IN THE HIGH COURT OF JUSTICE Claim No.: CO/3109/2020

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, INTERNATIONAL TRAVEL) (ENGLAND) REGULATIONS 2020;

IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, INTERNATIONAL TRAVEL) (ENGLAND) (AMENDMENT) (NO. 10) REGULATIONS 2020;

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

Permission Hearing on 18th March, 2021

B E T W E E N :

THE QUEEN
(On the application of (1) AB, (2) CD, (3) EF (a child by AB and CD, his litigation friends) and (4) GH (a child by AB and CD, his litigation friends)

Claimants

- and –

THE SECRETARY OF STATE FOR TRANSPORT

First Defendant

- and –

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Second Defendant

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANTS

INTRODUCTION

1 This is an application for permission in a judicial review issued in September 2021 listed for two hours. The Court is referred to the Grounds for the background facts as

they were at the date on which the claim was issued.[1] Expedition was sought but refused. Inevitably, the factual circumstances have changed since the claim was issued, given that permission is being determined over six months later. The principal statutory instrument in question, the International Travel Regulations, has also been amended. But it remains in force in its amended form and continues to impose upon all travellers to England a requirement to self-isolate, previously for 14 and now for 10 days.

2 The Claimants expects to be able to agree with the Defendants a short schedule setting out the principal changes to the International Travel Regulations since they were made. In summary, the material changes have been: (a) a requirement to have had a negative PCR test for the coronavirus before being permitted to enter England; (b) the ability of a person to be released from the self-isolation requirement after receiving a negative PCR test after arrival; (c) the reduction of the self-isolation period; (d) the removal of all countries from Schedule 1A, which contains countries for which no self-isolation requirement is imposed (albeit the Schedule and provisions relating to it remain and so countries could be added to it through amendments to the Regulations); and (e) the imposition of what is informally known as 'hotel quarantine' for travellers entering England from a number of countries named in Schedule B1.

3 All but two of those make the requirements imposed more stringent. The factual landscape has changed since the claim was issued and will change further between the permission hearing and the hearing of the if permission is given. That was inevitable. But the fundamental nature of the Regulations that remain in force is unchanged: a requirement to self-isolate imposed on all travellers into England (previously all save those from certain countries) that is at least arguably detention contrary to Article 5 of the ECHR.

4 With one exception,[2] the arguments of fact and law that are raised in this case raise questions of law of general public importance that have not been tested in relation to any of the recent judgments on restrictions imposed under the Public Health (Control

[1] Defined terms are as in the Grounds.

[2] The exception being whether admittedly materially identical self-isolation conditions to those imposed by the International Travel Regulations, in this case by the he Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020 No 1045), imposed false imprisonment, which was considered in *R (Francis) v Secretary of State* [2020] EWHC 3287 (Admin). See further below, in relation to Ground 1.

of Disease) Act 1984 (the 1984 Act) over the past year. In particular: the test for whether Article 5 is engaged in the circumstances in which these Regulations are imposed; the test for the exceptions in Article 5.1(e); and the rationality and proportionality of these particular restrictions.

5 The Defendants have indicated that they will criticise the length of the Grounds. Such criticism would be ill-merited. The Grounds include a relatively lengthy section setting a detailed account of the evidence, with references to the evidential material in the bundle. The witness statement does not include those references. While this account might normally be contained in witness evidence, this factual background relies entirely on matters and documents in the public domain exhibited in the JR bundle. Had the factual background been introduced in detail in a witness statement, the Grounds would have been considerably shorter but the combined length of the Grounds and witness evidence would have been identical.

ALLEGED DELAY

6 First, there has been no undue delay in this case. Secondly, even if there has been, the Defendants have failed to set out any reason why the court may refuse to grant permission or relief pursuant to s 31(6) of the Senior Courts Act 1981 ('the 1981 Act').

