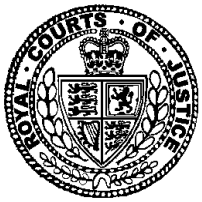

Neutral Citation Number: [2020] EWHC 3287 (Admin)

Case No: CO/3476/2020

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/20

**Before** :

**LORD JUSTICE HICKINBOTTOM**
**and**
**MRS JUSTICE WHIPPLE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**THE QUEEN ON THE APPLICATION OF**
**MATTHEW JAMES FRANCIS**

**Claimant**

**- and -**

**THE SECRETARY OF STATE**
**FOR HEALTH AND SOCIAL CARE**

**Defendant**

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**The Claimant appeared in person**
**Sir James Eadie QC, Zoe Leventhal** and **Christopher Knight** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 1 December 2020

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# Approved Judgment

**Lord Justice Hickinbottom:**

## Introduction

1. Between February and September 2020, severe acute respiratory syndrome coronavirus 2 ("coronavirus") was responsible for over 1m deaths worldwide, including 30,000 deaths in England. By the end of that period, the so-called "second wave" was in progress.

2. In response to the serious and imminent threat to public health that it posed, as evidenced by increasing rates of incidence, hospitalisation and death, on 27 September 2020, the Defendant Secretary of State made the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020 No 1045) ("the Regulations") which required any person notified of a positive test for coronavirus and close contacts of such persons to "self-isolate". The Regulations came into force the following day.

3. In this claim, the Claimant contends that the Secretary of State had no power to impose such a requirement, and seeks an order quashing the relevant parts of the Regulations.

4. Before us, the Claimant has appeared in person; and I commend him for presenting his arguments in such a coherent, focused and courteous way. Sir James Eadie QC, Zoe Leventhal and Christopher Knight appeared for the Secretary of State, and I also thank them for their helpful submissions.

## The Law

5. Because of the perceived urgency for the measure, the Regulations were made under the emergency procedure in section 45R of the Public Health (Control of Disease) Act 1984 ("the 1984 Act"), which allows for the approval by Parliament, not before, but within 28 days after the making of an instrument. The Regulations were duly debated and approved by both Houses of Parliament within that period.

6. The Explanatory Memorandum to the Regulations prepared as part of that procedure explained that, in light of the exponential growth of incidence of coronavirus, rising morbidity levels and severe economic damage it was causing across the world, "further action to suppress the virus, including new restrictions on personal liberty and penalties for non-compliance, [were] considered necessary to save lives, protect the NHS and the country's economy" (paragraph 3.3). It went on to say (at paragraph 6.6):

> "In particular, this instrument imposes requirements on people who are notified that they are legally required to self-isolate. It has a key role to play in slowing or preventing a rise in the rate of reproduction… of [coronavirus] and reducing the total number of infected people by restricting the movement of people most at risk of spreading the virus."

That made the purpose of self-isolation clear: it was and is to control the rate of reproduction of the virus and thus the number of infected people. And the

Memorandum identified the means: by restricting the movement of people most at risk of spreading the virus. The Memorandum said that "the Secretary of State… considers these measures a proportionate response to the public health risks arising from the resurgence of coronavirus in England" (paragraph 3.3); and that they were compatible with the European Convention on Human Rights ("the ECHR") (paragraph 5.1).

7. The crucial regulation for the purposes of this claim is regulation 2, a lengthy but, on the face of it, conceptually straightforward provision. The regulation refers to "P" and "R", as defined in regulation 5: "P" means a person subject to the self-isolation requirement in regulation 2(2), and "R" and "responsible adult" mean an adult who has custody or charge of, or parental responsibility for, a child. Under the heading, "Requirements on person notified of positive test for [coronavirus] and close contacts of such persons", regulation 2 provides (so far as relevant to this appeal):

> "(1) This regulation applies where an adult is notified, other than by means of the NHS Covid 19 smartphone app developed and operated by the Secretary of State, by a person specified in paragraph (4) that—
>
> (a) they have—
>
> (i) tested positive for [coronavirus] pursuant to a test after 28 September 2020, or
>
> (ii) had close contact after 28 September 2020 with someone who has tested positive for coronavirus;
>
> (b) a child in respect of whom they are a responsible adult has—
>
> (i) tested positive for coronavirus pursuant to a test after 28 September 2020, or
>
> (ii) come into close contact after 28 September 2020 with someone who has tested positive for coronavirus.
>
> (2) Where—
>
> (a) paragraph (1)(a) applies, the person notified must—
>
> (i) self-isolate for the period specified in regulation 3; and
>
> (ii) notify the Secretary of State, if requested by a person specified in paragraph (4), of the address at which they will remain pursuant to the restriction in paragraph (3)(a); and

(b) paragraph (1)(a)(i) applies, the person notified must notify the Secretary of State of the name of each person living in the same household as P;

(c) paragraph (1)(b) applies, R must—

(i) secure, so far as reasonably practicable, that the child self-isolates for the period specified in regulation 3; and

(ii) notify the Secretary of State, if requested by a person specified in paragraph (4), of the address at which the child will remain pursuant to the restriction in paragraph (3)(a); and

(d) paragraph (1)(b)(i) applies, R must notify the Secretary of State of the name of each person living in the same household as the child.

