



Neutral Citation Number: [2020] EWHC 1392 (Admin)

Case No: CO/1846/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2020

Before:

MR JUSTICE SWIFT

B E T W E E N:

**THE QUEEN
ON THE APPLICATION OF
TABASSUM HUSSAIN**

Claimant

- and -

SECRETARY OF STATE FOR HEALTH & SOCIAL CARE

Defendant

MS KIRSTY BRIMELOW QC, and MR JUDE BUNTING
(instructed by **Blacks Solicitors LLP**) appeared on behalf of the **Claimant**.

SIR JAMES EADIE QC, MS ZOE LEVENTHAL, MR CHRISTOPHER KNIGHT
(instructed by the **Government Legal Department**) appeared on behalf of the **Defendant**.

Hearing Date: 21 May 2020

TRANSCRIPT OF JUDGMENT

MR JUSTICE SWIFT:

- 1 I have decided to refuse the application for interim relief. I will now give my reasons for that decision.
- 2 This is a challenge to the Health Protection (Coronavirus Restrictions) (England) Regulations SI202/350. The Claimant is the Chairman of the Executive Committee of the Jamiyat Tablighi-Ul Islam Mosque in Barkerend Road, Bradford ("the Barkerend Road Mosque"). The challenge is directed to the effect of regulations 5(5) and 5(6) of the 2020 Regulations, regulation 6 of those regulations and also regulation 7 of the Regulations.
- 3 Regulation 5(5) requires that any person who is responsible for a place of worship to ensure that "during the emergency period" the place of worship is closed save for permitted uses listed at regulation 5(6). The "emergency period" is defined at regulation 3 to have started on 26 March 2020 and continue until such time as the relevant restriction or requirement imposed by the 2020 Regulations is terminated by direction of the Secretary of State. The purposes for which places of worship may be used are set out in regulation 5(6) as follows: funerals, the broadcast of acts of worship and the provision of essentially voluntary support services or urgent public support services.
- 4 Regulation 6 sets out restrictions on movement. Regulation 6(1) sets out a general prohibition: no person during the emergency period is to leave or be outside the place where they live "without reasonable excuse". Regulation 6(2) provides a non-exhaustive definition of what comprises reasonable excuse. By regulation 6(2)(k) ministers of religion and worship leaders may go to their place of worship, but there is no corresponding provision permitting others to go to their place of worship.
- 5 Lastly, regulation 7 prevents gatherings of more than two people in any public place, save for any of seven specified purposes. Attendance at an act of worship is not one of the permitted purposes. There was some issue before me as to whether a place of worship was a public place; that is to say whether regulation 7 was relevant at all to the present application. The Claimant, as a matter of caution, proceeded on the basis that places of worship are public places and that for that reason regulation 7 needed to be challenged. My view, without the benefit of full argument, is that a public place would naturally include a place of worship.
- 6 In these proceedings the Claimant contends, and it is accepted by the Defendant Secretary of State that the effect of the restrictions I have mentioned is to prevent collective Friday prayer at the Barkerend Road Mosque and, specifically, the prayer known as the Jumu'ah, the Friday afternoon prayer. This state of affairs is not unique to the Barkerend Road Mosque. The provisions of the 2020 Regulations that I have described apply to all places of worship of all religious denominations. No person who wishes or, as a matter of their religion is required, to attend a collective act of worship at their mosque, church, synagogue, temple or chapel is permitted to do so.
- 7 The Claimant has been in correspondence with the Secretary of State on this matter since 22 April 2020. Ramadan commenced on Thursday 23 April 2020. The Claimant was particularly keen that members of the Barkerend Road Mosque be able to attend Friday prayers at the mosque in person during Ramadan. Tomorrow, Friday 22 May, is the last

Friday in Ramadan. This application for interim relief, issued on Tuesday 19 May 2020 in proceedings issued that same day, is the Claimant's attempt to secure that at least some of those who wish to attend Friday prayers this week may do so. It would be some rather than all because the Claimant accepts that were the mosque to be open, social distancing measures, as required not in the 2020 Regulations but in guidance published by the Government, would need to be put in place. The Claimant's letter dated 22 April 2020 suggested that with such measures in place up to 40 worshippers would be able to attend. In a further letter dated 14 May 2020 it was suggested that the number able to attend would be 50. The Statement of Facts and Grounds states that although the mosque has capacity for some 4,000 people, there are some 50 persons who regularly attend Friday prayers. This would appear to explain the number stated by the Claimant in the letter of 14 May 2020.

