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Your ref: MP:MP3515
Our ref: Z2006192/HHS/HOI7

11 June 2020

Dear Sirs

Pre-Action Response: Rev. Ade Omooba et al.

We act for the Secretary of State for Health and Social Care who is named as the proposed defendant in your letter and whom we agree is the correct defendant.

The Proposed Claimant

The 25 Claimants referred to in your pre-action letter, which are not repeated here.

The Proposed Defendant

The Secretary of State for Health and Social Care.

The Defendant may be contacted via the Government Legal Department (GLD) Due to COVID-19 and the current circumstances, any correspondence or service of documents should be addressed to Hannah Sladen and sent via email to hannah.sladen@governmentlegal.gov.uk to limit the handling of materials by post

Reference details

Our reference: Z2006192/HHS/HOI7

Please cite the above reference number on all future pre-action correspondence. Hannah Sladen is the GLD pre-action contact on behalf of the Defendant.

The Issues

1. Your proposed challenge is to the lawfulness of (a) regulation 5(5) and regulation 7 of the Health Protection (Coronavirus, Restrictions) England Regulations 2020 ("**the Regulations**"), (b) *Our Plan to Rebuild: The UK Government's COVID-19 Recovery Strategy*, published on 11 May 2020 (CP 239) ("**the**

Lee John-Charles - Head of Division

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Strategy”) and (c) an alleged “*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.*”

2. Your letter raises two legal bases for this challenge:
 - a. firstly, that the Regulations are a disproportionate interference with Article 9 ECHR in circumstances where the vast majority of churches had already closed down voluntarily in response to the Coronavirus pandemic or adopted far-reaching precautions against infection; and
 - b. secondly, that the Regulations are *ultra vires* the Public Health (Control of Diseases) Act 1984 because the Secretary of State has no power to regulate churches pursuant to his powers under that Act. To do so is said to undermine the principle of church autonomy as enshrined in c.1 Magna Carta 1215.
3. You ask that the Secretary of State at the next review of the Regulations revokes regulation 5(5) and makes amendments to regulation 7 to allow a gathering for reasonably necessary participation in a religious ceremony. Your letter acknowledges the unprecedented difficulties faced by our client’s department at the present time. You have made an ADR proposal with a view to working constructively with our clients to resolve the issues raised.

Response

4. Before turning to the legal issues raised by your claim, we trust that you are aware that, since your letter was written, an announcement has been made to reopen places of worship shortly for individual prayer, in line with supporting guidance, to be published, on which we have consulted the Places of Worship Taskforce. We trust that this development will serve to demonstrate that the rights of your clients, and those of faith across England, are being carefully considered by the Secretary of State and across Government and that the restrictions placed on places of worship are being eased gradually, where possible and where supported by the scientific advice.

Proportionality in Article 9 ECHR terms

5. In terms of the proportionality of the Regulations in Article 9 ECHR terms, there are seven key points to make. **Firstly**, the population of England is presently affected by the public health pandemic caused by the virus known as COVID-19, as you recognise. The extremely serious risk to life and health posed by the virus has obliged the Government to take unprecedented, vital steps, including via the Regulations, to limit the ability of the virus to spread, and to reduce the burden on the National Health Service. Both of these aims seek to protect and reduce the risk to the lives of the population, in circumstances in which tens of thousands of people in England have died having tested positive for the virus.
6. **Secondly**, accordingly, there are fundamental Article 2 rights of the population at stake which the measures in the Regulations seek to protect. The UK has a positive obligation “*to take appropriate steps to safeguard the lives of those within its jurisdiction*” and to do “*all that could have been required of it to prevent...life from being avoidably put at risk*”: *LCB v United Kingdom* (1997) 27 EHRR 212 at §36. This obligation extends to the public health context: *Stoyanovi v Bulgaria* (App. No. 42980/04) at §60. This duty, in respect of the most fundamental right of all, weighs heavily in any balancing exercise, and in any assessment of the measures adopted in the Regulations.
7. **Thirdly**, the Secretary of State is acutely aware that the restrictions currently placed on places of worship interfere with the right to manifest one’s religious belief enshrined in Article 9 ECHR by limiting attendance in person by individuals at places of worship for those of all faiths. We acknowledge and respect the importance of your clients and their congregations place on communal worship and the central place of the church in the life of a believer. However, this is not a restriction on churches only, but applies equally to all places of worship and people of all faiths and beliefs. Moreover, they are not absolute: regulation 5(5) which requires places of worship to close is subject to the exception at reg 5(6) – and thus it has always been possible for faith leaders to provide services remotely from their churches; and no restrictions are or have been in place on people engaging in celebrations of religious rites and festivals

with members of their household. It is clear that the restrictions were at the time introduced, and still remain, proportionate in the interests of protecting life at a time of unprecedented public health emergency. Those measures are under careful review on a regular basis, and the Government has already published – as your letter acknowledges – a plan for the reopening of places of worship as part of Stage 3 of its strategy, currently planned to commence from 4 July 2020, subject to the scientific evidence supporting those steps at that time, and has announced changes for individual prayer. Thus, the ongoing interference is time-limited and under continual review.