7 It is at least probable that the Claimants would not have had standing to bring this claim until they were visiting a country to which the Regulations applied. They certainly could not have brought a claim for damages any sooner than they were was affected directly. Given that their claim includes claims under the HRA alleging breaches of Articles 5 and 8 and that such claims may only be brought by a person directly affected (s 7 of the HRA) such an objection would certainly have been taken by the Defendants had they brought the claim any earlier.

8 The Claimants unquestionably brought the claim promptly once they had standing to bring it. It cannot reasonably be suggested that the Claimants could not have challenged the lawfulness of the Regulations as a whole – restrictions that arguably entail their detention – because they had not brought the proceedings at a date on which they would have had no standing to bring them. That said, the Claimants deliberately sought to –

and did – issue the proceedings within three months of the Regulations being made. This was a deliberate decision – one that entailed the inability to comply with the pre-action protocol given the date on which they became effected by them – as the Defendants would certainly have taken the point on timing had they not done so.[3]

9 Thus, the Defendants would either have asserted no standing (had the proceedings been brought before the Claimants could have been affected), delay (despite their not having had standing up to the point of issue) or failure to comply with the protocol (although they would inevitably have otherwise complained of delay beyond three months).

10 In a part of the judgment of Lewis J *(Dolan & Ors v Secretary of State for Health And Social Care & Anor* [2020] EWHC 1786 (Admin)) that was not overturned by the Court of Appeal, the High Court did not refuse to consider that claim on the basis of delay. It is right the Court of Appeal (*R (Dolan) v Secretary of State* ([2020] EWCA Civ 1605, at para 35) did say that the claim should not have taken two months to issue. But that was a claim in which there was no question of the second and third claimants' standing or of that of the first claimant in respect of the *ultra vires* part of the judicial review.

11 Finally, a finding of undue delay is not a sufficient basis for refusing permission. If there has been undue delay, the court may refuse permission only if the granting of the relief sought would be likely to 'cause substantial hardship to, or substantially prejudice the rights of, any person' or would be 'detrimental to good administration' (s 31(6) of the 1981 Act). There is thus a discretion to refuse permission but it may be exercised only if the court is satisfied of either of the above.

12 Aside from a bare assertion that there has been delay, the Defendants make no submissions or provide no evidence as to why they can establish either. The Court of Appeal have held that the limited opportunity for dealing with delay at the substantive hearing underlines the need for any defendant who is seeking to raise a delay issue to address the point in the acknowledgement of service, and to put forward any evidence in support of the assertion, at the permission stage (*R v Lichfield Borough Council, ex p Lichfield Securities Ltd* [2001] EWCA Civ 304). This has not been done and the Defendants may not bring further evidence in support of such a contention at this late

[3] And compliance with the protocol does not extend time: *Finn-Kelcey v Milton Keynes Council* [2008] EWCA Civ 1067

stage without permission; and (it is respectfully submitted) should not be permitted to introduce further argument not raised in the acknowledgement of service – which should contain all evidence and argument to be considered by the court at the permission stage.

THE CLAIM IS NOT ACADEMIC

13 If permission is granted, the Claimants accept that the court will review the Regs in their amended form in the light of the factual circumstances pertaining at the date of the review. Indeed, this challenge was to the International Travel Regulations as they were at the date on which the claim was issued, not as they were when they were introduced.

14 It is not tenable to suggest that this claim is academic.

(1) The central part of the claim challenges the lawfulness *per se* (not the rationality and/or proportionality) of what is alleged to be detention: an assertion of one of the most fundamental human rights. It is irrelevant that this detention is for 14 or ten days or that it might be reduced in length after a negative PCR test. It is either lawful (because it is not detention under Article 5 or falls within the exceptions) or it is not.[4]

(2) That the challenge to the proportionality of the Regulations must be determined at the date of the review does not make it academic. A determination about proportionality can never be frozen in time: circumstances will always evolve in the period between a decision and the date of challenge, as much as they will between the date of challenge and the date of consideration (which is out of the parties' hands).

