C1/2020/1117

IN THE COURT OF APPEAL

ON APPEAL FROM [2020] EWHC 1786 (Admin) (Lewis J)

BETWEEN:

THE QUEEN

on the application of

(1) MR SIMON DOLAN

(2) MS LAUREN MONKS

(3) A.B. (a child, by his litigation friend C.D.)

Appellants

and

(1) SECRETARY OF STATE FOR HEALTH & SOCIAL CARE

(2) SECRETARY OF STATE FOR EDUCATION

Respondents

and

BIG BROTHER WATCH

Proposed Intervener

WRITTEN SUBMISSIONS ON BEHALF OF

THE PROPOSED INTERVENER

Introduction and Summary

1. These written submissions are served on behalf of Big Brother Watch ("BBW").

2. This appeal raises important questions of public interest concerning the legality of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the Regulations") which impose the most draconian restrictions on liberty since the Second World War. They criminalise normal social behaviour and are in force through ministerial fiat. BBW has a direct interest in the Regulations as well as recognised

expertise through its reports on the Regulations and briefings and recommendations to cross-party Parliamentarians and all sections of the media.

3. BBW's submissions are limited to Ground A of the appeal insofar as it concerns Ground 1 of the claim for judicial review, namely that the Regulations are *ultra vires*, and Ground C of the appeal, namely that the matter is not academic and points of real substance arise – fundamentally the essential core of legality; a basic component of the rule of law (as opposed to rule by law).

4. In summary: there are three issues with Lewis J's consideration of *ultra vires* in the first instance judgment ("the judgment") at §§37-46.

5. **Firstly,** it skips over the surface of the detailed provisions of Part 2A of the Public Health Act 1984 ("the 1984 Act"), landing on superficially persuasive words and phrases but largely failing to grapple with the particular categories and sub-categories of subordinate legislative powers delimited by the 1984 Act and the conditions imposed on each.[1]

6. **Secondly**, it fails to mention, let alone take account of, either the gravity of the restrictions on fundamental rights imposed by the Regulations or the still greater restrictions on rights that could be imposed by statutory instrument if the Secretary of State's interpretation of the Act is correct. The judgment refers at §43 merely to *"the adoption of a range of measures"*.

7. **Thirdly**, perhaps as a result, it ignores important principles of statutory interpretation – established in cases such as *Simms* [2000] 2 AC 115 – in favour of an approach focusing on the *"threat"* and considerations of alleged statutory purpose. As a matter of public policy, 'the end justifies the means' may be a justifiable principle, depending on one's point of view. But it is not a principle of law. The relevant legal principle, recently described by the Supreme Court as *"fundamental"*, is that a power conferred by general or ambiguous words is not to be construed so as to interfere with fundamental rights; *J v Welsh Ministers* [2018] UKSC 66; [2020] AC 757 at §24.

[1] For a detailed analysis of the various categories and sub-categories of statutory instrument making power conferred by Part 2A of the 1984 Act, see Coldrick, *Were the March 2020 lockdown restrictions lawfully imposed?*, UK Human Rights blog 24 & 25 September 2020 (https://ukhumanrightsblog.com/2020/09/25/were-the-march-2020-lockdown-restrictions-lawfully-imposed-part-2-emmet-coldrick/). A copy of the full article is available here: https://drive.google.com/file/d/1CDn2n_uHil44Hk3T5qqLwxfk-q2xRpeC/view

8. In summary, in relation to Ground 3 of the appeal, the public interest cannot be higher. The *ultra vires* issue is one of general public importance. This is heightened by the lack of Parliamentary scrutiny as to the legitimacy of the exercise of the Secretary of State's ("SoS") power. The Regulations in their various forms have been brought into force very shortly after publication with the detail *"confined in the breast of the legislator"* (Blackstone) until the last moment.

9. Whilst not quite in the league of Caligula who *"wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people",*[2] the SoS has overseen absolute confusion by ministers, Prime Minister and members of the public as to the law in force. And the principle of legality applies. The Regulations require a full review by the courts, acting as they do under the common law constitution as mediator between citizen and state. The graver the threat (let alone the graver the interference) to fundamental rights the more important the role of the court in preventing government illegality.

The Intervener

10. BBW is a non-partisan,[3] not-for-profit campaign group, which was founded in 2009. BBW campaigns to protect civil liberties, individual privacy, and individual freedoms. It has recent experience in litigating issues relating to the use of facial recognition technology, mass surveillance measures[4] and other human rights issues.

