

## CORONAVIRUS AND CIVIL LIBERTIES IN THE UK

Tom Hickman QC, Emma Dixon and Rachel Jones, Blackstone Chambers

6 April 2020

### (1) INTRODUCTION

1. On 26 March 2020 the country became subject to what are almost certainly the most severe restrictions on liberty ever imposed, going further than the regulations made under, respectively, the Defence of the Realm Act 1914 and the Emergency Powers (Defence) Act 1939<sup>1</sup> during the two world wars. The restrictions came into effect at 1pm in England, 4pm in Wales and 7.15pm in Scotland. Northern Ireland followed on 28 March 2020.
2. From then on, and presently for a period of six months, every person in the country, other than a homeless person, is subject to an obligation to remain in their home until further notice. Breach of the obligation is a criminal offence. There is an accompanying power for a “*relevant person*”, which (except in Scotland) extends to persons who are not police officers, to use physical force to return a person to their home if, in the relevant person’s opinion, they are outside the place where they are living without reasonable excuse.<sup>2</sup> The restrictions also close shops and businesses,<sup>3</sup> leaving hundreds of thousands of people out of work. Gatherings of more than two people outside the home are prohibited. Relevant persons can disperse such gatherings by using reasonable force.<sup>4</sup>
3. Despite the fact that primary legislation in the form of the Coronavirus Bill was proceeding at speed through Parliament at the same time that these measures were being prepared - it was enacted on 25 March 2020 - the measures were not expressly set out in that Act.<sup>5</sup> They were, instead, imposed by delegated legislation. The UK Government and the Welsh Government issued Regulations under the the Public Health Act 1984 (“1984 Act”), the Northern Irish Regulations were made under the Public Health (Northern Ireland) Act 1967 and the relevant provisions of these Acts were replicated in Schedule 19 to the Coronavirus Act 2020 to enable the Scottish Regulations to be made (collectively, “the Regulations”).<sup>6</sup> The Regulations were made on an urgent basis and were not subject to deliberation or approval by relevant legislatures before enactment.<sup>7</sup>
4. The approach that had been favoured by the UK Government in the days preceding the introduction of the Regulations had been to rely on official advice and guidance to the general population - in other words, a “*soft law*” approach. Some legal powers had been enacted to allow closure of certain businesses and land, and quarantine of persons returning from abroad,<sup>8</sup> but in the main the Government had been

pursuing a social distancing strategy without legal powers of enforcement. On Monday 23 March 2020, following a sunny weekend that saw large numbers of people congregate in the country's parks and open spaces - only a week earlier the Government advice had been that sporting fixtures and large outside gatherings could go ahead - the Government approach abruptly changed. The Prime Minister announced in a televised address to the nation that, *"From this evening I must give the British people a very simple instruction – you must stay at home ... If you don't follow the rules, the police will have the powers to enforce them, including through fines and dispersing gatherings ..."*<sup>9</sup> Following a gap of a few days in which no powers of enforcement existed, the Regulations were introduced.

5. Whilst the Regulations impose extraordinary restrictions, it is clear that *"stay at home"* orders, social distancing rules and closure of retail and leisure businesses are necessary to combat the appalling threat of Coronavirus and help our embattled health and frontline services to cope. Similar rules are now in place in countries across the world.
6. It is vital that individuals observe the law and follow the official guidance issued by the UK Government and other authorities across the United Kingdom. Nothing in the analysis that follows is intended to suggest otherwise.
7. It is also important that such exceptional measures are subject to detailed scrutiny. And people seeking to follow or enforce the rules must be clear about what is required of them. Moreover, whilst the main restrictions contained in the Regulations are unlikely to be controversial, and as we have already said are clearly justified, there are provisions which are more open to question, including differences between the rules in different part of the United Kingdom which seem difficult to justify. In Wales for example, it is a legal requirement that people not leave their house for exercise more than once per day, but no similar legal requirement exists elsewhere. In Scotland only a police officer can forcibly return a person to their home but in England a community support officer or any person designated by the Secretary of State may do so.
8. Indeed, soon after the Regulations came into effect, reports began emerging in the press of apparently overzealous action by the police and confusion over the meaning of certain rules. A number of these examples appear to derive from confusion over which rules are imposed by the Regulations and which are just a matter of official advice.
9. The Derbyshire Police used drones to film people out walking in the Peak District and published the footage on Twitter, urging people not to drive to the countryside to exercise. The walkers' behaviour may well contravene the published [Guidance](#) to avoid unnecessary travel (the Government has since further clarified that people should *"stay local"* for exercise: [Coronavirus Outbreak FAQs](#), last updated on 29 March 2020).<sup>10</sup> However, former Supreme Court judge Lord Sumption pointed out in an interview<sup>11</sup> that the Regulations contain no such restriction. He suggested that it was *"disgraceful"* that

Derbyshire police had sought to “shame” people into refraining from exercising their “undoubted right to take exercise in the country” and warned that the UK should not slide into a “police state” where officers enforced the preferences or wishes of Ministers rather than the law.<sup>12</sup> Whilst there is in our view currently no risk of the country becoming a police state, the Times was surely right in its leader on 1 April 2020 where it observed that the police must, “understand the difference between new laws and government advice... it is no official’s job to enforce the latter.”<sup>13</sup>

