 57, and *Ciulla v. Italy*, 22 February 1989, § 41) (*Austin v United Kingdom* [2012] ECHR 459).

140 The Strasbourg Court has found that home curfews or house arrest are a deprivation of liberty despite the fact that 'the authorities responsible for monitoring compliance with it were far away, which allowed him to breach it with impunity' (*Pekov v Bulgaria* [2006] ECHR 50358/99, para 73) or that the claimant had escaped on several occasions and had

[87] Counsel to the Claimant are grateful to Hickman *et al* (*ibid)* for their analysis of the extent to which Article 5 is engaged, which these submissions adopt to that extent.

actually spent much less time in custody (*Enhorn v Sweden* [2005] ECHR 56529/00 at paras 32 in fine, 33, 47 and 55).

141 Although considered in determining whether there had been a tort of false imprisonment, that the defendant in a magistrates' court had surrendered to his bail was sufficient to allow a finding that he 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.' (*R v Rumble* [2003] EWCA Crim 770; (2003) 167 JP 205, cited in *Jolloh* para 24). In *Jolloh*, it was the fact that the control order defined the place where the claimant could stay that was determinative of whether the claimant had been falsely imprisoned:

> *The fact that the claimant did from time to time ignore his curfew for reasons that seemed good to him makes no difference to his situation while he was obeying it… he is imprisoned while he is where the defendant wants him to be.*
>
> (Para 26)

And the court relied in that finding on the fact that his compliance was not voluntary but enforced by the fact that he would (*inter alia*) commit a criminal offence by not complying with the detention and was therefore 'backed up by the full authority of the State, which was claiming to have the power to do this' (para 27).

142 There have been circumstances in which the domestic courts have found that false imprisonment (including as defined in *Jollah* and *Rumble*) was not a deprivation of liberty. These include 'kettling' protesters for several hours (*Austin v Comr of Police of the Metropolis* [2007] EWCA Civ 989[88]) and a police officer standing in front of the front door of a house to prevent a person from leaving for a short period (*Walker v Comr of Police of the Metropolis* [2014] EWCA Civ 897. Both are far removed from deprivations of liberty imposed by statute and enforced by law for up to six months (the duration of the Regulations); and the judgments in *Jollah* and *Rumble* about the level of enforcement needed to constitute false imprisonment are pertinent to a determination of the level of enforcement required before a person is deprived of his liberty.

[88] Decision approved by the Strasbourg Court in *Austin v United Kingdom* (2012) 55 EHRR 14, cited in *Jollah,* para 30.

143 Nor can it be said that the restrictions merely constrict a person's freedom of movement, a right protected by Article 2 of Protocol 4 to the Convention, which the United Kingdom has not ratified and which must be distinguished from and not read into Article 5 rights (see *Austin v the United Kingdom* [2012] ECHR 39692/09, paras 55-57). They are expressly not framed as preventing individuals from moving but from leaving their residences save with a reasonable excuse.

144 Under the Regulations as first enacted, every individual in England was required to remain at their residence save where they left it with a reasonable excuse. Were they to leave without a reasonable excuse, they would commit a criminal offence (under reg 9). Moreover, not only could they be directed to return to the place where they were living by an officer or other authorised person (reg 8(3)(a)), they could be removed (reg 8(3)(b) by force (reg 8(4).

145 Since 22 April 2020, the Regulations have tightened to proscribe any individual from remaining outside their residence without a 'reasonable excuse'; and officers (etc) have the same powers of enforcement if they do not.

146 Since the Regulations were enacted, there have been around 1,500 fines.

147 In the premises, the restrictions are sufficiently proscribed and subject to a sufficient level of enforcement by the criminal law and by the lawful use of force as to amount to a deprivation of liberty that interferes with the rights of every person under Article 5.

Does the qualification in Article 5.1(e) apply?

148 In *Enhorn v Sweden* (*supra*) the Strasbourg Court considered the extent of this limitation:

> *41. The Court has only to a very limited extent decided cases where a person has been detained "for the prevention of the spreading of infectious diseases". It is therefore called upon to establish which criteria are relevant when assessing whether such a detention is in compliance with the principle of proportionality and the requirement that any detention must be free from arbitrariness.*
>
> *42. By way of comparison, for the purposes of Article 5 § 1 (e), an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three*

minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see Winterwerp v. the Netherlands, *judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39;* Johnson v. the United Kingdom, *judgment of 24 October 1997, Reports 1997-VII, p. 2409, § 60; and, more recently,* Varbanov, *cited above, § 45). Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see* Ashingdane v. the United Kingdom, *judgment of 28 May 1985, Series A no. 93, p. 21, § 44).*

Also by way of comparison, for the purposes of Article 5 § 1 (e), an individual cannot be deprived of his liberty for being an "alcoholic" (within the autonomous meaning of the Convention as set out in Witold Litwa v. Poland, *cited above, §§ 57-63) unless other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law; it must also be necessary in the circumstances (see, for example,* Witold Litwa, *cited above, § 78, and* Hilda Hafsteinsdóttir, *cited above, § 51).*

"[43] … Article 5.1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention…"

44. Taking the above principles into account, the Court finds that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention ***of the person infected*** *is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.*

(Emphasis added)

149 While it has been argued[89] that Article 5.1(e) refers not to *persons spreading infectious diseases* but to the need to detain *persons* for the *purpose* of preventing the spreading of infectious diseases, this is not a distinction recognised by the Strasbourg Court, which has

[89] Hickman *et al,* para 57

subsequently reaffirmed that limitation (see *James v United Kingdom* [2012] ECHR 25119/09, at para 195).[90] That the limitation should be tightly construed is supported by the analysis of Dr Alan Greene, which the Claimant adopts:

> …It is unclear whether Article 5.1(e) allows for the deprivation of liberty of healthy people to prevent the spread of infectious diseases. If Article 5.1(e) permits the detention of healthy people to prevent the spread of infectious disease, this will be the only class of deprivation authorised by Article 5 that is not based on the specific category of a person or their prior conduct. Even within Article 5.1(e), there are specific person classifications—persons of unsound mind, alcoholics, drug addicts or vagrants— outside of the ground of 'to prevent the spread of infectious diseases'. This is not a mere technical consideration; it constitutes a fundamental dispute as to the scope of state power permissible under Article 5.1(e): a restrictive, narrow understanding of Article 5.1(e) limited only to infected persons or persons who may be infected (with necessary safeguards regarding the burden of proof required to fall under this category); or an infinitely more expansive conception of Article 5.1(e) authorising the deprivation of liberty of everybody within a state's jurisdiction and with no burden of proof whatsoever required.
>
> This is important as there are fundamental safeguards in place with regards to assessing whether a person has committed, or that there is reasonable suspicion that they have committed a certain conduct; or that they fall within a certain class of persons. If the ECtHR were to agree that Article 5.1(e) permits the deprivation of liberty of healthy persons, this lack of a person-specific limitation needs to be factored into account when assessing whether the measures enacted constitute a restriction or deprivation of liberty. In this regard, the lack of a person-specific limitation to Article 5.1(e) is potentially similar to cases such as *Gillan and Quinton v UK*[91] and *Beghal v UK*[92] where powers of detention or restriction of movement had been conferred without a requirement of 'reasonable suspicion'. While the Court side-stepped the Article 5 question in each of these cases to focus on Article 8 and the right to privacy, the principle remains that the burden of proof question must feed into assessment of whether the measures enacted constitute restriction or deprivation of liberty. Furthermore, this side-stepping of Article 5 issues by the ECtHR does not bode well for any future cases where it will be called upon to review powers enacted in response to the pandemic.[93]

150 Article 18 of the Convention provides that the permitted restrictions to the rights and freedoms guaranteed may not be applied for any purpose other than those for which they have been prescribed; and this was emphasised by the Strasbourg Court in *Kurt v Turkey*

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[90] The Strasbourg Court has considered other cases where quarantine has been imposed but where a claim is brought on a basis other than under Article 5, including claims of disproportionate breaches of Article 8 rights: *Kuimov v Russia* [2009] ECHR 18

[91] (2010) Application no. 4158/05

[92] (2019) Application no. 4755/16

[93] 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic', Green, A, Senior Lecturer in Law at Birmingham Law School, Strasbourg Observers (https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/) 1.4.2020

(*supra*), where it emphasised '*the need to interpret narrowly any exception [was] "a most basic guarantee of individual freedom"…*'.

