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

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

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

B E T W E E N :

THE QUEEN

(On the application of
(1) SIMON DOLAN

(2) CRIPPS BARN GROUP LIMITED
and
(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

STATEMENT OF FACTS AND GROUNDS AND WRITTEN SUBMISSIONS OF THE CLAIMANTS

INTRODUCTION

Factual background

1 This claim challenges restrictions on the ability of individuals to meet and socialise with their family and friends, to attend political protests save in limited defined circumstances; and which reduce the ability of businesses to trade profitably and so deprive them of much of the value of their property. They impose restrictions on the day to day life and society of individuals and communities more onerous than perhaps any that have ever been imposed before March of this year.

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

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

3 The restrictions challenged in this claim, purportedly made in response to the SARS-CoV-2 epidemic ('**the coronavirus**'; '**the virus**'), were made on 3.7.2020, 26.8.20, 13.9.2020, 17.9.20 and 23.9.20 and each came into force only hours or even minutes after they were published. Aside from their effect on cherished fundamental human rights, they will, individually and collectively, have a devastating effect on businesses throughout the hospitality industry and (through the collateral effects) more widely. They were made without impact assessments, in the absence of any empirical scientific evidence that they would affect the transmission of the virus and after death rates from the virus had dropped below 1 % of total deaths. They have been justified using 'positive' test results, many of which – perhaps even the majority – represent individuals who present no risk of transmitting the virus. And the restrictions were made using the 'emergency' procedure but in the absence of circumstances that could possibly be described as necessary due to "urgency".

4 While many people have died from the virus in the last seven months, only just over 300 of those were under 60 with no pre-existing conditions The average age of death from the virus is over 80 years old.

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

5 On 13.9.2020, the Secretary of State for the Home Department made regulations that imposed a limit on gatherings of six persons, save where exceptions applied; and applied a statutory maximum of 30 to weddings, funerals and other 'significant events'. These and all other Regulations were made under Part 2A of the Public Health (Control of Disease) Act 1984, as amended ('**the 1984 Act**') These regulations (the Health Protection (Coronavirus, Restrictions) (England) (No 2) (Amendment No. 4) Regulations 2020, '**the Rule of Six Regulations**') were an amendment to the Health Protection (Coronavirus, Restrictions) (England) (No 2) Regulations 2020 ('**the No. 2 Regulations**'[2]), which were made by the Secretary of State for Health on 3.7.2020. The No. 2 Regulations replaced, in turn, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, ('**the Restriction Regulations**'), which were made on 26.3.2020 and which imposed the most fundamental restrictions on fundamental rights in the modern era.

6 On 24.9.2020 the Parliamentary Under Secretary of State for Business & Industry, Department for Business, Energy and Industrial Strategy, Nadim Zahawi MP, made The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 No.1008 ("**the Booking Regulations**") were made on 17 September. These regulations were again made using the emergency procedure and certified as urgent and came into force on 18.9.2020. 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.

7 The No. 2 Regulations had previously been amended by the Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 ('**the Holding of Gatherings Regulations**'), made on 28.8.2020, which increased the fixed penalty notice on those holding gatherings of over 30 to £10,000. These were made under the emergency procedure.

8 Before subsequent Regulations were made, the government's Chief Medical Officer, Professor Chris Whitty, and its Chief Scientific Officer, Sir Patrick Vallence, made a presentation on 21.9.2020. This presented selective data on the rise in positive test results that it described as 'cases' (despite those including non-symptomatic individuals). Very little information was given about the extremely low rate of deaths of patients with positive tests for the virus. A

[2] This term is used to refer to the No. 2 Regulations as originally enacted, not as amended by the Rule of Six Regulations.

graph was presented that purported to be a 'reasonable worst case scenario', which showed exponential growth of the virus. In the ten days since that presentation, cases have risen at a much slower rate. The officers failed to refer to the effect of the false positive rate on testing data (which suggests that a large proportion of tests show false positive readings at this level) and suggested that all but 8% of the population were susceptible to the virus (which is contrary to growing evidence about the existence of pre-existing T-cell immunity). They also failed to mention the relative risk to different age groups of the virus.

9 On 22.9.2020 the Prime Minister made a statement to the House of Commons followed by a broadcast that evening. In each, he asserted the supposed 'need' for further restrictions with no acknowledgment of any of the above factors and barely any of their grave effect on fundamental rights.

10 On 23.9.2020, the Parliamentary Under Secretary of State for Health, Lord Bethell, made the Health Protection (Coronavirus, Restrictions) (England) (No 2) (Amendment No. 5) Regulations 2020 ('**the Opening Hours Regulations**'). These imposed additional restrictions, including reducing the number of persons that could attend weddings to 15, restricting pubs and restaurants from serving food or drink save where customers were seated and prohibiting those premises from opening after 10 pm. They were made under the emergency procedure.

11 Separate statutory instruments extending the compulsory wearing of face coverings were made through 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.

12 Prior to the re-opening of pubs, cafés and restaurants on 4.7.2020, the UK Government issued 'the COVID-19 Guidance on Pubs, Bars, Restaurants, and Takeaway Services' ('**the Hospitality Guidance**'),[3] The Covid-19 Guidance on Wedding Receptions[4] ('**the Wedding Reception Guidance**') and Guidance for Small Marriages and Civil Partnerships[5] ('**the Marriage Guidance**') ('**the Guidance**' when referred to collectively). Regulation 5(5G) gives the latter Regulations direct statutory effect by requiring the organiser of a marriage or wedding

[3] https://assets.publishing.service.gov.uk/media/5eb96e8e86650c278b077616/working-safely-during-covid-19-restaurants-pubs-takeaways-240920.pdf
[4] 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
[5] https://www.gov.uk/government/publications/covid-19-guidance-for-small-marriages-and-civil-partnerships/covid-19-guidance-for-small-marriages-and-civil-partnerships#enforcement

reception to undertake a risk assessment that takes account of government guidance about the spread of the virus.

13 Before the Restriction Regulations were replaced by the No. 2 Regulations and restrictions on the fundamental rights of the entire population considerably relaxed, the First Secretary of State announced on 16.4.2020 a policy to guide the relaxation and possible tightening of restrictions. This policy was only to relax restrictions if each one of five tests ('the Five Tests') were met; and to tighten restrictions if any one of the tests were no longer met. Each of those tests related to the virus and none of them to any other considerations. The Five Tests were later reiterated by the Health Secretary and the Prime Minister and were set out in published guidance.

14 Very recently, on 23.9.2020, the UK Government, the Northern Ireland Executive, the Scottish Government, and the Welsh Government announced a policy that they 'must' reduce the reproduction rate of the virus below 1; and that they were collectively committed '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.'[6] This statement failed to state that measures to 'suppress' the virus must be proportionate to the harms they will cause. Indeed, the UK government has turned its face against acting proportionately or rationally in a narrow-minded focus on one potential harm that is unprecedented in modern history outside wartime and is, in its impact on fundamental rights, irrational and disproportionate.

15 The Claimant relies, in support of this claim, on evidence contained in the witness statements of:

(1) Michael Gardner, solicitor to the Claimants;
(2) Mark Henriques, managing director of Cripps;
(3) Simon Keeling, financial director of Cripps.
(4) Lauren Monks, the Third Claimant and
(5) Simon Dolan the First Claimant

Together with the documentary evidence, which is mostly in the public domain, exhibited by Michael Gardner as MG1.

The Claimants

[6] https://www.gov.uk/government/publications/joint-statement-on-covid-19/joint-statement-on-coronavirus-covid-19

16 Simon Dolan is an entrepreneur who owns a number of UK businesses which combined employ a total of around 600 people. While he lives abroad, he is a British citizen with both parents living in England who will be restricted from socialising with more than five other people on his visits to England and the demonstrations against the 'lockdown' policies that he would attend are restricted by the Regulations.

17 Cripps Barn Group Limited, trading as Cripps and Company ('**Cripps**') is a business running seven venues that hold weddings and other events and two public houses. These venues are all indoors but have some outside space. Their business was prevented from trading by the Restriction Regulations. While able to trade under the No. 2 Regulations, Cripps suffered from a considerable reduction in its profitability due to government guidance that weddings and receptions to be limited to 30 people ('**the Wedding Guidance**'); and guidance ('**the Hospitality Guidance**'; together '**the Guidance**') that limited footfall in their pubs by advising limiting gatherings to no more than two households, a slightly varied version of which (limiting gatherings to linked households or to no more than six persons) became legally enforceable through the Rule of Six Regulations. The wedding restriction has since been reduced to 15, making it impossible for the business to trade profitably; and the restrictions on pubs have been further tightened, requiring table service only and for customers to leave by 10 pm. Each further restriction has had the effect of reducing Cripps' profitability, which in turn has had the effect of reducing the goodwill value of Cripps from its value before March 2020 (before the Restriction Regulations).[7] This crippling effect of the Regulations and Guidance mirrors that of tens if not hundreds of thousands of businesses in the hospitality industry.

18 Lauren Monks is a resident of England. She has parents and other relatives living in England and her ability to socialise with them or with her friends is severely restricted by the Rule of Six Regulations.

19 Simon Dolan, Lauren Monks and an anonymous child challenged the lawfulness of the Restriction Regulations on a number of grounds, most of which overlap with the issues in this judicial review. While Lewis J refused permission for the judicial review to proceed (*Dolan v Secretary of State for Health* [2020] EWHC 1786 (Admin) ('***Dolan (No. 1)***'), the claimants appealed and Hickinbottom LJ ordered that the application for permission to appeal and the appeal be considered in a 'rolled-up hearing', now listed on 29/30.10.2020. In so ordering, Hickinbottom LJ observed that the Restriction Regulations 'impose[d] possibly the most restrictive regime on the public life of persons and businesses ever – certainly outside times of

[7] The evidence of reduced value is commercially sensitive and the court is asked to order that it not be disclosed to any person other than the parties and their legal representatives.

war' and that they 'potentially raise fundamental issues concerning the proper spheres for democratically accountable Ministers of the Government and judges'. Moreover, he observed that not only were 'substantial restrictions on public life remain in place' at a time when those restrictions were far less onerous than the current regime, but that 'it is possible that further restrictions will be (re)imposed in the future, as indeed they have been.[8]

Summary of Remedies sought and Grounds

20 The interference with the private and family lives, rights of assembly and property rights of each of the Claimants is mirrored by that of all residents of England and all English pubs, restaurants, cafés and many other businesses in the hospitality industry.

21 The Claimants apply for permission to review judicially the No. 2 Regulations, the Holding of Gatherings Regulations, the Rule of Six Regulations, the Booking Regulations, the Opening Hours Regulations and the Mask Regulations and the ongoing failure to remove or moderate restrictions on the number of gatherings in the Guidance. They seek the following remedies:

(1) To quash the No. 2 Regulations in their entirety (including as amended by later Regulations);
(2) Alternatively, to quash the Rule of Six Regulations and/or the Holding of Gatherings Regulations and/or the Opening Hours Regulations and/or the Booking Regulations and/or the Mask Regulations (which would have the effect of returning the No. 2 Regulations to their state before being amended by any one of the above);
(3) To quash those parts of the Marriage Guidance, the Wedding Reception Guidance and the Hospitality Guidance restricting the number of persons who may gather in a restaurant, pub or café or, alternatively, to order that it be moderated to impose a limit on the number of persons who may gather that is greater than 30 and that the Court considers to be proportionate;
(4) A declaration that all the restrictions imposed by all the Regulations and Guidance were not rational and/or were nor proportionate.

22 The Claimants seek the above relief on the following **three grounds**:

[8] The order of Hickinbottom LJ is exhibited at D1.26 of Exhibit MG1. It is the Claimants' case that Lewis J's judgment was, with respect, manifestly wrong, both in his findings of fact and of law; but it will not be referred to save where it is necessary to do so.

(1) That the five Regulations are *ultra vires* the Public Health (Control of Disease) Act 1984 ("1984 Act"), for the unlawful use of the emergency procedure (under s 45R);

(2) That the five Regulations are *ultra vires* the 1984 Act as the powers under which the Regulations were made (the imposition of special restrictions or requirements under s 45C(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;

(3) That the decision to make the five Regulations and to maintain restrictions on gatherings in the Guidance was irrational and disproportionate on the grounds that the Defendants:

   (a) Adopted an over-narrow approach placing considerations about the spread of the virus over and above all others, including the impact on fundamental freedoms, both through their application of the Five Tests and by acting in a manner consistent with the policy position announced on 23.9.2020 by which their policy would be so narrowly focussed on the suppression of the virus that any harms caused by this policy would be disregarded if they were not consistent with the suppression of the virus;

   (b) Have unreasonably failed to have regard to the relative lack of severity of the virus, particularly to the working population under 60, and to evidence of the limited effectiveness of restrictions to control the virus;

   (c) Have unreasonably failed to take into account the lack of scientific evidence of a likely substantial increase in hospitalisations or deaths from the virus;

   (d) Have imposed these restrictions in the absence of scientific advice or evidence that they would have any material effect on reducing deaths from the virus; and

   (e) Failed, adequately or at all, to have regard to the significant harms caused by the restrictions, including to the Claimants' fundamental rights protected by Articles 8, 11 and Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms ('**the Convention**') and to the Claimants and those in their situation and to society and the economy at large.

23 Each of the Regulations challenged were imposed through the improper use of the emergency procedure in circumstances that were far from urgent. Yet they imposed, without debate or scrutiny and with the minimum of notice, onerous restrictions on every person and many businesses throughout the country. Thus, it is submitted that the court should consider their lawfulness urgently.

24 With this claim the Second Claimant, Cripps, issues an application for an interim injunction prohibiting any public body from enforcing the two parts of the No. 2 Regulations (as amended

by the Opening Hours Regulations) that restrict the numbers of those who may attend marriages and wedding receptions to 15, namely part of reg. 5(3)(f) and reg. 5(3)(h)(i); and from having any regard to those parts of the Marriage and Wedding Reception Guidance that advise the same limitation on numbers. The application is made because of the serious and irreparable harm caused to Cripps by the effective prevention of their ability to trade, which will cause the collapse of their goodwill value and puts it at grave risk of insolvency. Cripps rely in support of this application on Ground One, to avoid the need for the Court to consider Grounds Two and Three. The grounds of this application are set out in a skeleton argument and the evidence is contained in the witness statements of Mark Henriques, Simon Keeling and Michael Gardner.

25 These Grounds and written submissions are longer than would be usual in claims for judicial review due to the number of Regulations that are being challenged, the complexity and importance of the issues, the considerable national importance of the challenge and in order that the learned judge or judges determining the claim have the fullest appreciation of the legal and factual background.

THE REGULATIONS AND GUIDANCE

26 The Restriction Regulations made in response to the epidemic prevented Cripps from trading by imposing restrictions on gatherings of more than two persons, with no exceptions for weddings or funerals save for close family members. Those Regulations also imposed the most Draconian removal of freedoms in the modern era, requiring every person in England (including Ms Monks) to remain at their residences at all times save where they had a 'reasonable excuse' and later (when amended) preventing them from staying overnight anywhere but their residences; preventing all political protest and assembly; preventing live religious services or gatherings; and preventing large numbers of businesses from trading (originally all but shops selling 'essential' goods and all restaurants and bars until the Restriction Regulations were repealed).

27 The Restriction Regulations were replaced by the No. 2 Regulations on 3.7.2020. Paragraph 5 of those Regulations removed the legal restriction on gatherings: indoors in public places or private places that were not a dwelling; outdoors in private places that were not a dwelling; or in public places outdoors providing a risk assessment had been undertaken. There was thus no restriction in law on unlimited numbers of persons attending a wedding reception or gatherings within pubs and restaurants or indoors in other non-dwellings. The No. 2 Regulations also permitted the re-opening of restaurants and bars.

28 However, prior to the replacement of the Restriction Regulations with the No. 2 Regulations, the Government imposed guidance about avoiding the spread of the virus, which included guidance to businesses in the hospitality industry and in respect of weddings. The guidance about weddings specified that wedding ceremonies and receptions should not be composed of more than 30 people. It also advises that businesses should maintain 'social distancing' of 2 metres or 1.5 metres with 'mitigation' (such as wearing masks).[9]

29 Each of these Regulations were passed under s 45C of the Public Health (Control of Disease) Act 1984, which allows the government to make regulations for the purpose of controlling infection from contagious disease. And each were passed under the 'emergency' procedure under s 45R of the Act, by which a government minister can make the regulations if he or she considers that it is 'necessary' to make the regulations by reason of 'urgency'. In consequence, they need not be considered by Parliament for up to 28 days after they were made, excluding periods in which it is not sitting or has been prorogued or dissolved.

30 None of the above Regulations (nor any amendments to them) were passed after an impact assessment. This has implications for the degree of latitude the government can be given in its assessment of the evidence supporting the regulations, as set out below.

31 The Hospitality Guidance states on p. 8 states: 'You must make sure that the risk assessment for your business addresses the risks of COVID-19, using this guidance to inform your decisions and control measures.'

