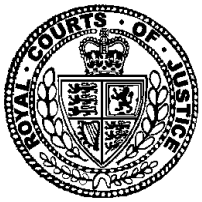

Neutral Citation Number: [2020] EWCA Civ 1605

Case No: C1/2020/1117

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LEWIS J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LADY JUSTICE KING
and
THE RT HON LORD JUSTICE SINGH

- -

Between:

The Queen (on the application of **(1) Simon Dolan** **(2) Lauren Monks** **(3) AB (by his litigation friend CD))**	**Appellants/ Claimants**
- and -	
(1) Secretary of State for Health and Social Care **(2) Secretary of State for Education**	**Respondents/ Defendants**

- -
- -

Mr Philip Havers QC and Mr Francis Hoar (instructed by **Wedlake Bell**) for the **Appellant**
Sir James Eadie QC, Ms Zoe Leventhal, Ms Jacqueline Lean and Mr Tom Cross
(instructed by the **Government Legal Department**) for the **Respondents**

Hearing dates: 29 & 30 October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be **MONDAY, 1 DECEMBER 2020 at 2 O'clock.**

Lord Burnett of Maldon CJ, King LJ and Singh LJ :

Introduction

1. The appellants challenge regulations made in response to the Covid-19 pandemic on 26 March 2020 and since which introduced what was commonly known as a "lockdown" in England. They submit that the regulations imposed sweeping restrictions on civil liberties which were unprecedented and were unlawful on three grounds. First, the Government had no power under the legislation they used to make the regulations, namely the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008 ("the 1984 Act"). Secondly, the regulations are unlawful applying ordinary public law principles; and thirdly they violated a number of the Convention rights which are guaranteed in domestic law under the Human Rights Act 1998 ("HRA"). Although the regulations were amended on several occasions and have since been repealed, the appellants contend that it remains important that the legal issues which arise should be authoritatively determined in the public interest.

2. Lewis J refused permission to apply for judicial review on 6 July 2020 having heard oral argument four days earlier. This is an application for permission to appeal his order refusing permission. When considering such an application this Court has wide powers, including the power to grant permission to apply for judicial review (rather than permission to appeal); and, if it grants permission, it may retain the substantive claim for judicial review and determine that claim itself rather than remit the case to the High Court: see CPR 52.8(1), (5) and (6).

Factual Background

3. On 31 December 2019, the World Health Organisation ("WHO") was notified by China of a cluster of unusual pneumonia cases. These cases were later identified as being caused by a novel coronavirus now referred to as Covid-19, although it is technically called "severe acute respiratory syndrome coronavirus 2" or "SARS-CoV-2".

4. On 30 January 2020 the Director General of WHO declared a public health emergency of international concern over the global outbreak of Covid-19. He announced that there had been an outbreak of a previously unknown pathogen. There were by then 98 cases in countries outside China, in Asia, Europe and North America.

5. On 31 January 2020, the United Kingdom reported its first cases of Covid-19.

6. On 16 March 2020 the Government advised the public to avoid non-essential contact with others, to stop all unnecessary travel and to work from home wherever possible.

7. On 18 March 2020 the Government requested that schools should stop providing education to children on school premises. This did not apply to children of those classified as key workers or to vulnerable children.

8. On 23 March 2020 the Prime Minister announced that England was being placed in what became known as the "lockdown". The regulations to give effect to that announcement were made on 26 March 2020. At 13.00 on that date, the Health

Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) were made, imposing restrictions on the activities of those living and working in England. They contained a review mechanism and were superseded by the time of the hearing before Lewis J.

9. The regulations were first reviewed on 16 April 2020. They were amended with effect from 22 April 2020 by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations (SI 2020/447). They were reviewed again on 7 May 2020. On 13 May 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations (SI 2020/500) came into force. On 24 May 2020, the Government confirmed a request to schools that some groups of school children should begin to attend school again from 1 June 2020. On 1 June 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (SI 2020/558) came into force. Then, on 13 June 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations (SI 2020/588) came into force. On 19 June 2020, it was announced by the Government that the coronavirus alert level had reduced to level 3 (that the virus was in general circulation) from level 4 (that the rate of infection was increasing exponentially).

10. On 3 July 2020, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684) were made and came into force on 4 July 2020. These repealed and replaced the earlier regulations, which are the subject of these proceedings.

The parties

11. The first appellant is Mr Simon Dolan, who is a British citizen but lives in Monaco. He is the owner of businesses based in the United Kingdom, including Jota Aviation Limited, which leases planes to airlines. He visits this country to see family and friends. In his evidence he says that, if it had been permitted under the regulations, he would have wished to join in protests against the regulations.

12. The second appellant is Ms Lauren Monks, who works for a company owned by Mr Dolan. She is a British citizen and lives with her 10-year old son. She is a Roman Catholic. Her son attends a Roman Catholic school. From late March until June 2020 her son did not attend school. From 2 June 2020 he attended school for two days a week. Neither Ms Monks nor her son was able to attend mass at church at the relevant time.

13. The third appellant is a pupil at school. He benefits from an anonymity order.

14. The first respondent is the Secretary of State for Health and Social Care ("the Secretary of State"), who made the regulations under challenge in this case. The second respondent is the Secretary of State for Education ("the Education Secretary").

