

**M Gardner  
Claimant  
1<sup>st</sup>  
1/10/20  
MG1**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO.**

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

**ADMINISTRATIVE COURT**

**BETWEEN**

**THE QUEEN**

**on the application of**

**(1) SIMON DOLAN**

**(2) CRIPPS BARNS GROUP LIMITED**

**(3) LAUREN MONKS**

**Claimants**

**and**

**1) THE SECRETARY OF STATE FOR HEALTH & SOCIAL CARE**

**(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**(3) THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**

**(4) PARLIAMENTARY UNDER SECRETARY OF STATE AT THE DEPARTMENT OF HEALTH  
AND SOCIAL CARE (MINISTER FOR INNOVATION)**

**(5) PARLIAMENTARY UNDER SECRETARY OF STATE AT THE DEPARTMENT FOR BUSINESS,  
ENERGY AND INDUSTRIAL STRATEGY (MINISTER FOR BUSINESS AND INDUSTRY)**

**Defendants**

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**WITNESS STATEMENT OF  
MICHAEL GARDNER**

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I, **MICHAEL GARDNER**, of 71 Queen Victoria Street, London EC4V 4AY, WILL SAY as follows:

## **1. INTRODUCTION**

- 1.1 I am a solicitor and partner in Wedlake Bell LLP. My firm represents the Claimants in this matter. The facts I refer to in this statement are, unless otherwise indicated, within my own personal knowledge. Where I refer to facts which are not within my own personal knowledge, I state the source of my information.
- 1.2 I make this statement in support of the Claimant's application for judicial review by the Claimants against the Secretaries of State for Health and Social Care, Business, Energy and Industrial Strategy, the Home Department and two Parliamentary Under-Secretaries of State. These are all the Ministers who signed off on the statutory instruments that are challenged in these proceedings. This statement is also made in support of the application by the Third Defendant for interim relief. The details of the claim and the grounds on which the claim and interim relief application are based are set out in the claim form, statement of grounds and application notice. The Claimants seek final relief in the form of quashing orders and declarations in relation to certain statutory instruments under which the Government has sought to tighten restrictions against citizens and businesses in England ostensibly in response to the continuing spread of the respiratory tract viral infection known as SARS-CoV-2 which causes the disease Covid-19. (In this statement, I shall refer to the virus as "Covid-19"). The application for interim relief is for an injunction to prohibit the enforcement of certain provisions in the relevant legislation and guidance.
- 1.3 In response to the pandemic, the Government has implemented a myriad of complex statutory instruments to impose restrictions on the country. These have been made under the Government's purported power in Part 2A of the Public Health (Control of Infectious Disease) Act 1984 ("the 1984 Act"). This action concerns only such laws introduced in England. For ease of reference, in this statement, I shall refer generically to the "health protection" titled series of statutory instruments made under the 1984 Act between 26 March 2020 and 2 July 2020 and the amendments to them as "the Original Regulations". In respect of the six statutory instruments which are the subject of challenge in these proceedings, I shall refer to those instruments collectively as "the Regulations".
- 1.4 The attack on the Regulations (whose details I describe further below) is based on a number of grounds. These are as follows:
- 1.4.1 That they are *ultra vires* the 1984 Act on two bases: first, due to the improper use of the emergency procedure under s45R to make them without prior Parliamentary scrutiny or approval when this was not necessary by reason of urgency; and

secondly, because the powers under which the Regulations were purportedly made (the imposition of special restrictions or requirements under s45C(3)(d)) do not permit the exercise of restrictions on the public generally or on categories of premises generally but only on those persons or premises that are established to be potentially infectious, infected or contaminated;

1.4.2 The Regulations were and are a disproportionate means of obtaining the object of reducing transmission of Covid-19 pursuant to s45D of the 1984 Act and are disproportionate interferences with the Claimants' rights under Articles 8, 11 and Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

1.4.3 The decisions to introduce the Regulations were not made on the basis of any specific scientific evidence that any of them would make any material difference to the transmission of Covid-19; rather the making of the Regulations relied on irrelevant considerations and failed to take into account relevant considerations, particularly in balancing the harms caused by the Regulations and that as a result the Regulations are, consequently irrational;

1.4.4 The same grounds apply to the Claimants' challenge to the Government's guidance on weddings and wedding receptions;

### **Urgency & interim relief**

1.5 As regards the first limb of the ultra vires ground (what the Claimants contend is a misuse of the emergency procedure in section 45R(2) of the 1984 Act, this is a practice that the Government has been using throughout the period of the Covid-19 pandemic – irrespective of how circumstances have changed and, so it would seem, irrespective of whether or not there really is "urgency" to bring in the instruments in question. The practical effect of the use of the emergency procedure as a matter of routine, is that the essential role of Parliament has, in effect, been by-passed when these laws are made. Not only does this prevent any prior, examination, amendment to or debate about what the law is to contain before it comes into force. But invariably this bypassing of Parliament results in little or no meaningful scrutiny of the legislation. This is because by the time the Government puts the measures forward to be approved in the Parliamentary order of business, the statutory instrument in question will have been in force for weeks, may well have been amended and in some cases may have been replaced altogether. This might not matter if the laws in question were trivial in nature. However, they are some of the most draconian and dramatic restrictions ever placed on the citizens of this country and have had – and continue to have - a profound effect on the health, wellbeing, lives and livelihoods of millions of people in England.

- 1.6 The Claimants believe that this repeated and unjustified use of the emergency procedure by Ministers is unlawful and that the Courts need to put a stop to it as a matter of urgency so as to prevent further abuse and to restore the role of Parliament in the process. It is not just the Claimants who have observed this. The disquiet has been expressed in both Houses of Parliament and, I submit, is now a matter of profound public interest.
- 1.7 For the above reasons, the Claimants are seeking an expedited and urgent timetable for the claim to progress as speedily as possible. Further, because of the serious and irreparable harm which the Regulations are causing to the Second Claimant (and many other similar businesses), a hearing of the application for interim relief on notice is being sought as a matter of urgency to prevent the measures that the Claimants submit were wrongly put into law using the emergency procedure. This would also have the effect of deterring the Government from continuing its practice of using the emergency procedure – where it is not merited - for future regulations.
- 1.8 A considerable amount of evidence was adduced in connection with a separate judicial review claim launched in May by, inter alia, the First and Third Claimants ("the Dolan Claim"). For ease of reference of the Court in this claim, I have sought to keep the evidence in the present proceedings as self-contained as possible so as to avoid the need for the Court to cross refer to that adduced in the Dolan Claim. Separate witness statements have been made by the individual Claimants themselves in this action and by officers of the Second Claimant, primarily in relation to proving their company's "victim" status for the purposes of their Article 1 Protocol 1 Convention claims under the Human Rights Act.
- 1.9 There is now produced and shown to me marked Exhibit "**MG1**" a bundle of documents to which I shall refer in my statement. References to Tabs in this Witness Statement are to the Tabs in the e-bundle.

## **2. BACKGROUND TO THIS CLAIM**

### **Covid-19**

- 2.1 For the purposes of this claim, it is unnecessary to revisit in any great detail how the Covid-19 pandemic originally unfolded in the UK. Suffice to say that the first case of Covid-19 was confirmed in the UK on 29 January 2020, and the first death from the disease occurred on 4 March. Thereafter, the virus spread rapidly and the Government began introducing what are termed "non-pharmaceutical interventions" to try and slow its passage through the population. This included messaging to the public about the need for hand washing and social distancing. On 18 March, on advice from the Scientific Advisory Group for Emergencies ("SAGE"), the

Prime Minister, announced that all schools would close with effect from 20 March for all children except those of so-called key workers. Eventually, however, amid considerable political and media pressure and following a report based on Professor Neil Ferguson's model which predicted hundreds of thousands of deaths, the Government decided to take the UK into what became known as the "lockdown".

2.2 Having announced via a televised message from the Prime Minister on the evening of 23 March that the lockdown would be happening, it took the Government until 26 March to actually make the lockdown legally binding through the implementation of the Health Protection (Coronavirus, Restrictions) (England) (Regulations) 2020. These measures were introduced purportedly under Part 2A of the 1984 Act. They resulted in what have been described by many commentators (including Lord Sumption formerly a judge of the Supreme Court) as "the worst interference with personal liberty in our history".

2.3 Although the nature and severity of the virus was much less well known in March 2020, there was by then substantial evidence that it particularly hit the elderly and those with pre-existing conditions and that it had a low fatality rate. On 19 March 2020 (seven days before the Restriction Regulations were made), the Government announced that:

*"As of 19 March 2020, COVID-19 is no longer considered to be a high consequence infectious disease (HCID) in the UK.*

*The 4 nations public health HCID group made an interim recommendation in January 2020 to classify COVID-19 as an HCID. This was based on consideration of the UK HCID criteria about the virus and the disease with information available during the early stages of the outbreak. Now that more is known about COVID-19, the public health bodies in the UK have reviewed the most up to date information about COVID-19 against the UK HCID criteria. They have determined that several features have now changed; in particular, more information is available about mortality rates (low overall), and there is now greater clinical awareness and a specific and sensitive laboratory test, the availability of which continues to increase."<sup>1</sup> (see D1.1 pages 200 to 205)*

2.4 There then followed a period of many weeks in which large sections of the economy and in effect, society were effectively closed down. Over a third of the entire country's workforce was put onto the "Furlough scheme" whereby 80% of their wages were paid by the state up to an annual limit. Millions more self-employed workers received a similar financial support scheme (although many who had become self-employed more recently did not). VAT

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<sup>1</sup> <https://www.gov.uk/guidance/high-consequence-infectious-diseases-hcid> . These figures are UK wide and England can be expected to be around 5/6s of the total.

payments were deferred. Government loans were made available. Laws were passed prohibiting landlords from enforcing rent arrears or evicting tenants. Tens of thousands of businesses in particular sectors were literally ordered to close by law. Offices emptied as people were either furloughed or began working from home. The population, meanwhile, was subjected to a form of house arrest under the first of the Original Regulations whereby it was made illegal to leave, and later be outside one's home, without a "reasonable excuse". The Prime Minister himself became infected with Covid-19 and ended up in intensive care. For weeks, every evening, the Government held a press conference at which the statistics of case numbers and deaths from the virus were announced.

- 2.5 The decision to introduce a lockdown has been shrouded in controversy. Some commentators have criticised the Government for supposedly not locking down quickly enough. I have read the SAGE minutes for the period and have also watched Professor Chris Whitty's appearance before a Commons Committee in which he was asked this directly by the Committee Chairman Jeremy Hunt MP. Chris Whitty stated that the Government had not in his view delayed the lockdown unduly in the face of advice from SAGE. Indeed, the SAGE minutes for the relevant period make no mention of SAGE having advised the Government to impose a blanket lockdown of the country as happened. As to whether or not the lockdown was effective, this too is controversial. A number of studies have been published that suggest the lockdown was ineffective at stopping the growth of infections and that this would have happened anyway.
- 2.6 For example, studies by Edinburgh University's Simon Wood<sup>2</sup> (see D1.2 pages 206 to 219) and Germany's Stefan Homburg<sup>3</sup> (see D1.3 pages 220-224) have suggested that based on an analysis of the timing between the date of the full lockdown and the peak of hospital deaths, they have concluded that infections had probably already peaked in the UK and in Germany before the lockdown<sup>4</sup> (see D1.4 pages 225 to 228) <sup>5</sup> (see pages D1.5 pages 229 to 235). They also point to a similar profile of infections in Sweden (which did not go into lockdown).
- 2.7 Another article about the ineffectiveness of lockdowns was published in the Lancet on 21 July 2020<sup>6</sup> (see pages D1.6 pages 236 to 243). Whilst the article suggested that full lockdowns and early border closure "*may lessen the peak of transmission, and thus prevent health*

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<sup>2</sup> <https://arxiv.org/abs/2005.02090>

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[https://advance.sagepub.com/articles/Comment\\_on\\_Flaxman\\_et\\_al\\_2020\\_The\\_illusory\\_effects\\_of\\_n-on-pharmaceutical\\_interventions\\_on\\_COVID-19\\_in\\_Europe/12479987](https://advance.sagepub.com/articles/Comment_on_Flaxman_et_al_2020_The_illusory_effects_of_n-on-pharmaceutical_interventions_on_COVID-19_in_Europe/12479987)

<sup>4</sup> <https://asiatimes.com/2020/05/global-virus-lockdown-was-madness/>

<sup>5</sup> <https://www.medrxiv.org/content/10.1101/2020.09.26.20202267v1>

<sup>6</sup> [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30208-X/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30208-X/fulltext)

*system overcapacity, which would facilitate increased recovery rates", as to the effectiveness on overall mortality, the article stated:*

*"... government actions such as border closures, full lockdowns, and a high rate of COVID-19 testing were not associated with statistically significant reductions in the number of critical cases or overall mortality."*

- 2.8 Indeed, Sweden did not impose a full lockdown and the virus there has followed the same pattern as in the UK. Moreover, the predictions using the "Ferguson" model for how many deaths there would be in Sweden proved very wide of the mark. The Ferguson report itself, which predicted that if nothing was done to suppress the spread of Covid-19, there could be many hundreds of thousands of deaths and which was not peer reviewed and has been widely credited with having persuaded the Government to introduce the lockdown in the first place, has been heavily criticised in scientific quarters.
- 2.9 On 25 March 2020, (one day before the Original Regulations were imposed) the Nobel Laureate for Chemistry Michael Levitt, Professor of Structural Biology at Stanford University commented on the report in an academic article<sup>7</sup> (see D1.7 pages 244 to 245). In this article, he used the example of the Diamond Princess, a cruise ship with disproportionately elderly passengers in which the virus spread throughout the passengers, to correct the estimates of total fatalities on the basis of the imposition of no restrictive measures. His calculations led to a prediction of just over 65,000 deaths in total, against the prediction of the Ferguson Report of 510,000 deaths – both on the basis of no restrictive measures being imposed.
- 2.10 A study from Sweden by Uppsala University in which a group of Swedish researchers had sought to use the methodologies of the Ferguson Report to try and forecast the impact of anti-Covid-19 measures was referenced in the AIER article with interesting findings and highlights just how dangerous it is to rely on these sorts of models as being able to accurately forecast the death toll from Covid-19<sup>8</sup> (see D1.8 pages 246 to 276). In particular, the findings of the Uppsala study predicted that the pandemic would peak in Sweden in May and forecast that without the introduction of a lockdown, total deaths would be 96,000 by 1 July 2020 (see page 12 of the article). As can be seen from the graph at page 29 of the article, the estimated deaths as at 1 May 2020 were 40,000. In fact, Swedish deaths attributed to Covid-19 stood at 2,462 as of 29 April.

