

# PRESSURE POINTS: ADMINISTRATIVE COURT REFUSES PERMISSION TO LEGAL CHALLENGE TO THE UK GOVERNMENT'S LOCKDOWN REGULATIONS (UK)

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Legal Briefings

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## [Dolan & Ors v Secretary of State for Health And Social Care & Anor \[2020\] EWHC 1786 \(Admin\)](#)

A claim brought by the entrepreneur Simon Dolan and others (“**the Claimants**”) seeking to challenge the lockdown measures introduced by the English Government following the Covid-19 outbreak has been refused permission in the Administrative Court. The claim attracted considerable attention as it was crowdfunded and challenged a key aspect of the Government’s response.

The Claimants challenged the provisions of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as amended (the “**Lockdown Regulations**”) on the basis that they were unlawful on various grounds. Following a hearing on 2 July 2020, Mr Justice Lewis refused permission to the Claimants.

## BACKGROUND

Following the outbreak of the virus and the consequent risk to public health and safety, the Secretary of State for Health and Social Care, Matt Hancock (“**the SoS**”), made the Lockdown Regulations on 26 March 2020, which introduced a number of restrictions and requirements on those living and working in England. This included the requirement for certain businesses to close during the emergency period, and also imposed strict restrictions on movement and gatherings (referred to colloquially as the ‘lockdown’).

The Lockdown Regulations have been amended a number of times since they were first made. These Regulations were also applicable only in England as the governments of Wales, Scotland and Northern Ireland made separate regulations using their devolved powers. Our previous blogposts on the Lockdown Regulations are available [here](#) and [here](#).

## THE CHALLENGE

Following a major crowdfunding campaign that saw them raise over £200,000, the Claimants sought permission to challenge the Lockdown Regulations. The Claimants argued that the Lockdown Regulations were unlawful on a number of public law grounds, including that they were *ultra vires* and irrational. The Claimants also suggested that specific provisions of the Lockdown Regulations breached the European Convention on Human Rights (“**ECHR**”). These grounds are summarised in paragraph 24 of the judgment.

It is worth noting that by the time the challenge was heard on 2 July 2020, a number of the restrictions set out in the original Lockdown Regulations had been replaced and were no longer in force. In fact, on 3 July, the Lockdown Regulations were superseded in most parts of England by The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 along with a separate set of regulations applicable to Leicester.

## ISSUES AND JUDGMENT

The Court considered nine separate issues as part of the application for permission.

- The first issue was whether the claim had been brought ‘promptly’ as required under the Civil Procedure Rules and whether the claim was academic as a result of the relevant provisions of the Lockdown Regulations no longer being in force. On the question of promptness, Mr Justice Lewis concluded that there was no failure to act promptly given the “*complexity and importance of the issues*” and that the Claimants were not prevented from bringing the claim on that basis. However, on the second question, the Court found that the claim for judicial review of the original regulation 6 (the prohibition on a person leaving home without reasonable excuse) and the original regulation 7 (the prohibition on more than two people gathering in public) was academic, and that there would be no practical purpose served through a claim for judicial review of those specific regulations. The Court observed that:

*“The fact that restrictions may be imposed in future, depending on the progress of the pandemic, does not provide a good reason for reviewing the original versions of the regulations now. Any challenge to a subsequent or replacement regulation would necessarily involve considering the content of that regulation and the circumstances leading to its imposition.”*

This observation may be of relevance to any future challenges to the Government’s response to the pandemic.