The regulations under challenge

15. The regulations under challenge were first made on 26 March 2020 by the Secretary of State.

16. The preamble to the regulations stated that they were made in response to "the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England". The preamble continued that the Secretary of State considered that the restrictions and requirements imposed by the regulations were "proportionate to what they seek to achieve, which is a public health response to that threat".

17. Regulations 4 and 5 as originally made required certain businesses to close during the emergency period. Businesses such as restaurants, cafes and public houses were prohibited from selling food and drink for consumption on the premises. They were permitted to sell takeaway food and drink. Other businesses and shops were required to close, save for specified exceptions, such as food retailers, pharmacies, banks and petrol stations. The regulations were later amended and, from 15 June 2020, other shops were permitted to open and to sell goods.

18. Regulation 5(5) as originally made provided that a place of worship had to close during the emergency period, save for limited purposes such as funerals. From 13 June 2020, places of worship were permitted to open for private prayer but not for acts of communal worship.

19. Regulation 6(1) as originally made prohibited a person from leaving the place where they were living without reasonable excuse. A non-exhaustive list of reasonable excuses was set out in regulation 6(2), including to obtain basic necessities (sub-para. (a)); to take exercise (sub-para. (b)); to travel for the purposes of work where it was not reasonably possible to work from home (sub-para. (f)); and to fulfil a legal obligation, including attending court (sub-para. (h)). From 1 June 2020, regulation 6 was replaced by a prohibition on a person staying overnight at any place other than where that person lived without reasonable excuse.

20. Regulation 7 in its original form prohibited gatherings in a public place of more than two people unless they came from the same household or for specified purposes such as work. Regulation 7 was amended and, from 1 June 2020, gatherings of more than six people in a public place, or two or more people indoors, were prohibited unless the persons were members of the same household. From 13 June 2020, a new concept of a "linked household" was introduced by regulation 7A, which permitted a household of a single adult to "link" with a second household. Members of the two linked households could gather together at outdoor or indoor places.

21. There were provisions for enforcing the regulations, including a power for specified persons to direct that persons should return to the place where they were living: see regulation 8. Contravention of regulations 4, 5, 7 or 8 was made a criminal offence punishable by a fine or a fixed penalty notice, but it should be noted that regulation 9(1)(a) contained a general provision that it was not a criminal offence if the act was done with "reasonable excuse". Contravention of regulation 6 was also made a criminal offence but, as we have already seen, that contained an exception where there was a reasonable excuse.

22. The regulations as made on 26 March 2020 were to expire at the end of six months. The Secretary of State was required to review the need for the restrictions every 21 days (later amended to every 28 days): see regulation 3. That regulation also required the Secretary of State to terminate any restriction or requirement as soon as he

considered that it was no longer necessary to prevent, protect against, control or provide a public health response to the spread of infection. That is indeed what occurred, although later regulations have been made from time to time which are not the subject of the challenge before this Court.

The judgment of Lewis J

23. Lewis J held that the claim for judicial review of the original regulations 6 and 7 was academic and that he would refuse permission to bring a claim for judicial review on the basis that they allegedly involved a breach of articles 5 and 11 of the Convention: para. 32. He rejected the *vires* argument. He considered that ground to be unarguable, on the correct construction of the enabling powers conferred by the 1984 Act: paras 34 to 46. The judge considered that the domestic public law challenges were also unarguable: paras. 47 to 63.

24. The judge granted permission to re-amend the claim to challenge the version of regulation 6 which applied from 1 June 2020 on the ground that it violated article 5 of the Convention. He concluded that the ground was unarguable because there was no deprivation of liberty for the purposes of that article: paras 67 to 73. He did so having regard to the decision of the Strasbourg Court in *Guzzardi v Italy* (1981) 3 EHRR 333 and the decision of the House of Lords in *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] AC 385.

25. The judge refused permission to advance the ground based on article 8 (private and family life). He considered that it was unarguable that any interference with article 8 rights was disproportionate: paras 74 to 78. In relation to article 9 (freedom of religion), he noted that regulation 5 had been amended on the day after the hearing, 3 July 2020, with effect from 4 July. He considered that the claim may therefore have become academic and proposed to adjourn consideration of this issue. Subsequently, after considering further written submissions from the parties, he refused permission on this ground in an order sealed on 22 July 2020. He also concluded that it was not arguable that there was any disproportionate interference with article 11 rights (freedom of assembly and association).

26. The judge considered the right to peaceful enjoyment of possessions in article 1 of the First Protocol to the Convention ("A1P1"). He concluded, first, that there was no evidence that the regulations had deprived the first appellant or anyone else of any possessions. Secondly, the first appellant had not provided sufficient evidence that the regulations had involved any unlawful interference with his property such as would justify permitting the claim to proceed on this ground. The judge noted that, so far as the airline leasing business was concerned, there was "simply no realistic basis on which it could be said that the regulations have caused the loss or damage to that business". He concluded that it was overwhelmingly more likely that the cause of any economic harm to that business was the restrictions on flights imposed by other countries; or the fact that people were unable or unwilling to fly because of restrictions or fears about the situation in other countries. Accordingly, he refused permission on this ground and an associated application to re-amend the claim: paras 97 to 105.