151 Applying this internal principle of construction, the particular purpose of Article 5 and the narrow construction of its limitations weighs in favour of Dr Green's analysis. Its limitations relate only to circumstances in which the actual detention of persons may be necessary; and only those that have developed in all European societies, namely the arrest and imprisonment of suspected and convicted criminals ((a)-(c)), the detention of children to return them to educational establishments (d), the detention of illegal immigrants (f) and (under (e)) the detention of those persons who may traditionally be lawfully detained for their own protection and that of others – namely the mentally ill, 'vagrants', alcoholics and drug addicts. It is to the last list that we may add 'the lawful detention of persons for the prevention of the spreading of infectious diseases…' This reflects the development of lawful quarantine of individuals and groups of persons in response to disease; and, while that development has always included potentially infected persons (for example those on an infected ship), it has not in modern times been extended more widely.

152 Moreover, as Dr Green argues, the right to liberty under Article 5 is in the second and middle category of rights: those that are strictly applied subject to exhaustive limitations (unlike qualified rights that may be interfered with where proportionate, such as to family life (A8), association and assembly (A11), etc) but which may be suspended in the event of a derogation from the Convention (unlike the right to life (A2) or the prevention of torture (A3)). Were circumstances ever so extreme that a universal quarantine may be justified, it is for member states to derogate and (if challenged) justify the exclusion of this right by establishing that 'life of the nation' is threatened.

153 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. 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).

154 It cannot reasonably be said every person in the UK was or is 'potentially infected' or that there was a risk of each one of them infecting others. The indiscriminate nature of such a classification would include those persons who were bed-bound and those persons in islands, villages or towns that had not suffered any infection. Insofar as the inability of this definition (potentially infected) to apply to the whole population may be considered to constrain the state unduly in a public health emergency, a state has the right to register and (if challenged) seek to justify a derogation if it does not consider it can accept the limitation.

Private and family life: Article 8

Engagement and scope

155 The right to private life includes the establishment and development of relationships with other human beings and the outside world,[94] including through activities of a professional or business nature.[95] It includes not only an 'inner circle' in which a person may live his own life and exclude the outside world,[96] but also a person's ability to function socially.[97]

156 Family life includes relationships outside the nuclear family including between siblings,[98] grandparents and grandchildren,[99] and between children and parents following the separation of the parents.[100]

157 The Regulations impose profound and far-reaching restrictions on the private and family lives of all citizens, more than at any time in the modern era. They prevent any meetings

[94] *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [47].
[95] *Niemietz v Germany* (1992) 16 EHRR 97.
[96] *Niemietz, ibid.*
[97] *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [9].
[98] *Moustaquim v Belgium* (1991) 13 EHRR 802, ECtHR.
[99] *Marckx v Belgium* (1979) 2 EHRR 330, ECtHR; *Re J (leave to issue an application for a residence order)* [2002] EWCA Civ 1346.
[100] *Berrehab v Netherlands* [1988] ECHR 10730/84.

with any persons outside a person's household, save perhaps by chance where a person leaves with a 'reasonable excuse' (albeit leaving one's house for an arranged meeting does not constitute one of the named reasonable excuses). This will be a particularly onerous intrusion into the personal and family lives of those with terminally ill relatives, who will thus be denied the opportunity to visit them at home in their last weeks or months; those who are mentally ill; and for those living alone, where they will be denied the possibility of human company through visiting or meeting any of their family or friends. But they affect everyone.

158 The ability of individuals to continue their direct personal relationships with family members or friends online is no answer to the impact of Regulations affecting the entire population, including the proportion that don't have access to the internet; and does not mean that Article 8 is not engaged, even if its impact might be mitigated, in some cases, by online contact.

Interference and proportionality

159 The right to a private and family life is qualified by the State's right to interfere where it is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Article 8.2). It is for the national authorities to make an initial assessment of the 'necessity' of interference with private or family life, but the interests of the community must be balanced against the right for a person's home (*Buckley v United Kingdom* [1996] ECHR 39, paras 74 and 76) or to the other cardinal rights to a family life set out in above.

Freedom of Conscience, Thought and Religion (Article 9)

Engagement and scope

160 This freedom includes the right to worship in community with others in public and to manifest religion or belief, in worship, teaching, practice and observance.[101]

[101] Article 9.1 of the Convention.

161 The Regulations prevent or severely restrict religious practice, including attending or gathering in places of worship and for services. The very limited exceptions to the restriction on gatherings (under reg. 7) include only weddings and funerals and prevent the gathering of people together in a religious service; places of worship may only be attended for services in the case of funerals;[102] and the list of reasonable excuses for leaving a residence includes 'in the case of a minister of religion or worship leader, to go to their place of worship'[103] which, read together with regs 4 and 8, suggests that it would not be a reasonable excuse for any other person to leave their house to gather in church, which would in any event amount to an unlawful gathering.

162 The effect of these restrictions is to prevent communal worship and, for Christians, the reception of most of the sacraments. Indeed, the wholesale closure of churches over Holy Week and Easter were the first such closures since the end of the Interdict of Pope Innocent III in 1213; and churches remained open even during the ravages of the Black Death.

Interference and proportionality

163 Article 9.2 qualifies the right to freedom of thought, conscience and religion by allowing limitations mirrored in the Convention's protection of other qualified rights, including for the protection of health. In assessing whether a restriction to this freedom is proportionate to the legitimate aim the court must apply 'very strict scrutiny' (*Manoussakis v Greece* (1996) 23 EHRR 387 at para 44); and, where an interference is challenged, it is for the State to establish that it is necessary in a democratic society for the protection (*inter alia*) of health (*Sahin v Turkey* (2007) 44 EHRR 99).

164 On 18 May 2020, the Council of State, the highest Administrative Court in France, found that the French ban on religious services as a response to the coronavirus was a "serious and manifestly illegal infringement" and a disproportionate curtailment of the right to freedom of religion protected by Article 9, in addition to French domestic law.[104]

[102] Reg. 5(6), although they may also be used to house the homeless or broadcast online services.
[103] Reg. 6(2)(k).
[104] https://www.lefigaro.fr/actualite-france/deconfinement-le-conseil-d-etat-ordonne-de-lever-l-interdiction-de-reunion-dans-les-lieux-de-cultes-20200518

165 *In Elkhorn Baptist Church, et a/ v. Katherine Brown Governor of the State of Oregon* (18 May, 2020) the Circuit Court of Oregon, in finding that the Governor's 'lockdown' restrictions were unlawful, observed that:

> The Governor's orders are not required for public safety when Plaintiffs can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the Governor have been authorized to do. [105]

166 An act of worship falls within the scope of the protections afforded by Article 9 (*Pavilides and Goergakis v Turkey* (2009) ECtHR, para 28); and the restrictions prevent any act of worship taking place within a religious building save recordings of services by clergy. The ability to watch a service online is an extremely limited answer to this interference, given the importance of direct interaction to religious practice and (for example, in Christian churches) the inability to partake in the sacraments.

