Neutral Citation Number: [2022] EWHC 82 (Admin)

Case No: CO/1846/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
18 January 2022

Before :

MR JUSTICE FORDHAM

- -

Between:

The Queen on the application of TABASSUM HUSSAIN	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**

- -

- -

The **Claimant** appeared in person
Christopher Knight (instructed by Government Legal Department) for the **Defendant**

Hearing date: 14/12/21

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. The substantive issue raised in this claim for judicial review is this: whether the 26 March 2020 Covid-19 prohibition on collective worship ("PCW"), as maintained from 13 May 2020, with its prohibiting consequences inter alia for communal prayers at a Bradford Mosque, breached the Human Rights Act 1998 ("the HRA") as an unjustified interference with freedom of religion (Article 9). The issue which I have to determine is this: whether it is appropriate to "strike-out" the claim, preventing it from proceeding to a substantive hearing. Permission for judicial review ("PJR") was granted by Swift J – who at the same time refused the Claimant's application for interim relief to suspend the PCW – on 22 May 2020: see his judgment at [2020] EWHC 1392 (Admin) ("Hussain"). By an application issued a year later – on 28 May 2021 – the Defendant asked the Court to strike-out the claim. The strike-out application is put on two grounds, in essence: (i) that the claim is inappropriate for substantive determination, having clearly been rendered "academic" by virtue of change in circumstances subsequent to the grant of PJR; and (ii) that there has been a serious failure of diligent pursuit of the claim. The hearing of the strike-out application was listed pursuant to an order of Chamberlain J on 13 September 2021. It proceeded as an in-person hearing. At the hearing, the parties were able helpfully to address me, both on (a) whether to strike-out the claim and (b) what the appropriate costs orders would be if I did so or refused to do so. I reserved my judgment, to deal with all issues in writing. Near the end of the hearing, the Claimant raised the possibility of an adjournment to allow him to instruct new lawyers. His previous legal representatives had told the Court on 9 December 2021 that they had ceased to act. I declined to adjourn. The Claimant had ample notice, and time to react. He had been able to address me with clarity. I had good visibility and was satisfied – in the interests of justice and the public interest, and having regard to the overriding objective – that an adjournment was unjustified and inappropriate. Many points to which I will make reference in this judgment are in the Court of Appeal's judgment (1.12.20) in R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605 [2021] 1 WLR 2326 ("Dolan").

Some relevant legal principles

2. I am going to start by going back to basics. Judicial review is a supervisory jurisdiction at common law, with an important statutory overlay, and an important procedural rule-book. The supervisory jurisdiction applies to secondary legislation, including the regulations which imposed the PCW. The statutory overlay includes the HRA, which imposes duties on public authorities to act compatibly with Convention rights, and duties on courts to determine whether they have done so. Among the Convention rights is Article 9, which provides:

> ***1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.***
>
> ***2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.***

Judicial review's essential purpose is to vindicate the rule of law and promote the public interest, securing accountability of public authorities to objective legal standards (including under the HRA), while at the same time recognising the primacy of each public authority's (contextually-applicable) 'latitude' to evaluate for itself questions of judgment, appreciation and policy. Procedurally, the supervisory jurisdiction operates using a set of important (contextually-applicable) principles, themselves designed to promote the interests of justice and the public interest.

3. Three of the procedural principles of judicial review are particularly relevant to what I have to decide in this case. (1) Where a judicial review claim is or has become "academic", the judicial review Court may decline to determine the legal merits of the claim; but may proceed to do so if there is a good reason in the public interest (see Dolan §§39-42, 99). (2) The Court has the power to strike-out a judicial review claim (see R (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990 [2007] 1 WLR 536 at §65), and may do so "in exceptional cases" where to do so is "appropriate" in the light of grounds which have "arisen after the date on which permission was granted" (see R (Suleiman) v Secretary of State for the Home Department [2017] EWHC 3308 (Admin) at §3). (3) There is a need for "procedural rigour" in judicial review, one manifestation of which is the general disinclination (though "there is no hard and fast rule") to allow "rolling judicial review" where "fresh decisions, which have arisen after the original challenge" are "sought to be challenged by way of amendment" of the pleaded judicial review grounds ("JRG") (see Dolan §§118, 29).

4. The Court's strike-out power (§3(2) above), as is invoked by the Defendant in this case, is an important residual safeguard in judicial review procedure. As with the other procedural principles, its basic purpose is to promote the interests of justice and the public interest. But the strike-out power is to be invoked sparingly ("in exceptional cases"). When a 'satellite' application of this nature is 'interposed' into judicial review proceedings, the Court will expect to be given a very clear-cut reason as to why a substantive hearing has now become inappropriate. Otherwise, a claim, which has been granted PJR and which is maintained by a claimant, will run its course to a substantive hearing. In that situation, a defendant or interested party who maintains that a claim is groundless or should not have been maintained, must take their protection from being able to demonstrate this at the substantive hearing, where the claim can be dismissed, and appropriate costs orders can be made. I note that an application for summary judgment may be used in a similar way in judicial review (see eg. R (All About Rights Law Practice) v Lord Chancellor [2021] EWHC 3048 (Admin)) but that does not, in my judgment, affect the approach which I should adopt to the present strike-out application.

The PCW

5. The Health Protection (Coronavirus Restrictions) (England) Regulations 2020 were made by the Defendant on 26 March 2020 (see Dolan §8). They took immediate effect. They were in response to the Covid-19 pandemic, in conjunction with the "lockdown" which had been announced on 23 March 2020 (Dolan §8). Regulation 5(5) provided that any place of worship had to close during the emergency period, except for limited purposes such as funerals (Dolan §18). That provision, in conjunction with others (Hussain §§3-5), constituted a PCW, with the prospect of criminal law consequences for a person responsible for a place of worship at which collective worship took place,

and anyone attending collective worship, in breach of the PCW. When the regulations were amended on 13 May 2020 (Dolan §9) some restrictions were relaxed, but the PCW was maintained. The picture from 13 May 2020 was different from that which had applied in March 2020, but the PCW remained in force. The PCW was subsequently withdrawn and ceased to have effect from 4 July 2020 (Dolan §25).

The claim

6. This judicial review claim was issued on 19 May 2020. The JRG were settled by Kirsty Brimelow QC and Jude Bunting, instructed by Blacks Solicitors. The claim included a request for expedition, by means of an urgent 'rolled-up' hearing, to secure a ruling on the substantive legal merits before the final Friday of Ramadan on 22 May 2020. In the event, Swift J conducted a one-day hearing on 21 May 2020 the culmination of which was his refusal of interim relief but his grant of PJR. The claim as pleaded had – and at the time of the hearing still had – these, among its essential components. (1) The "decision", which was identified in the claim form as being judicially reviewed, was the "ongoing prohibition of collective worship at Barkerend Road Mosque, Bradford". (2) The ground of challenge was a single ground, encapsulated in this way: "The ongoing failure of the Defendant to permit the limited opening of a Mosque in Bradford for communal Friday prayers is … unlawful and in breach of Article 9 of Schedule 1 [to] the Human Rights Act 1998". (3) The remedies (relief) sought were identified as follows: "(a) A declaration that [the] ongoing failure is unlawful. (b) An order requiring the Defendant to permit the Claimant to open the Mosque in the limited way set out [by the Claimant]. (c) Such further or other relief as the Court considers appropriate. (d) Costs".