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<https://www.dropbox.com/s/35e12dfdqdi46on/5.a.%20How%20accurate%20are%20the%20number%20of%20UK%20and%20US%20Deaths%20Predicted%20by%20Ferguson%20et%20al%202020%20by%20Michael%20Levitt-v2.pdf?dl=0>

<sup>8</sup> <https://www.medrxiv.org/content/10.1101/2020.04.11.20062133v1.full.pdf>

- 2.11 The coding used in the modelling underlying the Ferguson Report has also been heavily criticised. Two articles published by the blogsite "Lockdown Sceptics" on 6 May and 9 May 2020 by an author (admittedly under a pseudonym) who claimed to have worked for Google previously and to have 30 years of experience in coding, criticised the coding. The two articles were impressive and persuasive critiques and prompted significant numbers of comments<sup>9</sup> <sup>10</sup>(see D1.9 pages 277 to 282 and D1.10 pages 283 to 286). Professor Ferguson had admitted in a tweet on 22 March 2020 that created the code for his pandemic model over 13 years ago for the purposes of modelling the spread of an entirely different disease (influenza) and that he had failed to document his coding work<sup>11</sup> (see D1.11 pages 287 to 289). The significant time that has passed since then with the undeniable changes in working practices and human behaviours in the UK over the last 13 years coupled with the myriad assumptions build into the model undoubtedly creates a serious margin for error.
- 2.12 The existence of academic literature and media reports which cast into serious doubt the reliability of the Ferguson report and the predictions set out therein, ought, in the Claimants' view, to have caused the Government to review its reliance on Ferguson's modelling.
- 2.13 The Claimants are concerned that the Government may still be relying on similar modelling in making its current policy of seeking to suppress the virus.
- 2.14 There is substantial evidence about the inability of children to pass the virus to others and the evidence of a fatality rate that is statistically zero. For example, a survey in Iceland in April found not only that children were less likely to be infected than adults but they appeared not be very infectious themselves<sup>12</sup> (see D1.12 pages 290 to 303). Furthermore, it was reported that nine year old boy in France who, despite being Covid-19 and showing symptoms did not infect any of the 172 people he came into contact with<sup>13</sup> (see D1.13 pages 304 to 306).
- 2.15 According to NHS England figures, in England, out of 29,838 Covid-19 deaths in hospital between 1 March and 23 September 2020 just 21 in total have been in the under 19 age group<sup>14</sup> (see D1.14 page 307). Furthermore, if those who had pre-existing health conditions are stripped out, the death toll is just 4. This data can be seen in the table at paragraph 3.10 below from NHS England statistics (taken from the page "Covid-19 all deaths by condition.")
- 2.16 Whilst there is presently no vaccine against Covid-19, there is evidence that people who may not have developed anti-bodies are nevertheless immune or have resistance to becoming ill

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<sup>9</sup> <https://lockdownsceptics.org/code-review-of-fergusons-model/>

<sup>10</sup> <https://lockdownsceptics.org/second-analysis-of-fergusons-model/>

<sup>11</sup> [https://twitter.com/neil\\_ferguson/status/1241835454707699713](https://twitter.com/neil_ferguson/status/1241835454707699713)

<sup>12</sup> <https://www.nejm.org/doi/full/10.1056/NEJMoa2006100>

<sup>13</sup> <https://www.theguardian.com/world/2020/apr/21/boy-with-covid-19-did-not-transmit-disease-to-more-than-170-contacts>

<sup>14</sup> <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/>



because of memory T cells which can persist for many years and fight the virus as a result of their having fought off other coronavirus pathogens in the past. A study undertaken by Sekine et al highlighted the extend of adaptive immune responses and found that individual donors in the convalescent phase after mild Covid-19 symptoms who had been traced after returning from Sweden from endemic areas exhibited robust memory T cell responses months after infection, even in the absence of detectable circulating antibodies<sup>15</sup> (see D1.15 pages 308 to 333). Of particular note is that the study found:

*"...almost twice as many healthy individuals who donated blood during the pandemic had memory T cell responses versus antibody responses, implying that seroprevalence as an indicator may underestimate the extent of adaptive immune responses against [Covid-19]."*

### **The legal position during lockdown**

- 2.17 As far as the laws introduced by the UK Government were concerned, initially, it is fair to say that in my observation, considerable confusion abounded as to what exactly the lockdown laws did or did not allow. A number of high profile people were caught out failing to comply with the measures. These included Neil Ferguson himself, the architect of the now infamous Imperial College model which predicted huge numbers of Covid-19 deaths. He had to resign when it emerged he had broken the rules by visiting his girlfriend during lockdown. The Prime Minister's adviser Dominic Cummings became the subject of a media frenzy when it emerged he had made trips to and within the North East with his children and visited his parents home.
- 2.18 Even the police seemed confused by the regulations. Reports came in of people being told they could only leave their homes in England once a day for exercise or that they could only go so far from their homes. People sitting on park benches whilst out exercising were told they were breaking the law. Thousands of fixed penalty notices were issued. It is a matter of speculation as to how many of those were incorrectly issued, but not challenged.
- 2.19 The confusion over what was and was not illegal was heightened by three further factors. First, the legislation itself continued to be amended regularly as the lockdown started to be loosened but became ever more complex. Devices such as "support bubbles" and "linked households" all added to the complexity as the Government tried to legislate at a granular level to control the social interactions of the whole population. Secondly, the devolved administrations imposed their own laws which did not always match those implemented in England. (For example, in Wales for a time it was stipulated in law that people could only exercise once a day whereas that was never stipulated in law in England). Thirdly, the Government produced reams of "guidance" for people which was often at odds with the letter

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<sup>15</sup> <https://www.cell.com/action/showPdf?pii=S0092-8674%2820%2931008-4>

of the law. Ministers, officials and commentators in the media who did not themselves understand the rules would often say things that were not correct. Sadiq Khan, London's Mayor, for example, was quoted as saying that public transport was reserved only for "essential workers". This complexity in the rules and lack of understanding was later to be referred to by the Prime Minister on 9 September as one of the reasons behind the introduction of the regulations which are the subject of challenge in these proceedings.

2.20 The use of the emergency procedure under s45R of the 1984 Act by Ministers when introducing the Original Regulations meant that there was no Parliamentary scrutiny of them before they were implemented and precious little after that when they were later amended. The state of affairs was summarised by Conservative MP Steve Baker in an article published on 4 May in the Telegraph<sup>16</sup> (see D1.16 at pages 334 to 337) where he lamented the way in which Parliament had not been involved in the making of the Original Regulations:

*"Only today do those rules enforcing the most draconian restrictions in British history come before the Commons for retrospective endorsement with just two hours debate and no division. We have lived under house arrest for weeks by ministerial decree – a statutory instrument that parliament had no foresight of and no opportunity to scrutinise or approve before it changed life in this country as we know it. The situation is appalling.*

*As I conceded on March 23, there were good reasons for ministers to take rapid action. The public would expect nothing less. The first responsibility of any government is to protect the lives of its people and faced with the uncertainty of this awful virus, the instruction for us all to stay at home to save lives was the right call.*

*But this suspension of freedom comes with a cost too. Millions of people in our country have been plunged into idleness at public expense and unemployment, facing financial and psychological hardship on a scale never seen before. Thousands of people have missed life-prolonging health appointments. Vulnerable people are isolated and domestic violence has soared. Soon will come the full economic impact on all our lives.*

*These extraordinary measures require not only legal authority but democratic consent. There is a real possibility that they have had neither....*

*...A judicial review is being brought against the lockdown laws, claiming they are ultra vires – that is, that ministers have no legal authority to impose them in the way they*

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<sup>16</sup> <https://www.telegraph.co.uk/politics/2020/05/03/boris-johnson-must-end-absurd-dystopian-tyrannical-lockdown2/>

*did – and that they incur a disproportionate interference with fundamental rights and freedoms. There is serious legal scholarship supporting that view. I fear the present rules may be unlawful.*

*Meanwhile, the CPS is reviewing every single charge, conviction and sentence brought under emergency powers after civil liberties group Big Brother Watch detailed [a string of wrongful convictions](#) in a damning review. The zealous criminalisation of people for activity that, until a few weeks ago was entirely ordinary, has concerned many, including me. I am horrified by the expansion of the surveillance state, with thermal imaging cameras, drones, ANPR and location tracking being deployed at the drop of a hat to police the nation into imprisonment at home."*

- 2.21 Sadly, little appears to have changed in the Government's approach since those early days. Throughout the whole period, even at a point when cases of Covid-19 had fallen away dramatically and hardly anyone was being admitted to hospital with the virus, the Government continued to pass new legislation severely impinging on people's rights, with no effective involvement by MPs or Peers in the making of that legislation. Just how unsatisfactory the process had become is laid bare in a report entitled "Parliamentary Scrutiny of the Government's handling of Covid-19" published on 10 September 2020 by the House of Commons Public Administration and Constitutional Affairs Committee (see D1.17 pages 338 to 379). It said:

*"The Committee is concerned by both the scale of legislation and the inability of Parliamentarians to effectively amend COVID-19 legislation....*

*...Members have had no opportunity to meaningfully engage with and amend the lockdown regulations under the Public Health (Control of Diseases) Act 1984. The current system of Parliamentary scrutiny in relation to lockdown regulations is not satisfactory. The fact that this legislation, which contains stark restrictions on people's civil liberties, is not amendable by Members, made under the urgent procedure and therefore without parliamentary scrutiny or effective oversight, coupled with the extremely quick passing of the Coronavirus Act means the framework Parliamentary scrutiny of the Government's handling of COVID-19 is inadequate."<sup>17</sup>*

## **Easing of the lockdown**

- 2.22 By 16 April, the peak of daily infections (and deaths attributed to Covid-19) had been passed. But the Government announced for the first time in a speech by Dominic Raab on 16 April, its

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<sup>17</sup> <https://committees.parliament.uk/publications/2459/documents/24384/default/>

"five tests" which it claimed would need be met before it could consider easing the lockdown measures<sup>18</sup> (see D1.18 pages 380 to 384). These were all focussed exclusively on Covid-19 and the NHS. The economy, the mental and physical welfare of citizens, the plight of school children, the national debt etc – did not feature. The Secretary of State for Health and Social Care repeated the reliance on the five tests in a written statement on 28 April<sup>19</sup> (see D1.19 page 385). Around that time, the Nightingale Hospitals which provided substantial overflow capacity of thousands of beds were scarcely populated. On 15 April 2020, Secretary of State for Health and Social Care announced that "*spare capacity in critical care in the NHS today has reached a new record high of 2,657 beds*"<sup>20</sup> (see D1.20 pages 386 to 389). Subsequent announcements made by revealed that the NHS had "*3,190 critical care beds and 42% of oxygen supported beds were empty*"<sup>21</sup> (see D1.21 pages 390 to 394) as at 27 April 2020 and 3,413 spare critical care beds as at 4 May 2020<sup>22</sup> (see D1.22 pages 395 to 398).

2.23 In May, the Government finally did begin to ease some of the lockdown measures. But Ministers continued to stress their adherence to the "five tests" (see statement of Dominic Raab on 7 May at D1.23 pages 399 to 403)<sup>23</sup> and the Prime Minister's statement on 10 May<sup>24</sup> (see D1.24 pages 404 to 410). They also did so in the Government's "Covid Recovery Strategy document"<sup>25</sup> (see D1.25 pages 411 to 465). This process continued incrementally with the passing into law of further statutory instruments also introduced purportedly under the 1984 Act (invariably using the emergency procedure). The Government also imposed new types of restrictions. One of these was the introduction of new travel regulations which required anyone entering England from outside the common travel area to go into self-isolation for 14 days<sup>26</sup>. These particular regulations have since been amended more than 14 times as the list of countries from where travellers are required to self-isolate has changed on a weekly basis.

2.24 The easing of the lockdown measures (besides the travel regulations) culminated in the introduction of on 3 July 2020 of the *Health Protection (Coronavirus, Restrictions) (England)*

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<sup>18</sup> <https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020>

<sup>19</sup> <https://questions-statements.parliament.uk/written-statements/detail/2020-04-28/HCWS206>

<sup>20</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-15-april-2020>

<sup>21</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-april-2020>

<sup>22</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-4-may-2020>

<sup>23</sup> <https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-7-may-2020>

<sup>24</sup> <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf)

<sup>26</sup> The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 No. 568

*(No.2) Regulations 2020 No. 684* ("the No.2 Regulations") which revoked and replaced the Original Regulations.

## **The No.2 Regulations**

- 2.25 The No.2 Regulations marked a significant easing of the lockdown, although various types of businesses such as massage parlours, nail bars, spas, casinos, and nightclubs had to remain closed and conferences and trade shows continued to be prohibited.
- 2.26 The restrictions on the meeting up of people socially in small groups were largely removed to be replaced by a restriction against gatherings of more than 30 people in private dwellings or at unofficial outside events. The No.2 Regulations did allow larger gatherings to take place in outdoor public places provided they were organised and the organiser had undertaken a risk assessment. However, and crucially from the point of view of businesses such as the Second Claimants', there were no size limit restrictions imposed in law on any indoor places or any private outdoor spaces other than dwellings, including wedding receptions. What did impact upon the Second Claimant's business from this point, however, was that the Marriage and Wedding Reception Guidance was to restrict numbers to 30. As outlined in the Statement of Facts and Grounds, this Guidance had considerable statutory recognition and effectively prevented the Third Claimant from operating weddings larger than this.
- 2.27 For the next two months, economic and social activities that had previously been prohibited by law began to happen again. Bars and restaurants re-opened. People were permitted to hold and attend weddings although according to Mr Henriques of the Third Defendant, this was more theoretical than real because most weddings that might otherwise have taken place during this period had been cancelled or postponed. Religious gatherings, funerals and other events were also able to be held without restriction of numbers and subject only to the need to bear in mind (but not as a matter of law) various items of government guidance.
- 2.28 The prevalence of Covid-19, meanwhile, continued to decline.
- 2.29 Despite the considerable easing of the national lockdown measures, these figures registered very little change between 3 July, when the No.2 Regulations, were introduced and the beginning of September.

