

Very urgent

The Rt Hon Priti Patel MP
Secretary of State for the Home Department
2 Marsham Street
London
SW1P 4DF

By email

Date 4 June 2020
Your ref
Our ref MG/DOL/0041/00002/MG
Direct Dial [REDACTED]
Direct Fax [REDACTED]
Email [REDACTED]@wedlakebell.com

Dear Sirs

The Health Protection (Coronavirus, International Travel) (England) Regulations 2020

We act for Mr Simon Dolan.

1. Our client

Our client is a UK citizen and as you may be aware is the first claimant in a set of current judicial review proceedings against the Secretary of State for Health & Social Care & Anor.

In those proceedings, our client is challenging, inter alia, the legality of the *Health Protection (Coronavirus, Restriction) (England) Regulations 2020* (as amended) ("the Lockdown Regulations) under which unprecedented restrictions were imposed on the whole population of England in response to the outbreak of the SARS-CoV-2 virus ("Covid-19").

Those proceedings are currently underway in the Administrative Court under case No. CO/1860/2020. Our client's amended claim form was issued on 26 May 2020 and by order of the Court the defendants' response is due by 12 June.

In view of the urgency of the matters referred to in this letter and the short timeframe in which we require a response (i.e. tomorrow), we are copying in the relevant persons at the Government Legal Service who are presently dealing with our client's judicial review. However, please note that the issues raised in this letter are a new and distinct matter that falls outside of those proceedings.

2. Background

It has been a feature of the Government's response to the Covid-19 outbreak that ministers have said at all times that they have "followed the science". In particular, the Government claims to have been following the advice of the Scientific Advisory Group for Emergencies ("SAGE").

On 30 April 2020, our client sent a letter before action to the Secretary of State for Health and Social Care, requesting, inter alia, disclosure of the SAGE minutes relating to meetings of SAGE since the Covid-19 outbreak began. The Secretary of State dismissed this request. On 26 May, our client's judicial review proceedings were served and formal disclosure of the SAGE minutes was specifically applied for in those proceedings. On 29 May, a few days after the commencement of our client's judicial review proceedings, the Government belatedly published the minutes of 34 such meetings of SAGE.

EMAIL TRANSMISSION This email contains information which is confidential, may also be privileged and is for the exclusive use of the addressee. If received in error, please return immediately. Any use, distribution, copying or dissemination of this email other than by the addressee is strictly prohibited.

DOL/0041/00001/20885187/1

71 Queen Victoria Street London EC4V 4AY | Tel +44 (0)20 7395 3000 | Fax +44 (0)20 7395 3100
DX 307441 Cheapside | www.wedlakebell.com

Wedlake Bell LLP is a limited liability partnership incorporated in England and Wales with registered number OC351980.

Wedlake Bell LLP is authorised and regulated by the Solicitors Regulation Authority under number 533172. Its registered office and principal place of business is at 71 Queen Victoria Street, London EC4V 4AY. A list of members may be inspected at this address. The term 'Partner' is used to refer to a member of Wedlake Bell LLP

TRANS EUROPEAN
TELFA
LAWYERS ALLIANCE
Associated offices
throughout Europe

As the minutes show, the advice from SAGE back in February and March was that there was no point in imposing controls on the UK border to restrict inflows of potentially infected persons from overseas, because the Covid-19 virus had already spread into the UK population. Thus, as was widely reported in the press, thousands of potentially infected travellers continued to pour into the UK, through ports and airports, unchecked and untested – even after the Lockdown Regulations had been imposed for the first time on 26 March.

In recent weeks, as the peak of the Covid-19 infection has receded, the Government has finally taken tentative steps to ease some of the provisions of the Lockdown Regulations, although many severe restrictions on individuals and businesses still remain. The message, however, is unmistakable: the UK is emerging from the worst of the Covid-19 outbreak and increasingly the Government seems to want to encourage a much needed transition back to economic activity.

The removal of the Lockdown Regulations and a return to normality is desperately needed. As has been highlighted in the evidence served with our client's judicial review proceedings and as has become ever more obvious since that evidence was served, the UK is suffering disastrous and devastating damage to its health, wellbeing and to its economy from the restrictions imposed by the Government. All the evidence is that these are and will be grave consequences for all, but especially for the poorest and most disadvantaged in society.