7. The opening paragraphs of the JRG said this:

> ***This is a challenge to the ongoing failure of the Defendant to permit the limited opening of a Mosque in Bradford for communal Friday prayers; an obligatory aspect of the manifestation of Islam. On 13th May 2020, the Defendant introduced the amended Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 ("the Regulations"). The effect of [the] Regulations is that it is lawful for a member of the public to visit garden centres, golf clubs, or house-viewings in private homes, but not for the Claimant to arrange for socially distanced communal prayers in a Mosque. This lack of provision is unlawful, in that it is disproportionate and in breach of article 9 of Schedule 1 of the Human Rights Act 1998. The Claimant, and his fellow worshippers at the Mosque, consider communal Friday prayers to be an obligatory means of manifestation of their faith. The failure to permit these communal prayers, in the limited way suggested by the Claimant, has no adequate justification.***

8. Three features of the claim, as it was framed (and still is), are clear and noteworthy. (1) This was (and is) a challenge to the "ongoing" PCW. This was reflected in the decision, the ground of challenge and the remedies. (2) This was (and is) a challenge to the PCW in the context of the revised restrictions, in the regulations as amended on 13 May 2020. This was reflected in the opening paragraphs of the JRG (the reference to the PCW in the May amendment regulations, which made it "lawful for a member of the public to visit garden centres, golf clubs, or house-viewings in private homes"). (3) This was (and is) a challenge to the PCW in the context of not permitting arrangements which had been put forward by the Claimant for Barkerend Road Mosque in Bradford. This was clearly reflected in the ground of challenge (referring to "the limited opening"), remedies (referring to "the limited way set out") and the opening paragraphs (referring to "the limited way suggested"). In relation to the third feature – what the Claimant had

suggested should be permitted at the Mosque and the Defendant's response to it – the JRG included this:

> ***In a letter dated 22nd April 2020, the Executive Committee of the Mosque wrote to the Defendant to set out a proposal regarding how their religious obligations could be met during the coronavirus pandemic. The Committee suggested that the Mosque would be opened only between 21:30 and 00:00 each evening for Taraweeh prayers. The Mosque would remain closed at all other times. Only 40 worshippers would be permitted to enter the Mosque at any one time. The Mosque would enforce strict social distancing measures inside the Mosque, with a limited number of worshippers in each prayer hall, no entry for vulnerable persons who have received "screening" letters, and appropriate sanitary arrangements throughout.***
>
> ***In a letter dated 23rd April 2020, the Defendant refused to make any such provision. Th[e] Defendant accepted that the Regulations interfered with rights under article 9 of Schedule 1 of the Human Rights Act 1998. However, the Regulations were said to be "necessary to protect the fundamental Article 2 ECHR right to life of the population". This was because the virus "most easily spreads where groups of people gather"; because the Regulations affect "all religious communities"; because the Regulations permit the imam of a Mosque to attend the Mosque to broadcast evening prayers and other acts of worship, via the internet; because the Regulations permit the manifestation of religious belief within the home; because of the guidance of "Muslim umbrella organisations in the UK"; and because "there are steps that can be taken, and are being taken, to ensure that everyone can continue properly to manifest their religious beliefs in the current exceptional circumstances.***

The JRG went on to describe some adjustments, in the subsequent correspondence, in relation to what was being proposed (as to which, see too <u>Hussain</u> at §7).

9. As can be seen from the contents of the passage quoted immediately below: "Taraweeh prayers" are evening prayers during the holy month of Ramadan; and the "Jummah prayer" is the communal Friday prayer. The Claimant's witness statement, in support of the judicial review claim, tells the Court this:

> ***The Jamiyat Barkerend Road mosque ("the Mosque") is one of the largest mosques in Bradford. Jamiyat Tabligh-ul-lslam is an organisation which literally means "Uniting Humanity to Promote Peace". Its founder, in the 1960s, was Sayed Ma'roof Hussain Shah (Arif Qadri Naushahi). He is a direct descendent of the fourth caliph, Hazrat Ali who was the first cousin of the Prophet. He is from a noble family of Islamic scholars. In the 1960s British Muslims who had emigrated to fill jobs in textile mills and factories found guidance and support from Syed Ma'roof Hussain Shah. He taught in the community once he had finished work in the mills. In 1962, Syed Ma'roof Hussain Shah established the first charitable mission of Jamiyat Tabligh-ul-lslam. This remains to this day. The Mosque follows the Sufi Hanafi tradition of Islam. I follow the strict teachings of the Holy Prophet Mohamed (peace be upon him) and the Holy Scriptures as set out in the Quran. I encourage all the attendees to adopt an orthodox approach to the teachings and the scriptures. The regular congregation are orthodox. The Mosque is extremely spacious comprising three prayer halls and a large reception area. It has a capacity for around 4000 worshippers. It also has classrooms following the charitable and religious aims of education.***
>
> ***I was born in Bradford. Since a very young age I accompanied my father and siblings to the Mosque regularly for prayer, other religious ceremonies, and education… The Mosque has always and continues be a central focus in my life. I am passionate about the Mosque and have always done my hardest to ensure that the mosque provides all the facility required by the whole congregation to fulfil their religious beliefs and to advance the charitable aims.***
>
> ***…***
>
> ***The Hanafi Sufi Muslims follow the teachings of the Prophet that Friday is the most important day for prayer. In the Hadiths, the Prophet: "The word witnesses refer to Friday.***

> ***There is no day more virtuous than Friday. There is such an hour in this day that no Muslim will make dua in it except that his dua will be accepted. And he does not seek protection from anything except that Allah Most High will grant him protection." (Tirmaadi). A congregation is a minimum of three people. The Jummah prayer is obligatory and missing three prayers in a row is unforgiveable. I and the congregation could be viewed as outside our faith; as non-believers. Such is the importance and significance of the Jummah prayers.***
>
> ***…***
>
> ***I have attempted to obtain cooperation from the Defendant to permit the Mosque to open on a number of occasions. Firstly, I sought the Defendant's agreement to restricted attendance at the Mosque during Ramadan to observe Taraweeh prayers on a Friday. More recently, I have revised my proposal to be limited to the Jummah prayer. It is important to understand that the 5 times a day prayers required of Muslims have an optional part and an obligatory part. It is the congregational part which is obligatory. Friday prayers also are the most important to our faith; the Jummah prayer is an essential part of our faith.***

What happened after PJR

10. After the grant of PJR by Swift J on 22 May 2020, a number of significant things happened. First, there were the following developments, all in June 2020. On 13 June 2020, further amendment regulations meant that places of worship were now permitted to open for private prayer, but the PCW remained in force and applicable (see Dolan at §18). Then on 23 June 2020, the Prime Minister announced in a statement to the House of Commons that places of worship would be permitted to reopen for prayer and services (including communal worship and Jummah prayers) from 4 July 2020 in line with the Government's roadmap for easing of restrictions published on 11 May 2020 ("Our plan to rebuild: the UK Government's COVID-19 strategy"), provided that guidance on social distancing was complied with. On 26 June 2020, the Defendant filed its Detailed Grounds of Resistance ("the Defence") in these proceedings. Among the points made in the Defence was that the claim had become "academic", given the Prime Minister's announcement on 23 June 2020, about which the parties had subsequently corresponded. On that point, the Defence said this:

> ***This claim has, therefore, become academic. Places of worship are set to reopen for communal prayer … on 4 July 2020. The Secretary of State has invited the Claimant to discontinue the claim and/or to agree to a short stay to enable time for him to decide whether he will proceed (and if so on what basis), prior to submitting these Detailed Grounds. At the time of writing, the Claimant has indicated that he does not intend to discontinue this claim nor agree to any stay. It appears that he intends to ask the Court to determine the lawfulness of the restriction in respect of the period up to the date the restrictions are relaxed, with a view to a potential damages claim (which is not even pleaded). The Secretary of State submits that i) this is not a good reason to permit an otherwise academic claim, and ii) the Court should dismiss the claim as academic in the exercise of its discretion …***

11. In July 2020, two significant things happened in parallel. One was that the Dolan case was determined in the High Court. The other was that new regulations were announced and made, by which the PCW ceased to have effect. What happened was this. On 2 July 2020, Lewis J heard the application for PJR (Dolan §2), following which he refused PJR on 6 July 2020 on some of the grounds raised in that case. In the Dolan case, there was an Article 9 challenge to the PCW. One of the claimants in Dolan was Ms Monks. She was a Roman Catholic who was unable, by reason of the PCW, to "attend mass at church at the relevant time" (Dolan §12). In refusing PJR, Lewis J concluded that claims relating to restrictions which had been superseded by revised regulations were "academic" (Dolan §23) and so inappropriate for determination. Meanwhile, on 3 July

2020 the regulations had been amended again, as a result of which the PCW ceased to be in force from 4 July 2020. That development led Lewis J to defer PJR on the Article 9 ground in the Dolan case and invite written submissions (Dolan §25). On 22 July 2020, Lewis J refused PJR on the Article 9 challenge to the PCW raised in Dolan, ruling that the claim had become "academic" and refusing permission on that ground (Dolan §25). Having been refused PJR, the claimants in Dolan then took their case to the Court of Appeal. The case was known to be pending. It was heard on 29 and 30 October 2020.

12. On 1 December 2020 the Court of Appeal (Lord Burnett CJ, King and Singh LJJ) gave its judgment in the Dolan case. The following features of the Court of Appeal's reasoning are particularly relevant for present purposes.

(1) Lewis J had been "right" to refuse PJR on the Article 9 challenge to the PCW, on the grounds that the claim had become "academic" (see §11 above). The Court of Appeal described Lewis J's approach (Dolan §25):

> ***In relation to Article 9 (freedom of religion), [Lewis J] noted that regulation 5 had been amended on the day after the hearing, 3 July 2020, with effect from 4 July. He considered that the claim may therefore have become academic and proposed to adjourn consideration of this issue. Subsequently, after considering further written submissions from the parties, he refused permission on this ground in an order sealed on 22 July 2020.***

The Court of Appeal upheld that approach (Dolan §99):

> ***After the hearing before him [Lewis J] refused permission on [the Article 9] ground because amendments made to the regulations with effect from 4 July 2020 had rendered the point academic. In our view, he was right to do so.***

(2) There was a 'vires' argument in Dolan with which, although "academic", it was in the public interest (see §3(1) above) for the Court to deal substantively (Dolan §38, 41-42), as the Court did (Dolan at §78). All other substantive grounds of challenge to the restrictions in the regulations were "academic" and there was "no good reason in the public interest for them to be considered" (Dolan §42).

(3) In the context of the appropriateness of the Court dealing with the "academic" legal challenges, there was "force" in this submission by Treasury Counsel for the Secretary of State (Dolan §38)

> ***Sir James Eadie QC … recognised that there might be a distinction to be drawn between the different grounds on which the claim is brought. He recognised that there was merit in dealing substantively with the vires ground. The other grounds, he maintained, should not be entertained, since they would turn on the facts and, in particular, the facts as they were at the time when the regulations were made. He submitted, with force in our view, that this Court should not allow those parts of the claim to proceed in any event, since any decision on those grounds would not lay the foundation for any useful precedent for the future.***

The Court returned to this theme (see §12(5) below), in emphasising that: "in a context like the present … the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time" (§118).

(4) Since the Court had heard full argument on all grounds of challenge, the Court considered it appropriate – with one exception – to go on to address the merits

of the "academic" grounds which there was "no good reason in the public interest" to consider (Dolan §42). The Court went on to address the merits of those points (§§79-114), including the challenges based on alleged breaches of Convention rights (§§91-114). The one exception was that the Court would not address the merits of the Article 9 challenge to the PCW, having in mind that the present case had been granted PJR by Swift J and a "substantive hearing" was "pending in the High Court" (Dolan at §100):

> ***… we bear in mind that Swift J had already given permission to bring a claim for judicial review in a case in which the regulations are challenged under Article 9: R (Hussain) v Secretary of State for Health and Social Care [2020] EWHC 1392 (Admin). A substantive hearing is pending in the High Court. In those circumstances we do not consider that it would be appropriate to say any more about the merits of the argument under article 9.***

(5) Finally, there was a "postscript" to the judgment, on the subject of "procedural rigour" (Dolan §116-121). Within the postscript the Court addressed the suggestion – at one stage made (§29) – that the Court of Appeal might grant permission to amend the JRG to challenge the regulations made on 3 July 2020. The Court described that course as an inappropriate "rolling judicial review". Citing R (Spahiu) v Secretary of State for the Home Department (Practice Note) [2018] EWCA Civ 2064 [2019] 1 WLR 1297, the Court said this (Dolan at §118):

> ***This Court has … deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment: see Spahiu §§60-63. Although, as Coulson LJ said, at §63, "there is no hard and fast rule", he was right to say that it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving". In our view, that is particularly so in a context like the present, where the regulations have been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time. As we have mentioned, at one time, there was an application to amend the grounds so as to permit a challenge to be made to the regulations that were made on 3 July 2020. Fortunately, we did not have to determine that application, since it was not pursued, but we consider that this is precisely the kind of case in which "rolling" judicial review challenges should not be brought.***

The Supreme Court dismissed an application for permission to appeal on 9 December 2020: see [2021] 1 WLR 2326 at 2348F.