167 *In Surayanda v Welsh Ministers* [2007] EWCA Civ 893a case challenging an executive order interfering with religious freedom justified on the grounds of public health, the Court of Appeal applied the guidance of the House of Lords in *R (SB) v Governors of Denbigh High School* ([2006] UKHL 15, at para 30), which concerned dress:

> *There is no shift to a merits review, but the intensity of the review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in* R v the Ministry of Defence, ex parte Smith *[1996] QB 517, 544. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time:* Wilson v First County Trust Ltd (No 2) *[2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court:* R (Williamson) v Secretary of State for Education and Employment *[2005] 2 AC 246, para 51.*

168 Public health measures interfering with Article 9 rights that have been found to be justified include the destruction of a sacred bullock to protect against TB (*Surayanda*), a requirement for Sikh motorcyclists to wear crash helmets (*X v United Kingdom* (1978) 14 DR 234, EComHR) and (relatedly) a requirement to limit the volume of religious services *Hackney London Borough Council v Rottenberg* [2007] EWHC 166 (Admin).

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[105] Judgment available at https://s3.amazonaws.com/arc-wordpress-client-uploads/wweek/wp-content/uploads/2020/05/18181409/shirtcliff.pdf, at p 7

Assembly and association (Article 11)

Engagement and scope

169 The right to freedom of assembly and association largely engages meetings and assemblies of a political, not social, nature.[106] No restrictions may be placed on an assembly or association other than are prescribed by law and are necessary in a democratic society in the interests (*inter alia*) of public safety and the protection of health. The Strasbourg Court has described the freedom of assembly as a 'foundational feature of a democratic society, allowing people to visibly participate in the political process and communicate ideas that challenge the existing order';[107] and the Strasbourg Court found the way in which states enshrine and protect the freedom to associate is indicative of the state of democracy in the country concerned.[108] Both rights are part of a nexus of rights which include the right to freedom of expression.[109] The Court has held that:

> 'Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.'[110]

And the Strasbourg Court has also observed the right to freedom of association was of 'special importance'.[111]

170 The Convention right is reflected in the developing common law recognition of the right of assembly and association, as described by Lord Denning:

[106] Although Article 11 has been found to apply to assemblies of an essentially social character, see *Emin Huseynov v Azerbaijan* §91, concerning police intervention in a gathering at a private café (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-154161%22]}), as well as cultural gatherings (The *Gypsy Council v UK* (http://hudoc.echr.coe.int/eng?i=001-22414) and religious and spiritual meetings *Barankevich v Russia* (2007) Application no. 10519/03 (albeit also protected by Article 9).
[107] *Plattform 'Ärzte für das Leben' v Austria* (1988) 13 EHRR 204.
[108] *Tebieti Muhafize Cemiyyeti v Azerbaijan* [2009] ECHR 37083/03 at [52].
[109] *Steel v UK* (1998) 5 BHRC 339 at 358.
[110] *Stankov v Bulgaria*, Applications 29221/95, 29225/95.
[111] *Ezelin v France* (1991) 14 EHRR 362 at [53], ECtHR.

> '*…freedom of assembly is another of our precious freedoms. Everyone is entitled to meet with his fellows to discuss their affairs and to promote their views; so long as it is not done to propagate violence or do anything unlawful*.'[112]

And by Lord Bingham:

> *'it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it*.'[113]

Interference and proportionality

171 Article 11.2 allows the State the same ability to interfere with these rights where the interference is proportionate to the protection of (*inter alia*) public health.

172 The right to peaceful protest protects demonstrations that are contentious, heretical and eccentric,[114] including those that may annoy or give offence to persons opposed to the ideas and claims that are being promoted.[115] The ability to organise and meet online can only mitigate the great damage to these freedoms caused by the Regulations. Political movements rely on the ability to mobilise protest through gatherings; and the past four years have seen a resurgence of mass demonstrations involving, in some instances, many hundreds of thousands of people.

173 The restriction on gatherings of more than two people[116] will prevent any sort of meetings and demonstrations, including for political purposes. They are so far reaching that they prevent the mere possibility of a political meeting (association) or a public demonstration (assembly).[117] Moreover, although the Government guidelines have suggested that individuals should remain two metres apart from each other, the Regulations prevent any gathering of more than two people who are not in the same household without exception; and thus demonstrations in which individuals remained at what the Government considered

[112] *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at 217.
[113] *R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12 at 1.
[114] *Redmond Bate v DPP* (1999) 7 BHRC 375 at [20].
[115] *Plattform 'Ärzte für das Leben', ibid.*
[116] Reg 7 of the Regulations.
[117] And the police recently demonstrated their willingness to exert their powers to prevent such a threatened gathering for the purpose of a political protest: https://www.wiltshire999s.co.uk/mass-gatherings-in-protest-of-unlawful-lockdown-arranged-for-swindon/

to be an appropriate 'social distance' would not be permitted. This is in contrast to workplaces that are not restricted (including all non-retail businesses, about which there are no restrictions) or to railways, underground trains, buses or their stations, where the accumulation of people would not be considered a 'gathering'; and in none of those circumstances is there a *statutory* prohibition on individuals coming closer than two metres to each other.

174 Another consequence of the restrictions is observed by KD Ewing of King's College London:

> 'A hard fought qualification in the Civil Contingencies Act 2004 (inherited from the Emergency Powers Act 1920) referred to above is that the power to make emergency regulations may not be used to 'prohibit or enable the prohibition of participation in, or any activity in connection with, a strike or other industrial action'.82 There is no corresponding provision in the Public Health (Control of Disease) Act 1984, with the result that a spontaneous protest and picket outside a workplace about working conditions (such as enforced pay cuts, or the lack of effective PPE) runs the risk of being prohibited by regulation 7 if attended by more than two people.'[118]

Thus, trade union pickets or other gatherings specifically protected by the CCA that was reserved for emergency circumstances do not apply under these Regulations. It is lawful for workers to be able to work in factories, shops, warehouses and other premises without any form of social distancing (for which there is no statutory requirement) and yet they cannot protest outside their place of work – in the open air where infection is less likely to be spread – even with such distancing measures.

175 Interference with the right to demonstrate has been found proportionate where sanitation was so inadequate it could cause a public nuisance (*R (on the application of Gallastegui) v Westminster City Council* [2012] EWHC 1123 (Admin) at paras 62 and 88; *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 at para 42); and the Court should consider the extent to which a protest impacts upon the rights and freedoms of others.

[118] Covid-19: Government by Decree, K. D. Ewing, lecturer in law, King's College London (https://www.tandfonline.com/doi/full/10.1080/09615768.2020.1759398), 13.5.2020

176 The State's right to ban specific demonstrations has been considered in a number of cases[119] but restrictions that prevent all public gatherings without exception – including any political meetings or demonstrations – have never been examined by the Strasbourg or domestic courts. That is because no such restriction has ever been considered by any member state, let alone imposed.

177 It is submitted that there are no circumstances short of those in which a derogation is registered and able to be justified in which a State may lawfully prohibit all political demonstrations. Such an extreme step could only be justifiable under a derogation; indeed, that is the very purpose of the ability of a state to derogate. This is a submission that accords with the recent findings of the German Constitutional Court, which found 'lockdown' restrictions that prevented any political protest to be unconstitutional violations of the same right.[120]

178 Further, even if the Government's basis for imposing these restrictions and their proportionality in general were accepted, the blanket restriction on any political gatherings is inconsistent with the rational basis of the Regulations, given that it imposes tighter restrictions than are imposed on public transport or at workplaces – where there are no statutory requirements enforcing 'social distancing'. It cannot be proportionate for such a 'paramount value', precious freedom' and 'cherished tradition' to be given less protection than the right to work and to travel, however important it is to work and travel. The findings of the Oregon Circuit Court on 18 May 2020 that social distancing could safely be practised in churches or other religious buildings (see para 59 above) have still more force in gatherings outside.

