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Brent Haywood
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Lindsays WS
Edinburgh
Delivered by email only

Your ref:- BH/CC/11/1

Our ref :- LIT/AAN

22 January 2021

Dear Brent

The closure of places of worship in Scotland

Thank you for your letter of 15 January 2021 addressed to the Scottish Ministers which has been passed to me. I have been asked to respond on their behalf. I note that you act on behalf of representatives of certain Christian Churches and have asked that Scottish Ministers reconsider their decision to “close all places of worship”.

Preliminaries

You will have seen the letter from the Cabinet Secretary, Aileen Campbell, dated 18 January 2021 and I repeat what is said there. The Scottish Ministers appreciate how hard the measures which have been put in place are for everyone, including the faith and belief communities. We are pleased that your clients appreciate that the Scottish Ministers are motivated by a desire to act for the common good. Scottish Ministers are grateful for all of the steps taken by all faith and belief communities to comply with the restrictions and for all the work your clients have done, and continue to do, to help their communities through these difficult times.

The Scottish Ministers’ response to this pandemic in general, and in particular to the variant strain of Covid 19, has been guided by the principles set out in the Framework for Decision Making and more recently in the Strategic Framework, the requirement to suppress the virus, as well as the assessment of the scientific and medical evidence available and the guidance of expert clinicians.

Consultation and regular engagement with stakeholders have also informed Scottish Ministers’ decision making. Evidence is continually gathered in relation to economic and societal harm. All of this is assessed and the outcomes inform the decision making that the Scottish Ministers require to undertake. The Scottish Government website publishes the key evidence and assessments. Their decision making is scrutinised by the Scottish Parliament.

The restrictions are reviewed regularly and, as you know, Scottish Ministers are required by law to review the restrictions at least once in every three weeks. Reviews include full

equality and rights impact assessments which are published.

I note that you suggest in your letter that the regulations in question have “not even been laid before a legislative body”. In fact, the restrictions on places of worship have been set out by Ministers in Parliament, debated in Parliament, and approved of by Parliament in a vote. The Covid-19 Committee discussed this matter at its Committee meeting on 8 January, where the Deputy First Minister set out the government’s position on the issue: [link to Official Report](#) (see especially columns 31 onwards). The Scottish Parliament, sitting in plenary, considered a motion not to approve the No. 11 Regulations on 20 January, and chose instead to approve them by a vote of 96 for to 5 against: [link to Official Report](#) (see columns 97 onwards).

In relation to your comments regarding the Deputy First Minister’s appearance before the Covid-19 Committee on 8 January 2021, we would note that Mr Swinney offered to make available the rationale for the Government’s decision on places of worship and supporting evidence and he has done so.

Scottish Constitutional Issues

I should make it clear that the decision which your clients challenge does not “close Churches”. Nor do the decisions interfere with freedom of worship nor intrude upon the doctrine or governance of those Churches. Accordingly we do not agree that the steps taken violate the legislation you cite nor that they are either disproportionate or have serious implications for freedom of religion.

The steps taken are ones which the Scottish Ministers can rightly take. As you know, it is open to the state to regulate the secular activities of Churches including, as here, for the purposes of protecting public health. Churches require to comply with various aspects of “secular” law including in the areas of planning, the environment, licensing, criminal law, food safety, protection of vulnerable groups, charity law and many more which you will be aware of. The Scottish Ministers were entitled to make the decision they did to serve their public health objectives.

Paragraph 1A of schedule 5 of the regulations

It might be helpful to revisit paragraph 1A of schedule 5 of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, as amended (“the regulations”). Paragraph 1A(2) sets out exceptions to the requirement to close a place of worship. A place of worship may be used -

- (a) for a funeral
- (b) for a commemorative event for a person who has died but is not a wake or funeral tea
- (c) to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast
- (d) for a marriage ceremony or civil partnership registration which –
 - (i) consists of no more than 5 person or
 - (ii) where an interpreter is required to attend, consists of no more than 6 persons or

(e) to provide essential voluntary services or urgent public support services (including the provision of food banks or other support for the homeless or vulnerable people, blood donation session, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.