13. In March and May 2021 there was solicitors' correspondence in the present case. On 30 March 2021, the Defendant's solicitors wrote to the Claimant's solicitors, as follows:

> ***In Dolan … the Court of Appeal generally upheld the refusal of permission to a challenge to previous public health restrictions as academic, where the regulations in question had ceased to have effect by the time of the hearing: see paragraphs 36-42. The Court considering your client's claim will apply the same principles. Accordingly, we invite you to withdraw the claim before it is listed for hearing and/or our client is required to incur further costs in drafting a skeleton argument for, and attending, that hearing. It is important that litigation be brought to a conclusion and is not left sitting on the Court's files, with public money being expended on a claim which is both academic and not being actively pursued. If your client does not withdraw the claim against the Secretary of State, we intend to apply to strike out the claim as bound to fail for the reasons we have set out above. We will draw this correspondence to***

> ***the attention of the Court and invite it to make an order for our client's costs incurred by the application, and in the proceedings to date.***

On 6 May 2021, the Claimant's solicitors replied, saying:

> ***We acknowledge that Regulation 5(5) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) is now repealed. Be that as it may, it does not entitle your client to conclude that our client's case is now "academic." The question for the Court to consider is not what the position may be now following the gradual easing of the restrictions but whether the Defendant at the relevant time acted lawfully in the context of the legislation and the Regulations when it exercised its decision to close all places of worship (save for allowing some limited permitted use as was defined in the Regulation). We do not agree that the Court will apply the same principle [as] in the case of <u>Dolan</u> … The Court of Appeal was wrong in its finding in that case and our client will challenge that finding. Whilst the circumstances have indeed changed and the Regulations have been repealed, our client should not be debilitated from seeking a declaration and/or declaratory relief (with a view to a putative damages claim). Indeed, your client has already acknowledged and recognised that position at paragraph 62 of its detailed Grounds of Defence. In that context our client reserves his position to amend the Claim (and seek a direction to enable that amendment and consequential directions thereto). We also refer you to <u>Reverend Doctor William J U Philip & Others</u> [2021] CSOH32, a recent judicial review case in Scotland which supports our client's case. Whilst that case was set in the context of worship in the Christianity faith and the Scottish Coronavirus Regulations, it was successfully argued that the blanket ban imposed by the Scottish Regulations to enter a place of worship was unlawful and a disproportionate interference with the right to manifest the Christianity faith which did not permit certain online worship such as baptism (and in the context of our case as you know, neither are Jumma prayers permitted online) it was declared that this ban was a breach of their Article 9 Right…***

After that exchange of correspondence, on 28 May 2021, the Defendant issued the application to strike out the claim, on the two grounds relied on (§1 above).

14. On 17 August 2021 it came to light that the Administrative Court Office ("ACO") was treating this claim as "closed", by reason of the Claimant's default in paying the applicable post-PJR court fee (£770). By that stage, there had been a change of Counsel on the Claimant's side to David Berkley QC (notified on 9.8.21). The Claimant's representatives made an application (20.8.21) for "relief from sanctions" regarding the non-payment of the fee. It transpired that the Claimant's solicitors' original filing letter to the Court (19.5.20) had authorised the taking of the post-permission fee (£770) "should this matter be listed for hearing". There was also a real concern regarding whether the ACO's communications, about the default in payment of the fee, had been received. The witness statement (Luke Patel, 20.8.21) in support of the Claimant's application for relief from sanctions included this explanation of why the claim was being pursued:

> ***[I]t is the position of the Claimant that it remains prudent for the claim to be determined to assess whether the actions of the Defendant, at the relevant time, were lawful.***

On 13 September 2021, Chamberlain J granted relief from sanctions and directed the reinstatement of the claim, provided the fee were paid by 20 September 2021 and directed that the strike out application be listed for oral hearing, as it then was in front of me. Chamberlain J said this:

> ***Given that there is evidence that the letter warning the Claimant of the need to pay the court fee was not received, and no evidence to show that it was sent, it is appropriate to grant relief from sanctions and reinstate the claim. The Defendant's application to strike out the claim***

> ***will be listed for hearing. I note that there is reference to a claim for damages, but this does not appear to be pleaded. If a claim for damages is to be pleaded, it may be necessary to consider whether that claim should proceed in another court, given that it appears to be common ground that no forward-looking relief could now be granted.***

The hearing of the strike-out application was duly listed for hearing. My clerk was informed by email on 9 December 2021 that Blacks Solicitors and David Berkley QC had ceased to act for the Claimant. I did not enquire as to why the change of Counsel (August 2021), or why Counsel and solicitors had ceased to act (December 2021). I considered such an enquiry to be unnecessary and inappropriate. I have drawn no inferences and have put those changes to one side, except for the need to recognise that the Claimant was acting before me as a litigant in person.

Ground 2: 'Serious failure of diligent pursuit'

15. This is the second ground put forward for strike-out (§1 above), namely that: "the Claimant has entirely failed to prosecute his claim with any reasonable diligence". I will deal with it first. I cannot accept that this constitutes a good ground for strike-out of the claim. In my judgment, if there is a proper basis for strike-out, it must arise from the first ground. If it is now clearly inappropriate to allow an "academic" claim to proceed to the substantive hearing, then it will be struck-out for that reason. There may be aspects relating to proper pursuit of a claim – including procedural rigour (§3(3) above) – which can feature as part of that analysis. But, if that is not a good ground for strike-out, the claim should proceed. Failure of diligent pursuit is not a good reason for strike-out. My reasons are as follows. (1) There was obvious good reason in this case to await the judgment of the Court of Appeal on 1 December 2020. The Dolan case raised an Article 9 challenge to the PCW, albeit in the context of Catholic mass. More importantly, the Dolan case squarely raised the question whether it was right in principle to treat an Article 9 challenge to the PCW as having been rendered "academic" and inappropriate for substantive resolution by reason of the 4 July 2020 amendment of the regulations by which the PCW ceased to have effect. (2) It is true that the Claimant and his representatives allowed a period of nearly 6 months to pass between the Court of Appeal's judgment in Dolan (1.12.20) – followed a week later (9.12.20) by the Supreme Court's refusal of a petition for permission to appeal – and the Defendant's application to strike-out the claim (28.5.21). During that time, the Claimant's representatives did not take any action vis-à-vis the ACO, to have the case listed for a substantive hearing. Swift J had declined to order expedition. The Court of Appeal had described the substantive hearing in the present case as "pending" (Dolan §100). By 30 March 2021, the Defendant had threatened in correspondence to apply to strike-out, not (at that time) on the ground of failure of diligent pursuit, but squarely on the ground that the claim was "academic" and inappropriate for substantive determination. The strike-out application was duly made (28.5.21). (3) What transpired was that the Claimant's representatives were treating the case as in the pipeline, whereas the ACO was treating the claim as closed. That was why nothing happened. But, in the event, there were sufficient good reasons shown by the Claimant's solicitors for "relief from sanctions" in relation to the fee default (see §14 above). (4) The Defendant's legal representatives could themselves have been in contact with the Court. They could also have written, warning that they intended to strike out for lack of diligent pursuit, if steps were not taken to have the case listed for a substantive hearing. What is clear is that any action would have brought to light the position within the ACO and the fee, which would have been addressed in the way that it was, with relief from

sanctions being granted. (5) This is an important claim raising an important human rights argument, for which PJR had been granted, on an issue whose substance Court of Appeal deliberately left unaddressed in Dolan (see §12(4) above). If, like the vires issue in Dolan (§12(2) above), there were "a good reason in the public interest" for the Article 9 claim in the present case to be determined substantively, that in my judgment is what the interests of justice, together with the public interest, would now require.

Ground 1: 'Academic' and 'no good reason in the public interest'

16. This is the crux. In my judgment, in order to understand and faithfully apply the principles, with their underpinning in the interests of justice and the public interest, it is important to keep clearly in mind the options which are, in principle, open under the law and procedure of judicial review. In light of the underlying issue in these proceedings, the question which arises is not a binary on/off switch. It is not a question of blocking access to the Court to determine an important question of legal accountability under the HRA. The question is a nuanced one. It involves looking constructively at what the Court can, and should, do. It involves faithfulness to the received wisdom which comes to this Court, in our justice system, from the Court of Appeal. Looked at in this way, the correct answer is – in my judgment – clear-cut. The appropriate course is to strike-out the claim on this ground. I will explain why.