27. The judge also refused permission in relation to the right to education protected by article 2 of the First Protocol (A2P1): paras. 106-112. He did so on the basis that

there was no order made under the Coronavirus Act 2020 to close any school in England. The factual position was that, as at about 18 March 2020, the Government considered that education should not be provided at school premises in England save for the children of key workers and vulnerable children. There was no legal measure made by either of the two respondents requiring those responsible for running schools to close those schools. Regulation 7 specifically exempted educational facilities from the general prohibition on gatherings in a public place. The judge also refused permission to re-amend the grounds in support of this claim.

Grounds of appeal

28. Although the grounds of appeal are formulated in various ways, in substance this is a renewed application for permission to bring the underlying claim for judicial review. On behalf of the appellants Mr Philip Havers QC submits that the judge was wrong to refuse permission to bring the claim for judicial review, because the grounds are properly arguable.

29. At one time the appellants sought permission from this Court to amend the judicial review grounds to permit challenges to limited parts of the regulations that repealed and replaced the regulations under challenge with effect from 4 July 2020; effectively a rolling claim to all and any iterations of the regulations. That application was not pursued.

Procedural issues

Standing

30. The first procedural issue which arises, although it was not the subject of oral submissions at the hearing before us, is the question whether the appellants have standing to bring these proceedings. The test for standing is different in applications for judicial review as compared to a claim under section 7 of the HRA. For the former, the test is whether the applicant has "a sufficient interest in the matter to which the application relates": see section 31(3)(a) of the Senior Courts Act 1981. For the latter, the test is whether the claimant is, or would be, a "victim" of the alleged violation of Convention rights: see section 7(7) of the HRA and article 34 of the Convention, to which it expressly cross-refers. If proceedings under the HRA are brought by way of an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act: see section 7(3).

31. It is well established that the test of "sufficient interest" is broader than that of a "victim", since the latter requires that an individual is personally and directly affected, whereas the former does not. Nevertheless, in the circumstances of the present case, we would not have refused permission to bring this claim for judicial review on the ground that the appellants lack standing.

Time limits

32. The rules provide that an application for judicial review must be filed "promptly" and "in any event not later than three months after the grounds to make the claim first arose": see CPR 54.5(1)(a) and (b).

33. The time limit for a claim under the HRA is normally one year but this is subject to any stricter time limit in relation to the procedure in question (in this case judicial review): see section 7(5)(a) and (b) of the HRA.

34. It is clear from the text of CPR 54.5(1), and is also well established in the authorities, that there is no right to wait for a full three months. The claim form must be filed "promptly"; there may be undue delay even if an application is filed within three months.

35. The judge held that the present claim was not filed with undue delay in view of its complexity and importance (see para. 30 of his judgment) and no attempt has been made by the respondents to upset that conclusion. Nonetheless, we make clear our serious doubts about whether it was in fact made promptly in the circumstances of this case, without relying on them to determine the application before us. Firstly, this was a case that called for very quick action indeed given the fast-moving situation from late March. Secondly, many third parties were potentially affected by the challenge, not least in possible criminal proceedings. Thirdly, the issue of *vires* was one which was the subject of public debate, certainly amongst lawyers, immediately around the time that the regulations were first made in late March. It could have been dealt with very quickly. Fourthly, we bear in mind that one of the arguments that was made before us as to why this Court should grant permission to bring a claim for judicial review even if the case has become academic is that otherwise a claim could never be brought because the regulations have been changed many times. If anything, that point underlines how important it is for a challenge such as this to be brought very soon after the regulations are made. In our view, this is not a case in which it should have taken almost two months until the claim form was filed, on 21 May 2020.

Is the claim academic and, if so, should it nevertheless be considered in the public interest?

36. The judge held that the claim, as originally brought, was in part academic on the ground that it sought to quash the original regulations of 26 March, which had been significantly amended by the time of the hearing before him. Shortly after the hearing before Lewis J on 2 July 2020, and just before he gave judgment on 6 July, the regulations were repealed and replaced by a different set of regulations with effect from 4 July.

37. Before us Mr Havers submits that the claim was not academic at the time when it was brought, on 21 May. Further, he submits that, although the original remedy sought (a quashing order) could no longer be granted, since the regulations are no longer in force, there would be nothing to prevent this Court from granting a declaration or even simply saying that the regulations were unlawfully made.

38. On behalf of the respondents, Sir James Eadie QC invited us to refuse permission on the ground that the claim is academic. Nevertheless, at the hearing before us, he recognised that there might be a distinction to be drawn between the different grounds on which the claim is brought. He recognised that there was merit in dealing substantively with the *vires* ground. The other grounds, he maintained, should not be entertained, since they would turn on the facts and, in particular, the facts as they were at the time when the regulations were made. He submitted, with force in our view, that this Court should not allow those parts of the claim to proceed in any event, since

any decision on those grounds would not lay the foundation for any useful precedent for the future.

39. In our view, the present claim is clearly academic. The regulations under challenge have been repealed. The crucial question is whether, nevertheless, this Court should permit the claim for judicial review to proceed in the public interest and, if so, on what grounds.