(3) in paragraph (2), 'self-isolate' means P is subject to the following restrictions—

(a) P must remain in—

(i) P's home;

(ii) the home of a friend or family member of P or of R where P is a child; or

(iii) bed and breakfast accommodation, accommodation provided or arranged under section 4, 95 or 98 of the Immigration and Asylum Act 1999 or other suitable place;

(b) P may not leave the place specified in sub-paragraph (a) except where necessary—

(i) to seek medical assistance, where this is required urgently or on the advice of a registered medical practitioner, including to access—

(aa) services from dentists, opticians, audiologists, chiropodists, chiropractors, osteopaths and other medical or health practitioners, or

(bb) services relating to mental health,

(ii) to access veterinary services, where this is required urgently or on the advice of a veterinary surgeon,

> (iii) to fulfil a legal obligation, including attending court or satisfying bail conditions, or participating in legal proceedings,
>
> (iv) to avoid a risk of harm,
>
> (v) to attend a funeral of a close family member,
>
> (vi) to obtain basic necessities, such as food and medical supplies for those in the same household (including any pets or animals in the household) where it is not possible to obtain these provisions in any other manner,
>
> (vii) to access critical public services, including social services, and services provided to victims (such as victims of crime),
>
> (viii) to move to a different place specified in sub-paragraph (a), where it becomes impracticable to remain at the address at which they are.
>
> (4) The persons specified for the purpose of paragraphs (1) and (2) are—
>
> (a) the Secretary of State;
>
> (b) a person employed or engaged for the purposes of the health service…;
>
> (c) a person employed or engaged by a local authority."

8. The relevant periods of self-isolation are set out in regulation 3. The different periods prescribed have no part to play in this claim.

9. Part 3 of the Regulations deals with enforcement. Regulation 10(1) and (2), which feature in the Claimant's grounds of challenge, provide:

> "(1) Where an authorised person considers that P is away from the place that they are self-isolating in contravention of regulation 2, the authorised person may—
>
> (a) direct P to return to the place where they are self-isolating, or
>
> (b) remove P to the place that they are self-isolating.
>
> (2) An authorised person exercising the power in paragraph (1)(b) may use reasonable force, if necessary, in exercise of the power."

10. More generally, as with many regulatory schemes, there are a variety of criminal and civil enforcement steps available. Regulation 11 sets out various offences, including breaching regulation 2 "without reasonable excuse" (regulation 11(1) and (2)) and contravening a requirement under regulation 10 again "without reasonable excuse" (regulation 11(4)). All offences are punishable by a fine (regulation 11(5)). Regulation 12 provides a fixed penalty scheme as an alternative to prosecution. For example, for a breach of regulation 2, the fixed penalty is £1,000 for a first offence, rising to £10,000 for a fourth offence.

11. I will consider the specific grounds of challenge shortly; but each is based on the proposition that the Secretary of State did not have the power to make the regulations that he did. Consequently, it is necessary to look at the powers the Secretary of State purported to use when making the Regulations, namely those in Part 2A of the 1984 Act as inserted by Part 3 of the Health and Social Care Act 2008 ("the 2008 Act").

12. In part to implement the World Health Organisation International Health Regulations 1969 ("the WHO Regulations"), the 1984 Act was initially concerned with five specific "notifiable diseases": cholera, plague, relapsing fever, smallpox and typhus (section 10).

13. The powers given over those who had been infected with, or exposed to, a notifiable disease, exercisable by a magistrate, were set out in sections 35-38 of the Act. By sections 35 and 36, a magistrate could require the medical examination of an individual person or a group of persons where, on evidence from a doctor or the local authority, there was reason to believe that they were infected by a notifiable disease or carrying an organism that could cause such infection. Section 37, under the heading "Removal to hospital of person with notifiable disease", provided:

> "Where a justice of the peace (acting, if he deems it necessary, ex parte) is satisfied, on the application of the local authority, that a person is suffering from a notifiable disease and—
>
> (a) that his circumstances are such that proper precautions to prevent the spread of infection cannot be taken, or that such precautions are not being taken, and
>
> (b) that serious risk of infection is thereby caused to other persons, and
>
> (c) that accommodation for him is available in a suitable hospital vested in the Secretary of State,
>
> the justice may, with the consent of the Area or District Health Authority responsible for the administration of the hospital, order him to be removed to it."

Section 38 gave a magistrate the power to detain someone in hospital who was suffering from a notifiable disease and who would not on leaving the hospital be provided with lodging or accommodation in which proper precautions could be taken to prevent the spread of the disease by him or her.

14. As the Explanatory Notes to the 2008 Act explain, the WHO Regulations were updated in 2005 in the light of the severe acute respiratory syndrome coronavirus 1 ("SARS") outbreak in the period 2003-4, the inability of the 1969 regime to deal with such new threats then being recognised. There can be no doubt that the amendments introduced by the 2008 Act were specifically designed to give appropriately broad and flexible powers to deal with pandemics of the coronavirus-kind, the Act itself recognising the vital importance of limiting the incidence and spread of such infections.

15. Section 45G(1) of the 1984 Act, inserted by the 2008 Act, gives powers to magistrates, if they are satisfied that (a) an individual is or may be infected, (b) the infection is one which presents or could present a significant harm to human health, (c) there is a risk that that person might infect others and (d) it is necessary to make the order in order to remove or reduce that risk. The available powers are set out in section 45G(2), namely to impose one or more of the following restrictions and requirements:

> "(a) that P submit to medical examination;
>
> (b) that P be removed to a hospital or other suitable establishment;
>
> (c) that P be detained in a hospital or other suitable establishment;
>
> (d) that P be kept in isolation or quarantine;
>
> (e) that P be disinfected or decontaminated;
>
> (f) that P wear protective clothing;
>
> (g) that P provide information or answer questions about P's health or other circumstances;
>
> (h) that P's health be monitored and the results reported;
>
> (i) that P attend training or advice sessions on how to reduce the risk of infecting or contaminating others;
>
> (j) that P be subject to restrictions on where P goes or with whom P has contact;
>
> (k) that P abstain from working or trading."