## The Dolan Action

2.30 In accordance with the Claimants' duty of candour, I should point out some further pertinent facts concerning the Dolan Claim.

2.31 As I have said, the Dolan Claim was a judicial review claim directed against the Original Regulations and some of the grounds relied upon in that case were similar to those in the present claim. Proceedings in the Dolan Claim were issued on 22 May 2020 and followed on from a pre-action protocol letter sent to the Secretary of State for Health and Social Care on 30 April 2020. The Court gave directions for the filing of summary grounds of defence by the Defendants. But rather than dealing with the question of permission on the papers, the Court decided to rule on the question of permission at a hearing. This was held remotely on 2 July before Lewis J. He gave judgment on 6 July refusing permission to the Claimants to bring their proceedings. The Claimants applied for permission to appeal to the Court of Appeal against that ruling. By an order dated 4 August 2020, Hickinbottom LJ directed that there should be an expedited, rolled up hearing of the Claimants' application for permission to appeal and that this and the appeal itself should take place during week commencing on 28 September.<sup>27</sup>

2.32 In his judgment (see D1.26 pages 466 to 468) Hickinbottom LJ stated:

*"The challenged regulations impose possibly the most restrictive regime on the public life of persons and businesses ever – certainly outside times of war – but they potentially raise fundamental issues concerning the proper spheres for democratically-accountable Ministers of the Government and judges.. The Applicants contend that expedition is required and I agree...."*

2.33 A copy of Hickinbottom LJ's judgment is at pages 466 to 468 of MG1. The reported judgment of Lewis J will be in the authorities' bundle.

2.34 In the event, however, on 11 September the parties were informed that the constitution of the Court to hear the appeal had been changed and the Lord Chief Justice himself was to take the appeal. He sought to bring forward the hearing of the appeal to start on 23 September. Unfortunately, the Government's leading counsel was not available on that day and the next available date on which the relevant judges were available meant that the hearing was adjourned to 29 October. By an application notice filed on 22 September the Claimants

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<sup>27</sup> In his initial order, Hickinbottom LJ envisaged that the Court of Appeal would hear the judicial review itself if it allowed the Claimants' appeal but he later amended his ruling to remove this part of it following observations submitted by the Government.

sought to have the appeal brought forward as a matter of urgency in view of the latest developments. But I understand that the Court has declined to do this.

- 2.35 Thus, although it is the case that the Claimants' challenge to the Original Regulations was refused permission at first instance by Lewis J, that challenge very much remains a live issue pending the hearing of the rolled up appeal on 29 October.
- 2.36 I have referred to the Dolan Action because it is important to draw the Court's attention to the fact that one of the grounds in particular cited in this action mirrors a ground relied upon in the Dolan Action and which is subject to the appeal in that action. The ground in question is the second limb of the *ultra vires* ground in this claim (but not the first limb based upon the alleged misuse of the emergency procedure under the 1984 Act);

### **The ultra vires ground**

- 2.37 As regards the *ultra vires* challenge in this action, the ground of challenge based on the misuse of the emergency procedure by the Government to pass the relevant legislation is not a challenge to the lawfulness of that procedure as such, but rather to the application of it in relation to the Regulations. The outcome of that challenge depends upon a factual assessment of the circumstances prevailing at the time the Regulations were made and whether in those circumstances, a Minister, acting reasonably, could properly have certified under s45R(2) of the 1984 Act that it was necessary by reason of urgency, not to put the Regulations in draft before both houses of Parliament for approval.
- 2.38 As regards the first limb of the Claimants' *ultra vires* challenge, this concerns the fundamental question of whether or not the 1984 Act does confer on the Government the power to make regulations imposing general restrictions on the entire population's activities as it has purported to do. In my first witness statement made in support of the Dolan Claim, I exhibited a number of articles which had been published by various lawyers and legal commentators about this very point. Since those articles were published, Lord Sumption has voiced the opinion on a number of occasions that in his own view, the 1984 does not provide the power to do so. In the aftermath of the judgment of Lewis J, in a discussion with Joshua Rozenberg QC organised by Prospect Magazine, Lord Sumption expressed his "astonishment" that the issue had been ruled not to be at least an arguable proposition<sup>28</sup> (see D1.27 pages 469 to 470).
- 2.39 The question of whether or not all of the various lockdown laws including the Original Regulations and the Regulations are *ultra vires* the 1984 Act for that reason is a matter of statutory construction, rather than evidence. As such, there is nothing I can usefully add by

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<sup>28</sup> <https://www.prospectmagazine.co.uk/events/democracy-and-the-rule-of-law-in-the-age-of-covid-19>



way of factual evidence in relation to this ground. The second limb of the Claimants' ultra vires challenge, however, very much turns on the facts pertaining to the exercise of by Ministers of the emergency procedure. For that reason, it is convenient to deal with it last in this statement after I have addressed the other grounds of challenge and set out the facts surrounding the making of the Regulations. It will then be easier for the Court to view the Minister's decision in its full context.

### **3. THE POSITION AS AT 3 SEPTEMBER 2020 BEFORE THE INTRODUCTION OF NEW RESTRICTIONS**

3.1 As I have described, following the easing of the lockdown with the making of the No.2 Regulations on 3 July, the Government continued to impose restrictions on people who had gone on holiday or were travelling to England from countries not on an approved list. Returning travellers were required to self-isolate on their return (subject to various exceptions). A number of draconian "local" lockdowns began to be imposed in various parts of the country such as in Leicester and Bolton. A requirement to wear face coverings in certain settings had also been imposed. The impact these restrictions have had and the damage done are beyond the scope of this judicial review. These measures aside, there had not been any further nationwide restrictions other than a significant increase in the fixed penalty that could be imposed on anyone organising an "illegal" gathering in defiance of the No.2 Regulations. I deal with this further in paragraph 4.12 below.

3.2 Before addressing the events leading to the tightening of national restrictions in September, it is important to put in context where the country was following the several months of Government restrictions.

#### **Deaths**

3.3 According to the latest NHS dashboard as of 30 September 37,429 people had died in England having tested positive for Covid-19 within 28 days prior to their death (see <https://coronavirus.data.gov.uk/deaths>). According to the ONS bulletin dated 18 September, for England and Wales, deaths of Covid-19 patients accounted for 1.5% of the total of weekly recorded deaths for the latest week.

3.4 Out of the death toll the overwhelming proportion of those who had died (91% according to ONS figures) had been suffering from a pre-existing condition (on average at least two such conditions).



confirmed to be infected with Covid-19. This is shown in the table below at Fig 1. Below that at Fig 2 is a table from the same source which shows that out of a total of 2513 occupied mechanical ventilator beds in occupation, 58 contained confirmed Covid-19 patients.

Fig.1

Total beds

	Beds occupied	Beds occupied by confirmed COVID-19 patients
<b>England</b>	110,031	468
East of England	11,407	31
London	17,198	87
Midlands	21,900	83
North East and Yorkshire	16,892	86
North West	16,756	130
South East	15,249	39
South West	10,629	12

Fig.2

Mechanical Ventilation beds

	Beds occupied	Beds occupied by confirmed COVID-19 patients
<b>England</b>	2,513	58
East of England	239	3
London	667	12
Midlands	356	9
North East and Yorkshire	417	11
North West	356	16
South East	285	5
South West	193	2

3.8 From the outset of the pandemic reaching the UK and by the time the Dolan Action was started, it was already very clear that Covid-19 is a disease that overwhelmingly affects the elderly and those with pre-existing health conditions. This is evident in all of the data for deaths of those published by the ONS and the NHS (see paragraphs 3.5 and 3.9 below).

3.9 Figure 1. is NHS England's most up to date record showing the deaths of people in hospital in England to date who had been infected with Covid-19 broken down by condition. The table shows how many people died who had pre-existing medical conditions and those who died but who had no such other conditions. The data, I submit is striking. It shows that for the whole of England (population 55m), in 7 months, just 4 people in total under the age of 20 with no pre-existing conditions have died in hospital in England with Covid-19. For the under

40 age group, just 39 such deaths have been recorded in total during that period. Even if the whole under 60 age group is included, the figure for total deaths of such people in English hospital without pre-existing conditions is 309. I have personally kept a close eye on these datasets since the start of May and the figures have barely moved. At the time the Dolan Action was launched, the numbers of additional deaths in each category as at 12 May using the same dataset was 3, 30 and 220 respectively. So in over 4 months in those same categories (i.e. otherwise healthy people dying in English hospitals after testing positive for Covid-19) another 56 people under the age of 60 have died. The up to date position as at 23 September is shown in the table below which I have taken directly from NHS England's website.

Fig 3.

**Title:** COVID-19 deaths by age group and pre-existing condition  
**Summary:** This file contains information on the deaths of patients who have died in hospitals in England and have tested positive for Covid-19. .  
**Period:** All data up to 4pm 23 September 2020  
**Source:** COVID-19 Patient Notification System  
**Basis:** Provider  
**Published:** 24 September 2020  
**Revised:** -  
**Status:** Published  
**Contact:** [england.covid19dailydeaths@nhs.net](mailto:england.covid19dailydeaths@nhs.net)

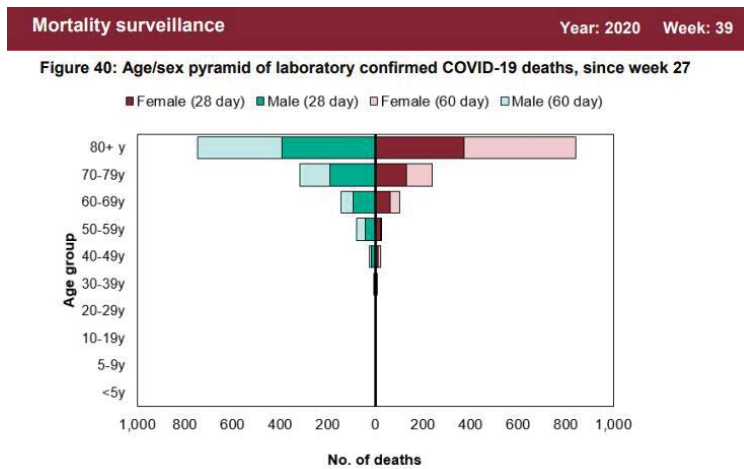
**Breakdown by pre existing condition**

Age group	Pre existing condition			Total
	Yes	No	Unkown presence of pre-existing condition	
<b>Total</b>	28,438	1,400	0	29,838
0 - 19 yrs	17	4	0	21
20 - 39	182	35	0	217
40 - 59	2,042	270	0	2,312
60 - 79	10,766	577	0	11,343
80+	15,431	514	0	15,945
Unknown age	0	0	0	0

- 3.10 Whilst every single death (from any cause) represents a devastating personal tragedy for those concerned and their loved ones, the implications of the data in this table are, in my submission inescapable.
- 3.11 They are that Covid-19 poses a statistically insignificant risk of death to anyone otherwise of good health under the age of 20 and a very tiny risk to anyone under the age of 40. Even if the age range is pushed up to include everyone under 60, the risk of an otherwise healthy person in that group dying of Covid-19 is very small – even smaller for those who are not obese or are female. As an example of how little risk the virus poses to young people, analysis data from 37 American universities shows that of 48,300 American students who have been infected with the virus since August, only two were hospitalised and there were no fatalities<sup>29</sup> (see D1.28 page 471).

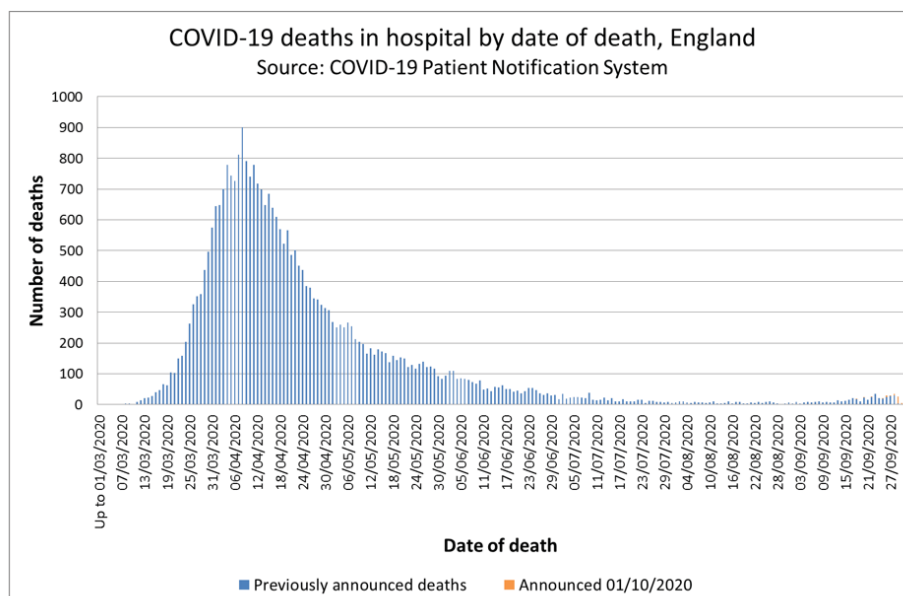
<sup>29</sup> See research documented by Andrew Bostom, with reference to public domain university reports: <https://threadreaderapp.com/thread/1308496346454913026.html> . Note that the typical period from infection to death in those that do die is 23 days; and that the research is dated 22.9.2020.

3.5 Below is a copy of a graphic published each week by Public Health England as part of its Covid Surveillance reporting. This starkly shows the age distribution of those who have died during weeks 27 to 39.



### What we know about Covid-19 in the UK

3.6 It is noticeable that despite the easing of the lockdown represented by the No.2 Regulations, there was no evidence of an upsurge in deaths from Covid-19 during the two months that followed. Below is a graphic produced by NHS England which shows how deaths had trailed off by the summer.



