

IN HER MAJESTY'S COURT OF APPEAL  
(CIVIL DIVISION)

C1/2020/1117

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

**B E T W E E N :**

**REGINA**  
on the application of the  
(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**

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**APPLICATION FOR PERMISSION TO INTERVENE  
ON BEHALF OF BIG BROTHER WATCH**

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**A. Introduction and Summary**

1. Big Brother Watch ("BBW") seeks permission to intervene in this appeal by way of written submissions, not to exceed 20 pages, as well as by way of short oral submissions, not to exceed 30 minutes. If permission to intervene is granted, BBW will rely on its proposed written intervention, which is attached.
2. This appeal raises questions of constitutional and practical importance. In particular, ground one of the appeal relates to whether the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 are *ultra vires*. This is an issue in which BBW has a direct interest and expertise.

3. The Appellants support this application to intervene and have indicated that it is content for BBW to intervene on a costs neutral basis. The Respondents have indicated that they will confirm their position upon receipt of BBW's written intervention.

## **B. The Proposed Intervener**

4. BBW is a non-partisan,<sup>1</sup> 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,<sup>2</sup> and other human rights issues. One recent focus of its campaigning has been the use of emergency powers in response to the COVID-19 pandemic. BBW has produced monthly reports on the impact of such emergency measures on civil liberties in the UK,<sup>3</sup> presented podcast episodes to inform the public,<sup>4</sup> and featured in press reports about the emergency legislation.<sup>5</sup>
5. This appeal raises important questions of public interest in which BBW has a direct interest as well as long-standing expertise. BBW is therefore well-placed to assist the Court in the wider context of this appeal and to ensure that the Court obtains "... a more rounded picture than it would otherwise obtain" (*In re E (a child)* [2009] 1 AC 536 at §2).

## **C. The nature of the proposed intervention**

6. BBW's proposed written intervention is attached to this application. BBW has provided its proposed intervention in this way so as to avoid any delay to the proceedings or any potential prejudice to the parties.

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<sup>1</sup> 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).

<sup>2</sup> See, for example, the judgment of the European Court of Human Rights in *Big Brother Watch and others v United Kingdom* (App. No. 58170/13).

<sup>3</sup> See, for example, the July 2020 report which is available online at: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/07/Emergency-Powers-and-Civil-Liberties-Report-JULY-2020.pdf>

<sup>4</sup> 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/>

<sup>5</sup> *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/>

7. As the Court will see, BBW seeks to concentrate, in its intervention, on the scope of the Secretary of State's regulation-making powers under s.45C Public Health (Control of Disease) Act 1984. This is an issue of general and continuing public importance. Over 80 regulations have been made under the power since March 2020 and regulations continue to be made under the power with regularity.
8. BBW is deeply concerned by the approach that has been adopted, which restricts parliamentary scrutiny and democratic input into the content of laws, and which appear to have been made in excess of the powers conferred by the Public Health (Control of Disease) Act 1984. It seeks to assist the Court with three issues arising in respect of this ground:
  - a. Considerations of statutory purpose were at the heart of Lewis J's decision to refuse permission, but more recent appellate authority, including the Supreme Court's decision in *J v Welsh Ministers* [2020] AC 757, shed light on how arguments from purpose should be approached where powers to interfere with fundamental rights are in issue;
  - b. The explanatory memorandum to the Health and Social Care Act 2008, and the background of the SARS epidemic, played a role in the Judge's reasoning. However, he may have misunderstood what the WHO International Health Regulations 2005 – implemented following SARS and referred to in the explanatory memorandum – actually provide. The Court would be likely to benefit from submissions addressing that aspect of the matter and the idea that the explanatory memorandum supports a reading of Part 2A of the Act that grants powers to impose severe population-wide restrictions, rather than measures targeted at persons who are or may be infected;
  - c. BBW also seeks to assist the Court on the wider constitutional and human rights perspective and on whether this challenge is properly regarded as "*academic*."
9. Counsel instructed by BBW have discussed this appeal with representatives of the Appellant. BBW will continue to discuss the nature of its proposed intervention with the parties so as to avoid overlap. It will not only provide relevant submissions that are not currently before this Court, but will also

seek to add value to the detailed submissions already advanced by the parties in this appeal.

10. BBW therefore respectfully invites the Court to grant it permission to intervene in this claim by way of written submissions, not to exceed 20 pages, as well as by way of short oral submissions, not to exceed 30 minutes.

**D. Costs**

11. BBW is conscious of the need not to duplicate the submissions of the parties and will ensure that its submissions are concise and focussed. It seeks to intervene on the basis that it will neither seek any order as to costs against any of the parties nor be liable for any other party's costs. The Appellants have agreed to BBW's application on this basis. The Respondents will clarify their position upon consideration of the written intervention.

**E. Conclusion**

12. This appeal raises important questions of public interest in which BBW has a direct interest and long-standing expertise. BBW is therefore well-placed to assist the Court in the wider context of this appeal. Accordingly, it respectfully invites the Court to grant it permission to intervene on a costs-neutral basis.

KIRSTY BRIMELOW QC  
Doughty Street Chambers

EMMET COLDRICK  
Quadrant Chambers

19<sup>th</sup> October 2020.