The unmistakeable reasoning from Dolan

17. In my judgment, the unmistakeable reasoning of the Court of Appeal in Dolan (§12 above) irresistibly supports the following conclusions: (i) that the Article 9 challenge to the PCW in this case has become academic; (ii) that it would only be appropriate to determine that challenge if there were good reason in the public interest for doing so; and (iii) that there is no good reason in the public interest for doing so. As has been seen, the Court of Appeal in Dolan specifically considered whether the Article 9 challenge to the PCW, advanced by reference to Ms Monks and her inability to attend mass at a Roman Catholic Church, had been "rightly" treated as academic and inappropriate for determination by Lewis J, on 22 July 2020, in light of the PCW having ceased to be in force from 4 July 2020. That question was addressed directly. In answering it, the Court of Appeal held that Lewis J had been 'right'. He had "rightly" refused PJR on this basis. Indeed, this conclusion was the determinative basis on which the Article 9/PCW point was resolved in Dolan. It was the sole basis on which the Court of Appeal dealt with the Article 9 challenge to the PCW. The Court did not go on to address the substantive legal merits of that challenge. It did not regard the Article 9 challenge to the PCW as falling within the same category as the vires ground, where there was good reason in the public interest for determining the issue.

The Dolan/Hussain Article 9/PCW substantive challenges are different

18. The Claimant is entitled to say that the Article 9 challenge to the PCW in Dolan – advanced by reference to Ms Monks and her inability to attend mass at a Roman Catholic Church – is not the same as the Article 9 challenge to the PCW in the present case. But the question is not whether they are the same challenge, with the same features. The question is, instead, whether the Court of Appeal's principled reasoning for treating the Dolan Article 9 challenge to the PCW as academic and inappropriate for substantive determination can be distinguished and the opposite conclusion arrived

at in relation to the Article 9 challenge to the PCW. I cannot see any room for another conclusion.

The present claim is fact-specific

19. A principal reason why the Article 9 challenge to the PCW in the present case is not the same as the Article 9 challenge to the PCW, raised by Ms Monks in Dolan, is because of the ways in which the present claim was specifically focused on the factual context. I have identified the three key features of the present claim (see §8 above). I have also identified some of the key points which are made in the Claimant's witness statement (§9 above). But that is part of the difficulty. It is obviously the case that any resolution of Article 9-compatibility of the PCW would have an impact beyond the four corners of the facts of the instant case. But it is nevertheless an inescapable fact that the determination of this claim would involve an assessment of the PCW, and of its impact, in the particular factual setting in which it was introduced, in the particular regulatory setting in which it was maintained in May 2020, viewed against the requests which had been made and which had been rejected for Barkerend Road Mosque. The question is whether there is a good reason in the public interest to conduct an "historic" assessment of Article 9 compatibility. In the context of that question, there is the point which emerges from the Court of Appeal's judgment in Dolan: the recognition (§12(3) above) that grounds of claim based on Convention rights may "turn on the facts and, in particular, the facts as they were at the time when the regulations were made"; that – where that is so – "any decision on those grounds would not lay the foundation for any useful precedent for the future"; and that the PCW arises in a "context" where "the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time".

The question of damages

20. One possibility which has been touched on is the possibility of these proceedings continuing in order to resolve a claim for damages. Pursuant to the HRA, the Court is empowered to grant damages as a remedy if it finds a violation of a Convention right. As Chamberlain J pointed out in his order (see §14 above), if the present proceedings were to be seen as a vehicle for a claim for damages, that would raise issues relating to transfer to another forum, most obviously the county court. As has been seen, the question of damages was specifically and properly raised by the Defendant in the Defence (see §10 above). The point was also touched on – in the phrase "a putative damages claim" – in the Claimant's solicitors' letter of 6 May 2021, and also in Mr Patel's witness statement (20.8.21). The question is whether a claim for damages justifies the courts determining this as a 'historic' claim. If so, I would transfer it to the county court, as Chamberlain J indicated.

21. There is, in my judgment, an emphatic set of answers to the idea that this claim should proceed to substantive determination in order to resolve a question regarding damages. (1) There has never been a claim for damages in this case. A damages claim was not pleaded at the outset. Nor was a damages claim included in or after July 2020, when the PCW ceased to have "ongoing" effect. Damages were not claimed after the Defence was filed and served. Nor was a damages claim included after December 2020, when the Court of Appeal decided Dolan. Nor was a damages claim made at or after the Claimant's solicitors' letter of 6 May 2021. That letter even referred to damages and the Claimant's solicitors said this: "our client reserves his position to amend the claim

(and seek a direction to enable that amendment and consequential directions thereto)". No such step was taken. There was no amendment. There was no application for permission to amend, or for consequential directions. Nor were damages pleaded after Chamberlain J's reasoned order (§14 above). (2) The prospect of a damages remedy – or of a "putative" damages claim – was not a reason for entertaining and determining the Convention rights challenges in Dolan. (3) There are applicable time limits where remedies are sought for breaches of the HRA. If a damages claim had been brought under the HRA in another forum, such as the county court, it would have needed to have been brought within one year (HRA s.7(5)), unless the county court were persuaded that a longer period was equitable in all the circumstances. Where a claim is brought by judicial review, the more exacting rules on promptness and delay are applicable (HRA s.7(5)(b)). Where permission to amend the claim is sought, including to seek a new remedy, the Court has to exercise judgment and discretion. The timing of the raising of the new claim sought to be advanced, or new remedy sought to be obtained, will in principle be relevant. If damages were being sought – which they are not – there would be obvious problems regarding the absence of prompt and diligent pursuit, as well as concerning appropriate procedural rigour. Procedural rigour in judicial review (§3(3) above) matters, so that there is clarity: "It is important that everyone should know where they stand, so that, for example, the defendant can properly prepare evidence in a timely fashion" (Dolan at §117). All of these points arise in a context where the Claimant had legal representation throughout the relevant sequence of events. (4) It is appropriate, in my judgment, that the Court should appreciate, understand and respect the core truth. It is that this claim is not about damages. It has never been about damages. Damages did not feature in the submissions made by the Claimant at the hearing before me. The Claimant was able to explain to me, clearly, what this case is about to him, why he wanted this claim to proceed to its substantive hearing, and why he was urging the court to allow that course. I have understood why this case matters so much to him. And I have understood that it is not about damages. It never was.

The grant of PJR

22. The Claimant emphasises that in this case PJR has been granted. This case is different from Dolan, where PJR was refused by Lewis J. The Claimant emphasised the following points: that PJR was granted by the Lead Judge of the Administrative Court (Swift J); that it was hard fought, with the Defendant – represented by Sir James Eadie QC – having fought strenuously to oppose PJR; that the interim relief and PJR hearing before Swift J was a lengthy hearing, and led to a detailed judgment; and that – out of all of that – the Claimant emerged victorious. He had the Court's permission to bring this claim. He had fought for, and won, the right to have his day in Court. How can that now be taken away from him.