32 The Wedding Reception Guidance under section 6 ('Enforcement') states: 'Where the enforcing authority, such as the Health and Safety Executive (HSE) or your local authority, identifies employers or venues who are not taking action to comply with the relevant public health legislation to control public health risks, they are empowered to take a range of actions to improve control of venue risks. Enforcement officers will take relevant guidance into account; and states that 'failure to complete a risk assessment which takes account of COVID-19, or completing a risk assessment but failing to put in place sufficient measures to manage the risk of COVID-19, could constitute a breach of existing health and safety legislation.' The same statement is repeated in section 6 of the Marriage Guidance.

[9] The Claimants do not accept that the guidance about social distancing or masks is rational or proportionate but do not challenge them in this judicial review to reduce the issues the court will be required to determine. It is noted that guidance is ongoing in its effect and the public bodies responsible for that guidance have an ongoing duty to review it to ensure that it remains a proportionate means of mitigating the threat of the transmission of the virus.

33 Many of the more stringent restrictions rely on other recent regulations, including The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 or paragraph 4 of The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020. Moreover, Regulation 3 of Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) imposes a duty on the employer to make 'suitable and sufficient assessment of risk' to the health and safety of employees and others; and s 16 of the Health and Safety at Work (etc) Act 1974 provides that the Health and Safety Executive can issue 'Codes of Practice' for the purpose of providing 'practical guidance' for the requirements contained in ss. 2-7 of the statute.

34 Thus, the guidance had statutory recognition and relevance both as evidence and as guides that inform decisions by licensing authorities, the Health and Safety Executive and other public bodies.

35 The guidance being challenged by in this judicial review is limited to guidance limiting: (a) gatherings and bookings in hotels, pubs, cafés and restaurants; and (b) gatherings for weddings and wedding receptions. Both have a material impact on Cripps and on tens if not hundreds of thousands of businesses in England.[10]

36 Under the Rule of Six Regulations, there is now an absolute prohibition on all gatherings of over six persons save where they are from one household or from two 'linked' households or where specific exceptions apply. These exceptions include weddings and wedding receptions of no more than 30 (and now 15) persons, 'significant event' gatherings (a religious ceremony to celebrate an event in a person's life, such as weddings, Bar Mitzvahs and confirmations), and funerals. They include political protests unless the organiser is (*inter alia*) a political body, business or charity, but not an individual; and such protests may only take place if the organiser has undertaken a risk assessment that (due to its requirement to take into account social distancing guidance) will have the effect of reducing considerably the numbers of persons who may protest. The exceptions to the Rule of Six also prevent any groups of more than six people mingling with each other when attending religious services or gatherings, impacting upon the freedom of religious practice.

[10] The Claimants do not accept that the guidance about social distancing, dancing, the playing of music, the wearing of masks or other things is rational or proportionate but do not challenge them in this judicial review to reduce the issues the court will be required to determine. It is noted that guidance is ongoing in its effect and the public bodies responsible for that guidance have an ongoing duty to review it to ensure that it remains a proportionate means of mitigating the threat of serious harm from the virus.

GROUND ONE: THE REGULATIONS ARE *ULTRA VIRES* THE 1984 ACT THROUGH THE UNLAWFUL USE OF THE EMERGENCY PROCEDURE

The applicable use of the emergency procedure

37 The 1984 Act applies multiple safeguards to the creation of regulations restricting fundamental rights. While the negative resolution procedure applies by default to certain regulations outside of 45C, for section 45C regulations – at issue here – the affirmative resolution procedure applies by default. Section 45C regulations "may not be made unless" a draft has been laid before and it has been approved by a resolution of each House of Parliament.

38 Section 45Q(3) provides that the affirmative resolution procedure can only be avoided if the instrument contains a declaration by the Secretary of State that he or she:

> "is of the opinion that the instrument does not contain any provision made by virtue of section 45C(3)(c) which imposes or enables the imposition of:
>
> a) A special restriction or requirement, or
> b) Any other restriction or requirement which has or would have a significant effect on a person's rights"

A "special restriction or requirement" is defined as one that can be imposed by a justice of the peace by virtue of section 45G(2)[11], 45H(2)[12] or 45I(2)[13].

39 The need for this protection arises because an instrument imposing a 'special restriction or requirement' (as these do) would have a 'significant effect' on a person's rights: hence it is enlarged to include any other restriction that would do so. The Secretary of State has not made nor could he have made a 45Q(3) declaration as in making any of the Regulations as the statutory authority for each of them is s 45C(3)(c).

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[11] (a) Submitting a person ("P") to a medical examination, (b) removing P to a hospital or other suitable establishment, detaining P in a hospital or other suitable establishment, keeping P in isolation or quarantine, disinfecting or decontaminating P, requiring P to wear protective clothing, requiring P to answer questions about their health, requiring P's health to be monitored and the results reported, requiring P to attend training or advice sessions on how to reduce the risk of contaminating others, subjecting P to restrictions on where P goes or with whom P has contact, requiring P to abstain from working or trading.

[12] Requiring "a thing" to be seized or retained, to be kept in isolation or quarantine, to be disinfected or decontaminated, be burned or cremated (in the case of a dead body), or destroyed or disposed of.

[13] Requiring premises: to close, to be disinfected or decontaminated, or destroyed, and, in the case of a moveable structure, that it be detained.

40 The Emergency Procedure is available only for regulations made under section 45C or section 45F(3) (health protection regulations) but not for regulations made under section 45G(7)[14], 45L(4)[15], and 45N[16], which, under section 45Q(2) and (4), must undergo the affirmative resolution procedure. The Emergency Procedure can only be invoked:

> "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".

Where the Emergency Procedure is used, the regulations are laid before Parliament after the instrument is made. They cease to have effect after 28 days unless they are approved by a resolution of each House of Parliament. However, this does not include any period within which Parliament is not sitting or has been prorogued, unlike regulations made under the Civil Contingencies Act 2004 ('**the CCA**').

41 Thus, sections 45Q and 45R of the 1984 Act demonstrate that Parliament, in making the amendments to the 1984 Act in 2008, was intensely concerned with protecting the fundamental rights of those affected by the subordinate legislation. The affirmative resolution procedure is the default position; and the negative procedure can be used only if the Secretary of State is of the opinion that, and makes a declaration that, the regulations do not impose restrictions or requirements that significantly affect a person's rights. The Emergency Procedure is one of last resort that may only be used where it is necessary not to lay them before each House and ask for a positive resolution in advance by reason of urgency.

42 Each of the Regulations contain a declaration of urgency, stating that:

> "In accordance with Section 45R.. 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."

43 These declarations were thus made – as they were required to be – before the Regulations were laid before Parliament.

Failure of Principal Secretaries of State to make the declaration in two Regulations

44 Regulations made under 45C can only be made by "the appropriate Minister", which is defined in 45T(6) as the "Secretary of State" where Regulations are made for England. Section 45R requires that the declaration of urgency must be made by 'the Secretary of State'.

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[14] Regulations about the evidence that must be available to a justice of the peace before the justice can be satisfied it may make an order imposing certain substantive restrictions on P.
[15] Regulations prescribing, in relation to any restrictions or requirements (other than those mentioned in section 45F(2)(c) or (d)), the maximum period for which may an order made under Part 2A the 1984 Act may be imposed.
[16] Regulations making further provision about the taking of measures pursuant to Part 2A orders.

45 The Interpretation Act 1978 provides the following definition (in Schedule 1): "Secretary of State" means one of Her Majesty's Principal Secretaries of State."

46 While the introduction to each of the Regulations challenged asserts that 'the Secretary of State' made the Regulations, the Opening Hours Regulations and the Booking Regulations were each *signed* by Parliamentary Under Secretaries of State (Lord Bethell and Nadim Zadawi, respectively). While any of Her Majesty's Principal Secretaries of State may perform acts reserved to them, there is no indication in the introductory sections as to which of them made the declaration.

47 The statute requires not merely that a Principal Secretary of State considers whether the use of the emergency procedure is necessary but that he or she make a declaration accordingly. The declaration must be on the face of the statute.

48 In the case of these two Regulations, the face of the document is that the Minister who signed the Regulations is the Minister who made the declaration. Thus, the declaration was made by Parliamentary Under Secretaries of State. Neither had the authority to make such a declaration and the Opening Hours Regulations and the Booking Regulations were made through the unlawful use of the emergency procedure (on this ground alone further and alternatively to the principal challenge to the use of the emergency procedure under this Ground) and they should be quashed.

<u>Limited if any explanation for the use of the emergency procedure</u>

49 The explanatory memorandum to the Holding of Gatherings Regulations provides no explanation as to why there was any urgency in increasing substantially fines on organisers of gatherings over 30 to levels that would put many individuals at risk of bankruptcy (£10,000), let alone why it was necessary to use the emergency procedure.

50 The explanatory memorandum to the Rule of Six Regulations states as follows:

> 7.5 The Original Regulations, which replaced the Restrictions Regulations, came into force on 4th July 2020. The Original Regulations have been amended three times on different dates to enable more venues and businesses to reopen.
> 7.6 The transmission rate has increased over recent weeks, in particular amongst young people, and compliance with social distance guidance has decreased. As a result it has been considered necessary to introduce new measures to limit the spread of coronavirus.

> 7.7 The Prime Minister addressed the nation on 9 September 2020 to announce the need to restrict social gatherings, so that they are cannot be larger than six unless exemptions apply.
> 7.8 There is a principal exemption for people who are members of the same household or of linked households ('support bubbles'). There are specific provisions for wedding ceremonies, wedding receptions, funerals, and life cycle events, where a limit of thirty people applies.
> 7.9 There are provisions for people to gather for shared activities in large numbers so long as the individual groups are six or less – and those groups do not mingle, subject to the gathering being appropriately organised.

51 Thus, the decision had been made to impose restrictions on gatherings to six by at least 9.9.2020, on which date the Prime Minister addressed the nation. However, the media had been briefed about a possible increase in restrictions in advance of this [see **Gardner, para 3.26**], which at least establishes that it was being considered on that date. The Regulations were made on 13.9.2020. No explanation is made as to why the introduction of these very significant restrictions was so urgent that it was necessary not to lay them before Parliament.

52 The explanatory note to the Booking Regulations states that:

> Public Health England publish weekly data on acute respiratory incidents reported to Health Protection Teams. In the report for the week ending 6 September 2020, of the 246 incidents reported, 38 incidents were from food outlet/restaurant settings (compared to 21 the previous week and 11 the week before that), of which 34 had at least one linked case that tested positive for COVID-19. Weekly data also provides a breakdown of contacts for people who have tested positive for COVID-19: the majority of contacts are other household members and household visitors, but the next biggest known category is 'leisure/community' which includes eating out, attending events and celebrations, exercising, worship, arts, entertainment, recreation and community activities.

53 While there was an increase in the number of acute respiratory incidents, only 38 were reported in the whole of England. No explanation is made about the evidence that tighter regulation by restaurants, pubs and cafés would make any difference to these numbers; or why it was so urgent that it was necessary not to lay these Regulations before Parliament. Nor could there be any reasonable grounds for believing that it could be.

54 The explanatory note to the Opening Hours Regulations sets out the above history in less detail before stating that:

> 7.7 Due to the transmission rate continuing to increase and the Chief Medical Officers upgrading the UK's Covid-19 Alert Level from three to four, the Government has taken further actions which affect [*sic*] businesses and social gatherings. The closure of businesses selling food and drink from 22:00 to 05:00 (subject to exemptions) will reduce the likelihood of people not adhering to social distancing rules, with compliance often being affected by alcohol consumption. Similarly, mandating seated consumption of food and drink aims to reduce the amount of time that customers spend at the

> ordering counter, which in turn will reduce the risk of transmission from mingling with people you do not live with. Preventing ordering or collection of food and drink at a counter or bar in businesses that sell alcohol for consumption on the premises will limit the risk of transmission even further in premises that carry increased risk. Introducing fines for businesses who do not follow these restrictions will deter businesses from not following these new rules. The fine levels are higher
> than some other restrictions, but in line with approaches taken in relation to business restrictions

55 The explanatory note to the Mask Regulations states, at para 7.4, that 'this amendment will reduce the risk of passing on the infection when moving through a restaurant, bar or other hospitality setting, hence offering greater protections to those visiting these indoor spaces as well as those working within them' and that 'there is *some* evidence to suggest that *when used correctly*, face coverings *may* have *some* benefit in reducing the likelihood of those with the infection passing it on to others, particularly if they are asymptomatic' (emphasis added). There is no suggestion that these assertions are supported by empirical evidence.

56 Para 7.8 of the explanatory memorandum suggests that 'SAGE has previously advised that there is evidence to recommend the use of cloth masks in certain higher-risk settings as a precautionary measure where masks could be at least partially effective.' However, it is not suggested that there was any scientific advice or evidence about the effect of <u>these</u> restrictions on the transmission of the virus. Still less was there any explanation as to why <u>these</u> restrictions were urgent.

57 In none of the explanatory memoranda to any of the above Regulations was any consideration given to how much time would be saved by the use of the emergency procedure or, in consequence, whether it was necessary.

<u>The limited impact of the use of the emergency procedure on timing</u>

58 Section 45Q(4) imposes no minimum timeframe within which regulations must be debated and / or approved. The affirmative procedure only requires that the regulations are laid before, and approved by, each House of Parliament <u>prior to</u> the regulations being made. Section 4 of the Statutory Instruments Act 1946 also contains no minimum timeframe for regulations to be debated under the affirmative resolution procedure.

59 In secondary legislation responding to the coronavirus epidemic, no emergency procedure was used where making the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 ('**the SEND Regulations**'), which were made under the Coronavirus Act 2020. In *R (Shaw) v Secretary of State for Education* [2020] EWHC 2216 (Admin), the

claimants argued that it was irrational of the Secretary of State for Education to lay regulations relating to special educational needs before Parliament the day before they came into force. Those Regulations were made on 28 April 2020, laid before Parliament on 30 April 2020 and entered into force on 1 May 2020 (see *Shaw*, para 19). This at least arguably breached the parliamentary convention that, where the negative resolution procedure is used, regulations should be laid before Parliament at least 21 days before they are due to come into force; but the failure to abide by that convention was found to be non-justiciable pursuant to Article 9 of the Bill of Rights 1689.

60 The Government controls the parliamentary schedule, particularly in the House of Commons where it has a clear majority. If it wished, as with the SEND Regulations, it could have placed the regulations at the top of the agenda, and asked the House to debate and approve them in quick succession, but with the benefit of the scrutiny such regulations clearly necessitate.

Article 9 of the Bill of Rights 1689 does not apply

61 Where a statute imposes an obligation on a Minister to follow a certain procedure prior to laying an instrument before Parliament, whether that procedure was followed is justiciable. In *Shaw* (*supra*) Kerr J found that an alleged breach of the aforementioned convention was non-justiciable because ruling on this would breach Article 9 of the Bill of Rights 1689 'that the Freedom of Speech, and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament'. While the court found for the government on the point, he also held that if a statute regulates *how* a Minister is to put a statute before Parliament (and any pre-cursor steps it must take) the Minister's compliance with the obligation *is* a judicially reviewable decision. See *Shaw* at [151] to [153]:

> [151] In my judgment, the judicial exclusion zone applies to decisions to lay delegated legislation as well as primary legislation before Parliament, **except in cases where statute and not merely parliamentary convention bestows upon the court authority to intervene**. **Unless there is some specific statutory obligation affecting the laying of secondary legislation**, the decision *when* to lay an instrument is as such taken in the political capacity of Member of Parliament as the decision *whether* to lay one.
>
> [152] In my judgment, the court would be dictating the terms on which the minister should exercise his or her political functions if it were to decide when the minister is free or not free to lay legislation before Parliament. **I accept that, as decided in *Adiatu*[17] and other cases, the position is different where it is not the court or common law but an express statutory obligation which limits the minister's freedom to lay secondary legislation before Parliament**.

[17] *R (on the application of Adiatu and another) v Her Majesty's Treasury* [2020] All ER (D) 78 (Jun)]

> [153] **It is the constitutional role of the court, in the usual way, to enforce the statutory obligation.** It is not the role of the court to enforce a parliamentary convention without legal force. Where there is no statutory obligation for the court to enforce, the laying of a statutory instrument is governed by the 1946 Act. The remedy for inadequate parliamentary time for scrutiny is a negative resolution under section 5(1) of the 1946 Act within the 40 day period.
>
> (Emphasis added)

62 *Adiatu* concerned a challenge to the financial support for workers provided by secondary legislation under the Coronavirus Act. It raised the issue of whether the Public Sector Equality Duty applied to the decision-making process by government departments leading to the making of delegated legislation. Relying on *R (C) v Secretary of State for the Home Department* ([2008] EWCA Civ 882; [2009] QB 657) the court found that it did. *C* concerned a challenge to the Secure Training Centre (Amendment) Rules 2007, on the basis that the Secretary of State had laid them before Parliament in breach of section 71 of the Race Relations Act 1976, by not having due regard to the need to eliminate unlawful race discrimination in the carrying out of their functions. The Court of Appeal found at [45]:

> **The legal obligation to take certain steps before laying legislation before Parliament is that of the executive**. It is not Parliament's role to control that obligation: that is the function of the courts. Rather, the function of Parliament is simply to approve or disapprove the Amendment Rules as laid. Its failure to disapprove the Amendment Rules cannot supply the executive's failure to perform the legal obligations that it bears before laying the Amendment Rules in the first place.