10. There are also [reported instances](#) of officials telling shops not to sell “non-essential” items such as Easter eggs and hot cross buns, a clear misunderstanding of the Regulations (people can leave home if they need to buy “basic necessities”, which includes food, and are not restricted in what they can buy).<sup>14</sup> In another reported case, a woman was prosecuted, found guilty and [fined £660](#) and for failing to provide police with evidence of her identity or reason for travel and for “failing to comply with the Coronavirus Act”. There are no such offences and the Coronavirus Act has no relevant application.<sup>15</sup>
11. There are also [examples](#) celebrated on social media of individuals leaving their homes to keep up community morale, such the people dressed as superheroes who have been running past children’s windows: are such people breaking the law? And what of the residents of a street who have a socially-distanced dance outside their house each morning? Or the people who step outside their house to clap the NHS each Thursday evening? Are these examples of breaches of the law, or failure to follow the guidance, or neither?
12. The College of Policing has issued a valuable [Policing Brief](#)<sup>16</sup> advocating that officers “police by consent” and encourage voluntary compliance.<sup>17</sup> That is greatly to be welcomed. The vast majority of the population need no legal compulsion to act responsibly. But that should not detract from the fact that the police and other persons identified in the Regulations now have enormously wide powers and individuals are subject to correspondingly broad duties, the boundaries of which are unclear and can be confusing even to the well-informed.
13. This paper does not provide a comprehensive account of the Regulations but, taking the English Regulations as its principal focus, it provides an overview and discusses certain issues that arise. The discussion shows that there is proper scope for debate over parts of the Regulations and that the rules would benefit from thorough scrutiny, particularly if they are to remain in place for a lengthy period of time. We also suggest that the obligation to remain at home (“home confinement”) and accompanying power of removal should be given an explicit mandate in primary legislation.<sup>18</sup>

## (2) KEY PROVISIONS OF THE REGULATIONS

14. The Regulations expire after a period of six months (English Regulations (to which subsequent references refer), regulation 12(1)) although particular restrictions or requirements may be terminated before this by the Secretary of State publishing a direction bringing them to an end.<sup>19</sup> The Secretary of State must review the need for the restrictions and requirements at least once every 21 days, with the first review being carried out by 16 April 2020 (regulation 3(2)).
15. The Regulations require the closure of business premises selling food and drink for consumption on the premises, and where businesses sell food or drink for consumption off the premises, they require the business not sell the food or drink from on its premises – the food or drink must be delivered, or collected from off the premises.<sup>20</sup> The Regulations also close shops, gyms, leisure centres, libraries, museums and galleries and many other places. Shops and libraries can trade online, by telephone or by post (regulation 5(1)(a)). Food retailers, off-licences, newsagents, petrol stations, hardware stores, bicycle shops and a number of other identified stores and services can remain open (Schedule 2, Part 3).
16. Regulation 6 sets out the most intrusive measures from the perspective of individual liberty. It provides that no person, other than a homeless person, is permitted to leave their home without a “*reasonable excuse*”. There follows a non-exhaustive list of 13 such excuses (several of which will not be applicable to many households) including the need:
  - (1) To obtain basic necessities, including food and medical supplies for those in the same household including pets, or for vulnerable persons; or to obtain supplies for the essential upkeep, maintenance and functioning of the household or that of a vulnerable person, or to obtain money.
  - (2) To take exercise either alone or with other members of the household.
  - (3) To seek medical assistance.
  - (4) To provide care or assistance to a vulnerable person or to provide emergency assistance.
  - (5) To donate blood.
  - (6) To travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably practicable to work or provide those services from home.
  - (7) To attend a funeral of a household or close family member or, if no household or family members are attending the funeral, of a friend.
  - (8) To fulfil a legal obligation.
  - (9) To access critical public services including childcare or educational facilities, social services, services provided by the DWP or services provided to victims of crime.
  - (10) To continue arrangements for access to and contact between parents and their children where one or both parents live in different households from the child.

- (11) For a minister of religion or worship leader to go to their place of worship.
  - (12) To move house where reasonably necessary.
  - (13) To avoid injury or illness or escape a risk of harm.
17. It is worth emphasising that the list of reasonable excuses is non-exhaustive, meaning that individuals may leave home for other reasons when they have a “reasonable excuse” to do so. But when a situation is not covered by the list (or any relevant guidelines), a person will be risking the authorities taking a different view from them as to what constitutes a reasonable excuse.
18. The College of Policing Brief (above) advises officers to: *“keep an inquisitive, questioning mind-set. It may not be safe for everyone to be at home. Consider whether there are any safeguarding issues at play. For example, are you dealing with aspects of domestic abuse, child abuse or mental health?”*
19. Regulation 7 prohibits public gatherings, without reasonable excuse,<sup>21</sup> of more than 2 people who are not members of the same household, except where these are essential for work purposes or within certain other enumerated exceptions.
20. Opinions can reasonably differ as to whether persons dressed as superheroes to run past children’s windows or persons standing in front of their houses to clap or dance together contravene the requirements of regulations 6 or 7. And that rather illustrates the problem and shows why different approaches are likely to be taken by different communities and police forces up and down the country. Take the example of the street dancers. Persons can leave their house for exercise but if they are not exercising alone or with members of their household they cannot rely on the exception in regulation 6(2)(b). Such an activity, given significant social distancing, might conceivably constitute exercising “alone”; but if not it would have to be within the general concept of “reasonable excuse”. Furthermore, people cannot exercise as part of a “gathering”. A “gathering” is not defined but, (a) it must involve more than two people, and (b) a gathering does not cease to be a gathering because the people are more than two metres apart. What constitutes a “gathering” is fact-sensitive and a matter on which opinions will differ. The example shows that it is not just the issue of reasonable excuse which lacks clarity and is open to interpretation, and that many activities which people consider to be safe and reasonable may not easily fit within the scheme of the regulations.
21. A notable feature of the Regulations is the very broad powers of enforcement that accompany these restrictions. They provide that a “relevant person” can take “such action as is necessary” to enforce requirements contained in regulation 4 and 5 (closure of businesses) and 7 (prohibition on gatherings). That is an extremely broad and ill-defined power. A “prohibition notice” can also be issued by a relevant person in connection with the closure of businesses where a relevant person “reasonably believes” that

a person is breaching regulations 4 or 5 and that it is necessary and proportionate to give the notice to prevent that person continuing to breach the requirement (regulation 8(1) and (2)).

