

Important & Urgent

The Rt Hon Matt Hancock MP  
Secretary of State for Health & Social Care  
39 Victoria Street  
London  
SW1H 0EU

**By email**

Date 30 April 2020

Your ref

Our ref

Direct Dial

Direct Fax

Email

Dear Sirs

## **THE HEALTH PROTECTION (CORONAVIRUS) (ENGLAND) REGULATIONS 2020; THE PUBLIC HEALTH (CONTROL OF DISEASES) ACT 1984**

### **PRE-ACTION PROTOCOL LETTER**

#### **Introduction and Summary**

- 1 This letter before action challenges the lawfulness of the Health Protection (Coronavirus) (England) Regulations 2020 (as amended) ("the Regulations"), through which restrictions have been imposed on every aspect of personal and public life throughout England. The Regulations were amended on 22 April 2020 by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (S.I. 2020/447) ("the Amended Regulations"). The Amended Regulations introduced stricter conditions on the general public, in particular by preventing them from remaining outside their residences rather than restricting them from leaving them save for a 'reasonable excuse'.
- 2 We represent Simon Dolan, an entrepreneur who owns fully or partially 10 UK businesses which combined employ a total of around 600 people. His company, Jota Aviation has in recent weeks made numerous flights to transport vital PPE equipment for NHS healthcare professionals and to repatriate British people stranded abroad, as well as flying daily for the Italian Post Office to help keep their goods moving.
- 3 It is our client's contention that the Regulations were, from the date on which they entered into force on 26 March 2020, alternatively from the date of their amendment pursuant to the Amended Regulations, unlawful on the following grounds that:
  - (1) They are *ultra vires* s45C of the Public Health (Control of Diseases) Act 1984 ("the 1984 Act"), the provision relied upon by Her Majesty's Government ("the Government") as delegating powers of secondary legislation by which they may impose the Regulations;
  - (2) The Government:

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- (a) Fettered its discretion by imposing a test before which the restrictions could be lifted, in reg 3(3), that was over-rigid in requiring the Secretary of State to consider only their effect on containing the coronavirus and not whether each of them were the least restrictive means of doing so or proportionate to the harms done by the restrictions, all regulations imposed under s 45C of the 1984 Act being required to be proportionate (pursuant to s 45D);
    - (b) Thus failed to consider the following relevant considerations before deciding whether to impose the Regulations: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium and long-term consequences of the measures; and (e) whether, in the light of those considerations, less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms;<sup>1</sup>;
    - (c) Imposed restrictions that were not proportionate, contrary to the limitation imposed by s 45D of the 1984 Act.
  - (3) The restrictions, save (for a limited period and subject to regular review) restrictions that would prevent gatherings of more than 100 people (provided schools can reopen), are a disproportionate breach of fundamental rights and freedoms protected by Articles 5, 8, 9, 11 and 14 and by Articles 1 and 2 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention').
- 4 Further and alternatively, our client contends that the decision of the Secretary of State to maintain each of the restrictions provided for by the Regulations, alternatively any one of them, in the review he conducted on 16 April 2020 in accordance with reg. 3(2), was *ultra vires* on the grounds that the Secretary of State:
  - (1) Failed to take any, or any adequate, account of the considerations stated in paragraph 2 (b) above and unreasonably fettered his discretion further by imposing an additional five tests, each of which had to be satisfied before the restrictions could be eased and none of which took any consideration of the above factors or whether each of them were the least restrictive means of doing so or proportionate to the harms done by the restrictions; and
  - (2) Decided not to terminate all, alternatively any one, of the restrictions (and subject to regular review) restrictions that would prevent large gatherings of more than 100 people, provided schools can reopen, notwithstanding that they were:
    - (a) Not proportionate, contrary to the limitation imposed by s 45D of the 1984 Act; and/or
    - (b) A disproportionate breach of the above Convention rightseven if, which is denied, they or any one of them were proportionate and/or were not disproportionate breaches of Convention rights on the date they were first imposed.
- 5 Mr Dolan gives notice by this letter that he will apply to bring judicial review proceedings against the Secretary of State for Health and Social Care if he does not agree, by 4 pm on Thursday, 7

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<sup>1</sup> These considerations are not exclusive and we reserve the right to allege that further considerations should have been taken into account in the event proceedings must be issued.

May 2020, to direct that all restrictions imposed by the Regulations are terminated, pursuant to reg. 3(b) of the Regulations, by Tuesday, 12 May 2020. This short timetable is imposed because of the seriousness of the continued harms to lives and livelihoods through the continued disproportionate breaches of Convention rights of all individuals and the majority of businesses throughout England.

- 6 Our client also requests that the Government disclose minutes of the meetings of the Scientific Advisory Group for Emergencies ('SAGE') since the beginning of 2020. Failure to do so will result in an application for disclosure if proceedings have to be issued.
- 7 Our client accepts that restrictions on gatherings of more than 100 people may be a proportionate means of slowing the spread of the coronavirus if subject to fortnightly review; but he does not accept that restrictions requiring the population to remain at home and that restrict (directly or indirectly) the trading of the majority of businesses in England are the least restrictive means of obtaining that legitimate objective and thus proportionate and lawful. He considers that the above restriction (on gatherings of more than 100 people) would not (*now*) be a disproportionate breach of Convention rights (albeit, we contend, imposed unlawfully as under the 1984 Act). We contend that any restrictions may only lawfully be imposed under the Civil Contingencies Act 2004 ("the CCA"); that they would not be the least restrictive means of controlling the virus unless they go no further than retaining the limited restrictions we consider proportionate; and that it is not proportionate for schools to remain closed. Mr Dolan would, however, consider not issuing proceedings if serious, alternative, less draconian suggested restrictions were imposed.
- 8 In the event that proceedings must be issued, our client will ask that the Court exercises its discretionary remedy to quash the Regulations but only after a short but sufficient period within which a Minister may lay regulations under the CCA that satisfy the requirements of domestic law and the Convention by being the least restrictive means of obtaining the objective of reducing the spread of the coronavirus while not causing disproportionate harm.
- 9 If proceedings are issued, our client will raise the further and alternative ground that the Secretary of State has an ongoing duty to review whether the continued imposition of all, alternatively any one, of the restrictions are the least restrictive means of containing the coronavirus and proportionate (pursuant to s 45D of the 1984 Act) and not a disproportionate breach of the above Convention rights, taking into account the considerations outlined in paragraph 3 (2) above and not fettering his discretion by imposing the five tests announced on 16 April 2020; and ask the Court to consider whether the continuation of all or any of the restrictions is not proportionate at the date of any court hearing, if it was not at the date of the imposition of the Regulations or on 16.4.2020.