3.7 By the time the most recent NHS figures for English hospital bed occupancy were published showing the position as at 3 September, they showed that in the whole of England there were a total of 110,031 hospital beds occupied out of which 468 were occupied by patients

3.12 To put these figures into perspective, according to the official data, the total number of deaths with Covid-19 of people under 40 and under 60 to date this year (regardless of pre-existing conditions) have been 217 and 2312. In contrast, in England and Wales, a total of 11,113 individuals under the age of 40 and 67,095 individuals under 60- died in 2018 (the last year for which statistics are obtainable from the ONS).<sup>30</sup> The below table has been produced using the ONS 2018 edition of the dataset for 'Deaths by single year of age tables, UK'.

		United Kingdom	England and Wales
Under 40s (39 and under)	Male	8572	7248
	Female	4524	3865
	Total	<b>13,096</b>	<b>11,113</b>
Under 60s (59 and under)	Male	40,116	34,309
	Female	25,345	21,673
	Total	<b>78557</b>	<b>67,095</b>
<i>NB – these figures are inclusive of the under 40s figures</i>			

3.13 Even if the totality of the Covid-19 deaths in the under 60 age group (i.e. including those in clinically vulnerable groups are taken into account) Covid-19 has been responsible for a tiny fraction of all deaths.

### Economic cost

3.14 The economic cost to the UK of the Covid-19 pandemic and the Government's reaction to it has been enormous. At the time of the Dolan Action in May a total of over 7m people had been on the Furlough or equivalent self-employed protection scheme at a cost of over £10 billion. The ONS bulletin I referred to above showed that at one point 32% of all workers in

<sup>30</sup>

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/deathregistrationsummarytablesenglandandwalesdeathsbysingleyearofagetables>

the UK were on Furlough. The hit on GDP of closing down whole swathes of the economy was a drop in output that was the biggest fall in history. According to an ONS bulletin published on 24 September<sup>31</sup> (see D1.29 pages 472 to 494) "*across Quarter 2 (April to June), the economy contracted by a record 20.4%. In comparison, the largest quarterly decline during the 2008 recession was 2.1%.*". The same bulletin confirmed that the economy was still 11.7% smaller than it had been pre-lockdown. The ONS bulletin confirmed that the UK's national debt has ballooned to levels not seen since 1961. As of the end of July it stood at 100.5% of GDP (over £2 trillion in cash terms) adding hundreds of billions of pounds compared to pre-lockdown.

- 3.15 A number of well-known companies such as Whitbread (6,000),<sup>32</sup> (see. D1.30 pages 495 to 498) British Airways (c10,000) and Pizza Express (1,100) have all announced large scale redundancies. But there is a widespread expectation that when the Furlough scheme ends in its existing form in October, this will inevitably result in a very significant rise in unemployment with all the attendant economic and health consequences which will flow from that. It is also the case that during the pandemic, the Government has imposed legal bars on the repossession of properties and some forms of insolvency process. Thus, if anything, the full economic impact has been cushioned even further. For companies such as the Second Claimant which operate in the hospitality sector, the situation has been especially grave as they have been one of the sectors bearing the brunt of the restrictions. A survey by three hospitality trade associations published on 25 September found that a quarter of its members believed their businesses could fail within the next 3 months<sup>33</sup> (see D1.31 pages 499 to 501).
- 3.16 In the circumstances, I respectfully submit that the dire economic consequences of the lockdown and the restrictions that continue to be imposed by the Government do not need spelling out here. They are many and obvious.

## Education

- 3.17 In March, the Prime Minister and his Education Secretary both announced that schools would close with effect from 20 March for all but children of essential workers. As a result, millions of school children were unable to continue their schooling from that point on. The decision to close schools was one of the elements of the Dolan Action but forms no part of this claim. The majority of schools in England reopened at the beginning of September. It may not be a coincidence that cases of Covid-19 increased from that point.

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<sup>31</sup>

<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19in10charts/2020-09-24>

<sup>32</sup> <https://www.bbc.co.uk/news/health-54246403>

<sup>33</sup> <https://www.ukhospitality.org.uk/news/527802/Quarter-of-hospitality-businesses-believe-they-could-fail-in-next-3-months-without-further-support.htm>

- 3.18 As the figures in paragraph 3.10 demonstrate and as appears to be accepted by the majority of scientific opinion that I have read, school age children are at very low risk of death or serious harm from Covid-19. The extent to which children may themselves contribute to the spread of Covid-19 to adults is more contentious. But the Government has stressed the importance of seeking to keep schools open and the Claimants do not take issue with this.

### **Health service**

- 3.19 It has been well documented that in reaction to the pandemic, there has been a drastic curtailment in access to NHS diagnostic and treatment of other health conditions. Large numbers of elective surgeries and consultations have been cancelled or postponed. The short term and longer term impact on those affected can only be imagined. Inevitably it will lead to more deaths and longer waiting times for those suffering while they wait for their treatment to be made available.
- 3.20 Again, as with the economic impact, the various harms caused to the nation's health by the disruption to medical services are well documented.

### **Disproportionate response to date**

- 3.21 It is an over-arching observation of the Claimants that in view of the above, it makes no sense for any Government to inflict the devastating effects of the lockdown on the whole country, in the face of a virus that has the characteristics of Covid-19. The blanket approach to locking down the country and everyone in it at enormous cost in lives lost (including from disruption to non-Covid healthcare provision and from the effects of economic damage), education lost, jobs and businesses destroyed and the toll of additional national debt is, the Claimants, submit, completely out of proportion to the threat posed by the virus to the vast majority of the population.
- 3.22 If it is suggested that back in March, the Government had genuine concerns about the ability of the NHS to cope with an expected surge of Covid-19 patients and that this led to it deciding to put the country into lockdown, those arguments cannot apply to the situation confronting Ministers when they decided to make the Regulations in September 2020.
- 3.23 The NHS has had 7 months since the pandemic first spread to the UK, within which to prepare for the Covid-19 pandemic by adding critical care bed capacity and building the Nightingale Hospitals (which, though mothballed are still available to be opened if required). There is more emergency equipment for treating Covid-19 patients such as ventilators and oxygen machines. Also, the initial shortages of supplies of personal protective equipment

have evidently been addressed. The Government now claims that it has "robust and resilient supply chains" for PPE, with the majority of it being sourced from within the UK and a 4 month stockpile in place to cope with future demand<sup>34</sup> (see D1.32 pages 502 to 504). Further, an enormous effort has been made (albeit not always successfully) to expand the testing capacity of the NHS. That testing capacity – almost non-existent at the start of the pandemic – is now enabling more than 200,000 people to be tested every day. The Government's test and trace mobile application has had many problems. But according to the SoS Health, over 10m people have now downloaded the App already<sup>35</sup> (see D1.33 page 505).

3.24 Although there was as yet no sign of a viable vaccine for Covid-19, the summer had seen some considerable progress made in treating patients suffering from Covid-19. For example, research has confirmed that treatment with a commonly available steroids dexamethasone and hydrocortisone has been shown to significantly improve the chances of survival of some of the sickest patients<sup>36</sup> (see D1.34 pages 506 to 507). Doctors have also learned that mechanical ventilation is not the preferred treatment for seriously ill patients if it can be avoided and that using alternative forms of treatment to give them oxygen can be more effective<sup>37</sup> (D1.35 pages 508 to 511). All of these improvements have led to a significantly improved mortality outlook for patients who end up seriously ill in hospital.

3.25 Above all, the endless messaging about the need to protect clinically vulnerable people has undoubtedly resonated with the public. People are more careful about visiting elderly or sick relatives or friends. I can say that not only do I practice careful measures around elderly and clinically members of my own family group, but I know from first-hand experience that people in my work and social circle do too. The Claimants' other witnesses all confirm in their own witness statements that do likewise. Doubtless there are those who do not take the requisite care. But if that is the case, the Claimants' submit it is inherently unlikely that such people would do any different in the privacy of their own homes – whatever the Government or the law may tell them to do.

3.26 It is clearly not accepted by the Government, but the Claimants believe the only viable strategy for dealing with Covid-19 is to take all possible steps to protect the clinically vulnerable members of society, whilst enabling life to go on for the vast majority of the population. The introduction of protocols for protecting care home residents against exposure to the virus and the continued improvement of infection control measures in hospitals are

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<sup>34</sup> <https://www.gov.uk/government/news/huge-increase-in-uk-personal-protective-equipment-production>

<sup>35</sup> <https://www.nationalhealthexecutive.com/Care-pathways/10-million-people-have-downloaded-the-nhs-covid-19-app->

<sup>36</sup> <https://www.imperial.nhs.uk/about-us/news/steroid-found-to-improve-survival-of-critically-ill-covid-19-patients>

<sup>37</sup> <https://www.statnews.com/2020/04/21/coronavirus-analysis-recommends-less-reliance-on-ventilators/>

essential. These are steps that would help reduce the death toll since they are the places where the people most vulnerable to Covid-19 are situated. This, the Claimants submit, would be a more proportionate response to the Covid-19 pandemic, than imposing oppressive restrictions on the bulk of the population who are not at anywhere near the same level of risk.

3.27 The NHS (which was not overwhelmed even at the height of the pandemic) ought to be (and presumably is) in a far better position to cope with any sudden increase in Covid-19 admissions now than it was in March. Thus the Government must, presumably, have much more "headroom" to be able to prioritise not locking down again, whilst avoiding a crisis whereby hospitals become unable to cope with a large influx of patients.

3.28 In performing the appropriate balancing exercise between weighing up on the one side the harms that can be done by Covid-19 and on the other side the harms that can be done by locking down or placing restrictions on people, businesses and ordinary activities, the Claimants submit that the Government is in a better position now than it was back in March. Knowing what we know now, the Claimants submit that the Government should be extremely reluctant to reintroduce blanket national measures that restrict people's civil liberties and which harm the recovery of economic activity.

3.29 In short, by the start of September the UK was in a completely different position to how it was back in March 2020. The Claimants submit that there it is simply not credible for the Government to claim that lockdown restrictions are needed in order to "protect the NHS" (the mantra repeated by the Prime Minister in his latest speech to the nation on 30 September). It is clear that for the vast majority of the working age population and for children and young people in higher education, Covid-19 poses no serious risk of harm. The types of people who are potentially vulnerable to Covid-19 are known and steps can be taken to help shield them as far as possible from exposure to the virus and to treat them more effectively if they become ill.

3.30 The Government has acknowledged in its own publications (and, it is submitted as is obvious as a matter of common sense) that the lockdown measures that were taken earlier in the year have undeniably caused huge harms to the country. These include:

3.30.1 Direct deaths due to the unwillingness or inability of people with non-Covid illnesses to access healthcare, whether through hospital treatment or early diagnosis of treatable conditions

3.30.2 Indirect deaths due to unhealthy lifestyles, eating and drinking habits acquired during lockdown;



- 3.30.3 Worse mental and physical health outcomes due to unemployment and impoverishment as a direct result of shutting down parts of the economy;
- 3.30.4 Disruption to the education and wellbeing of millions of school age children who were unable to go to school between March and September;
- 3.30.5 Massive short term, medium term and long term economic consequences caused by the destruction of businesses and jobs, declines in GDP, loss of tax revenues and enormous borrowing of hundreds of billions of £s;
- 3.30.6 a very serious degree of interference with and steady erosion of civil liberties and Convention rights ;
- 3.30.7 a breakdown of democratic control and accountability leading to "Government by decree";

3.31 These wide ranging and serious harms to the country as a result of the measures taken to combat the spread of Covid-19 are well documented and it is submitted there is at this point in time, little purpose in exhibiting large quantities of documentation evidencing them. The documents already exhibited should suffice. It is also worth noting that an article published in the Lancet on 10 August 2020 revealed that, of the 67 autopsies carried out at John Radcliffe Hospital (Oxford, UK) on behalf of Her Majesty's Coroner of Oxfordshire during the first 2 months of the lockdown period, only two autopsies identified COVID-19 that was undiagnosed before death. In contrast, in six cases reduced access to health-care systems associated with lockdown was identified as a probable contributory factor and a possible contributory factor in eight cases<sup>38</sup> (see D1.36 page 512).

3.32 For a Government that has to take rational decisions for the good of the country, not emotive ones made for one group of the population at the expense of others, the Claimants submit that it is overwhelmingly clear that the lockdown has been worse than the harms it was intended to avert. The country cannot afford another lockdown. Such a cure is worse than the disease.

#### **4. THE MAKING OF THE REGULATIONS WHICH ARE THE SUBJECT OF CHALLENGE**

##### **The Rule of Six Regulations**

4.1 During the second week of September, the Government began making noises about tightening, rather than easing further, the lockdown measures that remained in place.