In his judicial review proceedings, our client has not only challenged the lawfulness of the Lockdown Regulations as having been made "ultra vires" under the original 1984 Act of Parliament relied upon in making them, but he has also claimed that they are disproportionate to the threat posed by Covid-19.

This is because we know from many weeks of data collected since it first affected the UK, that Covid-19 overwhelmingly affects primarily the elderly and those with pre-existing health conditions, not the vast majority of the working population. Young people and children are scarcely affected at all. Indeed, as of the latest available figures published by NHS England, we note that out of a population of 56 million people in England alone, since the outbreak started, Covid-19 has been cited on the death certificates of just 279 people who died in hospital in England under the age of 60 with no pre-existing health condition.¹ Its threat to the health of the vast majority of the population is therefore demonstrably minimal. This is even more so now that infection rates have fallen sharply – particularly in the community outside of hospitals and care homes - NHS critical care capacity has been expanded and issues with supply of PPE and testing are being increasingly overcome.

Undeniably tragic though any deaths are to the people concerned and their loved ones, the NHS England figures graphically illustrate our client's central point: i.e. that the Lockdown Regulations imposed on the whole population have been completely out of all proportion to the threat posed by Covid-19. They are out of proportion because of their blanket application to the whole population, causing huge harm to public health, the education of children, to the nation's economy and to precious, hard won civil liberties.

It was thus with mounting surprise and concern, that our client learned last month of an intention on the part of the Government to impose what appeared to be a somewhat half-baked new "quarantine" scheme for people entering the UK from abroad. Rumours that this was in the offing first emerged in the second week of May when airlines warned of the "devastating" consequences such a scheme might have.² The proposals were subsequently described as "idiotic" by Michael O'Leary the CEO of Ryanair and organisations like the CBI urged the Government to think very carefully about the proposals due to the damage they could do to the economy.³

¹ See deaths by condition tab of weekly deaths link at <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/>

² <https://www.npr.org/sections/coronavirus-live-updates/2020/05/09/853255229/u-k-airlines-airports-fear-devastating-impact-of-possible-quarantine-rules?t=1591229015244>

³ <https://www.independent.co.uk/news/uk/politics/coronavirus-uk-quarantine-travel-cbi-economy-a9518746.html>

Once again, instead of focussing attention on protecting those most vulnerable to Covid-19 such as the population of care homes, those with illnesses needing to be shielded from infection and those in hospital, the Government has sought to implement a blanket "once size fits all" approach to everyone. The new traveller quarantine restrictions seemed likely to be, like the Lockdown Regulations, another example of a disproportionate piece of legislation going much further than necessary to achieve its aim – and causing huge and unnecessary damage in the process.

3. The lead up to the imposition of the new travel restrictions

It is clear that the whole process by which the new quarantine plans were evolved was a very troubled one.

Initially, there was talk in the press of how travellers from some of the worst affected countries in the world like France might be exempt from the proposed restrictions.⁴ There had also been much noise in the media and from Conservative politicians about the use of so-called "air bridges" to mitigate the impact of the new policy.⁵ By this device, it would be possible for travel to continue unimpeded as between countries with low infection rates. The air bridge idea had been floated by the Secretary of State for Transport Grant Shapps at a press conference on 18 May. But shortly afterwards the Government appeared to go into reverse on this idea.⁶ Reports in the press as recently as last weekend suggested that a sizeable number of Conservative MPs felt so strongly about the new rules that they might rebel on this issue.

However, it was not until yesterday afternoon, during her statement in the House of Commons, that the Secretary of State confirmed that the legislation to implement the new traveller quarantine rules would finally be laid before Parliament. This legislation, like the Lockdown Regulations, is in the form of a new statutory instrument purportedly issued by the Secretary of State under the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). It was published by the Government only late yesterday afternoon.

The legislation is the *Health Protection (Coronavirus, International Travel) (England) Regulations 2020* ("the Travel Regulations") which are due to come into force on Monday 8 June. Presumably, there will equivalent legislation passed by the devolved administrations of Scotland, Wales and Northern Ireland. For the purposes of this letter, we refer solely to the Travel Regulations as enacted in England.