11. A recent focus of its campaigning has been the use of emergency powers in response to the COVID-19 pandemic. BBW has produced monthly reports for parliamentarians and journalists on the impact of such emergency measures on civil liberties in the UK since April 2020. BBW has provided cross-parliamentary parliamentarians expert briefings on many of the coronavirus Regulations made under section 45C of the 1984

[2] Michael Tugendhat, *Liberty Intact* (Oxford University Press, 2016), p.58.

[3] BBW's Board consists of Lord Paul Strasburger (life peer and parliamentarian) (Chair); Al Ghaff (Chief Operating Office, Open Rights Group); Dinah Rose QC (President, Magdalen College, Oxford); Mark Littlewood (Director General, Institute of Economic Affairs); and Tim Knox (former Director, Centre for Policy Studies).

[4] *Big Brother Watch and others v United Kingdom* (App. No. 58170/13), *The Times*, 23 November 2018 (finding of violations of ECHR articles 8 and 10).

Act, from the first House of Commons motion in May 2020,[5] to an October motion in the House of Lords.[6]

12. In addition, BBW has sought to inform the public by presenting podcast episodes about the Regulations[7] and by assisting the media in reporting upon the Regulations. Its expertise and in-depth knowledge have developed since 26 March 2010.[8]

Analysis of the *ultra vires* issue: 8 propositions

13. The submissions below establish the following 8 propositions which demonstrate that the Regulations are *ultra vires* or at least establish that these propositions are sufficiently arguable to warrant a full judicial review.

(1) The 1984 Act carves out, from the broad regulation-making power in section 45C(1), a particular category of regulations *"imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things[9] or premises in the event of, or in response to, a threat to public health"* (emphasis added) ("the Section 45C(3)(c) Category") and imposes additional conditions on the making of such regulations.

(2) The Regulations fall within the Section 45C(3)(c) Category and so must meet the conditions applicable to that category. No residual general power under section 45C(1) authorises the making of such regulations where the conditions applicable to Section 45C(3)(c) Category regulations are not satisfied.

5 Big Brother Watch's Briefing for Motion on the Health Protection (Coronavirus, Restrictions) Regulations 2020: https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Health-Protection-Regulations-Motion-Briefing-4-May-2020-Big-Brother-Watch.pdf

6 Big Brother Watch Briefing on The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 for the House of Lords, October 2020: https://bigbrotherwatch.org.uk/wp-content/uploads/2020/10/Big-Brother-Watch-Briefing-on-The-Health-Protection-Coronavirus-Collection-of-Contact-Details-etc-and-Related-Requirements-Regulations-2020-for-the-House-of-Lords.pdf

7 See, for example, the recent discussion between the Director of BBW and Steve Baker MP, a former government minister and executive member of the 1922 Committee: https://bigbrotherwatch.org.uk/2020/09/podcast-5-coronavirus-act-biggest-expansion-of-uk-state-power-in-a-generation-silkie-carlo-steve-baker-mp/

8 *The Critic: "Liberty in lockdown*", September 2020 (which features an interview with the director of BBW): https://thecritic.co.uk/issues/september-2020/liberty-in-lockdown/

9 'Thing' would appear to include any chattel and is defined in section 45T(5) to include human tissue, a dead body or human remains, animals, and plant material.

(3) The Act goes on in effect to divide the Section 45C(3)(c) Category in two, by defining a sub-category of powers to make regulations imposing or enabling the imposition of *"a special restriction or requirement"* ("the Special Restrictions Power") and putting in place additional conditions on the exercise of such powers.

(4) Even leaving aside the *Simms* principle, the better reading of the 1984 Act is that the Special Restrictions Power does not extend beyond the powers conferred by the Act on the courts to impose restrictions and requirements on or in relation to persons, things and premises. Or at very least there is ambiguity such that the Act can be read in that way.

(5) The principles of statutory interpretation recognised in the *Simms* and *J v Welsh Ministers* line of authority are applicable, as there is ambiguity in the 1984 Act and fundamental rights are in issue.

(6) Applying those principles of interpretation, the Special Restrictions Power – like the powers conferred by the 1984 Act on the courts – does not extend beyond imposing restrictions on particular individuals or groups of persons, things and premises which are or may be infected or contaminated.