(3) Moreover, the fact that there is a challenge to proportionality weighs against, not in favour, of any suggestion that a challenge can become academic. The Regulations are of continuing effect. The 1984 Act provides that the Minister has a duty of review and the Minister must have decided, at each point at which

[4] See para 26(1) below with respect to the relevance of duration in determining whether confinement qualifies as detention: in summary, the only precedents for the contention that imprisonment may not amount to detention because of the duration of the confinement are where the confinement was for moments or hours at most.

such a review was required, that they remained lawful. Regulations that might have been proportionate at the date on which they were made my not remain so; and it is not a tenable argument to suggest that a person subject to detention is unable to challenge the lawfulness (through proportionality and rationality) of those restrictions at the date on which they affected him because they were lawful (proportionate and rational) at the date they were made.

(4) The Claimants claim damages for breaches of their Convention rights and for false imprisonment.

15 The *Dolan* judgments do not assist the Defendants. There, Lewis J found that those Regulations that were in force at the date of the hearing were not academic (see a summary of his findings in the judgment of the Court of Appeal at paras 23-25). He specifically considered the proportionality of the 'stay at home' regulations as they were at the date of the hearing, notwithstanding that they had been repealed two days before his judgment was given; and he would have given permission for the Article 9 challenge had the parties not agreed that the successor (the Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations 2020 ('the No. 2 Regulations) did not impose any restriction on the numbers of persons who may enter religious buildings. The Defendants' argument that the claim is academic because the Regulations have been amended is not tenable in the light of that judgment. Further and in any event, there was no claim for damages in the *Dolan* claim.[5]

16 Further and alternative, insofar as any part of the claim might be found to be academic, it is clearly in the general public interest for the court to review the lawfulness of secondary legislation that impose greater restrictions on international travel than have been imposed in the modern era (certainly in peacetime and quite probably in peace or in war).

[5] This is not apparent from the judgments but counsel settling this skeleton argument was junior counsel to Mr Dolan and can assure the court of the same.

STANDARD OF REVIEW

Grounds: paras 26-38;
SGR: paras 19-21

17 The arguments are set out at length in the Grounds and SGR. The Claimants emphasise three points:

(1) The general principles of proportionality set out in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 (a finding of the Supreme Court in contrast to those recent decisions cited in the SGR) do not cease to apply in a public health crisis;

(2) The intensity of the review remains heightened when fundamental rights are at stake (*Pham v Secretary of State for the Home Department* [2015] UKSC 19); and

(3) While the courts must resolve questions of law '…almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries…' (*R (Miller) v Prime Minister* [2019] UKSC 41, paras 31): a judgment that is, with respect, more authoritative than a finding of the High Court at a permission hearing (*cf.* SGR para 20).

GROUND ONE: THE REGULATIONS WERE *ULTRA VIRES* THE 1984 ACT

Grounds: paras 80-89
SGR: paras 22-28

18 The Claimants' case is that the Minister could not justify, at the date on which the Regulations were made, that they were 'necessary' "[f]or preventing danger to public health from vessels, aircraft, trains or other conveyances arriving in any place" (pursuant to s 45B of the 1984 Act) in the absence of advice to that effect from the government's scientific advisers. The submissions under this ground also go to the arguability of the challenge to the rationality and proportionality of the measures, under Grounds 3 and 4.

19 The Grounds set out in detail, by reference to evidence of SAGE Minutes, the absence of any positive advice by the government's primary scientific advisory body prior to the Regulations being made (see paras 39 to 46 and in particular para 45, in which the minutes are summarised) and that they failed to support them publicly after they were made (paras 47-51).

20 The only response to this by the Defendants, is that the CMOs advised on 9.5.2020 that 'once domestic transmission was low, imported cases *could* become a material issue and quarantining for 14 days persons arriving from a country with a higher rate of COVID-19 than the UK *may* have a useful impact on the epidemic in the UK' (quoted at 7 of the SGR, emphasis added). This does not begin to resemble advice that they *were* 'necessary'. Without making any disclosure of the nature or context of the advice by someone other than the government's chief medical officer, the Defendants assert, weakly, that the Chief Scientific Adviser to the Home Office advised *in similar terms* in late May and early June 2020' (emphasis added). That is the entirety of the Defendants' assertion and evidence about the presence or absence of advice.

