Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 2pm 06/07/2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

Neutral Citation Number: [2020] EWHC 1786 (Admin)

Case No: CO/1860/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 6th July 2020

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

(1) STEPHEN DOLAN **(2) LAUREN MONKS** **(3) AB**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE **(2) SECRETARY OF STATE FOR EDUCATION**	**Defendants**

- -
- -

Philip Havers Q.C. and Francis Hoar (instructed by **Wedlake Bell**) for the **Claimants**
Sir James Eadie Q.C. , Zoe Leventhal, Jacqueline Lean and Tom Cross (instructed by **Government Legal Department**) for the **Defendants**

Hearing date: 2 July

- -

APPROVED JUDGMENT

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is the judgment on an application for permission to apply for judicial review brought by Simon Dolan and Lauren Monks. By a claim form issued on 21 May 2020, they seek permission to bring proceedings to challenge the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as amended ("the Regulations") and what is described as a decision to close schools and educational establishments.

THE BACKGROUND

2. On 31 December 2019, China notified the World Health Organisation ("WHO") of a cluster of unusual pneumonia cases. They were later identified as being caused by a novel coronavirus, now referred to as Covid-19. On 30 January 2020, the Director-General of the WHO made a statement on the emergence of a previously unknown pathogen which had escalated into an unprecedented outbreak. He said that there were now 98 cases in countries outside China including countries in Asia, Europe and north America, and they included cases where the disease had been transmitted between humans. He declared a public health emergency of international concern over the global outbreak of novel coronavirus.

3. The following day, 31 January 2020, the first cases of coronavirus were reported in the United Kingdom. Various steps were taken in England, and elsewhere, to address the spread of coronavirus. On 16 March 2020, the government advised members of the public to avoid non-essential contact with others, to stop all unnecessary travel, and to work from home wherever possible. On 18 March 2020, the government announced that schools would stop providing education to children on school premises, save for the children of those classified as key workers and vulnerable children. On 26 March 2020, the Regulations were made imposing restrictions on the activities of those living and working in England. Those Regulations have been reviewed and amended from time to time.

4. As at the date of the hearing, 2 July 2020, there were 43,906 deaths associated with Covid-19 in the United Kingdom and over 39,000 of those were in England. There have been many hundreds of thousands of confirmed cases of persons infected by the coronavirus. The nature of the threat presented by coronavirus, and the rationale underlying the Regulations, is aptly summarised in the following observation by Swift J. in *R (Hussain) v Secretary of Staste for Health and Social* Care [2020] EWHC 1392 (Admin) considering an application for an interim order to enable a mosque to hold Friday prayers:

> "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."

5. The claimants question the approach taken and the priorities of the government in addressing the coronavirus epidemic. They draw attention to, amongst other matters, the impact on the economy, and the jobs and livelihoods of people, the impact on education, and the effect of the measures taken on treatment of other health conditions. They have drawn attention to the low mortality rate of those under 60 with no pre-existing underlying medical condition. In the light of all those factors, they question the appropriateness of the measures taken. Those are all matters of legitimate public debate. The question on this application is, however, whether the claimants should be given permission to bring a claim for judicial review of provisions of the Regulations to address the risks posed by the emergence of this novel coronavirus.

6. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the legal principles governing the exercise of their decision-making functions. In addition, Parliament requires public bodies to act in a way which is compatible with rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"): see section 6 of the Human Rights Act 1998. The court, therefore, is concerned to ensure that a public body is acting within the law and in a way which does not violate a Convention right.

7. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. The court is not responsible for determining how best to respond to the risks to public health posed by the emergence of a novel coronavirus. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies.

THE REGULATIONS

8. At 1 p.m. on 26 March 2020, the first defendant, the Secretary of State for Health made the Regulations which are applicable to England. The governments of Wales, Scotland, and Northern Ireland made regulations for their respective nations. This challenge concerns only the Regulations applicable in England.

9. The preamble to the Regulations states that:

> "These Regulations are 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 Secretary of State considers that the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to that threat."

10. The Regulations have been amended a number of times, notably by amendment made on 31 May 2020 and on 2 June 2020. Other amendments are anticipated.

11. Regulations 4 and 5 as originally made on 26 March 2020 required certain businesses to close during the emergency period. Business such as restaurants, cafes, public houses and the like were prohibited from selling food and drink for consumption on the premises (they were permitted to sell take-away food and drink). Other premises, businesses and shops were required to close or to cease carrying on business, save for specified exceptions such as food retailers, pharmacies newsagents, banks, petrol stations and others. Those regulations were amended and, from the 15 June 2020, shops were permitted to open and sell goods.

12. Regulation 5(5) as originally made on 26 March 2020 provided that a place of worship must close for the emergency period (save for certain limited, specified purposes such as funerals or a broadcast of an act of worship). From 13 June 2020, places of worship could be opened for private prayer (but not for acts of communal worship).

13. Regulation 6, in its original form, imposed restrictions on movement. It prohibited a person from leaving the place where he or she lived without reasonable excuse. A non-exhaustive list of ,reasonable excuses was specified. From 1 June 2020, regulation 6 was replaced by a prohibition on a person staying overnight at any place other than where the person lived without reasonable excuse.

14. Regulation 7 in its original form prohibited gatherings in a public place of more than two people (unless the people came from the same household or for specified purposes such as work). That was amended and, from 1 June 2020, gatherings of more than 6 people in a public place, or more than 2 people indoors, were prohibited unless the persons were members of the same household. Schools were specifically exempt from this regulation and regulation 7 did not prohibit schools from providing education to children on premises. From 13 June 2020, a new concept of a "linked household" was introduced by a new regulation 7A. That 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.

15. There were provisions for enforcing the regulations, including power for specified persons to direct that persons return to the place where they were living (see regulation 8). Contraventions of regulations 4, 5, 7 or 8 without reasonable excuse were criminal offences punishable by a fine or a fixed penalty notice.

16. The Regulations would expire at the end of six months after they were made. The Secretary of State was also required to be review the need for the restrictions and requirements imposed in the Regulations every 21 days (subsequently amended to every 28 days) by virtue of regulation 3 of the Regulations. That regulation also requires the Secretary of State to terminate any restriction or requirement as soon as he considers it is no longer necessary to prevent, protect against, control or provide a public health response to the spread of infection.

