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My Ref: MP:MP3515

Date: 28 May 2020

Government Legal Department

102 Petty France,

Westminster,

London

SW1H 9GL

By email only to *newproceedings@governmentlegal.gov.uk*

Dear Sirs,

Our clients: Rev. Ade Omooba et al

This letter is a formal letter before claim, in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules.

The claimants

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Criminal Defence Service

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The proposed defendant: The Secretary of State for Health and Social Care

Defendant's ref.: The Health Protection (Coronavirus, Restrictions) England Regulations 2020 (SI 350/2020)

The details of the claimants' legal advisers: see details at the top of this letter

Details of the matters being challenged:

(1) Regulation 5(5) of *The Health Protection (Coronavirus, Restrictions) England Regulations 2020*, dated 26 March 2020

(2) Regulation 7, insofar as it applies to church services and rites

(3) *Our plan to rebuild: The UK Government's COVID-19 recovery strategy*, dated May 2020, insofar as it applies to places of worship.

(4) Failure to provide assurances that the restrictions on church activities will be relaxed and/or lifted as a matter of priority as part of the Government's 'lockdown exit strategy'.

The Issues

Introduction

The proposed judicial review is against the blanket 'lockdown' imposed on all churches by the Regulations, and the failure to prioritise the re-opening of churches as part of the Government's 'exit strategy'. In summary, our clients contend that the relevant Regulations are:

a) disproportionate in the circumstances where the overwhelming majority of churches had closed down voluntarily in response to the Coronavirus pandemic, and the remainder had introduced far-reaching precautions against infection; and

b) *ultra vires* the Health Secretary's powers under *Public Health (Control of disease) Act 1984*.

Our clients do not for a moment suggest that churches should be allowed to operate as before notwithstanding the Coronavirus epidemic. Rather, our clients' concern is that, as a matter of principle,

the imposition of appropriate anti-epidemic measures in the Church is ultimately a matter for Church authorities rather than secular state authorities.

Our clients readily acknowledge that the *Regulations* were enacted by your client as a matter of urgency in very extreme circumstances. This being so, our clients are genuinely open to a constructive dialogue with your client to work out a pragmatic compromise which would be mutually acceptable both in principle and in practice.

Churches' response to the epidemic

It should be stressed that the Regulations were made in the circumstances when the vast majority of churches had already adequately responded to the threat of Coronavirus, ranging from drastic anti-infection precautions to (most typically) a voluntary 'lockdown'. For example, the Catholic Bishops announced a suspension of all public acts of worship on 14 March 2020. The Church of England made a similar announcement on 17 March 2020, which envisaged that the churches would only remain open for private prayer. However, the Church of England removed that exception and announced a complete closure of churches on 23 March, in response to the Prime Minister's advice made in the televised address on the same day, and before the Regulations were made.

Church autonomy

The principle of Church autonomy is zealously protected both in ECHR jurisprudence under Article 9 (see *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118) and in the domestic constitutional tradition, starting at least from c. 1 of Magna Carta. The martyrdom of Thomas Beckett for that very principle is of enormous significance in the Church of England Tradition. The Acts of Supremacy were necessary to establish the status of the Monarch as the Supreme Governor of the Church of England precisely because ecclesiastical authority is recognised by the common law as distinct from the temporal authority. Henry VIII could dissolve monasteries only after, and because, he had assumed the supreme ecclesiastical office; the measure would have been *ultra vires* the temporal powers of the Crown. Since then, the government of the realm and the government of the Church were always distinct in our Constitution, despite the same Monarch being ultimately at the head of both. *Articles of Religion 1562* provide in Article 37: "*Where we attribute to the King's Majesty the chief government… we give not to our Princes the ministering either of God's Word, or of the Sacraments*". The Church government is subject to its own constitutional law, currently governed by the *Church of England Assembly (Powers) Act 1919*.

Whatever difficulties may sometimes arise in drawing a precise boundary between temporal and ecclesiastical matters, there is no doubt, and has never been any doubt, that closure and opening of churches for services and rites is a matter for ecclesiastical authorities and not for temporal ones. The only historical precedent for a 'lockdown' of churches similar to the one introduced in the present Regulations is the suspension of all the church services and sacraments (except baptism) from 23 March 1208 to 1214 pursuant to the Interdict of Pope Innocent III. The services were suspended by the English bishops pursuant to an Interdict from Vatican. The suspension was expressly against the wishes of the temporal government and contrary to its interests. However the lawfulness of that suspension was never

questioned; nor has it ever been suggested that the temporal government had legal power simply to order a re-opening of churches.