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<sup>38</sup> [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30180-8/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30180-8/fulltext)

- 4.2 On 9 September 2020, the Prime Minister Boris Johnson, held a press conference with his senior scientific advisers and announced a significant tightening of national restrictions. A copy of his statement at the press conference is at pages 513 to 518 of D1.37.<sup>39</sup> Before he made his full statement, the Prime Minister handed over to Chris Whitty, the Chief Medical Officer to make a presentation. The theme of Professor Whitty's presentation was that the number of cases of reported Covid-19 infections had started to rise. He presented a number of graphs to that effect. He showed a graph which included how he said that Belgium had reduced a spike by taking measures quickly. His figures showed very clearly, however, that the sharpest rises in new Covid-19 cases were among younger age groups. As I have shown at paragraph 3.10 those age groups are the least vulnerable to suffer illness from Covid-19 and are at very low risk from the virus.
- 4.3 Professor Whitty did not produce any evidence of a rise in hospital infections during this period. Nor did he address concerns expressed by many scientists about the wisdom of relying on the PCR swab test for Covid-19 and its tendency to produce false positives that can significantly overstate the number of cases (see article by Carl Heneghan in the Spectator <sup>40</sup> (see D1.38 pages 519 to 522) and a report from Belgium suggesting that the Belgian Government had stopped using PCR swab test results showing cases because of the false positive problem<sup>41</sup> (see D1.39 pages 523 to 526). Moreover, Professor Whitty made no reference to the substantial evidence that pre-existing 'T-cell' immunity suggested that a far smaller proportion of the population were at risk from the virus than perhaps the percentage of the population with anti-bodies might suggest (see paragraph 2.16 above).
- 4.4. After Professor Whitty's presentation, the Prime Minister then made his statement (see pages 513 to 518 of D1.37). In it, he announced what has come to be known as the "rule of six". He explained that this had been devised because the police had been asking for something more simple to help them enforce the rules. He went on:

*"I know that, over time, the rules have become quite complicated and confusing. We have spoken to police officers about what they need for an effective enforcement regime and of course, listened to the feedback from you, the public.*

*In response, we are simplifying and strengthening the rules – making them easier for you to understand and for the police to enforce.*

*I should stress that if we are to beat the virus then everyone, at all times, should limit social contact as much as possible and minimise interactions with other households.*

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<sup>39</sup> <https://www.gov.uk/government/speeches/pm-press-conference-statement-9-september-2020>

<sup>40</sup> <https://www.spectator.co.uk/article/how-many-covid-diagnoses-are-false-positives->

<sup>41</sup> <https://www.fxstreet.com/analysis/could-we-be-witnessing-casedemic-number-2-202009241245>

*It is safer to meet outdoors and you should keep your distance from anyone you don't live with, even if they are close friends or family.*

*So in England, from Monday, we are introducing the rule of 6. You must not meet socially in groups of more than 6 – and if you do, you will be breaking the law.*

*This will apply in any setting, indoors or outdoors, at home or in the pub.*

*The ban will be set out in law and it will be enforced by the police – anyone breaking the rules risks being dispersed, fined and possibly arrested.*

*This single measure replaces both the existing ban on gatherings of more than 30 and the current guidance on allowing 2 households to meet indoors. Now you only need to remember the rule of 6.*

*There will be some limited exemptions. For example, if a single household or support bubble is larger than 6, they can still gather.*

*COVID Secure venues like places of worship, gyms, restaurants and hospitality venues can still hold more than 6 people in total. Within those venues however, there must not be individual groups larger than 6, and groups must not mix socially or form larger groups.*

*Education and work settings are unaffected, COVID Secure weddings and funerals can go ahead, up to a limit of 30 people, and organised sport will still be able to proceed."*

- 4.5 In fact, in the Claimants' submission there is nothing remotely "simple" about the rule of 6. The No. 2 Regulations were by comparison simple. They imposed a clear limit of 30 on gatherings in dwellings and outdoor public places and no limit at all on any other gatherings. The government then issued guidance that suggested limits on the number of people gathering. While the Claimants do not agree that the guidance was necessary, it left the decision about whether to gather to the individual and allowed the regulations themselves to be very simple. Now, in contrast and as Mr Johnson's own words reveal, there is not really a rule of six at all. The new proposals were full of exceptions and exemptions. Wedding parties could be for up to 30 people. No limit was placed on other types of gatherings. Even the rule of 6 was subject to exceptions in cases where "linked" households were meeting up in which case there could be more than 6 people. Or where a household itself comprised more than 6 people.

- 4.6 Beyond the presentation made by Chris Whitty, no other evidence whatsoever justifying the imposition of more lockdown regulations was presented by the Government. There was no explanation of why a restaurant or pub could accommodate as many people as could fit inside it whilst observing social distancing but a company such as the Second Defendant could not seat more than 30 people to eat a meal at a wedding reception in a large barn. There was no scientific or other evidence provided to explain or justify why 30 people was chosen as a limit for gatherings such as wedding receptions. Nor why 6 people – potentially comprised of 6 separate households – could meet together and how this magic number would make a material difference to the spread of the virus.
- 4.7 Nor did the Prime Minister go on to make a statement in Parliament about the new rules.
- 4.8 Thursday and Friday came and went and there was no sign of any new legislation. It was not until Sunday 13 September that a copy of the new regulations became visible via the official legislation website.
- 4.9 The legislation in question was the *Health Protection (Coronavirus, Restrictions) (England) (No.2) (Amendment) (No.4) Regulations 2020 No.986* ("the Rule of Six Regulations). The Rule of Six Regulations came into effect at 12.01am on 14 September 2020 and were laid before Parliament at 10.30am on 14 September. In common with all of the Original Lockdown Regulations, the Rule of Six Regulations were made using the "emergency procedure" under section 45R(2) of the 1984 Act and contained the following certificate:
- "In accordance with section 45R of that Act the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament."*
- 4.10 The Rule of Six Regulations were signed by the Home Secretary Priti Patel.
- 4.11 The Rule of Six Regulations were an amending statutory instrument and made amendments to the No.2 Regulations which had been made on 3 July. (The No.2 Regulations had also made using the emergency procedure even though they had involved an easing of the previous lockdown measures then in force).
- 4.12 As I have said, since the coming into force of the No.2 Regulations on 3 July, the Government had by this point already introduced dozens of similar regulations applying to localised areas of England, in many cases containing even tougher restrictions on individuals and businesses. Just how many such statutory instruments had been introduced is evident from the table at pages 527 to 528 of D1.40 although that table shows the position two weeks ago. The No.2 Regulations had themselves been later amended by the *Health Protection*

*(Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020* ("the Gatherings Regulations") which significantly increased the size of the fixed penalty notice that must be levied on those organising certain gatherings to £10,000. The Gatherings Regulations were introduced under the emergency procedure and certified as urgent by the Secretary of State for Health & Social Care on 26 August and came into force on 28 August. They were used for the first time shortly afterwards on 30 August when Piers Corbyn was served with a penalty notice for £10,000 for organising a gathering in Trafalgar Square<sup>42</sup> (see D1.41 pages 529 to 530).

- 4.13 I read the Rule of Six Regulations but could see no sign of one of the measures announced by the Prime Minister in his statement on 9 September, whereby it would become compulsory for venues such as pubs, bars and restaurants to collect customer contact details or require customers to use the new NHS track and trace mobile application. (Hitherto, this had been a voluntary, not compulsory requirement).
- 4.14 In the event, the legislation implementing these new rules *The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 No. 1005* were subsequently made on 17 September under the emergency procedure having been certified as urgent by the Secretary of State for Health and Social Care, and came into force in two stages on 18 and 24 September. (The Claimants do not challenge these regulations in this claim).

### **The Booking Regulations**

- 4.15 *The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 No.1008* ("the Booking Regulations") were made on 17 September and signed by Nadhim Zahawi the Parliamentary Under Secretary of State for Business and Industry. These regulations were again made using the emergency procedure and certified as urgent. They came into force on 18 September. The Booking Regulations imposed obligations on pubs, cafes and any establishment providing food or drink for consumption on its premises not to take bookings for groups of more than 6 (unless falling within exemptions). But they went further and imposed obligations on the venue to "take all reasonable measures" to prevent "mingling" by one group with another and to ensure persons remain seated whilst consuming food or drink. The Booking Regulations are punishable via fixed penalty notices or by prosecution leading to fines.

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<sup>42</sup> <https://www.theguardian.com/world/2020/aug/30/piers-corbyn-fined-10000-for-organising-anti-lockdown-rally>

## The Curfew Regulations and the Mask Regulations

- 4.16 However, shortly after the introduction of the Rule of Six Regulations on 14 September, and before any legal action could be mounted by the Claimants in response to them, speculation began in the press began that the Government was planning even more draconian restrictions to follow on soon after the Rule of Six Regulations.
- 4.17 There was mention in some quarters from as early as 16 September that measures such as a possible curfew would be imposed on venues. Then, over the weekend of 19-20 September, it was announced that the Prime Minister would be making a statement in the House of Commons and on television on Tuesday. It was expected that he would announce even tougher lockdown restrictions including possible curfews.
- 4.18 In view of these developments, the Claimants were not able to sensibly press forward with legal action without first assessing how the ground might be shifting following the Prime Minister's announcement.
- 4.19 On 21 September, Chris Whitty and Sir Patrick Vallance held a joint televised address at which they announced their concerns about rising Covid infections. They produced a chart suggesting that a possible scenario ("not a prediction") could see 50,000 cases of Covid-19 per day by October and 200 deaths per day by November, if further measures were not taken soon to curb a resurgence in infections. They did not take questions from the media following their announcement. Nor did they announce any new restrictions themselves. A copy of the chart referred to by Sir Patrick<sup>43</sup> is at pages 531 to 538 of D1.42. This presentation has been the subject of much criticism from within the scientific community which I explain further below.
- 4.20 The next day, on 22 September, the Prime Minister announced more restrictions would indeed be introduced. These were to include from the evening of Thursday 24 September, a 10pm curfew forcing pubs bars and restaurants to close at that time, enforced table-service only at such establishments, more rules on the wearing of face coverings to include, for example, shop staff and a reduction of the maximum permitted size of, inter alia, wedding parties to just 15 people.
- 4.21 The Prime Minister's announcement was followed by the implementation of the *Health Protection (Coronavirus, Restrictions)(England) No.2 (Amendment)(No.5) Regulations 2020 No.1029* ("the Curfew Regulations"). The Curfew Regulations were made (again using the emergency procedure) on 23 September by the Parliamentary Under Secretary for Health,

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/923117/2020-09-30\\_COVID-19\\_press\\_conference\\_slides\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923117/2020-09-30_COVID-19_press_conference_slides_.pdf)

Lord Bethell and primarily came into force at 5am on 24 September although some provisions do not come into force until 28 September.

- 4.22 Separate statutory instruments extending the compulsory wearing of face coverings were also made into law as the Prime Minister had indicated they would be. This was done via *The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 3) Regulations 2020 No.1026* ("the Mask Regulations"). The Mask Regulations were signed by the Secretary of State for Health and Social Care on 23 September and came into force on 24 September. They were again introduced using the emergency procedure.

### **The reaction of the scientific community to the Government's measures**

- 4.23 The Government's decision to impose further national restrictions – on top of the severe regional restrictions that now affect many parts of England – has been made, we are told, because of the worsening outlook for Covid-19 infections since the beginning of September. The question of what the data shows and what conclusions need to be drawn from it are the focus of considerable debate among the scientific and medical community. There is by no means a consensus.
- 4.24 Among those who have questioned the Government's view of the matter include the following: Dr John Lee ("The Cure is Worse than the Disease"<sup>44</sup> (see D1.43 pages 539 to 544), Professor Carl Heneghan ("No evidence of Covid-19 Second Wave")<sup>45</sup> (see D1.44 pages 545 to 549). Another well known commentator Professor Robert Dingwall said in a TV interview I saw that the "Government are jumping the gun based on extreme modelling data."

### **Impact on the Claimants of the Regulations**

- 4.25 Each of the Claimants has been personally impacted by the making of the Rule of Six Regulations.
- 4.26 I refer to the separate witness statements of Simon Dolan and Lauren Monks which confirm that they have personally and directly been affected by the provisions in the Rule of Six Regulations which restrict the size of gatherings in people's homes to no more than six people. The requirement of venue operators to take steps to prevent "mingling" between groups of diners or drinkers directly impacts on the Claimants' ability to socialise and interact with friends and work colleagues in a social setting and with family members. Their rights, if

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<sup>44</sup> <https://www.dailymail.co.uk/debate/article-8770435/Coronavirus-UK-Dr-JOHN-LEE-mourns-tragedies-CAUSED-lockdown.html>

<sup>45</sup> [https://www.huffingtonpost.co.uk/entry/carl-heneghan-second-wave-lockdown\\_uk\\_5f6710d2c5b6de79b6765e92](https://www.huffingtonpost.co.uk/entry/carl-heneghan-second-wave-lockdown_uk_5f6710d2c5b6de79b6765e92)



they chose to exercise them, to protest outside the confines of an officially organised protest are affected.

- 4.27 As such, the First and Third Claimants are victims of an interference with their Convention rights contrary to Articles 8 and 12 of the Convention.
- 4.28 As far as the Second Claimant is concerned, and no doubt large numbers of hospitality and events businesses throughout the country, the Rule of Six Regulations represented an especially serious development, which threatened to cause irreparable harm to Cripps' business. Mr Henriques, the Managing Director of the Second Claimant and his Finance Director Simon Keeling have each made separate witness statements about the impact of the Regulations. I have read their statements.
- 4.29 The Rule of Six Regulations imposed a legal limit of 30 persons who could now gather for a wedding reception. Also, whereas previously, Government Guidance on such events had not been binding in law, the Rule of Six introduced a new requirement to take specific account of that guidance. A copy of the latest such guidance<sup>46</sup> is at pages 550 to 558 of D1.45.
- 4.30 The guidance for wedding receptions is itself full of numerous (onerous) restrictions and limits on activities and the freedom of people at a wedding event to engage with each other in any kind of celebratory way. The guidance requires that people avoid singing, shouting, dancing and even stipulates what should happen during cake cutting and bouquet throwing.
- 4.31 The effect of the Rule of Six Regulations was thus to make life extremely difficult for the Second Claimant to carry on its business since few couples wanted to limit the size of their wedding events to just 30 persons, let alone to be constrained by the guidelines.
- 4.32 Furthermore, the reduction soon after the coming into force of the Rule of Six Regulations in the Curfew Regulations to the new maximum size of wedding ceremonies and receptions to just 15 persons threatens to do further, irreparable harm to the Second Claimant's business (and no doubt many other similar businesses). Obviously, a limit of just 15 persons is far too small for most weddings and would, in any event, be totally inappropriate for venues such as Cripps' barns which have a capacity of over 100. Customers of the Second Claimant will understandably not wish to pay hire tariffs appropriate to such venues for such small wedding receptions.
- 4.33 Mr Henriques has said and I believe, the Curfew Regulations will destroy the ability of the Second Claimant to continue operating its business.

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<sup>46</sup> <https://www.gov.uk/government/publications/covid-19-guidance-for-small-marriages-and-civil-partnerships/covid-19-guidance-for-wedding-and-civil-partnership-receptions-and-celebrations>



4.34 The Second Claimant's attempts to mitigate some of the damage caused by the various lockdown measures by seeking to operate some of its venues as restaurants will equally be frustrated by the above mentioned legislation and guidance. All of this will put the survival of a well-established and popular family business at risk – along with hundreds of jobs and livelihoods. The same is no doubt true for many other thousands of jobs in the events and hospitality industry throughout the country.

