Lockdown: trying but not unlawful

By Jonathan Lewis

In *R (Dolan & Ors) v Secretary of State for Health & Social Care*,[1] the Claimants advanced a plethora of arguments in an attempt to persuade the court that the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "Regulations") were unlawful. In a pithy judgment, Lewis J found the claims to have been brought promptly but refused to allow the Claimants to challenge particular regulations that had already been amended. He found that the Regulations were not *ultra vires*, not irrational and did not breach the Claimants' rights under the European Convention on Human Rights ("ECHR").

INTRODUCTION

1. Any public lawyer would quickly tell you that, given the circumstances in which they were made, it would be close to impossible to persuade a court that the Regulations were unlawful. This did not stop a non-resident businessman from trying. He claimed that his business had dried up as result of the Regulations. In order to boost his standing, he was joined by one of his employees (to provide a basis for an art.9 ECHR argument) and by a child (to provide platform for an argument that closing schools was unlawful). The claim was crowd funded. This was not the first attempt to challenge the Regulations.[2]

2. In essence, the claimants questioned the approach taken and the priorities of the government in addressing the coronavirus pandemic. They were concerned about the

[1] [2020] EWHC 1786 (Admin).
[2] See *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin). This was an application for an interim order to enable a mosque to hold Friday prayers.

impact on the economy, the jobs and livelihoods of people and on education, and the effect of the measures taken on treatment of other health conditions.

ANCILLARY MATTERS

Delay

3. On 18 March 2020, a decision was made to close schools. On 26 March 2020, the Regulations came into force. The claim was only issued on 21 May 2020. The claimants claimed that they did not realise until about the 23 April 2020 that a legal challenge was possible. They said that thereafter they acted promptly in engaging in pre-action correspondence.

4. It is trite that in a judicial review claim time 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 (at [29]). However, Lewis J decided that the claimants had not failed to act promptly given the "*complexity and importance of the issues*" raised in the claim (at [30]).

Challenging Outdated Regulations – Academic Claims

5. A consequence of the delay in bringing the claims was that a number of the regulations had been amended by the time the matter came to court.[3] Lewis J found that the claims in respect such amended regulations concerned historic matters, were academic and

[3] Original regs. 4 & 5 required certain businesses to close during the emergency period. They were amended from 5 June 2020 such that shops were permitted to open and sell goods. Original reg.5(5) provided that a place of worship must close for the emergency period (with some exceptions, such as funerals). From 13 June 2020, places of worship could be opened for private prayer (but not for acts of communal worship).

that it would serve no practical purpose, nor was there a good reason to entertain them.[4] He therefore refused permission in respect of them.

The Regulations were not *ultra vires*

6. The Regulations were made under the powers conferred by the Public Health (Control of Diseases) Act 1984 (the "**1984 Act**"). Relying on one specific provision, the Claimants boldly advanced that the powers only permitted regulations to made in respect of an individual or a specific group of people, but not in relation to the population of England as a whole (at [35]). Lewis J had little difficulty in rejecting this argument, finding that the powers were broad in nature (at [37]). This interpretation is consistent with the purpose of the 1984 Act (at [43]) and confirmed by the explanatory memorandum (at [44]). He therefore found this argument to be unarguable (at [46]).

The Public Law Arguments

7. In response to the claim, the Secretary of State understandably implored the Court to keep firmly in mind the context in which the Regulations were made and reviewed (at [48]). 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 NHS would be overwhelmed and so on.

8. The claimants relied on four public law grounds to impugn the making of the Regulations:

[4] Relying upon *R (Zoolife International) v Secretary of State for Environment, Food and Rural Affairs)* [2007] EWHC 2995.

8.1. **Fettering discretion**: In reviewing the Regulations, Government relied upon a document entitled "*Our plan to rebuild: the UK Government's Covid-19 recovery strategy*". The government set out five tests which had to be satisfied before lockdown was lifted.[5] Lewis J found those tests to be a lawful, rational method of assessing the risks (at [50]). Further, from a careful analysis of the document, it was clear that the government was aware of other considerations (including the effect on the social and economic life of the nation). The language did not demonstrate an unlawful fettering of discretion (at [52]).

8.2. **Ignoring relevant considerations**: The claimants maintained that the government had failed to take into account a number of considerations, including: the uncertainty of scientific evidence; the effect of the restrictions on public health generally; increased incidence of domestic violence; the economic effects of the restrictions and so on. However, Lewis J concluded that when the evidence was read fairly, it was clear that all of those matters had been taken into account (at [53]).