## Summary of the Regulations

- 10 In summary, the Regulations provide as follows (using like sub-paragraphs):
- (1) Citation, commencement, application and interpretation provisions;
  - (2) Revocation and saving provisions;
  - (3) The definition of the emergency period (starting when they came into force and ending when the Secretary of State terminates each one) and provision for review every 21 days;
  - (4) Requires premises named in Part 1 of Schedule 2 to close;
  - (5) Makes further restrictions on the opening of any businesses not named in Part 3 of Schedule 2;

- (6) Prevents any person from leaving or (under the amendments of 22 April 2020) remaining outside the place where they live without a 'reasonable excuse', including one of those specified in the Regulations;
  - (7) Restricts any gathering of more than two people outside the same household save under exceptions including that it is 'essential' for work purposes;
  - (8) Provides for enforcement, including by persons designated by the Secretary of State or local authorities in addition to police constables and community support officers;
  - (9) Creates offences of failing to abide by regulations 4, 5, 7 or 8;
  - (10) Provides for fixed penalty notices to be issued;
  - (11) Provides for prosecution of offences;
  - (12) Provides that the Regulations expire six months after the date on which they came into force.
- 11 The above measures are the some of the most extreme restrictions imposed on fundamental freedoms in the modern era. They confine every person in England to their homes save for limited purposes permitted by the state. Parents may not see their children or grandparents their grandchildren. Worshipers may not attend their services or children their schools. Businesses must close, thousands of them will fail and millions of people will lose their jobs. And all political meetings and public demonstrations are, without exception, proscribed by law.

## **Non-Convention challenges to the lawfulness of the Regulations at the date on which they were imposed**

### The *vires* of the Regulations under the 1984 Act

- 12 The part of the 1984 Act from which the delegated power to make the Regulations purportedly derives, s 45C(1) and (3(c)), is limited to providing for circumstances in which decisions may be made by a public body to impose a 'special restriction or requirement' on an individual or a group of persons; and that it does not allow secondary legislation imposing restrictions on the entire country. The Regulations are therefore *ultra vires* the 1984 Act.
- 13 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)).
- 14 The above powers of delegated legislation appear in Part IIA of the 1984 Act, which was inserted into the 1984 Act by s 129 of the Health and Social Care Act 2008.
- 15 The delegated powers by which secondary legislation may be passed may be contrasted with the procedure by which regulations may be made under the CCA. Regulations imposed under the CCA may last no more than 30 days (s 26) and lapse in the absence of positive resolutions by each House within seven days of being laid before Parliament (s 27), including in circumstances in which Parliament is not sitting or has been prorogued (s 28). Thus, while new regulations in the same form may be laid after the first regulations have lapsed, they would still require such a positive resolution.

16 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 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).

17 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).*

18 Section 45C(3) provides for the circumstances in which regulations may be made. These are strictly 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.*

19 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)

20 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. The only sub-paragraph that could conceivably give ministers the power to make the Regulations, (d), is further limited by s 45C(6)(a), providing that:

*a “special restriction or requirement” means a restriction or requirement which can be imposed by a justice of the peace [‘JPs’] by virtue of section 45G(2), 45H(2) or 45I(2)...*

It is notable that the wording is also singular – ‘a special restriction or requirement’.

21 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(1)(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.

- 22 The conditions that must be satisfied before a JP may make a special restriction must be further proscribed 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).
- 23 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.
- 24 Regulations made under s 45C are further limited by s 45F(2), which applies to all health protection regulations under ss 45B and 45C. This provides that they may confer 'functions' on local authorities and other persons (sub-para (a)), may 'provide for appeals from and reviews of 'decisions' taken under the regulations (sub-para (e)) and provide for the 'resolution of disputes' (sub-para (h)). Further, s 45F(6) of the 1984 Act provides

(6) *Regulations under s 45C must provide for a right of appeal to a magistrates' court against any 'decision' taken under the regulations by virtue of which a special restriction or requirement is imposed on or in relation to a person, thing or premises.*

(7) *Regulations under section 45C which enable a special restriction or requirement to be imposed by virtue of a decision taken under the regulations must also provide that, if the restriction or requirement is capable of remaining in force in relation to any person, thing or premises for more than a specified period, a specified person may require the continuation of the restriction or requirement to be reviewed in accordance with the regulations at specified intervals by a person determined in accordance with the regulations.*

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

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

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

(All emphasis added)

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

- 25 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.

26 Thus:

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

- (2) The limitations on special restrictions or requirements in s 45F(6)-(8) apply to restrictions made on individual persons or premises (using the term 'a' or 'any person thing or premises') or groups of premises (under s45J) in the same way as regulations provided for by s 45C(4)(a) and (b);
- (3) Section 45D provides that regulations imposing a 'special restriction' must make provision for a decision to be proportionate.
- (4) Section 45F(6) refers specifically to a 'decision' made 'by virtue of which a special restriction or requirement [singular] is [singular] imposed.
- (5) 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
- (6) 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.