21 Contrary to the submissions of the Defendants, the test for *vires* under s 45B is not whether there was or is a public health crisis but whether particular restrictions are 'necessary' for preventing danger to public health. In this respect, the court is entitled to consider the scientific advice on which any decision as to necessity was made. (Alternatively, it should take that into account in relation to rationality and/or proportionality.)

22 In the premises, this ground is at least arguable.

GROUND TWO: INDISCRIMINATE DETENTION IS NOT PERMITTED BY ARTICLE 5 OF THE CONVENTION

Is Article 5 engaged?

Grounds: paras 92-98
SGR: paras 30-34

23 Since the Grounds and the SGR were filed, the Divisional Court has considered the effect of similar provisions in the Health Protection (Coronavirus, Restrictions) (Self-

Isolation) (England) Regulations 2020 ('the Track and Trace Regulations') (*R (Francis) v Secretary of State* [2020] EWHC 3287 (Admin)). The self-isolation provisions of the Track and Trace and the International Travel Regulations are materially identical to each other. Regulation 4 3(a) of the International Travel Regulations is identical to 2(3)(a) of the Track and Trace Regulations and the limited exceptions to the self-isolation requirements in that part of both Regulations are materially identical, albeit arranged somewhat differently.

24 The Court found, in *Francis*, that those Regulations did not impose a requirement to 'isolate' or 'quarantine'. Sections 45C and 45G (applying to domestic regulations) specifically excludes from the Minister the power to impose 'isolation or quarantine' on a patient. The definition of both is considered in detail by Hickinbottom LJ in *Francis* (paras 34-57). But s 45B does not impose that restriction and the court need not consider whether the Regulations impose either isolation or quarantine (nor is that contention any part of the claim).

25 The Divisional Court did go on to consider 'detention' in *Francis* but only in relation to whether the self-isolation requirements constituted 'false imprisonment' (pursuant to *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4). The application of Article 5 was not considered judicially.[6] Insofar as the Divisional Court relied upon the Court of Appeal's judgment in *Dolan* (at para 64 of *Francis*) that was a review of a requirement that a person be required to stay overnight at their place of residence (which was the modified restriction introduced in June 2020 and reviewed) not that he or she may not leave it without a reasonable excuse. It does not take the Defendants' case any further.

26 Thus, *Francis* is not a precedent for the suggestion that it is not arguable that the claim does not engage Article 5. Paragraphs 92-98 of the Grounds are repeated and are clearly arguable.

27 Nor do the distinctions raised by the Defendants at para 31 of the SGR answer the Claimants' primary case, which is that the circumstances of their 'self-isolation' were

[6] The court will also note that the Divisional Court did not have the assistance of counsel to the claimant in *Francis*, in which the claimant represented himself.

no less onerous than the home curfew or house arrest which have been found to constitute detention (*SSHD v AP* at [2-4]; *SSHD v GG* [2016] EWHC 1193 (Admin) at [36]); *Pekov v Bulgaria* [2006] ECHR 50358/99). In particular, and responding to each of the similarly numbered sub-paragraphs of para 31 of the SGR:

(1) The duration of confinement cannot be material where it lasts for several days. Cases in which imprisonment at common law has been found not to constitute detention include those where the confinement was for a few hours and justified by the common law of necessity (by 'kettling: *Austin v Comr of Police of the Metropolis* [2008] QB 660) and where a person was forced to remain in his house for a 'very short time' (*Walker v Comr of Police of the Metropolis* [2015] 1 WLR 312) (see *Jalloh*, para 30). Unsurprisingly, the Defendants are unable to posit any precedent in which it was found that confinement for over one week did not constitute 'detention' because of the 'short' duration.