23. There are important answers to these points. (1) Swift J was dealing with this case on 21 and 22 May 2020, at which time there was a PCW which was in force. It was the "ongoing" PCW, as it is put in the claim (§§6-8 above). The circumstances, the arguments and the outcome before Swift J all arose in that context. They all preceded the change in circumstances, when the PCW ceased to be in force and effect. What Swift J did cannot answer the questions arising from the subsequent change in circumstances. (2) When, on the other hand, Lewis J dealt with the Article 9 challenge to the PCW in Dolan, the change in circumstances had happened and was directly in

focus. It remained in focus in the Court of Appeal. (3) It is not infrequently the case that, when a judicial review claim becomes "academic", that position arises because of some development after the grant of PJR. Where it does happen, it is no answer that PJR has been granted. The question whether it is appropriate to determine the issue arises after the grant of PJR, and it must be confronted. (4) It is not correct to say that a judicial review claimant who has been granted PJR has established the entitlement to a substantive hearing at which the legal merits of the claim which was granted PJR will be determined. The principle about claims which have become academic (§3(1) above) demonstrates that to be so. Judicial review claimants and their representatives have a duty to re-evaluate the position if there is a material change of circumstances. The strike-out jurisdiction is in principle available in a clear-cut case of a post-permission development which means the claim has lost its viability. (5) It is helpful to identify the position which would have applied in the present case, had there been no strike-out application. There would have been no 'entitlement' to a determination on the legal merits at the substantive hearing. The Claimant would have had his 'day in court'. But the very first issue confronted at the substantive hearing in the present case would have been the question whether to determine the 'historic' claim on its legal merits. The Defendant had pleaded this point in the Defence (§10 above). The Court at the substantive hearing would have needed to deal with it. Swift J's grant of PJR in this case could and would only lead to a determination of the legal merits of the challenge if that is a challenge which it is appropriate for the Court to entertain.

Whether the CA anticipated a substantive determination

24. A line of argument which can be made in the Claimant's favour is this. The Court of Appeal in Dolan expressly referred to the present case as one which was "pending" for its "substantive hearing" (§12(4) above). Moreover, because of that, the Court studiously avoided any comment on the Article 9-compatibility of the PCW. That indicates clearly that the Court of Appeal contemplated that the present case would proceed to a substantive hearing, at which the substantive merits of the Article 9 challenge to the PCW would be dealt with. Moreover, the Court of Appeal took that position, notwithstanding what it said about the Article 9/PCW challenge in Dolan itself. All of this supports the conclusion that, in the present case, the substantive merits of the Article 9 challenge to the PCW should indeed be determined; and that this is what the Court of Appeal was indicating it thought should happen, and expected to happen.

25. It is important to confront this line of argument, and all other points that could be made in the Claimant's favour, especially in circumstances where he now acts as a litigant in person. In my judgment, this line of argument would involve reading-into the Court of Appeal's judgment in Dolan reasoning and messaging which are not there. (1) The Court of Appeal was leaving to this Court the determination of the present claim, however it was to be determined. That would include the extent to which the present claim has features which make it a fact-specific challenge. It would include questions regarding any claim to damages. But it would also include the point – pleaded by the Defendant – that the claim had become academic. The Court of Appeal did not say, or mean, that there would necessarily be a substantive hearing. Nor that, if there was a substantive hearing, it would necessarily resolve the determination of the Article 9 challenge on its legal merits. The Court of Appeal thought there was the clear prospect of substantive determination, but the position can be put no higher than that. (2) The

Court of Appeal did not need to make any comments on the Article 9-compatibility of the PCW in Dolan, because it had already upheld Lewis J's refusal of PJR on the basis on which he had refused it: the claim had become academic, and it was not appropriate to determine it. The fact that the present case was pending was a further point. (3) The Court of Appeal decisively found that the Article 9 challenge to the PCW in Dolan did not fall within the application of the principle by which "academic" challenges are determined by reference to there being a "good reason in the public interest". Given the principled logic of its decisive reasoning, the Court of Appeal would not – in my judgment, could now – have been in the least bit surprised to find this Court treating this claim as having become academic and inappropriate for determination. That was for this Court to decide, and I am deciding it.

Looking back: the public interest and an "historic" claim

26. I return to the "nuanced" point which I have emphasised (§16 above), starting by considering this claim proceeding to its substantive hearing, and this Court determining the legal merits of the challenge as framed. This would, necessarily, be as an 'historic' exercise in evaluating the legal position as it was when the claim was brought. This is what the Claimant's solicitor Mr Patel said in his witness statement (§14 above), when he spoke of the claim being:

> ***… determined to assess whether the actions of the Defendant, at the relevant time, were lawful.***

The claim could only be a challenge to the PCW which was in force between 26 March 2020 and 4 July 2020. But, in fact, the claim is more specific. Its features include (see §§7-8 above) the position following amendment of the regulations on 13 May 2020. It is the fact that those regulations were relaxed, but not those restrictions that maintained the PCW, that looms large in the shape of the legal challenge. The claim raises questions about the justification for the PCW, viewed alongside other activities which were being permitted, as can be seen clearly from the encapsulation in the opening paragraphs of the JRG (§7 above). Then there is the further key feature: the claim necessarily raises questions arising from the impact on the Mosque and the measures which the Claimant and the Executive Committee had put forward, in light of the regulations and – in particular (see Hussain §8) – the then "Government guidance on social distancing" as it was in May 2020. All of these, as I have explained, are fact-specific considerations.

27. This judicial review claim does not, for example, involve the proposition that the PCW was an Article 9 violation from the moment that it was introduced on 26 March 2020, before any relaxation relating to other activities, and before any suggested bespoke arrangements have been identified. Nor does it involve the proposition that no PCW could ever be justified in Article 9 terms, or could never be justified in the context of a pandemic. The question is whether an "historic" analysis of that nature is an exercise for which there is "good reason in the public interest". The answer is to be found – once more – in Sir James Eadie QC's observations, whose "force" the Court of Appeal in Dolan recognised, about the analysis turning on the facts as they were at the time and the regulations are made, which does not lay the foundation for a useful precedent for the future (§12(3) above).

Looking forward: the public interest and a future PCW

28. It is relevant to ask, in this context, whether a substantive hearing with a substantive determination in the present claim would serve to promote the public interest so far as concerns clarity in relation to the legality, or illegality, of a future PCW. This Court's judgment in the present case would stand as vindication for one of the parties, so far as concerns the past. It could not be a direct, binding precedent for the future. The Court would not be deciding whether a future PCW, in the context of the Covid-19 pandemic or any other context, would violate Article 9. There is no claim to that effect. The position can be tested. Suppose that the Claimant sought to amend the claim, to argue that no PCW could be compatible with Article 9. Suppose what was sought was a binding declaration. Suppose the remedy included a prohibition. What then? In my judgment, the answer is clear. It is true that the judicial review Court has the jurisdiction to make a declaration which is 'advisory', and has the jurisdiction to grant a 'prohibition' to preclude future public authority action. But there is no prospect, at all, that such a claim would be entertained and granted in the present context. This is why, unlike the vires issue (where the true scope of the enabling power, determined by the Court of Appeal in Dolan, was a continuing objective legal truth), the ECHR-based challenges were context-specific. In addition to all of this, the Court would have in mind that a future PCW might never happen; and that – if it did happen – the Court would be able to respond appropriately.