(7) The Regulations purported to impose restrictions generally on the population at large and on persons, things and premises regardless of whether they were or may have been infected, regardless of specific vulnerabilities and regardless of specific actions of the individual as connected to public health as opposed to the economy or public order. Accordingly, even if the Regulations could be said to be useful to achieving important and legitimate aims, the Regulations are *ultra vires* the Special Restrictions Power.

(8) Any undefined residual power to make Section 45C(3(c) Category regulations (other than regulations under the Special Restrictions Power) does not extend to the making of laws such as the Regulations either. Hence, the Regulations are *ultra vires*. If the government wishes to impose such restrictions, it must choose a different, lawful route to do so – even if that means greater parliamentary scrutiny of its actions.

Proposition 1 to 4: the limits of the statutory instrument making power

Proposition 1: Section 45C(3)(c) Category

14. The first proposition should be uncontroversial. While the first instance judgment quotes section 45C(3)(c), it does not mention why the category was carved out from the broader regulation making power conferred by section 45C(1). The obvious purpose for doing so was to facilitate the imposition of conditions and limits on the making of regulations with the potential to interfere with civil and property rights. Thus, for example, sections 45D(1) and (2) impose a proportionality condition on regulations falling within the Section 45C(3)(c) Category. No such condition applies to regulations not falling within that category.

Proposition 2: no residual general power under section 45C(1) is relevant

15. The second proposition should also be uncontroversial. The Regulations plainly imposed *"restrictions or requirements on or in relation to persons, things or premises"* within the meaning of section 45C(3)(c). That was their clear purpose and apparent effect. Moreover, the introduction to the Regulations states in terms that they *" ... are made in response to the serious and imminent threat to public health ..."*. The Regulations therefore fall within the Section 45C(3)(c) Category and are subject to the conditions and limits set by the Act on the making of such regulations.

16. The focus in the submissions on behalf of the Respondents, and in the judgment below, on the phrase *"may in particular include"* in section 45C(3) is therefore misplaced. It may be that that phrase indicates that the list in section 45C(3) is not exhaustive and as such that the Minister's widely drawn powers under section 45C(1) extend to making regulations addressing matters other than those expressly set out in section 45C(3). But the Regulations clearly fall within the Section 45C(3)(c) Category and as such the focus of analysis needs to be on the conditions and limits applicable to the power to make regulations falling within that category (and its sub-categories). No residual general power under section 45C(1) could authorise the making of the Regulations if the conditions applicable to the Section 45C(3)(c) Category are not satisfied.

Proposition 3: the Special Restrictions Power

17. The 1984 Act goes on in section 45C(4) to sub-divide the Section 45C(3)(c) Category by setting out four sub-categories, including one of powers to make regulations

imposing or enabling the imposition of *"a special restriction or requirement"* ("the Special Restrictions Power") (section 45C(4)(d)). Again, this has been done by the statutory draftsman to facilitate the imposition of additional conditions and limits on the making of regulations within that sub-category (see sections 45D(3) to (5) and 45F(6) to (8)).

18. While section 45C(4) lists four sub-categories within the Section 45C(3)(c) Category, and while that list is prefaced by the words *"include in particular"*, the practical effect of the relevant provisions of the Act is to divide the Section 45C(3)(c) Category in two.

    a. On the one hand, there is the Special Restrictions Power – the content of which is addressed below – which is made subject to additional conditions and limits.

    b. On the other hand, there is the power to impose or enable the imposition of restrictions or requirements within the Section 45C(3)(c) Category that do not amount to the *"a special restriction or requirement"*. This category of powers, which can for convenience be labelled the 'Ordinary Restrictions Power', is not subject to any express statutory limits or conditions that are not imposed generally in relation to the Section 45C(3)(c) Category as a whole.

19. There are, therefore, two broad questions for the Court in relation to the *ultra vires* issue. (1) Did the Minister have authority to make the Regulations under the Special Restrictions Power? (2) If not, did he have authority to make the Regulations under the Ordinary Restrictions Power? The Special Restrictions Power is considered first below.

Proposition 4: the scope of the Special Restrictions Power

20. The phrase 'a special restriction or requirement' is defined in section 45C(6)(a) as *"a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2)"*. The Special Restrictions Power is thus a power to make regulations imposing, or enabling the imposition of, a restriction or requirement which can be imposed by a justice of the peace on or in relation to persons (section 45G(2)), things (section 45H(2)) or premises (section 45I(2)).