THE CLAIM FOR JUDICIAL REVIEW

17. There are two claimants. The first is Simon Dolan. He is a citizen of the United Kingdom although he lives in Monaco. He is described in the evidence as the owner of a number of business based in the United Kingdom. Together, these businesses employ around 600 people. They include Jota Aviation Limited where Mr Dolan is the sole legal and beneficial owner of all the shares in the company. Its business involved leasing planes to major airlines. Mr Dolan has informed his solicitor that that business has dried up. He has also said that he owns 70% of the shares of another business involved in public relations which has suffered heavily reduced revenues. In his statement, Mr Dolan says that, although he lives abroad, he visited the United Kingdom to see family and friends. He says if it had not been rendered illegal, he would have wished to join in protests against the Regulations.

18. The second claimant is Lauren Monks who works for a company owned by Mr Dolan. Ms Monks is a British citizen who lives with her 10 year old son. She is a Roman Catholic by religion. Her son attends a Roman Catholic school. From late March until June, her son did not attend school. From 2 June 2020, he has attended for two days a week. Ms Monks says that neither she nor her son have been able to attend mass at church. At the time she made the statement, 21 May 2020, she had dropped off food for her grandmother but could do no more. The restrictions had made meeting family friends difficult.

19. There is an application for a third claimant to be joined. He is a pupil at a school. I grant the application to amend the claim form to add the third claimant. I order that his identity, and that of his litigation friend. is not to be disclosed and they be referred to in these proceedings as AB and CD respectively. I am satisfied, having regard to the provisions of the CPR 39.2(4), and the decision in *JX MX v Darford & Gravehsam NHS* [2015] EWCA Civ 96 that it is necessary to make this order to protect his interests. As a young child, he may suffer adverse consequences if he is identified as a litigant or participant in a challenge to the Regulations. This is an area of public controversy and there is a risk that he may be subject to unnecessary and undue criticism by his school friends and others for challenging the Regulations. The restriction is the least restrictive measure possible. Members of the media (who attended the hearing) will be able to report on the fact that a child has brought proceedings (but cannot name him) and can report on the substance of the proceedings. Representatives of the media can apply to the court if they wish to apply to have the order varied.

20. The claimants indicate that the proceedings have been funded by donations from almost 4,000 people who responded to the first claimant's crowd funding campaign. There is also an application to intervene by the Independent Workers' Union of Great Britain. The parties, and the applicant, agreed that that application was better considered after this judgment had been delivered.

21. The claim form filed on 21 May 2020 was 87 pages long. It was accompanied by lengthy witness statements and exhibits. The claim form sought to challenge the Regulations in force on 21 May 2020 and what was described as the decision to close schools. The claim alleged that the Regulations, and the decision, was unlawful on a large number of grounds.

22. I ordered that there be an oral hearing of the application for permission for judicial review. At that stage, it was clear that there were a number of preliminary issues

including claims about delay, whether or all part of the challenge was now academic, where there had in fact been a decision by the second defendant to close schools and whether the grounds were arguable.

23. That hearing was held by video hearing on 2 July 2020. It was a public hearing in that parties and others had access to a link and could (and a number of persons, including representatives of the media, did) observe proceedings. The claimants, and the defendants, were represented by counsel. I am grateful to counsel for their submissions. I am grateful to both legal teams for ensuring that all the material was provided in advance in a way which enabled the efficient conduct of the hearing.

THE ISSUES

24. Against that background, the issues that need to be considered can conveniently be summarised as follows:

(1) Was the claim brought too late and/or are some of the grounds of challenge now academic?

(2) Are the Regulations arguably unlawful because they are outside the powers conferred by Parliament (ground 1 – *ultra vires*);

(3) Has the first defendant arguably acted unlawfully by:

(a) Fettering his discretion to review the Regulations by requiring that five tests be met before reviewing the Regulations (Ground 2A)?:

(b) Failing to take relevant considerations into account in the decision-making process (Ground 2B)?

(c) Acting irrationally in making or maintaining the Regulations (Ground 2C)? or

(4) Failing to act proportionately when deciding not to terminate the Regulations (Ground 2D)?

(4) Do the restrictions on movement contained in the original version of regulation 6, or the amended version of regulation 6, arguably involve a breach of the right to liberty guaranteed by Article 5 of the Convention?

(5) Do the restrictions imposed by regulations 6 and 7 arguably breach the right to respect for private and family life guaranteed by Article 8 of the Convention?

(6) Does the requirement to close places of worship save for certain purposes arguably breach Article 9 of the Convention?

(7) Do the restrictions on gatherings imposed by regulation 7 arguably breach the right to freedom of assembly and association guaranteed by Article 11 of the Convention?

(8) Do the Regulations arguably involve a deprivation of property or an unlawful control on the use of property contrary to Article 1 of the Second Protocol to the Convention?

(9) Is the second defendant arguably requiring schools to close in a manner which involves a breach of Article 2 of the First Protocol to the Convention?

25. The claimants initially claimed that the Regulations gave rise to unlawful discrimination contrary to Article 14 of the Convention, read with other articles (see paragraphs 179 to 184 of the amended claim form). At the hearing, Mr Havers Q.C. for the claimant expressly confirmed that the claimants were no longer maintaining that ground of challenge. For the avoidance of doubt, therefore, I refuse permission to challenge the Regulations on the grounds set out in paragraphs 179 to 184 of the amended claim form.

THE FIRST ISSUE – DELAY AND ACADEMIC CLAIMS

26. Sir James Eadie Q.C. for the defendant contends that the claimants did not bring the claim promptly as required by the Civil Procedure Rules ("CPR") and so it should not be permitted to proceed. The Regulations were made on 26 March 2020, and the decision to close schools was alleged to have been taken on 18 March 2020, but the claim was not brought until 21 May 2020. Further, he submitted that the challenge to regulations which were no longer in force was academic and historic and permission should be refused to bring a claim in relation to those regulations. He relied on the observations of Silber J. in *R (Zoolife International Ltd.) v Secretary of State for Environment, Food and Rural Affairs)* [2007] EWHC 2995.

27. Mr Havers Q.C. for the claimants submitted that the claimants did not realise until about the 23 April 2020 that a legal challenge was possible. Thereafter, they acted promptly by sending a pre-action protocol letter to the defendants (who requested an additional seven days to consider it) and filed the claim shortly afterwards. He submitted that the court could entertain a claim for judicial review, even if academic, if there were a good reason in the public interest for doing so, relying on the observations of Lord Slynn in *R v Secretary of State for the Home Department* [1999] 1 A.C. 450

Discussion

28. CPR 54.5 provides that a claim for judicial review must be filed:

> "(a) promptly; and
>
> (b) in any event not later than three months after the grounds to make the claim first arose".