And (at [220] and [226]):

> In our judgment, it is clear from the *C* case, and the authorities cited by the Court of Appeal, that the public functions exercised by the Defendant which are covered by s 149 include the steps which are taken before delegated legislation is laid before Parliament. **As the Court of Appeal made clear in *C*, the function of taking those preparatory steps is distinguishable from the function of Parliament, which is to approve and disapprove the rules as laid down**. It follows that there is no inconsistency with constitutional principle for Parliament to have decided, through s 149, to give the courts a role in reviewing the process followed by a Government Department before laying a statutory instrument before Parliament.
>
> […]
>
> [Upholding a claimant's assertion that a duty to consult arose as a result of a statement made by a Minister in the House of Commons would trespass on Parliamentary sovereignty.] **The position is different where, as here, the allegation is that the Minister has acted in breach of a requirement of an Act of Parliament by failing to have regard to equalities considerations before preparing a statutory instrument and bringing it to Parliament. Such a case is akin to the cases in which a court had held that delegated legislation is unlawful because the procedures laid down by the relevant enabling legislation have not been properly followed** (see,

> eg, *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] QB 353 (DC); and *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; [2003] ICR 405).
>
> (Emphasis added)

63 Sections 45Q and 45R set out a comprehensive regime for the Secretary of State to follow when preparing a statutory instrument under section 45C and bringing it before Parliament. By default, the affirmative resolution procedure applies. The Secretary of State may avoid using the affirmative resolution procedure only if he or she makes a declaration that the regulations do not "have a significant effect on a person's rights" or that the regulations impose a 'special restriction or requirement', in which case the negative resolution procedure can be used. If rights *are* significantly impacted, invoking the Emergency Procedure is the only way of avoiding use of the affirmative procedure.

64 It is a pre-condition of the Emergency Procedure that (i) the Secretary of State is of the opinion that "by reason of urgency, it is necessary" to make the regulations to make the order without the affirmative procedure being used and (ii) they make a declaration to that effect. Section 45R imposes a statutory obligation that the Secretary of State rationally considers whether the pre-condition is fulfilled before making its declaration; and this obligation is imposed on the Secretary of State outside of his or her functions as a Member of Parliament. This consideration and the declaration required under the Act may only take place before the Regulations are laid before Parliament. It is not a proceeding within Parliament and has no impact upon the freedom of members to speak and arrange their affairs. Pursuant to *Adiatu*, *C,* and *Shaw,* the court may review the government's compliance with such an obligation.

65 The reviewability of the Secretary of State's declaration does not infringe on Article 9 of the Bill of Rights 1688, as it takes place within the Minister's role as member of the Executive, and not as a Member of Parliament. The declaration requirement is imposed by statute, and "[i]t is one of the principal roles of the courts to interpret Acts of Parliament" *R(Miller) v Prime Minister & ors* ([2019] UKSC 41). The declaration requirement is not a decision of either House of Parliament. Rather, as in *Miller (No. 2)* (at para 68):

> "it is something imposed upon them from the outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament…[18]

[18] The United States Supreme Court has described the American analogue of 'proceedings in Parliament', the phrase 'legislative sphere', as including all activities which are 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration … of proposed legislation or with respect to other matters which the [United States] Constitution places within the jurisdiction of either House' (*Gravel v United States* 408 US 606 at 625 (1972).Erskine May

66 Analogous to the position of Commissioners bringing Parliament's proceedings to an end is the fact that the declaration by the Minister, far from being part of those proceedings, has the effect that Parliamentary scrutiny is impossible before the measures come into force. **It would be offensive as well as illogical for the protection given by Article 9 to Parliament to be used to oust the Court's jurisdiction from considering whether a Minister has acted – outside Parliament – to avoid that scrutiny.**

67 Thus, the only means by which a minister's declaration can be reviewed is through judicial review. And, as in *Miller (No. 2)*, if the decision (in that case that led to the advice to Her Majesty) was irrational, the declaration (or in that case the announcement of the prorogation to Parliament) was void and of no effect.

Standard of Review

68 In *Adiatu* the Court of Appeal considered the standard of review of the minister's compliance with the public sector equality duty ('**the PSED**'), which it found to be a statutory precondition to the imposition of secondary legislation, compliance with which was judicially reviewable.

> 207. The PSED does not require a detailed analysis of the sort that might be undertaken by leading counsel in the course of submissions in legal proceedings (see Williams, paragraph 16). In R (SG) v Secretary of State for the Home Department [2016] EWHC 2639 (Admin), at paragraph 329, Flaux J said that:
>
> > "… what is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court …. the PSED, despite its importance, is concerned with process not outcome, and the court should only interfere in circumstances where the approach adopted by the relevant public authority is unreasonable or perverse."
>
> 208. To like effect, in *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935; [2016] ICR 1, the Court of Appeal said, at paragraph 116:
>
> > "…..the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or misjudgments cannot constitute or evidence a breach of the duty."
>
> (Emphasis added)

69 The standard of review held to apply in *UNISON* was also highlighted in *Miller (No. 2)* (at para 49).

[13.12] fn 1. https://erskinemay.parliament.uk/section/4591/proceedings-in-parliament/?highlight=%22proceedings%20in%20parliament%22

70 Thus, the standard of review is that the declaration must have been made rationally; and it will not have been made rationally unless the Minister has 'conscientiously considered' the essential questions. Those questions are whether: (a) making the restrictions was 'urgent'; and (b) whether the *additional* time that would be taken by the use of the s 45Q procedure would be so great that the use of the emergency procedure was 'necessary'.

Consideration by the House of Commons Public Administration and Constitutional Affairs Committee

71 This Committee reported on Parliamentary scrutiny of secondary legislation under the 1984 Act on 8.9.2020. In that report[19] it found that 'limited Parliamentary scrutiny is not simply a mild inconvenience but often affects the quality of legislation' (para 40). It set out, in a table at pp 15/16, the time it had taken for Parliament to scrutinise secondary legislation passed under the emergency procedure. The Restriction Regulations – the most serious restrictions on day to day life to have been imposed on the population at large in modern history – were not debated until 4.5.2020, six weeks after they were made. The Health Protection (Coronavirus, Restrictions) England (No. 3) Regulations 2020 were made on 18.7.2020 and only debated on 7.9.2020; and the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 were made on 24.7.2020 but had not been debated by 9.9.2020. One Regulation, the fourth amendment to the Restriction Regulations, was made on 12.6.2020 but never debated as it was revoked by the No. 2 Regulations.

72 The Committee concluded (in a section set out in the report in bold-type):

> 51. The use of the urgent procedure has not always been justified, particularly when the Government has announced that measures will be introduced some weeks in advance. Examples of this are provided by the regulations mandating the use of face coverings on public transport, which were announced on 4 June, introduced on 15 June but not debated until 6 July. It is unclear **why the urgent procedure was necessary** when the planned legislation was announced **over a week before it was to come into force**. It is even more unclear why debate was not possible until over a month after their announcement.
>
> (Emphasis added)

73 The announcements about the Regulations challenged in this case were, similarly, made days before the Regulations were made; and with no explanation as to why any urgency (which was in any event asserted without supporting evidence) made it 'necessary' for them not to be laid

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19 https://committees.parliament.uk/publications/2459/documents/24384/default/?fbclid=IwAR3UPbKqaTxPco5U-SYEhQ-A_Vg9qHx0sSFZ6zw5zHUSNi4-gTnhMSa80s4

before and debated by Parliament before coming into force: a statutory requirement without which the use of the emergency procedure is unlawful.

74 In another emboldened section (in the original report), the Committee made the following observations, which the Claimants adopt:

> 48. The Committee is concerned by both the scale of legislation and the inability of Parliamentarians to effectively amend COVID-19 legislation. The scale of legislation, covering a large number of statutory instruments made under multiple sources, makes it very difficult for even experts to follow what legislation is in effect. **Even more concerning is the fact that Members have no mechanism to amend this legislation which is being made under statutory instrument**… Members have no power to amend statutory instruments made under that Act. As we detail below, Members have had no opportunity to meaningfully engage with and amend the lockdown regulations under the Public Health (Control of Disease) Act 1984.
>
> 49. 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.
>
> 50. **Parliamentary processes and debates help to confer legitimacy upon policy changes made through emergency legislation, particularly when the legislation is so striking in its curtailment of liberties that would normally be taken for granted**. Such debates also provide opportunities for parliamentarians to raise problems that exist in the legislation or guidance, be it on their own initiative or things that have been brought to their attention by constituents or by experts. The Committee recommends that the Government gives higher priority to facilitating parliamentary scrutiny of such legislation in future.
>
> (Emphasis added)

Conclusion

75 The explanatory notes to each of the Regulations purport to set out why the Secretaries of State used the emergency procedure. Yet none set out any reasoning (alternatively any rational reasoning) either: (a) why the measures would make any material difference to the transmission of the virus; or (b) why the introduction of the measures was urgent. Without any rational explanation as to the efficacy of the restrictions or of why (even if efficacious) they were needed urgently, there is no evidence that the Minister considered, 'conscientiously' or at all, whether the introduction of each of the Regulations was urgent.

76 No consideration was given, in any of the explanatory notes, about the number of days that would be saved between the policy decision and the regulations being made by the use of the

emergency rather than the standard procedure; or, in consequence, whether there would be a material impact on transmission by the measures being delayed by that period. (Even if, which is not the case, they had a rational basis for considering that they would make a material impact at all.) Thus, no Minister can have considered, let alone considered conscientiously, whether the use of the emergency was necessary.

77 Thus, the decisions made by the minsters that the use of the emergency procedure was necessary by reason of urgency were irrational and their declarations to that effect were thus void; and, in consequence, the use of the emergency procedure was unlawful and each of the Regulations challenged are *ultra vires* and should be quashed.

GROUND TWO: REGULATIONS ARE *ULTRA VIRES* THE 1984 ACT FOR BEING IN EXCESS OF THE ENABLING POWER RELIED UPON

Introduction

78 In determining the *vires* of each of the Regulations, the Court must apply two critical principles of statutory construction.

79 First, the introduction to each of the Regulations save the Holding of Gatherings Regulations[20] states expressly that:

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

80 There are no general enabling words. In consequence '…the court must proceed on the basis that the preamble to an SI sets out all the statutory enabling powers that are necessary for its validity' (*Vibixa Ltd v Komori UK Ltd and others; Polestar Jowetts Ltd v Komori UK Ltd and Others* [2006] EWCA Civ 536, para 22).

81 Secondly, the 1984 Act is subject to the principles of *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115, 131–132:

> "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.* ***Fundamental rights cannot be overridden by general or ambiguous words.*** *This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the*

[20] Which relies on s 45C(1) and (3)(b).

> *democratic process.* ***In the absence of express language or necessary implication to the contrary****, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document… What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament."*[21]
>
> (Emphasis added)

82 The sections of the 1984 Act from which the delegated power to make the Regulations purportedly derive, ss 45C(1), (3)(c) and (4)(d)[22], circumscribe the Minister's relevant powers to impose restrictions and requirements on or in relation to persons, premises and things by reference to the powers conferred on justices of the peace by other sections in Part 2A of the Act; see s 45C(6)(a)). Those powers to impose 'a special restriction or requirement' extend neither to imposing restrictions on the entire country nor to imposing restrictions on persons regardless of whether or not there are or may be infected. Nor do any residual powers under ss 45C(1) or (3)(c) extend to the imposing such restrictions. The Regulations are therefore *ultra vires* the 1984 Act.

83 The Regulations were imposed for six months (reg. 12) and subject to review every 21 days (reg. 3(2)). They were passed under the emergency procedure set out in s 45R of the 1984 Act. This requires that they be laid before both Houses of Parliament and that they cease to have effect in the absence of positive resolutions by both Houses within 28 days, but that period does not include any time during which Parliament is prorogued or dissolved or during which both Houses are adjourned for more than four days (s 45R(6)(a)). Moreover, once that initial resolution is passed,[23] there is no further requirement of Parliamentary scrutiny.

84 The above powers of delegated legislation appear in Part 2A of the 1984 Act, which was inserted into the 1984 Act by s 129 of the Health and Social Care Act 2008.

<u>Contrast with the Civil Contingencies Act 2004</u>

85 The delegated powers by which secondary legislation may be passed may be contrasted with the procedure by which regulations may be made under the CCA. Regulations imposed under the CCA may last no more than 30 days (s 26) and lapse in the absence of positive resolutions

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[21] See also *R v Secretary of State for the Home Department and others, ex p Saleem* - [2000] 4 All ER 814

[22] Save the Holding of Gatherings Regulations, which rely on s 45C(1), (3)(c) and (4)(b) and in respect of which see further below.

[23] As it was for the Regulations on 4.5.2020

by each House within seven days of being laid before Parliament (s 27), including in circumstances in which Parliament is not sitting or has been prorogued (s 28). Thus, while new regulations in the same form may be laid after the first regulations have lapsed, they would still require such a positive resolution.

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

Structure of the enabling provisions: 'special restriction or requirement'

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

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

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

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

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

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

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

91 Sub-section (1) is qualified by sub-section (3). Sub-sections (3) and (4) each provide that the powers 'include in particular' powers set out in their sub-sub-sections ((a) to (c) and (a) to (d) respectively); that is to say, those powers *might* be additional to others. However, the preamble to each Regulation clarifies that the enabling power derived from sub-paragraph (1) is limited to that given by sub-sub-sections (3)(c), which is the only identified sub-sub section of (3). In turn, while sub-section (4) provides that the powers of s (3)(c) 'include' those set out in (4)(a)-(d), the preamble identifies only s (4)(d). Consequently, the only enabling power is for the imposition of 'a special restriction of requirement'.

92 In any case, the Regulations plainly include provision *"imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health"* within the meaning of section 45C(3)(c). They are therefore subject to the statutory limits upon the power to make regulations imposing or enabling the imposition of such restrictions or requirements. Those limits cannot be evaded by reliance on some undefined residual category of power under the general enabling provision, s 45C(1).

93 A 'special restriction or requirement' is further defined by s 45F(6), which provides that, for the purposes of Part IIA (including s 45C)

> (a) a "special restriction or requirement" means a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)…

94 Thus, subject to any undefined residual powers he may have under section 45C(3)(c), the Secretary of State is limited to imposing restrictions and requirements that may be imposed by a justice of the peace ('**JP**')

Limitation on regulations that may be made as a 'special restriction or requirement'

95 Section 45D(3) provides that regulations imposing a special restriction or requirement under 45C(4)(d) may not include those mentioned in section 45G(2)(a), (b), (c) or (d), which include (as (d)) that a person 'may be kept in isolation or quarantine'.

96 Section 45(G) applies only to a person who is or may be infected or contaminated; s 45H(2) only to an object; and s 45(I)(2) to premises that 'are or may be infected or contaminated' and

where they may present harm to human health. Section 43J(1) provides that these powers may also be used 'to make an order in relation to a group of persons, things or premises'. Each of them gives JPs power to make restrictions only over an individual person, object or premises, or an identified group of them: and only after a judicial decision that each was or may be infected or contaminated (see ss 45J(3) to (5)).

97 The conditions that must be satisfied before a JP may make a special restriction must be further prescribed by regulations that 'make provision about the evidence that must be available to a justice of the peace' before the justice can be satisfied that 'the person or group of persons is or may be infected, risks infecting others and that it is necessary to make the order' (s 45G(7). This requirement is mirrored in relation to things and premises (respectively) by ss 45H(7) and 45I(7).

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

99 Regulations made under s 45C are further limited by s 45F(2), which applies to all health protection regulations under ss 45B and 45C. This provides that they may confer 'functions' on local authorities and 'other persons' (sub-para (a)), may 'provide for appeals from and reviews of 'decisions' taken under the regulations (sub-para (e)) and provide for the 'resolution of disputes' (sub-para (h)). Further, s 45F(6)-(8) of the 1984 Act provides that:

> *(6) Regulations under s 45C must provide for a right of appeal to a magistrates' court against any 'decision' taken under the regulations by virtue of which a special restriction or requirement is imposed on or in relation to a person, thing or premises.*
>
> *(7) Regulations under section 45C which enable a special restriction or requirement to be imposed by virtue of a decision taken under the regulations must also provide that, if the restriction or requirement is capable of remaining in force in relation to any person, thing or premises for more than a specified period, a specified person may require the continuation of the restriction or requirement to be reviewed in accordance with the regulations at specified intervals by a person determined in accordance with the regulations.*
>
> *(8) In relation to a special restriction or requirement mentioned in section 45G(2)(c) or (d)—*
>
> > *(a) the period specified by virtue of subsection (7) and the intervals specified by virtue of that subsection must be 28 days or less, and*

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

(All emphasis added)

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

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

102 In constructing the extent of the power that is delegated to Ministers, the Court must have particular regard to the *Simms* principles. The power to restrict fundamental rights may not be given by general or ambiguous words; and 'in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.' The right to gather with family and friends, at home and in public places, is a fundamental freedom protected by Article 8 and (where the gathering is political in nature, which it may be in a dwelling or public place) Article 11 of the ECHR. The forcible covering of an individual's face is a requirement never made universally in England before this year and is an intrusion on personal autonomy. And the restriction on the ability of pubs, cafés and restaurants to trade profitably is a significant deprivation of the goodwill value of their property. The Claimants rely for these propositions on submissions outlined below in Ground Three.