40. The principle which governs the exercise of the Court's jurisdiction to hear judicial review cases which have become academic was set out by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at 456 to 457. There is a discretion to hear disputes which have become academic but the discretion, even in the area of public law, must be exercised with caution; appeals which are academic between the parties should not be heard "unless there is a good reason in the public interest for doing so". By way of example (but stressing that this was only by way of example) Lord Slynn said:

> "When a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

41. In our view, the present is such a case but only in relation to Ground 1, that is the *vires* issue. We have come to the conclusion that it would serve the public interest if this Court itself were to decide that issue now rather than leave it, for example, to be raised potentially by way of defence in criminal proceedings in the Magistrates' Court and no doubt on appeal from there to the higher courts. In *Boddington v British Transport Police* [1999] 2 AC 143 the House of Lords held that a public law argument about the *vires* of an instrument in which a criminal offence is created can be raised by way of defence in criminal proceedings. Furthermore, the question whether the Secretary of State had the *vires* to make regulations of this type continues to be a live issue even though the particular regulations under challenge have been repealed. New regulations continue to be made under the same enabling power.

42. Accordingly, we propose to grant permission to bring this claim for judicial review but only in respect of the *vires* ground. We propose also to deal with that claim in this Court rather than remit it to the High Court for a substantive hearing. We consider that the other aspects of the claim are academic and there is no good reason in the public interest for them to be considered. We will, however, address the merits of those other grounds later in this judgment, since we have had the benefit of full argument about them.

Ground 1

43. Ground 1 is the *vires* issue. It turns on the correct construction of Part 2A of the 1984 Act, as amended.

44. Section 45A is the interpretation provision for Part 2A. It states, at subsection (3), that any reference to "infection" or "contamination" is a reference to infection or contamination which presents or could present significant harm to human health.

45. Section 45C provides:

> "45C Health protection regulations: domestic
>
> (1) 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).
>
> (2) The power in subsection (1) may be exercised—
>
> (a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and
>
> (b) so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances.
>
> (3) Regulations under subsection (1) may in particular include provision—
>
> (a) imposing duties on registered medical practitioners or other persons to record and notify cases or suspected cases of infection or contamination,
>
> (b) conferring on local authorities or other persons functions in relation to the monitoring of public health risks, and
>
> (c) imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.
>
> (4) The restrictions or requirements mentioned in subsection (3)(c) include in particular—
>
> (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.

(5) The power in subsection (1) is subject to section 45D.

(6) For the purposes of this Part—

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

(b) a restriction or requirement mentioned in subsection (4)(a), (b) or (c) is not to be regarded as a special restriction or requirement."

46. Section 45D also needs to be set out in full:

"45D Restrictions on power to make regulations under section 45C

(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) Regulations under section 45C may not include provision imposing a special restriction or requirement mentioned in section 45G(2)(a), (b), (c) or (d).

(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."

47. Section 45F makes it clear, amongst other things, that "health protection regulations" may create offences: see subsection (2)(b). They may also amend any enactment, for the purpose of giving effect to an international agreement or arrangement: see subsection (3).

48. Section 45G relates to the jurisdiction of a justice of the peace to order health measures in relation to persons. Subsections (1) and (2) provide:

> "(1) A justice of the peace may make an order under subsection (2) in relation to a person ('P') if the justice is satisfied that—
>
> (a) P 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.
>
> (2) The order may impose on or in relation to P one or more of the following restrictions or requirements—
>
> (a) that P submit to medical examination;
>
> (b) that P be removed to a hospital or other suitable establishment;
>
> (c) that P be detained in a hospital or other suitable establishment;
>
> (d) that P be kept in isolation or quarantine;
>
> (e) that P be disinfected or decontaminated;
>
> (f) that P wear protective clothing;

> (g) that P provide information or answer questions about P's health or other circumstances;
>
> (h) that P's health be monitored and the results reported;
>
> (i) that P attend training or advice sessions on how to reduce the risk of infecting or contaminating others;
>
> (j) that P be subject to restrictions on where P goes or with whom P has contact;
>
> (k) that P abstain from working or trading."

49. Section 45H confers power on a justice of the peace to make an order in relation to things.

50. Section 45I confers power on a justice of the peace to make an order in relation to premises. This may include an order that the premises be closed: see subsection (2)(a).

51. Section 45J provides that the powers in sections 45G, 45H and 45I include power to make an order in relation to "a group of persons, things or premises": see subsection (1).

52. Section 45P provides that the power to make regulations under Part IIA is exercisable by statutory instrument.

53. Section 45Q provides that an instrument containing regulations under that Part, except one to which subsection (4) applies, is subject to annulment (a) in the case of English regulations, in pursuance of a resolution of either House of Parliament: see subsection (1). Subsection (4) provides that, subject to section 45R, an instrument to which this subsection applies may not be made unless (a) in the case of English regulations, a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

54. Section 45R provides as follows:

> "45R Emergency procedure
>
> (1) This section applies to an instrument to which subsection (4) of section 45Q applies by virtue of subsection (2)(a) or (b) of that section.
>
> (2) The instrument may be made without a draft having been laid and approved as mentioned in subsection (4) of that section 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.