29. The time limit begins to run from the date when the grounds first arose not the date when a claimant first learned of the existence of the measure, still less, when a claimant first realised that there was a prospect of bringing a legal challenge. The grounds first arose in this case when the Regulations were made on 26 March 2020, and, in relation to the challenge to the decision relating to schools, on 18 March 2002. The claim was filed on 21 May 2020, almost 2 months after the Regulations were

made and more than two months after the decision relating to schools was said to have been made.

30. In all the circumstances of this case, I would not hold that the claim is barred by reason of any delay in filing the claim. Although a considerable period of time was taken before the claim was filed, I do not find that there was a failure to act promptly given the complexity and importance of the issues. The claimants are not prevented from bringing this claim by reason of CPR 54.5.

31. One of the consequences of the time taken to bring the claim, however, is that a number of the regulations challenged have been replaced or amended. That has the following consequences.

32. First, I do find that the claim for judicial review of the original regulations 6 (the prohibition on a person leaving home without reasonable excuse) and the original regulation 7 (the prohibition on more than 2 people gathering in public) is academic. Any judicial review of those regulations would be considering historic matters. The remedy sought is an order quashing the regulation. But the restrictions contained in those regulations are no longer in force as they have been replaced. In those circumstances, a claim for judicial review of those regulations in their original form would serve no practical purposes. While the courts may entertain academic claims if there is a good reason to do so, there is none here. The fact that restrictions may be imposed in future, depending on the progress of the pandemic, does not provide a good reason for reviewing the original versions of the regulations now. Any challenge to a subsequent or replacement regulation would necessarily involve considering the content of that regulation and the circumstances leading to its imposition. Any challenge to later versions of regulations 6 and 7 are, therefore, better considered having regard to the content of the regulation as subsequently made and in the light of the facts and the scientific understanding at that time. For that reason, I refuse permission to bring a claim to challenge regulations 6 and 7 as originally made on 26 March 2020 on the basis that they allegedly involved a breach of Articles 5 and 11 of the Convention (paragraphs 135 to 154 and 169 to 184 of the amended claim form respectively).

33. Secondly, the court on this application has to consider the question of whether there has been any arguable breach of any other Convention right by reference to the facts, and the Regulations, as they are now. Circumstances have changed since the Regulations were made and the position in relation to schools has developed. The court must assess matters as they currently stand.

THE SECOND ISSUE – THE VIRES OF THE REGULATIONS

34. The second issue concerns the question of whether the first defendant had the legal power to make regulations applying to all persons in England under the power conferred by the Public Health (Control of Diseases) Act 1984 (“the 1984 Act”).

35. Mr Havers for the claimants submitted that the Regulations were purportedly made under powers conferred by section 45C(1) and (3)(c) of the 1984 Act. He submitted that those powers only permitted regulations to made in respect of an individual or a group of persons and not in relation to the population of England as a whole. That, he submitted, followed from the fact that the Regulations imposed a special restriction or

requirement. That is defined as a restriction which magistrates could impose. Magistrates could only impose a restriction on an individual or a group (see section 45G and 45J of the 1984 Act) and only where a person was or may be infected and other preconditions were met. Similar provisions apply to premises and things, or groups of premises and things.

36. Sir James Eadie for the defendants submitted that the 1984 Act provides powers for the Secretary of State to make regulations of a general nature. Those powers were not limited to making orders in relation to specific individuals or groups of individuals and, he submitted, if would be absurd if the provisions were to be read otherwise given the nature of the public health threat and the purpose underlying the 1984 Act which was to enable measures to be taken to address the threat of epidemics such as serious acute respiratory diseases or SARS.

Discussion

37. The provisions of the 1984 Act do provide power for the Secretary of State to take measures, including measures applicable to England generally, for the purpose of combating the spread of infection from a disease such as Covid-19. The powers conferred on the Secretary of State are not limited to making regulations in relation to specific individuals or groups of individuals (or specific premises). The powers are broad powers intended to enable the Secretary of State to adopt a wide range of measures to combat the spread of infection. There are other mechanisms in place under the 1984 Act to ensure that those broad powers are used only in appropriate circumstances and that any restrictions imposed are kept under review. That conclusion follows from the wording and structure of the 1984 Act and its purpose.

38. First, on the wording, section 45C(1) of the 1984 Act provides that:

> "(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)".

39. Section 45C(2) of the 1984 Act then expressly provides that that power may be exercised, amongst other things, "so as to make provisions of a general nature".

40. Regulations "may, in particular, include" the matters referred to in section 45C(3) of the 1984 Act, namely

> "imposing or enabling the imposition of restrictions or requirement on, or in relation to persons, things or premises in the event of, or in response to, a threat to public health".

41. Section 45C(4) of the 1984 Act provides that the restrictions that may be made under that sub-regulation "include in particular" a "special restriction or requirement". That is defined in section 45C(6)(a) of the 1984 Act as a "requirement which can be imposed by a justice of the peace by virtue of" certain specified sections. That is a reference, so far as persons is concerned, to section 45G(2) of the 1984 Act which sets out a list of the restrictions or requirements that may be imposed by a magistrate on a person (referred to as "P" in the subsection). The restrictions include

> "(j) that P be subject to restrictions on where P goes or with whom P has contact;

(k) that P abstain from working and trading."

42. The wording in section 45C of the 1984 Act is clear. It is intended to enable the Secretary of State to make general regulations to combat the spread of infection. The provisions that may be made "include" the type of orders that a magistrate could make, such as restrictions on movement and contact and requirements to abstain from working or trading. The provisions are not intended to limit the Secretary of State to making the kind of individualised orders in relation to particular individuals who or are may be infected. Similar provisions apply in relation to premises and things.

43. That interpretation is consistent with the purpose of the 1984 Act. It is clear from the wording of the relevant sections that the whole purpose was to enable the minister to address the spread of infection. The purpose is said in terms to be " preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection". Depending on the nature of the infection, that may require the adoption of a range of measures.

44. That is also confirmed by the explanatory memorandum to the Health and Social Care Act 2008 which amended the 1984 Act to provide the relevant powers. Paragraph 29 of that memorandum explains that much of the legislation dealing with disease was out of date reflecting 19th century concerns about the risks from the kind of health threats arising from infectious diseases such as plague, cholera and the like. Those provisions were increasingly recognised as being unable to deal with new threats such as serious acute respiratory syndromes or SARS. The new international approach, and regulations, were concerned with infectious diseases and contamination generally and paid more attention to the arrangements needed within countries (not simply at borders) to provide an effective response to health risks. The 1984 Act was amended to enable that approach to be adopted.