22. Most strikingly, where a relevant person “*considers that a person is outside the place where they are living in contravention of regulation 6(1)*” they can either direct the person to return home or they can elect to physically remove the person to that residence (regulation 8(3)). Several features of this power are worthy of highlighting:

(1) It is not an arrest and does not require the person to be placed under arrest.

(2) A relevant person for this purpose is not only a police officer but also a community support officer or other person designated by the Secretary of State (regulation 8(12)(a)).

(3) It does not include any express requirement of reasonable belief (by contrast with the power to issue prohibition notices for closure of businesses).<sup>22</sup>

(4) Although the power is subject to the proviso that the person exercising it may only do so if they “*consider*” that it is a necessary and proportionate means of ensuring compliance (regulation 8(8)), that again is a subjective test and is weaker than the requirement in relation to prohibition notices for a reasonable belief” in necessity and proportionality (regulation 8(2)(b)), which has an objective element. A relevant person might consider, albeit wrongly or unreasonably, that it is necessary and proportionate for a person to be removed to their home even if, for example, the person is prepared to return themselves. That would be consistent with the legislative regime.

23. A similar enforcement power exists in relation to the dispersal of gatherings, which, in addition to a power to direct a gathering to disperse and for persons to return home, also includes a power for a relevant person to remove a person to the place to their home, where they consider them to be in breach of the prohibition on gatherings (regulation 8(9)). Again, there is no requirement of reasonable belief, no explicit objective element to the necessity and proportionality test, no requirement for an arrest, and no clarity as to which persons will be given such power pursuant to the Secretary of State’s power to designate persons (regulation 8(12)(a)(iv)).

24. Regulation 8(11) also confers a power on a relevant person to give a person “*any reasonable instruction they consider to be necessary*”. This is not further elaborated. It is unclear, given the privilege against self-incrimination, whether this would extend to requiring people to provide the reasons for their actions. The College of Policing takes the view that, “*There is no power to stop and account*”.<sup>23</sup>

25. The only thing that is clear is that these powers give considerable discretion to relevant persons and that more tightly circumscribed powers would certainly be desirable.

26. A person who without reasonable excuse contravenes regulations 4, 5, 7 or 8, or who contravenes the home confinement requirement in regulation 6, commits a criminal offence (regulation 9(1)). It is also an offence without reasonable excuse to obstruct a person enforcing the Regulations or to fail to comply with a direction to return home or to fail to comply with a reasonable instruction or prohibition notice given by a relevant person (regulations 9(2) and (3)).
27. An offence is punishable on summary conviction by fine. It can also be enforced by a fixed penalty notice of £60, or £120 for a second offence. The amount doubles for each offence, up to a maximum of £960.
28. It is possible for individuals to commit multiple offences and incur multiple fixed penalty notices in respect of a single incident. If for example they are outside their house without reasonable excuse, fail to comply with a direction to return home and then obstruct removal, a person would potentially commit a number of separate offences.
29. There are a number of differences between the English Regulations and those in force in other parts of the United Kingdom which are puzzling and may be difficult to justify. The differences include:
- (1) In Scotland, only a police constable (and not a PCSO, nor a person designated by the Secretary of State nor Scottish Ministers) may remove a person to their home for having left without reasonable excuse (see regulation 7(12)).
  - (2) The Welsh Regulations specifically limit outdoors exercise to “no more than once a day”: regulation 8(2)(b).
  - (3) The Scottish Regulations provide that it is an offence to leave your home subject to the *defence* of having a reasonable excuse (regulation 5(1); regulation 8(1) and 8(4)); whereas the English, Welsh and Northern Irish restrictions appear make the absence of reasonable excuse an element of the offence.
  - (4) The Welsh Regulations include a provision for the closure of public parks, land and paths and empower persons designated by a National Parks authority or Natural Resources Wales to remove persons found on land or paths that are closed, using reasonable force to do so (regulation 9(4), 10(9) and (13)). This does not appear to have any equivalent in the other jurisdictions.
  - (5) In Wales and Scotland, “social distancing” rules are prescribed for certain premises, notably food retailers: supermarkets must take reasonable measures to ensure a distance of two metres between persons on their premises and in external queuing areas (except between two members of the same household, or a carer and the person assisted by the carer): see regulations 6(1) and 7(2), (4) and

(5) of, and paragraph 2(2)(b) of Schedule 1 to, the Welsh Regulations, and regulation 4(1) and (7)-(9) of, and paragraph 2(2)(b) of Schedule 1 to, the Scottish Regulations.

30. In addition to the differences between the Regulations, there are also differences between the Regulations and published guidance. The following table seeks to highlight which parts of the required measures are backed by legal compulsion and which are set out only in the guidance and to illustrate some differences between the different parts of the United Kingdom:

STAY AT HOME – COVID-19 OFFICIAL GUIDANCE AND RULES ( <u>as at 2 April 2020</u> )				
	England	Wales	Scotland	Northern Ireland
Stay at home unless you have <b>reasonable excuse</b> to leave				
Reasonable excuse <b>includes</b> <ul style="list-style-type: none"> <li>• Obtaining basic necessities including food and medical supplies</li> <li>• Exercising alone or with other members of the household</li> <li>• Seeking medical assistance</li> <li>• Providing care or assistance to a vulnerable person</li> <li>• Donating blood</li> <li>• Travelling for the purpose of work or providing voluntary or charitable services (where it is not reasonably practicable to do this from home)</li> <li>• Attending certain funerals</li> <li>• Fulfilling a legal obligation</li> <li>• Accessing critical public services</li> <li>• Escaping a risk of harm</li> <li>• Continuing access/contact arrangements for children who do not live with one or both parents</li> <li>• For ministers or religion, going to their place of worship</li> <li>• Moving house 'where reasonably necessary'</li> <li>• Avoiding injury or escaping a risk of harm</li> </ul>				
Limit exercise outside the home to once a day				
Do not travel unnecessarily for outdoor exercise				