Conversely, in the long history of epidemics and anti-epidemic measures in this country, up to and including the Spanish influenza in early 20th century, there is no precedent for state legislation which in any degree prohibits and criminalises church services or sacraments.

There is no basis for suggesting that this constitutional principle has become obsolete in modern times. On the contrary, the principle has been reinforced by Article 9 of the ECHR and the jurisprudence on Church autonomy which developed under it. It was further reinforced by s. 13 of the Human Rights Act 1998. Further, under the modern anti-discrimination law, the principle must apply equally to the Church of England and various other non-conformist churches and denominations.

In the circumstances where the Church has responded adequately to the public health threat, there was no lawful basis for the state to interfere with its rights and liberties in this drastic fashion. If it was necessary to supplement the Church self-regulation with any degree of state regulation, that interference had to be proportionate, and confined to exercising the powers which have a proper basis in law. A blanket ban imposed by the state on all church activities (with three prescribed exceptions) does not meet those requirements.

While the short-term practical difference between state regulation and church self-regulation may be limited in present circumstances, the principle of Church autonomy is extremely important in the broader constitutional context, and must be protected for the benefit of present and future generations.

Rationale behind the principle

The principle identified above is important for the simple reason that a believer's worldview is radically different from a non-believer's worldview. It may seem natural for a temporal authority, well-meaning and intending no disrespect to religion, to see a church service as simply an example of a 'public event' which attracts a peculiar kind of people interested in it – roughly similar to entertainment. In that worldview, church services are important for welfare of those who need them, but obviously less important than things like steady food supplies and protection of health.

By contrast, in a believer's worldview, church services are part of our means for achieving eternal salvation of the soul, which is infinitely more important than even a survival of the body. The Bible and centuries of tradition oblige Christians to gather weekly for worship and witness around the Word of God and sacraments; we need one another to flourish in our service to Christ (Ex. 20: 9-11; 1 Cor. 16: 1-2; Heb. 10:24-25; Acts 2:42, 20:7). Neither confessional Christian faith nor the Church as an institution can *faithfully exist* without a Lord's Day gathering. The Church has adhered to that obligation through long periods of persecution, where fulfilling it meant a risk of death at the hands of temporal authorities. The church does not exist by *permission* of the state, for its establishment and rule is found in Jesus Christ himself.

This difference of worldviews inevitably entails a difference in priorities, and most importantly, in the underlying criteria. To illustrate the point, the 1208-1214 Papal Interdict made an exception for the

sacrament of baptism, since it is considered necessary for the salvation of a soul. By contrast, the present lockdown makes an exception for funerals, because here, the church contributes to what the state sees as an important public function: disposal of dead bodies. The secular authorities did not, and cannot reasonably be expected to, give a similar or indeed any consideration to the disposal of living souls.

The restrictions imposed on the Church activity principally affect the believers. Hence it is important that the decisions about them are taken by believers – not by people who, in their minds and/or as a matter of professional duty, live in a wholly different world. If churches are to be closed, that must not be done by people who may well have never been to a church in their lives.

Churches in context of the government's wider 'lockdown' policy

The Government has taken an extremely wide range of measures to counter the threat of Coronavirus. Virtually all aspects of the society's life have been categorised according to their importance on the one hand, and epidemiological risks on the other. Restrictions of different severity were accordingly imposed. Very roughly, four different categories may be identified:

1) 'Essential' services which have been allowed to remain open throughout the 'lockdown', such as food retailers, off licence shops, pharmacies, and other businesses listed in Part 3 Schedule to the Regulations.
2) Services prioritised to resume operations at 'Step 1' in *Our Plan to Rebuild* (e.g. schools and businesses important for the economy, such as construction).
3) Services which resume at 'Step 2' (e.g. non-essential retail, cultural and sporting events behind closed doors)
4) Services which will not resume until 'Step 3': that includes beauty salons, pubs, cinemas, and indeed churches.