(2) The choice of accommodation is no different from a person subject to home arrest, which is a deprivation of liberty even if 'the authorities responsible for monitoring compliance with it were far away, which allowed him to breach it with impunity' (*Pekov*, para 73).

(3) No prisoner is required to isolate from a person providing him with medical care.

(4) While being able to remain together as a family may mean that a person was not 'isolated', it does not mean that they were not detained; and any person subject to home curfew or house arrest will be able to 'self-isolate' with his family.

(5) The refugees in *ZA v Russia* (Applications nos. 61411/15), relied upon by the Defendants, were able to leave the country without consent but were still forced to remain in one place and still found to be detained.

(6) The circumstances in which the Claimants were able to leave home were exclusive not (as they were under the Restriction Regulations) inclusive: they were limited to those exceptions set out in the Regulations. All but the last of the 'range of reasons' (medical treatment, to avoid injury or escape harm) relied upon by the Claimants would be expected in any form of home curfew or house arrest and would be justified by the common law of necessity in any event. Only in 'exceptional circumstances' may a person obtain 'necessities'.

(7) The ability to move to another place of self-isolation is no different from a person being permitted to move to another house if under self-arrest.

(8) The lack of supervision was no barrier to confinement being considered detention in *Pekov* or *Enhorn v Sweden* ([2005] ECHR 56529/00 at paras 32 in fine, 33, 47 and 55). Although a false-imprisonment case, *R v Rumble* (2003) 167 JP 205 is also of some relevance. As Lady Hale summarised it in *Jalloh*: 'The defendant in a magistrates' court who had surrendered to his bail was in custody even though there was no dock, no usher, nor security staff and thus nothing to prevent his escaping (as indeed he did). The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.' Again, any person subject to home curfew or home arrest will be able to work from home or keep in contact with friends or family by telephone; as indeed (in principle and subject only to prison rules) could any prisoner.[7]

(9) The existence of a fixed penalty notice scheme is irrelevant where it is a criminal offence to contravene the requirement.

28 On the contrary, it is wholly irrelevant that countries were added and removed (SGR, para 33), as it is that the Claimants could have left the country to avoid detention. Moreover, the First Claimant has unavoidable commitments in Croatia. The Defendants' suggestion that the Claimants could have avoided detention by making themselves aware of the countries listed in Schedule 1A is particularly ill-judged given that he was within Croatia when it was removed from that list.

29 The Strasbourg Court has found that a person may be detained even where he is not under supervision or surveillance, provided he is required to stay in a place by law (in particular in *Pekov*). Paragraph 34 of the SGR wrongly asserts that the court should have regard to the 'acid test' set out by Supreme Court in *Cheshire West and Chester Council v P* [2014] AC 896. That case concerned the detention of old and vulnerable patients who may lack capacity. Had the Defendants quoted the whole paragraph in which the term is used, it would have been apparent that the 'acid test' set out is peculiar to 'those' cases:

[7] One is reminded that *The Pilgrims Progress* (*The Pilgrim's Progress from This World, to That Which Is to Come'*, John Bunyan, 1678) and *The Ballard of Reading Gaol* (Oscar Wilde, 1897) were written in prison.

> [48] So is there an acid test for the deprivation of liberty in these cases? I entirely sympathise with the desire of Munby LJ to produce such a test and thus to avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Ms Richards is right to say that the Guzzardi test is repeated in all the cases, irrespective of context. If any of these cases went to Strasbourg, we could confidently predict that it would be repeated once more. But these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty. *P, MIG* and *MEG* are, for perfectly understandable reasons, not free to go anywhere without permission and close supervision. So what are the particular features of their 'concrete situation' on which we need to focus?
>
> (Emphasis added)

30 A vulnerable patient not subject to a specific legal requirement to stay at a care home is detained only if she is under constant supervision. That must be right. But that does not mean that a person who is under an ongoing legal requirement to remain in one place is not detained. Further and in any event, there is some supervision over a person self-isolating, as the police or other persons authorised by the Secretary of State can and do check whether individuals are isolating where they are required to be.