45. At the hearing, Mr Havers raised an additional point as to whether the 1984 Act provided power to close businesses. The regulations that may be made include regulations requiring a person to abstain from trading. The regulations do precisely that by requiring persons to cease from carrying on specified business during the emergency period. The 1984 Act does, therefore, provide a power in appropriate circumstances to close businesses.

46. The 1984 Act does therefore confer power on the Secretary of State to make regulations applicable to persons, premises, and things in England as a whole in appropriate circumstances and subject to duty to keep the restrictions under review. The claim that the Regulations were *ultra vires,* that is, outside the powers conferred by the 1984 Act, is, therefore unarguable. Permission to claim judicial review on ground 1 (paragraphs 26 to 48 of the amended claim form) is refused.

THE THIRD ISSUE – DOMESTIC LAW CHALLENGES TO THE REGULATIONS

47. Mr Havers submits that the actual making of the Regulations in this case, or the failure to bring them to an end, is unlawful for four reasons of domestic public law. Mr Havers submitted that the evidence of speeches by government ministers showed that the government had fettered its discretion by requiring five tests to be met before the Regulations would be replaced and the government was not considering other matters such as the effect on health arising from other conditions not treated, or the

effect on the economy, or on schools. He submitted the Secretary of State had failed to have regard to relevant consideration in making the Regulations. He further submitted that the Regulations were irrational. He referred to the government's figures evidence on mortality rates as at 12 May 2020 which indicated that only 3 children and young persons with no pre-existing underlying medical condition had died from Covid-19 and that remained the position as at 16 June 2020. Similarly, only 253 persons under 60 without a pre-existing underlying medical condition had died from Covid-19 as at 12 May 2020 and 297 as at 16 June 2020. Those figures, he submitted indicated the nature and extent of the risk that had to be factored into the decision to make and maintain the Regulations. He identified in written submissions situations where one type of contact was not permitted but other types of allegedly analogous contact would be permissible to support his submission as to irrationality. Finally, he submitted that the making or maintenance of the Regulations was not proportionate under the 1984 Act.

48. Sir James Eadie submitted that the context in which the Regulations were made and reviewed should be borne in mind. The spread of coronavirus presented a serious risk to life. The number of cases of persons infected with coronavirus, and dying, were increasing at the time that the Regulations were made. There were real fears that the National Health Service would be overwhelmed and unable to cope with the increasing number of cases. The coronavirus was a novel pathogen and scientific understanding of coronavirus was limited. Transmission from human to human was seen to be a major cause of the increase in cases of persons suffering, or dying, from coronavirus. Steps were taken to reduce transmission given the severity of the risk. As the risks have diminished, there has been a progressive easing or relaxation in the restrictions imposed. He submitted that there was no basis for considering that the government had even arguably fettered its discretion, failed to have regard to relevant considerations, acted irrationally or disproportionately.

Was there arguably a fettering of discretion?

49. The basis of this aspect of the challenge is to the exercise of the power to review the Regulations and to terminate the restrictions under regulation 3(2) and (3). It is important in that regard to read the evidence fairly and as a whole. I have read all the material to which the claimants and the defendant have drawn my attention. In my judgment, the best source of evidence as to how the government is approaching the task of reviewing the Regulations is the document entitled "Our plan to rebuild: the UK Government's Covid-19 recovery strategy". The version I was provided with is that updated on 12 May 2020.

50. Reading the evidence fairly, the following emerges. The five tests to which the claimant refer were first articulated publicly on 16 April 2020. They are tests, or means, for assessing the risk posed by coronavirus. There are five elements: ensuring that the NHS has the capacity to cope, a sustained fall in the daily death rate, reliable data to show that the rate of infection is decreasing to manageable levels, confidence that the range of operational measures needed, such as testing capacity and supplies of personal protective equipment, are in hand, and confidence that any adjustments to the current measures would not risk a second peak of infections. That is a lawful, rational method of assessing the risks posed by coronavirus and the ability to cope with the coronavirus. It is clear from the remainder of the document that the government is acutely aware of managing the risks it assesses as being posed by coronavirus against

overall health considerations (including increases in mortality from other health conditions, not Covid-19, which might have resulted from measures taken to deal with coronavirus), and the effect on the economic and social life of the nation. Read fairly, the document is seeking to articulate the aims of the government to save lives, which it says is the overriding priority, and to minimise other harm to people's wellbeing, livelihoods and wider health concerns. The point is put clearly at section 2 of the document where it says:

> "The Government's aim has been to save lives. This continues to be the overriding priority at the heart of this plan.
>
> The government must also seek to minimise the other harms it knows the current restrict measures are causing – to people's wellbeing, livelihoods and wider health. But there is a risk that if the Government rushes to reverse these measures, it would trigger a second outbreak that could overwhelm the NHS. So the UK must adapt to a new reality – one where society can return to normal as far as possible; where children can go to school, families can see one another and livelihoods can be protected, whilst also continuing to protect against the spread of the disease."

51. The Government's aims are said to be to:

> "return to life as close to normal as possible, for as many people as possible, as fast and fairly as possible …
>
> ….. in a way that avoids a new epidemic, minimises lives lost and maximises health, economic and social outcomes."

52. That language does not demonstrate the unlawful fettering of discretion. It describes lawful aims, lawful considerations and the difficulties in balancing rival considerations. The government places particular weight on particular aims. The claimants may take different views on the different priorities and may make a different choices as to what measures should be relaxed and when. Those are matters of legitimate public debate. But it cannot arguably be said that the approach of the government involves unlawful fettering of its powers.

Was there a failure to have regard to relevant considerations?

53. The claimants refer in their grounds to a failure to have regard to the uncertainty of scientific evidence, the effect of the restrictions on public health generally (including non-Covid-19 deaths), the increased incidence of domestic violence, the economic effects of the restrictions, the medium and long-term consequences of the restrictions and whether less restrictive measures could have been adopted.

54. It is clear from the evidence, read fairly, that all of those matters have been considered in the decision-making process and continue to be taken into account in the reviews. There has been no failure to take those matters into account. The ultimate decision on how to respond, given the spread of coronavirus and the consequences of the restrictions, is a matter of difficult health, social, and economic choice. People may legitimately disagree on where the balance should be struck. But, as a matter of law, it cannot be argued that the government has not had regard to those considerations in reaching its decision on where the balance should be struck.