103 Moreover, it is inappropriate to suggest (as Lewis J did in *Dolan (No. 1)*, at para 43) that it can be 'clear' from the ambiguous wording of an enabling Act that 'a range of measures' (of exceptional breadth and affecting every person in England) can be said to be said to be consistent with the 'purpose' of the Act simply because they are asserted by the Minister to be made for the purposes of *"preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection"*. [24]

[24] See paras 72-75 in 'Were the March 2020 lockdown restrictions lawfully imposed?' Emmet Coldrick (barrister, member of Quadrant Chambers), 23 September 2020 This, the article quoted, is a detailed article that is summarised in a two part article on the UK Human Rights Blog. Mr Coldrick's other analysis strongly supports the Claimants' position in Ground 1B and is relied upon in full. The full pdf article is publicly available at this link https://drive.google.com/file/d/1CDn2n_uHil44Hk3T5qqLwxfk-q2xRpeC/view and is also available via the summary article page at: https://ukhumanrightsblog.com/2020/09/25/were-the-march-2020-lockdown-restrictions-lawfully-imposed-part-2-emmet-coldrick/ .

104 Such reasoning is the sort of 'cart before the horse' approach that was deprecated by the Supreme Court in *J v Welsh Ministers* [2018] UKSC 66; [2019] 2 W.L.R. 82 at 93 [24]:

> *"With the greatest of respect to the Court of Appeal, this approach puts the cart before the horse. It takes the assumed purpose of a CTO* [community treatment order] *– the gradual reintegration of the patient into the community – and works back from that to imply powers into the MHA* [Mental Health Act] *which are simply not there. We have to start from the simple proposition that to deprive a person of his liberty is to interfere with a fundamental right—the right to liberty of the person. It is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights."*

105 The statement of broad statutory purpose in s 45C(1) is of little or no assistance in interpreting the statutory definition, in s 45C(6)(a), of the power to impose 'a special restriction or requirement'. As Mr Emmet Coldrick puts it:

> 'Wide powers to make subordinate legislation are undoubtedly not conferred by section 45C… [which] confers powers for a range of purposes that sections 45C(4)(d) and 45C(6)(a) should not be taken to have been intended to confer powers co-extensive with the powers conferred by Part 2A on the courts but much wider powers, including wider powers to interfere with fundamental rights.'

And it would be 'fallacious to suggest that it can safely be inferred from the wide statement of purpose in section 45C(1) of the Act that Parliament must have intended that the Secretary of State should have the power to impose such a regime, which is not only highly restrictive but unprecedented.'[25]

106 Save with respect to the requirement of closures of pubs, restaurants and cafés at 10 pm (which is itself almost unprecedented as national legislation; and certainly since the Second World War), each of these measures would have been unprecedented before the extraordinary stripping of fundamental liberties in March 2020. Restrictions on the number of persons who may gather to only six, severe penalties on gatherings of over 30, the requirement to wear masks (at all and in pubs and restaurants in particular) and the continued closure of categories of businesses.

107 Thus:

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

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[25] *Ibid*

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

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

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

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

108 Further and in any event:

(1) The Secretary of State's powers to impose 'a special restriction or requirement' are defined in section 45C(6)(a) expressly and solely by reference to "a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)".

(2) On the natural meaning of those words and/or in light of the *Simms* principle, the Secretary of State's powers to impose 'a special restriction or requirement' are thus co-extensive with, not greater than, the powers of a JP to impose restrictions or requirements on or in relation to persons, things and premises.

(3) A JP cannot impose a restriction or requirement on the entire population (as opposed to a person or group of persons) and nor can the Secretary of State do so pursuant to his 'special restriction or requirement' power. Moreover, a JP can only impose a restriction or requirement where the person, thing or premises in question is or may be contaminated (see ss 45G(1), 45H(1) and 45I(1)) and the Secretary of State's 'special restriction or requirement' power is subject to the same constraint.

(4) The Regulations are therefore *ultra vires* the Secretary of State's 'special restriction or requirement' power, both because they purport to impose restrictions on the entire population and because they purport to impose restrictions without regard to whether persons, premises or things are or may be infected or contaminated.

(5) Insofar as the Secretary of State has, under section 45C(3)(c), some undefined residual power (not subject to the statutory limits and conditions applicable to the making of regulations imposing a special restriction or requirement) to impose restrictions and requirements on the population at large, that power does not, in view of the *Simms* principle, extend to a power to interfere with fundamental rights.

(6) Further, it is most unlikely that Parliament on the one hand defined and circumscribed the Secretary of State's powers to impose a 'special restriction or requirement' expressly and particularly by reference to the powers of JPs while, on the other hand, intending that the Secretary of State should have an ill-defined general power to impose such restrictions as he thinks fit on the population generally.

(7) Hence, the Regulations are *ultra vires* both the defined 'special restriction or requirement' power and any undefined residual powers the Secretary of State may have under s 45C(1) or s 45C(3)(c).

Powers relating to '**a**' gathering; and interpretive effect on other Regulations

109 The enabling power relied upon by the Holding of Gatherings Regulations is s 45C(1), (3)(c) and (4)(b) of the 1984 Act. Sub-section (4)(b) provides that the restrictions or requirements that may be made by the Minister include:

> 'a prohibition or restriction relating to the holding of an event or gathering'.

110 While s 43J(1) provides that powers under 45G, 45H and 45I may apply to a 'group of persons', these powers apply only to 'special restrictions and requirements' under s 45(4)(d), not powers relating to 'an' event or gathering under s 45(4)(b).

111 Thus, there is no basis in the statute for s 45(4)(b) to make provision for more than one gathering; and the Holding of Gatherings Regulations are *ultra vires* the 1984 Act. Insofar as it might be suggested that any interpretive provision that the singular includes the plural:

(1) These are the essence of general and ambiguous rules that could not on their face allow the Secretary of State to make orders affecting all gatherings over a certain size throughout England (as the Holding of Gatherings purport to do); and

(2) Were this in doubt, the *Simms* principle does not allow such general words to be used to interfere with fundamental rights contrary to Articles 8, 9 and 11 of the Convention; and, insofar as they deprive businesses of their goodwill value through much decreased profitability, Article 1 of Protocol 1 to the Convention; and

(3) Further and alternatively, even if the power permitted the Minister to make orders about more than one event or gathering, it does not permit him to make general orders about all gatherings in England distinguished only by their number or whether they have had a risk assessment, rather than about specific and identifiable events and gatherings.

(4) In any event, the s 45(4)(b) power refers solely to a prohibition or restriction relating the holding of an event or gathering. It does not provide a basis for prohibiting and criminalising mere participation in a gathering.

112 The remaining Regulations imposing restrictions on gatherings (the No. 2 Regulations in their original form and as amended and the Rule of Six Regulations and the Booking Regulations) rely for their power to do so on sub-section (4)(d) as imposing special restrictions or requirements. However, they do so despite the specific statutory power given to Ministers to impose restrictions on '**an**' event or '**a**' gathering; or, alternatively, specific and identifiable gatherings.

113 In these circumstances *lex specialis derogat legi generali* applies: a law which governs a specific matter overrides, or takes precedence over, a law of general application (*R (Nealon) v SS for Justice* [2015] EWHC 1565 (Admin) at [32]). See also *Moohan v Lord Advocate* [2015] AC 901, per Lord Hodge at [62]: 'where two provisions are capable of governing the same situation, a law dealing with a specific subject matter overrides a law which only governs general matters."

114 Thus, not only do Ministers not have powers to restrict gatherings through their power to impose a 'special restriction or requirement', in doing so they have attempted to use a general power for a specific measure when there is a specific provision permitting such regulations **but only in very limited circumstances**. Thus, not only is the reliance on the enabling power an impermissible use of general and ambiguous words to impose restrictions on fundamental rights, s 45C(4)(d) is not available to them where s 45C(4)(b) provides a specific statutory power.

The explanatory memorandum to the 2008 amendments and the International Health Regulations

115 In his judgment in *Dolan (No. 1)* Lewis J relied upon the explanatory memorandum to the 2008 Act and a "new international approach" in the International Health Regulations 2005 ('IHR'), to which the explanatory memorandum refers. In his detailed and learned article, Mr Coldrick set out why that reasoning was unjustified by either.[26] Mr Coldrick's analysis is copied below and relied upon by the Claimants, with gratitude, in full:

> 76. Lewis J also considered that the explanatory memorandum to the 2008 Act supports the Secretary of State's case as to his legislative powers under Part 2A. He stated at [44]:

[26] *Ibid*.

"Paragraph 29 of that memorandum explains that much of the legislation dealing with disease was out of date reflecting 19th century concerns about the risks from the kind of health threats arising from infectious diseases such as plague, cholera and the like. Those provisions were increasingly recognised as being unable to deal with new threats such as serious acute respiratory syndromes or SARS. The new international approach, and regulations, were concerned with infectious diseases and contamination generally and paid more attention to the arrangements needed within countries (not simply at borders) to provide an effective response to health risks. The 1984 Act was amended to enable that approach to be adopted."

77. That reasoning is also flawed. Paragraph 29 of the explanatory memorandum merely states:

"The Public Health (Control of Disease) Act 1984 ('the Public Health Act 1984') consolidates earlier legislation, much of it dating from the 19th century. Many of its assumptions, both about risks and about how society operates, are now out of date. Most concerns about health threats have, since the 19th century, related to infectious disease (plague, cholera and the like). This is reflected in the way that Part 2 of the Public Health Act 1984 focuses on infectious disease. It makes highly detailed provision on some matters (for example, it is a criminal offence to expose a public library book to plague, or to hold a wake over the body of a person who has died of cholera)…

78. There is nothing in the explanation above to suggest that the 'updating' was intended to confer new and extraordinarily far reaching powers on Ministers to interfere with the fundamental rights of the entire population. Moreover, the only *"matters that are now of concern"* that are referred to in paragraph 29 explanatory memorandum are *"contamination by chemicals or radiation"*.

79. Paragraph 30 of the explanatory memorandum goes on to state that:

"Internationally the case for taking an "all hazards" approach to dealing with such health threats was taken up by the World Health Organization ('WHO') and reflected in the International Health Regulations 2005 ('IHR'). The IHR are the means by which WHO aims to prevent and control the international spread of disease, by action that is commensurate with and restricted to public health risks, and which avoids unnecessary interference with international traffic and trade. The previous International Health Regulations (1969) were concerned with action at international borders in relation to three specific infectious diseases (cholera, plague and yellow fever), but increasingly were recognised as unable to deal with new threats, such as SARS. The new IHR are concerned with infectious diseases generally, and also with contamination. They also pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks. The IHR came into effect in June 2007. This Act amends the Public Health Act 1984 to enable IHR to be implemented, including WHO recommendations issued under them."

80. It appears that counsel for the Secretary of State may have used the reference in the above to SARS to bolster his submission (recorded in paragraph 36 of the judgment) that the Secretary of State's *"powers were not limited to making orders in relation to specific individuals or groups of individuals and…[it] would be absurd if the provisions were to be read otherwise given the nature of the public health threat*

and the purpose underlying the 1984 Act which was to enable measures to be taken to address the threat of epidemics such as serious acute respiratory diseases or SARS.". Quite apart from the point that such reasoning conflates the various categories and sub-categories of subordinate legislative powers conferred by Part 2A, the submission on behalf of the Secretary of State proceeds on an implicit but erroneous assumption that it is obvious that Parliament understood and intended that a power to impose wide ranging restrictions on the liberty of population as a whole was needed to deal with threat of epidemics such as SARS.

81. The new International Health Regulations 2005 ("IHR 2005"),[27] referred to in paragraph 30 of the explanatory memorandum, did indeed *"pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks"*. However, the measures that they contemplated did not include the sort of population wide 'lockdown' restrictions that the Secretary of State contends Part 2A entitles him to impose. Article 18.1 of the IHR 2005 deals with recommendations issued by the World Health Organization to State Parties with respect to persons. It provides that such recommendations *"may include the following advice"*:

> *"– no specific health measures are advised;*
> *– review travel history in affected areas;*
> *– review proof of medical examination and any laboratory analysis;*
> *– require medical examinations;*
> *– review proof of vaccination or other prophylaxis;*
> *– require vaccination or other prophylaxis;*
> *– place suspect persons under public health observation;*
> *– implement quarantine or other health measures for suspect persons;*
> *– implement isolation and treatment where necessary of affected persons;*
> *– implement tracing of contacts of suspect or affected persons;*
> *– refuse entry of suspect and affected persons;*
> *– refuse entry of unaffected persons to affected areas; and*
> *– implement exit screening and/or restrictions on persons from affected areas."*

82. The above list does not include the sort of population wide measures (prohibiting the entire population from leaving their homes, prohibiting gatherings of more than 2 people, prohibiting business from being carried on) that the Secretary of State contended with bluster was so obviously intended that it would be "absurd" to read the Act otherwise. Moreover, Parliament evidently chose not to confer on the Secretary of State a power to impose all of the measures referred to in the IHR 2005 list quoted above. The list includes *"require vaccination or other prophylaxis"*, but section 45E of the 1984 Act provides that:

> *"(1) Regulations under section 45B or 45C may not include provision requiring a person to undergo medical treatment.*
> *(2) "Medical treatment" includes vaccination and other prophylactic treatment."*

83. The reality is that the explanatory memorandum provides little or no real assistance in relation to the issues of interpretation that arise in this case. SARS may have been recognised as a *"new threat"* but it does not even begin to follow that the statutory intent in Part 2A was to afford the Secretary of State colossal powers to restrict the liberty of the population as a whole.

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[27] 5 A copy of the IHR 2005 is publicly available on the WHO website: https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1

Further support for the Claimants' position

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

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

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

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

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

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

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

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

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

(4) As argued by Sandhurst and Brandreth:

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

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

for the use of force are *ultra vires*, irrespective of whether other parts of the Regulations are *vires*.

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

(7) The wide powers provided for under the CCA are subject to strict limitations of time and rigorous Parliamentary scrutiny. Parliament, in passing the additional s 45G in the 1984 Act (by s 129 of the Health and Social Care Act 2008) may be imputed to have had in mind that any delegation of the power to make secondary legislation through the 1984 Act would supplement the delegated powers of the CCA (of 2004); and that powers that had the breadth of those delegated under the CCA should only be used under that Act. This is further supported by the fact that Parliament (in passing the 2008 Act) will have been aware that regulations that may be made under the CCA must be subject to much stricter limitations of time and much more rigorous Parliamentary scrutiny than those imposed under the 1984 Act; and the principle (albeit in reference to delegated powers in the same Act), that a general delegated power cannot be used in a way that would undermine the limitations imposed in relation to delegated powers elsewhere in that Act.[28]

(8) If this were not sufficient to establish the intention of Parliament in providing for regulations imposing a 'special restriction or requirements' and recourse could be made to ministerial statements during the passage of the 2008 Act (by which Part 2A of the 1984 Act was inserted) these also strongly support the above construction, as Craig has observed.[29] Ministers proposing the 2008 legislation in parliament (HL Debates, Vol. 700, Col. 452 (28 March 2008)) claimed that the legislation 'provided significant safeguards… to protect individuals' and made no reference to delegating powers more widely.

GROUND THREE: THE REGULATIONS ARE IRRATIONAL AND DISPROPORTIONATE

Introduction

117 The Claimants' submissions in support of this matter consider the legal test and material considerations before setting out why the Court is asked to find the Regulations and Guidance

[28] *Bennion on Statutory Interpretation,* s 3.7, citing *R (JM (Zimbabwe)) v Secretary of State for the Home Department* [2017] EWCA Civ 1669 *per* Flaux LJ at [74], [76].
[29] *Ibid*

are irrational and disproportionate. This question is one that can only be answered holistically. These grounds have the following structure:

(1) The standard of review;

(2) The elements of the Guidance that are challenged on the grounds that they restrict the number of gatherings;

(3) The government's narrow approach to decisions to make or ease restrictions;

(4) Evidence of the severity of the virus in general and the limited effect of previous restrictions;

(5) Government data about the extent of the virus now and the risk of growth in transmission;

(6) The absence of scientific evidence or advice about the efficacy of these measures;

(7) The harms caused by these measures:

  (a) Through interference with fundamental rights;

  (b) On the Claimants; and

  (c) On society and the economy; and

(8) Conclusion with respect to each of the Regulations and challenged portions of the Guidance.