The powers in paragraphs (a)-(c) replaced those in former sections 35-38 (which were repealed); but in more succinct form, and with an extension of the places to which a person might be removed, or in which he or she might be detained, to "a hospital or other suitable establishment", a change to which I shall return.

16. The powers under section 45G(1) and (2) are given to magistrates in respect of individual persons or, as expressly provided for by section 45J, groups of individuals. The requirement for the court to consider the specific facts and circumstances of the

particular case is clear from the evidence upon which the magistrate is required to act. Section 45G(7) requires the Secretary of State to provide for evidence that must be available to a magistrate before he or she can be satisfied as to the matters in section 45G(1). The relevant regulation is regulation 4 of the Health Protection (Part 2A Orders) Regulations 2010 (SI 2010 No 658) ("the Part 2A Orders Regulations"), which identifies the evidence as follows (so far as relevant to this claim):

> "(a) a report which gives details (insofar as known and relevant), or gives reasons for the omission of details, of—
>
> (i) the signs and symptoms of the infection… in the person (P) who is the subject of the application,
>
> (ii) P's diagnosis,
>
> (iii) the outcome of clinical or laboratory tests, and
>
> (iv) P's recent contacts with, or proximity to, a source or sources of infection…;
>
> (b) a summary of the characteristics and effects of the infection… which P has or may have which includes an explanation of—
>
> (i) the mechanism by which the infection… spreads,
>
> (ii) how easily the infection… spreads amongst humans, and
>
> (iii) the impact of the infection…on human health (by reference to pain, disability and the likelihood of death);
>
> (c) in relation to applications seeking an order under section 45G(2), an assessment of the risk to human health that P presents, including a description of any acts or omissions, or anticipated acts or omissions, of P which affect that risk;
>
> (d) …
>
> (e) in relation to applications seeking an order under section 45G(2), an assessment of the options available to deal with the risk that P presents;…".

By regulation 4(3) and (4), a report under paragraph (a) must include the details mentioned in at least one of subparagraphs (a)(i) to (iv); and the evidence must be given by persons who are suitably qualified to give the evidence.

17. Those are the powers – the much wider powers – given to magistrates by the 2008 Act in respect of individuals who may be infectious. However, in the new provisions, powers exercisable with a view to controlling the reproduction rate of a disease were also given to the Secretary of State. Indeed, as the Court of Appeal said in its judgment handed down earlier this afternoon in R (Dolan, Monks and AB) v

Secretary of State for Health and Social Care and the Secretary of State for Education [2020] EWCA Civ 1605 ("Dolan") at [71]:

> "… [W]e have reached the conclusion that the purpose of the amendments that were made in 2008 clearly included giving the relevant Minister the ability to make an effective public health response to a widespread epidemic such as the one that SARS might have caused and which [coronavirus] has now caused."

That is clearly so.

18. Thus, the inserted section 45C(1) of the 1984 Act provides:

> "The appropriate Minister may by regulations 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 and Wales (whether from risks originating there or elsewhere)."

This reflects, not the clinical necessity of treating those who are sufficiently affected, but the need to control the reproduction rate of "new" diseases such as coronavirus.

19. Section 45C(3) – it seems to me, given the obvious width of section 45C(1), inserted merely for the avoidance of doubt on account of the potential loss of personal rights which they might involve – sets out particular matters which may be covered by such regulations, notably (for the purposes of this claim):

> "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."

20. Of that, by way of further explanation, section 45C(4)(d) provides:

> "The restrictions or requirements mentioned in subsection (3)(c) include in particular—
>
> …
>
> (d) a special restriction or requirement."

21. Section 45C(6) defines "special restriction or requirement"; but again, as was said in Dolan at [63]:

> "… [I]t is abundantly clear that, when Parliament referred to a special restriction or requirement in paragraph (d), that was not

> a provision which cuts down the generality of the power conferred on the Secretary of State earlier in section 45C."

So far as it applies to persons, section 45C(6) defines the phrase in terms of "a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2)…" – listed at paragraph 15 above – but subject to section 45D(3) which provides that "regulations under section 45C may not include a special restriction or requirement mentioned in section 45G(2)(a), (b), (c) or (d)". The Act therefore draws a clear distinction between restrictions or requirements (a)-(d) which can only be imposed by a magistrate on the basis of evidence specific to an individual; and (e)-(k) which can be imposed by regulations made by the Secretary of State.

22. For the purposes of this claim, it is particularly important to note that the statutory regime gives the Secretary of State the power to make regulations prescribing restrictions on where the relevant person ("P") goes and with whom he or she has contact (paragraph (j)); but withholds from the Secretary of State the power to make regulations under which P can be kept in isolation or quarantine (paragraph (d)) or removed to or detained in a hospital or other suitable establishment (paragraphs (a)-(c)). The latter statutory prohibition is especially important in the context of this claim, because the Claimant contends that each of the challenged provisions falls within one of the proscribed categories.