- 8 By this application, the Claimant seeks interim relief in the form of an order prohibiting enforcement of regulations 5, 6 and 7 of the 2020 Regulations so far as they prohibit attendance at Friday prayers at Barkerend Road Mosque. The Claimant offers various undertakings with a view to following the Government guidance on social distancing, but the substance of the matter is a form of suspension of the mechanisms of enforcement, including criminal enforcement, contained in the 2020 Regulations.
- 9 There is no dispute as to the principles to apply when deciding this application for interim relief. In this case, the Claimant must first show a real prospect that at trial he will succeed in obtaining a permanent injunction, taking account of the fact that any decision to grant such relief would include consideration of the public interest. If the required real prospect exists, the next issue is whether or not the balance of convenience favours the grant of relief. As is ordinarily the case, the balance of convenience requires me to assess the prejudice that would arise if interim relief were wrongly granted, and weigh that against the prejudice that would arise were interim relief wrongly to be refused. At this stage too, the public interest is a relevant consideration: see generally *Smith v Inner London Education Authority* [1978] 1 All ER 411 and *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin.) In this case the relevant public interest is that of the Secretary of State continuing to operate effective measures to safeguard public health in response to the risk presented by the COVID-19 pandemic. I also accept the submission made by the Secretary of State that since the relief sought would prevent operation of part of the 2020 Regulations, no question of granting interim relief would arise unless I am satisfied, to adopt the words of Goff LJ in *R v Secretary of State for Transport, ex parte Factortame No. 2* [1991] 1 AC 603, that the "challenge is so firmly based as to justify" such a cause of action (see the speech of Goff LJ at page 674D). Thus, this application for interim relief will not succeed on the first *American Cyanamid* requirement unless the prospect that the substantive case will succeed is particularly strong.
- 10 The claim is that the Secretary of State's failure to make provision for the Claimant to open the Barkerend Road Mosque for communal Friday prayer is contrary to his right, under Article 9 of the ECHR, to be permitted to manifest his religious belief in worship, teaching, practice and observance. For the reasons I have referred to above, concerning the general application of the restrictions in the 2020 Regulations, there is no Article 14 claim of unlawful discrimination. There is (and could be) no suggestion that Islam has been afforded some form of specific treatment (whether directly or indirectly); all

religions which include an obligation to undertake communal prayer or worship are equally affected by the effect of the 2020 Regulations.

- 11 So far as concerns whether there is a strong prospect that at trial the Claimant will succeed in obtaining an order in the form now sought, my conclusions are as follows. There is no dispute that the cumulative effect of the restrictions contained in the 2020 Regulations is an infringement of the Claimant's right to manifest his religious belief by worship, practice or observance. The Claimant's case is that attendance at Friday prayers is a matter of religious obligation, and the Secretary of State does not seek to contend otherwise. Nevertheless, various points bear upon the extent and nature of the interference caused by the 2020 Regulations which have some relevance to the question of justification which I will consider later.
- 12 The first is that the interference relied on in these proceedings concerns only one aspect of religious observance - attendance at communal Friday prayers. This is not to diminish the significance of that requirement, yet it is relevant to the scope of the interference that is to be justified. In submissions it was suggested that the inability to attend Friday prayers in a mosque rendered the Claimant's Article 9 rights to manifest his religious belief illusory. The Claimant's evidence does not make that case good, albeit it is clear that the Claimant considers, and I accept, that the interference that does exist is an important matter.
- 13 Next, the duration of the interference will be finite. Although the Claimant's evidence emphasises the particular importance, he attaches to communal Friday prayers during Ramadan, the orders sought, and also if granted at trial, would permit communal Friday prayers to take place indefinitely. The 2020 Regulations are time-limited. They will expire in September 2020. Further, the content of the 2020 Regulations must be reviewed every three weeks: see regulation 3(1). Further still, it is clear from a strategy document published by the Government dated May 2020 that even within the period that the Regulations are in force, the reach and scope of the prohibitions in the 2020 Regulations remain under review. The strategy document includes a so-called "route map". Step 3 of that route map envisages lifting restrictions on attendance at public places, including places of worship. The route map states that step 3 will not be reached until early July. Of course, since the progress of the steps in place to combat the Covid-19 pandemic is uncertain, it is entirely possible that when and how certain steps will be taken will be subject to delay or will otherwise not take place as indicated in the route map. However, the point remains, the restriction in issue in this case is temporary, not permanent. In this respect I also make mention of the Places of Worship Task Force established by the Secretary of State on 15 May 2020. The Task Force comprises religious leaders of all major faiths practised in the United Kingdom. It includes a member of the British Board of Scholars and Imams. Its task is to formulate a plan for the safe opening of places of worship. The work the Task Force is to do is indicative of the direction of travel and also of the temporary nature of the prohibition on use of places of worship.
- 14 The third matter concerns the evidence of the position adopted by the British Board of Scholars and Imams in a briefing document published on 16 March 2020. Part 2 of this document is headed "Principles underlying this guidance". Principles 3 to 6 are as follows:

“3. We take seriously our responsibility to minister to the welfare of the Community, both worldly and next-worldly. This involves a recognition of the serious importance that our religion places on life, health, community, and spiritual well-being. To trivialise any aspect of this would be an error. As our scholarly tradition demands, our approach in the Guidance is directed by consideration of what is essential, recommended, and desirable. This includes a keen understanding of when (and which) religious rulings may be suspended due to temporary harms or hardship.

4. The concern within this guidance does not merely relate to the risk of becoming infected with Coronavirus, but more so to the risk of transmitting it to others, especially the old and infirm. To choose to put oneself in harm's way may be acceptable, unwise, or even prohibited; to put others in harm's way is always more severely censured. The guidance uses a risk matrix approach that considers both likelihood of infection/transmission and consequence of infection, from mild to severe.

5. In the event that government directives are issued over-riding any part of the guidance relating to gathering in public or private spaces, then the government directives would take priority.

6. This document is [not] intended to provide specific guidance to individuals, but a general framework of decision making for institutions and mosques. Given that each mosque and institution is different ... we call for local imams, scholars and mosques to decide on what is in the best interests of their communities. However, our advice is that this should be done when all parties are properly informed and have considered all the principles outlined in this document.”

15 Principle 5 is of note because this document was published before the 2020 Regulations were made and came into force. It seems to me, on a fair reading of Principle 5, the reference there to “government directives” includes instruments such as the 2020 Regulations.

16 Part 5 of the document is headed “The Jumu’ah prayer”. The opening paragraphs read as follows:

“It is understood that this is the most contentious question within this guidance, and it has been the subject of significant and vigorous debate among religious scholarship and among the members of the BBSI in particular. Jumu'ah is both an obligation on healthy adult males and a clarion sign of Islam; lifting or suspending that obligation from the community at large is not a step that can or should be taken lightly. Nonetheless, we reiterate that the prime directive for animating this briefing paper is people's health and welfare, particularly protecting the elderly and infirm. Given these factors, the question of Jumu'ah will be explored in some detail. Equally it should be noted that this section primarily refers to the norm of performing Jumu'ah in the mosques.

Two points of consensus emerged from the discussions: (1) If the government issues a directive banning public gatherings this needs to be adhered to, and (2) high risk individuals (as previously identified in the congregational prayers section) SHOULD NOT attend: not only is the obligation of Jumu'ah lifted from them but their attendance, if any congregation does occur, should be severely and proactively precluded. If they are at high risk of transmitting the virus to vulnerable people, it should be unambiguously clarified that their attendance would be immoral and sinful.

With this being understood, two broad opinions are articulated by BBSI members: that of the continuing obligation of Jumu'ah and the position as individuals in the UK are generally exempt from the obligation of Jumu'ah prayers.

Strenuous efforts were made given the extremely short timescales and the difficulty of engaging in detailed legal argumentation remotely, to survey the opinions of over 100 members of the BBSI on their basic stance regarding these two positions. A clear majority of those consulted opined that at this time and until further notice the obligation of Jumu'ah should be lifted from the generality of UK Muslims. These guidelines will be regularly reviewed for continuing relevance and proportionality."

- 17 The Claimant makes clear that his own religious belief differs from the majority view stated by the British Board of Scholars and Imams. I do not make this point to suggest that there is any hierarchy of doctrinal opinion. It is no part of the court's role to entertain any such submissions. ECHR Article 9 has little, if any, concern for such matters. The British Board itself makes the point that it is not a body that gives directives or prescribes permitted forms of religious practice. The Board recognises that some believe that the obligation to attend communal Friday prayers remains binding. However, this legitimate difference of opinion has something to add to consideration of the question of justification - the fair balance between the general and societal interest and the Convention rights of those such as the Claimant. The Claimant's beliefs do not cease to be important. Real weight continues to attach to them. But the overall fair balance can recognise the indisputable point that the Claimant's beliefs as to communal Friday prayer in current circumstances are not beliefs shared by all Muslims.
- 18 I turn now to the question of justification. My conclusion is that were this matter to go to trial, it is very likely that the Secretary of State would succeed on his submission that interference with the Claimant's article 8 rights as a result of the 2020 Regulations is justified. Put in the way that is relevant for the purposes of this application for interim relief, the strong prima facie case the Claimant requires to get over the first *American Cyanamid* hurdle does not exist.
- 19 The Covid-19 pandemic presents truly exceptional circumstances, the like of which has not been experienced in the United Kingdom for more than half a century. Over 30,000 people have died in the United Kingdom. Many, many more are likely to have been infected with the Covid-19 virus. That virus is a genuine and present danger to the health and well-being of the general population. I fully accept that the maintenance of public