27 This, our client's primary 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(1)(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 argued,<sup>2</sup> 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.

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<sup>2</sup> 'Lockdown: a response to Professor King' (<https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/>), 6.4.2020.

- (4) Primary legislation may not authorise conduct that would otherwise constitute a trespass or common law imprisonment save where sanctioned by express words or necessary implication in the statute. (*Morris v Beardmore* [1981] AC 446, 455; *R (Gedi) v Home Secretary* [2016] EWCA Civ 409, [2016] 4 WLR 93). As argued by Tom Hickman QC, Emma Dixon and Rachel Jones<sup>3</sup> the Regulations (especially since their amendment requiring persons not to remain outside their home without a reasonable excuse) would require each individual in England to be subjected to the tort of false imprisonment (*R (Jalloh) v Home Secretary* [2020] UKSC 4).
- (5) 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.
- (6) 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.<sup>4</sup>
- (7) 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.<sup>5</sup> 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.

28 Some of these arguments are supported by leading practitioners and academics in the articles cited above and others by Lord Anderson QC,<sup>6</sup> and Lord Sandhurst QC and Benet Brandreth QC<sup>7</sup>.

Proportionality under the 1984 Act, fettering discretion and failure to take into account relevant considerations and not to take into account irrelevant considerations

29 Section 45D of the 1984 Act provides that:

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<sup>3</sup> 'Coronavirus and Civil Liberties in the UK' ([https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#\\_edn4](https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4)), 6.4.2020.

<sup>4</sup> *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].

<sup>5</sup> *Ibid*

<sup>6</sup> 'Can we be forced to stay at home?' (<https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/>) 26.3.2020.

<sup>7</sup> 'Pardonable in the Heat of a Crisis – Building a Solid Foundation for Action' ([https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359\\_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf](https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf)), 16.4.2020 (Lord Sandhurst practised at the Bar as Guy Mansfield QC).

(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.*

30 Regulation 3(3) provides as follows:

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

31 It may be imputed that the Government’s decision to impose the Regulations was made on that basis. We rely, further, on the Government’s public announcements prior to the imposition of the Regulations in support of this contention, which we set out in Appendix One to this letter. These provide overwhelming evidence that the considerations taken by the Government were limited to the effect measures would have on limiting the spread of the coronavirus.

32 The Government thus fettered its discretion by imposing an over-rigid test before which the restrictions could be lifted, one that required the Secretary of State to consider only their effect on containing the coronavirus and not whether they were the least restrictive means of doing so or proportionate to the harms done by the restrictions (*British Oxygen Co Ltd v Board of Trade [1971] AC 610*); this led in turn to it failing to take into account relevant considerations and taking into account irrelevant considerations (*R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23*).

33 Further and alternatively, even if the Government did take those considerations into account, the effect of s 45D is that the regulations would be *ultra vires* unless proportionate, requiring a positive decision by the Court on the merits. It should be emphasised that s 45D imposes a

higher test than the Human Rights Act 1998, which requires that secondary legislation is only *ultra vires* if measures impacting upon fundamental rights and freedoms are 'not disproportionate'.

- 34 A determination of the proportionality of the Regulations, imposing a code affecting a number of different freedoms for public health reasons, should be judged through applying the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted for that purpose by the UN Economic and Social Council in 1984, and the UN Human Rights Committee. The courts are bound to have close regard to principles accepted by international bodies, particularly given their close adherence to overarching principles of proportionality developed by the Strasbourg Court and the domestic courts (*Demir v Turkey* [2015] ECHR 316 at [85]–[86], ECtHR). They are principles of international law developed and adopted for that purpose during public health crises, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms. They incorporate well established proportionality principles and must be considered alongside the proportionality of restrictions of individual rights, all of which will also be relevant to the determination of the challenge.
- 35 The Siracusa Principles require that restrictions should, at a minimum, be:
- carried out in accordance with the law;
  - directed towards a legitimate objective;
  - strictly necessary in a democratic society to achieve the objective;
  - the least intrusive and restrictive available to reach the objective;
  - based on scientific evidence and neither arbitrary nor discriminatory in application; and
  - of limited duration, respectful of human dignity, and subject to review.
- 36 A restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been attained "equally well by measures that were less restrictive of a fundamental freedom" (*R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, para 66; *Sejdic v Bosnia and Herzegovina* (2009) 28 BHRC 201, ECtHR) and the test to be applied by the court is whether an objective consideration leads to the conclusion that such restrictions are disproportionate (*R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15).
- 37 The gravity of the effects and consequences of restrictions made under the Regulations are extreme and affect every area of national life. In such circumstances, they could only be proportionate if the positive effect of their imposition on the coronavirus (if any) relative to less restrictive measures was not outweighed by the harms they might cause. The Government could only make this determination after adequate consideration of (at least) the following: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium- and long-term consequence of the measures; and (e) whether, in the light of those considerations, whether less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms.<sup>8</sup>
- 38 Our client relies further on the evidence set out below, in relation to breaches of Convention rights, that the Government failed to take into account (at all or adequately); and, for reasons set out below in respect of the breaches of Convention rights, the failure to take the above

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<sup>8</sup> These considerations are not exclusive and we reserve the right to allege that further considerations should have been taken into account in the event proceedings must be issued.

considerations into account led to the Government imposing restrictions that were not proportionate; and they are thus unlawful and should be quashed.