21. An analysis of the natural meaning of the words used, the broader scheme of Part 2A of the 1984 Act and considerations of statutory purpose shows that the better reading of the 1984 Act is that the Special Restriction Power does not extend beyond the power

conferred by the 1984 Act on the courts. Alternatively, at very least there is ambiguity and the 1984 Act can be understood in that way.

22. **Natural meaning of the words used.** This has been addressed by the Appellants. It must suffice to say here that if the statutory intent truly were that the Special Restrictions Power should extend beyond the powers conferred by the 1984 Act on the Courts – which extend only to imposing restrictions/requirements on individuals or groups (see section 45J) where they are or may be contaminated (see sections 45G(1), 45H(1) and 45I(1)) – it is incongruous that the Act defines the Special Restriction Power expressly and solely by reference to *"a restriction or requirement which can be imposed by a justice of the peace"* (section 45C(6)(b)).

23. On the defendants' case, the difference between the courts' power under sections 45G(2), 45H(2) and 45I(2) and the Minister's Special Restrictions Power is enormous, notwithstanding that the latter power is expressly and solely defined by reference to the former power. For example, unless the person in question is or may be infected, a court cannot, pursuant to section 45G(2), require a person to stay away from an infected area or infected persons or premises, no matter what the risk to their own or others' public health. It is, pursuant to section 45G(1), a condition on the imposition of any restriction on a person that they are or may be infected. By contrast, on the Secretary of State's case, his Special Restrictions Power would extend to requiring everyone over 60, or indeed the entire population, to isolate themselves completely supposedly for their own good. That is a stark difference, which is far from obviously intended by the definition of the Special Restrictions Power in section 45C(6)(a). On the face of it, section 45C(4)(d), read together with section 45C(6)(a), merely confers powers coextensive with those of justices of the peace. At very least, the ambit of the Special Restrictions Power is unclear and the wording of the Act ambiguous.

24. **Scheme of Part 2A of the 1984 Act.** The definition of 'a special restriction or requirement' in section 45C(6)(a) is applicable equally to regulations directly imposing special restrictions and to regulations enabling their imposition by administrative decision. Section 46F(6) confers a right of appeal against decisions imposing a special restriction or requirement.

25. If the Respondents' interpretation of the 1984 Act is correct, the Minister has the power to enable the imposition, by administrative decision, of restrictions of the type set out

in section 45G(2) on the whole population, regardless of whether the conditions in section 45G(1) are met. He could thus, for example, make regulations conferring himself or another person with the power to require the entire population to submit to medical examination, isolate, remain at home, avoid all contact with others or cease trading. Thus, patently, the administrative decision-making powers that, on the Respondents' case, could be conferred by regulations are enormous. Even if it is possible that that was the statutory intention, the extent of the inference with fundamental rights that could on the defendants' case be made by administrative decision should at least give serious pause for thought.

26. Moreover, on the Respondents' case, the right of appeal conferred by section 45F(6) gives rise to the surprising result that the ultimate decision-maker in relation to whether such wide measures should be imposed would be a magistrates' court, on appeal from the administrative decision-maker. Such a function in relation to policy matters potentially (on the defendants' case) affecting the population at large is not a function that Parliament ordinarily leaves to magistrates.

27. By contrast, it is logical that the powers to impose restrictions by administrative decision that may be conferred by the Minister by regulation are co-extensive with the powers conferred on the courts and, on any appeal, the court would consider the matter in the same way it would if, before it, was an application by a local authority.

28. The only apparent contrary argument might be that the Regulations directly imposed restrictions and so are not subject to a right of appeal. However, the issue is that of the statutory intention as to the scope of the Special Restrictions Power. It is incoherent for the Act to confer powers to enable the imposition of enormous restrictions on the entire population by administrative decision, with the ultimate decision making power, on appeal, left to a magistrates' court.

29. **Statutory purpose.** Lewis J was of the view that considerations of statutory purpose support the SoS's case. He stressed that *"the whole purpose was to enable the minister to address the spread of infection"* (judgment §43).

30. With respect, this is to fall into the trap identified by the Supreme Court in *J v Welsh Ministers* at §24:

"With the greatest of respect to the Court of Appeal, this approach puts the cart before the horse. It takes the assumed purpose of a CTO – the gradual reintegration of the patient into the community – and works back from that to imply powers into the MHA which are simply not there. We have to start from the simple proposition that to deprive a person of his liberty is to interfere with a fundamental right—the right to liberty of the person. It is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights."