Even on the day they were introduced, the former Prime Minister Theresa May and at least two former cabinet ministers reportedly attacked the Travel Regulations as "*disproportionate and economically damaging*." ⁷ MPs and travel groups have expressed similar sentiments.

4. The Travel Regulations

The Travel Regulations themselves as published comprise 22 pages of which we note that 12 (i.e. more than half) are made up of provisions explaining who is exempted from complying (either wholly or partially) with the Travel Regulations. In other words, more of the statutory instrument's wording is devoted to those who are *not* obliged to comply with the main provisions of the Travel Regulations, than to those who are.

Among the (many) categories of persons who are excluded from having to comply with the self-isolation provisions of the Travel Regulations are lorry drivers, fruit pickers, airline crews, seamen, specialist workers and people who live in the UK but who travel abroad regularly to work overseas and vice versa.

Thus, a significant number of people who travel to and from the UK do not have to comply with the self-isolation requirements at all but can continue to come and go from the UK as they please.

⁴ <https://www.telegraph.co.uk/news/2020/05/17/two-week-quarantine-plan-uk-visitors-poised-announced-week/>

⁵ <https://www.telegraph.co.uk/politics/2020/05/18/air-bridge-plan-save-holidays-abroad/>

⁶ <https://www.telegraph.co.uk/politics/2020/05/20/grant-shapps-air-bridges-plan-holidaymakers-escape-quarantine/>

⁷ <https://www.thetimes.co.uk/article/senior-tories-revolt-over-travel-quarantine-2wmzb6c2d>

The Travel Regulations require those who are covered by them, to complete a special form and provide "passenger information" to the UK border authorities.

Having been allowed entry to England, they are then obliged by law to proceed directly to the accommodation where they will self-isolate for the next 14 days. However, there is nothing to stop them using public transport for this purpose. Once at their place of self-isolation, they can live with friends or family members in the same accommodation and they can go out to shops to obtain supplies of food. They are also allowed to leave their accommodation for the purposes of departing from England.

5. Protection of public health?

Thus, under the Travel Regulations, someone who may be suffering from Covid-19 and be infectious, is still allowed to mix on crowded public transport where they could be in an enclosed space with hundreds of people (for hours if travelling a significant distance from the airport or seaport where they had arrived). They can use elevators, go to shops, travel via public transport to obtain supplies, touch surfaces, cough, breath and do all the things that are known to spread the virus.

In short, even in full compliance with the law as contained in the Travel Regulations, such persons can easily spread Covid-19 into the community. Indeed, there is nothing in the Travel Regulations that prevents someone who develops symptoms of Covid-19 from leaving their accommodation, travelling via public transport back to the airport and taking a flight home from England – infecting others along the way as they do so.

The guidelines published by the Government state that someone who is displaying symptoms of Covid-19 "will not be allowed" to use public transport.⁸ However, there is nothing to that effect in the Travel Regulations themselves. Moreover, there is of course no way for any staff at airports, stations or anywhere else for that matter to tell whether or not an individual arriving at a London Underground station or boarding a bus has Covid-19. Given that people can be infectious before they even display symptoms, there is no sure fire way to stop incoming travellers spreading the virus anyway.

Further, all of this assumes that each and every person will actually comply with the Travel Regulations after they arrive in the UK, against the possibility that at some point over the next 14 days, they will be visited by a policeman and their non-compliance will be discovered. A source quoted in the Guardian said of the chances of being caught "*you would have to be unlucky and stupid.*"⁹

Finally, it is now the case that persons in England are allowed to lawfully meet with up to 5 other people who are not from their own household in private outdoor spaces. If a person caught by the Travel Regulations is self-isolating in accordance with those Regulations, they can still mix with those additional non-household persons as well as others in the same household. And of course there is no law that prevents the persons coming into contact with that person from then going out into the community and unwittingly infecting others.