23. In addition to those categories, regulations made under section 45C may not include provision enabling the imposition of any special restriction or requirement:

    i) unless they are made in response to a serious or imminent threat to public health (section 45D(4)(a));

    ii) unless the Secretary of State considers that they are proportionate to what is sought to be achieved by imposing it (section 45D(1)); and

    iii) unless they are compatible with the ECHR (section 6 of the Human Rights Act 1999).

24. The restrictions put in place to combat coronavirus are constantly evolving in response to the rate of reproduction and other factors. It so happens that, this afternoon, the Secretary of State is proposing to make further regulations, in the form of the Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment( (England) Regulations 2020, with the intention that they be debated in Parliament tomorrow. A copy of those draft regulations has been provided to us. However, although they amend the Regulations with which we are concerned, it is rightly not suggested by either party that they do so in a way material to the issues with which we have to deal.

25. Furthermore, earlier this afternoon, as I have already indicated, the Court of Appeal handed down its judgment in Dolan. That case also involved a challenge to restrictions imposed as a result of coronavirus (namely restrictions on schools and other educational establishments); and, in upholding the refusal of the challenge the Court of Appeal stressed the need to ascertain the intention of legislative provisions from the words used but in the light of their context and purpose (see [69], quoting R (Black) v Secretary of State for Justice [2017] UKSC 81; [2018] AC 215 at [36(3)]

per Baroness Hale of Richmond PSC). Both parties before us not only accepted that proposition, but expressly relied upon it. However, the issues in this case are very different from those raised in Dolan; and it is again rightly common ground that it does not directly assist in addressing the issues of construction with which we have to deal. It has therefore not been necessary for us to adjourn to enable the parties to consider that judgment at greater length.

## The Grounds of Challenge

26. The Claimant relies upon three grounds of appeal.

27. First, he submits that, in requiring a person notified that he or she has tested positive for coronavirus (or has been in close contact with someone who has tested positive) to self-isolate, regulation 2(2)(a)(i) is a restriction or requirement that a person "be kept in isolation or quarantine"; and, as such, it cannot be the subject of regulation by the Secretary of State and is unlawful as a result of section 45D(3) read with section 45G(2)(d). Chamberlain J gave permission to proceed with this ground by his Order of 14 October 2020.

28. Second, relying on R (Jalloh) v Secretary of State for the Home Department [2020] UKSC 4; [2020] 2 WLR 41, he submits that a person who is subject to the self-isolation requirements of regulation 2(2)(a)(i) is "*detained* in a hospital or other suitable establishment" (emphasis added), and they are therefore unlawful as a result of section 45D(3) read with section 42G(2)(c).

29. Third, he submits that, in giving a power to authorised persons (such as police constables) to remove a person to his or her place of self-isolation and/or detain him or her there, regulation 10(1)(b) is a restriction or requirement that a person be removed to or detained in "a hospital *or other suitable establishment*" (emphasis again added), which is wide enough to include (e.g.) a person's home; and such a restriction or requirement cannot be the subject of regulation by the Secretary of State and is therefore unlawful as a result of section 45D(3) read with section 45G(2)(b).

30. In respect of the second and third grounds, which derive from the same phrase in the Regulations and which are closely related, although he did not pursue any claim based on human rights, the Claimant submitted that the right of liberty (including the rights not to be removed to a particular place and not to be detained) is a fundamental right; and therefore, relying upon the principle enunciated by Lord Hoffmann in R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115 at pages 131-132, not to be overridden by general or ambiguous words.

31. These second and third grounds were not initially pleaded; but Mostyn J gave permission to amend the grounds to include them by his Order of 19 November 2020. Although he observed that he considered the grounds "tenable", he did not formally conclude they were arguable or deal with the applications for permission to proceed. They are however not only linked to each other, but also to the first ground; it seems to me that Mostyn J would not have granted permission to amend to include the grounds unless he considered them arguable; and we have heard full argument on them. I would grant permission to proceed on both of these further grounds.

32. In his original grounds, the Claimant contended that the Regulations were not only beyond the Secretary of State's powers, but legally irrational in the Wednesbury sense (i.e. no Secretary of State could sensibly have made the challenged regulations) and in breach of article 5 of the ECHR which protects the right to liberty. However, not only was the application for permission to proceed with those grounds refused by Chamberlain J and not renewed, but, before us, the Claimant positively accepted that the self-isolation of those who test positive for coronavirus is proportionate, reasonable and rational; and, indeed, "it is a vital part of the response to the deadly disease that threatens the most vulnerable amongst us, those who require our protection, our support and our understanding…" (paragraph 2 of his skeleton argument). He re-emphasised that stance in his oral submissions to us today. The Claimant's claim is in any event now limited to whether the Secretary of State had the power to make the specific regulations he challenges. As I have already indicated (paragraph 22 above), he contends that each of the challenged regulations is specifically proscribed by section 45D(3) of the 1984 Act.

33. On 26 October 2020, Nicol J made a costs capping order in terms that, irrespective of the result of the claim, there should be no order as to costs.

## Ground 1: Self-Isolation

34. As his first ground, the Claimant submits that regulation 2(2)(a)(i), in requiring a person to self-isolate, requires a person to be "kept in isolation". It is a requirement backed by the threat of a fine or penalty on breach, and, more directly, by the powers in regulation 10(1) and (2) to return an individual to their place of self-isolation, by use of force if necessary. Thus, it is submitted that regulation 2(2)(a)(i) falls within an area proscribed for regulation-making purposes by section 45D(3). It is therefore unlawful as being *ultra vires*.