8.3. **Irrationality**: The Claimants relied heavily upon mortality rates as at 12 May 2020, which showed only 3 children with no pre-existing underlying medical condition had died from Covid-19; further, as at 16 June 2020 only 253 persons under 60 without a pre-existing underlying medical condition had died from Covid-19. Lewis J nonetheless found that the Regulations were rational, in essence, because "*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*" (at [56]).

[5] (1) Ensuring that the NHS has the capacity to cope; (2) a sustained fall in the daily death rate; (3) reliable data to show that the rate of infection is decreasing to manageable levels; (4) confidence that the range of operational measures needed, such as testing capacity and supplies of personal protective equipment, are in hand, and (5) confidence that any adjustments to the current measures would not risk a second peak of infections.

8.4. **Proportionality**: It is important to make clear that the court was not considering proportionality as freestanding principle. Rather, s.45C(3)(c) of the 1984 Act required any restriction or requirement to be proportionate. Lewis J noted that courts accord 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*".[6] He also noted that the Regulations were time limited and reviewed regularly. He found that the Regulations were proportionate.

CLAIMS OF BREACH OF CONVENTION RIGHTS

9. The Claimants argued that the Regulations unlawfully interfered with a number of their Convention rights. Lewis J's explanation as to why an interference with Art.8 rights was justified seems equally true for the other alleged breaches: "*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*" (at [78]).

10. In respect of arguments peculiar to each article, the Court held:

10.1. **Article 5**: The Claimants argued that the obligation in amended reg.6 not to stay overnight at a place other than where a person is living amounted to a "*deprivation of liberty*". Lewis J rejected their reliance upon *R (Jalloh) v SSHD*,[7]

[6] Per Lord Bingham LCJ in *R v Secretary of State for Health ex parte Eastside Cheese Company* [1999] EWCA Civ 1739; [1999] 1 CMLR 123 at [50].
[7] [2020] UKSC 4; [2020] 2 WLR 418.

as that case was concerned with the tort of false imprisonment: the scope of what constitutes a deprivation of liberty for the purposes of Art. 5 is different from, and more limited than, the scope of detention for the purposes of the tort of false imprisonment (at [72]). He further noted that in *SSHD v JJ*,[8] the House of Lords said that 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, taking into account such factors such as the nature, duration, effects, and manner of execution or implementation of the penalty or measure (at [69]). He found that there was no deprivation of liberty in these circumstances (taking into account such matters as that people will be in their own home overnight, will be with their families etc, will have access to all the usual means of contact with the outside world).

10.2. **Article 8**: The Claimants alleged that the restrictions on the ability to see family members and friends constituted an infringement of the right to respect for private and family life and was not justified. Lewis J held it unarguable that the restrictions were not justified *if* they amounted to an interference (at [77]). He found them to be limited and proportionate.

10.3. **Article 9**: The Second Claimant is Roman Catholic and had not been able to attend communal worship. She alleged a breach of Art.9 (freedom of religion etc). However, as the relevant restriction was in the process was being amended, Lewis J adjourned consideration of this particular breach ([79]-[87]).

10.4. **Article 11**: The Claimants alleged that the restrictions on gatherings permitting only six people to gather outdoors and two people indoors amounted to a breach of Article 11 ECHR (peaceful assembly / freedom of association). Lewis J found there clearly to be an interference with this right but found it to be proportionate given the general circumstances in which reg.7 had been made.

[8] [2007] UKHL 45; [2008] A.C. 385.

10.5. **Article 1 of Protocol 1**: The Regulations did not breach the right to peaceful enjoyment of property. Lewis J found that the evidence did not establish that Mr Dolan had been deprived of his possessions within the meaning of that article (at [101]). Whilst this article covered goodwill, it did not cover loss of revenue (at [102]). He also pointed to difficulties in establishing causation: it was far more likely that the cause of any economic harm to Mr Dolan's business (aircraft leasing) was the restrictions on flights imposed by other countries or the fact that people are unable or unwilling to fly to other countries (at [104]).

10.6. **Article 2 of Protocol 1**: The Claimants sought to challenge the closure of schools. The difficulty that the Claimants faced is that the government had not introduced any *legal* measures requiring those responsible for running schools to close those schools (at [110]) – there was no legally enforceable prohibition in place preventing attendance at school. Further, government policy was to encourage a phased return to school. In those circumstances, Lewis J found this claim to be academic and dismissed it (at [112]).

CONCLUSION

11. There has been much public debate about the nature and scope of the Regulations. They are probably the greatest restriction on liberty ever imposed on the population as a whole in peace time. However, the fact that there are differing views as to how they should have been formulated is not a basis for asserting them to be unlawful. This judgment crisply demonstrates by use of traditional public law principles how difficult it is to establish any unlawfulness in emergency regulations of this nature.

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22 July 2020