Was the decision to make and maintain the regulations irrational?

55. There is no arguable basis for concluding that the decision to make the Regulations or to maintain them in force, with amendments, was irrational. The claimants refer to the risks of mortality to those under 60, and to children and young persons. They point to alleged anomalies in the operation of the Regulations.

56. The basic point, however, is that the measures adopted are intended to reduce the risk of transmission between humans of a disease which is infectious, and can cause death or serious ill health, and where the scientific understanding of the disease is limited. The focus on the death rates of particular groups does not make it irrational to take steps to reduce opportunities for transmission from persons in those groups to others. The fact that not all situations where contact, and potentially transmission, may occur are subject to restrictions does not make it irrational to adopt a set of measures which are intended to bear down on the risk of transmission by prohibiting other contacts. Given the complexities of modern life and social interaction, there may be situations where contact between persons can occur which are not covered by the Regulations. Such differences, or anomalies, do not render the decision to make or maintain the Regulations irrational.

Was the making or maintaining of the Regulations disproportionate under the 1984 Act?

57. Section 45D of the 1984 Act provides that Regulations may not include restrictions or requirements under section 45C(3)(c) of the 1984 Act (restrictions relating to persons, things or premises):

> "unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved".

58. That obligation applies to the initial making of the Regulations and, in my judgment, to any amendment including any further restriction or requirement. Regulation 3(3) of the Regulations also requires the Secretary of State to terminate any restriction or requirement as soon as he considers it is no longer necessary for combatting the spread of infection.

59. The decision on proportionality and necessity under the 1984 Act and Regulations is, ultimately, for the minister. The courts recognise the legitimacy of according a degree of discretion to a minister "under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to the public health risks "(per Lord Bingham LCJ in *R v Secretary of State for Health ex parte Eastside Cheese Company* [1999[1 CMLR 123 at paragraph 50).

60. The obligations under the 1984 Act and the Regulations involve a consideration of the proportionality, or necessity, of the measure as a matter of domestic law weighing the effects of the measure against the public health aims being pursued. In that regard, the aim of the Regulation is, as the preamble makes clear, to respond to the:

> "serious and imminent threat to public health posed by the "incidence and spread of severe acute respiratory syndrome coronavirus".

61. In terms of the response, the context in which the Regulations were made was the emergence of a novel coronavirus which had already caused deaths throughout Asia

and western Europe. On 12 March 2020, the World Health Organisation announced that there were now more than 20,000 confirmed cases and almost 1,000 deaths in Europe. Scientific knowledge and understanding of coronavirus were limited but the disease was highly infectious and could be transmitted from human to human. Against that background, it is simply unarguable that the decision to make the Regulations on 26 March 2020 and to impose the restrictions contained in the Regulations on that date was in any way disproportionate to the aim of combatting the threat to public health posed by the incidence and spread of coronavirus. That is further confirmed by the fact that the Regulations were time-limited and would expire at the end of 6 months, that there was also a duty to review them every 21 days (now every 28 days) and a duty to terminate any restriction if it was no longer necessary to meet the public health aim.

62. Since the 26 March 2020, the minister has reviewed the Regulations. The incidence of coronavirus in England, and the number of deaths, however, increased. The threat to the capacity of the NHS to cope grew. Over time, the incidence of coronavirus has lessened and the daily death rate in England is lower now than at the peak. The scientific understanding of the disease is still limited. The effects of the Regulations on the nation are clearer. A number of restrictions imposed by the Regulations have been removed or eased. There is no arguable basis for contending that there has been any failure to comply with the obligations imposed by section 45D of the 1984 Act or regulation 3 of the Regulations.

Conclusion on Ground 2

63. There is no basis upon which it could reasonably be argued that there has been any fettering of discretion or any failure to have regard to relevant considerations. Similarly, there is no basis for contending that the making and maintaining of the Regulations involves any arguable irrationality or failure to act proportionately. Permission to apply for judicial review on grounds 2A, 2B, 2C and 2D (paragraphs 49 to 92 of the amended claim form) is refused.

THE FOURTH ISSUE – ARTICLE 5 OF THE CONVENTION

64. Mr Havers applied to amend the claim form to include a challenge to the version of Regulation 6 of the Regulations which applied from on 1 June 2020 and replaced the earlier obligation in regulation 6 not to leave the place where you lived without reasonable excuse. He submitted that the obligation in the amended regulation 6 not to stay overnight at a place other than where a person is living amounted to a deprivation of liberty within the meaning of Article 5 of the Convention. He relied upon, in particular, the decision of the Supreme Court in *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4.

65. Sir James Eadie submitted that the claimants should not be given permission to amend their claim, relying on the decision in *R (Spahiu) v Secretary of State for the Home Department* [2019] 1 W.L.R. 1297 at paragraph 62 which indicates that "rolling" or "evolving" judicial claims (i.e. claims amended to take in new decisions or grounds) are not usually appropriate. In any event, he submitted that there is no arguable basis that the restriction in regulation 6 amounted to a deprivation of liberty within the meaning of Article 5 of the Convention having regard to decisions such as that of the European Court of Human Rights in *Guzzardi v Italy* (1980) 2 EHRR 3. He further

submitted that if there were a deprivation of liberty it fell within the exception in Article 5.1(e) which permits the lawful detention of persons for the prevention of the spread of infection.

The application to amend

66. I accept that it is often undesirable to amend claim forms to include new challenges for the reasons given by Coulson L.J. in *Spahiu*. However, there is a need for an appropriate degree of procedural flexibility. In the present case, the issue of the compatibility of the form of regulation 6 with Article 5 of the Convention is a limited, defined and discrete issue arising out of an amendment to the Regulations under challenge. I therefore grant permission to the claimants to re-mend the amended claim form to include a challenge to regulation 6 in the terms set out in paragraph 12 of the claimants' supplementary grounds dated 23 June 2020.

Is it arguable that Regulation 6 is incompatible with Article 5 of the Convention?

67. Regulation 6 of the Regulations as in force on 2 July 2020 provided so far as material that:

> "6 (1) No person may, without reasonable excuse, stay overnight at any place other than the place where they are living or whether their linked household is living."