31. Leaving aside the detailed content and effect of the *Simms* principle, the basic principle identified by the Supreme Court in the passage above is that, where interference with fundamental rights is in issue, **the starting point** is the *Simms* principle, if it is engaged. It is not correct in law to start – as the Court of Appeal had done in *J v Welsh Ministers* and as was done at first instance in this case – with considerations of alleged statutory purpose and work back from there.

32. Fundamental rights are plainly in issue here. The Regulations themselves interfere with such rights. Moreover, the issue with which the Court must grapple concerns not only the particular restrictions stated in the Regulations. The issue of the ambit of Special Restrictions Power is a pure issue of interpretation, of the 1984 Act alone. On the Respondents' case, the SoS is entitled to impose or enable the imposition of every type of restriction and requirement referred to in sections 45G(2), 45H(2) and 45I(2), indiscriminately on the entire population or any subset of his choosing, and without any of the constraints imposed by the 1984 Act (see sections 45G(1), 45H(1) and 45I(1)) on the imposition of such restrictions or requirements by court order.

33. Leaving aside the explanatory memorandum (addressed below), there is no good reason to consider that Parliament must have intended a power to impose such restrictions generally, regardless of whether the persons, things or premises in question are or may be infected. The sort of restrictions purportedly imposed by the Regulations are without precedent. Indeed, it is far from obvious that Parliament had such restrictions in mind in Part 2A of the 1984 Act.

34. **Explanatory memorandum.** Lewis J considered that the explanatory memorandum to the 2008 Act supports the Respondents' case as to the legislative powers under section 45C. He stated at §44:

"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."

35. However, §29 of the explanatory memorandum merely states:

"The Public Health (Control of Disease) Act 1984 ('the Public Health Act 1984') consolidates earlier legislation, much of it dating from the 19th century. Many of its assumptions, both about risks and about how society operates, are now out of date. Most concerns about health threats have, since the 19th century, related to infectious disease (plague, cholera and the like). This is reflected in the way that Part 2 of the Public Health Act 1984 focuses on infectious disease. It makes highly detailed provision on some matters (for example, it is a criminal offence to expose a public library book to plague, or to hold a wake over the body of a person who has died of cholera) but does not address other matters that are now of concern, such as contamination by chemicals or radiation. Part 3 of this Act updates the Public Health Act 1984 to take account of these points."

36. There is nothing in the explanation above to suggest that the 'updating' was intended to confer new and extraordinarily far reaching powers on Ministers to interfere with the fundamental rights of the entire population. Moreover, the only *"matters that are now of concern"* that are referred to in §29 are *"contamination by chemicals or radiation"*.

37. Paragraph 30 of the explanatory memorandum goes on to state that:

"Internationally the case for taking an "all hazards" approach to dealing with such health threats was taken up by the World Health Organization ('WHO') and reflected in the International Health Regulations 2005 ('IHR'). The IHR are the means by which WHO aims to prevent and control the international spread of disease, by action that is commensurate with and restricted to public health risks, and which avoids unnecessary interference with international traffic and trade. The previous International Health Regulations (1969) were concerned with action at international borders in relation to three specific infectious diseases (cholera, plague and yellow fever), but increasingly were recognised as unable to deal with new threats, such as SARS. The new IHR are concerned with infectious diseases generally, and also with contamination. They also pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks. The IHR came into effect in June 2007. This Act amends the Public Health Act 1984 to enable IHR to be implemented, including WHO recommendations issued under them."

38. We note that Lewis J relies upon the Respondents' submissions that the Minister's *"powers were not limited to making orders in relation to specific individuals or groups of individuals and…[it] 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"* (judgment §36). However, this submission proceeds on an implicit but erroneous assumption that it is obvious that Parliament understood and intended that a power to impose wide ranging restrictions on the liberty of population as a whole was needed to deal with threat of epidemics such as SARS.