Go to the shops for basic necessities as infrequently as possible				
Wash your hands as soon as you get home				
No gatherings of more than 2 people in a public place unless part of same household or essential for work purposes or to attend a funeral (and certain other exceptions)				
If you go outside, stay 2 metres (6 feet) away from others at all times (“social distancing”)				
<b>Certain</b> businesses must close, including bars and pubs (and others specified in the law)				
Food retailers, including supermarkets, should take measures to ensure social distancing on their premises and in external queuing areas (except between two members of the same household, or a carer and the person assisted by the carer)				
Self-isolate for 7 days if you have symptoms. Members of the same household should isolate for 14 days from when the first person in the home shows symptoms; <b>and</b> if any of them develop symptoms they should isolate for 7 days from when their symptoms start, <b>even if</b> that means isolating for longer than 14 days in total				



                     = The Health Protection (Coronavirus) Regulations, available here: [England](#), [Wales](#), [Scotland](#) and [Northern Ireland](#)



                     = Official Government Guidance (i.e. [www.gov.uk](http://www.gov.uk) and/or nation-specific), available here: [UK](#), [Wales](#), [Scotland](#) and [Northern Ireland](#)

### (3) THE VIRES OF THE REGULATIONS

31. The legal basis for the English and Welsh Regulations is the 1984 Act. Under section 45C(1) of the 1984 Act, the appropriate Minister is empowered to make regulations for the purpose of protecting against, controlling or providing a public health response to the incidence or spread of infection in England and Wales:

*(3) Regulations under subsection (1) may in particular include provision –*

...

(c) *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.*

(4) *The restrictions or requirements mentioned in subsection (3)(c) include in particular—*

(a) *a requirement that a child is to be kept away from school,*

(b) *a prohibition or restriction relating to the holding of an event or gathering,*

(c) *a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies or the handling, transport or disposal of human remains, and*

(d) *a special restriction or requirement.*

32. Subsection 3(c) is the legal basis for each of the restrictions in the English and Welsh Regulations. It clearly provides authority for the restriction on gatherings (regulation 7 of the English Regulations). It also provides authority for the closure of businesses in regulations 4 and 5. More problematic, however, is the vires for confinement to home and for the power for a “*relevant person*” to use force to remove a person to their home.

33. The authority for these powers derives from the reference to subsection 3(d) (“*special restriction or requirement*”). These are restrictions or requirements that can, under the 1984 Act, be imposed by a magistrate under section 45G(2). This subsection provides a list of special restrictions, ranging from requiring a person to submit to a medical examination or be kept in quarantine to a requirement that a person answer questions or abstain from working or trading. The only restriction in the list in section 45G(2) which could justify home confinement is the following:

*“(j) that P be subject to restrictions on where P goes or with whom P has contact;”*

34. There is, to put it mildly, a significant question mark over whether section 45G(2)(j) can bear the weight that is placed upon it by the English and Welsh Regulations. Four points explain why this is so.

35. First, the Regulations purport to authorise conduct which would otherwise constitute the torts of false imprisonment and trespass to the person at common law:

(1) A requirement, backed by criminal sanctions, to stay at home constitutes a deprivation of liberty or “*imprisonment*” at common law. This is the case notwithstanding that a person can leave their house with reasonable excuse. The law on this point was very recently considered by the Supreme Court in R. (Jalloh) v Home Secretary [2020] UKSC 4, [2020] 1 WLR 418, which concerned a requirement imposed on persons subject to immigration control to remain in their home for specified times during the day unless they had reasonable excuse to leave. The Supreme Court held this to constitute a common law imprisonment and rejected the argument that in the absence of physical restraint or equivalent there was no imprisonment.<sup>24</sup> It might be argued that, by contrast with such a case, the vast majority of people are choosing to remain in their houses voluntarily, rather than

under threat of compulsion. Whilst that might indeed mean that most people are, in fact, not being confined by the Regulations, but rather by their own will, one cannot assume that this is universally the case when considering the vires of the Regulations. Self-evidently, the purpose of the Regulations is to address situations where people are not willing to observe Government advice. In examining the vires of regulation 6 of the English Regulations the appropriate starting point must be that it is imposing a common law deprivation of liberty.

(2) The power to remove a person to their home using reasonable force is even more straightforwardly a power to engage in conduct that, if not sanctioned by law, would be both an imprisonment (during the course of removal) and a trespass to the person, where reasonable force is used to effect the removal.

36. Secondly, it is a standard rule of statutory interpretation that, in order for primary legislation to authorise conduct that would otherwise constitute a trespass or common law imprisonment, this must be sanctioned by express words or necessary implication in the statute. Numerous authorities could be cited to illustrate this principle. In Morris v Beardmore [1981] AC 446, 455 Lord Diplock stated that the “*presumption is that in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct*”. In R (Gedi) v Home Secretary [2016] EWCA Civ 409, [2016] 4 WLR 93 the Court of Appeal held that a power to impose a “*restriction as to residence*” did not authorise the imposition of a home curfew because such a power could be used to restrict residence in ways that fell short of home confinement.

37. Thirdly, section 45G(2)(j) does not expressly or by necessary implication authorise physical confinement. Quite obviously, a person, P, can be subject to “*restrictions on where P goes*” without being confined in a form that constitutes an imprisonment at common law. For example, were P to be prevented from attending a place of work or worship, or a gym, or from visiting friends or family or going to the cinema or football match, or entering any port or airport, these would constitute restrictions on where P goes but none would amount to a common law imprisonment. Indeed, it is notable that the 1984 Act makes explicit provision for things like keeping children away from school, isolation and quarantine, prohibiting gatherings and requiring persons to wear protective clothing, but lacks any similarly explicit authorisation for the most intrusive obligations imposed by the Regulations. There is also nothing in section 45G(2)(j) that entails an authorisation for the use of force to remove a person to their home without placing them under arrest and without the relevant person (not necessarily a police officer) having to have a reasonable belief that they are in breach of the regulations. The Secretary of State does have an ancillary power to make provisions for execution and enforcement of the obligations imposed by regulations (1984 Act, section 45F(2)(d)), but equally this does not authorise the removal power expressly or by necessary implication.