The prohibition of discrimination (Article 14)

Engagement and Scope

179 Although discrimination on the grounds of disability is not expressly recognised in Article 14, it has been found to be a protected ground derived from a person's personal

[119] See *Tabernacle* (*supra*); *Adali v Turkey* (2009) 48 EHRR 19, ECtHR
[120] Top German court: Coronavirus restrictions not grounds to ban all protests (https://www.dw.com/en/top-german-court-coronavirus-restrictions-not-grounds-to-ban-all-protests/a-53153858), 16.4.2020. The author thanks Prof Colm O'Cinneide for drawing his attention to this judgment.

characteristics.[121] Those subject to a disability include individuals suffering from long-term and terminal illness as well as those with long-term mental health conditions. Discrimination on the grounds of sex is expressly prohibited.

180 Indirect discrimination through the imposition of a law or policy with a greater detrimental effect on individuals with a protected characteristic than those without can be proven without recourse to statistics.[122] It is self-evident that some of those suffering from mental health issues will be more gravely affected by isolation than those who do not. This is evidenced by the spike in mental health crises since the 'lockdown' was imposed.[123] Similarly, women are statistically much more likely to be victims of domestic violence and there is evidence that its incidence has more than doubled since mid-March 2020.[124]

Interference and Proportionality

181 Judgments of the Strasbourg Court must be treated with some caution in view of their application of the less rigorous test of the 'margin of appreciation', according more deference to the decisions of the State than a domestic court must accord to the executive (including in relation to secondary legislation). Moreover, while the Strasbourg Court has held that it will not interfere with decisions made on social or economic grounds unless 'manifestly without reasonable foundation' (*Stec v United Kingdom* [2006] 43 EHRR, at para 52), this was in reference to primary legislation – which is immune from challenge to its validity in domestic courts and which is naturally treated with a higher degree of deference by international courts than executive decisions.

182 While the Regulations impose restrictions due to a public health crisis, they are not comparable to a considered economic policy such as the legislative decision to provide for a lower pensionable age for women (as in *Stec*). Moreover, the restrictions were imposed to protect the public from a public health risk in an ongoing epidemic where the effectiveness of and need for the restrictions would develop and change, as would scientific

[121] *R (on the application of RJM) v Secretary of State for Work and Pensions* [2009] 2 All ER 556.
[122] *DH v Czech Republic* (2007) 47 EHRR 59.
[123] 'Domestic violence and anxiety spiked after lockdown announcement' (https://www.sheffield.ac.uk/news/nr/depression-anxiety-spiked-after-lockdown-announcement-coronavirus-mental-health-psychology-study-1.885549), 31.3.2020.
[124] https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown.

knowledge of their effect on viral spread. Thus, there needs to be a 'flexible assessment' as these restrictions are more akin to measures that might be 'justified at the time of its introduction may cease to be justified in the light of changes in society' (*Zeman v Austria* [2006] ECHR 23960/02 at para 40)

183 In *R (A) v Secretary of State for the Home Department* (*supra*) it was held (at paras 68, 158 and 237/38) that the benefits restrictions may bring to a greater number of people could not justified their singling out one group. Although that was in relation to direct discrimination (control orders imposed only on non-UK citizens) it is a principle of general application that would apply were the restrictions found to have a disproportionate impact on particular groups within minorities – including (disproportionately) female victims of domestic abuse and those suffering from mental illness. That they are imposed for the 'greater good' is not enough.

184 In his witness statement, Michael Gardner introduces public domain evidence of, amongst other things, the huge rise in domestic violence (disproportionately affecting women and children, both protected groups by virtue of age and sex), mental health (disproportionately affecting those with a disability due to long-term mental health conditions) and the access to education of children from deprived social and economic backgrounds and some ethnic minority groups.[125] Amongst the subscribers to this crowdfunded judicial review claim are those who fall within these categories, whose communications to the Claimant have been exhibited in the evidence of Michael Gardner.

<u>The right to the peaceful enjoyment of property (Article 1, Protocol 2 to the Convention)</u>

Engagement and scope

185 The Protocol prohibits the 'deprivation' of property, which includes the 'serious interference' with the enjoyment of property. This has been found to include un-enacted or proposed legislation that nonetheless caused serious harm to businesses, measured by a decline in its goodwill due to its inability or reduced ability to trade.[126]

[125] Witness statement of Michael Gardner at paras 6.25 – 6.28
[126] *Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408.

186 The Protocol is undoubtedly engaged by the closure of business premises under the Regulations.[127] The inability to trade for an indefinite period will have had a considerable effect on goodwill value. Many businesses will fail, notwithstanding government measures to mitigate the situation. Evidence of the likely impact on business closures and loss of value and on the economy generally is set out in paragraph 214 to 219 of the witness statement of Michael Gardner.

Interference and proportionality

187 There must be a 'reasonable relationship of proportionality between the means employed to restrict property rights and the aim sought to be realised' by any measures applied by the State.[128] The Court must take into account a number of factors including the terms of any compensation paid, the conduct of the parties, the means employed by the state and its implementation[129]. There will not be a fair balance if the affected party must bear a disproportionate and excessive burden.[130] The state has the right to enforce such laws as it deems necessary to control the use of property, but such restrictions are limited to those that are proportionate.

188 The restrictions imposed by the Regulations directly are those preventing the opening the following businesses: all listed in Part 3 of Schedule 2 to the Regulations (cinemas, gyms, nightclubs, etc); cafes, bars and restaurants (listed in Part 1 of Schedule 2) save where providing food or drink to take-away; and all retail businesses not listed in Part 2 of Schedule 2 save through online, telephone or mail order sales.[131]

189 Regulation 6(2)(f) permits individuals to travel to work where it is not reasonably possible for them to work or provide services from home. However, the effect of the Regulations in general and the guidance that has accompanied it has been a very substantial downturn in the turnover and profitability of large numbers of businesses not directly affected. Given that the Court must consider the interference with this Convention right on businesses in

[127] Under regs 4 and 5.
[128] *James v United Kingdom* (1986) 8 EHRR 123 at para 50, ECtHR; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 para 69, and see paras 68–78.
[129] *Broniowski v Poland* (2004) 40 EGRR 573 at [151]
[130] *Former King of Greece and others v Greece* (2000) 33 EHRR 516 at [90],
[131] See regs 4 and 5.

general, it is submitted that it would be reasonable to take into account those wider effects, direct as well as indirect.

190 The relationship between the legitimate objective and the means used to obtain it is critical to an assessment of proportionality. The Claimant relies on the evidence highlighted in submissions below, particularly in relation to the harms caused to businesses by the Regulations, in support of his submission that their interference with the peaceful enjoyment of property are disproportionate.

Education (Article 2, Protocol 1 to the Convention)

191 The right is a negative right not to be denied an education. As has been said above, it is not a right qualified by the right of the state to restrict it for a legitimate aim or for reasons of public health, in the way that positive rights (in particular to family life or to religious practice) are restricted. The only limitation recognised in the Protocol is the right of parents to educate their children in conformity with their religious convictions.

192 This right thus falls within the second category of rights: those subject to strict limitations that may not otherwise be interfered with (which also include A5) other than through a derogation; and it may be contrasted with those rights from which there may be no derogation (including A2 and A3) and those which are subject to qualifications and which may be restricted (other than under strict limitations) if it is proportionate to do so (such as A8 and A11). It is perhaps the negative nature of this right – limited in its application – that led the signatories to this Protocol not to qualify its application save where a derogation is justified.