68. Article 5 of the Convention provides so far as material that:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.:
>
> …..
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases….. "

69. The case law of the European Court of Human Rights, including the decision in *Guzzardi*, was considered by the House of Lords in *Secretary of State for the Home Department v JJ* [2008] A.C. 385. The task of the court is to assess the impact of the measures on a person in the situation of the person subject to them and (per Lord Bingham at paragraph 16):

> "account should be taken of a whole range of factors such as the nature, duration, effects, and manner of execution or implementation of the penalty or measure in question"

70. In that case, the House of Lords held that a curfew where a person was required to stay in a flat for 18 hours, coupled with the effective exclusion of visitors, resulted in the individual being in solitary confinement for that lengthy period every day, for an indefinite duration, and with very little opportunity for contact with the outside world and with insufficient provision of facilities for self-entertainment and in the knowledge that the flat could be entered and searched at any time. That amounted to a deprivation of liberty (see paragraph 24 of the decision).

71. In the present case, there is no arguable basis that the provision of te versio of regulation 6 in force on 2 July 2020 would amount to a deprivation of liberty in the

light of the current case law. Persons will be in their own home overnight. They will be with their families or others living with them as part of their household. They will have access to all the usual means of contact with the outside world. The prohibition is on staying overnight at a place other than their home (although that will, in practice necessitate them staying in their own home overnight). They are able to leave their home during the daytime to work or to meet others (subject to the requirements of regulation 7 on gatherings). Furthermore, regulation 6 is limited in time and has to be reviewed regularly and the restriction must be removed as soon as it is no longer necessary to combat the threat posed. The facts fall far short of anything that could realistically be said to amount to a deprivation of liberty within the existing case law.

72. The reliance on the decision in *Jalloh* does not assist the claimants. That case was dealing with the tort of false imprisonment in domestic law (not Article 5 of the Convention). That tort is committed where a person is detained as a matter of fact and there is no lawful authority for the detention. As a matter of domestic law, the restriction on staying overnight at a place other than where you live does have lawful authority as it is authorised by regulation 6. The tort will not have been committed whether or not the restriction amounts to detention as a matter of fact. More importantly, for present purposes, the scope of what constitutes a deprivation of liberty for the purposes of Article 5 of the Convention is different from, and more limited than, the scope of detention for the purposes of the tort of false imprisonment. The appellant in *Jalloh* sought, unsuccessfully, to persuade the Supreme Court to align the concept of deprivation of liberty in Article 5 with the tort of false imprisonment as appears from paragraph 32 of the judgment in *Jalloh* so that detention would have a more limited meaning. The Supreme Court declined to align the two concepts in that way: see paragraph 34 of the judgment. The decision does not address the issue of what constitutes a deprivation of liberty within the meaning of Article 5 of the Convention.

73. For those reasons, it is not arguable that regulation 6 in the form in force on 2 July 2020 constitutes a deprivation of liberty within the meaning of Article 5 of the Convention. Permission to apply for judicial review of regulation 6 of the Regulations on the ground set out at paragraph 12 of the supplementary grounds dated 23 June 2020 is refused.

THE FIFTH ISSUE – ARTICLE 8 OF THE CONVENTION

74. Mr Havers submitted that the restrictions on the ability to see family members and friends imposed by regulation 6 and 7 in particular constitutes an infringement of the right to respect for private and family life guaranteed by Article 8 of the Convention which is arguably not justified.

75. Sir James Eadie submitted that the restrictions imposed on the ability to meet family members and friends are not so serious as to amount to an infringement of the right to respect for private and family life. In event, he submitted, those restrictions are justified under Article 8(2) of the Convention and the contrary is unarguable.

Discussion

76. Article 8 of the Convention provides as follows:

"Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well--being of the country, for the prevention of disorder or crime, or for the protection of the rights of others."

77. On any analysis, it is unarguable that the restrictions imposed here would be a justified if they amounted to an interference with the right to respect for private and family life. The Regulations seek to achieve a legitimate aim, namely the reduction of the incidence and spread of coronavirus. They do that by seeking to reduce the opportunity for transmission between households. That is a legitimate aim and is in accordance with law as the restrictions are included in Regulations made under powers conferred by an Act of Parliament.

78. Any interference is proportionate. The restrictions are limited. Persons remain free to live with family members or friends forming part of their household. They may communicate with other and family members by means of communication such as telephones and, if available, internet facilities. They may physically meet family and friends outdoors (subject to the restrictions on numbers in regulation 7). Given the limited nature of the restrictions, the gravity of the threat posed by the transmission of coronavirus, the fact that the Regulations last for a limited period and have to be reviewed regularly during that period, and restrictions must be terminated as soon as no longer necessary to meet the public health threat, there is no prospect of the current regulations, at the current time, being found to be a disproportionate interference with the rights conferred by Article 8 of the Convention. The contrary is not, in truth, arguable. Permission to argue that the Regulations currently in force infringe Article 8 of the Convention (paragraphs 155 to 159 of the amended grounds) is refused.

THE SIXTH ISSUE – ARTICLE 9 OF THE CONVENTION

79. Mr Havers submitted that the prohibition on the use of places of worship for communal acts of worship involved a breach of Article 9 of the Convention. The second claimant is a Roman Catholic who has not been able to attend communal worship, or receive the sacraments, since the Regulations were made

80. Sir James Eadie submitted that the restrictions have been eased and that places of worship may not open, amongst other things for private prayer. He submitted there was no breach in the circumstances or it was justified under Article 9(2) of the Convention.

Discussion

81. Regulation 5 of the Regulations as in force at the time of the hearing on 2 July 2020 provided that:

"(5) A person who is responsible for a place of worship must ensure that, during the emergency period, the place of worship is closed, except for uses permitted in paragraph (6)."

82. The permitted uses include funerals, the broadcasting of an act or worship, or for private prayer (so long as not part of communal worship).

83. Article 9 of the Convention provides that:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or orals, or for the protection nof the rights and freedoms of others".

84. Swift J. has already considered the issue of whether Regulation 5 involves an arguable breach of Article 9 of the Convention in *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin). That arose in the context of the restrictions on the use of an Islamic mosque for communal Friday prayers during Ramadan. Swift J. held there was a sufficiently arguable case to grant permission to apply for judicial review. He refused interim relief as, although there was an arguable case, there was no realistic likelihood of the claimant ultimately succeeding such as would justify the grant of interim relief.

85. In the present case, the second claimant is a Roman Catholic who wishes to attend mass. In the light of the judgment of Swift J. in *Husain*, I was minded to consider that it was is arguable that the restriction on the use of a Roman Catholic church for communal worship and the taking of the sacraments involves an interference with Article 9(1) of the Convention. I was minded to permit that issue to proceed to a full hearing to enable the court to determine in the light of all the evidence, and full legal argument, whether or not the restriction involves a breach of Article 9 of the Convention.