Practicality and effectiveness: a future challenge to a new PCW

29. I have explained that the choice is not the 'binary' one, between allowing an Article 9 challenge to a PCW in the context of the pandemic and 'shutting it out'. I have described the position as 'nuanced'. The choice is between permitting to proceed to a substantive hearing an historic Article 9 challenge to the previous PCW in the circumstances in which it was imposed and recognising that if an Article 9 challenge to a PCW is to be advanced then it should – and must – await circumstances in which the issue is a live one. It is a central truth of remedies relating to the HRA-compatibility of public authority action that remedies available, through the right of access to the Courts, must be practical and effective (and not theoretical and illusory).

30. The Claimant is entitled to say this, from his perspective. I brought my Article 9 challenge to the PCW, in the context of the May 2020 restrictions and the refusal of the proposals which I had put forward. I also used Form N463 and asked for urgent resolution. There was a live PCW. There was a hearing, convened urgently, before Swift J. But it did no more than to secure PJR. There was no order for expedition, and the Defendant had a fairly substantial time period for filing a Defence and witness evidence. My substantive challenge had not been resolved by the time the PCW ceased to have effect in July 2020. If there were to be a future PCW, I would find myself having to push the ball again, up from the bottom of the hill. Moreover, if that did happen, there are likely to be practical constraints on the Court dealing with the substantive issues expeditiously. In the meantime, a new PCW would be in place and its effects would be being experienced. In the pandemic, things move fast and the legal process may be unable to keep pace. Prohibitions may be expected to be short-lived. I could be faced with the same position all over again: the PCW withdrawn after weeks or months, and no practical and effective recourse to law. The Court should grasp the substantive nettle now and determine the issue of legal substance identified in the claim. That would give everyone clarity, which would necessarily impact on future decisions.

31. This is an understandable position and I have some sympathy for it. But the answers are as follows. (1) None of this changes the fact: that the claim is fact-specific and context-specific; that resolution would be of the "historic" question of past Article 9-compatibility of the past PCW; and that the 'nettle' being grasped would not be prospective resolution of the legality of a future PCW, so as to be 'ahead of the curve' in relation to any future PCW in future circumstances. (2) The present challenge was not raised in the context of the March 2020 PCW. Its focus was on the PCW which was maintained, in the context of other relaxations in the regulations, in May 2020. The Claimant's representatives sought, and obtained, a lengthy hearing at great speed and urgency. They chose to advance an argument for interim relief, to suspend the PCW, which failed. They obtained PJR. They sought an expedited substantive hearing. Swift J was not persuaded that it was appropriate to direct expedition, for reasons that he gave. The lockdown regulations had been imposed from 26 March 2020, with the revised regulations from 13 May 2020; the focus was originally on Taraweeh prayers and the holy month of Ramadan was coming to an end; and interim relief had been sought and refused. Swift J reasoned as follows: the "general challenge directed to the effect of the 2020 Regulations on the ability to conduct communal or Friday prayers… is a claim that could and ought to have been brought much earlier, were it to be eligible for serious consideration as an expedited claim". He also added that "if either party" following the filing of the Defendant's detailed grounds of resistance (which he fixed for a date four weeks away, which date was subsequently extended) "wishes to make any application in relation to the timing of the hearing, they are free to do so, and that application will be considered on the basis of written representations". Expedition was not subsequently sought by the Claimant in light of those observations. That was no doubt because, by the time of the Defence (26.6.20), it was known that the PCW was soon to be withdrawn by amendment of the regulations, as it subsequently was on 4 July 2020. (3) Whether expedition and an urgent rolled up hearing would be appropriate in the context of any future PCW and any future prompt challenge to its legality invoking Article 9, is an open question. But if those steps are appropriate in those future circumstances, in the judgment of the Court dealing with that situation, then they will be granted. If they are not granted, it is because they are not appropriate. That is as it should be. There is nothing here approaching any deficit in the Court's ability to provide an appropriate response which would justify, in the public interest, allowing the present claim to proceed by means of an "historic" analysis of the justification for the PCW in the circumstances as they were in and after March 2020 or May 2020. The correct position in principle is – and has to be – that the Courts have, and will always seek to discharge, the responsibility of delivering practical and effective justice, consistently with the overriding objective. (4) The Claimant has achieved a secure platform in the following respects. His case achieved the grant of PJR. His case has not been determined adversely on its substantive legal merits. It is known to be an open question whether the PCW in and after May 2020 was Article 9-compatible. The Court of Appeal in Dolan also recognised that open question. There is also the Philip case in Scotland to which Blacks solicitors referred in their letter of 6 May 2021 (see §13 above).

32. A claim challenging a future PCW – if the Claimant considers a challenge to be justified and if he seeks his 'day in court' – could be pursued with conspicuous and demonstrable promptness, pointing to all these considerations. Instead of pressing for interim relief, the Claimant could be asking for the Court's resources to be channelled into an expedited 'rolled-up' hearing. There would need to be a reworked JRG. But that is as it should be, to ensure a disciplined focus and to engage judicial review remedies

designed to be practical and effective. The Court will respond in the way that it judges promotes the interests of justice and the public interest. That is a good and sufficient answer. So, there is here an important positive and constructive chord. It has been struck by the Defendant, as Mr Knight pointed out when I raised it with him. He also, candidly, accepted that it was made for the first time in his skeleton argument (filed and served on 7 December 2021). As is there said, the positive and constructive point is this:

> ***Were places of worship to be closed under future restrictions the point can be tested in an appropriate challenge at that stage.***

This is an important recognition. If there were to be a future PCW, and if the Claimant sought promptly to challenge its Article 9 compatibility, the Defendant would need to think carefully about what position it takes in the proceedings – given the duty of (candour and) cooperation – so far as concerns the facilitation of prompt resolution of the substantive legal merits.

Momentum and support

33. The Claimant told me that, if the claim does not go ahead now, with its momentum and the grant of PJR, in reality no similar claim is likely to go ahead ever. He tells me he has invested his savings in bringing this case. He says that, to others who might be interested in supporting the claim, a strike-out now will be seen as obvious 'defeat'. He says there will be little or no appetite to pursue or support the pursuit of a claim in future. He says, in all the circumstances, it is 'now or never'. The answer to these points is as follows. This is not a 'defeat'. The Court cannot proceed on the basis that its decision or judgment will be misunderstood. The Article 9-compatibility of the PCW from May 2020 onwards is recognised to be an open question. The Court is deciding whether there is a good public interest reason for allowing the "historic" challenge to be determined on its legal merits. The Court is recognising that, if there were a further PCW, its Article 9 compatibility could be raised on its legal merits. Whether the Claimant and any supporters would have the resources to bring a future claim, in light of the position in the present claim, is not a reason to allow this claim to proceed to a substantive hearing on an "historic" issue. There are good and well-founded reasons for not proceeding to a determination on the legal merits at a substantive hearing. It cannot be taken that there will inevitably be any future PCW. If and insofar as resources need to be found for a future substantive hearing, they will not now need to be found for the substantive hearing of this "historic" challenge. Insofar as the Claimant has a momentum and a legal platform, that supports the contention that arguably, in principle, a PCW is or can be a violation of Article 9.