193 While the power to close educational premises is derived from primary legislation,[132] it must be exercised through a declaration by the Secretary of State. That decision is thus challengeable by judicial review, as it is by this claim, on the grounds that it is a disproportionate interference with the right to education under the Protocol. Further, the Regulations themselves prevent the opening of educational establishments: reg. 6 does not include attending educational premises as a named example of a 'reasonable excuse' and, while the list in reg. 6(2) is not comprehensive, attending a school or university does not

[132] Sch 16 to the 2020 Act (Part 1 applying to England and Wales).

fall within the exceptions to the prohibitions on gatherings under Reg. 8 and so would arguably be unlawful.

194 In *Ali v Head Teacher and Governors of Lord Grey School*, the House of Lords found that:

> 'The test, as always under the convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?'[133]

And that:

> '…art 2 of the First Protocol is concerned only with results: was the applicant denied the basic minimum of education available under the domestic system?... For this purpose it is necessary to look at the domestic system as a whole…. [A breach of A 2 of the First Protocol] would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education.'[134]

195 It is conceded that the provision of a comprehensive – or even perhaps a reduced – education through online resources *may* be sufficient to avoid a finding that the closure decision and the relevant restriction in the Regulations did not breach the Protocol.

196 The Claimant relies, however, on evidence that a considerable proportion of schools are providing minimal, if any, education; and that this disproportionately affects poorer children of less well-educated parents and children with disabilities at an acute disadvantage.[135]

Does Article 2 impose positive obligations to impose restrictions?

197 The Defendant has asserted that the impact of the coronavirus is such as to impose positive obligations on member states with respect to the right to life and to respect for private life under Article 2, in particular that:

> …there are fundamental Article 2 rights of the population at stake which the measures in the Regulations seek to protect. The United Kingdom has a positive

[133] [2006] UKHL 14, para 24, *per* Lord Bingham.
[134] At paras 57 and 61, *per* Lord Hoffman.
[135] 'Coronavirus will deepen the class divide' (https://www.thearticle.com/coronavirus-will-deepen-the-class-divide-in-next-years-gcse-results), 15.4.2020. This might also be a basis on which the measures could be found indirectly discriminatory, particularly in relation to its potentially differential impact on children with disabilities see also witness statement of Michael Gardner at para 6.22

> obligation "*to take appropriate steps to safeguard the lives of those within its jurisdiction*" and to do "*all that could have been required of it to prevent…life from being avoidably put at risk*": *LCB v United Kingdom* (1997) 27 EHRR 212 at §36. This obligation extends to the public health context: *Stoyanovi v Bulgaria* (App. No. 42980/04) at §60.[136]

198 These selectively chosen quotations beg the question of what the Strasbourg authorities have found are the limitations of what are 'appropriate steps' that a member state could be 'required' to take to prevent life from being 'avoidably put at risk'. Even a peripheral reading of the cases the Defendant relies upon shows that what is 'appropriate' for a State to do does not extend nearly as far as 'requiring' it to breach fundamental liberties of its citizens.

199 Elsewhere, it has been suggested that:

> '...once the nature of measures required to tackle a threat [have] become clear and are within the capacity of the State to take – notably through restricting the activities that can be undertaken by inhabitants – then the failure to adopt them could well be viewed as violating the obligations owed under Articles 2 and 8 (as in *Finogenov and Others v. Russia*, no. 18299/03, 20 December 2011)…' [137]

200 It is of course possible that the impact of the coronavirus and decisions made by Government directly affecting its staff may engage the positive investigative duty under Article 2, as has been argued,[138] and that it may engage the State's duty to provide information to the public about public health risks and to provide sufficient medical support. But there is no authority to suggest that it can go as far as to *require* a member state to take measures restricting fundamental freedoms of its citizens.

201 First, the judgment in *LCB* concerned the State's duty to provide information about risks and to monitor health. The case was brought by a resident of Christmas Island, an Overseas Territory of the UK, who had been exposed since before birth to radiation caused by nuclear testing on the island. The risks to which the claimant was exposed were thus caused by the State. It was found that *'[t]he Court's task is… to determine whether, given the*

[136] Defendant's PAP response letter, *ibid*, para 10.
[137] An analysis of Covid-19 Responses and ECHR Requirements' by Jeremy McBride (echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?m=1), 27.3.2020, pp 2/3.
[138] See 'Learning lessons the hard way – Article 2 duties to investigate the Government's response to the Covid-19 pandemic', Paul Bowen QC (https://ukconstitutionallaw.org/2020/04/29/paul-bowen-qc-learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic/), 29.4.2020

circumstances of the case, the State did all that could have been required of it *to prevent the applicant's life from being avoidably put at risk*.' (para 36, emphasis added). The question posed by the Strasbourg Court was whether '*in the event that there was information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question*, to provide advice to her parents and to monitor her health.' (para 38, emphasis added); and it found that they were not obliged to provide such advice and monitoring given the information available to them at the time.

202 Secondly, the judgment in *Stoyanovi* does not in any way support the proposition suggested by the Defendant. It concerned the family of a soldier who had died in a parachute exercise; and the Strasbourg Court drew a distinction between risks which a soldier must expect as an incident of his ordinary military duties and 'dangerous' situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards'. An operational obligation would only arise in the latter situation.

203 At paragraph 59, the Court went on to hold that:

> '…*In certain well-defined circumstances it may extend to requiring the authorities to take* preventive operational measures *to protect an individual whose life is at risk from the criminal acts of another individual. Subject to considerations as to the difficulties involved in policing modern societies, the unpredictability of human conduct* and the operational choices *which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities and which also* conforms with the other rights guaranteed under the Convention. *The test imposed in the context of the duty to prevent and* suppress offences against the person *is that it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals* from the criminal acts of a third party *and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*…'

In respect of the public health obligations relied upon by the Defendant:

> Positive *obligations apply in the public-health sphere too. They require States to* make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. *They also require an effective* independent judicial system *to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see* Powell v. the United Kingdom *(dec.), no. 45305/99, ECHR 2000-V;* Calvelli and Ciglio v. Italy *[GC], no. 32967/96, ECHR 2002 I;* Vo v. France *[GC], no. 53924/00, ECHR 2004 VIII). Where the infringement of the right to life or to physical integrity is not*

> *caused intentionally*, the positive obligation imposed by Article 2 **to set up an effective judicial system** *does not necessarily require the provision of a criminal-law remedy in every case…*
>
> (All emphasis added)

204 Thirdly, the judgment in *Finegenov* does not support the proposition suggested above. That case concerned the actions of the Russian state to intervene to safeguard hostages held in a Moscow theatre by Chechen terrorists in 2002, when they used gas intended to put terrorists and hostages alike to sleep in order to effect a rescue. The complaint to the Strasbourg Court was that the state had put the lives of the hostages at risk through its intervention (para 164). The claim was defended, in part, on the grounds that the state was obliged to use all appropriate measures to secure the release of hostages, under Article 3 of the International Convention against the Taking of Hostages.[139] The Court also judged the case in relation to the exception in Article 2 permitting the use of proportionate force by law enforcement officers to protect life.[140]

205 The Strasbourg Court found that *'[a] duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and if the authorities retained a certain degree of control over the situation'*.[141] This is very different to the circumstances of an epidemic in which *some* scientific evidence suggests heavy restrictions on the movement and association *of the whole population* is necessary to contain its spread. Moreover, that passage is in relation to the *justification* of potentially lethal force to safeguard life, not 'measures' applying to the population at large (or even specific sections of the population).