Accordingly, not only do the Travel Regulations allow many thousands of people falling within Schedule 2 to travel to and from England and be exempt from the need to self-isolate, but in respect of those who are required to comply, what kind of quarantine is it? The requirements – which depend entirely upon the self-compliance of the person concerned – do not prevent the spread of Covid-19 by those who are infected. As the above examples demonstrate, they make very little difference – even if people do comply. What they do achieve, however, is to interfere with the lives and interactions of those who have to comply with the Travel Regulations and they cause huge harm to the industry sectors that are affected by the decimation of international travel.

⁸ <https://www.gov.uk/government/publications/coronavirus-covid-19-how-to-self-isolate-when-you-travel-to-the-uk/coronavirus-covid-19-how-to-self-isolate-when-you-travel-to-the-uk>

⁹ <https://www.theguardian.com/world/2020/jun/01/critics-round-on-no-10-over-ridiculous-rules-for-14-day-quarantine-coronavirus>

6. The impact of the Travel Regulations

The imposition of a 14 day self-isolation requirement on UK citizens returning from abroad or on non-UK citizens travelling to the UK, will have a devastating effect on the aviation and travel industries which have already been severely affected by the Lockdown Regulations since March.

Very few people in England (except perhaps the very wealthy and those who no longer have to work) are going to book any kind of holiday abroad if, on their return, they will be compelled to self-isolate for 14 days. For those who cannot work from home, the vast majority of working people in England do not have sufficient holiday entitlement to allow them to tag on an extra 14 days off work to their holidays or else cannot afford to have 14 days of unpaid leave. So the effect of the Travel Regulations will be to virtually end all further bookings of flights and trips abroad. The same applies to self-employed people and to the vast majority of business travellers.

For those who wish to visit England as tourists from overseas, for obvious reasons, few people will do so if they know they will have to spend 14 days stuck in isolation in a hotel room or other place before they are allowed to lawfully do anything else. Business travel will similarly be severely affected for the same reasons.

Not only will the Travel Regulations decimate the income of airlines and travel companies but the knock on effects will be even more wide ranging – and damaging.

As well as the jobs directly lost at airlines and travel companies, the whole support infrastructure and linked sectors will similarly be devastated. Businesses such as airports, retail outlets at airports, maintenance providers, airline meal providers and caterers, manufacturers of spare parts - none will be spared the continued loss of income that will be caused to them and their employees.

For the domestic tourist industry, it is true that to an extent, the reduction in foreign visitors may be partially offset by the increase in the number of English residents holidaying at home. But there is no way that this will adequately compensate for the huge fall in foreign tourists and business people who would normally fill up the hotels, restaurants and principal tourist attractions – even if social distancing guidelines were still to be in force.

For many millions of people, especially with children of school age, their only opportunity to go abroad on holiday would be during school holidays and that opportunity will be denied them this summer.

It is therefore the case that huge damage will be caused to very important sectors of the economy – to the detriment of all – by the Travel Regulations. But what is worse is that it is very difficult to see how those same regulations can make any material difference when it comes to protecting public health. That is quite apart from the fact that the threat posed to the majority of the population by Covid -19 is so modest.

This is clearly another example of the lack of proportion being shown by the Government in its approach to dealing with the Covid-19 outbreak.

As far as we can see, there are some serious questions as to the lawfulness of the Travel Regulations.

7. Are the Travel Regulations lawful? – the 1984 Act

The Travel Regulations are purportedly made under powers conferred on the Government by sections 45B, 45F(2) and 45P(2) of the 1984 Act. Section 45B allows the authorities to make regulations "*preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place*".

On the face of it, we cannot see how the Travel Regulations achieve this aim of "*preventing danger to public health*".

Persons arriving in England (including those infected with Covid-19) are either exempted from restrictions under the Travel Regulations, or else they are still allowed to enter the country and carry on activities (e.g. use public transport) whereby they may well pose a danger to public health. We do not see how the Travel

Regulations are "preventing danger to public health" which is the purpose for which the Secretary of State can make regulations under s45B.