35. However, I am unable to accept the central premise upon which this argument is based, namely that "self-isolation" is the same as, or at least a subset of, "isolation" or "isolation or quarantine".

36. "Self-isolation", as used in the Regulations, is a term of art defined in regulation 2(3) as a requirement that, for the period as set out in regulation 3, the relevant person remains in a particular place, namely his or her home, the home of a friend or family member, bed and breakfast accommodation, accommodation provided or arranged under the Immigration and Asylum Act 1999 "or other suitable place".

37. I am unable to accept the Claimant's interpretation of regulation 2(3)(a) (which concerns where self-isolation can take place: see paragraph 7 above) in two respects. He submitted that:

    i) regulation 2(3)(a)(ii) applies only to a child, because "where P is a child" governs both "P" and "R"; and therefore it is only a child who may resort to the home of a friend or family member; and

    ii) regulation 2(3)(a)(iii) applies only to accommodation in an immigration context, and "… or other suitable place" has to be construed accordingly.

Any wider interpretation, he said, would fundamentally undermine the purpose of the Regulations to limit the movement and contact of those with (or who had had exposure to) coronavirus.

38. With regard to regulation 2(3)(a)(iii), whilst I accept "… or other suitable place" could have formed a new subparagraph (iv) within regulation 2(3)(a), it is clear that that phrase cannot have the meaning ascribed by the Claimant, because "bed and breakfast accommodation at the beginning of that paragraph" is clearly not restricted to an immigration context. Nor, in my view, even arguably, is "other suitable place". It is clearly a reference to another place – any other place, other than a home (covered by (i) and (ii)) – that is suitable for self-isolation.

39. That would in any event render the interpretation the Claimant posits for regulation 2(3)(a)(ii) somewhat empty; but, on its true construction, it seems to me that "where P is a child" governs only "R", so that paragraph means "the home of a friend or family member of (a) P or of (b) R where P is a child". In other words, resort can be had to the home of a friend or family member by both children and adults alike. In my view, that is the only possible construction, when that phrase is seen in its full context.

40. I do not accept that those constructions I favour undermine the purpose of the Regulations, namely limiting the movement of those with or recently exposed to coronavirus and their contact with others so as to reduce the reproduction rate of the disease; because the Regulations expressly seek to limit movement and contact on a relative basis, limiting liberty in a proportionate way, taking into account the interests and welfare of those involved. This is an aspect of the Regulations to which I shall return (see paragraph 55 below).

41. Therefore, whilst I understand that a person required to self-isolate may in practice wish to limit the contact he or she has with household members, his or her ability to mix with – and have free contact with – anyone else who lives in the place in which he chooses to self-isolate is legally uninhibited. However, once a person has decided upon the single place within those categories where he will self-isolate, he or she may not leave that place or mix with people outside that household except where necessary for one of the purposes listed in regulation 2(3)(b) (e.g. to go food shopping, or to attend a funeral, or where it becomes impracticable to remain in that address).

42. "Self-isolation" is therefore quintessentially a restriction "on where P goes" and, perhaps to a lesser extent, "on… with whom P has contact", within the terms of section 45G(2)(j).

43. Neither "isolation" nor "quarantine" is defined in the Regulations or in any iteration of the 1984 Act. Consequently, the starting point for their construction in this context is how the words are used in ordinary language. As such, they too clearly involve a restriction on where a particular person can go, and with whom he or she can have contact; but it is self-evident from the wording of section 45G that they cannot be defined simply in terms of those restrictions, because the Secretary of State is expressly given the power to make such restrictions (under section 45G(2)(j)) but is proscribed from making regulations "that [any person] be kept in isolation or quarantine" (under section 45D(3)). "Isolation or quarantine" must therefore have an element over and above a restriction on movement and contact.

44. However, that element is not found in compulsion, which is a feature of both isolation and self-isolation. As the Claimant properly emphasised, someone who is subject to self-isolation may be compelled to stay in his or her place by the threat of criminal or civil sanctions in the event of breach, and may be physically returned to such a place with the use of such force as is reasonably necessary. The distinction must lie elsewhere.

45. In the ordinary usage of the word, "to isolate" means to cause to be alone – literally, to make into an island. "Quarantine" is simply a period of isolation for someone who has been exposed to a disease, but has not yet developed it. For the Secretary of State, Sir James Eadie submitted that, in section 45G(2)(d), these terms are used in a medical context, so that "isolation" means the separation of an infected person from everyone except those involved in clinically managing the infection; and "quarantine" means the similar separation from everyone, except those involved in clinical observation, of a person who has been exposed to infection, but prior to the development of the condition, in the period when he or she might develop it. Because of the need for clinical management or supervision, isolation and quarantine will usually be in a medical establishment, although they may be elsewhere (including in a person's home) but only where, in that place, contact with others is restricted to contact with clinicians and others involved in medical management or supervision.

46. In my view, that is the correct interpretation of the section 42G(2)(d) on the face of the words used. In coming to that conclusion, I have particularly taken into account the following.

47. First, as Sir James Eadie submitted, section 42G(2)(j) of the 1984 Act uses the phrase "isolation or quarantine"; but regulation 2(2)(a)(i) uses the term "self-isolate". It is a tenet of construction that different terms, as used in the same statutory scheme, are intended to have different definitions and relate to different concepts.

48. Second, as I have described, the need for "isolation or quarantine" under section 42G(2)(d) (like the need for medical examination or hospitalisation under section 42G(2)(a)-(c)) can only be sufficiently shown on the basis of evidence – usually, medical evidence – in respect of the circumstances of the particular individual. Such evidence is more likely to be necessary when an order requiring some form of future clinical intervention or supervision is being contemplated; it is not necessary where someone is going to be required to stay at home or other place without any such requirement.