- The second issue before the Court was one of *vires* – specifically, whether the SoS had the legal power to make regulations applying to all persons in England under the powers conferred by the Public Health (Control of Diseases) Act 1984 ( “**the 1984 Act**”). The Court concluded that section 45C of the 1984 Act did in fact confer power on the SoS to make regulations that applied to persons, premises and things in England as a whole in appropriate circumstances (and on the basis that the restrictions would be kept under review in line with the provisions of the 1984 Act). Consequently, permission on that ground was also refused.
- The third issue focussed on the Claimants’ argument that the making of the Regulations was unlawful for four reasons of domestic public law. First, that the SoS had fettered his discretion by requiring five tests to be met before the Lockdown Regulations would be replaced. Secondly, it was argued that the SoS failed to have regard to relevant issues when making the Lockdown Regulations. Thirdly, the Claimants submitted that the Regulations were irrational, and finally, that they were not proportionate under the 1984 Act. The Court analysed these grounds in some detail in paragraphs 47-63 of the judgment, and concluded that there was no basis on which these four sub-grounds could be reasonably argued. Permission was accordingly refused on this issue.
- The fourth, fifth, sixth, seventh, and eighth issues all revolved around the Claimants’ arguments that the Lockdown Regulations imposed various requirements and restrictions that were contrary to a number of Articles of the ECHR. The relevant articles included the right to liberty and security (Article 5), the right to private and family life (Article 8), freedom of religion (Article 9), freedom of peaceful assembly and association (Article 11), and the right to property (Article 1 of the First Protocol). The Court considered the scope of the rights under these Articles, and concluded that it was not arguable that these rights and freedoms were affected. Even where specific rights were affected – for instance, in the case of the freedom of assembly and association – the Court concluded that the restrictions were justified and proportionate. The Court went as far as saying that *“in all reality in those circumstances, there is no realistic prospect of a court deciding in these, possibly unique, circumstances that the regulation was a disproportionate interference with the rights guaranteed by Article 11 of the Convention.”*

The only exception was the sixth issue on the freedom of religion. Specifically, the Claimants argued that the prohibition on the use of places of worship for communal acts of worship involved a breach of Article 9 of the ECHR. Mr Justice Lewis was minded to let that specific issue proceed to a full hearing in light of a previous decision on a similar issue ([R \(Hussain\) v Secretary of State for Health and Social Care \[2020\] EWHC 1392 \(Admin\)](#)). However, following the making of new regulations on 3 July 2020 permitting acts of communal worship for up to 30 people, this issue was considered to be academic. Nevertheless, as the new regulations were made after the hearing on 2 July, the parties have been given the opportunity to make further submissions on this point.

- The final issue was directed at the Secretary of State for Education (the second

Defendant), and focussed on the Government's 18 March 2020 announcement that education should not be provided at school premises in England save for the children of key workers and vulnerable children. The Claimants suggested that this announcement was in effect a direction for schools to close, and therefore amounted to a breach of Article 2 of Protocol 1 to the ECHR which protects the right to education. However, the Court concluded that there was no legally enforceable measure made by either SoS preventing attendance at school. Further, the Court noted that the current policy of the Government was to encourage the return of pupils on a phased basis. Consequently, any claim in relation to schools and Article 2 Protocol 1 was academic. Permission was therefore refused on this ground as well.

## SUMMARY

Through this detailed judgment refusing permission, the Administrative Court has firmly rejected the Claimants' submissions that the Government (acting through the two Secretaries of State) acted unlawfully in making the Lockdown Regulations. The Claimants are considering appealing the decision. It is unclear whether they intend to make further submissions to the Administrative Court on the freedom of religion issue.

It is worth noting that while the judgment relates to the most prominent aspect of the Government's response i.e. the decision to introduce the lockdown, other decisions taken by the Government either previously or going forward can still be challenged. However, in circumstances where the regulations and guidance are changing on a day-to-day basis, Mr Justice Lewis' comments on 'academic' claims may turn out to be relevant to any current and future challenges.

Separately, this claim was notable for being the biggest of the crowdfunded cases threatened or brought against the English Government so far in the Covid-19 context. Crowdfunding of judicial reviews provides an opportunity for political participation from the public at large, but we can see it throwing up numerous issues around how the money raised is being used, and whether funders are fully aware of the legal merits of challenges. The costs implications where a crowdfunded claim for judicial review fails are also as yet unknown, and Mr Justice Lewis made no comments on costs in this judgment.

If you have any questions on the public law aspects of Covid-19, please contact Andrew Lidbetter, Nusrat Zar, Jasveer Randhawa or Sahil Kher. You can listen to our podcast on various public law issues surrounding Covid-19 [here](#), including our latest episode on regulators and their response to the pandemic.

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# KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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