8. **Fourthly**, this is based on the scientific advice to the Secretary of State that the virus is highly contagious and particularly easily spread in gatherings of people and indoors. In the Strategy, it explains: “*SAGE [the Scientific Advisory Group for Emergencies] advise that the risk of infection outside is significantly lower than inside*”. The basic principle underlying the restrictions in the Regulations is to reduce the degree to which people gather and mix with those outside of their household, particularly in indoor spaces. The opening of places of worship generally is inconsistent with this basic principle and not judged to be appropriate. This is not because churches (or other places of worship) have been placed in “the most dangerous and least important” category; but rather that there is “*a qualitative difference in terms of the risk of transmission of the virus between a situation such as a religious service where a number of people meet in an enclosed space for a period of an hour or more, and the transitory briefer contact likely in a setting such as that of shopping in a garden centre*” (as recognised by Swift J in his recent decision to refuse interim relief to a mosque from Bradford seeking an exemption from regulation 5(5) and regulation 7: *Hussain v SoS for Health* [2020] EWHC 1392 (Admin) (**copy attached**) (to which we return below).
9. **Fifthly**, a specific taskforce was established on 15 May – the Places of Worship Taskforce – which includes leaders and representatives from all the major faiths, including the Archbishop of Canterbury, to assist the Government in developing this phased plan. The Taskforce is currently working on guidance to enable changes to be made as soon as reasonably possible.
10. **Sixthly**, we note the point you make that it was not necessary to close places of worship when many churches were voluntarily closing down, and/or others had adopted various social distancing measures. The Regulations take a general approach to all places of worship as justified by the very important public health objective of protecting life – and thus the issue was wider than just the compliance that could be expected from Church of England churches. As you recognise, some churches may have been voluntarily complying but some were not, and the need for clarity and consistent rules across all places of worship was plainly justifiable in the interests of protecting public health given the grave risks at stake. As to the point about *vires*, this is addressed below. We note that you do not disagree that the measures in place are or were proportionate at the time imposed, but that churches should have been able to adopt them themselves. This goes to demonstrate their proportionality (however imposed or adopted).
11. **Finally**, for all these reasons, we consider that it is clear that any challenge by your clients on the basis the current restrictions breach Article 9 ECHR will fail. The Court will give a wide margin of appreciation to the Secretary of State in a case such as this, as it did in *Hussain*:

“21. In this way, the Claimant questions the Secretary of State’s priorities. Why are matters such as those mentioned above permitted when attendance at a place of worship in fulfilment of a religious obligation is not? While the Secretary of State’s order of priorities is a legitimate matter for public debate, in terms of whether the decision on it contained within the 2020 Regulations is lawful, he must be allowed a suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions in the 2020 Regulations. What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess.”

12. In rejecting the application for interim relief, the Court i) emphasised that the interference with Article 9 ECHR rights is finite, ii) placed weight on the work of the Taskforce to develop guidance to allow, if possible, communal prayer to be commenced at Stage 3, and iii) noted that the Secretary of State was plainly entitled to take a precautionary stance; and that this was not a case where there was a “*single*

right answer". Thus, Swift J did not think that there was "any realistic likelihood that the Claimant's case on Article 9 will succeed at trial" (see §24).¹

Vires and Church autonomy

13. We note the points you make about Church autonomy, the effects of the Church of England Assembly (Powers) Act 1919 and so on. However:
- a. the concept of what the 'Church' is has clearly evolved since Magna Carta, not least with the Reformation and recognition of the Church of England as the established church in England. The relationship between (a) the Church of England and (b) Parliament, HM Government and the Crown is complex and beyond the scope of this letter for present purposes.
 - b. The critical point is that it is clear that Parliament can legislate for Church of England matters, most recently having done so in section 84 of the Coronavirus Act 2020. As a matter of constitutional law, Parliament remains sovereign.
 - c. There is thus no constitutional bar on what has been done under the Public Health Act (Control of Diseases) Act 1984 and the Regulations in public health terms in relation to Church of England premises. Indeed, there would be obvious and stark difficulties both in Article 9 (and Article 14) ECHR terms (in respect of which all religious beliefs are to be treated as equally valid and given equal respect), and similarly in constitutional terms, associated with the points you make i.e. that the Church of England should be deemed to be exempt from state public health control, whereas other faiths and religious groups are subject to the relevant restrictions and thus at risk of criminal penalties if they fail to comply.
 - d. Thus the relevant question (on which you agree we should focus) is whether the restrictions breaches the Human Rights Act, which we have addressed above, and in response to which the answer is no.

Conclusions

14. Accordingly, the Secretary of State does not intend to take the action proposed, namely to commit to revoking the relevant restrictions at the next review. There is active work underway to ensure that the restrictions on places of worship are lifted as soon as reasonably possible bearing in mind the risk to life which remains, and based on the scientific evidence as the appropriate approach. That carefully phased plan is taking account of the expertise of and engagement with informed representatives, such as yourselves, and has already produced the plan regarding individual prayer.
15. In light of this, and the ongoing work of the Taskforce, we consider that the legal action you propose is not justified.

ADR proposals

16. Accordingly, we do not consider that it is necessarily pragmatic to proceed with ADR at this juncture. However, that is not to say that officials within the Department of Health and Ministry of Housing, Communities and Local Government are not willing to meet your clients, if you still have concerns. At this stage, we consider it is likely to be more productive for your clients to contribute to the work already underway by the Places of Worship Taskforce. We understand that some signatories to your letter have also contributed already to multi-faith and Christian Roundtable meetings. Therefore, we would encourage you to make contact with the Faith team in MHCLG in order to ensure that your work feeds into this ongoing discussion. However, if you still consider that an ADR meeting remains essential, our clients are willing to consider that also.

Response to requests for information and documents.

¹ Despite this finding, he did grant permission to the Claimants in the particular circumstances of that case. However the position has moved on since, as above. The fact remains that there is no realistic prospect of success in that claim, or in your clients' proposed claim.

17. Advice from SAGE is referred to in the Strategy cited above (see paragraph 8). All SAGE minutes up to 7 May 2020 are available on the gov.uk website. We do not consider that it is necessary or proportionate to provide any further disclosure of scientific or other evidence at this time.

Please acknowledge receipt of this letter.

Yours faithfully

Hannah Sladen

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For the Treasury Solicitor**

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