4.35 Further, as Mr Henriques says in his statement, his company has built a business which depends very much on the professionalism and experience of its staff and the high level of service they provide. If the company is forced to make large scale redundancies, it will find it very difficult, if not impossible to find and replace the skilled employees it will have lost, and to rebuild its goodwill.

### **Disproportionate interference**

4.36 Neither the First nor the Third Claimant are individuals in clinically vulnerable groups. Neither the First, nor the Third Claimant, as far as they are aware, have Covid-19. Yet they, along with the entire population of England, are now subject to the Regulations.

4.37 As described in their statements, they are severely limited in relation to how many people they can mix with and socialise with groups – even in their own homes in England or in those of friends or family. They are subject to a 10pm curfew which prevents the Third Claimant from eating out or socialising at a venue such as a bar or café after that time and would do to the First Claimant were he to travel to the UK. No evidence has been produced to justify why these measures will have any effect on the spread of Covid-19 and why it is necessary for people who are clearly at very low risk to be restricted in this way.

4.38 The restrictions imposed by the Rule of Six Regulations is having a profound impact upon the social lives of the First and Second Claimant and the entire UK population. It has now been some 6 months' since the Original Regulations were first introduced which placed the entire population under house arrest. Whilst restrictions were eased on 3 July, the Rule of Six Regulations has had a hugely detrimental impact on social plans for many, restricted people's ability to visit family and friends depriving of meaningful face-to-face support. Clubs remain closed and people cannot meet as a gathering even in public places as a result of their inability to 'mingle' if they attend events with other groups. It remains unclear whether the Rule of Six Regulations applies to fundraising events organised by charities. Tight restrictions on other celebrations, including birthdays and wedding anniversaries which are not excepted in the limited number of 'significant event' exceptions mean that plans have been scuppered. Parents are cancelling their children's birthday parties, festivities and other celebrations such

as engagement, hen and stag parties are being cancelled. Staycations booked as an alternative to holidays abroad that were cancelled are now under threat with the risk that families and friends who have booked a much needed autumnal / winter break may now have to abandon their plans. The sacrifices being forced on the population are not insignificant when considering the considerable length of time that people's every lives have been turned upside down and moreover given that these new restrictions may last for a further six cold and wet months.

- 4.39 Moreover, the restriction on gatherings to the very small number of six indirectly discriminates against certain religious denominations that are more likely than others to have large families such as Roman Catholics (whose faith prohibits the use of contraception) and Hasidic Jews. Large families will be disproportionately affected as they will be much less likely to be able to gather for social occasions where they are made up of multiple households (for example multiple siblings with their own families).
- 4.40 Protests are now only possible provided that a risk assessment has been undertaken and even then peaceful protests are at risk of being broken up on the basis that said assessment is no longer valid as was the case at a recent mass demonstration at Trafalgar Square on 27 September 2020 which was broken up by the Metropolitan Police Force<sup>47</sup> (see D1.46 pages 559 to 568).
- 4.41 The impact of the Regulations is extremely serious for the Second Claimant, as outlined in the statements of Mr Henriques' and Mr Keeling.
- 4.42 But the Regulations are also irrational and illogical in how they impose particular restrictions on businesses such as the Second Claimant.
- 4.43 As Mr Henriques explains, his company organises wedding receptions to take place at its premises which are refurbished and converted barns in various locations in the countryside in England. These venues are spacious. The smallest has room for 140 seated guests while larger venues can accommodate 200 plus. Cripps' staff are experienced and well trained.
- 4.44 Although guidelines and social distancing would mean that dancing and mingling would not be able to take place as it would in ordinary circumstances, there is no reason for the arbitrary restriction of wedding receptions first to 30 persons, as per the Rule of Six Regulations and then 15 persons as per the Curfew Regulations.

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<sup>47</sup> <https://news.sky.com/story/coronavirus-protesters-and-police-officer-hurt-in-clashes-at-anti-lockdown-rally-in-central-london-12082468>

- 4.45 This produces an obvious and illogical anomaly. A pub or a bar which might have poor ventilation and low ceilings could have scores of people (in groups of no more than 6) within its premises at any one time – limited only by the capacity of the venue. Those people would breathe the same air, use the same washroom facilities, touch the same door handles etc and this would be completely legal even under the Regulations. Yet if a company such as the Second Claimant were to hold a wedding reception for say 18 (or 45 after the Rule of Six but before the tighter restrictions) people seated in groups of 6 at a venue with a capacity of 160, this would (or would have been) be illegal and expose the company's management and staff to fines and possible criminal prosecution.
- 4.46 It is unsurprising that from what I have learned from my clients and press reports that the hospitality business is exasperated and dismayed about the 10pm curfew that has been in place since 24 September 2020 and which will undoubtedly cause devastation to already hard hit businesses that have suffered numerous devastating blows. The logic behind the decision remains unclear with many businesses left confused by this arguably arbitrary measure. Businesses are urging the Government to explain the reasoning behind its decision to roll out a nationwide curfew. A letter sent to the Prime Minister from 100 major hospitality firms including JD Wetherspoon and Burger King, warns that half of the UK's 100,000 hospitality firms already feared they would not survive beyond the middle of 2021, before the restriction on late-night trading was introduced.<sup>48</sup> The letter is at pages 569 to 576 of D1.47.
- 4.47 Another obvious illustration of how poorly thought through the 10pm curfew appears to be evidenced by the way that on the first night of the Curfew Regulations, in towns and cities throughout England everyone was discharged onto the street at around the same time. This resulted in crowds of people milling around in close proximity to each other and walking at the same time to transport hubs and taking buses, tubes or trains in close proximity to each other. In some places, this even led to an impromptu street party atmosphere<sup>49</sup> (see D1.48 pages 577 to 583).
- 4.48 Indeed, I submit that this is a very good example of the value of Parliamentary scrutiny of legislation. It is the sort of issue that can be raised and discussed before a regulation becomes law and potentially mitigated or removed. The Curfew Regulations are, in my view, a classic example of how a piece of legislation can benefit from being considered and scrutinised.
- 4.49 As the figures from PHE's surveillance reports show, data for reported cases of Covid-19 appears to be falling in the South East, South West, East Midlands, East of England and London – none of which have local lockdown measures in place. But new cases seem to be

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<sup>48</sup> <https://www.morningadvertiser.co.uk/Article/2020/09/30/100-hospitality-leaders-write-to-PM>

<sup>49</sup> <https://www.standard.co.uk/news/london/pubs-curfew-10pm-soho-bars-social-distancing-a4556916.html>

rising in the areas of England which do have such restrictions – strongly suggesting that those measures are at best ineffective.

4.50 Data for new cases of Covid-19 are not showing anything like the exponential rises suggested in the "Possible scenario" shown in Sir Patrick Vallance's chart on 21 September. In fact total new cases in England and new hospitalisations have not grown exponentially. Below are tables showing data extracted from the Government's Covid digital dashboard site at <https://coronavirus.data.gov.uk/healthcare>. These show positive Covid-19 cases by reference to sample date and a separate list by reference to reporting date. The third table shows hospital admission data for England up to 30 September.

**Cases:**

Date	Cases by specimen date (England only)	Cases by date reported (England only)
	Number of people with at least one lab-confirmed positive COVID-19 test result, by specimen date, by nation. Individuals tested positive more than once are only counted once, on the date of their first positive test.	Number of individuals who have had at least one lab-confirmed positive COVID-19 test result, by date reported. On 2 July, case data from pillars 1 and 2 of the testing programme were combined and de-duplicated, resulting in a step decrease in the cumulative number of cases reported.
03-Sep	2,661	1,507
04-Sep	2,582	1,669
05-Sep	2,183	1,477
06-Sep	2,055	2,576
07-Sep	3,461	2,528
08-Sep	2,995	2,094
09-Sep	2,848	2,286
10-Sep	3,099	2,578
11-Sep	2,850	3,143
12-Sep	2,201	3,008
13-Sep	1,703	2,837
14-Sep	2,881	2,259
15-Sep	3,032	2,649
16-Sep	3,727	3,396
17-Sep	3,914	2,788
18-Sep	4,227	3,771
19-Sep	4,150	3,638
20-Sep	4,337	3,279
21-Sep	4,606	3,754
22-Sep	5,181	4,187
23-Sep	5,015	5,083
24-Sep	5,318	5,632
25-Sep	4,728	5,723
26-Sep	4,027	4,639
27-Sep	3,397	4,800
28-Sep	3,161	3,316
29-Sep	97	5,651
30-Sep	-	5,656

Source: HM Government

While cases were certainly up on August's, there is no sign of exponential growth in cases (above) or admissions (below) during the second half of September. Further, as is shown in paragraph 4.51 and as was demonstrated by the presentations made by Professor Whitty in

support of the latest restrictions, there are huge regional variations in Covid-19 activity. This is not a uniform situation.

**Hospital admissions:**

Date	Patients admitted to hospital (England only)
Daily and cumulative numbers of COVID-19 patients admitted to hospital. Data are not updated every day by all four nations and the figures are not comparable as Wales include suspected COVID-19 patients while the other nations include only confirmed cases.	
03-Sep	69
04-Sep	67
05-Sep	94
06-Sep	85
07-Sep	84
08-Sep	99
09-Sep	136
10-Sep	143
11-Sep	135
12-Sep	143
13-Sep	153
14-Sep	172
15-Sep	194
16-Sep	183
17-Sep	199
18-Sep	205
19-Sep	204
20-Sep	237
21-Sep	275
22-Sep	268
23-Sep	314
24-Sep	288
25-Sep	274
26-Sep	245
27-Sep	241
28-Sep	308

Source: HM Government

- 4.51 The data being published by Public Health England and that used in the presentations by Sir Patrick Vallance and Professor Whitty show very significant regional variations between different parts of the UK. The graphic overleaf is taken from the latest PHE Covid Surveillance Report. This shows that there appears to be a downward trend of cases in the East Midlands, East of England, London, South East and South West regions. The upward trends are in the North East, North West, Yorkshire and Humber and, to a lesser extent, the West Midlands. The explanatory note at the top of the chart notes that the highest incidence of cases are at 20-29 year olds. These are among the lowest risk age group.

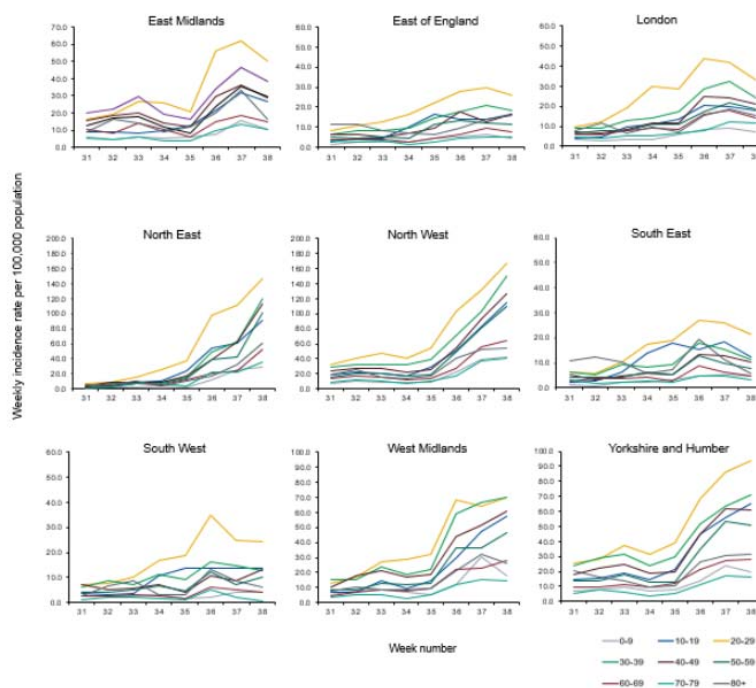
From PHE England surveillance report:

**Confirmed cases in England** Year: 2020 Week: 39

**Incidence rates by region**

In the regions with the highest overall rates and with most local authorities on the watchlist, the age groups most affected appears to be young working age adults (20-29 years). This is consistent with mixing patterns in this age group who may be more likely to be working away from home, including in public facing roles. In those regions, highest rates are also observed in Asian communities of either Other ethnic background or Pakistani origin, most likely reflecting the ethnic mix in the most affected local areas. In some regions the daily numbers of cases in each ethnic group can be small, so minor variations in rates should be interpreted with caution.

**Figure 14: Weekly incidence per 100,000 population by age group and region, weeks 31-38**



4.52 On 28 April 2020 SAGE considered a paper entitled ‘measures at the border’<sup>50</sup> (see D1.49 pages 584 to 590). This paper included the following passages which shows the unreliability of the testing data:

...

*"...Analysis could focus on countries that are assessed as being particularly high risk based on the incidence of COVID-19 cases in their population. The numbers of deaths reported in those countries is likely to be a better indicator of incidence than confirmed cases, given differences in testing regimes in different countries. Reported numbers of deaths could therefore be used to extrapolate the likely incidence in the*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/893404/S0244\\_Measures\\_at\\_the\\_border.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/893404/S0244_Measures_at_the_border.pdf),

*general population, and in conjunction with the predicted passenger numbers, give an estimate of the numbers of cases likely to be imported from those countries over the coming week."*

#### **Irrationality and failure to take into account relevant considerations**

4.53 On 25 September the devolved administrations of all countries in the UK issued a joint statement following a COBRA meeting. They stated as follows:

*".....We are seeing the start of a second wave. The Chief Medical Officers have agreed the alert level should increase to 4. Cases are rising rapidly and **we must take action to stop an exponential increase that could overwhelm our health services** and aim to bring R back below 1 while minimising the impact on the economy and society.*

*Following our meeting at COBR this week, we therefore **reaffirm our shared commitment to suppressing the virus to the lowest possible level and keeping it there**, while we **strive** to return life to as normal as possible for as many people as possible. We agree that **our policy decisions should be consistent with this objective**. [emphasis added].*

4.54 Thus, it would appear that the Government is still making policy based around a fear of the NHS being overwhelmed by an exponential increase in Covid cases. This is in spite of the fact that the NHS has had 7 months to increase critical care capacity (which it clearly has done) and should not be in any significant danger of being overwhelmed. The Government's policies and primary objective are evidently focussed on "suppressing the virus to the lowest possible level and keeping it there" while striving to return life to as normal as possible. The emphasis, appears to be very much on what happens with Covid cases and the NHS, whereas the economy and the rest of society are left playing second fiddle. This, the Claimants submit, is little more than a rehash of the five tests with which the Government was constraining its decision making with during the lockdown in the spring and summer. Now, once again, it appears to be placing Covid-19 suppression at the head of everything else.