38. Fourthly, these considerations are reinforced by the fact that the 1984 Act expressly prohibits the Secretary of State from imposing certain of the “*special restrictions or requirements*” listed in section 45G(2) (see section 45D(3)). These prohibited special restrictions or requirements are that a person submit to a medical examination; that they be removed to hospital; that they be detained in hospital; and (significantly) that they be kept in isolation and quarantine. It is significant that all of these things involve a confinement or what would otherwise be a trespass to the person. They can only be imposed by a magistrate where they are satisfied that a person is or may be infected. The Act thus draws a distinction between restrictions that can be imposed by the Secretary of State which *fall short* of constituting physical restraint or imprisonment at common law, which *can* be imposed by regulations, and those restrictions which *do* amount to otherwise tortious conduct, which *cannot* be.
39. Indeed, it is difficult to attribute to Parliament the intention that a Minister *may not* impose isolation or quarantine requirements upon persons diagnosed with an infectious disease but that, at the same time, the Minister may confine the entire population of the country to their homes (or indeed any other place) even when most people are not suspected of being infected. To be clear: we do not suggest that the home confinement requirement is medically unjustified, clearly a “*stay at home*” order *is* justified, the question we are considering is whether such a measure has a clear basis in primary legislation.
40. A conventional legal analysis therefore suggests that important parts of the Regulations may be ultra vires. But is a conventional legal analysis warranted? The Regulations are emergency Regulations addressing a global public health crisis. There is certainly some authority for the proposition that in times of crisis the courts should interpret statutes in a different fashion, in way that confers the widest powers on Government that the words will reasonably bear.
41. In R v Halliday [1917] AC 260, for example, the House of Lords held that the Defence of the Realm Consolidation Act 1914, which gave the Government power to issue regulations for securing public safety during the war, including to prevent communication with or assistance being given to the enemy, was sufficient statutory authority for the Government to intern persons of hostile origin or association without trial, including British subjects. Lord Finlay LC dismissed the argument that the Act needed to be explicit in authorising deprivation of liberty, stating: “*It appears to me to be a sufficient answer to this argument that it may be necessary in time of great public danger to entrust great powers to Her Majesty in Council, and Parliament may do so feeling certain that such powers will be reasonably exercised.*” (268)
42. In Liversidge v Anderson [1942] AC 206, which concerned similar regulations made during the Second World War, Viscount Maughan stated that “[t]here can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with...” (219).

43. In those cases, it was considered to be obvious that internment was a measure that might be needed to combat the risk of the hidden threat from hostile persons within the country. Whilst the context of an infectious disease is of course different, it would no doubt be argued that home confinement is a power that must have been contemplated as a method to combat community transmission. The difficulty with such an argument is that it is far from clear that this was contemplated when the relevant provisions of the 1984 Act were introduced by amendment in 2008.<sup>25</sup> Professor Jeff King, who has argued that the English and Welsh Regulations can be supported by a literal reading of the 1984 Act's enabling powers, points to a Hansard Statement in which the risk posed by SARS was identified and mentioned in general terms the need to curtail ordinary rights.<sup>26</sup> However, nothing in the Hansard statement suggests that Parliament understood it was authorising a power to impose home confinement or physical constraint other than under the authority of a magistrate and subject to the protections in the Act in respect of the use of that power.
44. Lord Anderson KBE QC has, like us, also raised doubts about the vires of the home confinement provisions in the Regulations. He has pithily summed up the legal issue thus: *"for such a remarkable limitation of personal freedom to be contemplated by statute, one would have expected to find clear words in section 45G(2): something like 'that P be required not to leave the place where P is living, save for specified purposes'."*<sup>27</sup>
45. Therefore, whilst there is undoubtedly a *plausible* basis for the most intrusive restrictions in the English Regulations, section 45G(2) is by no means a clear or satisfactory basis for such extraordinary powers. Moreover, Halliday's Case and Liversidge v Anderson are cases that have acquired notoriety for adopting a permissive approach to legislative interpretation and failing to ensure that the rule of law is adhered to consistently even in times of national crisis. In IRC v Rossminster Ltd [1980] AC 952, 1011, Lord Diplock stated that, *"I think the time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson were expediently and, at that time, perhaps, excusably, wrong ..."* (see also Lord Scarman at 1025).
46. Given that the Coronavirus Bill was proceeding through Parliament at precisely the same time as the Regulations were being made, it is difficult to understand why the Government did not take the opportunity to establish a more explicit legislative basis for the most intrusive powers constrained in the Regulations. Indeed, the Act makes explicit provision in schedule 21 for public health officials to remove and quarantine potentially infectious persons and in schedule 22 it makes express provision for prohibition of events and gatherings. The Scottish Regulations (unlike those in England and Wales) do find their vires in the 2020 Act, rather than the 1984 Act, but (a) the vires of the Scottish Regulations<sup>28</sup> is Schedule 19 of the 2020 Act which essentially cuts and pastes the relevant provisions of the 1984 Act and thus has the same deficiencies; (b) that has evidently been done because the 1984 Act itself does not extend to Scotland (section 79(3)). It would have been highly desirable for Parliament to have given a legislative endorsement to all of the Regulations and expressly sanctioned the measures within them.

Whilst the courts would no doubt be very reluctant to take a blue pencil to the Regulations, the legal analysis set out above suggests that this could occur. It would be greatly preferable, particularly if the measures are to persist for any length of time, that they be considered by Parliament and placed on a firmer legislative footing.