## Disproportionate breach of Convention rights

### Convention rights and freedoms engaged

- 39 The impact of the Regulations on rights and freedoms is particularly grave. In particular:
- (1) They constitute a deprivation of liberty engaging Article 5 (*R (Jalloh) v Home Secretary* [2020] UKSC 4), particularly since the amendments of 22 April 2020, by which no individual may leave the place where he lives. The only public health qualification to this right permits an individual to be quarantined. This is: (a) not permitted by regulations imposed under s 45C; and (b) could only be imposed (pursuant to the qualification to Article 5) on an individual basis.
  - (2) Each cardinal freedom protected by Article 8, including the maintenance of relationships with parents, children, and siblings, is engaged.
  - (3) The restrictions on gatherings prevent worshipers from attending or gathering in any places of worship (protected by Article 9) other than for funerals.
  - (4) The interference with the political rights of association and assembly (Article 11) – a ‘precious freedom’ (*Verrall v Great Yarmouth Borough Council* [1981] QB 202) and one of the ‘paramount values of a democratic society’ *Stankov v Bulgaria* [2007] ECHR 582) that has ‘almost become a constitutional principle’ (*R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12) – are particularly serious given the limited Parliamentary scrutiny of the Regulations and place an unreasonable impediment upon the mobilisation of opposition to such impositions upon rights and freedoms.
  - (5) The isolation required by the Regulations engages Article 14, being indirectly discriminatory on those with mental illness.<sup>9</sup> (in view of the isolation it imposes) on women (given that they are disproportionately affected by the domestic violence that has more than doubled<sup>10</sup> during the ‘lockdown’) and on poorer and disabled children (whose education has suffered<sup>11</sup> much more than others).
  - (6) The closure of businesses will decrease their goodwill and will engage Article 1, Protocol 1 to the Convention (*Breyer Group plc v Department for Energy and Climate Change* [2015] EWCA Civ 408).
  - (7) Notwithstanding online provision, many children will be denied the ‘basic minimum of education’, thus at least engaging Article 2 of Protocol 1 (see *Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14).

### Evaluating whether the impact of the Regulations on Convention rights is disproportionate

- 40 The exceptions and qualifications to the above rights are each expressed somewhat differently and have developed their own case law, all of which is relevant, and which supports our client’s

<sup>9</sup> ‘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.

<sup>10</sup> <https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown>.

<sup>11</sup> <https://www.thearticle.com/coronavirus-will-deepen-the-class-divide-in-next-years-gcse-results>

position that the measures are disproportionate. However, the Regulations restricting movement and gatherings are a code that limit the exercise of all the above rights; and the Court could not determine their proportionality without considering their impact on each of the rights engaged. For example, by restricting individuals to their residences their liberty is impacted; they are unable to associate personally or to assemble, to attend religious services or educational establishments or to visit their close relations; and these (and more specific) restrictions affect the profitability, goodwill and survival of numerous businesses.

41 Thus, as with the statutory test of proportionality in s 45D of the 1984 Act, proportionality is best judged through the application of the Siracusa Principles; and the case law cited above applies equally to determining whether the restrictions are the least restrictive means of obtaining a legitimate objective.

42 It is reasonable to assume the underlying facts found by the Government to justify the restrictions are that: (i) the form of social distancing they enforce will reduce the spread of the virus; and (ii) it will, in turn, reduce the death rate to an extent that the NHS can cope with the increased demands.

43 In *R (on the application of UNISON) v Lord Chancellor*, a case concerning the *vires* of secondary legislation introducing fees to the Employment Tribunal, the Supreme Court evaluated the factual evidence of the impact of the fees on access to justice and made its determination.<sup>12</sup> Such a course should be followed in this case, given that the court is determining the proportionality of secondary legislation, rather than an individual decision by a public body. Given the exceptional (and to a certain extent unprecedented) breadth of the impact of these Regulations, the Court should not hold back from at least determining whether the scientific evidence is of a sufficient strength to justify the magnitude of the restrictions imposed.

44 Further, since the Regulations closures are ongoing any judicial review must determine their effect on the day of the review: it is within the power of the Secretary of State to terminate them at any time and any failure to do so where the proportionality test (through, it is submitted, applying the Siracusa Principles) was not satisfied would render the restrictions (individually or as a whole) *ultra vires*.

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

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

#### Failure to consider relevant considerations and scientific and comparative evidence

47 We set out in Appendix Two government and other papers relating to pandemic preparation. These contain analysis that questions the effectiveness of the extreme social distancing

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<sup>12</sup> *UNISON, ibid*, paras 90-94.

measures and 'lockdowns'. The Appendix also contains substantial evidence (additional to that cited in the body of this letter) of the harms caused by the Regulations. They are not exclusive and will be added to should we need to issue proceedings.

- 48 In respect of all evidence, where the evidence was not available at the date on which the Regulations were imposed (26 March 2020) but was available on the date of review (16 April 2020) we rely on our below alternative grounds that it should have been taken into account before the review. Where evidence post-dates the review, we rely on it in support of our client's final ground that the Government has an ongoing duty to ensure that the Regulations continue to be proportionate as the least restrictive means of obtaining the objective of containing the virus without causing disproportionate harms.
- 49 A court considering a challenge to the legislation would be obliged to evaluate such evidence; and the cogency of such evidence is a necessary and key consideration in any determination of whether the Regulations were and/or continue to be proportionate, the least restrictive means of obtaining the government's objective and necessary in a democratic society. For that reason, some references are set out below to scientific material and evidence of the relative merits of alternative measures taken by other jurisdictions that at least demonstrate a real controversy amongst experts in the field about the efficacy and effectiveness of 'lockdowns' to reduce viral spread; and contradict the suggestion it is so much more effective than less regressive measures such as to justify the extreme impact it has on the rights and freedoms considered above.
- 50 The following are examples of evidence questioning the evidence informing government policy. An analysis of the infection rate<sup>13</sup> by two Stanford professors of medicine suggests that the infection rate may be much higher, and the mortality rate much lower, than modelled, something supported by epidemiologist and statistician Prof John Ioannidis.<sup>14</sup> More recently, this evidence has been supported by evidence that the infection might be so large that the virus may only have mortality rate of up to 0.2%.<sup>15 16</sup>
- 51 The reliability of modelling the spread of a novel virus when so many critical factors are unknown is highly contentious.<sup>17</sup> It is of some relevance that evidence of modelling infection and mortality rates from new illnesses is notoriously uncertain; and that Prof Neil Ferguson, the epidemiologist whose paper was key to the government's imposition of the Regulations, himself predicted up to

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<sup>13</sup> <https://www.wsj.com/articles/is-the-coronavirus-as-deadly-as-they-say-11585088464>.