The standard of review

118 The lawfulness of the Regulations is subject to judicial review;[30] and the requirements of rationality and proportionality apply to guidance as they do to the Regulations.[31]

119 The Claimants are 'victims' of the breaches of Convention rights outlined below, pursuant to s 7 of the HRA. However, the Court's power of review of the proportionality of the restrictions is not confined to the impact of the restrictions on those Claimants. It must interpret the power to make the regulations in a manner that is compatible with Convention rights generally.

120 Section 3 of the HRA 1998 provides that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

121 Section 3 is applicable irrespective of whether the party (with sufficient interest) invoking the statutory provision in question is a "victim".

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[30] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 (CA) at 362

[31] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273 and many other cases

122 In respect of regulations made under the 1984 Act, s 45D provides that:

> *(1) Regulations under section 45C may not include provision imposing a restriction or requirement by virtue of subsection (3)(c) of that section unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
> *(2) Regulations under section 45C may not include provision enabling the imposition of a restriction or requirement by virtue of subsection (3)(c) of that section unless the regulations provide that a decision to impose such a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
> *(3) …*
> *(4) Regulations under section 45C may not include provision enabling the imposition of a special restriction or requirement unless—*
> *(a) the regulations are made in response to a serious and imminent threat to public health, or*
> *(b) imposition of the restriction or requirement is expressed to be contingent on there being such a threat at the time when it is imposed.*
> *(5) For the purposes of this section—*
> *(a) regulations "enable the imposition of a restriction or requirement" if the restriction or requirement is imposed by virtue of a decision taken under the regulations by the appropriate Minister, a local authority or other person;*
> *(b) regulations "impose a restriction or requirement" if the restriction or requirement is imposed without any such decision.*

123 Section 45C of the 1984 Act imposes a discretion on the Secretary of State which, in accordance with section 3 of the HRA 1998, must be read in a manner consistent with the requirements of Articles 8, 11 and of Article 1 of Protocol 1 of the Convention (amongst others). It therefore cannot be exercised in a manner that breaches the principles of necessity and proportionality; and regulations that fail to conform to such requirements are *ultra vires* (*R (Rusbridger) v Attorney General* [2003] UKHL 38 at [21] per Lord Steyn).

124 A restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been used to achieve the legitimate aim, although a challenge will not succeed merely by establishing that alternative methods *could* have been used to achieve the aim.[32] The domestic courts must engage in 'anxious scrutiny' of decisions affecting fundamental rights;[33] and, being in a better position to assess local needs and conditions, apply a stricter standard than the Strasbourg Court while allowing the domestic public authority a 'discretionary area of judgment' within which the court will not interfere.[34] The question is an

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[32] *Mellacher v Austria* (1989) 12 EHRR 391; *Sejdic v Bosnia and Herzegovina* (2009) 28 BHRC 201, ECtHR
[33] See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [26]–[27], *per* Lord Steyn; *R (on the application of Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36 at [9], *per* Lord Bingham of Cornhill; *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [16], per Lord Bingham of Cornhill
[34] See *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 843–844 and 993–994, HL, per Lord Hope of Craighead; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105, (reversed on appeal but not on this

objective one based on the merits, not whether the decision maker has considered each less restrictive measure.[35]

125 Where, as with all Regulations challenged, no impact assessment has been made, the court should not give the government any or a more than minimal margin of discretion (*R (FACT) v Secretary of State for DEFRA* [2020] EWCA Civ 649 at [100]).

126 Where the proportionality of secondary legislation under the Convention is determined by a domestic court, the Supreme Court has observed that the 'margin of appreciation' is not applicable[36] and that any 'margin of discretion' may be narrow[37]. The Court of Appeal, in *R (British and American Tobacco and Others) v Secretary of State for Health* ([2016] EWCA Civ 1182 a challenge to the proportionality of secondary legislation imposed on public health grounds) found that it would be appropriate for a domestic court to apply a test of objective reasonableness rather than a margin of appreciation (at para 227).

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

> '…national rules or practices likely to have a restrictive effect, or having such an effect, on imports are compatible with the Treaty only to the extent to which they are necessary for the effective protection of health and life of humans. A national rule or practice cannot benefit from the derogation provided for in art 30 EC if the health and life of humans may be protected just as effectively by measures which are less restrictive of intra-Community trade (see, to that effect, the *Deutscher Apothekerverband* case[38] (para 104)).'[39]

128 The Court of Appeal has held[40] that the test of proportionality applied to public health measures, again by EU law, was as set out in *R v Minister of Agriculture, Fisheries and Food, Ex parte Federation Européenne de la Santé Animale (FEDESA) and Others* ([1990] ECR I-4023, para 13), namely:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately

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point [2007] UKHL 11); *Sheffield City Council v Smart* [2002] EWCA Civ 04 at [42], *per* Laws LJ; *Brown v Stott* [2003] 1 AC 681 at 703, 710–711.
nsport Roth GmbH v

[35] *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19, *per* Baroness Hale at para 31
[36] *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, paras 44 and 55
[37] *R (Steinfeld and Keidan) Secretary of State for International Development* [2018] UKSC 32
[38] (2003) 81 BMLR 33.
[39] *Rosengren and others v Riksåklagaren* [2009] All ER (EC) 455, para 43.
[40] *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, at paras 20 and 48

> pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."
>
> (Emphasis added)

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

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

130 And, to the extent that the exercise of the power of delegated legislation might be treated similarly to any other public law decision, the test to be applied by the court is not to determine whether the decision maker failed adequately to take potential restrictions of Convention rights into account, but whether an objective consideration leads to the conclusion that such restrictions are disproportionate.[41]

131 The intensity of review is considerable where fundamental rights are at stake: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, *per* Lord Reed at para 113:

> "there are a number of authorities in which a finding of unreasonableness was based on a lack of proportionality between ends and means. ... There are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker's view depending on the context. The variable intensity of reasonableness review has been made particularly clear in authorities, such as *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, and R v Ministry of Defence, Ex p Smith [1996] QB 517, concerned with the exercise of discretion in contexts where fundamental rights are at stake. The rigorous approach which is required in such contexts involves elements which have their counterparts in an assessment of proportionality, such as that an interference with a fundamental right should be justified as pursuing an important public interest, and that there should be a searching review of the primary decision-maker's evaluation of the evidence."

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

(Emphasis added)

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

> [*The effect of precedent*] *can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine*
>
> *(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;*
> *(ii) whether it is rationally connected to the objective;*
> *(iii) whether a less intrusive measure could have been used; and*
> *(iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.*
>
> *These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.*
>
> (*Bank Mellat, supra*, paras 20)

133 And, more concisely:

> *There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference.*
>
> (*Pham v Secretary of State for the Home Department* [2015] 3 All ER 1015, para 106)

134 Moreover, the Supreme Court recently held that:

> '*…although the courts cannot decide political questions, the fact that a legal dispute… arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it… almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries…*
>
> *'…the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts…*'[42]

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

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[42] *R (Miller) v Prime Minister (No. 2), ibid,* paras 31 and 33.

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

(1) That the restrictions are imposed on every individual in the country;
(2) The magnitude of their impact on a nexus of rights and freedoms;
(3) That the restrictions prevent society from functioning as it has traditionally through an exceptional curtailment on the social and cultural lives of the population (measured against the norm: that more Draconian restrictions have previously been imposed is irrelevant);
(4) The absence of any evidence that SAGE advised the Secretary of State to impose a limit to gatherings of 30 (before No. 2 Regulations were imposed, in respect of gatherings in dwellings or before that limit was set out in Guidance for weddings) or of 6 (before making the Rule of Six Regulations) or to impose the additional restrictions in the remaining Regulations;
(5) Insofar as any advice was given, there is no empirical evidence that any of those restrictions would have made a material difference to transmission of the virus;
(6) The fact (known to the government before it imposed these restrictions) that the relaxation in restrictions had had no negative effect on the transmission of the virus, measured by its impact on hospitalisations and deaths;
(7) The absence of any evidence that the government has evaluated this evidence (adequately or at all) against the harms likely to be caused by the restrictions and that were caused by similar or tighter restrictions imposed by the Restriction Regulations;
(8) That such exceptional restrictions were imposed with no initial Parliamentary scrutiny, very limited subsequent scrutiny and under an Act that did not impose a fixed period before initial scrutiny or require regular (or any) scrutiny thereafter, unlike under the CCA;[43] and
(9) The other factual considerations outlined below.

Guidance

137 Non-statutory Government guidance is judicially reviewable, even though it does not impose direct legal consequences on the claimant.[44] The court must also limit its analysis to what is

[43] See above in relation to Ground 1.
[44] See, e.g. *R. (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003; [2006] Q.B. 273 (review of guidance on withdrawal of artificial feeding, though noting that the "court should not be used as a

required to resolve the practical problem before it –it must not answer hypothetical questions of law.[45]

138 Government guidance will be unlawful where, if followed, it would lead to a breach of a person's Convention rights.[46] Where Convention rights require a balance to be struck, and the guidance concerns issues of social or economic policy, the executive will be entitled to a substantial degree of deference from the courts.[47] The level of deference to which the executive is entitled will decrease where the rights at stake are unqualified, or of high constitutional importance, or are of a kind where the courts are well placed to assess the need for protection.[48] Guidance must be proportionate to be lawful.[49]

139 In respect of the Hospitality Guidance, the Court is asked to quash the following:

(1) Guidance not to accept a table booking for a group of more than six individuals or admit a group of more than six people (p 9);
(2) Guidance to take reasonable steps to prevent separate groups of six (or any groups) from mingling with each other (p 9);
(3) Limits on gatherings of more than six save within a support bubble (p 15);
(4) Guidance to local authorities avoiding licensing events with larger gatherings (p 16);
(5) Removing the example of '(facilitating indoor gatherings between multiple households)' at p 16;
(6) All reference to face-coverings at p 41;
(7) Any part of the guidance that reflects the Regulations quashed (including but not limited to gathering limits, opening hours, the wearing of masks and table only service);
(8) Any other limitation on the numbers of persons who may sit together or otherwise gather or on bookings;

140 In respect of the Marriage Guidance and the Wedding Reception Guidance, the court is asked to quash all restrictions on the number of persons who may gather (either as a whole or on

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general advice centre" [21]; *R. (on the application of A) v Secretary of State for Health* [2009] EWCA Civ 225; (2009) 12 C.C.L. Rep. 213 (NHS guidance on how NHS trusts should exercise discretion to grant or withhold treatment to failed asylum seekers was unlawful for lack of clarity).

[45] *Ibid.*

[46] Since the relevant department is a "public authority" for the purposes of section 6 of the Human Rights Act 1998 when it publishes the document. *See e.g. R (Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin), [2006] QB 539.

[47] *R. (on the application of Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin); [2006] Q.B. 539 at [147] (citing *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC A326, 381, Per Lord Hope of Craighead).

[48] *Ibid* at [148].

[49] *Ibid* at [150].

particular tables) and any part of the guidance that reflects Regulations quashed (including but not limited to gathering limits, opening hours, the wearing of masks and table only service).

141 The Claimants' submit as follows:

(1) Were the Rule of Six and subsequent regulations quashed, the Guidance would continue to impose restrictions on gatherings that would restrict the exercise of Article 8 rights (by restricting the ability of family and friends to gather outside their houses, which would be particularly damaging for those with small flats of houses) and Article 11 rights (by restricting the ability of persons to gather for political meetings). The Guidance has also deprived businesses of much of their goodwill value by restricting their profitability.

(2) This and other Guidance has been applied rigorously by the public bodies to the extent that it would not be possible for Cripps and other businesses to contravene the guidance without having their ability to trade curtailed or removed;

(3) The Guidance, collectively, imposes restrictions with statutory recognition and commercial effect that are unlike any that have been imposed in peacetime (and including in pandemics with similar or more fatalities in 1957/58 and 1968/69, to say nothing of the 1918/19 pandemic that was more serious by an order of magnitude). Their effect is difficult to distinguish from the effect of legislation so far as it affects the aforesaid fundamental rights of individuals and businesses.

(4) Thus, if the Court finds that the restrictions on gatherings are disproportionate breaches of fundamental rights, it follows that they are disproportionate when imposed (effectively) through guidance; and that those parts of the Guidance should be quashed.

The government's narrow approach to the policy decisions

142 The background to the policy formation by the government of its approach to relaxing and reinstating restrictions to contain the virus begins with the statement of the First Secretary of State, made on 16.42020,[50] when announcing the decision not to end the original Restriction Regulations, made the following statement:

> "Now, in terms of the decisions that lie ahead, we want to be as up front with the British people as we possibly can. So, let me set out 5 specific things which the government will need to be satisfied of before we will consider it safe to adjust any of the current measures.[51]
>
> (Emphasis added)

[50] The Regulations were imposed for six months but the Secretary of State has a duty to review them every 21 days (reg. 3(2)) and must terminate them if he decides they are 'no longer necessary' for the reasons quoted in para 59, above (reg. 3(3)).

[51] Witness statement of Michael Gardner, para 2.22 (https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020)

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

- making sure the NHS could cope;
- a "sustained and consistent" fall in the daily death rate;
- reliable data showing the rate of infection was decreasing to 'manageable levels';
- ensuring the supply of tests and Personal Protective Equipment (PPE) could meet future demand; and
- being confident any adjustments would not risk a second peak.[52]

144 In a written statement to the House of Commons made on 28 April about the review of and amendments to the Regulations the First Secretary of State re-iterated that the 'five conditions' 'would need to be met before the measures were are eased'.[53]

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

> '…And, it's important to say this, at **each** point along the way when we take these decisions, they will be based on the five tests and the scientific advice that we receive…'.[54]
>
> (Emphasis added)

146 These five tests were re-iterated by the Prime Minister in his press-conference on 10 May 2020. In that speech, he stated that, while there would be a staged relaxation of the 'lockdown' restrictions, each relaxation would be 'subject to all these conditions and further scientific advice' and that 'we will be driven not by mere hope or economic necessity. We are going to be driven by the science, the data and public health.'[55]

147 The Prime Minister and Government have since confirmed in an official paper that each of the above five tests will have to be fulfilled before future relaxations of the 'lockdown' – and the restrictions under the Regulations – can be permitted.[56]

148 While these statements were made at an earlier stage in the development of the government's response, they form the background to its approach. In formal statements of Government policy made (twice) by the First Secretary, (twice) by the Prime Minister and in a formal Government

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[52] 'UK lockdown extended for 'at least' three weeks' (https://www.bbc.co.uk/news/uk-52313715), 16.4.2020).
[53] Witness Statement of Michael Gardner, para 2.22 (https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-28/HCWS206/)
[54] Witness statement of Michael Gardner para 2.22
[55] Witness statement of Michael Gardner, para 2.23 (https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020)
[56] Witness statement of Michael Gardner, paras 2.23

paper, the government pronounced that each of the five tests must be met before any of the restrictions are lifted. Regardless of the 'awareness' of the Government of these considerations, they could not take them into account in determining whether to relax the restrictions if – as the Prime Minister and First Secretary have said they do – they must be satisfied that these tests are each met.

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

> 'The longer the virus affects the economy, the greater the risks of long-term scarring and permanently lower economic activity, with business failures, persistently higher unemployment and lower earnings. This would damage the sustainability of the public finances and the ability to fund public services including the NHS. It would also likely lead to worse long-run physical and mental health outcomes, with a significant increase in the prevalence of chronic illness.'[57]

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

150 The witness statement of Michael Gardner includes at paragraphs 2.22 to 2.23 references to the evidence that the Government has imposed on itself a requirement to meet all five conditions before it may lessen any of the restrictions.

151 Although the Five Tests have not been mentioned in government announcements since May, there is nothing to suggest that the government has departed from its over-rigid policy to prioritise considerations about the virus above all others. Indeed, on 23.9.2020 the UK government was a party to a joint declaration with devolved governments that it was committed 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.' [58]

152 A statement made after a declaration that:

> 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.

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

[58] https://www.gov.uk/government/publications/joint-statement-on-covid-19/joint-statement-on-coronavirus-covid-19

153 While the policy declaration states that the government intends to 'minimise' the impact on the economy and society, that was a secondary consideration. It committed itself to 'suppressing' the virus 'to the lowest possible level and keeping it there' while only 'striving' to return life to 'as normal as possible'; and stated that 'we must' aim to bring 'R back below 1'. **This is a reference to the attempted impostion by governments of a dystopian 'New Normal' that has never been the subject of any debate in Parliament, let alone in the country.**

154 No mention was made in this statement that the government's decisions – including restrictions on the fundamental rights and the economic future of the country – must be proportionate and must weigh in the balance the harms that may be caused by such a policy. This is consistent with its policy position since March, that considerations about viral transmission should be put before any other.

155 The government's approach to policy formation and decisions to tighten or decrease restrictions was and is fundamentally flawed.

156 Its adoption of an over-rigid policy, effectively disabling itself from executing "a true and proper exercise of the discretion conferred by Parliament";[59] and failed to use its powers in the way they were intended, namely to employ and use the discretion conferred upon it.[60] By "shutting its ears", it foreclosed its participation in the decision-making process that was intended by Parliament.

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

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[59] *R (on the application of Hillsden) v Epping Forest* [2015] EWHC 98 (admin) at [29] per McCloskey J, [2015] All ER (D) 226 (Jan).
[60] *De Smith's Judicial Review* (8th edn Sweet & Maxwell 2018) [9-002].