#### **(4) THE HUMAN RIGHTS ACT 1998**

47. The Human Rights Act 1998 gives effect to the European Convention on Human Rights (“ECHR”) in UK law. The Regulations are subject to the Human Rights Act and the “Convention rights” and must be compatible with such rights.

#### **Article 5**

48. Article 5(1) ECHR provides that “[n]o one shall be deprived of his liberty”. It is subject to a number of listed and exhaustive qualifications. Those cases include Article 5(1)(e): “*the lawful detention of persons for the prevention of the spreading of infectious diseases...*”.

49. It is established by both the case law of the European Court of Human Rights (“ECtHR”) and the domestic case law that, for Article 5 purposes, a deprivation of liberty may take a variety of forms other than classic detention in prison or strict arrest (Guzzardi v Italy (1980) 3 EHRR 333 at [95]; De Tommaso v Italy (2017) 65 EHRR 19; SSHJ v JJ [2008] 1 AC 385; SSHJ v AP [2010] UKSC 24). A court must consider the type, duration, effects and manner of implementation of the measure in question, the difference between restriction and deprivation being one of degree or intensity rather than nature or substance.

50. The ECtHR has said in this context in De Tommaso:

*“[81] ...the requirement to take account of the ‘type’ and ‘manner of implementation’ of the measure in question ... enables [the Court] to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in a modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good...”.* (Emphasis added.)

51. A leading text on the ECHR suggests that the Court will consider the concrete situation of the applicant in order to assess the degree of restriction of freedom of movement and: “[w]hilst the period of confinement is clearly a key factor, the impact of other restrictions both during and outside the confinement period are critical too, notably those affecting isolation and social contact”.<sup>29</sup>

52. Thus, a court will consider whether the extent of control by the State, both within and outside of a curfew period, is sufficient to enable an individual to “*have a social life and maintain relations with the outside world*” (De Tommaso at [49]). The domestic case law in the context of control orders imposed on persons

suspected of involvement of terrorist-related activity suggests that a curfew beyond 18 hours a day (or 16 hours when coupled with other restrictions) would amount to the deprivation of liberty for Article 5 purposes and notes that “*social isolation is a significant factor*” (SSH D v AP at [2-4]; SSH D v GG [2016] EWHC 1193 (Admin) at [36]). Control orders varied in their content, but characteristically involved a requirement that a person remain in their place of residence, which could be with family members (who were not confined), during specified hours and could only leave in exceptional circumstances during those hours. When they did leave, controlled persons were often restricted to certain geographical areas, although they could work or study outside curfew hours. Such restrictions bear similarities with the home confinement requirement, although controlled persons were also subject to a range of other obligations (tagging, restrictions on internet usage, etc) which obviously have no counterpart in the present situation.

53. Having regard to these principles, a requirement for persons to remain in their homes for the entirety of every day and subject to limited exceptions such as shopping, exercise and (in some cases) work, is in our view likely to constitute a deprivation of liberty under Article 5. The fact that persons can leave with reasonable excuse is unlikely to affect that analysis, particularly given the limited circumstances envisaged in the Regulations and accompanying advice. The point is really simple: people must stay at home. And when they are out of their homes they cannot meet up with other people. In our view such restrictions engage Article 5.
54. The question then becomes whether the measures are justified as a measure necessary for the prevention of spreading of an infectious disease. It has been suggested by Alan Greene that it is “*unclear whether Article 5.1(e) allows for the deprivation of liberty of healthy people to prevent the spread of infectious diseases*”.<sup>30</sup> If that is right, then the home confinement requirement would breach Article 5. Greene suggests that Contracting States should therefore be using the power to derogate from Article 5 provided by Article 15 of the ECHR. Article 15 allows Contracting States to derogate from some parts of the ECHR “*in times of war or other public emergency threatening the nation...*”.
55. However, there are good reasons for confining the power to derogate to the most exceptional circumstances. Derogation means that the constraints imposed by the ECHR are lifted in respect of the rights subject to derogation, thereby limiting the scope for courts to test the justification of measures. Moreover, from a political perspective, derogating from ECHR rights may have significant downsides, both because it concedes that measures taken by Governments breach the human rights that are normally observed and because it requires States to declare that they are subject to a national emergency threatening the life of the nation – which they are understandably reluctant to do. Such considerations are likely to be factored into any assessment made by a domestic court of the ECtHR.
56. The basis for Greene’s analysis appears to be Enhorn v Sweden (2005) 41 EHRR 633, in which the Second Section of the ECtHR stated:

*"[43]... Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention..."*

57. However, Article 5.1(e) does not refer to *persons spreading infectious diseases*, it refers to the need to detain *persons* for the *purpose* of preventing the spreading of infectious diseases. This distinction was not relevant in the Enhorn case because the applicant suffered from HIV. The Court in Enhorn did not consider the situation which now arises, where healthy people need to be shielded from infectious people in order to slow the spread of a virus. In English terms, the comments in Enhorn were *obiter dicta*.
58. There are, moreover, three fundamental problems with Article 5.1(e) being limited in the manner suggested.
59. First, as the current Coronavirus crisis all too vividly shows, it is often not possible to know whether a person is infected or not. Even if testing is feasible, it might not be available. It would therefore not be practicable or possible for Article 5(1)(e) to be limited to the detention of infectious persons.
60. Secondly, and connectedly, even if it will only rarely be necessary to detain all people within a country or community, it is easy to envisage the necessity of isolating people simply because they have been in contact with an infected person or have been in a high risk environment or area. The present global pandemic illustrates that to combat the spread of an infectious disease, measures seeking only to isolate infected persons, or even persons suspected of being infected, will sometimes be insufficient. Article 5(1)(e) should not be read in a manner that would preclude detention in such situations, since the purpose of that provision is to allow Contracting States to effectively combat the spread of contagious diseases.
61. Thirdly, it is perfectly possible to imagine outbreaks which require measures to isolate non-infected persons but which are locally confined, or are taken in the early stages of an outbreak, when the national threat levels remain low or moderate. Even if the current situation permits derogation under Article 15, such local or limited situations would not. This would mean that States were precluded from taking necessary targeted or early action to combat the spread of contagious disease at potentially great cost to health and life.
62. A final point is that it is politically undesirable for States to have to declare national emergencies in situations where their own national threat levels are not such as to justify it, simply in order to derogate from ECHR rights. It is preferable that the rights themselves are interpreted in a manner that allows

Governments to take necessary and proportionate measures, and which confines the use of Article 15 rather than expands it.