<sup>14</sup> 'A fiasco in the making... we are making decisions without reliable data' (<https://www.statnews.com/2020/03/17/a-fiasco-in-the-making-as-the-coronavirus-pandemic-takes-hold-we-are-making-decisions-without-reliable-data/>), 17.3.2020; see also 'Population-level COVID-19 mortality risk for non-elderly individuals overall and for non-elderly individuals without underlying diseases in pandemic epicenters', by Prof Ioannidis (<https://www.medrxiv.org/content/10.1101/2020.04.05.20054361v1>), 8.4.2020.

<sup>15</sup> 'Why a study showing that covid-19 is everywhere is good news' (<https://www.economist.com/graphic-detail/2020/04/11/why-a-study-showing-that-covid-19-is-everywhere-is-good-news>), 11.4.2020, *ibid*.

<sup>16</sup> Antibody study suggests coronavirus is far more widespread than previously thought' (<https://www.theguardian.com/world/2020/apr/17/antibody-study-suggests-coronavirus-is-far-more-widespread-than-previously-thought>), 18.4.2020, *ibid*.

<sup>17</sup> 'Predictive Mathematical Models of the COVID-19 Pandemic', Nicholas P. Jewell, PhD and others (<https://jamanetwork.com/journals/jama/fullarticle/2764824>), 16.4.2020.

138,000 deaths from vCJD, a disease that has killed only around 150 people to date;<sup>18</sup> and who has also been criticised for his modelling of the foot and mouth crisis in 2001.<sup>19</sup> Moreover, Carl Heneghan, director of the centre for evidence-based medicine at Oxford University, has suggested that the 'peak' of infections may have been as early as 18<sup>th</sup> March, days before the start of the 'lockdown'.<sup>20</sup>

- 52 Comparative evidence of the impact of alternative measures in different jurisdictions, while difficult to evaluate, is a relevant consideration, given the different extent to which infections are introduced, population density and other factors. The European state whose policy has been most at odds with the rest of the continent has been Sweden, which has not introduced a 'lockdown', has kept primary schools open and has not closed shops, restaurants or even bars. Sweden's policy is strongly endorsed by its chief medical advisors and, while its death rate increased faster than comparable Scandinavian countries at the beginning of the infection, those rates have plateaued in recent days.<sup>21</sup> <sup>22</sup> Its chief health adviser has stated that reduced infection rates in Stockholm suggests that the archipelago will achieve 'herd immunity' within weeks.<sup>23</sup> Only yesterday (29 April 2020) the World Health Organisation praised the measures Sweden has put in place to contain the virus.<sup>24</sup>
- 53 Meanwhile, an Israeli study published days ago suggests that the measures that each country has taken has had little impact on mortality rates.<sup>25</sup>
- 54 A key ground for the government's imposition of these restrictions has been that the need to reduce a 'spike' in hospital admissions in order to ensure that the NHS is able to treat those

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<sup>18</sup> The spread of the prediction was of different orders of magnitude – from 150 to 158,000 – which itself reveals the uncertainty of any such modelling: <https://www.telegraph.co.uk/news/uknews/1330370/Scientists-fear-second-wave-of-human-BSE.html>.

<sup>19</sup> Use and abuse of mathematical models: an illustration from the 2001 foot and mouth disease epidemic in the United Kingdom, University of Edinburgh. ([https://www.research.ed.ac.uk/portal/files/14288330/Use\\_and\\_abuse\\_of\\_mathematical\\_models\\_an\\_illustration\\_from\\_the\\_2001\\_foot\\_and\\_mouth\\_disease\\_epidemic\\_in\\_the\\_United\\_Kingdom.pdf](https://www.research.ed.ac.uk/portal/files/14288330/Use_and_abuse_of_mathematical_models_an_illustration_from_the_2001_foot_and_mouth_disease_epidemic_in_the_United_Kingdom.pdf)), 2006.

<sup>20</sup> 'Coronavirus Peak is past and now lockdown worse than virus' (<https://www.thetimes.co.uk/edition/news/coronavirus-peak-is-past-and-now-lockdown-worse-than-virus-expert-insists-sq6dd0jdx>), 21.4.2020.

<sup>21</sup> Sweden sees just 77 new deaths from coronavirus and number of new infections drops by a quarter to just 544 as nation continues to resist lockdown (<https://www.dailymail.co.uk/news/article-8208397/Sweden-sees-just-77-new-deaths-coronavirus.html>), 10.4.2020.

<sup>22</sup> Up to date statistics (in Swedish): <https://experience.arcgis.com/experience/09f821667ce64bf7be6f9f87457ed9aa>.

<sup>23</sup> 'Stockholm could have herd immunity by next month' (<https://www.aol.co.uk/news/2020/04/19/coronavirus-stockholm-could-have-herd-immunity-by-next-month/?ncid=webmail&guccounter=1>), 19.4.2020.