> (3) After an instrument is made in accordance with subsection (2), it must be laid—
>
> > (a) in the case of English regulations, before each House of Parliament; …
>
> (4) Regulations contained in an instrument made in accordance with subsection (2) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved—
>
> > (a) in the case of English regulations, by a resolution of each House of Parliament; …
>
> (5) But if on any day during that period, on proceedings on a motion that (or to the effect that) the instrument be so approved, either House of Parliament … comes to a decision rejecting the instrument, the regulations cease to have effect at the end of that day instead.
>
> (6) In reckoning any such period of 28 days, no account is to be taken—
>
> > (a) in the case of English regulations, of any time during which Parliament is prorogued or dissolved or during which both Houses are adjourned for more than 4 days; …
>
> (7) Subsections (4) and (5) do not—
>
> > (a) affect anything done in reliance on the regulations before they ceased to have effect, or
> >
> > (b) prevent the making of new regulations.
>
> (8) In this section 'English regulations' … have the same meaning as in section 45Q."

55. In the present context, the regulations of 26 March 2020 were certified, in the opinion of the Secretary of State, to be necessary to be made without a draft having been laid before Parliament, in accordance with the emergency procedure in section 45R.

56. According to the preamble to those regulations, the Secretary of State made them in exercise of the powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the 1984 Act.

57. At the hearing before us Mr Havers laid stress on the fact that the regulations referred to having been made under section 45C(4)(d). That is a reference to "a special restriction or requirement".

58. Mr Havers also submits that, when one turns to the provisions of sections 45G, 45H and 45I, which deal with special restrictions or requirements, orders made under those sections can only be in respect of either an individual or a group of persons: see section 45J.

59. In our view, that does not mean that the Secretary of State does not have power to make the regulations under challenge. If all that was required by way of a public health response was orders in respect of individuals or groups of persons, no doubt it would suffice to make an application to a justice of the peace. The purpose of the new regime introduced in 2008 was to cater for the possibility of a much greater public health response which might be needed in order to deal with an epidemic.

60. When section 45C(4)(d) refers to a special restriction or requirement, it does not mean that such a requirement may only be imposed by the Secretary of State in circumstances where an order could be made a justice of the peace. If it were confined in that way, there would be no need for a power to be conferred on the Secretary of State. The true construction of these provisions, in our view, is that a special restriction or requirement is a restriction or requirement of the type which could be imposed by a justice of the peace, for example that a person be subject to restrictions on where he or she goes or with whom he or she has contact: see section 45G(2)(j).

61. We also note that Parliament has expressly provided that regulations under section 45C may not include provision imposing a special restriction or requirement of the types mentioned in section 45G(2)(a), (b), (c) or (d). Those are the following specific requirements:

    (a) that P submits to medical examination;

    (b) that P be removed to a hospital or other suitable establishment;

    (c) that P be detained in a hospital or other suitable establishment; and

    (d) that P be kept in isolation or quarantine.

    This express exclusion suggests that Parliament intended the Secretary of State to be able to impose the other types of restrictions and requirements listed in section 45G(2).

62. Most importantly, in our view, Mr Havers' submission fails to grapple with the fact that the Secretary of State had power to make the regulations under section 45C(1) and (2). The breadth of those provisions is not to be cut down by the more particular provisions of subsections (3) and (4). The words of subsection (1) could not be broader. Furthermore, subsection (3) makes it clear that regulations under subsection (1) "may in particular include" provision of the types then set out in paragraphs (a), (b) and (c): that makes it clear that what follows is not exhaustive. Furthermore, the words of paragraph (c) are themselves broad:

> "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."

63. Finally, in relation to the statutory language, subsection (4) makes it clear that the restrictions or requirements mentioned in subsection (3)(c) "include in particular" what is then set out in paragraphs (a) through to (d). Again therefore it is abundantly clear that, when Parliament referred to a special restriction or requirement in paragraph (d), that was not a provision which cuts down the generality of the power conferred on the Secretary of State earlier in section 45C.

64. We should mention one other submission of Mr Havers, based on the language of section 45C(4)(a), (b) and (c). He emphasises the use of the singular "a", "an" etc. He accepted, as he had to, that, unless the contrary appears, the singular is taken to include the plural and vice versa: see section 6(c) of the Interpretation Act 1978. Nevertheless, Mr Havers submitted that those references must have been, for example, to keeping children from a specific school and not the population generally from schools in England. That submission founders, as King LJ observed during the hearing before us, on the fact that subsection 3(c) refers to "persons, things or premises" in the plural in any event.

65. We are reinforced in this interpretation of the relevant statutory provisions by the Explanatory Memorandum which accompanied the amendments made in 2008. That makes it clear that this new regime was introduced in order to update legislation which was outdated, dating as it did from 19th century conditions, precisely in order to meet a modern epidemic such as that caused by SARS in the early part of this century. If the power to make regulations were as limited as Mr Havers submits, it would not be effective in achieving that purpose.

66. Mr Havers also relies upon the principle of legality, as set out in, for example, *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131-132 (Lord Hoffmann):

> "… The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

As Lord Hoffmann made clear in that passage, it is not only express language which may evince an intention to the contrary. Necessary implication will suffice.

67. Furthermore, as Sir James pointed out before us, it is not sufficient that there may be an interference with fundamental rights; what is required is that such rights would otherwise be "overridden".