63. In our view, when confronted with the circumstances of the present Coronavirus pandemic, a court is very likely to conclude that Article 5(1)(e) is capable of applying to both infected and non-infected persons. Nothing in the text of Article 5 requires any other conclusion.
64. That is not, however, the end of the issue. Article 5 requires that measures under Article 5(1)(e) must be lawful, and this means not only that they must be compatible with domestic law, but also, (a) that the conditions of detention be clearly defined and the law foreseeable in its application, and (b) that the deprivation of liberty must be “*the last resort in order to prevent the spreading of the disease*”; less severe measures must have been considered and found to be insufficient to safeguard the public interest (Enhorn at [36])
65. Despite suggestions by some (including Lord Sumption<sup>31</sup>) that the current restrictions may not be evidence-based, being instead induced by panic about the virus, the fact is that most other European countries, and increasing numbers of countries globally, have adopted similar measures.<sup>32</sup> Moreover, in the case of the UK, the Government began with more relaxed measures with no legal enforcement, and only introduced the Regulations late in the day. Even having such measures in place, the NHS is reported to be a highly precarious state and operating on a war footing.
66. At present therefore the requirement of “*last resort*” would be satisfied. However, as Lord Anderson has suggested,<sup>33</sup> this may become an issue as time passes. For example, given the Government’s apparent position that persons who have suffered from Covid-19 and recovered from it are safe to return to normal society, the question might arise as to the necessity for their continued confinement; and pressure might continue to mount for all persons who think they might have had the virus to be able to demonstrate through testing that they have antibodies. In turn, the return of tested persons to society is likely to provoke a further issue, as people who have not suffered from the virus but are, or believe themselves to be, currently free of it may remain in indefinite confinement. If such persons are to remain in lockdown conditions for an indefinite or protracted period of time, the question of necessity and indeed non-discrimination is likely to assume importance.
67. However, at least initially, the most pressing issue of proportionality relates to specific aspects of the law and guidance which restrict the circumstances in which persons can leave home. For example, it might be argued that it is difficult to see what justification there could be for the restriction contained in the Welsh Regulations on persons leaving their home to exercise more than once per day, given that it is not present in the other Regulations. There have also been reports of a legal challenge being mounted by parents of autistic children who have justifiable medical reasons for needing to be more frequently out of their homes in circumstances that do not meet the exception for seeking medical assistance or taking

exercise.<sup>34</sup> In our view, amendments to the guidance to take account of situations such as this can be expected and are required to meet the requirement of proportionality.

68. The position of persons under the age of 18 also calls for consideration. There were initially conflicting Ministerial pronouncements on the position of minors. The Government Guidance on social distancing now states: “*where parents do not live in the same household, children under 18 can be moved between their parents’ homes*”. But the Regulations are more narrowly drawn, referring to “*existing arrangements for access to, or contact between ...*” parents (reg. 6(2)(j)). In many cases, there may be no concrete or regular arrangements and this restriction is difficult to justify in light of the more liberal statement in the guidance. Here, and in other cases where there is a conflict between the Regulations and guidance, issues of legal certainty, clarity and foreseeability also arise.

69. Indeed, a central part of the regime is the prohibition on leaving home without a “*reasonable excuse*”. Whilst that is a term used in other contexts, such as immigration curfews, it is far from clear what the term encompasses in the present, highly exceptional, situation. Other aspects of the Regulations, discussed above, are also ill-defined. Questions of legal certainty and foreseeability are therefore very likely to arise and to provide a potential basis for defending prosecutions under the Regulations.

#### **Other Convention Rights**

70. It is worth briefly considering two other Convention rights.

71. Article 11 guarantees the rights to freedom of peaceful assembly and of association with others, subject once again to restrictions prescribed by law and necessary in a democratic society for aims including “*the protection of health*”. Article 11 will of course be of particular significance in testing the justification for restrictions on gatherings and meeting with friends, on open-air events (even ones respecting social distancing) and engagement with religious or other supportive communities on which people rely. Similar considerations as to legal certainty will arise here as elsewhere, though in terms of the underlying merits, the restrictions on public gatherings, being less onerous than home confinement, are more readily justifiable.

72. Article 8 guarantees the right to respect for private and family life (as well as for an individual’s home) and is likely to be engaged in respect of the core restrictions imposed by the Regulations. It is not, however, likely to add substantially to the legal analysis. It would certainly reinforce arguments under Articles 5 and 11, for example concerning the need for disabled children to be able to leave the house more frequently than other children or permitting contact between children and their parents living in

different households; however, it is likely that the prism for most legal analysis and for legal challenges will be Articles 5 and 11.

## **(5) CONCLUSION**

73. This survey of the Regulations makes no claim to be comprehensive. Nor does this survey suggest that the core obligations imposed by the Regulations are unjustified. On the contrary, “*stay at home*” and social distancing orders are now recognised as vital and central globally to the battle against coronavirus. Exceptional measures are necessary to combat an unprecedented public health crisis. The measures are, nonetheless, ones that require very careful scrutiny and this paper has suggested that there are respects in which the Regulations can be tightened, reinforced and improved to enhance legal certainty and civil liberty.

---

1 As extended by the Emergency Powers (Defence) Act 1940 and subsequent Parliamentary resolutions.

2 Where the use of such force is (i) reasonable and (ii) necessary in the exercise of the power to remove that person to the place where they are living: see eg Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (UK [S.I. 2020/350](#)), regulation 8(3)(b) and 8(4).