<sup>24</sup> [https://nypost.com/2020/04/29/who-lauds-sweden-as-model-for-resisting-coronavirus-lockdown/amp/?\\_\\_twitter\\_impression=true](https://nypost.com/2020/04/29/who-lauds-sweden-as-model-for-resisting-coronavirus-lockdown/amp/?__twitter_impression=true)

<sup>25</sup> Israeli Study Suggests Lockdown Has No Effect On Coronavirus Timeline (<https://www.dailywire.com/news/israeli-study-suggests-lockdown-has-no-effect-on-coronavirus-timeline-say-israeli-space-agency-chair>), 13.4.2020.

hospitalised with ventilators. Yet even their effectiveness in treating Covid-19 is disputed.<sup>26</sup> <sup>27</sup> Moreover, accepted evidence shows that the emergency hospitals that have been built are largely empty and that there is much capacity for additional coronavirus patients should infection rates increase were the restrictions removed or eased.

55 In respect of the particular decision to close schools (one impossible to reverse without some restrictions within the Regulations being removed) a detailed assessment of evidence published by the *Lancet* on 6.4.2020 casts doubt on their need or effectiveness as a means of containing viral spread.<sup>28</sup>

56 The above are cited in addition to the scientific evidence cited in Appendix Two and establish substantial doubt about the scientific and statistical basis for the modelling that has been the basis on which the Government has imposed the Regulations. In weighing the supposed benefits of the restrictions against the harms they unquestionably cause, this undermines the weight that that evidence should be given and any attempt to assert that the restrictions are proportionate.

57 Finally, we note the Government's belated inclusion of care home deaths in the overall mortality figures. We make two observations. First, these sad deaths are irrelevant to the efficacy of the 'lockdown' restrictions. Infections in care homes could and would be restricted by restrictions on those who could visit them irrespective of wider restrictions on the population as a whole. Secondly, we note evidence that the decisions by the NHS to discharge patients from hospital to care homes without testing them for C19 is likely to have increased the spread of the virus within them – something for which the State is responsible.<sup>29</sup>

### Harms caused by the Regulations

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

59 Our client first relies on the harms set out in paragraph 37 above, caused by the interference with fundamental human rights. These are set out in summary only and we will, should proceedings be necessary, rely on more detailed evidence in relation to each infringement.

60 Secondly, our client relies on evidence cited in Appendix Two.

61 In summary, the harms caused by the Regulations are exceptional. Indeed, there is a strong possibility that they could cause the greatest harm to the country's economy, in peacetime, for 100 years. Each of these harms will grow greater the longer the Regulations remain. In particular but far from exclusively (and relying on evidence cited in Appendix Two):

- (1) The short-term impact on health, including the risk of thousands more deaths from cancer and heart conditions that are undiscovered (through people being unable or unwilling to seek medical advice, for example, with lumps or other symptoms) and untreated, including from

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<sup>26</sup> 'Clinical course and mortality risk of severe COVID-19', Paul Weiss, David R Murdoch, *The Lancet*, ([https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30633-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30633-4/fulltext)) 17.3.2020.

<sup>27</sup> 'Ventilators aren't a panacea for a pandemic like coronavirus' by Matt Strauss, *The Spectator*, 4.4.2020.

<sup>28</sup> School Closures and Management Practices by Prof Russell Viner and others, *the Lancet* ([https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(20\)30095-X/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30095-X/fulltext)), 6.4.2020.

<sup>29</sup> See <https://www.telegraph.co.uk/global-health/science-and-disease/unlike-spanish-flu-trek-peak-coronavirus-will-long/>

the fear caused by the Government's messaging policy that has the effect of deterring those at risk from seeking treatment;<sup>30</sup>

- (2) The short-term impact on mental health and domestic violence caused directly by the lockdown, particularly on poor and vulnerable families effectively locked in small flats with no outside space and limited opportunities to leave and exercise;
- (3) The damage to the education and lifetime opportunities of a generation of children and young people;
- (4) The catastrophic economic damage. In producing a "reference" scenario, the Office for Budget Responsibility (OBR) finds that UK GDP might fall by as much as 35% in Quarter 2 (Apr to June) 2020. These anticipated effects on the UK economy are based on the effects of reducing the demand for goods and services and the impact on the ability of businesses to supply those goods and services. Any recovery will be far more difficult to achieve the longer business is unable to operate, the more companies become insolvent and the more people lose their jobs – including at the end of the period in which they may be preserved by the Government's furlough scheme; and predictions include that the UK economy could be damaged by £800 billion in ten years;
- (5) The consequence of that damage on individuals, families, communities and societies as a whole. A primary consideration is the damage to health and wellbeing from poverty and unemployment but the closure of numerous small businesses – particularly but not exclusively restaurants, cafes and pubs, will have a devastating effect on towns and cities in particular.

### Application of the Siracusa Principles

62 These Principles are the most appropriate means of evaluating the proportionality of the Regulations as a whole. They are principles of international law developed and adopted for that purpose during public health crisis, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms; and they incorporate well established proportionality principles. Case law on the proportionality of restrictions of individual rights will also be relevant to the determination of the challenge and we will rely on it in our Statement of Grounds in the event proceedings must be issued.

63 Applying the Principles, the following considerations establish that the Regulations, considered as a whole, are not a proportionate response to this public health crisis.

*Provided for and carried out in accordance with the law.*

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

*Directed toward a legitimate objective of general interest.*

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

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<sup>30</sup> <https://www.theguardian.com/society/2020/apr/29/extra-18000-cancer-patients-in-england-could-die-in-next-year-study>

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

- 66 These are considered together as the question of whether the Regulations are the least intrusive and restrictive measure available is relevant to that of whether they are 'strictly necessary' in a democratic society. It is submitted that they are neither.
- 67 The Regulations were imposed as part of an express policy that not only fails to consider the potential effectiveness of less restrictive measures but which (through the First Secretary's tests) expressly fails to balance the harms they may redress against the harms they cause. They impose unprecedented and exceptionally grave restrictions on every area of society and on almost all means of human interaction. And they are likely to devastate the livelihoods of millions and to cause great harm to individuals and to society.