Regulations made under section 45B of the 1984 Act are not subject to the same statutory requirements of proportionality as those made for domestic purposes under s45C of the 1984 Act. Nor do the same requirements and safeguards apply (which our client argues in his judicial review proceedings render the Lockdown Regulations ultra vires). The Travel Regulations nevertheless purport to regulate the conduct and activities of persons in England – including UK citizens – when they are well away from any aircraft, vessel or other conveyance they may have arrived on. The Travel Regulations purport to govern what those people must do once they are at their chosen accommodation.

We must seriously question whether the Secretary of State has power under the 1984 Act to make these regulations. Are the Travel Regulations, like the Lockdown Regulations, ultra vires the 1984 Act?

8. Are the Travel Regulations lawful? – irrationality

The case against the Travel Regulations on irrationality grounds is particularly strong.

First, we would make the obvious comment that it simply does not appear rational that the Travel Regulations are being imposed only now, when infection rates in the UK (at least outside of care homes and hospitals) have fallen away dramatically and where the same has happened – only more so - in many countries overseas.

Why did the Government allow the continued unchecked arrival into the UK of many thousands of travellers from areas known at the time to be heavily affected by Covid-19 (e.g. Northern Italy, Spain, Wuhan, Iran etc) at the start of the pandemic and even long after the imposition of the Lockdown Regulations? Why, even while UK citizens were confined to their own homes on penalty of committing a criminal offence, were travellers arriving into the UK's airports allowed to pass unchecked and flow onto public transport and out into the wider community? But, now, we are told, there must be restrictions on such persons (albeit restrictions that are full of holes). This is irrational.

Secondly, we are now in a situation where many countries have either eliminated or massively reduced Covid-19 infections, in many cases to rates far below those that are still being seen in England. New Zealand for example has had no cases at all for nearly two weeks. Even some European countries such as Greece have dramatically fewer infection rates than the UK.

In those circumstances, how can it be that people who live in the most heavily infected areas of the UK and who have travelled directly abroad to somewhere like Greece, could pose a higher risk to health when they return directly to the UK, when compared to the risk they would pose from mixing with people within their local community? There is no attempt in the Travel Regulations to have any regard to the risk posed by travel from a particular country.

Such a blanket approach in the Travel Regulations – irrespective of whether persons are travelling directly from a low infection country – makes no sense in public health terms and is clearly irrational.

Thirdly, other countries, including in Europe, announced as long ago as 18 May plans to ease their own border restrictions and many of them are now doing so with effect from the middle of June – almost precisely at the time when the UK is introducing quarantine measures.¹⁰ The EU has encouraged this move to reopen borders. Those reopening their borders to travellers include countries such as Austria, France, Germany, the Netherlands, Greece and others.

The UK followed those other countries by introducing a lockdown in March when they had already done so. Yet in relation to the imposition of border controls, the UK failed to implement any kind of self-isolation or equivalent controls when other European countries did so. Yet now, it finally does so at the very moment when they are relaxing those rules. This is irrational.

¹⁰ <https://www.theguardian.com/travel/2020/may/18/europe-holidays-which-european-countries-are-easing-coronavirus-travel-restrictions-lockdown-measures>

Fourthly, in her statement to Parliament on 3 June, the Home Secretary stated as follows:

"The scientific advice is that imported cases of the virus pose a more significant threat to our national effort and our recovery."

"Travellers from overseas, could become a higher proportion of the overall number of infections in the UK and therefore increase the spread of the disease."

"The government is therefore taking a proportionate and time-limited approach to protect the health of the British public."

As regards the "scientific advice", we cannot see any reference to such scientific advice in any of the most recent minutes of SAGE that have been published so far following our client's judicial review proceedings. This is in spite of the fact that the proposal to impose a quarantine law was first mooted as far back as 9 May. SAGE does not once mention in any of the May minutes so far published, the need for a new quarantine procedure for incoming international arrivals.

Where is the scientific advice referred to by the Home Secretary in her statement to Parliament? If there is any such advice, how does it square with the points we have made above about the timing of these measures and the huge loopholes in the quarantine measures they purport to introduce? Why are they necessary now on a blanket basis, including where travel is from countries that have lower infection rates than the UK?

If (as seems to be the case) there is no convincing scientific advice to support the making of the Travel Regulations, then this is a further example of their irrationality.