31 Finally, reliance is placed by the Claimants on their assertion that they were subject to false imprisonment, which was determined against the claimant in relation to materially identical provisions in *Francis*. This judgment, that of another panel of the High Court, is not binding upon the court, although of course highly persuasive. It is respectfully submitted that it is at least arguable that the decision was wrong. While the considerations set out in para 27 principally address the question of detention, they are not irrelevant to the question of whether 'self-isolation' can constitute false imprisonment; neither *Pekov*, *Austin*, or *ZA* were cited in the judgment or, it can reasonably be assumed, by any of the parties; and the court arguably gave too little account for the requirement (under the Track and Trace and the International Travel Regulations) that a person notify the Secretary of State of the place where he is are isolating. However, as the Supreme Court held in *Jalloh*, the two concepts of false imprisonment and detention are not identical and were not aligned.

32 In the premises, it is at least arguable that the Claimants were detained and that their Article 5 rights were engaged.

The qualification in Article 5.1(e) does not allow indiscriminate quarantine by country

Grounds: paras 99-105
SGR: paras 35/36

33 This subject was given no judicial consideration in either *Dolan* or *Francis*. It is at least arguable that the qualification does not apply and that the arguments of the Claimants (set out fully and so not repeated) should be preferred to those of the Defendants: in particular, that detention can only be permitted of those who are at least potentially infected.

34 Further, this construction (to include potentially infected persons but not others) is supported by the qualification on the powers in Part IIA of the 1984 Act that apply to domestic regulations (under s 45C rather than s 45B). Section 45G(2)(d) does permit a person 'P' to be 'kept in isolation or quarantine' but only where a JP is satisfied that P (*inter alia*) *may* be infected and there is a risk that P may infect others. (As observed above, regulations imposing special restrictions cannot impose this form of quarantine: s 45D(3).) Section 19 of the HRA requires that the Minister declare that a Bill is considered to be compatible or that he cannot make such a declaration but that the government nevertheless wishes it to become law; and a declaration of compatibility was made of the 2008 Act (by which Part IIA was inserted into the 1984 Act) before it was passed into law. Parliament can thus be presumed to have intended, in passing amendments to the 1984 Act in 2008, to pass legislation in conformity with Article 5; and to have considered that the above limitations were consistent with those of Article 5.1(e). It cannot reasonably be said every person entering England from a country not on Schedule 1A (currently, every other country in the world outside the common travel area) 'may be infected' or that there was a risk of each one of them infecting others.

GROUND THREE: RATIONALITY AND PROPORTIONALITY

Grounds: paras 106-136
SGR: paras 38-56

35 In the first instance, the inability of the Defendants to rely on medical advice to support the imposition of this policy, through secondary legislation, is sufficient to establish that the policy (and the International Travel Regulations) was irrational and thus unlawful. (Alternatively, to that being sufficient to determine Ground One.)

36 The submissions of the Defendants do not answer the test on rationality and proportionality. In response to similarly numbered points at paragraphs 41 to 43.

37 First, the bare assertion that individuals returning from countries with a higher incidence of the virus may be at a higher rate of infection than those in the UK (or, now, those entering from *all* other countries) may or may not be right but does not, in itself, demonstrate that the measures are rational and proportionate.

38 Secondly, the fact that the detention (alternatively, significant restriction on movement and interaction with others that engaged Article 8 rights,) could have been more onerous does not sustain the Defendants' case unless it is first able to justify the rationality and proportionality of the measure. In that respect, they cannot point to any medical evidence in support prior to its imposition and they make no attempt to engage in any analysis justifying it by reference to the *Bank Mellot* test. (This applies also to para 46 of the SGR.)