49. Third, whilst neither the 1984 Act nor the Regulations define "isolation", other regulations made by the Secretary of State under the 1984 do define the term, and define it in the way I have described. The Public Health (Aircraft) Regulations 1979 (SI 1979 No 1434) ("the Aircraft Regulations") and the Public Health (Ships) Regulations 1979 (SI 1979 No 1435) ("the Ships Regulations"), which as their names suggest concern the prevention of public health danger from aircraft and shipping vessels, have both been made by the Secretary of State under section 13 of the 1984 Act. Where a person intending to leave an aircraft is suffering, or the medical officer suspects he or she is suffering, from an infectious disease, regulation 9(1)(a) of the Aircraft Regulations gives that officer the power to:

> "… cause such person on leaving the aircraft to be isolated, or to be sent to a hospital or to some other suitable place approved for that purpose by the responsible authority, as may be appropriate."

Regulation 10(1)(a) of the Ships Regulations is to similar effect as applied to ships. Regulation 2(1) of each set of Regulations defines "isolation" as follows:

> "'isolation', when applied to a person or group of persons, means the separation of that person or group of persons from other persons, *except the health staff on duty*, in such a manner as to prevent the spreading of infection" (emphasis added).

Whilst – as the Claimant pointed out – regulations made under a primary statute cannot of course be used to construe that Act, in the sense that it cannot be assumed that the Secretary of State is using a term in the sense that Parliament intended it to be used, it is noteworthy that both the Aircraft Regulations and the Ships Regulations were laid before Parliament and approved by Parliament under the negative approval procedure required by section 13(6) of the 1984 Act. They have, to that extent, Parliamentary endorsement.

50. Fourth, although in my view it is unnecessary to rely on it, it comes as some comfort that, during the progress of the Bill that became the 2008 Act, at the House of Lords' Grand Committee stage and in response to a proposed amendment to section 45G(2) to remove the reference to "isolation", the Minister (Baroness Thornton) expressly approved the following description: "Isolation involves the clinical management of a person who is already infected…" (Hansard HL, vol 701, 22 May 2008, col 596GC).

51. In his written submissions, the Claimant did not appear to accept that "isolation" necessarily implies some form of clinical management; but, in the course of argument before us, he fully accepted that it did. In my view, for the reasons I have given, he was right to do so.

52. However, he submitted that self-isolation *does* require clinical management or supervision because (i) it can only be triggered by a clinically administered test or by a clinician as part of the NHS Test and Trace scheme and (ii) self-isolation may be the subject of monitoring. I am unpersuaded. Isolation and quarantine imply some form of required clinical management or supervision during the period of isolation/quarantine: it is insufficient that such a period can only be triggered by a decision involving a clinician, even if that be the case here (which, on the limited evidence that we have, is far from clear: regulation 2(4) certainly provides that notification of a positive test or close contact may be given by a non-clinician). Self-isolation may be monitored to ensure that those who should be self-isolating are doing so, for example by calls to ensure that an individual is still at his or her chosen place of self-isolation; but it does not require that (and there is no evidence to suggest that in practice) the contact is made, required or triggered by a clinician. There is nothing to suggest that it is anything other than an administrative procedure.

53. With regard to "quarantine", although it is colloquially said that those who come to the UK from many countries abroad have to "quarantine" because of the risk that they have coronavirus in asymptomatic or other covert form, the requirements on those

who arrive in England are set out in the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (SI 2020 No 568) as amended, under which the requirement is, not to "quarantine", but to "self-isolate", i.e. "isolation from others in accordance with this regulation", regulation 4(8) making expressly clear that there is no requirement to remain in isolation from any member of the household in which they self-isolate. Neither does that, therefore, run contrary to the construction of self-isolate which I prefer, in which there is no requirement for a clinical role. Indeed, those regulations again appear to distinguish between "self-isolation" and quarantine properly so-called.

54. Thus, in my view, "isolation" and "quarantine" as used in section 45G(2)(d) of the 1984 Act involve an element of clinical management and/or supervision and the exclusion of contact with anyone other than those involved in that management and supervision, which is absent from the definition of "self-isolation" as set out in the Regulations. Self-isolation restricts – indeed, severely restricts – a person's movement, but does not restrict those with whom that person may live as part of a household in his or her home or other chosen place.

55. The Claimant, relying on Black (see paragraph 25 above), submitted that that construction would be contrary to the whole purpose of the Regulations in limiting contact of those who have coronavirus; but that submission fails to take into account the fact that the Regulations do not take an absolute position. "Self-isolation" is different from "isolation" in this respect: because the Regulations, far from being absolute, seek to balance the public health need to reduce the degree to which an infected person (or person exposed to infection) has contact with other people, with the need to ensure that there is no more than a proportionate interference with that person's rights. For example, the regulations permit even an infected person to leave their home, if necessary, e.g. to attend a funeral or a veterinary surgeon. That is inconsistent with the definition and concept of "isolation or quarantine". That balance is also reflected in the choice of place of self-isolation allowed. As I have indicated, the Claimant, now, accepts that the Regulations do not disproportionately interfere with or otherwise breach an individual's rights.