68. We also accept the submission by Sir James that, in the present context, the words used by Parliament are not "general or ambiguous". The issue of construction which the *vires* issue raises concerns precisely questions such as whether restrictions on a person's movement or the persons with whom they may associate can be imposed; or whether premises can be ordered to be closed. There can be no doubt, even on Mr

Havers' submission, that a justice of the peace has all of those powers. The issue of construction which his argument raises is the relatively narrow one of whether the Secretary of State has power to impose such restrictions or requirements not only in relation to an individual or a group of persons but also in relation to the population generally in England. That issue of construction is not, on proper analysis, touched by the principle of legality in *Simms*.

69. In that context we would also accept the submission made before us by Sir James in reliance on *R (Black) v Secretary of State for Justice* [2017] UKSC 81; [2018] AC 215, at para. 36 (Lady Hale PSC). In that passage Lady Hale set out a number of "simple propositions" about statutory interpretation. They included the following:

> "(3) The goal of all statutory interpretation is to discover the intention of the legislation.
>
> (4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose."

70. She noted that, in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, at para. 45, Lord Hobhouse of Woodborough had said that: "A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context" (emphasis in original). Lady Hale said that that dictum "must be modified to include the purpose, as well as the context, of the legislation".

71. In the present case, we have reached the conclusion that the purpose of the amendments that were made in 2008 clearly included giving the relevant Minister the ability to make an effective public health response to a widespread epidemic such as the one that SARS might have caused and which Covid-19 has now caused.

72. Finally, we should refer to Mr Havers' submission in reliance on the Civil Contingencies Act 2004 ("the 2004 Act"). Mr Havers submitted that regulations of the kind that were made in this case could have been made under the 2004 Act. Although we did not hear detailed submissions about this, that would appear to be correct. The meaning of an "emergency" in section 19(1)(a) would apply to the present circumstances:

> "An event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region …"

73. Under section 20(1) of the 2004 Act, Her Majesty may by Order in Council make emergency regulations if satisfied that the conditions in section 21 are satisfied. Under subsection (2) a senior Minister of the Crown may make emergency regulations if satisfied (a) that the conditions in section 21 are satisfied, and (b) that it would not be possible, without serious delay, to arrange for an Order in Council under subsection (1).

74. One of the conditions in section 21 is that (a) existing legislation cannot be relied upon without the risk of serious delay, (b) it is not possible without the risk of serious

delay to ascertain whether the existing legislation can be relied upon, or (c) the existing legislation might be insufficiently effective: see section 21(5) of the 2004 Act.

75. As Sir James submits the 2004 Act is an Act of last resort. The existence of those emergency powers does not detract from the fact that the *vires* to make the regulations under challenge in this case exists under the 1984 Act, as amended in 2008.

76. In any event, as Sir James also submits, it is simply not to the point that regulations might have been made under another Act of Parliament. The critical issue which arises before this Court is whether the 1984 Act, as amended, confers power on the Secretary of State to make the regulations which he did. We have come to the clear conclusion that it does. That conclusion is not affected by the fact that the Secretary of State might have had power to make the regulations under the 2004 Act as well.

77. Mr Havers pointed to various differences in the procedure and timetable for the laying of regulations under the two different Acts: see, for example, section 27 of the 2004 Act, which deals with Parliamentary scrutiny of emergency regulations made under that Act. We do not consider that this detracts from the fundamental point that the Secretary of State may well have had a choice of options and could have acted under the 2004 Act. It does not follow that he was required to do so; nor that he is somehow prevented from using the powers which Parliament has conferred upon him in the 1984 Act, as amended.

78. For those reasons, we have come to the conclusion that, although permission to bring this claim for judicial review should be granted, in view of the public interest in the resolution of this important issue, the correct construction is that the Secretary of State did have power to make the regulations under the 1984 Act, as amended in 2008. We would therefore reject Ground 1.

Ground 2

79. Under Ground 2 Mr Havers renews various arguments which were rejected by the judge based on domestic public law.

80. First, Mr Havers submits that the Secretary of State fettered his discretion by imposing five tests before he would be prepared even to consider the easing of the initial "lockdown" which was imposed on 26 March 2020.

81. We do not accept this submission. In company with the judge we have come to the clear conclusion that setting five tests did not fetter discretion but was an exercise of Governmental policy as to how that discretion would be exercised. The principle against fettering of discretion does not prevent a public authority from adopting a policy, even a strict policy. What it does do is to prevent it from being "willing to listen to anyone with something new to say": see *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, at 625 (Lord Reid). That is not what the Secretary of State did on the facts of the present case. At all times is has been possible for those who disagree with the Government to make representations to invite it to ease restrictions or to do so earlier than in fact occurred. That was open to Parliamentarians as well as to others in society.

82. The second ground which Mr Havers advances in this context is that the Secretary of State failed to take account of relevant considerations, in particular as set out in the Amended Statement of Facts and Grounds at para. 71. There are five considerations set out there:

> "The Government could only make this determination after adequate consideration of (at least) the following: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; and in particular the unreliability of the evidence of Prof Ferguson and the Imperial College teams (as set out in para 92 below); (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium- and long-term 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."

83. This submission fails for want of an evidential foundation, without needing to travel into the question whether each of the matters identified was a legally relevant factor. The Secretary of State was well aware of all of these matters and, on the evidence before the judge, he was entitled to reach the conclusion that the Secretary of State did have regard to them.