39 Thirdly, this paragraph of the SGR (43) is pure assertion unsupported by any evidence. The Court should not accept the assertion of the content of scientific advice without its full disclosure. It is otherwise impossible to subject it to any analysis or scrutiny. Moreover, while the court is required to give the government a margin of discretion:

(1) There was no scientific evidence as to the efficacy of these restrictions before they were implemented;

(2) The Defendants have not sought to introduce any evidence of its efficacy at the date on which they filed the SGR or subsequently (and it is far too late for them to be permitted to do so if any such attempt is made before the permission hearing); and

(3) There is no evidence that the government have even considered, at any stage, whether whatever positive effect these measures might have on transmission of this one virus outweighs their negative effect on the fundamental rights of those affected or its economic and social effects (which it is bound to consider before deciding whether it is rational, even if that does not go to any of the fundamental rights of these particular Claimants).

In summary, it cannot be sufficient for Secretaries of State to assert that a measure that impacts upon the Claimants' fundamental rights (on the Claimants' case) and (on any view) has considerably disruptive effects on individuals' freedom of movement on the economy is rational or proportionate simply because they assert that it is. The existence of a pandemic does not strip from the court its duty to analyse rationality and proportionality according to evidence and analysis, not bare assertion.

40 In respect of proportionality and rationality in general, the Defendants concede that the rationality of the restrictions 'as a whole' should be considered (SGR, para 49). The Claimants agree. So, too, should their proportionality, including its impact upon fundamental rights in general. Section 3 of the HRA 1998 provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." That is to say, the Public Health Act 1984 and its 2008 amendments must be read 'so far as it is possible' to be compliant with the Convention. Consequently, that Act cannot be construed as giving a Minister the power to enact secondary legislation that interferes disproportionately with Convention rights; and a party may challenge its lawfulness on that basis whether or not a victim under s 7 of the HRA (*R (Rusbridger) v Attorney General* [2003] UKHL 38, at [21] per Lord Steyn).

41 The Claimants primary case is that there is no evidence that the Defendants: (a) were advised on the efficacy of the restrictions imposed; (b) considered any evidence of their efficacy; and (c) made any attempt to weigh any positive attempt against its negative consequences; and that, in consequence, (d) they cannot satisfy the *Bank Mellot* test of proportionality. It is not sufficient (as they do in paras 51-56 of the SGR) to assert that the tests are met because of the severity of the pandemic and because the Secretaries of State have judged them necessary.

GROUNDS FIVE AND SIX: INCLUSION OR EXCLUSION OF COUNTRIES (INCLUDING CROATIA) FROM SCHEDULE A1

Grounds: paras 137-143
SGR: paras 57-64

Decisions about which countries to add and remove from Schedule A1

42 While there are currently no countries on Schedule A1, the Schedule remains and the Minister would be able to add or remove countries from it were the International Travel Regulations amended.

43 Each of these decisions affect thousands to hundreds of thousands of travellers and have a direct economic impact. While it is accepted that the decisions are those that must be taken by government on a day-to-day basis, that does not and cannot make them immune from scrutiny.

44 The government has chosen not to disclose or to publish any of the minutes from the Joint Biosecurity Committee ('JBC'). The policy outlined in paras 12-15 of the SGR amounts to the most detailed account of government policy to be disclosed heretofore (far more detailed than the Ministerial announcement relied upon by the Defendants) but cannot be scrutinised in the absence of the publication or disclosure of the JBC minutes.

45 Similarly, the Court cannot scrutinise the rationality and/or proportionality of the decision to remove Croatia from Schedule A1 without disclosure of the minutes and evidence relied upon in support of the meetings that led to the advice to remove it from the Schedule.

46 In circumstances where the Minister relies on expert advice given by a committee – particularly where that advice is tendered to such a fact specific question and where it is reasonable to expect that the Minister will invariably follow that advice – the decision cannot be scrutinised without scrutiny of the committee's decision.

CONCLUSION

47 The Court is respectfully asked to grant permission and to give directions for the hearing of the judicial review.

8th March, 2021

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