Finally, the Home Secretary has stated that the measures are "proportionate".

But how can that possibly be the case in the light of huge damage that the measures are doing to the livelihoods and industry sectors affected, the modest health risks posed to the majority by Covid-19, and the gaping holes and flaws in the Travel Regulations themselves which mean that they are not true quarantine measures anyway?

Why, when the Government tells us it has massively ramped up its testing capacity, has no attempt been made to use the testing of incoming travellers for Covid-19 as an alternative or mitigating element to its travel restrictions? It may not be practicable for there to be testing of all incoming travellers at the point of entry. But there is not even an attempt to offer testing to those who ask for it, as an alternative to self-isolation. If – as is the case anyway under the Travel Regulations – people who might have Covid-19 are allowed into the country, then why can they not take a test which, if negative, could enable them to be released early from such quarantine or avoid it altogether?

Unless and until the Government can convincingly answer these questions, and address the other factors we have mentioned, there would appear to be very strong grounds for a legal challenge to the Travel Regulations on the grounds of irrationality.

9. Other grounds of challenge

In addition to the strong illegality and irrationality points raised above, there are almost certainly other technical grounds on which the lawfulness of the Travel Regulations could, on analysis, be challenged.

For example, although the UK has left the European Union, it remains subject to EU law for so long as the country remains within the transition period provided for in the Withdrawal Agreement. That period will not end – at the earliest – until 31 December 2020. EU law continues to enjoy supremacy over our own domestic law for the time being. This includes the rules concerning free movement of people and workers and the right of free access to access services guaranteed under the Treaty on the Functioning of the European Union.¹¹

¹¹ See in particular Articles 20, 21, 45 and 49-62 of the TFEU

Whilst the Travel Regulations specifically exempt those who may live outside England and who travel here to work at least once per week (or vice versa), that is not sufficient to deal with objections as to the right of EU citizens to move freely to and from the UK – as well as within the UK. The Travel Regulations appear to impose a disproportionate interference with such rights, contrary to EU law.

Another area where the Travel Regulations are open to challenge is via the Human Rights Act 1998. Under that Act, individuals whose rights under the European Convention on Human Rights ("the Convention") are interfered with by the Government have the right to bring proceedings to enforce their Convention rights. The Travel Regulations clearly impinge on the human rights of our client, amongst others in a number of respects.

His right to the peaceful enjoyment of his property enshrined in Article 1 of Protocol 1 of the Convention is engaged by virtue of his owning and running an airline business (Jota Aviation Ltd). The goodwill in that business is being damaged by the Travel Regulations (just as it is by the Lockdown Regulations). Moreover, like the thousands of UK citizens resident in England who have contributed funds to our client's crowdfunding campaign for the judicial review of the Lockdown Regulations, our client is himself affected by the requirements for self-isolation imposed by the Travel Regulations should he visit England while they are in force, which engage upon his right not to be deprived of his liberty (through the requirement to self-isolate) under Article 5 of the Convention.¹²

10. Summary and required next steps

The Travel Regulations were only unveiled for the first time on the afternoon of 3 June. They are due to take effect as from Monday 8 June.

For all the above reasons, our client considers that they are deeply flawed and almost certainly unlawful as drafted. They will cause massive additional economic damage to the country and to the livelihoods of a great many of its citizens whilst providing almost no discernible benefit the other way. There is no evidence that they will prevent any threat to the nation's health in their current form.

Our client strongly urges the Secretary of State to immediately suspend the introduction of the Travel Regulations pending an urgent review of their legality and the need to introduce them at all.

Failing that, we request that the Government provides urgent answers to the questions posed in this letter and a cogent explanation as to why the Government nevertheless considers that the introduction of the Travel Regulations is justified and not irrational. In this regard, we consider that the published statements to Parliament and the media by the Secretary of State are totally inadequate as justification for these measures.

Given the timing and urgency of the matter, we must require a response to this letter by no later than 5pm on Friday 5 June 2020.

Yours faithfully



Wedlake Bell LLP

cc Government Legal Service

¹² And it cannot rationally be argued that any person travelling to England directly from a very low infection country might be infected with the virus (Article 5.2(e)).