Whether to grant a stay

34. I have considered – again as a possible point in the Claimant's favour – the possible alternative to striking out the claim, of imposing a 'stay of the proceedings, with liberty to restore'. The logic of that course would be as follows. The claim would not be dismissed. It would not need to revert to a permission stage. The claim would, rather, be 'on hold'. Were there to be a newly announced future PCW, the Claimant would be able to use the liberty to restore, to have the proceedings reactivated, with a view to having the issue of the Article 9-compatibility of the new PCW ventilated before this Court. The Court has the jurisdiction to grant a stay of proceedings. But I am quite satisfied that it would be wrong in this case for the Court to go down the route of a stay.

My reasons are these. (1) An Article 9 challenge to a future PCW, although it would no doubt benefit from the industry reflected in the JRG in the present case, would necessarily need to focus with discipline and clarity on the measure being impugned, the circumstances in which it has been introduced and operates, explaining the precise basis on which it is said to be an unjustified interference with Article 9 rights. In restoring the case following a stay, there will need to be a properly pleaded JRG and the identification of the remedies sought. (2) It is not appropriate prospectively to bypass the PJR stage. Any decision as to PJR (or a rolled-up hearing) should in principle be addressed in the context of the newly formulated challenge. Form N463 is available. The Court is flexible and responsible. In any event, even if a stay were granted, permission to amend the JRG and adduce evidence would be needed. (3) It would not be appropriate, in the interests of justice or the public interest, to leave these judicial review proceedings hanging over everyone, based on the prospect that there may be a need to move the Court at some unknown future stage, to challenge some future decision. (4) The logic inherent in the idea of staying the claim would fly directly into the teeth of the Court of Appeal's description of a "rolling" approach to judicial review involving amendments to challenge a fresh decision, which the Court of Appeal explained – in terms – that it regarded inappropriate in the context of the restrictions imposed in the regulations (see §12(5) above).

<u>Conclusion on strike-out</u>

35. It follows, for the reasons which I have set out above, that I am quite satisfied that the Defendant has identified a clear-cut reason as to why a substantive hearing has now become inappropriate in this case, in the light of post-PJR changes in circumstances. It is not appropriate, in my judgment, to defer consideration of the issue to the substantive hearing; it is necessary and appropriate in this case to deal with it now. This is one of those rare and exceptional cases where it is appropriate to strike-out the claim, in light of grounds for doing so which have arisen after the date on which permission was granted (§3(2) above). Doing so is a faithful application of the principle (§3(1) above) applicable when claims have become academic, absent a good reason in the public interest. It is a faithful application of the clearly applicable reasoning of the Court of Appeal in a case which directly overlaps with the present case. It is also a faithful application of the principle of procedural rigour in judicial review (§3(3) above).

<u>Costs</u>

36. Mr Knight submitted that, if the Court were to accede to the Defendant's application to strike out this claim for judicial review, the Court ought in principle to make a costs order in favour of the Defendant. He invited the Court to summarily assess the appropriate order for costs. His submission was that the appropriate scope of that costs order would be the entirety of the Defendant's costs in defending these judicial review proceedings, leaving aside only those costs of resisting interim relief which Swift J has already ordered be paid by the Claimant. Mr Knight submits that it is "right in principle" that costs should all "follow the event" where a claim is struck-out, and that they should "in principle" be the entirety of the costs of defending the (struck-out) claim. Mr Knight relied on cost assessment documents filed by the Defendant. A schedule of costs dated 27.5.21 had given a global costs figure of £22,163. Mr Knight gave me an updated global costs figure was £26,200. I am satisfied that I can reasonably and appropriately take Mr Knight's global figure (£26,200) as meaning that some £4,037 in the Defendant's overall claimed costs have been incurred in these proceedings between

27.5.21 – the date of the previous schedule – up to and including the hearing before me on 14.12.21.

37. The Claimant submitted that, if the Court were to accede to the application to strike-out the claim, there ought to be "no costs". He emphasised that this is a case in which he was successful on the question of PJR and that, if anything, the Defendant should have to pay his costs of the pursuit of PJR to that successful outcome. He also told me that he spent all of his savings on lawyers (some £30,000), and that an adverse costs order would leave him unable to pursue any subsequent claim to challenge any future PCW, were one to be imposed in circumstances warranting the resolution of its compatibility with Article 9.

38. In my judgment, the appropriate costs order is this: the Claimant should pay an appropriate portion of the Defendant's reasonable costs, but only a relatively modest proportion of the overall costs, which I will summarily assess at £4,000. My reasons are these. (1) In my judgment, it could not be just or appropriate to award the Defendant the entirety of the costs of resisting the claim. The claim has been struck-out, but this is specifically because of post-PJR events rendering it academic, there being no good reason in the public interest to determine the historic Article 9-compatibility. If, in the letter of 6 May 2021, the Claimant's solicitors had agreed that it was appropriate not to proceed to a substantive hearing, there would in my judgment have been no basis for a costs order against the Claimant. The Defendant has not been vindicated in the substantive legal position taken in the proceedings. Rather, the Defendant has persuaded the Court that it is not appropriate to rule, either way, on who is right or wrong on the substantive legal merits. (2) The vast bulk of the costs of £22,163, included in the schedule dated 27.5.21, were costs related to defending the proceedings. By way of example, the work on documents includes £340 attributable to solicitors work on the strike-out application itself. On the other hand, the £4,037 for work post-27.5.21 will have included Counsel's work on the skeleton argument and for attending the hearing. It will also have included work relating to the successful application made by the Claimant for relief from sanctions, which Chamberlain J granted (13.9.21). (3) The Defendant has a prima facie claim to its costs (on a standard basis) of the application to strike-out, the costs of Mr Knight's skeleton argument, and the costs of his appearance at the hearing before me. Taking a broad-brush approach, that will have been a small portion of the £22,163, and the main portion of the £4,037, and in each case not on an 'indemnity' basis. (4) On the other hand: (a) one of the grounds for strike-out has failed; (b) a central point was recognised by the Defendant and communicated for the first time in the skeleton argument (7 December 2021); and (c) the prospect of the appropriate facilitation of a substantive determination of Article 9 compatibility should there be another PCW is a material part of the analysis on this strike-out application. Furthermore, in the exercise of my judgment and discretion in relation to costs, it is relevant to have in mind the importance of the issue which was raised, which is left as an open question, and the facilitation of whose future resolution engages the interests of justice and the public interest. (5) Having said all of that, it is right to remember that: (a) the Defendant's position on the strike-out has in substance been vindicated and its costs have been incurred by reason of the Claimant's response; and (b) the Claimant had legal representation throughout these proceedings until recently, and those representatives were in a position to explain that the Claimant could save his resources for a future challenge, if needed and if promptly pursued, building on the work done in these proceedings. (6) Having regard to all of these considerations,

and all the circumstances of the case, I will order that the Claimant pay the Defendant a portion of its costs, summarily assessed at £4,000.

Permission to appeal

39. Following circulation of this judgment in confidential draft, Mr Knight was able to liaise with the Claimant and communicate to the Court the Claimant's indications that (a) he would like permission to appeal (PTA) but (b) he did not feel able to formulate an application for PTA without legal representation. I agree with Mr Knight that the fairest course in the circumstances is for this Court to consider the appropriateness of PTA and, if considered appropriate, grant PTA. Having done so, I have concluded that an appeal has no real prospect of success and there is no other good reason for granting it, and I refuse PTA.