84. The third ground of challenge in this context is irrationality. Mr Havers submits that the regulations, or at least the decision not to repeal them earlier, was arguably irrational because there could have been more targeted measures, for example to protect those in the most vulnerable groups in society. He relies on evidence consisting of data which suggests that, at around 12 May 2020, "only" 253 people under the age of 60 had died in hospital of Covid-19.

85. Mr Havers also submits that it was arguably irrational not to ease the restrictions by the end of April, because at that time there were 3,000 spare beds in the National Health Service.

86. We must bear in mind that the regulations were approved by Parliament using the affirmative resolution procedure, albeit this occurred some weeks after they were made, as they were made in accordance with the emergency procedure in section 45R. Although this does not preclude judicial review of the regulations, it does go to the weight which the courts should give to the judgement of the executive, because it has received the approval of Parliament.

87. Furthermore, this argument takes no account of the fact that the health consequences of the virus are not to be measured only in the number of deaths. It is well known that many people, including those under the age of 60, were hospitalised and many placed in intensive care units, with intrusive treatment. We also bear in mind that, when the regulations were made in March 2020, the state of medical knowledge was uncertain

and continues to develop. For example, what has since become clear is that there can be the phenomenon of "long Covid". The exact long-term consequences remain unclear.

88. Moreover, in our view, the Government was entitled to take into account public opinion. It is apparent that a number of different interests had to be weighed in the balance, not only the effect on public health but also the effect on the economy, the effect on education and so on. In that context the opinion of members of the public, for example schoolteachers, who may have felt reluctance to go back to teaching pupils physically in a school environment before conditions were ready, were perfectly legitimate matters for the Government to weigh in the balance.

89. We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123, at para. 47: "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers".

90. We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.

Ground 3

91. Under Ground 3 Mr Havers submits that the regulations were unlawful because they were incompatible with various Convention rights, contrary to section 6(1) of the HRA.

Article 5

92. Article 5 protects the right to personal liberty. Mr Havers submits that, both as a consequence of the original regulations enacted in late March and as a result of amendments which had been made by the time of the hearing before the judge on 2 July, the position was clear: that everyone had to stay in their own home. Mr Havers submits that this amounted in effect to a curfew or house arrest.

93. The fundamental difficulty with that submission is that there was no deprivation of liberty within the meaning of article 5, in accordance with the criteria set out by the European Court of Human Rights in *Guzzardi v Italy*. In our view, it is a mischaracterisation to refer to what happened under the regulations as amounting in effect to house arrest or even a curfew. No proper analogy can be drawn with the decision of the House of Lords in *JJ*, which concerned control orders imposed on suspected terrorists. The obligation to stay at home in the original version of

regulation 6(1) was subject to numerous, express exceptions, which were non-exhaustive, and the overriding exception of having a reasonable excuse.

94. In our view, it is unarguable that what happened under these regulations amounted to a deprivation of liberty. Accordingly, there is no need to bring the situation within any of the express exceptions set out in article 5, for example article 5(1)(e), which refers to the lawful detention of persons for the purpose of the prevention of the spreading of infectious diseases.

Article 8

95. Article 8 guarantees the right to respect for private and family life. It is one of the qualified rights in the Convention. In that context we would reject the submission to the effect that if it is arguable that there has been an interference with a qualified Convention right, permission must be granted, since the onus is on a defendant to show justification for that interference. There is no such general principle. Much will depend on the particular facts. If it is possible for a court to say with confidence, even at the permission stage, that there was unarguably a justification for any interference with a qualified Convention right, it may properly refuse permission.

96. There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate.

97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.

Article 9

98. Article 9 guarantees the right to freedom of thought, conscience and religion and, in particular, the right to manifest one's beliefs, for example through worship with others.

99. After the hearing before him the judge refused permission on this ground because amendments made to the regulations with effect from 4 July 2020 had rendered the point academic. In our view, he was right to do so.

100. In any event, we bear in mind that Swift J had already given permission to bring a claim for judicial review in a case in which the regulations are challenged under article 9: *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin). A substantive hearing is pending in the High Court. In those circumstances we do not consider that it would be appropriate to say any more about the merits of the argument under article 9.

Article 11

101. Article 11 guarantees the right to peaceful assembly and association. On the face of it, regulation 7 as originally enacted in March 2020 might be thought to have taken away this right altogether. Nevertheless, it must always be recalled that regulation 9(1)(a) provided a general defence of "reasonable excuse".

102. In *R (JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542; [2020] HLR 30, Hickinbottom LJ summarised the applicable principles. He noted that a distinction must be made between challenges under the HRA to legislation and challenges to the application of that legislation to a particular case. At para. 118, he said that "legislation will not be unjustified (and, so, not unlawful) unless it is incapable of being operated in a proportionate way in all or nearly all cases".

103. The first difficulty with Mr Havers' submissions on article 11 is that he submits that the regulations must necessarily be regarded as being incompatible with article 11 in all, or nearly all, circumstances. It is difficult to see how that can be so when the regulations themselves include the inbuilt exception of "reasonable excuse". That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. In our view, the regulations cannot be regarded as incompatible with article 11 given the express possibility of an exception where there was a reasonable excuse. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March.