56. In my view, the differing construction of "self-isolate" from "isolation" should not come as any surprise, because they reflect different public health purposes driven by different types of diseases. "Isolation" is intended to ensure that an individual is properly clinically managed and supervised – vital in the "old" notifiable diseases, as well as restricting opportunities for him or her to spread the disease. "Self-isolation" is targeted on the "new" diseases such a coronavirus which, whilst sadly fatal for many, is nevertheless symptomless or not prone to serious effects for most, but can spread very quickly and with devastating effect. It is therefore focused on merely reducing the reproduction rate of the disease, which is essential for such viruses.

57. For those reasons, in my view, the Secretary of State had the power to make regulation 2(2)(a)(i) of the Regulations under section 45C(2)(j) of the 1984 Act, and that regulation is not contrary to section 45D(3) read with section 45G(2)(d). Consequently, I do not consider that the Claimant's first ground has been made good.

## Ground 2: Detention

58. As his second ground, on the basis of authorities, the Claimant submits that the requirement to self-isolate within the Regulations is unlawful, because it amounts to "detention", and section 45D(3) read with section 45G(2)(c) proscribes regulations that a person "be *detained* in a hospital or other suitable establishment".

59. In respect of the authorities relied the Claimant upon in support of that proposition, R v Bournewood Community and Mental Health NHS Trust ex parte L [1999] 1 AC 458 concerns article 5 of the ECHR, which is not in play in this claim. Meering v Graham-White Aviation Company Limited (1920) 122 LTR 44 is authority for the proposition that a person can be detained without realising it; but that is of no assistance in determining the scope of "detention". The other authorities to which he referred were generally concerned with the scope of "detention". All of them were considered in Jalloh, which, for the purposes of this claim, authoritatively set out the criteria for "detention" at which the Claimant's submissions on the authorities in respect of this ground were aimed.

60. It is to Jalloh that I therefore turn. The case concerned a claim against the Secretary of State for the Home Department for false imprisonment. Mr Jalloh was the subject of a deportation order, and liable to be administratively detained pending removal. However, rather than detaining him, purportedly using her powers under Schedule 3 to the Immigration Act 1971, the Home Secretary imposed a night-time curfew upon him which required him to spend the hours of 11pm to 7am each day at his home address in Sunderland. That order, which was enforced by an electronic tag and the threat of criminal sanctions in the event of breach, was in place from 3 February 2014 to 14 July 2016. He claimed that the 1971 Act did not give the Home Secretary the power to impose such a curfew, and that the restriction on his liberty amounted to imprisonment for the purposes of the claim of false imprisonment. The Supreme Court held that there could be imprisonment at common law without there being a deprivation of liberty for the purposes of article 5 of the ECHR; and, laying article 5 aside, the curfew amounted to imprisonment at common law.

61. The Claimant especially relies upon passages of the judgment of court delivered by Baroness Hale of Richmond. Those passages, put into their context, are as follows:

> "24. As it is put in Street on Torts, 15th ed (2018), by Christian Witting, p 259, "False imprisonment involves an act of the defendant which directly and intentionally (or possibly negligently) causes the confinement of the claimant within an area delimited by the defendant". The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process…. The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.
>
> 25. In this case there is no doubt that the defendant defined the place where the claimant was to stay between the hours of 11pm and 7am. There was no suggestion that he could go

> somewhere else during those hours without the defendant's permission….
>
> 26. The fact that the claimant did from time to time ignore his curfew for reasons that seemed good to him makes no difference to his situation while he was obeying it. Like the prisoner who goes absent from his open prison, or the tunneller who gets out of the prison camp, he is not imprisoned while he is away. But he is imprisoned while he is where the defendant wants him to be."

62. The Claimant submits that, particularly in the light of the power in regulation 10(1)(b) to remove a person subject to the self-isolating regime back to the place of self-isolation, using force if necessary, self-isolation amounts to "imprisonment" (and, thus, "detention") in this sense.

63. However, in my view, the situation for an individual required to self-isolate is readily distinguishable. As Baroness Hale made clear in the passages I have quoted, "imprisonment" involves another person or authority defining the place where an individual must stay. As I have described, the Regulations do not prescribe where someone required to self-isolate must stay, the only restriction in regulation 2(3)(a) being that the place must be "suitable", i.e. suitable for self-isolation. The range of potential places at which a person might choose to self-isolate, whilst not being entirely limitless, is very wide indeed; and, where a chosen place becomes impracticable, the Regulations allow the person to choose again. Neither the Secretary of State nor anyone else may define the place where that person is required to stay which, as Jalloh makes clear, is an essential element of "imprisonment". Furthermore, an individual subject to the regime is allowed to leave the place of self-isolation for identified purposes; and cannot be liable to conviction or for civil penalty if he acts with reasonable excuse. The Regulations of course involve substantial restrictions on a person who is required to self-isolate; but they do not involve that person being "imprisoned" or "detained" at common law.

64. Whilst (i) as I have said, Dolan is of no substantive assistance in relation to the specific issues of statutory construction with which we have to deal, (ii) Jalloh draws a distinction between circumstances that may amount to a breach of article 5 of the ECHR and imprisonment at common law and (iii) article 5 is not in play here, it is worth noting that, in Dolan, in which there *was* an article 5 claim, the Court of Appeal said this in relation to that claim:

> "93. … In our view, it is a mischaracterisation to refer to what happened under the regulations as amounting in effect to house arrest or even a curfew. No proper analogy can be drawn with the decision of the House of Lords in [Secretary of State for the Home Department v JJ [2007] UKSC 45; [2008] 1 AC 385; a case upon which the Claimant here relied], which concerned control orders imposed on suspected terrorists. The obligation to stay at home in the original version of regulation 6(1) was subject to numerous, express exceptions, which were non-exhaustive, and the overriding exception of having a reasonable excuse.