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

- 68 While the Regulations are based on scientific evidence, that evidence can only be measured insofar as it justifies the effectiveness of *these* restrictions measured against any that would be less regressive. There is no evidence that the government has considered such evidence adequately; and the First Secretary's tests would appear to prevent the termination of any of the restrictions unless *each* of the conditions it set are met. These include a sustained reduction in infections and death rates that take no account of whether less regressive measures might achieve the same object. Thus, the government's policy can be imputed to be that they will remain in such circumstances even in the face of evidence of that less restrictive measures would be just as effective.
- 69 The scientific evidence of the efficacy and effectiveness of the Regulations as a proportionate means of reducing the spread of the virus is uncertain. Before such evidence could establish that the Regulations are the 'least restrictive' means of addressing the objective, it would need to be compared to evidence of the effectiveness of less regressive measures; and there is positive evidence that no such evaluation has been conducted. Indeed, the speed with which the Prime Minister announced a change in policy on considering the evidence of just one scientific team, led by Prof Ferguson, strongly suggests that it was not.

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

- 70 While the measures are subject to review every 21 days, the decision of the Secretary of State is absolute and subject only to judicial review. Unlike regulations passed under the CCA, Parliament has no right to scrutinise the Regulations until they expire after six months.
- 71 Moreover, the Regulations themselves proscribe – for the first time in the history of this country – all political gatherings and public demonstrations without exception. Even if such an exceptional step was found (on other grounds) to be proportionate, the chilling effect it must have on the ability of opposition to the policy to be organised and mobilised and to demonstrate publicly weighs against a determination that restrictions of this magnitude, subject to no democratic scrutiny for up to six months<sup>31</sup>, are justifiable.

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<sup>31</sup> In view of the fact that the requirement for positive resolutions by both Houses of Parliament within 28 days is subject to the qualification that this period does not include periods where Parliament is prorogued, dissolved or not sitting for more than four days; see fn 14, above.

## Lawfulness of the decision to retain the Regulations after the review on 16 April 2020

72 Further and alternatively, our client contends that the decision of the Secretary of State to maintain each of the restrictions provided for by the Regulations, alternatively any one of them, in the review he conducted on 16 April 2020 in accordance with reg. 3(2), was *ultra vires* on the following grounds that he:

- (1) Failed to take any, or any adequate, account of the considerations stated in paragraph 3 (b) above and unreasonably fettered his discretion by imposing a further five tests, each of which had to be satisfied before the restrictions could be eased and none of which took any consideration of the above factors or whether each of them were the least restrictive means of doing so or proportionate to the harms done by the restrictions; and
- (2) He decided not to terminate all, alternatively any one, of the restrictions (save restrictions that would prevent gatherings of more than 100 people, provided schools can reopen), notwithstanding that they were:
  - (c) Not proportionate, contrary to the limitation imposed by s 45D of the 1984 Act; and/or
  - (d) A disproportionate breach of the above Convention rights

even if, which is denied, they or any one of them were proportionate and/or were not disproportionate breaches of Convention rights on the date they were first imposed.

### Failure to take into account relevant considerations and further fettering of discretion

73 Our submissions (in paragraphs 26-36) on the effect of the fettering discretion and failure to take any, or any adequate, account of relevant considerations, are repeated. To the extent that any of those considerations are found not to have been necessary before the decision was taken to impose the Regulations, they should have been taken into account by the Secretary of State in his review of the continued application of the Regulations before he made the decision to retain them on 16 April 2020.

74 On 16 April 2020<sup>32</sup> the First Secretary of State, announcing the decision not to end their application on that date, 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.<sup>33</sup>

75 This statement imposed a considerable additional fetter over the Secretary of State's future decisions about whether to relax the Regulations. The above additional tests fail to require

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<sup>32</sup> 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)).

<sup>33</sup> 'UK lockdown extended for 'at least' three weeks' (<https://www.bbc.co.uk/news/uk-52313715>), 16.4.2020.

ministers to consider whether the Regulations are, and continue to remain, the least restrictive means of obtaining the object of reduced viral spread; fail to take any account of the considerations that should be applied under the Siracusa Principles; and thus do not allow the Secretary of State to determine whether the continuation of the restrictions in the Regulations (or any one of them) remain proportionate, under s 45D of the 1984 Act, or whether they have become disproportionate infringements of Convention Rights.

- 76 Under the First Secretary's tests, restrictions would remain if there were insufficient tests or (given that each of the tests must be met) the rate of infection had not decreased. No consideration is required – or even may be taken – of whether different or less restrictive means could be attempted or are likely to succeed in reaching that object: the tests fail to ask whether the interference is now and will continue to be proportionate to this object.
- 77 While the scientific and comparative evidence<sup>34</sup> concerning the impact of the virus is of key importance, it is not and cannot be the only – or even the overriding – consideration in imposing restrictions of such magnitude and in limiting and removing fundamental human rights.

Continuation of Regulations was not proportionate under the 1984 Act and was a disproportionate breach of Convention rights

- 78 We repeat the submissions made between paragraphs 36 and 63 above. To the extent that the decision to impose the restrictions (or any one of them) might be found proportionate under the 1984 Act or not a disproportionate breach of Convention rights, our client submits that they were by the date of the review on 16 April 2020. Our client relies also (*inter alia*) on the additional evidence available to the Government on the second but not the first date; and in particular on the additional scientific evidence questioning the mortality rate, the modelling of Imperial College on which the Government unreasonably relied. Additionally, there is comparative evidence of the success of less restrictive measures in protecting the most vulnerable in the population.
- 79 Our client further relies on the increasing and developing harms caused by the 'lockdown' restrictions to mental and physical health, the education of children, to businesses, to the jobs of millions and to society as a whole. The evidence on which our client relies establishes that these harms will only grow the longer these restrictions remain.