39. The new International Health Regulations 2005 ("IHR 2005"),[10] referred to in §30 of the explanatory memorandum, did indeed *"pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks"*. However, the measures that they contemplated did not include the sort of population wide 'lockdown' restrictions that the Respondents contend Part 2A entitles the SoS to impose. Article 18.1 of the IHR 2005 deals with recommendations issued by the World Health Organization to State Parties with respect to persons. It provides that such recommendations *"may include the following advice"*:

"– no specific health measures are advised;
– review travel history in affected areas;
– review proof of medical examination and any laboratory analysis;
– require medical examinations;
– review proof of vaccination or other prophylaxis;
– require vaccination or other prophylaxis;
– place suspect persons under public health observation;
– implement quarantine or other health measures for suspect persons;
– implement isolation and treatment where necessary of affected persons;
– implement tracing of contacts of suspect or affected persons;
– refuse entry of suspect and affected persons;
– refuse entry of unaffected persons to affected areas; and
– implement exit screening and/or restrictions on persons from affected areas."

40. The above list does not include the sort of population wide "lockdown" measures as prohibiting the entire population from leaving their homes, prohibiting gatherings of

[10] A copy of the IHR 2005 is publicly available on the WHO website: https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1

more than 2 people, prohibiting business and prohibiting religious worship. Moreover, Parliament evidently chose not to confer powers to impose all of the measures referred to in the IHR 2005 list quoted above. The list includes *"require vaccination or other prophylaxis"*, but section 45E of the 1984 Act provides that:

> *"(1) Regulations under section 45B or 45C may not include provision requiring a person to undergo medical treatment.*
>
> *(2) "Medical treatment" includes vaccination and other prophylactic treatment."*

41. SARS may have been recognised as a *"new threat"* but it does not begin to follow that the statutory intent in Part 2A was to afford the Secretary of State unprecedented powers to interfere with the fundamental rights of the entire population, as opposed to powers – coextensive with those conferred by the Act on the courts – to impose more targeted measures on individuals or groups of persons, premises or things which are or may be infected or contaminated.

Propositions 5 to 8 and the *Simms* and *J v Welsh Ministers* principles

Proposition 5: the Simms and J v Welsh Ministers principles are engaged

42. For the reasons set out above, the statutory definition of the Special Restrictions Power is at best ambiguous. Even if the Special Restrictions Power can be exercised generally (as opposed to as against particularly identified individuals or groups) a reading of the Act whereby the Special Restrictions Power is subject to the same substantive, but not the same procedural, restraints as apply to restrictions imposed by the courts pursuant to sections 45G(2), 45H(2) and 45I(2) is both logical and sensible.

43. Understood in that way, the Special Restrictions Power could be exercised to impose restrictions or requirements in relation to persons, things or premises generally, but (reflecting the express conditions in sections 45G(1), 45H(1) and 45I(1)) only to extent that the persons, things or premises in question are infected or contaminated. Such a reading of the 1984 Act would reflect the long-standing approach taken in English law in relation to public health matters – which is that stringent public health measures can be implemented in respect of persons, things and premises that are or may be infected, but there is no broader warrant for interference with civil liberties or property rights more generally.

44. Once it is accepted that the 1984 Act can sensibly be read in a way other than that asserted by the Respondents, such that there is ambiguity, important consequences follow. The principles established in cases following *Simms* [2000] 2 AC 115 are engaged. The well-known passage in Lord Hoffmann's speech in *Simms* was cited to Lewis J (§ 47(7) of the appellant's 87-page Statement of Facts and Grounds). However, it seems to have become lost, as it is not mentioned in the judgment (or in either side's skeleton argument for the appeal).

45. The principles established in *Simms* and the cases following it are of real and central importance to the issues arising in this case. Lord Hoffmann said in *Simms* that (at 131-2):

> *"… the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document… What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament."*

46. These are not words to be admired and then ignored. They state the relevant law as to how general or ambiguous words in a statute said to authorise an interference with fundamental rights must be interpreted. In *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 at 621 §27, the *Simms* principles were endorsed as applicable not only to ECHR rights but to fundamental rights beyond the four corners of the Convention. Lord Hoffmann's statement of the law was further endorsed by Lord Reed (for the majority of a seven-judge panel of the Supreme Court) in *AXA General Insurance Ltd v HM Advocate* [2012] AC 868 at 945 §151. He went on to state (at §152) that:

> *"The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so".*

47. Recently, in *J v Welsh Ministers*, §24, these principles again were emphasised and applied. Baroness Hale PSC (for a unanimous Supreme Court) stated that *"[i]t is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights"*. General words in section 17B of the Mental Health Act 1983, dealing with community treatment orders, were held to be insufficient to permit the making orders interfering with fundamental rights.