158 The restrictions may only be proportionate if three conditions are met. First, it was reasonable for the Minister to conclude that there was a 'serious' risk to human life (and not just of the transmission of the virus) were restrictions not introduced. Secondly, that a Minister could reasonably conclude that these particular restrictions would reduce materially the serious risk to human life. Thirdly, that the positive effect of their imposition on the risk to human life from the coronavirus relative to less restrictive measures (if any) is not outweighed by the harms they might cause.

159 In making this decision, the Secretaries of State were required to have had regard to the gravity and magnitude of the effects and consequences of the restrictions on the fundamental rights of every resident of England and all businesses in one sector of the economy.[61] This duty to take into account those considerations is independent and complementary to its duty not to impose restrictions disproportionate to the exercise of fundamental rights (pursuant to s 6(1) of the HRA). Those effects are of 'fundamental importance' to the decision whether to impose the measures.

Evidence of the severity of the virus and the effectiveness of previous restrictions

160 The nature and severity of the virus was much less well known in March 2020, although 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 19.3.2020 (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.[62]

161 Since then, the scientific evidence and knowledge about the virus has increased considerably; and has demonstrated that it is minimal seriousness to most of the population. In particular:

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

[62] 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.

(1) Only 309 people under 60 with no pre-existing health conditions have died in England in hospital (the 309 least likely to have shielded and most likely to have been in contact with the most number of people) and just over 2,000 under 60 (including those with pre-existing conditions) have died in total. Of under 40-year-olds only 238 have died in England, with or without pre-existing conditions (Gardner **WS 3.9**). These deaths, that have occurred over around six months. This is to be contrasted with 7,926 under 40-year-olds who died in total in 2018 (the last year for which statistics are obtainable from the ONS) and 29,174 under 60-year-olds.[63]

(2) As an example of this, of 48,300 American students in 37 universities who have been infected with the virus since August, only two were hospitalised and there were no fatalities.[64]

(3) The infection fatality rate ('**IFR**', that is to say the proportion of those infected with the virus who die) is between 0.1% and 0.25%, rather than the 0.9% that was the assumption by Professor Neil Ferguson *et al* in the report that is widely credited with influencing the government to impose a 'lockdown';

(4) Professor Ferguson modelled the infections growing exponentially without intervention to infect 70% of the population. Serious flaws in Prof Ferguson's credibility have been known for many years, given the extreme exaggerations of the predicted fatality rates of Swine Flu, SARS and other minor pandemics. Well before the challenged Regulations were made, serious flaws were exposed with the coding on which he based his modelling, his predictions and evidence that his predictions exaggerated fatality rates by orders of magnitude (including that his modelling, applied to Sweden, predicted 15 times more deaths than actually occurred) (see Gardner para 2.10);

(5) There is substantial evidence that between 30 and 50 % of the population are likely to have had pre-existing 'T-Cell immunity' due to their exposure to other coronaviruses (such as versions of the common cold) that would suggest that herd immunity can be reached after around 20 to 30 % of the population were infected with the virus, rather than the 70 % that was assumed by Professor Ferguson;

(6) Although asymptomatic adults infected with the virus are able to transmit it, there is substantial evidence that their

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63 https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/deathregistrationssummarytablesenglandandwalesdeathsbysingleyearofagetables

64 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.

(7) The 'trajectory' of infections from the virus can now be seen to have peaked well before the original 'lockdown' was introduced, measured by the average number of days between the date of a death of a patient with the virus and his or her infection, which is around 23;[65] an analysis that also shows that the rate of increase of infections began reducing in February 2020 and was not exponential at least from that point (which was another of Professor Ferguson's assumptions). This evidence is also consistent with that of Sweden (and in particular Stockholm, where there was no lockdown or school closures for those under 16), whose trajectory of deaths from the virus forms a 'Gompurtz curve' very similar to that of England and (in particular) London.[66]

(8) There is evidence that the official number of Covid-19 fatalities inflates substantially the number of those whose death was caused by the virus, including that they include all those who have had a positive test for the coronavirus (not necessarily a finding that they have developed Covid-19) and those who have not tested positive for the virus but whom a clinician reasonably believes may have been infected with it **(WS para 4.3)**;

(9) 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[67] **(WS 3.9);**

(10) The original, and effectively the only, justification for the 'lockdown' was that it was necessary to 'save the NHS' from being overwhelmed with patients needing treatment from the virus, in particular through artificial ventilation in intensive care units ('**ICUs**'). Yet, the NHS's capacity in its existing hospitals was never over-reached at the peak of hospitalisations and deaths in April 2020 and it never used the 'Nightingale' hospitals built to provide additional capacity, which have now been mothballed.

(11) The restrictions imposed in March were progressively reduced from April 2020. This entailed, by definition, a great increase in the degree of social interaction. Yet the rate of hospital hospitalisation and deaths continued to decline throughout this period and to date.

162 While it is not for the court to evaluate this evidence, 'there should be a searching review of the primary decision-maker's evaluation of the evidence' (*Pham, supra*). Where the government's

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[65] 'Did COVID-19 infections decline before UK lockdown?' (https://arxiv.org/pdf/2005.02090.pdf) Simon N. Wood, University of Edinburgh, 20.9.2020 (an earlier version was published in July)/

[66] 'Comment on Flaxman et al. (2020): The illusory effects of non-pharmaceutical interventions on COVID-19 in Europe' (https://advance.sagepub.com/articles/Comment_on_Flaxman_et_al_2020_The_illusory_effects_of_non-pharmaceutical_interventions_on_COVID-19_in_Europe/12479987/1) Stefan Homburg, Christof Kuhbandner 17.6.2020

[67] 21 children and teenagers under 20 have died in circumstances where Covid-19 was mentioned on their death certificates compared to 166 victims of seasonal flu in 2018 and a total of around 1,000 deaths of children between 1 and 15 in 2019; references in witness statement.

entire approach has been predicated on 'non-pharmaceutical interventions' (that is to say, breaches of fundamental human rights) being effective means of reducing transmission and necessary to save life, it was incumbent on them to evaluate whether they were. Yet, not only is there is no publicly available evidence that these factors have been evaluated, they were ignored in the presentation by Professor Whitty and Sir Patrick Vallence in their presentation that was designed to emphasise the need for more restrictive measures.

The current risk presented by transmission of the virus

163 The government's approach to evidence of the risk of transmission is predicated on three assumptions: (a) that the use of Positive polymerase chain reaction ('**PCR**') tests is the most appropriate means of measuring the transmission of the virus; (b) that transmission of the virus is rising and is at risk of rising exponentially; and (c) that it is a proportionate public health response and a lawful use of powers granted by the 1984 Act to focus on transmission of a virus rather than the risk of death. Each of these assumptions is flawed.

164 First, the government's evaluation of its use of the PCR tests is a relevant consideration where the increase in positive testing has such devastating consequences for large regions (where 'local lockdowns' are justified wholly or mainly by the increase in raw positive test result) and the country as a whole (given that test results are at the heart of its justification for the challenged restrictions). This usage is irrational and disproportionate on the following grounds:

(1) Empirical evidence – that is to say analysis of individuals who have been tested rather than the speculative modelling favoured by the government and its advisers – shows that the PCR test find positive test results for individuals who have not been infectious for up to ten weeks.[68]

(2) There is considerable evidence that the PCR tests run by the government return a considerable number of false positive results; and that the proportion of false positives is greatly increased when a very small proportion of tests are positive (as they now are). This is explained by Dr Carl Henghan of Oxford University and Dr Mike Yeadon, formerly chief adviser of Pfizer, who explain that the overall percentage of test results can expected to include 0.8% or more of false positives. Thus, were the positive results only 1 %, they could include upwards of 80% false positive results.

[68] 'SARS-CoV-2, SARS-CoV-1 and MERS-CoV viral load dynamics, duration of viral shedding and infectiousness: a living systematic review and meta-analysis' by Cevik, Tate, Lloyd, Maraolo, Shafers and Ho (https://www.medrxiv.org/content/10.1101/2020.07.25.20162107v2) (29.7.2020). 'No study to date has detected live virus beyond day nine of illness' and yet 'Maximum duration of SARS-CoV-2 RNA shedding reported in URT, LRT, stool and serum', which can lead to positive test results, was found after '83, 59, 35 and 60 days' of illness (so up to 74 days after the last day of possible infectiousness).

(3) The number of 'cases' bears a strong relationship to the number of tests, which the government has been increasing and intends to increase still further;

165 Secondly, the government has failed to take into account the limited change in hospitalisations and deaths, which is a far more relevant consideration than the above. It is of significance that the Scientific Committee for Emergencies ('**SAGE**') advised (in a paper considered on 28.4.2020 concerning whether to impose quarantine on travellers from other countries) that rates of deaths were a much more accurate means of measuring the prevalence of SARS-CoV-2.

166 Thirdly, the government has asserted falsely that there has been or is likely to be 'exponential growth' in the number of infections. This is not borne out by the data, as set out by Mr Gardner at paras 4.50 – 4.51. Moreover, it is not borne out by evidence that the trajectory of viral infections does not rise exponentially, as set out in the above section addressing the spread of the virus during the epidemic in March and April.

167 Fourthly, there is no rational basis for considering that the increase in infections will lead to a substantial increase in deaths. The evidence of what is known about the virus (addressed above) strongly suggests that any increase will be mild.

168 Fifthly, there is no rational basis for considering that, even if there was a considerable increase in deaths, that would present a public health crisis so serious that it would put the NHS at risk. As set out above, the NHS had no need for additional hospital capacity even at the height of the epidemic (judged by deaths not infections) in April 2020.

169 Sixthly, the government has failed to take into account reasonable measures short of these restrictions that might mitigate the risk of a public health crisis. Those include protecting the most vulnerable to infection – that is to say the elderly and those at risk – through advice; and, most importantly, through protecting elderly residents of care homes by ensuring no discharge of infected patients. This is something that – deplorably – the government failed to do in March and April, considerably increasing the number of fatalities from the virus.

Absence of scientific advice or evidence that these measures will make a material difference to deaths from the virus

170 The evidence from the government's data does not support the suggestion that there is a 'serious' risk of loss of life from the virus in the absence of restrictive measures.

171 The government has failed to provide any explanation based on empirical evidence that justifies these policies. Relevant extracts of the explanatory memoranda to each Regulation are set out in para 50 above. They do not state that there is any empirical evidence for considering that reducing gatherings to six, requiring patrons to sit at tables, closing pubs and restaurants at 10 pm or other measures would make a material impact on transmission. Nor is it even stated that these particular measures were made on the basis of scientific advice. In the absence of minutes and position papers from SAGE, the Court has no basis for concluding that they were and so can only conclude that they were not.[69]

172 Further and alternatively, the evidence that was available to the government was insufficient to justify these measures. In announcing these measures on 9 September 2020, the Prime Minister relied (at least publicly) on the presentation of Mr Whitty, the UK government's Chief Medical Officer, who showed the public seven graphs[70] purporting to demonstrate that the number of cases of reported Covid-19 infections had started to rise, and showing "the need for action" by way of "effective intervention". Two of the graphs focused on rates of Covid-19 in the 11 – 21 age group. The second graph noted that the rates remain flat for "older people and younger children". Another graph showed how Belgium had reduced a spike by taking measures.[71]

173 On making his announcement, the Prime Minister stated: "[i]t is clear from that very powerful graphic that we must act."[72] The Prime Minister described routine precautions that could be taken (handwashing, social distancing) before explaining the "Rule of Six", which he stated was necessary to make the rules easier for the public to understand and for the police to enforce.[73] No mention was made of what scientific basis the rule had been made on, or how it linked to the graphs, nor what "effective intervention" constituted generally. Furthermore, the basis of the need for the measures was not entirely clear, given the Prime Minister's reference to the Rule of Six arising out of police enforcement and public comprehension concerns. In short, a "need for action" was asserted, but no evidence of how the measure met that need was given.

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[69] If the government later publishes or discloses evidence, from SAGE or otherwise, that it was advised about these individual measures, the Claimants reserve the right to reply to that evidence.

[70] The graphs were titled as follows: (i) Number of confirmed cases (ii) weekly incidence per 100,000 population (iii) weekly individual test positivity, % (iv) weekly incidence per 100,000 population (by age group 11 to 21 year olds) (v) weekly individual test positivity (by age group 11 to 21 year olds) (vi) UK case relative to selected European countries; and (vii) distribution of people testing positive for Covid-19.

[71] See the witness statement of Michael Gardner at paragraph 4.2.

[72] https://www.gov.uk/government/speeches/pm-press-conference-statement-9-september-2020

[73] See the witness statement of Michael Gardner at paragraph 4.4.

174 This trajectory continued in relation to the introduction of the Booking Regulations (18.9.20), the Curfew Regulations (24.9.20), and the Mask Regulations (24.9.20). The Booking Regulations came into force without any further evidence relating to their effectiveness or the need for them being produced. No explanation was given as to the effectiveness in reducing transmission of, for example, requiring establishments to take 'all reasonable steps' to prevent patrons from 'mingling' at threat of criminal sanction.[74]

175 The Curfew and Masks Regulations were preceded by a joint televised address by Mr Whitty and Mr Vallance, on 21 September 2020 showing a chart with a possible scenario ("not a prediction") leading to 200 deaths per day by November, if further measures were not taken.[75] They did not take questions from the media. Again, while the need to adopt further measures was stressed, no analysis of what kind of measures would be effective was provided. The Curfew and Masks Regulations came into force on 24 September.[76]

176 The wording of the explanatory memorandum about masks is set out under Ground One. It is highly ambiguous and does not state that the government had received any scientific advice to impose, through the Mask Regulations, requirements for masks in restaurants, pubs and cafés. Mr Gardner sets out, at paras 5.31 to 5.41 of his witness statement, the absence of any scientific consensus about the efficacy of face masks as a means of reducing the spread of respiratory infection in general, but particularly where their use is required within the community.

177 The data provided by the government to justify the new restrictions was the subject of considerable debate among scientists.[77] Mr Whitty's presentation on 9 September contained no material about hospital admissions or deaths, and demonstrated the main increases in Covid-19 cases were amongst the young – i.e. the least vulnerable segment of the population. Mr Whitty did not say that imposing new measures was time critical, or that this had to be done within 24 hours of the announcement. No evidence of the effectiveness of the Rule of Six, or any of the other measures taken, in slowing the rate of Covid-19 has been provided by the government.

[74] See paragraph 4.15 of the witness statement of Michael Gardener. These considerations are not exclusive and the Claimant reserves the right to allege that further considerations should have been taken into account in the event further evidence comes to light after proceedings are issued.
[75] See paragraph 4.19 of the witness statement of Michael Gardner.
[76] With some provisions of the Curfew Regulations coming into force on 28 September 2020.
[77] See paragraph 4.23 of the witness statement of Michael Gardner.

Interference with particular Convention rights

Introduction

178 Articles 8, 11 and A1P1 are qualified rights and interference may be justified if proportionate and in pursuit of a legitimate aim. Case law relating to the extent to which interference with fundamental rights may be justified is, however, limited in its application; and (save the Restriction Requirements) there are few precedents for restrictions as broad and of such magnitude as these. It is for that reason that the Claimants' primary submission is that the restrictions and the proportionality of their impact on all relevant Convention rights must be considered generally with reference to the *Bank Mellat* principles.

179 Before each of the qualified rights may be justified through the application of the proportionality principle, they must each be lawful and imposed for a legitimate aim. The requirement of lawfulness would have been met if Ground 1 unsuccessful but for the restrictions being found to be disproportionate interferences with Convention rights (which is a later consideration).

180 The Claimants outline, in this section, the extent to which each Article is engaged and the extent of the interference. In respect of each of the interferences, the Claimant's rely on the above submissions and evidence supplied above in support of their contention that none of the below are proportionate interferences with fundamental rights.

181 The Claimants concede that restrictions imposed to contain a public health crisis may, in principle, be imposed for a legitimate objective. That is not to say that it is conceded that it is legitimate to place that objective above all other considerations, including interferences with Convention rights; still less to exclude all those considerations from any decision about whether they should be terminated, as the Claimants contend the Government has done.

Private and family life: Article 8

Engagement and scope

182 In order to appreciate the gravity of this Regulation, the Court should consider how it might have reacted had the government ordered every person in England not to gather with any more than six other persons – not including their parents, children or siblings living elsewhere – in 2019 or in any other year before it. It is a quite extraordinarily onerous and far reaching interference with fundamental rights. The fact that there has been a serious epidemic and that an even more extraordinary restriction was imposed until July this year makes absolutely no

difference to that fact. Indeed, it is if anything even more extraordinary given that it has been imposed when only around one percent of total deaths are attributed to the virus.