The transmissibility of the new variant of Covid 19 has meant that unfortunately there has been a return to stay at home restrictions. The current restrictions are set out in the regulations. The decision to return to stay at home restrictions was informed, assessed and approved by the Scottish Parliament. In the footnotes you will find links to evidence which was considered prior to the regulations being made.¹ In particular you will note the evidence regarding the increase in transmissibility of the new variant of the virus. As a result of that increase in transmissibility, the risk posed by the virus at the moment is similar if not greater than it was at the beginning of the pandemic in March last year.

Despite this there has been special provision made to allow those leading worship to leave their homes and to use places of worship to lead remote services. The Scottish Ministers have provided support to enable worship to be conducted remotely. We are aware of a variety of online video streaming and audio services which have been made available by faith organisations and individual places of worship to their communities.

Likewise we are aware of the important pastoral work which continues to be undertaken by many faith and belief communities including your clients. It has been shown possible to provide pastoral care for those who require it and to continue to provide the support which Churches, such as your clients provide. Our guidance makes clear that it is permissible to enter someone's house to provide emotional support to someone whose well being is at risk, including those who are isolated because of a disability or a caring situation. It is a matter for those undertaking pastoral care to exercise judgement as to whether a personal visit is required as opposed to a virtual one.

Article 9 Rights

In relation to the Convention challenge, you appear to accept, and in any event we suggest there can be no doubt, that if there is any interference by virtue of the provision made in the regulations with the rights protected by Article 9 when read with Article 11 ECHR (and we reserve our position on that issue) it is both "prescribed by law" and in pursuance of a legitimate aim.

The issue in such circumstances is therefore whether any interference is "necessary in a democratic society ... for the protection of public order, health or morals" i.e. whether or not it is proportionate.

Your primary position in that regard appears to be that the decision-making process which led to the regulations being made was unevicenced. That is not accepted for the reasons which I have already given. The regulations including their provisions regarding places of worship, were made in light of scientific evidence regarding the increased transmissibility of

¹ Public Health Scotland Covid-19 Statistical Report 7 January 2021.

https://beta.isdscotland.org/media/7153/21-01-07-covid19-publication_report.pdf

Mitigations to reduce transmission of the new variant SARS-CoV-2 virus, 22 December 2020.

<https://www.gov.uk/government/publications/emgspi-btweg-mitigations-to-reduce-transmission-of-the-new-variant-sars-cov-2-virus-22-december-2020>

SARS-COV-2: Transmission Routes and Environments, 22 October 2020

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933225/S08_24_SARS-CoV-2_Transmission_routes_and_environments.pdf

the new variant of the virus and the risk of transmission in various settings, including places of worship.

The measures which have been introduced are temporary and subject, as I have already noted, to review. They form part of a time-limited series of measures all of which are aimed at suppressing the virus and are targeted to the areas most at risk.

Further, the measures are limited to areas subject to Level 4 restrictions. The necessity for Level 4 restrictions is itself subject to regular review.

In the whole circumstances, we would respectfully suggest that the proportionality of the measures introduced by the regulations as regards places of worship is both evidenced and clear.

For the avoidance of doubt, we do not agree with your analysis of section 13 of the Human Rights Act 1998.

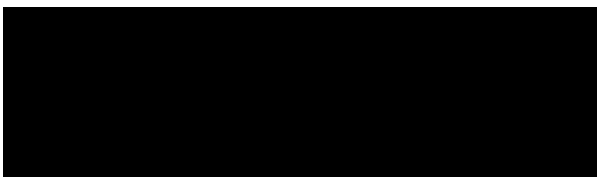
Conclusion.

It is our position that the decision your clients complain of is not disproportionate. The regulations which you seek to challenge are lawful and compatible with Convention rights. Churches have not been closed. Worship can, and is, continuing, albeit by virtual means. The regulations enable those leading worship to do so in places of worship and for necessary and essential pastoral work to be carried out.

Our lead policy official has offered to meet with representatives of your clients to discuss the contents of this letter further in case there has been any misunderstanding which can be resolved. Our clients look forward to working with yours and, as the Cabinet Secretary says in her letter, to work with each other on how the restrictions can eventually be lifted.

Please do not hesitate to contact me if there is anything else you wish to have clarified.

Yours sincerely



Aileen A Nimmo