86. At the hearing on 2 July 2020, Sir James indicated that the Regulations may be amended in the near future to permit communal worship. No regulations, or even draft regulations, amending regulation 5 were produced at the hearing.

87. Following the hearing on 2 July 2020, I learnt that regulations were made at 10 a.m. on 3 July 2020. Those regulations appear to permit places of worship to hold acts of communal worship for up to 30 people with effect from 4 July 2020. If that is correct, this aspect of the claim may have become academic. It would not be right to reach any conclusion on that issue without first giving the parties the opportunity to make submissions on the relevance of the new regulations on this issue. Equally, it is not necessary or desirable to delay the handing down of the judgment on all the other issues that arise in this case. I propose, therefore, to adjourn consideration of this discrete issue, that is, whether any claim that restrictions arguably involve a breach of Article 9 of the Convention has become academic, for further submission but give judgment on the other issues.

THE SEVENTH ISSUE – ARTICLE 11 OF THE CONVENTION

88. Mr Havers applied to amend the claim form to include a challenge to regulation 7 in its current form. He submitted that the restrictions on gatherings permitting only six people to gather outdoors and two people indoors amounted to a breach of Article 11 of the Convention.

89. Sir James Eadie objected to the application to amend the grounds as that would amount to a rolling or evolving judicial review of the kind deprecated in *Spahiu.* In any event, he submitted that it was clear beyond any doubt that any interference would be justified.

The Amendment

90. In the present case, the issue of the compatibility of regulation 7 with Article 11 of the Convention is a limited, defined and discrete issue arising out of an amendment to the Regulations under challenge. It is appropriate in the circumstances to allow an amendment to raise that issue. I therefore grant permission to the claimants to re-amend the amended claim form to include a challenge to regulation 7 in the terms set out in paragraphs 16 to 17 of the claimants' supplementary grounds dated 23 June 2020.

The Issue

91. Regulation 7 of the Regulations as in force at the time of the hearing on 2 July 2020 provided so far as material that:

> "7(1) During the emergency period, unless paragraph (2) applies, no person may participate in a gathering which takes in a public or a private place –
>
> (a) outdoors, and consists of more than six persons, or
>
> (b) indoors, and consists of two or more persons.

92. There is a list of exceptions where gatherings are not prohibited including gatherings where all the person are members of the same household, or involve attendance at funerals, or attendance at work or the gathering takes place at an educational facility and is reasonably necessary for the purposes of education.

93. Article 11 of the Convention provides:

> "1. Everyone has the right of freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2 No restriction shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

94. The restrictions imposed by regulation 7 do involve an interference with the right to freedom of assembly and association within the meaning of Article 11(1) of the Convention. They do restrict the ability of persons to assemble and associate as they may do so only in small groups. They impinge upon the freedom, important in a democratic country, to gather to protest

95. The real issue is whether it is arguable that the restrictions are justified under Article 11(2) of the Convention. They pursue a legitimate aim as they are intended to bear down upon the spread of infection by preventing opportunities for the transmission of coronavirus between humans. They are in accordance with law as they were imposed by regulations made pursuant to an Act of Parliament. The issue is whether it is arguable that they are not a proportionate interference. There is an attraction in leaving that matter to be considered at a full hearing. In truth, however, there is no realistic prospect that the courts would find regulation 7 in its current form to be a disproportionate interference with the rights guaranteed by Article 11 of the Convention. The context in which the regulation was made was one of a pandemic where a highly infectious disease capable of causing death was spreading. The disease was transmissible between humans. The scientific understanding of this novel coronavirus was limited. There was no effective treatment or vaccine.

96. The regulation was intended to restrict the opportunities for transmission between humans. The regulation therefore limits the opportunity for groups of individuals to gather together, whether indoors or outdoors. The regulation was time-limited and would expire after 6 months in any event. During that period, the government was under a duty to carry out regular reviews and to terminate the restriction if it was no longer necessary to achieve the public health aim of reducing the spread and incidence of coronavirus within the population. In all reality in those circumstances, there is no realistic prospect of a court deciding in these, possibly unique, circumstances that the regulation was a disproportionate interference with the rights guaranteed by Article 11 of the Convention. There is, therefore, no purpose in granting permission to bring the claim. Permission to apply for judicial review of regulation 7 of the Regulations on the grounds set out in paragraphs 16 to 17 of the supplementary grounds dated 23 June 2020 is refused.

THE EIGHTH ISSUE – THE RIGHT TO PROPERTY

97. Mr Havers submitted that the Regulations amounted to a deprivation of possession or an impermissible control on the first claimant's right to property contrary to Article 1 of the First Protocol to the Convention.

98. Sir James Eadie submitted that there was no deprivation of possessions and no evidence of an interference with the first claimant's right to property within the meaning of the Convention. In any event, he submitted, any restriction on the first claimant's right to use property was justified.

Discussion

99. Article 1 of the First Protocol to the Convention provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in accordance in the public interest

and subject to the conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

100. A claim of a breach of Article 1 of the First Protocol will require careful consideration of the evidence. In the present case, the claim is made only by the first claimant. His evidence is that he has a number of businesses in England. One is a public relations company which has seen a decline in revenues. Another is a company which leases planes to companies such as British Airways and Air France. That business has been, it is said, severely affected.

101. First, there is no evidence that the Regulations have deprived the first claimant (or anyone else) of any possessions within the meaning of the Convention.

102. Secondly, the first claimant has simply not provided sufficient evidence that the Regulations have involved any unlawful interference with his possessions or property such as would justify permitting this claim to proceed. So far as possessions are concerned, existing case law is that this does not include loss of revenue but will include goodwill. So far as the public relations company is concerned, there is evidence that it has lost revenue but no evidence to indicate that the goodwill of the company has suffered.

103. So far as the airline leasing business is concerned, there is simply no realistic basis on which it could be said that the Regulations have caused the loss or damage to that business. The first claimant has had ample opportunity to file evidence about the effect of the Regulations on his business interests in these proceedings. He has filed one witness statement and his solicitor has filed four. Those do not demonstrate an evidential basis which justifies allowing the claim to proceed.