> 94. In our view, it is unarguable that what happened under these regulations amounted to a deprivation of liberty…".

65. In any event, neither Jalloh nor any of the other authorities upon which the Claimant relied assists his cause.

66. Nor do I consider regulations 9(2) and (3) of the Prison Rules 1999 (SI 1999 No 728), under which the Secretary of State for Justice may temporarily release a prisoner and upon which the Claimant relied, are of any assistance in determining whether the self-isolating regime of the Regulations with which we are concerned amounts to "detention". For the reasons I have given, it does not.

67. I would dismiss the second ground.

## Ground 3: Removal

68. Finally, as his third ground, the Claimant submits that regulation 10(1)(b) is unlawful, because, by giving an authorised person (such as a police constable) the power to remove a person who is required to self-isolate to his or her place of isolation, if necessary using reasonable force so to do (regulation 10(2)), it falls within the scope of section 45G(2)(b) of the 1984 Act, being a power to remove a person "to a hospital or other suitable establishment". The same phrase is, of course, used in section 45G(2)(c). Those provisions are thus again unlawful as in breach of section 45D(3) of the 1984 Act.

69. In support, he relies upon Hansard HL, vol 701, 22 May 2008, col 596GC, to which I have already referred (paragraph 50 above), where the Minister Baroness Thornton, in response to a proposed amendment to omit the words "or suitable establishment" (thereby leaving the only place to which a person could be removed to, or in which he could be detained, as a hospital, as under sections 37-38 of the original 1984 Act provisions), made clear that an individual's home might be a "suitable establishment".

70. However, the phrase "hospital or *other* suitable establishment" (emphasis added) makes clear that a hospital is "a suitable establishment", which begs the question: suitable for what? Sir James Eadie submitted, and I accept, that it must be suitable for clinical intervention. It seems to me that that is made clear by the following.

71. Again, in my view, in construing this phrase it is important background that, like section 45C(2)(d) which featured in the first ground, section 45C(2)(b) (and, indeed, (c)) are subject to the evidential requirements of the Part 2A Orders Regulations, i.e. a magistrate can only make an order to remove a person to a hospital or other establishment on the basis of evidence (including medical evidence) in relation to that person (see paragraph 16 above).

72. It was clear that the predecessor of section 45G(2)(d), namely section 37 of the earlier iteration of the 1984 Act, gave the power to remove a person to a hospital (and a hospital alone) so that he or she could be clinically managed and clinically supervised there: indeed, removal could only take place with the consent of the health authority responsible for the administration of the hospital to which he or she would be removed. There is nothing to suggest that a fundamental change was envisaged in the repeal of that section and its replacement by section 45G(2)(b).

73. Indeed, the passage from Hansard upon which the Claimant relies is to the opposite effect. The full passage of the Minister reads:

> "Most important, being able to choose an alternative location to a hospital could help to reduce the impact of the measure on an individual's human rights. For example, if justice deemed it 'suitable', an individual could be detained in their own home. Support systems would need to be put in place, but this could be infinitely preferable to their being in a hospital. More likely, detention could be in a nursing home or hospice. Detention does not always need to be high-tech. To remove this provision would remove such options."

74. Therefore, whilst accepting that the home might fall within the scope of "other suitable establishment", the Minister made clear that "detention" – her word, and not apparently used in any technical sense – at home under this provision could only be appropriate if "support systems" were in place. In context, the Minister could only have meant clinical support systems: she could not have included (as the Claimant suggested) support in the form of friends and family members assisting with shopping etc during a person's period of self-isolation. In the light of that response, the proposed amendment to remove the words "or other suitable establishment" – which was prompted by concern that detention for the purposes of "isolation" could occur in, e.g., a prison – was withdrawn. Consequently, the provision was left with flexibility to remove a person with clinical management and/or supervision requirements to (and detain him or her at) some place with appropriate clinical support other than a hospital.

75. It is also important that the context of "other suitable establishment" is taken into account. In regulation 2(3)(a), "other suitable place" clearly means "suitable for self-isolation"; because the Regulations are about self-isolation. That is not the same context as section 45G(2)(b) and (c) where, in addition, the phrase is not "suitable place" but "suitable establishment". "Suitable" here cannot mean "suitable for self-isolation". In my view, it refers back to hospital; and means "like a hospital, suitable for clinical management and/or supervision".

76. Therefore, although a home may be a "suitable establishment" for the purposes of section 45G(2)(b) and (c), it can only be such if clinical management and/or supervision is in place there, those provisions thereby sitting with section 45G(2)(d) considered in the first ground. On the other hand, a home without such clinical support is clearly sufficient for the purposes of regulation 2(2) and (3) of the Regulations, i.e. for the purposes of a place appropriate for self-isolation.

77. For those reasons, in my view, regulation 10(1) of the Regulations is not unlawful as being contrary to section 45D(3) read with section 45G(2)(b) and/or (c). Consequently, I do not consider that the Claimant's third ground has been made good either.

## Conclusion

78. Therefore, subject to my Lady, Whipple J, having granted permission to proceed on the Claimant's second and third grounds, I would dismiss the whole claim. On the

basis of the cost capping order to which I have referred (see paragraph 33 above), I would make be no order for costs.

**Mrs Justice Whipple :**

79. I agree.