THE CORONAVIRUS LOCKDOWN & PUBLIC LAW

BRIEFING NOTE

A. INTRODUCTION

1. The government's buzzword to describe the Covid-19 measures that it is implementing is 'unprecedented'. Unprecedented? Yes. Unlawful? Maybe.

2. This Briefing Note sets out what may become the key public law battleground arising out of the coronavirus pandemic: a challenge to the lawfulness of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "**Regulations**").

B. LAWFULNESS OF THE REGULATIONS

3. Regulation 6(1) provides that "*During the emergency period, no person may leave the place where they are living without reasonable excuse.*". A number of plausible arguments have been posited that Regulation 6(1) is *ultra vires* and unlawful. [1]

4. It is first necessary to set the legislative background. The Regulation is expressly made pursuant to sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 (the "**Act**").

5. S. 45C(1) of the Act provides that a minister may make provision "*for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England & Wales*". S.45(3)(c) then provides that regulations may include provision for *"imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health."*

6. These two sections prompt the question: "what restrictions may the minister impose?".

7. An answer is provided by s. 45C(4), which relevantly includes at ss.(d) *"a special restriction or requirement."*. One continues, down the legislative rabbit-hole, to s. 45C(6)(a) for the definition of "*a special restriction or requirement*":

[1] https://www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home/?fbclid=IwAR2lsXxnShhRd_c0t09s-3jEb03GS4xOAojlby2j2-f9lX2CxzZWewynbwE;
https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/;

"a "special restriction or requirement" means 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)".

8. S. 45G(2)(j) then provides, *inter alia*, that a justice of the peace may impose on a person (P) a restriction or requirement *"that P be subject to restrictions on where P goes or with whom P has contact".*

9. That is all to say that the legislative basis for Regulation 6(1), that no person may leave the place where they are living without reasonable excuse, is the provision in s.45G(2)(j) of the Act, that a justice of the peace may require *"that P be subject to restrictions on where P goes or with whom P has contact".*

10. The key question is whether Regulation 6(1) falls within the scope of s.45G(2)(j)? If not, then Regulation 6(1) is unlawful.

11. There may indeed be plausible arguments that s. 45G(2)(j) of the Act does not justify Regulation 6(1), and that Regulation 6(1) is therefore *ultra vires.*

12. Robert Craig (Tutor, University of Bristol) has argued that the power in s. 45G(2)(j) cannot be exercised over the whole population, and so is unlawful for that reason. S.45G(2)(j) is a power to be exercised over a person (P). True it is, that s.45J(1) clarifies that references to a 'person' include a 'group of persons'. However, it is doubtful , as a matter of construction, whether the entire population can be said to be a group of persons. In this respect, Lord Hoffmann's classic statement in **R v Secretary of State for the Home Department, ex p. Simms** [2000] 2 A.C. 115 that fundamental rights cannot be overridden by general or ambiguous words is on point. Where there is ambiguity as to whether the population can properly be regarded as a group of persons, and Regulation 6(1) imposes such severe restrictions on our liberty, the construction to be preferred is that Regulation 6(1) is ultra vires.

13. There would, however, seem to be a difficulty with Robert Craig's argument. S.45C(2)(a) is cast in very broad terms, and enables the power to be exercised "*in relation to infection or contamination generally"* (emphasis added). S. 45C(2)(b) also anticipates that the minister will be able to "*make provision of a general nature*" (emphasis added). The generality of S. 45C(2) cuts against the argument that restrictions can only be made against specific persons or groups of persons.

14. Lord Anderson has advanced a similar argument to Robert Craig as to why the Regulations are unlawful. His suggestion is that the restraints imposed by Regulation 6(1) go further than a mere "*restriction*", in the language of s.45G(2)(j). Because Regulation 6(1) imposes such an extensive limitation on individual freedom, s.45G(2)(j) would need to be expressed in clearer terms in order to justify Regulation 6(1). As it is, s.45G(2) is couched in quite general terms, which may not justify the extent of the intrusion on personal liberty.

15. By contrast, Jeff King (Professor, University College London) argues that if a challenge were brought to the Regulations, the courts would not be likely to take such a narrow view of the

Act so as to declare the Regulations unlawful. The context of the legislation and the purpose of the Act is, in this respect, important. Parliamentary records (unsurprisingly) support the view that the legislation was intended to provide a framework for dealing with serious infectious diseases, which could have a serious impact on individual human rights.[2] That context must inform the construction of the legislation. On that view then, Regulation 6(1) does fall within the ambit of s.45G(2)(j).

16. Professor King raises an alternative question over the legality of the Regulation. Although the minister may impose restrictions in the same way as justice of the peace may do, s.45D(3) makes it clear that restrictions may not extend to the restriction in s. 45G(2)(d), that a person be kept in isolation or quarantine. If Regulation 6(1) amounted to a quarantine, then that may be a viable line of argument that it is *ultra vires*. There is no definition of quarantine in the Act, although Professor King suggests that the current lockdown measures fall short of a quarantine, as a matter of ordinary language, and as a matter of public health expertise. [3]

17. There are powerful competing interests at stake here. On the one hand, one can quite well see the argument that the purpose of the legislation is clear, and in such a time of national emergency, cute and technical readings of legislation by the courts are unwelcome. On the other, it is precisely when emergency powers are in force that governments are inclined to overreach, and when judicial scrutiny of the executive is most warranted. It is a quintessential example of the balancing of the competing virtues of efficient government and the rule of law.

18. Given the extraordinary impact of Regulation 6(1) on all of our lives, it seems eminently possible that it will be challenged in the courts.

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[2] J King, 'The Lockdown is Lawful' UK Constitutional Law Blog U.K. Const. L. Blog (1 April 2020) (available at: https://ukconstitutionallaw.org/)

[3] J King, 'The Lockdown is Lawful: Part II' UK Constitutional Law Blog U.K. Const. L. Blog (2 April 2020) (available at: https://ukconstitutionallaw.org/