183 The right to private life includes the establishment and development of relationships with other human beings and the outside world,[78] including through activities of a professional or business nature.[79] It includes not only an 'inner circle' in which a person may live his own life and exclude the outside world,[80] but also a person's ability to function socially.[81] Private life under Article 8 is primarily intended to ensure the development, without outside interference, of the individual in his relations with other human beings.[82] There is a "zone of interaction" of a person with others, even in a public context, which may fall within the scope of private life[83] and the notion of autonomy is an important principle underlying its guarantees.[84] Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them.[85]

184 Private life further requires the state to desist from steps which may adversely impact on an individual's mental health, which is "an indispensable precondition to effective enjoyment" of Article 8 rights.[86]

185 Family life includes relationships outside the nuclear family including between siblings,[87] uncles and aunts, [88]grandparents and grandchildren,[89] and between children and parents following the separation of the parents.[90] Article 8 protects the family, or extended family, which is the group on which many people most heavily depend, socially, emotionally, and often financially.[91] There comes a point at which prolonged and unavoidable separation from this group seriously inhibits individuals' ability to live full and fulfilling lives, which will depend

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[78] *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [47].
[79] *Niemietz v Germany* (1992) 16 EHRR 97.
[80] *Niemietz, ibid.*
[81] *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [9].
[82] *Von Hannover v Germany* (2012) 55 EHRR 15 (GC) at [95]; *Dulgheriu v Ealing Borough Council* [2018] EWHC 1667 (Admin), [2019] PTSR 706 at [58].
[83] *Ibid.*
[84] *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61].
[85] *R (Countryside Alliance) v A-G* [2008] UKHL 52, [2008] 1 AC 719 at [115], per Baroness Hale (as she then was).
[86] *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [47]; *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 at [9].
[87] *Moustaquim v Belgium* (1991) 13 EHRR 802, ECtHR.
[88] Application 42455/98, *GHB v United Kingdom* (4 May 2000, unreported).
[89] *Marckx v Belgium* (1979) 2 EHRR 330, ECtHR; *Re J (leave to issue an application for a residence order)* [2002] EWCA Civ 1346.
[90] *Berrehab v Netherlands* [1988] ECHR 10730/84.
[91] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [18].

on factors such as the "age, health, vulnerability" of the individual, the closeness and previous history of the family, and prevailing cultural tradition.[92]

186 The Regulations impose profound and far-reaching restrictions on the private and family lives of all citizens, more than at any time in the modern era. They prevent any gatherings of more than six people save in certain prescribed circumstances. The exceptions are limited, including gatherings taking place in premises operated by a business, or charitable body attended alone (or in no more than a group of six, a group larger than six if part of the same household, or a group of 'linked' households), and "mingling" with any other persons at such events is expressly prohibited. On 28 September 2020, wedding attendances were limited to 15 people (including the bride and groom), excluding many core members of many families from crucial life events.

187 The gathering restriction will be a particularly onerous intrusion into the personal and family lives of those with large families, meaning only nuclear family units of four or fewer will, for example, be able to visit grandparents. And particularly during the winter months where individuals, families and social groups become more dependent upon each other and spend more time in each other's company inside.

188 Furthermore, the exclusion of "private dwellings" from the exceptions to the rule of six, may amount to a denial of a right of access to the home, as extended families from different households are unable to meet up at the other household (or indeed mingle with each other at all, even at excepted gatherings such as those hosted by charitable bodies).[93]

189 The ability of individuals to continue their direct personal relationships with family members or friends online is no answer to the impact of Regulations affecting the entire population, including the proportion that don't have access to the internet; and does not mean that Article 8 is not engaged, even if its impact might be mitigated, in some cases, by online contact. To the extent that 'modern communication' has been used to justify interferences in the past,[94] those have been in immigration cases where individuals have no right to remain in the UK (or

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[92] *Ibid.*

[93] *Buckley v United Kingdom* (1996) 23 EHRR 101 at [63]: "'Home' is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a 'home' which attracts the protection of Art 8(1) will depend on the factual circumstances, namely the existence of sufficient and continuous links"; *Cyprus v Turkey* (1983) 15 EHRR 509 (violation of Article 8 where there was a prevention of returning home)

[94] See e.g. *ZA (Nigeria) v SSHD* [2010] EWHC 718 (Admin) at [61]; R (Stephenson) v SSHD [2010] EWHC 704 (Admin) at [19] (citing Home Office decision letters).
Save in *Dolan (No. 1)*, where Lewis J did not ask for submissions on this point before taking it into account.

are being deported) and the use of the internet may mitigate the impact of removal or deportation on families affected; although even in these cases reliance on online communications has been criticised as a substitute for social interaction in person.[95] It is not appropriate to use this as an analogy to excuse the removal of social interaction from the whole population. Again, the indiscriminate and wholesale interference with liberty is no more acceptable because (too many) people have become inured to it. Nor is it a sufficient answer that many in the population support the removal of these rights. The rights of the whole population are not theirs to take away.

Interference and proportionality

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

Assembly and association (Article 11)

Engagement and scope

191 The No. 2 Regulations, in their original form and as amended by the Rule of Six Regulations, impose severe restrictions on the right to protest lawfully and assemble for political purposes.

192 Under reg. 5 of the No. 2 Regulations in their original form, the following restrictions applied:

(1) Political gatherings of more than 30 at a dwelling were unlawful; and

[95] See. *SS (India) v SSHD* [2010] EWCA Civ 388 at [50], per Aikens LJ: "The AIT concluded somewhat lamely at paragraph 40 that there could be some degree of family life through "modern means of communication" and possible visits to India. But that conclusion sits ill with the earlier finding, in paragraph 38, that Navdeep and Pardeep are extremely close to their father and seek his guidance in all the big decisions in their life."; *Omotunde (best interests – Zambrano applied – Razgar) Nigeria* [2011] UKUT 247 (IAC) at [28]: "We reject the submission that family life hitherto enjoyed between an active parent and a small child could be appropriately maintained by telephone calls or other 'modern methods of communication' from Nigeria. […] Difficult as the issues in a case such as the present are to decide, their resolution is not assisted by wholly unrealistic suggestions such as this."

(2) Political gatherings of more than 30 in a public outdoor space (significant for political protests as most if not all major protests are in such spaces, such as Trafalgar Square, Speakers Corner and St Peters Field in Manchester) were unlawful save where organised by a business, charitable, benevolent or philanthropic organisation or political body and that body had undertaken a risk assessment that was required to take account of the transmission of the virus.

193 Those restrictions have been tightened significantly by the Rule of Six Regulations. While protests in outdoor public places are subject to the same restrictions, political gatherings[96] indoors or in private outdoor spaces are only permitted: (a) if the premises are operated by a business, charitable, benevolent or philanthropic institution or a public body or part of premises used for the operation of the above (reg. 5(2); and (b) if they participate in a qualifying group (of up to six people or one or two linked households) but do not 'mingle' with any other group. Thus, political gatherings cannot take place in dwellings or in premises operated by a political group (in contradistinction to gatherings in public outdoor spaces). And it is questionable whether a meeting (as opposed to a speech or series of speeches) can occur under reg. 5(2) as it would appear to necessitate members of the group 'mingling' with each other.[97]

194 The right to freedom of assembly and association largely engages meetings and assemblies of a political, not social, nature.[98] No restrictions may be placed on an assembly or association other than are prescribed by law and are necessary in a democratic society in the interests (*inter alia*) of public safety and the protection of health. The Strasbourg Court has described the freedom of assembly as a 'foundational feature of a democratic society, allowing people to visibly participate in the political process and communicate ideas that challenge the existing order';[99] and the Strasbourg Court found the way in which states enshrine and protect the freedom to associate is indicative of the state of democracy in the

[96] Here used to mean gatherings of more than six persons (or of one or two linked households)
[97] The word 'mingle' has never before been used in legislation and is not defined, sloppy drafting that reflects the lack of thought given to these restrictions and that also reflects the inherent unsuitability of criminal legislation to regulate every iota of the personal life of an individual.
[98] Although Article 11 has been found to apply to assemblies of an essentially social character, see *Emin Huseynov v Azerbaijan* §91, concerning police intervention in a gathering at a private café (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-154161%22]}), as well as cultural gatherings (The *Gypsy Council v UK* (http://hudoc.echr.coe.int/eng?i=001-22414) and religious and spiritual meetings *Barankevich v Russia* (2007) Application no. 10519/03 (albeit also protected by Article 9).
[99] *Plattform 'Ärzte für das Leben' v Austria* (1988) 13 EHRR 204.

country concerned.[100] Both rights are part of a nexus of rights which include the right to freedom of expression.[101] The Court has held that:

> 'Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.'[102]

And the Strasbourg Court has also observed the right to freedom of association was of 'special importance'.[103]

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

> '*…freedom of assembly is another of our precious freedoms. Everyone is entitled to meet with his fellows to discuss their affairs and to promote their views; so long as it is not done to propagate violence or do anything unlawful*.'[104]

And by Lord Bingham:

> *'it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it*.'[105]

Interference and proportionality

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

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[100] *Tebieti Muhafize Cemiyyeti v Azerbaijan* [2009] ECHR 37083/03 at [52].
[101] *Steel v UK* (1998) 5 BHRC 339 at 358.
[102] *Stankov v Bulgaria*, Applications 29221/95, 29225/95.
[103] *Ezelin v France* (1991) 14 EHRR 362 at [53], ECtHR.
[104] *Verrall v Great Yarmouth Borough Council* [1981] QB 202 at 217.
[105] *R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12 at 1.

197 The right to peaceful protest protects demonstrations that are contentious, heretical and eccentric,[106] including those that may annoy or give offence to persons opposed to the ideas and claims that are being promoted.[107] The ability to organise and meet online can only mitigate the great damage to these freedoms caused by the Regulations. Political movements rely on the ability to mobilise protest through gatherings; and the past four years have seen a resurgence of mass demonstrations involving, in some instances, many hundreds of thousands of people.

198 To prevent mass protest unless a risk assessment has been undertaken *that may be checked by the government* imposes a fundamental obstacle to free and unfettered protest. The biggest protests in recent weeks have been against these very measures.

199 The significance of this point is underlined by the fact that the Metropolitan Police Force broke up a mass demonstration in Trafalgar Square as recently as 26.9.2020.[108] That protest had had a risk assessment but it was broken up – *by riot police* – after the police decided that the assessment was no longer valid. This interpretation of the Regulations is highly questionable but is stark proof of the power of the state to curtail, prevent and even break up peaceful political protest against some of the most onerous deprivations of rights and freedoms to have ever been imposed.

200 Moreover, the Strasbourg Court's, in *Plattform 'Artze für das Leben' v Austria*,[109] held that the state must take positive steps to protect demonstrations and enable them to take place safely and without participants being subjected to violence. While police discretion is used to judge compliance with the No 2 Regulations at protests, the scope for clashes and violence is clearly apparent.

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

> 'A hard fought qualification in the Civil Contingencies Act 2004 (inherited from the Emergency Powers Act 1920) referred to above is that the power to make emergency regulations may not be used to 'prohibit or enable the prohibition of participation in, or any activity in connection with, a strike or other industrial action'.82 There is no corresponding provision in the Public Health (Control of Disease) Act 1984, with the result that a spontaneous protest and picket outside a workplace about working

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[106] *Redmond Bate v DPP* (1999) 7 BHRC 375 at [20].
[107] *Plattform 'Ärzte für das Leben', ibid.*
[108] 'Covid: Clashes as police shut down protest over new rules' (*BBC News*, 26 September 2020) < https://www.bbc.co.uk/news/uk-54309603> accessed 29 September 2020; Claire Sibthorpe 'Coronavirus: London anti-lockdown protests see 16 arrests as police left in hospital after clashes' (*Sky News*, 26 September 2020) < https://news.sky.com/story/coronavirus-protesters-and-police-officer-hurt-in-clashes-at-anti-lockdown-rally-in-central-london-12082468> accessed 29 September 2020.
[109] (1991) 13 EHRR 204

conditions (such as enforced pay cuts, or the lack of effective PPE) runs the risk of being prohibited by regulation 7 if attended by more than two people.'[110]

While KD Ewing was speaking to the previous regulation 7, the same can be said for regulation 5 in so far as a risk assessment must be carried out for both indoor and outdoor protests. Thus, trade union pickets or other gatherings specifically protected by the CCA that was reserved for emergency circumstances do not apply under these Regulations, as they are not benevolent, philanthropic societies. It is lawful for workers to be able to work in factories, shops, warehouses and other premises without any form of social distancing (for which there is no statutory requirement) and yet their right to protest outside their place of work in numbers of more than 30 – in the open air where infection is less likely to be spread – is restricted.

202 In considering the proportionality of measures such as these, account must be taken of their 'chilling effect'.[111] The requirement for organisers to undertake a health and safety risk assessment as a pre-condition for any lawful protest, and the prohibition on political bodies organising indoor protests, coupled with police powers to "take such action as is necessary to enforce any requirement imposed by [Regulation 5]"[112] imposes significant restrictions on the right to protest, which entail a chilling effect. The dangers are evident from the clashes on 26.9.20, at which Commander Ade Adelakan said that the lack of organiser's action to maintain social distancing "voided the risk assessment submitted by event organisers the night before", in his view justifying disbursement of the crowds.[113] For organisers to be subject to continual scrutiny as to whether they comply with Regulation 5G (e.g. that they <u>have</u> carried out a risk assessment and <u>have</u> taken all reasonable steps, which, in any case, implies duties imposed only prior to the protest) during the protest, failing which they or participants are subject to police enforcement, is an onerous burden on the right to protest.

203 It is submitted that there are no circumstances short of those in which a derogation is registered and able to be justified in which a State may lawfully restrict political demonstrations under the Regulations. Such steps could only be justifiable under a derogation; indeed, that is the very purpose of the ability of a state to derogate. It is submitted that the Regulations and the right to

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

[111] *Christian Democratic People's Party v Moldova* (2007) 45 EHRR 13.

[112] No 2 Regulations, Regulation 7(1). 7(3) gives the police the power to direct that (i) gatherings are dispersed, (ii) a person participating in the gathering returns home (iii) a person is removed from the gathering. Reasonable force may be used to remove a person from a gathering, pursuant to Regulation 7(5).

[113] Presumably under Regulation 7(3), however that would only give power to disperse if "a number of people are gathered together in contravention of regulation 5", when Regulation 5 only imposes a requirement to "have carried out a [relevant] risk assessment" and "have taken all reasonable measures to limit the risk of transmission", implying duties that take place prior to the protest.

protest are simply incompatible. Protests concern the exchange of ideas, entailing both interaction and mingling. The Regulations either place an undue burden on the exercise of this right, through prior restraints, or, more ominously, they are doomed to be dispersed and upended by law enforcement who interpret deviations from social distancing as "voiding" risk assessments and compliance with the Regulations, leading to enforcement action.

204 It cannot be proportionate for such a 'paramount value', precious freedom' and 'cherished tradition' to be given less protection than the right to work and to travel, however important it is to work and travel. The findings of the Oregon Circuit Court on 18 May 2020 that social distancing could safely be practised in churches or other religious buildings (see para 59 above) have still more force in gatherings outside.

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

Engagement and scope

205 The Protocol prohibits the 'deprivation' of property, which includes the 'serious interference' with the enjoyment of property, which is the equivalent of 'assets'.[114] This has been found to include un-enacted or proposed legislation that nonetheless caused serious harm to businesses, measured by a decline in its goodwill due to its inability or reduced ability to trade.[115]

206 The Protocol is undoubtedly engaged by the restrictions on gatherings and business operations under the Regulations.[116] The limiting of wedding guests to 15 has rendered it incredibly difficult, if not impossible, for wedding venues to operate profitably, as Cripps' experience attests to. The prohibition on restaurants, cafes, bars (including in hotels or members' clubs) and pubs taking bookings of, or admitting into their premises, groups of more than six people (unless a No 2 Regulations exception applies), limits the footfall passing through their premises, and hence their profitability, goodwill, and value of their assets. Taken in the context of a nationwide closure of these premises from 23 March to 4 July 2020, these new losses will in many cases be fatal, amounting to a sure 'deprivation' of property. Evidence of the likely impact on business closures and loss of value and on the economy generally is set out in paragraph 3.14 – 3.16 of the witness statement of Michael Gardner.

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[114] *Parochial Church Council of the Parish of Aston Cantlow v Wallbank* [2003] UKHL 37, [2003] 3 WLR 283 at [91], per Lord Hobhouse.
[115] *Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408.
[116] Under regs 4 and 5.

Interference and proportionality

207 There must be a 'reasonable relationship of proportionality between the means employed to restrict property rights and the aim sought to be realised' by any measures applied by the State.[117] The Court must take into account a number of factors including the terms of any compensation paid, the conduct of the parties, the means employed by the state and its implementation[118]. There will not be a fair balance if the affected party must bear a disproportionate and excessive burden.[119] The state has the right to enforce such laws as it deems necessary to control the use of property, but such restrictions are limited to those that are proportionate.