206 Fourthly, although considered in relation to property rather than Article 2 rights, the Strasbourg Court has found that *'natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature'* (*Budayeva and others v Russia* [2008] ECHR 15339/02, para 174). While a pandemic is not entirely

[139] See para 186.
[140] Citing *Hilda Hafsteinsdóttir v Iceland* [2004] ECHR 40905/98; *Ergi v Turkey* [1998] ECHR 23818/94, McCann v UK [1995] ECHR 18984/91 and *Andronicou v Cyprus* [1997] ECHR 25052/94.
[141] Para 209, citing *Osman v United Kingdom* (1998) 29 EHRR 245, at para 116.

analogous to (for example) a hurricane or mudslide and there is some evidence about what can be done to reduce their spread, it is nonetheless a natural disaster in origin.

207 Fifthly and in conclusion, aside from its investigative duty, Article 2 is satisfied by a state safeguarding life through a legislative and administrative framework designed to provide effective deterrence against threats to the right to life,[142] through an effective criminal law and operational machinery by which it is enforced,[143] of which *Finegov* was an example. In applying its operational duty, a disproportionate burden 'must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources'.[144]

208 Other decisions of the Strasbourg Court illustrate the limited nature of the positive operational duty through circumstances in which it has been found to apply and not to apply, in particular:

(1) The duty applied where a state agency monitored the risk of mudslides and called for an emergency clean-up and restoration work and an early warning system, none of which were implemented;[145]
(2) It did not apply to soldiers taking part in risky activities such as parachuting;[146]
(3) It may be engaged (although was not breached in that case) through an accident at a rubbish dump under the authorities' control;[147]
(4) It may be engaged where a state did not institute a prosecution for homicide but the duty may be satisfied where civil proceedings could be and were instituted;[148]
(5) The state has a duty to protect individuals known by the authorities to be at risk of domestic violence;[149]
(6) The positive duty may apply where state employees are exposed to unreasonable risks of asbestos poisoning once the state becomes aware of that risk and are unable to obtain compensation through domestic courts;[150] and

[142] *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10.
[143] *Osman* (*ibid*) at para 115.
[144] *Budayeva, ibid,* para 135
[145] *Budayeva*, *ibid*
[146] *Stoyanovi v Bulgaria* [2010] ECHR 1782
[147] *Oneryildiz v Turkey* [2004] ECHR 48939/99
[148] *Calvelli & Ciglio v Italy* [2002] ECHR 3
[149] *Opuz v Turkey* (2009) (Application No. 33401/02); *Volodina v Russia* [2019] ECHR 539
[150] *Brincat v Malta* [2014] ECHR 836

(7) A state must notify workers where they may be exposed to dangerous levels of radiation.[151]

209 Thus, while scientific evidence supporting restrictions on the many fundamental rights and freedoms impacted by the Regulations *might* be relevant considerations in determining the proportionality of the Regulations, the Strasbourg case law does not support a *positive* obligation on the state to impose them.

210 This reasoning is further supported by the availability of the right by a member state to derogate from the Convention. In such circumstances, all but a limited number of rights might (if and insofar as the derogation was found justified) be set aside for the duration of an emergency. That is as it should be. While the Convention rights relied upon in this case are limited or qualified, those qualifications generally apply where they are only to be limited (for example where Roman Catholic adoption agencies are prevented from restricting their services to straight, married couples notwithstanding their religious beliefs) not where they are being stripped almost in their entirety. Yet this is the effect of the Regulations - individuals are unable to visit their parents, believers to attend services, political protesters to attend <u>any</u> demonstration and children to be educated in their schools. These are not the measures that are compatible with a free, democratic society in anything other than the most extreme circumstances; and only where a derogation is justifiable could they (perhaps) be required by the most extreme risk of loss of life, which simply is not the case in this instance.

211 <u>Alternatively</u>, were Article 2 to impose a positive obligation to safeguard life that went further than the above limited duty, the courts would be obliged (in reviewing the Regulations) to consider the threat to life from the effects the 'lockdown' imposed to restrict the spread of the virus. These can be divided into two: (i) the loss of life that might be attributed directly to the 'lockdown' restrictions; and (ii) the impact of the restrictions on health, wellbeing and (ultimately) life-expectancy in the long-term.

212 The second (long-term) effects are contentious, rest upon assumptions about the impact of poverty (caused by the economic depression likely to be caused by the restrictions) on health and are a matter of high government policy also impacted by government decisions

[151] *L.C.B. v United Kingdom*, *supra*

across a range of areas. While this impact has a bearing on decisions about the proportionality of the Regulations,[152] there is no sound arguable basis they could lead to Article 2 rights being engaged.

213 The short-term effects of the restrictions on life are, however, no less immediate then the supposed risk to life caused by neglecting to impose 'lockdown' measures. Indeed, in some cases the consequences are more direct They include but are not limited to the increase in deaths caused by suicide due to isolation, domestic violence,[153] neglect through isolation[154] and the cancellation of operations and other medical treatment for those with serious and terminal health conditions.[155] Each of these categories are apparent direct consequences of the positive action of the state, as opposed to its inaction in the face of a natural disaster; and a more conventional application of Article 2 jurisprudence suggests they are more naturally relevant considerations in a review of the proportionality of the restrictions. These harms are dealt with in the witness statement of Michael Gardner and considered in more detail in the following section.

Harms caused by the Regulations and assessment of proportionality

214 This section addresses the following:

(1) Evidence of harms caused by the restrictions; and

(2) Concluding submissions that the Regulations were disproportionate, in the light of the above and applying the Siracusa and *Bank Melet* Principles.

[152] Particularly in the light of the increased willingness of the courts to intervene in matters of high policy, for example in *R (Miller) v Prime Minister* [2019] UKSC 41.

[153] 'Domestic violence and anxiety spiked after lockdown announcement' (https://www.sheffield.ac.uk/news/nr/depression-anxiety-spiked-after-lockdown-announcement-coronavirus-mental-health-psychology-study-1.885549), 31.3.2020 (*ibid).*

[154] For example, the deaths of abandoned residents of a care home in Spain imputed to its lockdown policy: https://www.bbc.co.uk/news/world-europe-52014023.

[155] https://www.itv.com/news/2020-03-26/coronavirus-outbreak-cancer-treatment-surgery-cut-back-surge-in-covid-19-patients/.

Evidence of harms caused by the Regulations and of disproportionate breaches of particular Convention rights

215 In determining whether the Regulations are the 'least restrictive' means of reducing the spread of the virus and proportionate, an essential consideration is whether the harms they cause are disproportionate to the benefit they bring.

216 The Claimant first relies on the harms set out in the previous section, caused by the interference with fundamental human rights.

217 Secondly, the Claimant relies on evidence cited in the witness statement of Michael Gardner.

218 In summary, the harms caused by the Regulations are exceptional. Indeed, there is a strong possibility that they could cause the greatest harm to the country's economy, in war or in peace for over 300 years (and thus in the history of the United Kingdom). Each of these harms will grow greater the longer the Regulations remain. In particular but far from exclusively (and relying on evidence in Mr Gardner's witness statement):

(1) The short-term impact on health, including the risk of thousands more deaths from cancer and heart conditions that are undiscovered (through people being unable or unwilling to seek medical advice, for example, with lumps or other symptoms) and untreated, including from the fear caused by the Government's messaging policy that has the effect of deterring those at risk from seeking treatment (**WS para 6.31**);[156]

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(2) The short-term impact on mental health and domestic violence caused directly by the lockdown, particularly on poor and vulnerable families effectively locked in small flats with no outside space and limited opportunities to leave and exercise (**WS paras 6.28 and 6.32**);

[156] https://www.theguardian.com/society/2020/apr/29/extra-18000-cancer-patients-in-england-could-die-in-next-year-study

(3) The damage to the education and lifetime opportunities of a generation of children and young people (**WS paras 6.21 – 6.24**);

(4) The catastrophic economic damage. In producing a "reference" scenario, the Office for Budget Responsibility (OBR) finds that UK GDP might fall by as much as 35% in Quarter 2 (Apr to June) 2020. These anticipated effects on the UK economy are based on the effects of reducing the demand for goods and services and the impact on the ability of businesses to supply those goods and services. Any recovery will be far more difficult to achieve the longer business is unable to operate, the more companies become insolvent and the more people lose their jobs – including at the end of the period in which they may be preserved by the Government's furlough scheme; and predictions include that the UK economy could be damaged by £800 billion in ten years (**WS paras 6.1 – 6.12**);

(5) The consequence of that damage on individuals, families, communities and societies as a whole. A primary consideration is the damage to health and wellbeing from poverty and unemployment but the closure of numerous small businesses – particularly but not exclusively restaurants, cafes and pubs, will have a devastating effect on towns and cities in particular (**WS para 6.7**).