At different stages, different levels of restriction apply to each of the different categories.

Another important distinction should be drawn between the two principal tools used to implement the anti-epidemic measures. In relation to some aspects of the national life, the government has limited its interference to giving advice or guidance. For example, as part of the latest modification of the Coronavirus policy, the Government has issued guidance documents for public transport, and for businesses to ensure safety at workplace. On the other hand, the Government has chosen to impose some of the other restrictions by means of binding legislation, with a criminal sanction for non-compliance.

Within this system, churches have been given the most unfavourable treatment possible. Churches have been placed in the bottom category of the most dangerous and least important services, subjected to severest restrictions for the longest period of time. Those restrictions are imposed by means of formal legislation with a criminal sanction; unlike many other organisations and individuals, churches are not trusted to follow advice.

The latter is the principal complaint of the Claimants: if it was appropriate to limit the state intervention to advice in some cases, that is certainly so in the case of the Church, whose independence of the state is protected by a fundamental constitutional principle, and who had responded to the epidemic sooner, and more effectively, than the government.

Alternatively, if the state is entitled to regulate the church services by criminal legislation, the proper place of churches in the list of priorities is higher than at the very bottom.

Disproportionate interference with Article 9 rights

It is undisputed that the Regulations are a significant interference with freedom of religion and religious assembly and, in particular, the principle of church autonomy. Any justification of that interference is to be assessed under the usual Article 9 principles. Article 15 ECHR gives member-states a right to derogate from the Convention in the event of a national emergency, by giving notice to the Secretary General of the Council of Europe. However, unlike several other member-states, the United Kingdom has chosen not to avail itself of that right. Therefore, Article 9 applies to the government's anti-Coronavirus measures in the usual way.

One of the most unwavering and established principles found in the jurisprudence of the European Court of Human Rights is the doctrine of church autonomy. A public authority may not interfere with the internal workings of a church or religious organization and may not impose rigid conditions on the practice or functioning of religious beliefs. See further: *Serif v. Greece*, No. 38178/97, Reports 1999-IX, 14 December 1999, §§ 51-53; *Manoussakis v. Greece*, No. 18748/91, Reports 1996-IV, 26 September 2000, § 82. So strong is this principle that it has been upheld three times by the Grand Chamber of the European Court of Human Rights. ECHR, *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, Reports 2000-XI, 26 October 2000, § 82; ECHR, *Case of Fernandez Martinez v. Spain* [GC[, No. 56030/07, Judgment of 12 June 2014; ECHR, *Case of Sindicatul "Pastorul Cel Bun" v. Romania* [GC], No. 2330/09, Judgment of 9 July 2013. Most recently the Court again upheld the same principle regarding respect for the internal workings of religious organizations in a judgment against Hungary. ECHR, *Case of Karoly Nagy v. Hungary*, No. 56665/09, Judgment of 1 December 2015.

The forced closure of churches by the state is an extreme interference with Article 9 rights. That extremity is not mitigated by the exception in Reg. 5(6), which allows the churches to remain open only for social welfare purposes. On the contrary, this amounts to an enforced secularization of the purpose of churches. The state has usurped the right to prioritise certain aspects of the church life over others using its own criteria, and identified the spiritual aspects as dispensable.

Such a for-reaching and large-scale intervention may only be justified by the most compelling scientific evidence of a resulting benefit to public health. The broader the impact of the Regulations on the Convention rights, the more compelling must be the justification: *R (on the application of UNISON) v Lord Chancellor.*

For interference with freedom of worship to be legitimate, the interference in question must be *necessary in a democratic society*. The term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 § 116 (Eur. Ct. H.R. June 14, 2007). Fundamentally, only convincing and compelling reasons can justify restrictions on a fundamental Convention freedom, see *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1956.

Proportionality in relation to Article 9, and the supervisory authority over any restrictions imposed on the freedom to manifest all of the rights inherent in freedom of religion, call for "*very strict scrutiny*": ECHR, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 1354, § 44.

It is clear that the wholesale manner in which churches were closed is anything but a narrowly tailored means of achieving public health. Indeed, it appears that the Secretary of State has given hardly any consideration to balancing competing rights and interests, or to achieving his public health objectives by lesser interference with Article 9 rights.