4.55 As it did before with the five tests, the Government is looking at the problem through the wrong end of the telescope. The Claimants submit that what a responsible Government should have as its primary objective, is the return to as near normality as possible by encouraging the return of people to work, removing oppressive legal constraints on civil liberties, helping the economy return to a growth curve and returning the healthcare system to one that is there to protect the health of the public, not the other way around. While pursuing these objectives, the Government should be striving, to protect, as far as possible, those who



are clinically vulnerable to Covid-19. Instead, once again, the Government is pursuing a policy that needlessly disrupts and restricts the lives and activities of the vast majority of citizens who are not at serious risk from the virus, in an effort to suppress Covid-19 and the threat to the minority who are.

- 4.56 The Government's approach has been coming in for serious criticism from its own supporters in recent weeks. Sir Graham Brady MP, Chairman of the Conservative 1922 Committee described the situation as the Government "ruling by decree"<sup>51</sup> (see D1.51 pages 594 to 597). Sir Graham led a group of "rebel" MPs seeking to pressure the Government to allow greater scrutiny of lockdown measures. At the heart of these criticisms is the charge that the Government is not having enough regard to the damage its restrictions are doing to the country and that it is not operating with regard to constitutional norms and is bypassing Parliament. This brings me to an important ground of challenge to the Regulations, namely that they are ultra vires because of the unlawful use by the Government of the emergency procedure under the 1984 Act.
- 4.57 It is this ground on which the Second Claimant relies in relation to its application for urgent interim relief.

## **5. THE MISUSE OF THE URGENT PROCEDURE AND THE EXCLUSION OF PARLIAMENT**

- 5.1 Part 2A of the 1984 Act contains a number of provisions which empower the Secretary of State and at local level, justices of the peace, to make what are, by any standards, very draconian orders against persons, premises and "things" in cases where there is a serious threat to public health.
- 5.2 As a quid pro quo for the powers conferred by the 1984 Act, Parliament has sought to impose some checks and balances in Part 2A, so as to ensure that there is sufficient democratic oversight of any secondary legislation passed under this part of the 1984 Act.
- 5.3 Under s45Q of the 1984 Act, where a statutory instrument contains regulations made pursuant to, inter alia, section 45C of the 1984 Act (as all of the Regulations do), then unless certain exceptions apply – and subject always to s45R of the 1984 Act – such a statutory instrument cannot be made unless a draft of it has first been laid before and approved by a resolution in each House of Parliament.
- 5.4 The only statutory exceptions to this rule under s45Q are where the statutory instrument does not contain a provision which imposes or enables a "special restriction or requirement" or a restriction or requirement "which has or would have a significant effect on a person's rights".

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<sup>51</sup> <https://www.bbc.co.uk/news/uk-politics-54232375>



5.5 Neither of these exceptions applies to any of the Regulations. They all have or would have a significant effect on a person's rights.

5.6 Thus, subject to s45R, there is an absolute requirement imposed by the 1984 Act that the Government must have had the Regulations approved by both houses of Parliament before they could take effect in law.

5.7 Section 45R(2) provides as follows:

*"The instrument may be made without a draft having been laid and approved as mentioned in [section 45Q(4)] if the instrument contains a declaration that the person making it is of the opinion that, **by reason of urgency, it is necessary to make the order without a draft being so laid and approved.**" [emphasis added].*

5.8 Section 45R(3) states that after an instrument is made in accordance with subsection (2) it must be laid before each House of Parliament.<sup>52</sup>

5.9 Section 45R(4) confirms that the instrument becomes subject to the affirmative procedure in Parliament whereby it will cease to have effect if it has not been approved by a resolution of each House of Parliament within 28 days of when it was made.

5.10 Finally, it is noticeable that section 45R(7) of the 1984 Act makes clear that where a statutory instrument is made under this procedure but ceases to have effect, either because no approval is given within the 28 day period or Parliament votes to reject it in the meantime, this does not affect anything done in reliance on the regulations before they ceased to have effect. Nor does it prevent the making of new regulations.

5.11 It is therefore clear that the use of the emergency procedure under section 45R(2) potentially confers enormous power on the Government. Legislation passed on this basis can be brought into effect immediately with very little advance notice given to anyone and it will have legal effect immediately, unless and until enough Parliamentarians come together to force a motion to reject it or until 28 days have passed without Parliamentary approval.

5.12 What has happened in practice throughout the pandemic is that the Government has used the emergency procedure almost every time it has made a lockdown statutory instrument. According to the Hansard Society, the Government has used the emergency procedure under

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<sup>52</sup> I emphasise the fact that it is only **after** the relevant minister has made his or her declaration under s45R that the instrument is laid before Parliament. This is a further answer to any suggestion that the use of the emergency procedure is somehow to be considered as a "proceeding in Parliament" which would render it non-justiciable by the Courts.

the 1984 Act 53 times. The Hansard Society has a list of all the statutory instruments introduced since the Covid-19 pandemic began (see <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>).

- 5.13 What has happened in practice is that where statutory instruments have been made using the emergency procedure, by the time the 28 period for obtaining approval has elapsed, the instrument may well have been amended (sometimes more than once and invariably also using the emergency procedure) or superseded.
- 5.14 The upshot is, that by the time Parliament is asked to approve the instrument, it will already have been in place for a period of weeks and may already be of historic status by the time MPs or Peers have a chance to consider it.
- 5.15 This in part may explain why there has been so little willingness by Parliamentarians to scrutinise or debate the lockdown measures in any depth or with any enthusiasm. Most of the time, the "approval" Parliament gives is a formality, invariably carried out at the end of a business day with no debate and no vote. For example, on 22, the House of Commons "approved" no less than 16 separate lockdown statutory instruments in the space of a few minutes (see copy extract from Hansard for that day at page D1.52 pages 598 to 603).<sup>53</sup>
- 5.16 The whole issue concerning the Government's default use of the emergency procedure is not just a technical point.
- 5.17 As I explain below, many of the measures introduced by the Government on this basis have been very complex and difficult to understand. They have also involved extremely serious interferences with the rights of individuals and businesses and have contained many apparently arbitrary and illogical exceptions. The Claimants submit that this demonstrates how important it is that such legislation is the subject of prior Parliamentary scrutiny before it becomes law. Indeed, that is the very purposes of such scrutiny. It is an essential part of the process of law making.
- 5.18 By effectively using reliance on section 45R to by-pass the process of Parliamentary approval – irrespective of whether the "urgency" condition is really satisfied at all, the Claimants submit that the Government is acting in a manner that is undesirable in the interests of good administration and which is clearly unlawful. I note the concerns expressed by the Commons Committee in its report (see D1.17 pages 338 to 379).

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<sup>53</sup> <https://hansard.parliament.uk/Commons/2020-09-22/debates/37FD84F5-4793-4508-BAC7-96CF74898AED/BusinessWithoutDebate>

- 5.19 The Claimants submit that it cannot be the case that just because a Minister certifies an instrument as needing to be laid without the approval of Parliament due to "urgency", that can be conclusive of the matter. If that were the case, s45R would be stripped of all meaning which cannot have been the intention of Parliament when it passed the legislation. The Court must, I submit, be able to look behind the urgency certificate in cases where on the face of it there is no real urgency and the Minister who made the certificate must be accountable and able to demonstrate that the use of s45R was justified.
- 5.20 It follows, the Claimants submit, that the Court must undertake an assessment of the circumstances that pertained to each decision by the Minister to certify legislation as meeting the requirements of section 45R(2) so as to justify using the affirmative procedure. If, the Court concludes that no reasonable Minister could have held the view that such a procedure was justified by the urgency of the situation, then it must be the case that the instrument in question was made unlawfully and is *ultra vires*.
- 5.21 The Claimants' case is that this is so in relation to all of the Regulations for the reasons set out below. Further, it is very difficult to see how the contrary can be argued.

#### **The Rule of Six Regulations – no urgency**

- 5.22 The Claimants do not know when the Government first began considering tightening the restrictions nationally or when it reached a decision about what tightening would happen. The only "evidence" presented by the Government to justify the introduction of the Rule of Six Regulations was the presentation given by Chris Whitty on 9 September shortly before the Prime Minister announced the changes would be coming.
- 5.23 Chris Whitty's evidence did not contain any material about hospital admissions or deaths. The official up to date estimates for hospital admissions published by NHS England (see <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-hospital-activity/>) showed a mixed picture with big regional variations between regions of England. But the rises in hospital admissions were at extremely low levels and rising very slowly – not exponentially. Professor Whitty's presentation showed that the main increases in cases of Covid-19 were among the young – i.e. the least vulnerable segment of the population.
- 5.24 Whilst it was the theme of Professor Whitty's presentation that the Government should act quickly to stem the potential rises in infections because it would inevitably reach more vulnerable elements of the population, he did not say that this was time critical in the sense that it had to happen the same day or within 24 hours of the announcement. Nor did Mr Whitty present any evidence to support the notion that any of the measures announced by the Prime Minister would have the effect of slowing the growth in cases of Covid-19.

5.25 The legislation to give effect (in part) to the Rule of Six Regulations did not appear until Sunday 13 September and came into force for the first time just after midnight at 12.01hrs on Monday 14 September.

5.26 There had thus been two full working days of the week left before the weekend and the weekend itself. Commenting on the failure to give Parliament an opportunity to debate and scrutinise the measures before they became law, Sir Graham Brady MP was interviewed on Talk Radio by Julia-Hartley Brewer on 21 September and said this:

*"But I suppose the crucial point, Julia, is that this isn't just it is an important principle that Parliament ought to be consulted, but it's not just a principle; there's a very practical purpose, which is that if you have those debates in Parliament, ministers are forced to give their justification. They're forced to give answers as to why they're doing things, what the measures are meant to achieve and then set out the criterion that will be used to judge whether they've been successful or not. **For instance, two weeks ago when we had the so-called rule of six being talked about, it was leaked on the Tuesday, it was announced on the Wednesday (not in Parliament). The Thursday was very light business, just general debates in the House of Commons. There's no reason why we couldn't turn that into a full day's debate and a vote which would have forced ministers to explain why six not eight or ten, why small children are included in England whereas the scots in my view have made a very sensible decision to exclude small children from the numbers. So, you know all those things could have been drawn out - they weren't because there was no debate.**" [My emphasis]*

5.27 I have looked up the Parliamentary order papers for 10 and 11 September and these are exhibited at pages 605 to 700 at D1.54 and D1.55. As Sir Graham had observed, there does not appear to be any reason why Parliamentary time could not have been scheduled so that MPs and later Peers in the Lords, could have looked at these measures. Further, it seems highly unlikely given the subject matter, that there would have been any appetite on the part of Parliamentarians to resort any sort of blocking tactics against the legislation.

5.28 Furthermore, as was demonstrated earlier in the pandemic by the way the Coronavirus Act 2020 was passed in less than a week, Parliament can move extremely quickly when it suits MPs and Peers to do so. MPs and Peers demonstrated this only last year in relation to the two Acts of Parliament which delayed the UK's exit from the European Union. Neither of those Acts had the support of the Government and yet they each went from first reading to Royal Assent in less than a week. These were Acts of Parliament. The process of making an Act of Parliament is necessarily more complex and time consuming process than that

required for a statutory instrument. All that is required under the 1984 Act is that a draft of the relevant statutory instrument is laid before Parliament and both MPs and Lords approve it.

5.29 There is no good reason, the Claimants contend, as to why the Government could not have given Parliament an opportunity to examine the Rule of Six Regulations as Mr Brady has said.

5.30 It follows that in all the circumstances, the Claimants submit that no reasonable minister could have properly held the opinion that due to "urgency" it was necessary to make the Rule of Six Regulations without the approval of both Houses of Parliament.

### **The Mask Regulations – no urgency**

5.31 The subject of face coverings ("masks") was frequently raised at the daily press conferences during the earlier part of the Covid-19 pandemic. The Government's scientific and medical advisers who attended the conferences consistently poured cold water on the idea that masks were worth wearing as a means of protection for the wearer against the virus or to stop others from catching it. The evidence for mask wearing was frequently described as "weak" (see for example pages 701 to 705 of D1.56).<sup>54</sup> Even when the Government finally changed tack on face coverings and decided to legislate to make them compulsory in some settings, it was hardly with much enthusiasm.

5.32 The introduction of compulsory masks on public transport was confirmed by the Transport Secretary Grant Shapps at a press conference on 4 June (see D1.57 pages 706 to 712) where he said this:

*"With more people using transport, the evidence suggests that wearing a face covering offers some – albeit limited – protection against the spread of the virus."*

5.33 The law making enforcing this new requirement was to take effect from 15 June. It was passed using the emergency procedure.