Application of the Siracusa and *Bank Melet* Principles

219 It has already been submitted that the proportionality of the Regulations can only be considered 'globally', given that they almost all interfere with a nexus of fundamental rights which cannot readily be disentangled. The Claimant's primary submission is that the Court should apply the Siracusa Principles (as summarised above) as principles of international law recognised by the domestic and Strasbourg Courts as having particular application to public health emergencies in which emergency measures may be taken. While the Defendant has taken issue with this proposition in his reply to the Letter before Action, he agrees that the first four tests accord with the principles applied by the domestic and Strasbourg courts where considering proportionality.[157] They are indeed consistent with the *Bank Mellet* principles set out above.

[157] *Ibid,* at para 42

220 In general as well as specific terms the Claimant relies upon decisions of common law and European Courts of the highest standing that have found 'lockdown' restrictions to be unlawful and to be disproportionate breaches of Convention rights (including equivalent constitutional rights in the United States). These include the Council of State of France, the German Constitutional Court, the Wisconsin Supreme Court, the Prague Municipal Court and the Oregon Circuit Court.[158]

221 These Grounds have outlined in some detail:

(1) The test that should be applied in determining the proportionality of the Regulations;
(2) The limitation that should be placed upon the Government's ability to rely on scientific evidence where, applying the 'sliding scale', the Court considers whether the restrictions (in view of that scientific evidence) are the least restrictive that may be proportionate;
(3) The grave flaws in the scientific evidence on which the Secretary of State relied in deciding to impose and not to terminate the Regulations; and, in particular, the considerable body of evidence that has developed that shows that the unreasonableness of any reliance on that evidence; and
(4) The Convention rights that are engaged;
(5) The gravity of the interference by the Regulations with each Convention right engaged;
(6) The harms that the Regulations cause, each of which apply to particular Convention rights engaged.

222 Applying the Principles, the following considerations establish that the Regulations, considered as a whole, are not a proportionate response to this public health crisis. In respect of each of the submissions, insofar as the Court is not satisfied that the restrictions (or some of them) were not disproportionate at the date on which they were first implemented, it must consider whether they were on the subsequent material dates up to the date on which it determines this claim (namely the first review on 16 April 2020, the amendments to the Regulations on 22 April 2020, the second review on 7 May 2020-, the amandments to the Regulations on 13 May and the date on which these proceedings were issued).

[158] See paragraphs 2, 3, 164, 165 and 177 above.

Provided for and carried out in accordance with the law.

223 The statutory basis of the Regulations is sufficient to meet this test.

Directed toward a legitimate objective of general interest.

224 The intention to reduce the spread of the coronavirus and its threat to human lives is of course a legitimate objective.

Strictly necessary in a democratic society to achieve the objective;
The least intrusive and restrictive available to reach the objective.

225 These are considered together as the question of whether the Regulations are the least intrusive and restrictive measure available is relevant to that of whether they are 'strictly necessary' in a democratic society. It is submitted that they are neither.

226 This term was considered by the Judicial Committee of the Privy Council in *De Freitas* (*supra*, at para 25):

> Even if the subsection, with or without the supplementary provision sought to be implied by the Court of Appeal satisfied the first of the two requirements already referred to, namely that was a restraint upon the freedom of civil servants "reasonably required for the proper performance of their functions", it would still have to satisfy the second requirement of being "reasonably justifiable in a democratic society". Their Lordships were referred to three cases in which that phrase has been considered. In *Government of the Republic of South Africa v. The Sunday Times Newspaper* [1995] 1 L.R.C. 168 Joffe J. adopted from Canadian jurisprudence four criteria to be satisfied for a law to satisfy the provision in the Canadian Charter of Rights and Freedoms that it be "demonstrably justified in a free and democratic society". These were a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies. In two cases from *Zimbabwe, Nyambirai v. National Social Security Authority* [1996] 1 L.R.C. 64 and *Retrofit (Pvt.) Ltd. v. Posts and Telecommunications Corporation*, [1996] 4 L.R.C. 489, a corresponding analysis was formulated by Gubbay CJ., drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases at page 75 he saw the quality of reasonableness in the expression "reasonably justifiable in a democratic society" as depending upon the question whether the provision which is under challenge "arbitrarily or excessively invades

> the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual". In determining whether a limitation is arbitrary or excessive he said that the Court would ask itself:-
>
> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

227 The Regulations were imposed as part of an express policy that not only fails to consider the potential effectiveness of less restrictive measures but which (through the First Secretary's tests) expressly fails to balance the harms they may redress against the harms they cause. They impose unprecedented and exceptionally grave restrictions on every area of society and on almost all means of human interaction. And they are likely to devastate the livelihoods of millions and to cause great harm to individuals and to society.

Based on scientific evidence and neither arbitrary nor discriminatory in application.

228 While the Regulations are based on scientific evidence, that evidence can only be measured insofar as it justifies the effectiveness of *these* restrictions measured against any that would be less regressive. There is no evidence that the government has considered such evidence adequately; and the First Secretary's tests would appear to prevent the termination of any of the restrictions unless *each* of the conditions it set are met. These include a sustained reduction in infections and death rates that take no account of whether less regressive measures might achieve the same object. Thus, the government's policy can be imputed to be that they will remain in such circumstances even in the face of evidence of that less restrictive measures would be just as effective.

229 The scientific evidence of the efficacy and effectiveness of the Regulations as a proportionate means of reducing the spread of the virus is uncertain. Before such evidence could establish that the Regulations are the 'least restrictive' means of addressing the objective, it would need to be compared to evidence of the effectiveness of less regressive measures; and there is positive evidence that no such evaluation has been conducted. Indeed, the speed with which the Prime Minister announced a change in policy on considering the evidence of just one scientific team, led by Prof Ferguson, strongly suggests that it was not.

Of limited duration, respectful of human dignity, and subject to review.

230 While the measures are subject to review every 21 days, the decision of the Secretary of State is absolute and subject only to judicial review. Unlike regulations passed under the CCA, Parliament has no right to scrutinise the Regulations until they expire after six months.

231 Moreover, the Regulations themselves proscribe – for the first time in the history of this country – all political gatherings and public demonstrations without exception. Even if such an exceptional step was found (on other grounds) to be proportionate, the chilling effect it must have on the ability of opposition to the policy to be organised and mobilised and to demonstrate publicly weighs against a determination that restrictions of this magnitude, subject to no democratic scrutiny for up to six months[159], are justifiable.

STANDING

232 The Defendant has conceded that the Claimant has standing to challenge the *vires* of the Regulations but not to make challenges on Convention grounds.[160] Given that the challenge to the *vires* of the Regulations includes (under Ground Two) a challenge to whether any of the restrictions are proportionate pursuant to s 45D of the 1984 Act, it is submitted that this concession includes an acceptance that the Court could consider all arguments and evidence that they were not; and that this must include the contention that they are disproportionate breaches of Convention rights. It is of course accepted that the test of standing goes to jurisdiction and must be determined by the Court.