Chapter 1 of Magna Carta 1297

In the domestic English law, the principle of church autonomy is of a much greater antiquity then, and at least as important constitutional status as under the Convention. C. 1 of Magna Carta 1297 provides:

> *FIRST, We have granted to God, and by this our present Charter have confirmed, for Us and our Heirs for ever, that the Church of England shall be free, and shall have all her whole Rights and Liberties inviolable.*

The principle has always been understood to mean that the Church is to manage its own affairs just as the State manages its own affairs. Church authorities are at least, in principle, as capable as the state authorities in making decisions for themselves and in the interests of their congregations; and it is a constitutional right of the church to make those decisions without state interference.

It is now well established that Magna Carta 1297 is a prime example of a constitutional statute which is not subject to the doctrine of implied repeal: *Thoburn v Sunderland City Council* [2003] QB 151, paras 58-59, *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324, paras 78-79, 206-207; *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5: para 67. It follows that all later statutes (including, most importantly for present purposes, Public Health (Control of Disease) Act 1984) must be interpreted consistently with Magna Carta unless they expressly repeal its provisions. The 1984 does not authorise the Secretary of State to exercise his powers in a way which interferes with any of the "Rights and Liberties" of the Church within the meaning of c. 1 of Magna Carta.

The legislative powers of Parliament in relation to the Church of England are governed by the Church of England Assembly (Powers) Act 1919. The legislative authorities and procedure established by that Act leaves no constitutional place for an alternative procedure where a Secretary of State permits or prohibits church services by statutory instrument made under a different Act.

In today's constitutional framework, the same principles apply to non-conformist and other churches outside the ecclesiastical jurisdiction of the Church of England. This is because:

(a) The meaning of the expression "Church of England" in 1297 was different from the modern meaning. Magna Carta was passed before the series of schisms which separated the modern Church of England from Roman Catholics and non-conformist Protestants. Those schisms were

ecclesiastical matters of no concern to the state; accordingly, all Christian churches which originate in the Church of England as it was in 1297 are entitled to the protection of Magna Carta.

(b) In any event, the modern anti-discrimination law (Article 14 ECHR and the Equality Act 2010) prohibits state discrimination on the grounds of religion or belief. It follows that all denominations are entitled to the same constitutional rights as the Church of England.

Action(s) that the defendant is expected to take

Despite the importance of the principles which the proposed claim seeks to protect, our clients acknowledge the unprecedented difficulties faced by the Department at present and would like to avoid putting any excessive pressure on your clients.

The Secretary of State is in any event under an obligation to review the Regulations at least every 21 days. We understand the next review must take place on or before **18 June**. In the light of the points made above, we suggest it will be appropriate, by that date, to:

(a) revoke Regulation 5(5),
(b) amend Regulation 7 to provide for an exception for a reasonably necessary participation in a religious ceremony,
(c) replace Regulation 5(5) with a Guidance for the appropriate precautions to be taken by churches at the next stage of the epidemic.

The constructive approach set out above is without prejudice to our client's position that the Regulations in their present form are unlawful and liable to be quashed on judicial review. Alternatively, our clients will seek a mandatory order for the Regulations to be revoked within a specified timeframe, and/or a declaration.

ADR proposals

As indicated above, our clients are in sympathy with the pressures put on the Government by the epidemic, and are prepared to work constructively with your client for the legal errors identified above to be rectified in an orderly fashion.

We invite the Secretary of State to arrange an online conference with our clients (if necessary also attended by lawyers on both sides) to work out a mutually acceptable timetable for relaxation of the existing restrictions on church activities, and/or replacing the Regulations by an appropriate Guidance document which properly respects the principle of church autonomy.

Details of any information sought / details of any documents that are considered relevant and necessary

Please disclose all scientific and other evidence the Secretary of State relies upon for the purposes of justification under Article 9(2) ECHR.

Proposed reply date

This matter is, by its nature, urgent. Further, our clients sincerely hope that if the Secretary of State is willing to engage in a constructive dialogue, it shall be possible to work out a mutually acceptable solution by the time of the next review of the Regulations on 18 June. For those reasons, we request a substantive response to this pre-action letter within 7 days, by **4 June 2020**.

We look forward to hearing from you.

Yours faithfully,