health is a very important objective pursued in the public interest. The restrictions contained in regulations 5 to 7, the regulations in issue in this case, are directed to the threat from the Covid-19 virus. The Secretary of State describes the “basic principle” underlying the restrictions as being to reduce the degree to which people gather and mix with others not of the same household and, in particular, reducing and preventing such mixing in indoor spaces. I accept that this is the premise of the restrictions in the 2020 Regulations, and I accept that this premise is rationally connected to the objective of protecting public health. It rests on scientific advice acted on by the Secretary of State to the effect that the Covid-19 virus is highly contagious and particularly easily spread in gatherings of people indoors, including, for present purposes, gatherings in mosques, churches, synagogues, temples and so on for communal prayer.

- 20 For the purpose of his disproportionality submission, the Claimant points to various other activities which are permitted by the 2020 Regulations as most recently amended on 13 May 2020. These include taking exercise, including with one member of another household; visiting parks and open spaces for recreation; visiting houses in connection with the purchase, sale, rental of a residential property; going to local tips and recycling centres. Businesses that are now permitted to open include outdoor sports centres and garden centres. The Claimant submits that none of these is necessarily any more essential than being able to attend communal Friday prayers at his mosque. Put in terms of the proportionality test set out by the Supreme Court in *Bank Mellat v HM Treasury*, the Claimant’s submission is that the means used, so far as they prevent the use of places of worship, are more than is necessary to achieve the legitimate aim – i.e. that a less intrusive approach could have been taken without compromising the achievement by the Secretary of State of his legitimate objective.
- 21 In this way, the Claimant questions the Secretary of State’s priorities. Why are matters such as those mentioned above permitted when attendance at a place of worship in fulfilment of a religious obligation is not? While the Secretary of State’s order of priorities is a legitimate matter for public debate, in terms of whether the decision on it contained within the 2020 Regulations is lawful, he must be allowed a suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions in the 2020 Regulations. What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess.
- 22 In the circumstances of the present case, the issue is not whether it is more important, for example, to go to a garden centre than to go to communal prayer; the issue is not whether activities that are now permitted and those that are prohibited are moral equivalents. Rather, the question is as to the activities that can be permitted consistent with effective measures to reduce the spread and transmission of the Covid-19 virus; that so far as they interfere with Convention rights, strike a fair balance between that interference and the general interest. That will be a delicate assessment. There will be no single right answer. The Secretary of State is entitled, in my view, to adopt a precautionary stance.
- 23 Yet, even putting those points to one side, and even accounting for the use of social distancing measures such as those that the Claimant proposes, it is possible to recognise a qualitative difference in terms of the risk of transmission of the virus between a situation such as a religious service where a number of people meet in an enclosed space

for a period of an hour or more, and the transitory briefer contact likely in a setting such as that of shopping in a garden centre.