233 The test for standing in judicial review proceedings is not high. In *Walton v Scottish Ministers* ([2012] UKSC 44) the Supreme Court quoted with approval this finding of Lord Denning in *Attorney-General of the Gambia v N'Jie* ([1961] AC 617, at 634):

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[159] In view of the fact that the requirement for positive resolutions by both Houses of Parliament within 28 days is subject to the qualification that this period does not include periods where Parliament is prorogued, dissolved or not sitting for more than four days; see fn 14, above.

[160] Reply to letter before action, *ibid.*

> *"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."*

234 A person may bring proceedings by way of judicial review against a public authority if he is or would be a victim of a violation of his Convention rights (s 7(3) of the HRA; and see *R (on the application of the Countryside Alliance) v A-G* [2006] EWCA Civ 817).

235 While not permanently resident in England, the Claimant is a British citizen who owns a residence in England and satisfies the test of being a potential 'victim' of each of the following violations of Convention rights, for reasons outlined in his witness statement:

(1) He has family members and friends who live in England who, under the regulations, he may not stay with, visit or even meet in person (save, since the amendments to the Regulations on 13.5.2020, one person at a time) (Article 8);
(2) He would attend a demonstration in England against the 'lockdown' Regulations and government guidelines were they not proscribed by reg. 7 (Article 11); and
(3) He has standing under Article 1 of Protocol 2 in view of his business interests, on grounds developed in the following paragraph.

236 In respect of the violations of the Claimant rights under Article 1 of Protocol 1, the Claimant has standing on the following grounds:

(1) He is the director and sole owner of a number of trading company which is incorporated in England and Wales, namely Jota Aviation Ltd, and owns other businesses in England and Wales. As a part passenger/part freight operation, this business (which earns a large proportion of its money in England specifically) has been negatively affected by the coronavirus epidemic and the Regulations in particular. The Regulations effectively prevent any passenger flights save (perhaps) in exceptional circumstances. The Regulations prejudice his interests and he has standing to bring this claim.
(2) The Court of Appeal recently considered the Strasbourg case law about where a shareholder of a company could bring an action as a 'victim' of an infringement of his rights under Article 1 of Protocol 2 (*Bank Mellat v HM Treasury (No 3)* - [2017]

2 All ER 139, at paras 27/28). The Strasbourg Court has found that he could do where he was the sole shareholder because there was 'no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention and its Protocols or concerning the most appropriate way of reacting to such infringements' (*Ankarcrona v Sweden* (App No 35178/97) (27 June 2000, unreported).

237 Although it is conceded that the Claimant is not a 'victim' under Article 5, 14 or under Article 2 of Protocol 1 to the Convention, it is submitted that in a review of the proportionality of the Regulations and their compatibility with the Convention that is as comprehensive as this, the Court could not reasonably avoid considering whether they were indirectly discriminatory (on grounds set out above). It is not submitted that the Regulations would (at least necessarily) be unlawful on the grounds of the interference with this Convention right alone. Rather, the Regulations can only be considered in relation to the cumulative effect on individuals, groups, businesses within England and on society as a whole; and that they are discriminatory in effect is an important part of that 'global' assessment.

238 Moreover, the Regulations are, beyond question, of the most far reaching kind and impact directly on every person resident in England. They impose extraordinary restrictions that are subject to minimal Parliamentary scrutiny and it is of the highest public interest that the Court is able to determine whether they were imposed lawfully. In circumstances where the Claimant can establish the 'victim' test in respect of a number of Convention rights, it is submitted that it would be wholly artificial for the Court not to examine the proportionality of all breaches of Convention rights.

239 Mr Dolan brings this action in the public interest. He has launched a crowd-funding campaign in which nearly 4,000 individuals have contributed a total of over £125,000 by the date of issue.[161] In this respect, the Court will have in mind the judgment of the Administrative Court in *R (on the application of Save our Surgery Ltd) v Joint Committee of Primary Care Trusts* ([2013] EWHC 439 (Admin), *'Save our Surgery'*). There, Nicola Davis J found that a claimant had sufficient interest where it represented:

[161] https://www.crowdjustice.com/case/lockdownlegalchallenge/

> *"…many individuals who have contributed financially in order to bring these proceedings. It includes individuals who have been or could be directly affected by the closure of the Leeds Unit and clinicians who work within the unit. Incorporation, following the intervention of the Charity Commission, was a proper means of allowing the interests of a substantial number of such persons to pursue this litigation"*

240 In making this decision, the Court took into account that:

> *The majority, if not all of the individuals who have contributed to the fighting fund, together with the Directors of the claimant, would have a direct sufficient interest in their own right had they brought the claim as individuals… The adverse costs in litigation are such that no citizen of ordinary means would prudently contemplate bringing this litigation as an individual. Incorporation was and is the proper means of allowing the interests of a substantial number of persons who consider the defendant's decision to be unfair and unlawful to be jointly represented…*

241 Mr Gardner exhibits a selection of the first 500 emails of received by the Claimant after his appeal for information from the almost 4,000 contributors to the Crowdjustice funded site, which had raised over £125,000 for this judicial review by the date of issue. These were only the 500 received in the first 24 hours after the Claimant's appeal. The Claimant's solicitors have read the emails and compiled the information received and found that the subscribers who contacted the Claimant include victims of each of the breaches of Convention rights relied upon and include:

(1) 473 individuals who reside in England and are confined to their homes save where they can show a 'reasonable excuse' (Article 5);

(2) 458 who may not visit their parents, children, siblings or other family members or even to see them in person save (under the Regulations as amended on 13 May 2020 but not before) one at a time (Article 8);

(3) 198 who are unable to worship in their religious buildings (Article 9);

(4) 412 who would attend a political demonstration against the 'lockdown' were they not proscribed by the Regulations (Article 11);

(5) 180 who own businesses whose value has been negatively affected by the impact of the 'lockdown' caused by the Regulations or who work for such businesses (Article 1 of Protocol 1); and

(6) 192 who have children of school age who are unable to attend school and receive an adequate education; although not directly analogous, relatives of a deceased potential victim of a breach of Article 2 rights may claim relief (*Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2) and it is submitted that parents of

children whose education rights are affected are in a similar position (Article 2 of Protocol 1).

242 While these individuals are not applicants for relief under the HRA, there are amongst them victims of each of the Convention rights engaged and each of them have an active interest in the claim as subscribers, some of whom (where they have donated more than £1,000) have a right to be repaid costs recovered by the Claimant recovers them where there are sufficient funds to pay them.

243 It is notable that the Defendant opposed standing because the Claimant had supposedly given no details about his claim to 'victim' status (he had in fact given details of his business interests) and that the Clamant knew nothing about the circumstances of the subscribers to the crowdfunding campaign.[162] While standing is a matter for the Court, both these concerns have been satisfied and it is submitted that they are sufficient to satisfy s 7 of the HRA sufficiently to allow the Court to examine the proportionality of the Regulations as a whole.

APPLICATION FOR DISCLOSURE

244 As stated in the introduction, an application is made for disclosure of the SAGE minutes since January 2020 and the 122 documents considered by the Committee other than those 30 that have been published. The Claimant relies in support of this application on the witness statement of Michael Gardner, in particular section 8 thereof.

[162] Reply to letter before action, paras 12/13

REMEDIES AND CONCLUSION

245 In the premises, the Claimant asks for the Regulations and the Order of the Secretary of State to be quashed. Alternatively, if the Court finds that some restrictions would be proportionate, it will agree to a stay of any order for three working days within which period Regulations may be made that satisfy the Court's findings.

PHILIP HAVERS QC

FRANCIS HOAR

20th May, 2020