208 The restrictions imposed against entities by the Regulations are as follows:

a. Restrictions on bookings and admission (and 'taking all reasonable measures 'to ensure compliance with the 'no mingling' rule and an 'appropriate distance' is maintained between tables) under the Bookings Regulations: public house, café, restaurant or other 'relevant business' (any business providing food or drink for consumption on its premises).

b. Restrictions preventing opening hours between 10pm and 5am under the Opening Hours Regulations (save for operating takeaway services, or cinemas, theatres or concert halls where the show began before 10pm, or motorway service areas) : all listed in Part 1 or Part 2 of Schedule 3 to the Regulations (cafes, bars and restaurants).[120]

c. Restrictions preventing gatherings of more than six people, save where certain exceptions apply: applicable to all "persons", and specifically limits gatherings at weddings to 15 where "it takes place in premises other than a private dwelling".

209 While these Regulations impose less onerous restrictions than previous Regulations during the 'lock-down', the effect of the Regulations in general and the guidance that has accompanied them has led, and will lead, to a very substantial downturn in the turnover and profitability of large numbers of businesses not directly affected. Indeed, the effect is so serious that the industry body has estimated that a quarter of all businesses in the hospitality industry could collapse.[121] Given that the Court must consider the interference with this Convention right on

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[117] *James v United Kingdom* (1986) 8 EHRR 123 at para 50, ECtHR; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 para 69, and see paras 68–78.

[118] *Broniowski v Poland* (2004) 40 EGRR 573 at [151]

[119] *Former King of Greece and others v Greece* (2000) 33 EHRR 516 at [90],

[120] See regs 4 and 5.

[121] One quarter of hospitality businesses at risk of closure: https://www.ukhospitality.org.uk/news/527802/Quarter-of-hospitality-businesses-believe-they-could-fail-in-next-3-months-without-further-support.htm

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

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

Does Article 2 impose positive obligations to impose restrictions?

211 In their response to the grounds in *Dolan (No. 1),* the Defendants asserted that the impact of the coronavirus is such as to impose positive obligations on member states with respect to the right to life [and to respect for private life] under Article 2, in particular that:

> …there are fundamental Article 2 rights of the population at stake which the measures in the Regulations seek to protect. The United Kingdom has a positive obligation "*to take appropriate steps to safeguard the lives of those within its jurisdiction*" and to do "*all that could have been required of it to prevent…life from being avoidably put at risk*": *LCB v United Kingdom* (1997) 27 EHRR 212 at §36. This obligation extends to the public health context: *Stoyanovi v Bulgaria* (App. No. 42980/04) at §60.[122]

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

213 Elsewhere, it has been suggested that:

> '...once the nature of measures required to tackle a threat [have] become clear and are within the capacity of the State to take – notably through restricting the activities that can be undertaken by inhabitants – then the failure to adopt them could well be viewed as violating the obligations owed under Articles 2 and 8 (as in *Finogenov and Others v. Russia*, no. 18299/03, 20 December 2011)…' [123]

214 It is of course possible that the impact of the coronavirus and decisions made by Government directly affecting its staff may engage the positive investigative duty under Article 2, as has

[122] Defendants' PAP response letter, *ibid*, para 10.
[123] An analysis of Covid-19 Responses and ECHR Requirements' by Jeremy McBride (echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?m=1), 27.3.2020, pp 2/3.

been argued,[124] and that it may engage the State's duty to provide information to the public about public health risks and to provide sufficient medical support. But there is no authority to suggest that it can go as far as to *require* a member state to take measures restricting fundamental freedoms of its citizens.

215 First, the judgment in *LCB* concerned the State's duty to provide information about risks and to monitor health. The case was brought by a resident of Christmas Island, an Overseas Territory of the UK, who had been exposed since before birth to radiation caused by nuclear testing on the island. The risks to which the claimant was exposed were thus caused by the State. It was found that *'[t]he Court's task is… to determine whether, given the circumstances of the case, the State did* all that could have been required of it *to prevent the applicant's life from being avoidably put at risk*.' (para 36, emphasis added). The question posed by the Strasbourg Court was whether '*in the event that there was information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question*, to provide advice to her parents and to monitor her health.' (para 38, emphasis added); and it found that they were not obliged to provide such advice and monitoring given the information available to them at the time.

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

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

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

[124] See 'Learning lessons the hard way – Article 2 duties to investigate the Government's response to the Covid-19 pandemic', Paul Bowen QC (https://ukconstitutionallaw.org/2020/04/29/paul-bowen-qc-learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic/), 29.4.2020

> *immediate risk to the life of an identified individual or individuals* from the criminal acts of a third party *and that they failed to take measures within the scope of their powers which, judged reasonablyle, might have been expected to avoid that risk*…'

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

> Positive *obligations apply in the public-health sphere too. They require States to* make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. *They also require an effective* independent judicial system *to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see* Powell v. the United Kingdom *(dec.), no. 45305/99, ECHR 2000-V;* Calvelli and Ciglio v. Italy *[GC], no. 32967/96, ECHR 2002 I;* Vo v. France *[GC], no. 53924/00, ECHR 2004 VIII). Where the infringement of the right to life or to physical integrity is not caused intentionally,* the positive obligation imposed by Article 2 **to set up an effective judicial system** *does not necessarily require the provision of a criminal-law remedy in every case…*
>
> (All emphasis added)

218 Thirdly, the judgment in *Finegenov* does not support the proposition suggested above. That case concerned the actions of the Russian state to intervene to safeguard hostages held in a Moscow theatre by Chechen terrorists in 2002, when they used gas intended to put terrorists and hostages alike to sleep in order to effect a rescue. The complaint to the Strasbourg Court was that the state had put the lives of the hostages at risk through its intervention (para 164). The claim was defended, in part, on the grounds that the state was obliged to use all appropriate measures to secure the release of hostages, under Article 3 of the International Convention against the Taking of Hostages.[125] The Court also judged the case in relation to the exception in Article 2 permitting the use of proportionate force by law enforcement officers to protect life.[126]

219 The Strasbourg Court found that *'[a] duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and if the authorities retained a certain degree of control over the situation'*.[127] This is very different to the circumstances of an epidemic in which *some* scientific evidence suggests heavy restrictions on the movement and association *of the whole population* is necessary to contain its spread. Moreover, that passage is in relation to the *justification* of potentially lethal force to safeguard life, not 'measures' applying to the population at large (or even specific sections of the population).

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

220 Fourthly, although considered in relation to property rather than Article 2 rights, the Strasbourg Court has found that *'natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature'* (*Budayeva and others v Russia* [2008] ECHR 15339/02, para 174). While a pandemic is not entirely analogous to (for example) a hurricane or mudslide and there is some evidence about what can be done to reduce their spread, it is nonetheless a natural disaster in origin.

221 Fifthly and in conclusion, aside from its investigative duty, Article 2 is satisfied by a state safeguarding life through a legislative and administrative framework designed to provide effective deterrence against threats to the right to life,[128] through an effective criminal law and operational machinery by which it is enforced,[129] of which *Finegov* was an example. In applying its operational duty, a disproportionate burden 'must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources'.[130]

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

(1) The duty applied where a state agency monitored the risk of mudslides and called for an emergency clean-up and restoration work and an early warning system, none of which were implemented;[131]
(2) It did not apply to soldiers taking part in risky activities such as parachuting;[132]
(3) It may be engaged (although was not breached in that case) through an accident at a rubbish dump under the authorities' control;[133]
(4) It may be engaged where a state did not institute a prosecution for homicide but the duty may be satisfied where civil proceedings could be and were instituted;[134]

[128] *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10.
[129] *Osman* (*ibid*) at para 115.
[130] *Budayeva, ibid,* para 135
[131] *Budayeva*, *ibid*
[132] *Stoyanovi v Bulgaria* [2010] ECHR 1782
[133] *Oneryildiz v Turkey* [2004] ECHR 48939/99
[134] *Calvelli & Ciglio v Italy* [2002] ECHR 3

(5) The state has a duty to protect individuals known by the authorities to be at risk of domestic violence;[135]

(6) The positive duty may apply where state employees are exposed to unreasonable risks of asbestos poisoning once the state becomes aware of that risk and are unable to obtain compensation through domestic courts;[136] and

(7) A state must notify workers where they may be exposed to dangerous levels of radiation.[137]

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

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

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

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[135] *Opuz v Turkey* (2009) (Application No. 33401/02); *Volodina v Russia* [2019] ECHR 539

[136] *Brincat v Malta* [2014] ECHR 836

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

226 The second (long-term) effects are contentious, rest upon assumptions about the impact of poverty (caused by the economic depression likely to be caused by the restrictions) on health and are a matter of high government policy also impacted by government decisions across a range of areas. While this impact has a bearing on decisions about the proportionality of the Regulations,[138] there is no sound arguable basis they could lead to Article 2 rights being engaged.

227 The short-term effects of the restrictions on life are, however, no less immediate then the supposed risk to life caused by neglecting to impose 'lockdown' measures. Indeed, in some cases the consequences are more direct They include but are not limited to the increase in deaths caused by suicide due to isolation, domestic violence,[139] neglect through isolation[140] and the cancellation of operations and other medical treatment for those with serious and terminal health conditions.[141] Each of these categories are apparent direct consequences of the positive action of the state, as opposed to its inaction in the face of a natural disaster; and a more conventional application of Article 2 jurisprudence suggests they are more naturally relevant considerations in a review of the proportionality of the restrictions. These harms are dealt with in the witness statement of Michael Gardner and considered in more detail in the following section.

Irrationality of the measures

228 Mr Gardner sets out how irrational the measures are at paragraphs 4.36 to of his witness statement 4.57

Harms caused by the Regulations to the Claimants

229 The harms to the Claimants are outlined in detail in the witness statement of Michael Gardner, from para 4.52 to 4.35 and in the witness statements of Mark Henriques (Managing Director of Cripps), Simon Dolan and Lauren Monks. The harm to Cripps is also outlined in more detail

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

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

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

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

in the skeleton argument in support of the application for interim relief. These harms are considerable.

230 The effect on Cripps's profitability has been so serious that it has significantly reduced its goodwill value. And this has been a cumulative loss: from being limited to 30 through guidance only, to that becoming a legal requirement, to the effective inability of it to trade since the Opening Hours and Booking Regulations.

231 The interference with Lauren Monks's family life is serious, restricting her ability to visit her siblings or parents and meaning that she will be unable lawfully to celebrate Christmas in the traditional manner. This interference with her fundamental rights reflects the attack on the rights of the entire population.

232 Simon Dolan has become a prominent figure in the political opposition to the lockdown. He will be restricted from engaging in or organising mass political protests as will everyone and as outlined in the above section relating to Article 11. Although he does not live in England, he is English and has family and friends here whom he will be restricted from visiting by the Regulations imposed since September 2020.

Harms caused by the Regulations to society and the economy

233 These Regulations will cause exceptional, long lasting and , affecting the whole of the hospitality industry. Those affecting society as a whole are more difficult to quantify but should still have been evaluated, carefully, by the government before its decision to impose them. Yet, not only did the government not do this, it had no impact statement attached to any of the Regulations.

234 Some of these harms have been set out above, in respect of Convention rights. Those and others are outlined in Mr Gardner's witness statement.

235 In respect of the hospitality industry, the industry body estimates that up to **one quarter** of businesses in the hospitality industry could close.[142] It is no answer to say that yet more financial support could come 'from the government'. That does no more than shift the damage from businesses to every taxpayer in the United Kingdom and to the future generations that will

[142] https://www.ukhospitality.org.uk/news/527802/Quarter-of-hospitality-businesses-believe-they-could-fail-in-next-3-months-without-further-support.htm: Paragraph 3.15 of Gardner

have to pay for the loans for such financial support. Moreover, the evidence provided by Cripps demonstrates that financial support is only of limited effectiveness; and that it does not prevent highly trained staff from losing their skills and their value to their employers and to themselves.

236 Further harm caused both to the economy and society arises not merely from job-losses but from the loss of productive occupations, skills and self-respect to the millions of people who have been furloughed for months.

237 None of these factors are matters for the court. But the court is not merely entitled to but required to review whether they have been considered carefully and weighed in the balance by the government against any benefit that it could reasonably have foreseen.

238 The harm caused to society more generally is obvious, even though difficult to quantify. The Regulations and the Guidance will have at least the following effects:

- Restricting the ability to see family and friends;
- Restricting meetings of clubs and societies, including that they cannot meet as a gathering even in public places because of the rule of six being enforced there and their inability to 'mingle' if they go to an event with other groups (reg. 5(2) and (3);
- Tight restriction on other celebrations, including birthdays and wedding anniversaries which are not excepted in the 'significant event' exception; in respect of which it is no small consideration that 'lockdown' measures were was imposed until July but that these restrictions may last for six cold and wet months;
- The effective ban on Christmas celebrations for the first time since the Protectorate and on all other religious festivals, which would include Divali and Hannukah (amongst others).

239 The proportionality test requires the court to review whether the Defendants evaluated the consequences of the restrictions imposed by the Regulations and Guidance, it must engage in a 'searching review of the primary decision-maker's evaluation of the evidence' in doing so; and this must include the Defendants' evaluation of the harms that would be caused.

240 Moreover, the government's evaluation should have been through the prism of what is normal, not what the restrictions imposed in March (which the Claimants maintain were unlawful and disproportionate) have allowed Ministers to become accustomed to. The court can only review this evaluation by stepping back from 2020 and considering how it might have reacted to a government banning weddings, imposing closing hours through public health legislation, curtailing the ability of an entire sector of the economy to trade profitability, effectively banning

Christmas celebrations and criminalising the normal exercise of social and community life. And again, these measures have been imposed in response to a virus which is not dangerous to most of the population and which is now responsible for no more than around 1 % of deaths.

241 The concept of the 'New Normal' is not one that has ever been debated in Parliament and which is inimical to fundamental rights. Where the executive arrogantly appropriates to itself – on the basis of its presumed devolved legislative power – the power to force a change in the way of life for the entire population, it is entirely right that this power is reviewed and questioned by the Courts that have been charged with protecting that population's fundamental rights.

Whether the restrictions are strictly necessary in a democratic society and are the least restrictive measures necessary

242 These are considered together as the question of whether Regulations that impose restrictions on fundamental rights are the least intrusive and restrictive measure available is relevant to that of whether they are 'strictly necessary' in a democratic society. They are neither.

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

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

proper respect for the rights and freedoms of the individual". In determining whether a limitation is arbitrary or excessive he said that the Court would ask itself:-

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

244 First, exceptional interferences with fundamental rights have been imposed without any democratic scrutiny.

245 Secondly, the Regulations were imposed as part of an express policy that not only fails to consider the potential effectiveness of less restrictive measures but which (through the narrow mindedness of the Five Tests and the policy of suppressing the virus at almost any cost) expressly fails to balance the harms they may redress against the harms they cause. They impose unprecedented and exceptionally grave restrictions on every area of society and on almost all means of human interaction. And they are likely to devastate the livelihoods of millions and to cause great harm to individuals and to society.

Summary of Ground Three

246 In summary:

(1) The measures that have been imposed subject the population as a whole and the hospitality industry in particular to economic and social harm that would have been unprecedented in peace-time before March 2020; and these harms are undeniable;

(2) There is no evidence that the measures will make any material difference to the transmission of the virus, let alone to materially reducing hospitalisations and deaths;

(3) The measures are themselves irrational;

(4) The government have failed to provide any or any adequate evidence that any measures, even if effective, are necessary to avert the danger of a public health crisis;

(5) There is substantial evidence that there is no risk of a public health crisis from the virus, or even anything more than a relatively minor increase in deaths;

(6) There is no evidence that the government has evaluated whether other, less restrictive measures could attain the same object; and its hasty and ill-considered behaviour strongly suggests that they have not;

(7) The government has failed to engage in a sufficient or even any evaluation of whether the benefits from the measures for which there is reasonable evidence outweigh the harms that they will cause; and

(8) In conclusion, the decisions of the Defendants to impose each of the Regulations challenged and not to remove the restrictions on gatherings contained in the Guidance was unreasonable, irrational and disproportionate.

CONCLUSION

247 England and the United Kingdom have long been esteemed as the cradle of Parliamentary democracy and of the rule of law.

248 At the heart of that system is Parliament. The high council in which all are represented and to which all may bring their grievance. And at the heart of Parliament's role and its duty is the scrutiny of legislation and the holding of the government to account.

249 Not one of these restrictions – restrictions that remove fundamental rights that have been enjoyed without question, in peace and in war, throughout the modern era – has been debated in Parliament. Worse, Parliament was given no notice of their purpose or their effect before they were made. This is an abuse of fundamental democratic rights and it is an abuse of the limited and exceptional procedure available only for emergencies and only where it is necessary.

250 In making these Regulations, the government has arrogated to itself the power to remove fundamental social, political and economic rights on the flimsy basis of vague words in a public health statute. It has refused to use the legislation available for emergency in a flagrant attempt to avoid Parliamentary scrutiny. It has abused its power and it has acted *ultra vires* the 1984 Act.

251 Finally, the government has made no attempt to weigh the exceptional harms of these measures against the unempirical assertion of their efficacy. Its decisions were unreasonable, disproportionate and irrational and, in consequence, unlawful.

252 The Court should have no hesitation in quashing all these Regulations and other restrictions. They have no democratic legitimacy, they are *ultra vires* and they are disproportionate.

1st October, 2020

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