104. Mr Havers invites me to infer that regulations such as those which originally prevented people leaving their homes without reasonable excuse or which as amended prevent people staying overnight at places other than where they are living inflicted harm to the first claimant's airline leasing business. It is overwhelmingly far more likely that the cause of any economic harm to that business is the restrictions on flights imposed by other countries or the fact that people are unable or unwilling to fly to other countries because of restrictions or fears about the situation in those other countries. If inferences are to be drawn, therefore, the overwhelmingly reasonable inference to draw is that any harm to the first claimant's airline leasing business has been caused by other factors (such as restrictions on flights imposed by other countries or difficulties in travel to other countries) not by the Regulations.

105. The first claimant also suggests that other people, who are not claimants, but who run businesses affected by regulations 4 or 5, might be able to show a violation of Article 1 of the First Protocol to the Convention. This court is concerned with the position of the current three claimants and the current evidence before it. It is not appropriate to speculate about who else might bring a claim and what evidence they might be able to produce. In all the circumstances, the first claimant has not established an evidential basis that the Regulations have even arguably involved a breach of his rights under

Article 1 of the First Protocol. The second and third claimants do not suggest that the Regulations have affected any rights that they may have under that article. For those reasons, permission to challenge the Regulations on the ground that they violate the first claimant's rights under Article 1 of the First Protocol (paragraphs 185 to 190 of the amended claim form) is refused. For the same reasons I refuse permission to re-amend the claim form to include a claim on the basis set out in paragraph 18 of the document entitled supplementary grounds dated 23 June 2020.

THE NINTH ISSUE – THE 18 MARCH ANNOUNCEMENT RELATING TO SCHOOLS

106. Mr Havers submitted that it was clear from the speeches made by ministers in March 2020 that ministers were directing or instructing schools to close. He submitted that that involved a breach of Article 2 of the First Protocol to the Convention. Given the role that the government had had in bringing about the closure of schools, it was appropriate to grant permission. The court could require the second defendant to request or give guidance that schools should re-open.

107. Sir James Eadie submitted that the government had not exercised any power to close schools. Rather, they had requested schools not to provide education on school premises save for the children of key workers and vulnerable children. and to comply with their continuing duties to provide education by other means. The current policy of the government was to seek to encourage schools to arrange a phased return of schools and, on 2 July 2020, the second defendant had made a statement in which he made it clear that the governments plans were to ensure that children return to school from September. In any event, the obligation in Article 2 to the First Protocol was not to deny anyone the right to education. The obligation to provide education had not been suspended. Education was being provided but not on school premises.

Discussion

108. There has been discussion about the precise meaning of certain of the statements made in relation to schools in March 2020. It is neither necessary, nor helpful, to spend time dealing with that matter in this judgment.

109. The factual position is this. As at about the 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.

110. The legal position is that there is currently no legal measure made by either of the two defendants requiring those responsible for running schools to close those schools. The Regulations made on 26 March 2020 prohibited gatherings in a public place but the government did not consider that schools were public places for these purposes. In any event, regulation 7 as amended an in force from 1 June 2020, and which imposes restrictions on gatherings in public and private places, specifically exempts educational facilities. No order has made under the Coronavirus Act 2020 to close any school in England. No other power has been identified as having been exercised so as to impose any legal requirement on any school in England to close.

111. The present position is that it is the current policy of the government to encourage the return of pupils on a phased basis so that they will receive education at school. The government wishes every child who can attend school to do so from September 2020.

112. In all those circumstances, the claim in relation to schools and Article 2 of the First Protocol to the Convention is academic and serves no purpose. The claimants want a remedy which will, in some way, make it clear that school attendance is not prohibited by the government or to require or encourage the government to issue some form of guidance that children should return to school. There is, however, no legally enforceable prohibition in place issued by either defendant preventing attendance at school. The current policy of the government is to encourage children to attend at school. There is, therefore, no relevant remedy which could serve any real practical purposes in the present circumstances. Whatever the precise meaning of the statements made in March 2020, and whatever the position of the government has been over the intervening months, the position in practical terms is that government policy now aims at the result that the claimants are seeking. In those circumstances, this aspect of the claim is academic. I refuse permission to apply for judicial review of the decision said to have been taken on 18 March 2020 on the grounds set out in paragraphs 121 to 196 of the amended claim form. I refuse permission to the claimants to amend the claim form by adding paragraphs 19 to 29 of the document entitled supplementary grounds dated 23 June 2020.

ANCILLARY MATTERS

113. This judgment deals with the grounds of challenge specifically alleged in the amended claim form and the supplementary grounds dated 23 June 2020. Those documents make a large number of points about a wide range of matters. Consideration of whether to grant permission has been deferred in relation to regulation 5 on one specific ground, namely an alleged breach of Article 9 of the Convention. Permission has not been granted to argue any of the other matters referred to in the claim form as a free standing ground of judicial review of any regulation, decision or other measure.

CONCLUSION

114. The Secretary of State had the legal power to make the Regulations. In making and maintaining the Regulations, he has not fettered his discretion. He has had regard to relevant considerations. He has not acted irrationally. He has not acted disproportionately. Permission to apply for judicial review on grounds 1 and 2A, 2B, 2C and 2D in the amended claim form is refused.

115. The claim to challenge the restrictions on movement and gatherings in the original regulations 6 and 7 are academic as those regulations have been replaced. The challenge to the 18 March 2020 announcement relating to schools is also academic in the circumstances. Permission to apply for judicial review to challenge those regulations and that decision is refused.

116. The amended regulation 6 in force on 2 July 2020 requiring persons not to stay overnight other than where they live is not even arguably a deprivation of liberty within the meaning of Article 5 of the Convention. Permission to challenge that regulation is refused.

117. The Regulations in force on 2 July 2020 did involve a restriction on the freedom of assembly and association. That freedom is an important one in a democratic society. The context in which the restrictions were imposed, however, was of a global pandemic where a novel, highly infectious disease capable of causing death was

spreading and was transmissible between humans. There was no known cure and no vaccine. There was a legal duty to review the restrictions periodically and to end the restrictions if they were no longer necessary to achieve the aim of reducing the spread and the incidence of coronavirus. The Regulations would end after six months in any event. In those, possible unique, circumstances, there is no realistic prospect that a court would find that regulations adopted to reduce the opportunity for transmission by limiting contact between individuals was disproportionate. Permission to apply for judicial review on that ground is refused.

118. The Regulations do not, even arguably, involve a breach of the right to respect for private and family life guaranteed by Article 8 of the Convention or of the first claimant's property rights under Article 1 of the First Protocol to the Convention. Permission to challenge the Regulations on those grounds is refused.