**Ongoing duty of review and to terminate any or all of the restrictions as soon as they are not proportionate**

- 80 If proceedings are issued, our client will raise the further and alternative ground that the Secretary of State has an ongoing duty to review whether the continued imposition of all, alternatively any one, of the restrictions are the least restrictive means of containing the coronavirus and proportionate (pursuant to s 45D of the 1984 Act) and not a disproportionate breach of the above Convention rights, taking into account the considerations outlined in paragraph 3 (2) above and not fettering his discretion by imposing the five tests announced on 16 April 2020; and ask the Court to consider whether the continuation of all or any of the restrictions is not proportionate at the date of any court hearing, if it was not at the date of the imposition of the Regulations or on 16 April 2020.

**Standing**

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

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<sup>34</sup> Of alternative means of containing the virus adopted by other countries. There is no evidence that these have been evaluated by government; and Ministers' express announcements suggest that they have not been.

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

82 Mr Dolan is the director and majority shareholder in a trading company which is incorporated in England and Wales, namely Jota Aviation Ltd, and has other business interests in England and Wales. As a part passenger/part freight operation, this business has been negatively affected by the coronavirus epidemic and the Regulations in particular. The Regulations effectively prevent any passenger flights save (perhaps) in exceptional circumstances. The Regulations prejudice his interests and he has standing to bring this claim.

83 Moreover, the Regulations are, beyond question, of the most far reaching kind and impact directly on every person resident in England. They impose extraordinary restrictions that are subject (we say unlawfully) to minimal Parliamentary scrutiny and it is of the greatest public interest that the Court is able to determine whether they were imposed lawfully.

84 Mr Dolan brings this action in the public interest. On this letter before action being served, he will launch a crowd-funding campaign in which any person supporting the scrutiny of this legislation can contribute. In this respect, we draw your attention to the judgment of the Administrative Court in *R (on the application of Save our Surgery Ltd) v Joint Committee of Primary Care Trusts* ([2013] EWHC 439 (Admin), 'Save our Surgery'). There, Nicola Davis J found that a claimant had sufficient interest where it represented:

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

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

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

## **The Secretary of State for Health and Social Care is the appropriate potential defendant**

86 The Regulations provide that the declaration of circumstances of an emergency and the review of the Regulations that must take place every three weeks is to be by 'the Secretary of State'. We appreciate that any power exercisable by the Secretary of State may be exercised by any one of them; but we understand that the powers are in this case exercised by the Secretary of State for Health and Social Care.

87 We would be grateful if you could inform us if you consider that the powers exercised under the Regulations are in practice exercised by another Secretary of State who would thereby be a more appropriate defendant.

## **Other information required by the Protocol**

### The Defendant's reference details

88 This is not applicable as this is a new action.

### The details of the Claimants' legal advisers dealing with the claim

89 Our address and reference number are above. The partner dealing with this matter is Michael Gardner.

### The detail of the matter being challenged

90 The purported exercise of the delegated power to impose secondary legislation through s45C of the 1984 Act; and the Secretary of State's decision not to terminate all, alternatively any, of the provisions of that secondary legislation.

### The details of the interested parties

91 We do not consider that there are any interested parties as the decision to impose the regulations was one that could exclusively be exercised by Ministers of the Crown; and the review and decision not to terminate the Regulations could only be undertaken and made by the Secretary of State, pursuant to reg. 3.

### The issue

92 We refer you to our above submissions.

### The details of the action that the defendant is expected to take

93 To take the action set out in the introduction.

### ADR proposals

94 While he considers that the Regulations are *ultra vires* Mr Dolan would consider not issuing proceedings were the Secretary of State to agree to terminate all restrictions save those he considers not to be disproportionate breaches of Convention rights, namely (for a limited period) restrictions (subject to regular review) that would prevent large gatherings of more than 100 people, provided schools can reopen. Mr Dolan would, however, reserve his right to bring such proceedings should the continuation of those measures become disproportionate.

95 Our client could consider alternative proposals to moderate the restrictions.

96 We do not consider that this is a matter suitable for mediation and it is wholly unsuitable for arbitration, being a matter of public law of the highest importance.

### The details of any information sought

97 Our client does not seek any information at this stage but reserves his right to do so should he be required to issue proceedings.

### The details of any documents that are considered relevant and necessary

98 As stated in the introduction, our client requests that you disclose minutes of the meetings of SAGE since the beginning of 2020. Failure to do so will result in an application for disclosure if proceedings have to be issued.

- 99 Our client does not demand further disclosure at this stage in order to allow you to focus on considering the legal submissions in this letter; but we reserve his right to do so should it become necessary in due course.
- 100 If you do not make the declaration sought, our client will seek disclosure of the SAGE minutes and may seek disclosure of other documents taken into account by the Government before its decision to impose the Regulations and/or not to terminate them on 16 April 2020 or at any later reviews before the date of any court hearing.

The address for reply and service

- 101 We confirm that we are instructed to accept service on behalf of Mr Dolan.

Proposed reply date

- 102 As previously stated and for the reasons set out, our client will issue proceedings after 7 May 2020 if the Secretary of State does not agree to the remedies sought.

We accordingly look forward to hearing from you on or before **4pm on 7 May 2020**.

Yours faithfully

*Wedlake Bell LLP*

Wedlake Bell LLP

Enc

cc Government Legal Department