5.34 This move by the Government may have been a reaction to the change of stance by the WHO on face coverings (it had previously not supported the idea of people wearing them). On 6 June, the BBC<sup>55</sup> (see D1.58 pages 713 to 716) reported the WHO as saying as follows:

*"the WHO advises that governments should encourage the general public to wear masks where there is widespread transmission and physical distancing is difficult, such as on public transport, in shops or in other confined or crowded environments."*

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<sup>54</sup> <https://www.expressandstar.com/news/uk-news/2020/04/23/decision-on-mass-wearing-of-masks-difficult-say-health-experts/>

<sup>55</sup> <https://www.bbc.co.uk/news/health-52945210>

- 5.35 On 12 June 2020 Deborah Cohen, a journalist who had worked on a report on the evidence behind facemasks for BBC Newsnight, reported that she had been informed that scientists at WHO had only changed their advice because of 'political lobbying'; and that, when she had put that question to one of them, he had failed to deny it<sup>56</sup> (see D1.59 pages 717 to 718).
- 5.36 It was not until 14 July that the Government announced that masks would be made compulsory for customers going into shops – despite this having been one of the settings where the WHO advised their use back in June. The new law was passed on 24 July under the emergency procedure.
- 5.37 The decision to enforce mask wearing in shops on the entire population was a huge decision. Masks are uncomfortable, potentially unhygienic if re-used (or where they are washable and they are not washed) and making them compulsory has a huge environmental impact by increasing the amount of disposable synthetic waste material in circulation. The WHO in its guidance says that one of the disadvantages of masks is that they may give people a false sense of security and make them less rigorous in relation to more effective hygiene measures such as hand washing.
- 5.38 Mask use had not been compulsory for many months of the pandemic until 15 June. Why it suddenly became "urgent" to extend it to shops in late July when shops had been one of the settings that featured in the WHO's guidance back in June was not explained. Supermarkets, corner shops, off licences, chemists and other essential stores had remained open throughout the pandemic even while the Original Regulations were in force. Yet the new regulations which extended the rules to people visiting shops were all made under the emergency procedure on 24 July, once again avoiding any scrutiny of the legislation. There was also widespread confusion about whether people going into a sandwich shop to buy a takeaway item would have to wear a mask, whilst those who went in and ate on the premises would not. The confusion was increased because the Government only made the legislation at the last moment (see Telegraph article at pages 719 to 724 at D1.60).
- 5.39 The Mask Regulations – extending, inter alia, the compulsory wearing of masks to shop workers – were implemented on 17 September, having been announced by the Prime Minister on 9 September. Why was it suddenly "urgent" to legislate under the emergency procedure to force millions of shop workers to wear masks without placing a draft of the legislation before Parliament for approval first? People visiting shops have the choice as to whether to do so if they have to put on a mask. Plus, they are only likely to be there and having to wear one for a very limited time. Shop workers, by contrast, would now have to

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<sup>56</sup> This was reported in a 'thread' placed by Ms Cohen on Twitter: <https://threadreaderapp.com/thread/1282244768257499136.html>

wear a face covering all day (or night) while at work – whether they wanted to or not. Back when masks were imposed on shoppers in July, USDAW the shop workers union had expressed concern about their members having to enforce the new law. They also made these comments about the possibility of staff wearing masks:

*“Employers must also be aware that staff will need regular breaks when they can take their face covering off and have the opportunity to replace it. Staff on tills who are behind screens should not be required to wear a face covering.”*

- 5.40 The above points all illustrate that something like the law enforcing the wearing of masks is a serious measure that ought to have been the subject of a careful weighing up of the pros and cons and consideration of all relevant factors – the sort of exercise that is likely to happen if there is proper scrutiny of the legislation before it was made. This did not happen at any stage of the Government's introduction of compulsory mask wearing.
- 5.41 This is a classic example of how the Government has simply fallen into the habit of using the emergency procedure as a default procedure, irrespective of whether the use of that procedure is justified.
- 5.42 No reasonable minister, in the Claimants' submission, could have held the opinion that it was necessary by reason of urgency to introduce the Mask Regulations using section 45R(2) of the 1984 Act.

#### **The Gatherings Regulations – no urgency**

- 5.43 The Gatherings Regulations were made using the emergency procedure on 28 August. These imposed a requirement to issue a £10,000 fixed penalty against an organiser of an illegal gathering. £10,000 is a huge sum for most people and unprecedented as a penalty that can be handed out summarily on the spot for doing something which, until this year, would have represented a perfectly normal and lawful exercise of free speech. To have introduced such a measure without any discussion in Parliament is extraordinary. The No.2 Regulations which the Gatherings Regulations made amendments to were themselves made back on 2 July.
- 5.44 The Claimants do not understand why it was "necessary by reason of urgency" to introduce such a law at this particular point in time without laying the draft legislation before Parliament.



## **The Curfew Regulations – no urgency**

- 5.45 The Claimants do not know when it was that the Government first considered tightening the national (as opposed to local/ regional) lockdown laws or when the decision to do so was made. However, I submit that it must be a reasonable inference that it first considered doing at the latest, during the week before. (The Sun newspaper had been reporting on the possibility of a 10pm curfew law as far back as 9 September). Preparations for the broadcast by Sir Patrick Vallance and Chris Whitty started to be made over the weekend of 19/20 September. I believe that their presentation must have been part of the Government's strategy to "soften up" the public for the announcement to come that restrictions were going to be tightened. That being the case, the Government's decision to introduce the Curfew Regulations must presumably have been made – at the latest – by 18 September.
- 5.46 The Prime Minister's statement to the House of Commons at 12.30pm on 22 September contained details of all the new restrictions that were to be introduced. Given the significance of these measures why was Parliament not asked to consider them in detail before they were implemented?
- 5.47 Other than the highly contentious "scenario" chart that had been presented on the previous day, the Government completely failed to present any evidence (scientific or otherwise) to explain how the measures it announced would meaningfully impact on the spread of Covid-19. In particular, it failed to produce evidence to show that the imposition of the curfew measures had to be done on a Thursday evening and why it could not have waited until say Monday to implement this. At no stage did the Government appear to have any intention of allowing Parliament to see any draft legislation or to scrutinise it, let alone to suggest amendments or changes.
- 5.48 The Curfew Regulations imposed a further reduction on the maximum number of persons who were permitted to gather for the purposes of attending wedding receptions. This had been set at 30 persons in the Rule of Six Regulations introduced on 14 September. In the Curfew Regulations, introduced 10 days later, the figure of 30 was to be reduced to just 15 as from 28 September.
- 5.49 No evidence was produced by the Prime Minister to explain why the figure of 30 had ceased to be viable within two weeks of being imposed and why this had to be reduced to 15. This was all the harder to fathom given that restaurants and bars continued to be allowed to take bookings for 6 people at a time and to fill their premises with many times more than 15 people. Yet for example the Second Claimant, could not organise a sit down reception for 50 people in a venue capable of seating 200.

5.50 Furthermore, there is no logic to the suggestion that it suddenly became a matter of "urgency" on 22 September, to reduce wedding reception party sizes from 30 to 15.

5.51 No reasonable Minister could have held the opinion that there was such urgency. Nor, given the timing, was there any reason why these further restrictions and the need for them could not have been properly debated and scrutinised by Parliament.

### **Summary on the use of the emergency procedure**

5.52 The Claimants submit that the provisions of sections 45Q and 45R of the 1984 Act were enacted for a reason and that reason was to ensure adequate democratic safeguards as a check and balance on what are by any standards, very draconian powers.

5.53 As I believe I have demonstrated in this statement, the Government has done nothing to justify its use of the emergency procedure in the making of any of the Regulations. It may well be that having Parliament approve such legislation makes the process of introducing it more onerous for the Government than it would otherwise be. But that cannot, in the Claimants' submission, be a good reason for by-passing the normal legislative process, especially when the civil liberties and livelihoods of millions of people are at stake.

5.54 The Claimants invite the Court to declare that the Regulations are ultra vires and unlawful on this basis and in the meantime grant to the Second Claimant an injunction prohibiting the enforcement of the Regulations insofar as they impose the 15 (or 30) limit on wedding gatherings.

### **Expedition**

5.55 In his witness statement, Mr Henriques the Managing Director of the Second Claimant has explained the enormous damage that the lockdown has already caused to his company. But he has also in my view clearly demonstrated that the making of the Regulations will, if allowed to stand, cause irreparable harm and unquantifiable damage to the Second Claimant. Many other businesses in the hospitality sector will no doubt be similarly affected.

5.56 There is, in my view, a very strongly arguable case that the Government has acted unlawfully by using the emergency procedure to make the Regulations and that it is bound to continue doing so unless the Court intervenes. The case for expedition is therefore extremely strong since the Government has misused the procedure in Parliament to pass legislation without scrutiny. As has been noted, attempts by MPs to require the Government to change tack have failed. There is a considerable public interest and importance in this matter. If the hearing is not held quickly and the question decided by the Court, the Government will have been able

to benefit from misusing the emergency procedure to avoid Parliamentary scrutiny. If a decision in this action is made quickly, not only will it force the Government to rethink the Regulations, but it will set down an important marker to the Government that the emergency procedure is not to be used as it has been up to now. This can only be a good thing going forward and in the interests of good administration.

### **Balance of convenience**

- 5.57 The Claimants are asking for permanent injunctive relief as they recognise that any order quashing the Regulations would be final and determinative. Nevertheless, I have set out the relevant considerations the court would determine in an application for interim injunctive relief.<sup>57</sup>
- 5.58 The harm done by the Regulations to millions of ordinary citizens and individuals (including the First and Second Claimants) as well as to businesses besides the Third Claimant is also serious and irreparable. For so long as the Regulations remain in force, they will be prevented from exercising rights of association and to conduct their private and family lives without the constraints of the criminal law and the threat of prosecution and fines.
- 5.59 The rules restricting what individuals can and cannot do in their own homes are clearly unenforceable. The Curfew Regulations have had the unintended consequence of causing large numbers of people to be discharged onto the streets and onto public transport all at the same time thus making the potential for transmission of Covid worse than it would otherwise be. They are also, I submit, bound to lead to more instances of groups of people from different households meeting to continue drinking and socialising at home, rather than in establishments where health and safety rules can be observed. There have already been calls for an urgent rethink of this provision.
- 5.60 No evidence has been produced by the Government to support the notion that any of the most recently announced measures will have any material effect on the likely spread of Covid-19. If the Regulations were quashed, the Claimants submit that this would not cause any corresponding harm or expose more people to illness and death from the virus.
- 5.61 The exceptions to the rules are various and illogical (i.e. bereavement support groups of any number are allowed but wakes are restricted to 15, shooting parties of any number are

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<sup>57</sup> Although the Claimants would ask the Court to stay the proceedings in such an eventuality, pending the possibility that they be made under the ordinary procedure, in which case it would retain its challenges on all other grounds. Were it not to do so, the question of the vires and rationality of the measures would be far from academic and the Claimants reserve their right to ask for them to be considered and determined at a later date.

allowed but no more than six people from different households can meet up in their own garden etc).

5.62 The balance of convenience, in my view, favours the expedition of this case and the swift quashing the Regulations. The Guidance would also have to be amended so that it no longer restricts the numbers of persons who can attend weddings and wedding ceremonies.

5.63 For all the above reasons, the Claimants submit that there is a strong case that the Regulations are ultra vires on the basis of the improper use of the s45R emergency procedure. The Claimants also submit that there is no pressing reason why the Regulations should be saved and that the balance of convenience weighs in favour of granting an interim injunction to prevent enforcement pending a final hearing at which they could be quashed.

## **6. THE TIMING OF THE CLAIM AND THE APPLICATION FOR INTERIM RELIEF**

6.1 In the Dolan Claim, the Government sought to argue that there had been too great a delay between the making of the decisions and legislation under review and the launch of the proceedings. Those submissions did not succeed before Lewis J. Since the Claimants are seeking to have the Government's actions judicially reviewed on an urgent basis as well as seeking interim relief, and the Government may again seek to raise delay as an issue, I should briefly deal with this here and now.

6.2 The first that the Claimants knew that more legal restrictions tightening the national lockdown measures, was when the Prime Minister gave his address on 9 September. But it was not until Sunday 13 September that it was possible to have sight of any of the law that followed on from that announcement. Even then, not all of the measures that had been announced by the Prime Minister were set out in the Rule of Six Regulations. As has been noted, the Booking Regulations came out on 17 September. However, it was announced in the press as early as 16 September that yet further tightening of the lockdown measures was being considered by the Government.

6.3 The Claimants were minded to challenge the Rule of Six Regulations and were in discussions with the Claimants' legal advisers. But it was clearly not possible to sensibly commit to any action in view of the likelihood that the goalposts might move again.

6.4 When on 22 September the Prime Minister's announcement heralded the introduction of the Curfew Regulations, it appeared that the Rule of Six Regulations might be about to be overtaken by events. The Curfew Regulations themselves were only published for the first time on 23 September and some of their provisions entered force on 24 September. The

regulations which are the most damaging to the Second Claimant – i.e. the restriction on the size of wedding parties to just 15 persons – did not come into force until 28 September.

6.5 On the evening of 25 September 2020, my firm was given the go ahead to prepare and send a pre-action letter warning of the issue of urgent judicial review proceedings in relation to the Regulations. On Saturday 26 September a detailed letter before action was sent to the Government Legal Department putting the defendants on notice of the claim and the Claimants' intention to move the Court on an urgent basis. There is now produced and shown to me a copy of that letter at pages 723 to 731 at D1.61. The Government Legal Department's response was received on Tuesday 29 September (see D1.62 pages 732 to 734).

6.6 Shortly before the issue of the claim, my firm learned that the Prime Minister was due to make another statement in the company of his scientific and medical officers. This took place on the evening of 1 October. In the circumstances, we had little option but to wait and see what, if anything was announced, lest it impact on the proceedings. At pages 735 to 737 at D1.63 is a copy of the statement made by the Prime Minister and at pages 531 to 538 of D1.42 the slides presented by Messrs Whitty and Vallance.<sup>58</sup> This presentation if anything confirmed that the Claimants had no option but to proceed as it contained a warning from the Prime Minister that he would not hesitate to take further action if need be. On the same day as this statement was being finalised I read an article by Lord Sumption commenting on the recent events and the whole issue of the Government's reliance on legislation passed under the guise of the 1984 Act. He describes the manner of the Government's use of the 1984 Act as being, on the face of it "an abuse of power"<sup>59</sup> (see D1.64 pages 738 to 740).

6.6 In the circumstances, the Claimants submit that they have clearly moved extremely quickly to mount a challenge to the making of the Regulations commensurate with the requirement to bring proceedings "promptly" and given their request for expedition and for interim relief. The Claimants have put the Government on notice of their intended action as soon as was reasonably practicable and have necessarily followed up with proceedings quickly.

### Statement of truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed. 

Dated... 1 October 2020

Michael Gardner

<sup>58</sup> <https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-30-september-2020>

<sup>59</sup> <https://www.thetimes.co.uk/article/rebel-mps-are-right-ministers-must-not-be-free-to-rule-by-decree-ncwjn5b3m?shareToken=3b113fd766081142481a5f50425ef80d>