3 See eg Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 5.

4 See eg Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulation 8(9), 8(10) and 8(4).

5 Cf the powers in section 51 and Schedule 21 (Powers relating to potentially infectious persons) and section 52 and Schedule 22 (Powers to issue directions relating to events, gatherings and premises) to what is now the Coronavirus Act 2020 (c.7), which provisions came into force on 25 March 2020, the date of Royal Assent (see s.87(1) to the 2020 Act).

6 Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020 ([Scottish S.I. 2020/103](#)); Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 ([Wales S.I. 2020/353 \(W. 80\)](#)); Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020 ([Statutory Rules of Northern Ireland 2020 No. 55](#)).

7 They must be approved subsequently by each legislature: [Public Health Control of Diseases Act 1984](#) section 45R in the case of the English Regulations and the Welsh Regulations, Schedule 19, para 6(3) of the [Coronavirus Act 2020](#) for Scotland and section 25Q of the [Public Health Act \(Northern Ireland\) 1967](#) for Northern Ireland.

8 Health Protection (Coronavirus) Regulations 2020 ([UK S.I. 2020/129](#)) passed to meet the threat of quarantined persons returning from an area of infection or suspected of being infectious for screening and quarantine. The vires for aspects of these regulations was unclear and detailed provisions are now contained in the Coronavirus Act 2020, Schedule 22.

9 *The Guardian*, [“How coronavirus advice from Boris Johnson had changed”](#) (23 March 2020).

10 *BBC News*, [“Stay local to exercise, says government”](#) (27 March 2020); see also [Gov.uk Guidance](#).

11 The [interview](#) was on *BBC World at One* (30 March 2020) from 17’34”; an edited transcript is available [here](#).

12 *The Times*, [“Lord Sumption warms against police overstepping limits”](#) (31 March 2020).

13 *The Times*, [“The Times View on Enforcement of Coronavirus laws: Policing by Consent”](#) (1 April 2020).

14 See e.g. *BBC News*, [“Coronavirus: Easter egg crackdown over essential status ‘wrong’”](#) (30 March 2020).

15 See e.g. *The Times*, [“Woman Fined £660 for ‘crime that doesn’t exist’”](#) (2 April 2020).

---

<sup>16</sup> COVID-19 – Policing brief in response to Coronavirus Government legislation, National Police Chiefs’ Council, College of Policing, 31 March 2020.

<sup>17</sup> See National Police Chiefs’ Council and College of Policing, [“Covid-19: Policing Brief response to Coronavirus Legislation”](#) (31 March 2020) and [Coronavirus Act 2020 \(the Act\): Support Public Health—exceptional powers for exceptional circumstances only \(3 April 2020\)](#).

<sup>18</sup> Cf Schedule 21 to the 2020 Act, paragraph 14(3)(e) of which makes provision to require a person (in England) to remain at a specified place in isolation from others for a specified period but only in certain limited circumstances and after either (i) screening or assessment for the virus confirming infection or being inconclusive or (ii) assessment by a public health officer finding reasonable grounds to suspect that the person is potentially infectious (paragraph 14(1)(a) and (b) respectively).

<sup>19</sup> England Regulations, regulation 3(1)(b). As soon as the Secretary of State considers that any restrictions or requirements set out in the Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State is required to (“must”) publish a direction terminating that restriction or requirement: regulation 3(3).

<sup>20</sup> Subject to exceptions for hospital, care home, school, prison and armed forces canteens, and for services feeding the homeless – as well as for workplace canteens where there is no practical alternative (England Regulations, Schedule 2, paragraph 2).

<sup>21</sup> Regulation 9(1)(a).

<sup>22</sup> The requirement in regulation 8(3) is simply that the relevant person “considers” the individual to be outside their home in contravention of regulation 6(1): contrast, for example, regulation 8(2) which provides for the giving of a prohibition notice where the relevant person “reasonably believes” there is a contravention of regulation 4 or 5.

<sup>23</sup> See National Police Chiefs’ Council and College of Policing, [“Covid-19: Policing Brief response to Coronavirus Legislation”](#) (31 March 2020).

<sup>24</sup> Paragraph 81: *“The argument that the restraint here was not sufficiently “complete” for the purpose of the tort for like reasons also leads nowhere. It suffices that, under force of compulsion of the notice of restriction (coupled with the threat of criminal sanction and with tagging), IJ was, and felt himself to be, obliged to be confined within the parameters of his home during the specified hours. That, moreover, cannot possibly be equated with a “mere restriction on movement”, as was suggested.”* Whilst the Claimant in *Jalloh* was subject to an electronic tag, this was not a decisive factor in the reasoning of the Court and is not a basis for distinguishing that case from the present circumstance.

<sup>25</sup> Health and Social Care Act 2008 (c.14), section 129.

<sup>26</sup> Jeff King, [“The Lockdown is Lawful”](#) (UKCLA Blog, 1 April 2020).

<sup>27</sup> David Anderson QC, [“Can we be forced to stay at home?”](#) (Personal Blog, 26 March 2020).

<sup>28</sup> The Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020 ([Scotland S.I. 2020/103](#)).

<sup>29</sup> Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (4th edition 2018) at 294.

<sup>30</sup> Alan Greene, [“States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic”](#) (Strasbourg Observers Blog, 1 April 2020).

<sup>31</sup> See note 11 above.

<sup>32</sup> For a graphic representation of measures around the world as at 18 March 2020 and as at 25 March 2020, see [https://twitter.com/O\\_LJ/status/1242770509395345409](https://twitter.com/O_LJ/status/1242770509395345409).

<sup>33</sup> See <https://twitter.com/bricksilk/status/1245291965886980096>.

<sup>34</sup> See <https://twitter.com/legalhackette/status/1245368366568800257>.