- 24 In this case I do not think there is any realistic likelihood that the Claimant's case on Article 9 will succeed at trial. The infringement of his Article 9 rights is not disproportionate. In reaching this conclusion I have taken account of the requirement under section 13 of the Human Rights Act to pay particular regard to Article 9 rights.
- 25 I have also considered carefully the judgment of the German Constitutional Court dated 29 April 2020 in *F* (1BBQ 44/20). In that case, the German Constitutional Court granted relief so as to permit Friday prayers to take place. It concluded that a general prohibition in German law brought in to address the Covid-19 pandemic was in breach of Article 4 of the German Constitution since the law did not allow for exceptional approval to be granted for religious services on a case-by-case basis. I do not regard that judgment as providing any template, let alone precedent, for me to follow. I am unaware of the particular factual circumstances prevailing in Germany at the particular time at which this decision was taken - how the threat to public health was assessed, what was its extent and so on. However, even if circumstances were exactly the same in Germany and the United Kingdom. That does not require the conclusion that what the court has required in Germany must happen here too. *First*, the question for me at this stage concerns the margin of appreciation and the overall fair balance. This is a situation, as I have said, with no right answer. I must assess the Secretary of State's response to it as set out in the 2020 Regulations on its own terms. *Second*, the prohibition in regulation 5(5) of the 2020 Regulations is subject to the exceptions set out in regulation 5(6). *Third*, even though the exceptions so prescribed in the Regulations are of general application rather than permitting the possibility of case-to-case exceptions, that approach, the use of a bright line or bright lines, if you will, is not an impermissible form of response to circumstances such as those presented by the Covid-19 pandemic.
- 26 Taking account of the points I have already made as to the nature and extent of the interference, the justification submissions made by the Secretary of State are likely to be sufficient. It is not to the point that the Claimant only brings his case on behalf of himself and on behalf of his own mosque. The submissions made for him are essentially generic, hence the Secretary of State's response pitched at a generic level is a valid response. Thus, while I can readily appreciate and sympathise with the Claimant's frustration at the impact of the 2020 Regulations on his religious convictions, I do not consider that any of the evidence relied on or submissions made on his behalf are likely to satisfy a court that the Secretary of State has failed to strike a balance that is fair.
- 27 Had it been necessary to consider the balance of convenience, I would have reached the same conclusion – that grant of the interim relief sought is not an appropriate course of action. The matters I have already referred to when considering the question of justification weigh heavily in the balance against the grant of relief. Further, the logic of this application is not just that it would apply to the Barkerend Road Mosque, but that it would apply to all collective worship pursuant to religious obligations at all places of worship. Permitting that poses too great a risk to the balance between restricted activities and permitted activities concerning social contact that is struck by the 2020 Regulations to permit of the possibility of a grant of interim relief as a matter of the balance of convenience.

28 For all these reasons the Claimant's application is refused.

L A T E R

- 29 I have two applications before me. One is in relation to the costs of the application for interim relief. The Secretary of State asks for an order that his costs be paid by the Claimant to be assessed on the standard basis if not agreed. The Claimant opposes that and says there should be no order for costs, drawing attention to his personal financial circumstances and to the fact that it is said that his preference, rather than a hearing for interim relief, was a rolled-up final hearing.
- 30 The usual order should apply in relation to costs. Costs should follow the event and the event here is that the application for interim relief has failed. In those circumstances, the order will be that the Claimant shall pay the Defendant's costs of and occasioned by the application for interim relief to be assessed on the standard basis if not agreed. I do not see the force in the argument that the Claimant was not seeking a hearing for interim relief. Regardless of the particular label attached to the hearing, the Claimant was seeking an urgent hearing to determine by today whether or not he should be permitted to open the mosque for prayers tomorrow afternoon. In those circumstances, some form of hearing was inevitable on the Claimant's own request. Since the Claimant's attempt to permit Friday prayers to go ahead has failed, a costs order against him is the appropriate order.
- 31 Both parties invite me to deal with the application for permission to apply for judicial review based on the information that I have received for the purposes of the hearing and in the course of this hearing. I am content to do that.
- 32 I have expressed the view very clearly, that by reference to the standard required under the *American Cyanamid* principles to provide a basis for a grant of interim relief, this case does not meet that standard. That is not to say that the standard applicable under *American Cyanamid* is the same as the question of arguability for the purposes of permission to apply for judicial review. It is fair to say I have held the Claimant to a higher standard in the context of the interim relief application because of the particular circumstances I described in the judgment, and the submissions made by counsel as to the applicable standard.
- 33 Even though I have refused the application for interim relief, I am satisfied that there is a sufficiently arguable case to grant permission to apply for judicial review. I do not, however, order that the claim be expedited. It seems to me that the question which was a question of genuine urgency has been addressed by the application for interim relief today. I must take account, when considering requests for expedition, the proportionate use of court time for a particular case, and also the position of all other litigants before the court at this stage. As the parties will understand, this is by no means the only urgent application or only important case that comes before this court at this time. I also take into account the fact that the challenge now has reinvented itself to the extent that it is no longer simply a challenge to a prohibition on communal Friday prayer during the period of Ramadan, but a more general challenge directed to the effect of the 2020 Regulations on the ability to conduct communal or Friday prayers. That is a claim that could and ought to have been brought much earlier, were it to be eligible for serious consideration as an expedited claim.

- 34 In those circumstances, the only direction I will make at this stage is that the Secretary of State may serve detailed grounds and evidence in response to the claim by 4 pm on 18 June 2020, which is some four weeks from today. If either party at that stage wishes to make any application in relation to the timing of the hearing, they are free to do so, and that application will be considered on the basis of written representations.