48. The *J v Welsh Ministers* case is important not only for its resounding reaffirmation of the *Simms* principle and for what it sets down about the proper approach to alleged considerations of statutory purpose in this context. It is also an important reminder that where fundamental rights are concerned, the full rigour of the *Simms* principle must be applied – notwithstanding that the statute in question has undoubtedly legitimate aims and notwithstanding how useful the alleged power to interfere with fundamental rights might actually be to achieving that aim.

49. Here, the aim of protecting public health is also laudable. But, where there is ambiguity, protection of fundamental rights from interference must take priority over the public policy aim. For the reasons already given, there is ambiguity in this case and interference with fundamental rights is plainly in issue. Accordingly, the principles established in the *Simms* and *J v Welsh Ministers* line of authority are engaged.

Proposition 6: application of the Simms and J v Welsh Ministers principles

50. Once it is accepted that the *Simms* principles are engaged, the answer to issue of interpretation that arises becomes clear. The Court is faced with a choice between:

    50.1 on the one hand, a reading of the 1984 Act that would enable enormous restrictions to be imposed – whether directly by regulations or indirectly by administrative decision under regulations – on or in relation to persons, things or premises regardless of whether they are or may be infected; and

    50.2 on the other hand, a reading of the 1984 Act that confers a narrower set of powers, coextensive with the powers of justices of the peace by reference to which they are defined.

51. In light of authorities such as *Simms* and *J v Welsh Ministers*, the latter interpretation of the Act must be preferred. If Parliament had wished to authorise the imposition, by

statutory instrument and administrative decision under statutory instrument, of population-wide 'lockdown' measures of the sort contained in the Regulations, it would have needed to use much clearer words.

Proposition 7: the Regulations are ultra vires the Special Restrictions Power

52. It follows that the Regulations are *ultra vires* the Special Restrictions Power. The Regulations purport to impose restrictions and requirements on or in relation to persons and premises generally, as opposed to persons or premises or things (whether individually or in groups) which are or may be infected.

53. It is not a reasonable contention that the entire population can be regarded as a "group" within the meaning of section 45J (which extends the section 45G, 45H and 45I powers to groups). Nor is it a reasonable contention that 'anyone might have it' reasoning is sufficient to satisfy the requirements of section 45G(1). Indeed, it plainly is not. Such an approach would radically expand not only the Minister's powers but the powers of magistrates' courts under section 45G(2), obviously contrary to Parliament's intention.

Proposition 8: no undefined residual power authorised the Regulations

54. Once it is accepted that the Special Restrictions Power did not authorise the Regulations, the remaining argument is that the Ordinary Restrictions Power was sufficient to authorise the Regulations. Any such argument would be without merit.

a. First, as a matter of common sense, it is highly unlikely to have been the legislative intention that the 1984 Act, while carefully circumscribing the Minister's Special Restrictions Power by reference to the detailed and specific powers conferred on the justices of the peace on the application of a local authority, should simultaneously confer on the Minister a general residual Section 45C(3) Category power to impose, in relation to the population as a whole, such restrictions and requirements as he thinks fit on or in relation to persons, things or premises.

b. Secondly, it would be all the more surprising if the statutory intention was that the Minister was to have a broad general power to impose restrictions and requirements on the population as a whole in circumstances in which his more narrowly defined Special Restrictions Power is made subject to conditions and safeguards that are not applicable to his Section 45C(3)(c) Category powers generally (see for example sections 45D(3) and (4)).

c. Thirdly, the *Simms* line of authority is again very much on point. On any view, the words of section 45C(3) are general in nature: *"… restrictions or requirements on or in relation to persons, things or premises …"*. It is quite clear that the *Simms* principle is engaged and that such general words should not be read as providing a warrant for subordinate legislation interfering with fundamental rights.

d. Lastly, that is clear simply on the application of common law principles of statutory interpretation, without regard to the European Convention on Human Rights. However (adopting the words of Baroness Hale in *J v Welsh Ministers* (cited above) at §29), it is doubtful, to say the least, whether the European Court of Human Rights would regard an ill-defined and ill-regulated general power to impose restrictions and requirements on and in relation to persons, things and premises as meeting the Convention standard of legality.

55. It follows that the Regulations are *ultra vires*. If the government wishes to impose such restrictions, it must choose a different, lawful route to do so – even if that means greater parliamentary scrutiny of its actions.

Is the claim "*academic*"?