104. Furthermore, as Sir James submits, the phrase "reasonable excuse" is not materially different from the phrase "lawful excuse", which is used in section 137 of the Highways Act 1980 and which was construed by the Divisional Court in *DPP v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253 as being capable in principle of embracing the exercise of Convention rights, in particular article 11, depending on the particular facts: see paras. 58 to 65 in the judgment of the Court (Singh LJ and Farbey J). In particular, we would emphasise the way in which the Divisional Court concluded, at para. 65: "This is inherently a fact-specific inquiry".

105. There are also powerful arguments that the restrictions, time limited and subject to review as they were, were in any event proportionate.

106. Finally, Sir James reminds us that the HRA is primary legislation, whereas the regulations are subordinate legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right: see *Poplar Housing and Regeneration Community Association Ltd* [2001] EWCA Civ 595; [2002] QB 48, at para. 75, in particular at sub-para. (a) (Lord Woolf CJ).

107. We therefore conclude that the ground based on article 11 is unarguable.

Article 1 of the First Protocol

108. A1P1 guarantees the right to peaceful enjoyment of possessions.

109. The judge made findings of fact which were adverse to the first appellant in this regard: paras. 101to 104 (see [26] above). We do not consider that it is arguable that the judge was wrong on the evidence before him.

110. In any event, it is impossible to conceive that there was a disproportionate interference with the right in A1P1. The margin of judgement to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case. Furthermore, the balance to be struck under this A1P1 would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic.

111. There is no arguable basis for the contention that there was a breach of A1P1.

Article 2 of the First Protocol

112. Article 2 of the First Protocol guarantees the right to education.

113. The judge made a finding of fact which was adverse to the appellants: paras. 109 to 110 of his judgment (see [27] above). He was entitled to make that finding. The fundamental problem for the appellants' submission is that there was no order by the Education Secretary or Government that schools had to close. Nor was there any order that all education had to cease. The wish of all concerned, including the Education Secretary, was that schoolchildren should receive education by remote means, for example through online instruction.

114. Further and in any event, article 2 of the First Protocol, reflecting a theme which runs throughout the Convention, envisages a fair balance having to be struck between the rights of the individual and the general interests of the community. In the exceptional circumstances of the pandemic, there is no arguable ground on which a court could interfere with the actions of the Government in this respect.

Conclusion

115. For the reasons we have given we have reached the following conclusions:

i) Permission to bring a claim for judicial review is granted but limited to Ground 1 (the *vires* argument).

ii) The substantive claim for judicial review is retained within this Court and not remitted to the High Court.

iii) We dismiss the claim for judicial review on Ground 1. The Secretary of State did have the power to make the regulations under challenge.

iv) We refuse permission to appeal against the decision of Lewis J insofar as he refused permission to bring a claim for judicial review in respect of Ground 2 (the domestic public law arguments) and Ground 3 (the arguments under the HRA). Those grounds are now academic, because the regulations under challenge have been repealed, and, in any event, they are not properly arguable.

Postscript

116. In a number of recent cases this Court has noted that there is "increasing concern about the need for appropriate procedural rigour in judicial review cases": see *R (Spahiu) v Secretary of State for the Home Department: Practice Note* [2018] EWCA Civ 2064; [2019] 1 WLR 1297, at para. 2, where earlier authorities are set out (Coulson LJ). The present case leads us to repeat that concern.

117. Procedural rigour is important not for its own sake. It is important in order for justice to be done. It is important that there must be fairness to all concerned, including the wider public as well as the parties. It is important that everyone should know where they stand, so that, for example, the defendant can properly prepare evidence in a timely fashion.

118. This Court has also deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment: see *Spahiu*, paras. 60-63. Although, as Coulson LJ said, at para. 63, "there is no hard and fast rule", he was right to say that it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving". In our view, that is particularly so in a context like the present, where the regulations have been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time. As we have mentioned, at one time, there was an application to amend the grounds so as to permit a challenge to be made to the regulations that were made on 3 July 2020. Fortunately, we did not have to determine that application, since it was not pursued, but we consider that this is precisely the kind of case in which "rolling" judicial review challenges should not be brought.

119. We have a particular concern in this case about the length and complexity of the grounds of challenge. The Amended Statement of Facts and Grounds runs to 87 pages. This was followed by Supplementary Grounds, which were another 13 pages. It is impossible to see how such statements can be regarded as complying with the requirement in the Administrative Court Judicial Review Guide 2020, at para. 6.3.1.1: that the document "should be as concise as reasonably possible, while setting out the claimant's arguments. The grounds must be stated shortly and numbered in sequence". That Guide was published after the present proceedings were commenced but similar guidance was given in earlier editions of that Guide: see e.g. the 2019 edition, at para. 6.3.4.1. Furthermore, this Court has, on more than one occasion, emphasised the need for a clear and succinct statement of the grounds: see e.g. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, at para. 68 (Singh LJ).

120. Despite these statements, we are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced. They make the task of the court more difficult rather than easier and they are wasteful of costs. It is for these reasons that skeleton arguments are subject to length constraints and so too, for example, the length of printed cases in the Supreme Court.

121. Although the Administrative Court Judicial Review Guide is clear, we consider that the time has come to invite the Civil Procedure Rule Committee to consider whether any amendments to the Rules or Practice Direction governing judicial review claims are called for to contain the problem we have identified.