56. The claim for judicial review of Regulations 6 and 7 is not academic. Those Regulations continue to inform and join the ebb and flow of subsequent regulations. According to a Westlaw search carried out on 19th October 2020, over 80 statutory instruments have been enacted using the section 45C power since the Regulations were made in March 2020. Regulations imposing restrictions interfering with civil liberties continue to be made with regularity under that section. The question of the extent of the Minister's powers under section 45C is of obvious continuing relevance.

57. In any case, it would be in the public interest for the claim to be permitted to proceed:

a. It is profoundly wrong, and contrary to the rule of law, to deny any person, whose fundamental rights arguably have been breached, the opportunity to establish in a court of law that his rights were unlawfully breached on the grounds the law in question has since been changed.

b. That is correct as a matter of general principle but is true *a fortiori* of regulations that purport to authorise conduct which would otherwise constitute the tort of false imprisonment. In *R (Jalloh) v Home Secretary* [2020] UKSC 4, [2020] 1

WLR 418, the Supreme Court held, in the context of a restriction imposed in the context of immigration control, that a requirement to stay at home constituted a deprivation of liberty amounting to 'imprisonment' at common law, even where the person could leave their home if they had reasonable excuse to do so.

c. A bewildering array of restrictions, amendments to restrictions, repeal of restrictions and reintroduction of restrictions have flowed from the repeated use of section 45C power in recent weeks and months. The result is that any challenge to the legality of the exercise of the power is necessarily facing a moving target.

d. Another result is the undermining of such limited, *ex post facto* parliamentary scrutiny as is allowed by the government's rule by decree approach. Regulations are published sometimes minutes before they come into force and Parliament now has been bypassed since 26th March 2020.

e. That makes it all the more important in the public interest that the courts perform their constitutional function of judicial review where a serious challenge to the legality of government action is made, even where the action in question concerns a matter of public health – see *R v Secretary of State for Health, ex p Imperial Tobacco* [2001] 1 WLR 127 at 142D to F.

58. Whatever procedural course the Court chooses to adopt, there is a strong public interest in at least the *ultra vires* issue proceeding to a full judicial review hearing (whether in the Administrative Court or the Court of the Appeal) with expedition.

a. The issue is one of profound and exceptional general public importance.

b. The key issue is one of law: what are the limits of the subordinate legislative powers conferred by section 45C of the 1984 Act?

c. New regulations imposing restrictions interfering with fundamental rights are repeatedly being made, without prior parliamentary debate or scrutiny, under emergency powers said to be conferred by the 1984 Act.

Conclusion

59. In the context of so-called Henry VIII powers conferred by statute, the House of Lords and the Supreme Court have repeatedly endorsed the observation of Lord Donaldson MR that subordinate legislation:

> *"… is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach"* (*McKiernon v Secretary of State for Social Security*, *The Times*, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989, quoted in *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531 at 1157 §27 (emphasis added).

60. *"Recognition of Parliament's primary law-making role in my view requires such an approach"*; per Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, quoted in *The Public Law Project* at 1157 §28.

61. In view of the *Simms* line of authority, a *"restrictive approach"* is also required where interference with fundamental rights is in issue. Democracy and the rule of law require that, where fundamental rights are in issue, *"Parliament must squarely confront what it is doing"* (per Lord Hoffmann in *Simms* at 131) and so any powers to interfere with fundamental rights must be read restrictively if expressed in general or ambiguous words.

62. That is as true in a public health context as in any other context. In the *Imperial Tobacco* case (cited above, at §142), Lord Millett endorsed a principle (framed by Dworkin in *Law's Empire*) that *"[t]he state's force must not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial those ends, except as licensed or required by law"*. Lord Millett continued:

> *"It is the responsibility of the judges to ensure that this principle is observed and to inquire into the validity of any law which is invoked by the state to support its actions".*

63. The submission that the Regulations are *ultra vires* is not only arguable, it is well-founded. And the issue of the scope of the subordinate legislative powers conferred by section 45C of the 1984 Act is one of extraordinary general public importance. The

regulations that have been made under that power fundamentally interfere with the living (and the dying) of the entire population.

64. Judicial review is where the courts and the executive are "*engaged in a common enterprise*," a "*partnership based on a common aim*," which includes "*the public interest in upholding the rule of law*" (*R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941 at 945; *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at §20.

65. There is a high interest in permitting the *ultra vires* issue to proceed to a full judicial review hearing, Indeed, it is submitted that detailed scrutiny of the Regulations by the courts is central to ensuring the functioning of liberal democracy.

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